



HUMAN
RIGHTS
WATCH

RACE AGAINST TIME

The Need for Legal and Institutional Reforms
Ahead of Zimbabwe's Elections



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Ahead of Zimbabwe's Elections**

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List of Acronyms

AIPPA	Access to Information and Protection of Privacy Act
AU	African Union
BAZ	Broadcasting Authority of Zimbabwe
CIO	Central Intelligence Organization
COPAC	Constitution Select Committee of Parliament
CPEA	Criminal Procedure and Evidence Act
GPA	Global Political Agreement
JOC	Joint Operations Command
JOMIC	Joint Monitoring and Implementation Committee
MDC	Movement for Democratic Change
MP	Member of Parliament
NSC	National Security Council
POSA	Public Order and Security Act
SADC	Southern African Development Community
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZEC	Zimbabwe Electoral Commission
ZHRC	Zimbabwe Human Rights Commission

Summary

In September 2008 the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two factions of the Movement for Democratic Change (MDC) party agreed to form a power-sharing government, formed officially in February 2009. But over four years after the Global Political Agreement (GPA) was signed little progress has been made on one of the key aspects of the GPA that aimed at preparing the country for credible, free and fair elections. The legal and institutional reforms that are expected to address various political, institutional and human rights issues ahead of the 2013 elections have either not been introduced or are not being implemented.

The so-called unity government, whose partners are anything but united, consisting of the former ruling ZANU-PF and the two MDC factions has failed to hold accountable those responsible for past human rights abuses, including during the 2008 electoral violence. It has also failed to reform key state institutions responsible for the administration of justice, which remain highly politicized and extremely partisan towards ZANU-PF.

The main purpose of the GPA was to establish institutional and legal reforms to create a conducive environment for the holding of free and fair elections.¹ The formation of the unity government, however, left longtime President Robert Mugabe and ZANU-PF—because of their control of key government ministries including defense, state security and justice—with significantly greater power than the MDC, which has been used to frustrate or stop crucial reforms.

On a number of occasions since the unity government assumed office President Mugabe and Prime Minister Morgan Tsvangirai of the MDC have issued joint public statements condemning political violence but with no corresponding action to dismantle the infrastructure of violence and end impunity.

¹ “Agreement between the Zimbabwe African National Union-Patriotic Front (Zanu-PF) and the Two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe” (Global Political Agreement or GPA), September 15, 2008.

The GPA, except in article 20 (the framework for a new government) incorporated into the constitution through amendment 19, has no legal status under the law of Zimbabwe, and as a result, ZANU-PF has repeatedly undermined the GPA and put off the implementation of essential reforms. Such reforms include amendments to repressive laws such as the Access to Information and Protection of Privacy Act (AIPPA), 2002; the Public Order and Security Act (POSA), 2007; the Criminal Law (Codification and Reform) Act, 2004; and the Presidential Powers (Temporary Measures) Act, 2007, which empowers the president to enact legislation even during elections.

This report assesses the legislative and electoral reforms undertaken by the unity government and analyzes the quality of those reforms and their capacity to create an environment conducive to credible, free and fair elections. Human Rights Watch has found that the contending parties have focused on only one aspect of reforms—securing agreement on the necessary legal and administrative requirements for free and fair elections. However, little attention has been paid to the implementation of the agreed reforms and to securing agreement and ensuring reforms on areas where agreement has not been reached. The unity government has neglected the enforcement of various agreements that would facilitate a rights-respecting environment and the holding of credible, free, and fair elections.

Mugabe, according to papers filed with the High Court on September 27, 2012, wants national elections to be held in March 2013, without prior consultations with the prime minister as stipulated in the GPA. Nevertheless, because of the power Mugabe wields, it is a strong indicator that elections may indeed take place in March 2013.

The timing of national elections is governed by Zimbabwe's constitution, which provides that parliament, unless dissolved earlier, shall last for five years, counting from the day the person elected as president enters into office.² Mugabe was sworn in on June 29, 2008, and the presidential and parliamentary term of office ends on June 29, 2013, with fresh elections required to be held no more than four months after that date.³ If elections are not

² Constitution of Zimbabwe, 1979, art. 63(4).

³ *Ibid.*, as amended by the Amendment Act, No. 19, 2009, art. 58.

held in March as Mugabe has indicated, the latest they can be held constitutionally is October 29, 2013.

Legislative reforms and the enactment of a new constitution are key but insufficient for free and fair elections. A level playing field for all political parties also requires robust enforcement mechanisms that are implemented by independent and non-partisan institutions, such as the judiciary and electoral commission, that act to prevent violence, hold accountable perpetrators of abuses, and ensure equal access to the media by political parties and candidates. A comprehensive approach to democratic reforms in Zimbabwe requires laws and regulations consistent with international standards, but it also requires close attention to the independence and professionalism of the government institutions and individuals—such as civil servants—responsible for delivering reforms.

With the unity government making little progress in several areas, including on key legal reforms, there are genuine concerns that if elections are held in March, there will be widespread human rights violations ahead of, during and after the elections. Such violations will undermine a credible, free and fair vote. Time is fast running out for the unity government to institute reforms, including finalizing the new constitution and allowing time for its provisions to be implemented before elections are held.

The unity government, supported by the Southern African Development Community (SADC), should urgently introduce and implement key human rights and institutional reforms as outlined in the GPA; otherwise it may be far too late to create an environment conducive to the holding of credible, free and fair elections. Failure to hold credible elections could result in an increasing spiral of violence, chaos, and lawlessness.

Zimbabwe's unity government should take action to halt the ongoing political chaos by ensuring a level playing field for all political parties and the impartial enforcement of laws. Qualified, non-partisan individuals should be appointed to run governance institutions, including the Zimbabwe Electoral Commission (ZEC), the judiciary, and the police.

Recommendations

To the Unity Government of Zimbabwe

- Fully implement all provisions of the Global Political Agreement to level the political field and create a rights-respecting environment conducive to the holding of credible, free and fair elections;
- Repeal or amend all repressive legislation such as the repressive sections of the Criminal Law (Codification and Reform) Act, the Public Order and Security Act, the Access to Information and Protection of Privacy Act and section 121 of the Criminal Procedure and Evidence Act (CPEA). Prohibit use of the Presidential Powers (Temporary Measures) Act to amend laws once elections are called;
- Ensure accountability for the perpetrators of past human rights abuses, including by investigating cases of serious abuses and prosecuting those found responsible, and press for appropriate remedies to victims of abuses, including those from the 2008 elections;
- Replace all partisan heads of the police and other security forces with new, non-partisan individuals accountable to independent supervisory boards; members of the security forces implicated in abuses should be held to account, regardless of rank or affiliation;
- Direct heads of the police and other security forces to take all necessary measures to ensure that they remain neutral;
- Amend the Zimbabwe Human Rights Commission (ZHRC) mandate to enable it to investigate abuses before February 2009;
- Ensure that the Zimbabwe Election Commission is adequately resourced, and has competent, independent and non-partisan secretariat staff;
- Put in place legislative and administrative mechanisms to ensure the fulfillment of the right of Zimbabwean citizens living abroad to vote; and
- Ensure that the processes relating to the new constitution, including its drafting and the constitutional referendum, are completed and necessary amendments made to various national laws to permit a legislative and administrative framework that would allow credible, free, and fair elections.

To South Africa

- Press Zimbabwe's political parties, through the Southern African Development Community (SADC) appointed facilitator for Zimbabwe negotiations, to fully implement all provisions of the GPA to level the political field and create a rights-respecting environment conducive to the holding of credible, free, and fair elections; and
- Press the SADC to ensure that the Zimbabwe unity government institutes sufficient legislative and electoral reforms to facilitate elections that fully comply with the SADC's Principles and Guidelines Governing Democratic Elections.

To the Southern African Development Community and the African Union

- Ensure SADC officials deployed to monitor the GPA together with the Joint Monitoring and Implementation Committee (JOMIC) have a sufficient long-term presence in Zimbabwe that would enable them to effectively carry out their monitoring duties;
- Call on political parties to stop intimidating, threatening and harassing opponents and their supporters so that the environment will be conducive for Zimbabweans to freely vote at the elections;
- Independently assess and certify that conditions are right for the holding of elections that comply with the SADC Principles and Guidelines Governing Democratic Elections before the SADC clears Zimbabwe to hold elections;
- Provide for early deployment and sufficient numbers of SADC and African Union (AU) election observers to Zimbabwe and maintain such monitors for a sufficient period after elections to deter violence and intimidation;
- Develop and publicize a robust enforcement mechanism for its resolutions on Zimbabwe including consideration of sanctions on key individuals;
- Clarify to all unity government officials obstructing key reforms that there will be consequences (including suspension of Zimbabwe's membership and sanctions) if reforms necessary to deliver credible, free, and fair elections are not instituted; and
- Go beyond the first step of calling upon the unity government to implement critical reforms and enunciate consequences if the unity government fails to ensure full and speedy implementation of all agreed electoral reforms.

To the United Nations, European Union, and the United States

- Publicly call on Zimbabwe to create an environment conducive to the holding of credible, free and fair elections;
- Support SADC initiatives to press Zimbabwe's political leaders to implement the agreed roadmap to free and fair elections; and
- The European Union and the United States should maintain restrictive measures on President Mugabe and his inner circle, including travel bans and assets freezes, and condition any lifting of restrictive measures upon tangible human rights reforms.

Methodology

This report is based on research conducted in late 2012. The report reviews Zimbabwe's domestic legislation, especially those laws relevant to the upcoming elections and more broadly those relating to or impacting on human rights, including the current constitution and the draft constitution. The report also draws on previous research in Zimbabwe by Human Rights Watch.

Human Rights Watch, in preparing the report, also consulted and analyzed other documents, including the reports of local and international nongovernmental organizations, court judgments, Southern African Development Community (SADC) resolutions, and media reports on the progress the power-sharing government has made in implementing human rights reforms towards creating an environment conducive to the holding of credible, free, and fair elections.

The Global Political Agreement

Envisioned Reforms

The Global Political Agreement outlines the key reforms necessary for implementation by the unity government to improve the human rights environment and create conditions necessary for democratic elections. These reforms include a parliament-led process to draft a new constitution; promotion of equality, national healing and unity; introduction of police training programs on matters relating to the rights to freedom of assembly and association; prioritizing a legislative agenda to reflect the letter and spirit of the GPA; renouncing politically motivated violence; and ensuring that the government applies the laws of the country fully and impartially in bringing all perpetrators of politically motivated violence to justice.⁴

The GPA also guarantees free political activity, urges respect for the rule of law, and commits the unity government to work in a manner that guarantees the full implementation and realization of the rights to freedom of association and assembly and the promotion of freedom of expression and communication.

On July 6, 2011, negotiators from the three parties in the unity government agreed, in consultation with the SADC facilitator for Zimbabwe, to a roadmap to free and fair elections containing a number of GPA reforms.⁵ The purpose of the roadmap was to define “milestones and signposts that must be executed and implemented before the next election,” including the constitutional process, media reform, electoral reform, rule of law, freedom of association and assembly, a legislative agenda, and logistical preparations for the actual election, including voter registration and accreditation of observers.

The roadmap noted areas of disagreement and deadlock among the political parties with regards to fundamental reforms that would, if implemented, effectively transform Zimbabwe’s political and human rights environment. The main areas of disagreement

⁴ Signatories to the Global Political Agreement undertook to prioritize legislative reforms necessary to implement the unity government’s agreed human rights reforms and policies to entrench democratic values and practices.

⁵ “Zimbabwe Elections Roadmap with Timelines,” Harare, Zimbabwe, July 6, 2011.

related to the staffing of the Zimbabwe Electoral Commission, with the MDC factions calling for the recruitment of new staff to ensure non-partisanship and transparency, which ZANU-PF disagreed with; calls for security forces to publicly commit to respect the constitution and the rule of law— a call rejected by ZANU-PF; and calls for the amendment of the Public Order and Security Act as agreed under the GPA. ZANU-PF opposed any amendments to POSA, insisting that the act provides “a sound legal framework for regulating meetings and assemblies.”⁶

Failure to incorporate the entire GPA into law meant that, together with the roadmap to elections, it remains a document of political aspirations with no legal status, dependent on political will for enforcement of its provisions.

To monitor implementation of the GPA the unity government set up the Joint Monitoring and Implementation Committee comprising senior representatives from the three main political parties in government. The JOMIC does not have legal status as it is not a statutory body, nor does it have mechanisms to ensure GPA implementation. To strengthen the JOMIC, SADC leaders in March 2011 agreed to appoint SADC officials to work with JOMIC and South African President Jacob Zuma’s Zimbabwe Facilitation Team in monitoring the GPA.⁷ In March 2007, SADC leaders had appointed South Africa, led by then-President Thabo Mbeki, to facilitate negotiations to resolve Zimbabwe’s political and governance crisis and report to the SADC’s Organ on Politics, Defence and Security Cooperation.⁸ The SADC revived this mandate following the disputed 2008 elections and Zuma took over the role of facilitator when he became president of South Africa—appointing a team of three senior officials as advisors in the Zimbabwe facilitation team.

To date, more than 18 months after a SADC resolution on the matter, the two SADC officials from Tanzania and Zambia have yet to begin their monitoring duties with JOMIC. Their scheduled first meeting on September 28, 2012, did not take place because the ZANU-PF

⁶ “Zimbabwe Elections Roadmap with Timelines,” July 6, 2011.

⁷ “Summit of the Organ Troika on Politics, Defence and Security Cooperation,” SADC communiqué, Livingstone, Zambia, March 31, 2011.

⁸ “Extraordinary Summit of the Southern African Development Community (SADC),” Dar es Salaam, Tanzania, March 29, 2007.

representative failed to attend.⁹ The officials' lack of a sufficient long-term presence in Zimbabwe further undermines their GPA monitoring work.

Progress Made

The unity government has made some progress in implementing those parts of the GPA that do not address political violence or create conditions for credible elections. For instance, the unity government established four new national commissions—the Zimbabwe Electoral Commission, the reconstituted Zimbabwe Media Commission, the Anti-Corruption Commission, and the Zimbabwe Human Rights Commission. The ZHRC commissioners appointed in April 2010 only started work on October 12, 2012, when President Mugabe signed the Zimbabwe Human Rights Commission Act into law.¹⁰

The ZHRC has the following functions and powers:

- (a) to promote awareness of and respect for human rights and freedoms at all levels of society;
- (b) to promote the development of human rights and freedoms;
- (c) to monitor and assess the observance of human rights in Zimbabwe;
- (d) to recommend to parliament effective measures to promote human rights and freedoms;
- (e) to investigate the conduct of any authority or person, where it is alleged that any of the rights in the constitution's declaration of rights has been violated by that authority or person;¹¹ and
- (f) subpoena powers to compel any authority or person to appear before the commission and to produce any document or record relevant to any investigation by the commission.¹²

⁹ "Bill Watch: Electoral Amendment Act gazette, 45/2012," *Veritas*, October 3, 2012. See also, "Jomic meeting fails to take place," *The Standard*, October 1, 2012, <http://www.thestandard.co.zw/2012/10/01/jomic-meeting-fails-to-take-place/> (accessed October 1, 2012).

¹⁰ "Bill Watch: Human Rights Commission Act gazette, 47/2012," *Veritas*, October 13, 2012.

¹¹ Zimbabwe Human Rights Commission Act, 2/2012, October 12, 2012, art. 4.

¹² *Ibid.*, art. 12.

The potential impact of the ZHRC on the human rights environment, particularly curtailing impunity for serious abuses, is undermined by the commission's limited mandate and jurisdiction—it can only investigate and address human rights abuses committed since February 13, 2009, when the unity government was formed, and not the rampant abuses committed before February 2009, including the widespread electoral violence of 2008.¹³ The commission can only investigate an issue if a complaint is made within three years from the date on which the action or omission complained of occurred.¹⁴

On November 20, 2012, the Zimbabwe Human Rights Commission issued a press statement indicating that it was not fully operational to address human rights complaints or carry out its core mandate because:

1. The terms and conditions of the commission had not yet been finalized.
2. The commission had yet to set up a functional secretariat and was without staff, which would require funds for recruitment of technical staff, payment of salaries, and procurement of essential office equipment.¹⁵

Barely a month later, on December 13, the Zimbabwe Human Rights Commission chairperson, Professor Reginald Austin, resigned citing inhibiting laws and lack of resources that compromise the ZHRC's independence and capacity to carry out its mandate.¹⁶ Professor Austin's resignation severely weakens the commission and brings into question its capacity to positively impact on the human rights environment in the country, including addressing human rights complaints.

The Zimbabwe Media Commission has licensed new newspapers, including the once banned *Daily News*, that are now operating in the country, but the media remain under the shadow of repressive legislation that severely restricts rights to freedom of expression and association. This includes broad sections of the Criminal Law (Codification and Reform) Act

¹³ Zimbabwe Human Rights Commission Act, 2/2012, October 12, 2012, art. 9.

¹⁴ Ibid.

¹⁵ "Press Statement to All Citizens and Residents of Zimbabwe," Zimbabwe Human Rights Commission, issued by Dr. Ellen Sithole, Deputy Chairperson of the commission, November 20, 2012.

¹⁶ "Zimbabwe human rights chief resigns in protest," *Mail & Guardian* (South Africa), December 29, 2012, <http://mg.co.za/article/2012-12-29-zimbabwe-human-rights-chief-resigns-in-protest> (accessed December 30, 2012).

on criminal defamation or publicly making statements that may cause feelings of hostility towards or cause hatred, ridicule, or contempt of the president—whether in person or in respect of the office of president.

The ZANU-PF minister for media, information, and publicity unilaterally and controversially constituted the Broadcasting Authority of Zimbabwe (BAZ), which has since issued two private commercial radio licenses as part of the commitment to free up the airwaves.¹⁷ The first commercial radio station, *Star FM*, is owned by Zimpapers—a state-owned company that publishes all state-owned newspapers, including the ZANU-PF-aligned *Herald* daily newspaper. The only other private commercial radio license was awarded to AB Communications to run *ZiFM Radio*.¹⁸ There is concern that the independence and impartiality of the two radio stations is compromised by their close links to Mugabe and ZANU-PF. For instance, Supa Mandiwanzira, the founder and chief executive officer at *ZiFM Radio*, is the ZANU-PF treasurer for Manicaland province.¹⁹

Despite the provision in the roadmap to elections that new, independent boards for the Mass Media Trust and the Zimbabwe Broadcasting Company should be appointed to make state-owned broadcasting and print media politically neutral, this has not happened.²⁰

In March 2009 the unity government set up the National Security Council (NSC), comprising top government officials from all three political parties and all heads of Zimbabwe’s security sector, to provide civilian oversight of the security sector.²¹ Key functions of the NSC, which was required to meet at least once each month, included

¹⁷ On February 8, 2012, Prime Minister Tsvangirai and Deputy Prime Minister Arthur Mutambara in a press statement called for the Broadcasting Authority of Zimbabwe to be reconstituted and for the licenses issued by BAZ to be revoked. Since then, no action has been taken either to reconstitute BAZ or to revoke licenses issued by BAZ.

¹⁸ “ZiFM hits the airwaves,” *The Herald*, August 14, 2012, http://www.herald.co.zw/index.php?option=com_content&view=article&id=49753:zi-fm-hits-the-airwaves&catid=43:entertainment&Itemid=135 (accessed September 15, 2012).

¹⁹ “ZiFM begins live broadcasts,” *New Zimbabwe News*, August 14, 2012, <http://www.newzimbabwe.com/news/printVersion.aspx?newsID=8764> (accessed September 22, 2012).

²⁰ “Constitution Watch 2012,” *Veritas*, October 5, 2012. See also, “Zimbabwe Elections Roadmap with Timelines,” July 6, 2011.

²¹ National Security Council Act, 2/2009, March 4, 2009.

reviewing national policies on security, defense and law and order as well as ensuring that all operations of the security forces comply with the constitution and other laws.²²

The NSC has not had any impact on Zimbabwe's security sector as the body has failed to provide civilian oversight to the security forces. Instead, the Joint Operations Command (JOC), comprising Mugabe and the heads of the security forces but without representation from the MDC leadership, continues to meet to discuss and decide on national security issues on overtly partisan lines.²³ In 2008 Human Rights Watch found that the JOC was responsible for orchestrating widespread violence throughout the country, including through organizing, planning, and perpetrating violence that led to the killings of hundreds of perceived MDC activists and supporters and the beating, torture, and forced displacement of thousands more.²⁴

On a number of occasions since the formation of the unity government Mugabe and Tsvangirai have jointly issued public statements condemning political violence but with no corresponding actions to dismantle the infrastructure of violence and end impunity.²⁵

The Constitution-Making Process

As prescribed by the GPA the unity government established a Constitution Select Committee of Parliament (COPAC) to lead a constitution-making process with explicit steps including: public consultation hearings; writing a draft constitution; debating the draft constitution in parliament; holding a referendum; and then, if approved, submitting it to parliament for ratification. The entire process was set to be completed within 18 months, but has dragged on for more than 36 months. The process of public consultations on the draft constitution was marred by intimidation and violence leading to the disruption and cancellation of at least 23 constitutional outreach meetings in Manicaland and Harare.²⁶

²² National Security Council Act, art. 4.

²³ "Mugabe meets Service chiefs behind PM's back," *The Standard*, October 1, 2012, <http://www.thestandard.co.zw/2012/10/01/mugabe-meets-service-chiefs-behind-pms-back/> (accessed October 1, 2012).

²⁴ Human Rights Watch, "*Bullets for Each of You*": *State-Sponsored Violence since Zimbabwe's March 29 Elections*, June 9, 2008, <http://www.hrw.org/reports/2008/06/09/bullets-each-you>.

²⁵ "Heed President's Anti-Violence Call," *The Herald*, August 14, 2012.

²⁶ "Guns used to disrupt outreach meetings," *The Zimbabwean*, September 18, 2010, <http://www.thezimbabwean.co.uk/human-rights/34270/-guns-used-to-disrupt-outreach-meetings-.html> (accessed 15 November 2012).

On September 19, 2010, ZANU-PF supporters and uniformed police assaulted MDC supporters in Mbare, Harare, and prevented them from attending a constitution outreach meeting. One resident, Chrispen Mandizvidza, died from his injuries on September 22.²⁷

COPAC produced a draft constitution on July 18, 2012, that was discussed at the second constitutional stakeholders meeting held on October 22 and 23 in Harare.²⁸ With elections expected in six months there is little time for the finalization of the constitution, and, if approved at referendum and ratified by parliament, for its operationalization and the revision of national laws in preparation for free, fair, and credible elections.

The unity government has not set out an alternative path to ensure credible, free and fair elections in the event that the COPAC draft constitution is rejected at referendum stage. The draft constitution leaves intact many of the executive powers that Mugabe has abused in the past, such as sweeping legislative powers, powers to make key government appointments, and presidential immunity from prosecution while in office and after leaving office. It also does not recognize the right of diaspora Zimbabwean nationals to vote, a major issue that could affect election results.²⁹ Several civil society groups have already rejected the draft and a “no” vote is a real possibility at referendum.³⁰

Electoral system principles in the COPAC draft constitution are general and vague, calling for elections to be: (a) peaceful, free and fair; (b) conducted by secret ballot; (c) based on universal adult suffrage and equality of votes; and (d) free from violence and other electoral malpractices.³¹ In light of the insufficient legislative and human rights reforms highlighted in this report, Human Rights Watch remains concerned that the constitutional referendum will not be free and fair.

²⁷ “Zimbabwe: Violence, Intimidation Mar Constitutional Outreach,” Human Rights Watch news release, September 28, 2010, <http://www.hrw.org/news/2010/09/27/zimbabwe-violence-intimidation-mar-constitutional-outreach>.

²⁸ “Stakeholders Conference a Success, says parties,” *The Herald*, October 25, 2012, <http://allafrica.com/stories/201210250518.html> (accessed October 28, 2012).

²⁹ “Zimbabwe Draft Constitution,” COPAC, July 17, 2012, http://www.copac.org.zw/index.php?option=com_content&view=section&id=7&Itemid=154 (accessed December 3, 2012).

³⁰ Civil Society groups such as the National Constitutional Assembly, the Zimbabwe Congress of Trade Unions, and the Zimbabwe National Students Union have indicated serious reservations over the COPAC process and the draft constitution that emerged from that process.

³¹ “Zimbabwe Draft Constitution,” art. 7.1.

The Tsvangirai-led MDC party has begun a campaign for a “yes” vote to the COPAC draft constitution, stating that although it is not perfect, the draft would be an improvement on the current constitution.³² At its annual conference in December 2012 ZANU-PF expressed its disagreement with the MDC’s position on the draft constitution saying:

[We are] outraged that the draft constitution produced by COPAC on July 18, 2012 deviated in serious material respects from the views of the people expressed during the COPAC outreach exercise and which are contained in the National Statistical Report;... calls upon the party [ZANU-PF] to resist all attempts and machinations by some international forces and their local proxies to smuggle nefarious values and practices onto the proposed new constitution; and implores the GPA parties to conclude the constitution making process before Christmas [2012], failing which the Head of State [Mugabe] should dissolve Parliament and fix a date for the holding of elections under the current Constitution.³³

If the draft constitution is accepted at referendum it requires at least two-thirds majority support in parliament for ratification and no single party currently has that majority in parliament.³⁴ If there is no agreement between ZANU-PF and the MDC, then the draft constitution will not take effect. At the first attempt to write a new constitution in February 2000, the proposed draft constitution was rejected at referendum prompting Mugabe to set aside the constitutional reform process, saying a new constitution was no longer a priority for government.

Electoral Reforms

Amendments enshrined in the Electoral Amendment Act gazetted on September 28, 2012, repeal the Electoral Act and incorporate the Zimbabwe Electoral Commission Act.³⁵ When

³² “Tsvangirai launches YES campaign,” *The Standard*, September 9, 2012.

³³ “Zanu PF Conference resolutions,” *ZBC*, December 11, 2012, <http://www.zbc.co.zw/news-categories/top-stories/26513-resolutions-of-the-zanu-pf-13th-national-peoples-conference.html> (accessed December 15, 2012).

³⁴ Constitution of Zimbabwe, art. 52(3), provides: “A Constitutional Bill shall not be deemed to have been duly passed by Parliament unless, at the final vote thereon in the Senate and House of Assembly, it received the affirmative votes not less than two-thirds of the total membership of each House.”

³⁵ “Bill Watch: Electoral Amendment Act gazette, 45/2012,” *Veritas*.

the ZEC was established under the unity government with the responsibility to manage all electoral matters in the country, a new team of commissioners led by Justice Simpson Mutambanengwe was appointed. There is serious concern that, because the ZEC chairperson is based in Namibia where he is a Supreme Court judge, ZEC is effectively being run by his deputy, Joyce Kazembe, a strong Mugabe ally who was part of the discredited electoral commissions that presided over previous elections, which were marred by violence and voter intimidation.³⁶ Kazembe is currently the acting ZEC chairperson while Mutambanengwe is in Namibia.³⁷

While ZEC has new commissioners, the secretariat staff is largely the same pro ZANU-PF team that worked for previous commissions. Several senior ZEC staff are either serving or retired members of the security forces drawn from the Central Intelligence Organization (CIO), the army, and the police.³⁸ ZANU-PF continues to resist calls by civil society and the MDC factions for an independent audit of ZEC staff followed by a fresh recruitment of professional, independent, and non-partisan personnel.

The COPAC draft constitution and the electoral law do not exclusively assign to the electoral commission the key functions of registration of voters or the compilation of the voter rolls and registers.³⁹ The draft constitution leaves room for other bodies, such as the Registrar General's Office, widely viewed as partisan towards ZANU-PF, and which previously had the exclusive responsibility to register voters, issue passports and register births and deaths, to continue to play a role in the registration of voters, while ZEC is authorized to perform the following functions:

- (a) register voters, or supervise the registration of voters by the authority charged with that responsibility, as may be provided under the Electoral Law; and

³⁶ "Mugabe ally effectively running election body," *The Zimbabwean*, June 3, 2012, <http://www.thezimbabwean.co.uk/news/zimbabwe/56787/mugabe-ally-effectively-running-election-body/> (accessed September 19, 2012).

³⁷ "ZEC boss relocates to Namibia," *The Daily News*, December 1, 2012. See also: "Elections: Ball start rolling," *The Sunday Mail*, September 30, 2012.

³⁸ "Elections: Ball start rolling," *The Sunday Mail*. For instance, the current ZEC Chief Elections Officer, Lovemore Sekeramayi, is a former member of the President's Office.

³⁹ "Zimbabwe Draft Constitution," art. 12.8(1).

- (b) compile voters' rolls and registers, or to supervise the compilation of those rolls and registers by the authority charged with that responsibility, as may be provided under the Electoral Law.⁴⁰

Other functions of the Zimbabwe Electoral Commission include provision of voter education to the electorate; supervision of other bodies, including civil society, that it duly accredits to provide voter education;⁴¹ and accreditation of local and international election observers.⁴² On the accreditation of observers, the act proposes the creation of an Observers Accreditation Committee chaired by the ZEC chairperson, but with individuals nominated by the president's office, by the minister of justice, the minister of foreign affairs, and the minister of home affairs.⁴³ This provision effectively permits the executive to control the Observers Accreditation Committee, undermining ZEC's independence.

The electoral law prohibits Zimbabwean citizens living outside the country from voting, with the exception of those on government business, such as diplomats.⁴⁴ The prohibition of the diaspora vote disenfranchises a significant population of Zimbabweans—estimated at well over a quarter of the country's total population.⁴⁵ This provision appears to be a violation of the constitutionally guaranteed political right of every adult Zimbabwean citizen to vote in referendums and elections for any legislative body established under the constitution.⁴⁶

On measures against politically motivated violence and intimidation, the Electoral Amendment Act provides that the Zimbabwe Human Rights Commission shall, in consultation with the ZEC, establish a Special Investigation Committee for each provincial center to be chaired by a ZHRC commissioner or member of staff, and consisting of a

⁴⁰ "Zimbabwe Draft Constitution."

⁴¹ Electoral Amendment Act, *Parliament of Zimbabwe*, No. 3, September 28, 2012, art. 40.

⁴² *Ibid.*, art. 40(g).

⁴³ *Ibid.*, art. 40(h).

⁴⁴ Electoral Amendment Act, art. 72.

⁴⁵ Migration Citizenship Education, "Zimbabwean migrants in Britain: An Overview," <http://migrationeducation.de/49.1.html?&rid=157&cHash=b9366be6e0e22d84fc2d9e8709e036> (accessed 18 November 2012).

⁴⁶ Constitution of Zimbabwe, art. 23(a).

provincial special police liaison officer and two representatives from each political party or independent candidate contesting the election.⁴⁷

The Special Investigation Committee only has the power, where incidents of violence have taken place, to warn candidates and party supporters that they may be prosecuted or barred from campaigning in the elections. Where such warning is ignored, the Special Investigation Committee may compile a report and submit it to special provincial prosecutors.⁴⁸

Establishing special investigation committees comprising of police officers from a highly partisan police force heightens rather than alleviates concerns that these committees can prevent political violence and intimidation during elections. Instead of strengthening the human rights commission's involvement in elections, close participation by pro-ZANU-PF police officers seems likely to undermine it.

The Electoral Amendment Act in article 160(g) directs all public broadcasters to grant equal access to the media for all political parties and independent candidates contesting elections. Finally, in the fourth schedule, the Electoral Amendment Act contains an electoral code of conduct for political parties and candidates that puts forward a prohibition on political violence and intimidation but does not provide a mechanism for enforcement beyond the Special Investigation Committees.

Many of these electoral reforms were instituted just before the 2008 “harmonized” elections (the holding of presidential, parliamentary, and local government elections at the same time) and would have significantly improved the human rights and electoral conditions had they been faithfully implemented. The widespread human rights abuses and an unequal playing field in previous elections was not primarily due to a lack of relevant laws. Rather, it was a result of ZANU-PF's use of an informal network of highly partisan and extremely politicized leaders of state institutions who undermined the legal framework for the ruling party's benefit.⁴⁹ ZANU-PF and its allies in key state institutions have over the years undermined provisions relating to free and fair elections, running

⁴⁷ Electoral Amendment Act, art. 133(h).

⁴⁸ *Ibid.*, art. 133(i).

⁴⁹ The Police Act, for instance, prohibits members of the police from partisan conduct, including taking part in party politics.

roughshod over provisions in the current constitution guaranteeing equal protection before the law for all citizens, and prohibiting the leadership of key state institutions from partisan conduct.⁵⁰

⁵⁰ Article 23(a) of the Constitution of Zimbabwe provides that every Zimbabwean citizen has the right to free, fair, and regular elections for any legislative body and the right to secret vote.

Lack of Legal and Institutional Reforms

Restrictions on Rights to Freedom of Expression, Association, and Assembly

The unity government has failed to make any changes to repressive laws such as the Access to Information and Protection of Privacy Act, the Public Order and Security Act, and the Criminal Law (Codification and Reform) Act. These laws have been used to severely curtail basic rights through vague defamation clauses and draconian penalties. Provisions dealing with criminal defamation and undermining the authority of or insulting the president have been routinely used against journalists and political activists.

Within the framework of developing the roadmap to free and fair elections, ZANU-PF rejected proposals by the MDC factions to amend POSA in light of abuse of the law by the police and to bring it in line with commitments in the GPA.⁵¹ Partisan policing and prosecution has worsened the impact of the repressive provisions in POSA and AIPPA laws. Often the police have deliberately misinterpreted provisions of POSA to ban lawful public meetings and gatherings, including religious meetings, exempt from police permission where the requirement is only for police to be notified. Failure to repeal or significantly revise these laws and to develop mechanisms to address the partisan conduct of the police leaves little chance of a full enjoyment of the rights to freedom of association and assembly in the run-up to and during the coming elections.

The Criminal Procedure and Evidence Act in section 121 effectively permits prosecutors to overturn judicial rulings granting bail and extend detention time by seven days.⁵² It has frequently been used by prosecutors targeting political and civil society activists with local human rights organization. Zimbabwe Lawyers for Human Rights recorded 30 cases between April 2008 and February 2012 during which the section was abused.⁵³ In February 2011 police arrested Member of Parliament (MP) Douglas Mwonzora (of the Tsvangirai-led MDC) and 22 co-accused MDC members on charges of allegedly committing public

⁵¹ “Zimbabwe Elections Roadmap with Timelines,” July 6, 2011.

⁵² Criminal Procedure and Evidence Act, No. 14, 2004, art. 121.

⁵³ “Release of Accused on Bail Repeatedly Thwarted by State Misuse of the Law [Section 121(3) of the Criminal Procedure and Evidence Act],” Court Watch 8/2012, *Veritas*, April 25, 2012.

violence, but when the Nyanga magistrate granted them bail a few days later the state invoked section 121(3), resulting in all 23 remaining in custody for 25 days until their release following the dismissal of the state's appeal by a High Court judge.⁵⁴ On July 6, 2011, the GPA parties agreed to have section 121 amended to restrict its use to specific, prescribed offenses, but this has yet to be done.⁵⁵

Presidential Powers to Legislate during Elections

The Presidential Powers (Temporary Measures) Act in chapter 10:20 broadly empowers the president, if he thinks urgent action is needed in the general public interest, to bypass parliament and unilaterally pass regulations (effective for a period of six months) to suspend, amend or modify any law, other than the constitution, at any time, including during election periods.⁵⁶ In the past President Mugabe has used this law to pass regulations amending the Electoral Act during elections.

On March 17, 2008, barely two weeks before general elections, Mugabe invoked the Presidential Powers Act to amend the Electoral Act to allow police officers (widely perceived to be pro-Zanu-PF) to enter polling stations, ostensibly to aid those requiring assistance to vote.⁵⁷ In February 2008 Mugabe changed local government qualifying requirements for election candidates through amendments to the Electoral Act using excessive powers under the act.⁵⁸ In October 2000 Mugabe, using the Presidential Powers Act, revoked a private radio station's operating license, thereby reinstating the partisan

⁵⁴ "Release of Accused on Bail Repeatedly Thwarted by State Misuse of the Law," *Veritas*.

⁵⁵ "Zimbabwe Elections Roadmap with Timelines," July 6, 2011.

⁵⁶ Article 2 of the Presidential Powers (Temporary Measures) Act provides that: (1) When it appears to the President that—
(a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and
(b) the situation cannot adequately be dealt with in terms of any other law; and
(c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation; then, subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation.

⁵⁷ Presidential Powers (Temporary Measures) (Amendment of Electoral Act), No. 2, Regulations – Statutory Instrument, 43/2008, March, 17, 2008, http://www.kubatana.net/html/archive/legisl/080317si43.asp?orgcode=paroo1&year=2008&range_start=1 (accessed September 12, 2012).

⁵⁸ *Ibid.*

Zimbabwe Broadcasting Corporation's broadcast media monopoly.⁵⁹ The Supreme Court, in a September 2000 ruling, had declared legislation granting broadcasting monopoly to Zimbabwe Broadcasting Corporation invalid and allowed *Capital Radio*, a private radio station, to operate and provide broadcast services in Zimbabwe.⁶⁰

Granting the president sweeping legislative powers during elections permits him to alter electoral conditions in ways that undermine credible, free and fair elections. The COPAC draft constitution would prohibit any changes to electoral laws once an election has been called.⁶¹

No Meaningful Institutional Reforms

Genuine and comprehensive institutional reforms to end the pro-ZANU-PF partisanship of key state institutions such as the security forces, electoral management bodies and public broadcasters are necessary to level the playing field and create an environment conducive to the holding of credible elections. ZANU-PF has not embraced such reforms in the name of promoting a more democratic Zimbabwe, but has actively resisted them.

The absence of meaningful institutional reforms to facilitate full restoration of the rule of law increases concern for human rights protections ahead of Zimbabwe's next elections. The GPA noted that state organs and institutions do not belong to any political party and should be impartial in the discharge of their duties.⁶² This declaration remains wholly unimplemented.

At the beginning of 2012 the unity government had an opportunity to appoint a new, independent head of the police when current Commissioner-General Augustine Chihuri's term of office ended. However, Mugabe unilaterally reappointed Chihuri, who has publicly

⁵⁹ Presidential Powers (Temporary Measures) Broadcasting Regulations, October 2000.

⁶⁰ *Capital Radio (Private) Limited v. The Minister of Information, Posts and Telecommunications*, Supreme Court of Zimbabwe, Case No. r SC 99/2000, Judgment, September 22, 2000.

⁶¹ "Zimbabwe Draft Constitution," art. 7.3(5).

⁶² The Global Political Agreement, art. 13.

stated his support for ZANU-PF in violation of constitutional provisions requiring him to be politically neutral.⁶³

In July 2012 High Court Judge Nicholas Mathonsi highlighted blatant police partiality and unwillingness to perform their duties in cases where ZANU-PF supporters are perpetrators of political violence.⁶⁴ In passing judgment in a case of the murder of two MDC supporters by known ZANU-PF supporters in 2001, the judge said:

Although the assailants are known, were mentioned by name, and the police officers witnessed the assault only to plead with the criminals to release the victims, we are told more than 10 years after the victims met their painful death, that the co-accused persons are still at large.

How can they be at large when the police officers witnessed the assault? Why did they not arrest them then and there? Why did it take such a long time to even commence this excuse of a trial? It really leaves a sour taste in the mouth, as it suggests that the police just stood akimbo as innocent victims were bludgeoned to death in their full view.

The assailants were then allowed to walk free. In my view, the police should do a lot of soul searching if they are to sustain any credibility in the eyes of those whose safety and well-being they are sworn to safeguard.⁶⁵

The bulk of political violence in Zimbabwe involves state security agents, and is fueled by the failure of the police and the judiciary to hold accountable the perpetrators of serious abuses and provide justice for victims. Urgent reforms essential for free and fair elections should focus on the prevention of politically-motivated violence. Unless the government institutes measures to prevent the security forces—particularly the military, the police, and

⁶³ “Chihuri ‘shreds’ Police Act to protect Mugabe,” *The Standard*, August 15, 2012. Police Commissioner General Augustine Chihuri has publicly declared his political allegiance to Zanu-PF in contravention of the Police Act.

⁶⁴ *State v. James Muromo & Another*, High Court of Zimbabwe, Case No. HH 286-2012, July 2012.

⁶⁵ *Ibid.*

state intelligence agents—from unduly influencing the electoral process through violence and intimidation, the problems of past elections are likely to reoccur.

The Attorney General’s Office has been run on partisan lines, abusing its prosecutorial authority to persecute MDC political activists while protecting ZANU-PF allies implicated in political violence and other serious human rights abuses. The GPA contains a commitment that “the government shall apply the laws of the country fully and impartially in bringing all perpetrators of politically motivated violence to book,”⁶⁶ and the MDC presented evidence to the attorney general of political violence in 2008 that allegedly resulted in the deaths of at least 200 MDC supporters. Yet the attorney general has been unwilling to seriously investigate, let alone prosecute, these incidents.⁶⁷

The MDC factions have pushed for the security forces to issue a public statement that they will unequivocally uphold the constitution and respect the rule of law prior to and following any election or referendum.⁶⁸ However, ZANU-PF has rejected all security sector reforms insisting they are not electoral matters.⁶⁹ Since May 2012 senior army commanders including Major General Douglas Nyikayaramba and Major General Trust Mugoba have publicly expressed support for President Mugabe and ZANU-PF, after Major General Martin Chedondo declared: “As soldiers, we will never be apologetic for supporting ZANU-PF because it is the only political party that has national interests at heart.”⁷⁰

In recent months soldiers and sections of the police have declared certain locations “no go” areas for MDC supporters, disrupting and preventing MDC officials from holding lawful political rallies, violating fundamental rights, as well as undermining the electoral process.⁷¹

⁶⁶ The Global Political Agreement, art. 18.5(c).

⁶⁷ “MDC-T pushes for arrests for 2008 murders,” *SW Radio Africa*, January 16, 2012, <http://www.swradioafrica.com/2012/01/16/mdc-t-push-for-arrests-of-2008-murderers/> (accessed September 23, 2012).

⁶⁸ “Zimbabwe Elections Roadmap with Time lines.”

⁶⁹ *Ibid.*

⁷⁰ “Zanu-PF election tactics exposed,” *The Zimbabwe Independent*, October 5, 2012, <http://www.theindependent.co.zw/2012/10/05/zanu-pf-election-tactics-exposed/> (accessed October 5, 2012).

⁷¹ “Soldiers, Zanu-PF youths disrupt MDC-T rally in Darwendale,” *SW Radio Africa*, July 16, 2012, <http://allafrica.com/stories/201207170421.html> (accessed September 7, 2012).

This vicious cycle of serious human rights abuses and malpractices around electoral periods in Zimbabwe can be traced to pro-ZANU-PF officials presiding over the police, the prosecuting authority and the security forces, and actively encouraging partisan conduct in ways that undermine free and fair elections. The institutions then neglect or refuse to act to ensure accountability in cases of human rights abuses, thereby entrenching impunity. Finally, pro-ZANU-PF officials remain in senior positions in government institutions, resisting crucial reforms while only allowing cosmetic tinkering that does not bring wrongful conduct to an end.

To break the vicious cycle of human rights abuses, the unity government should implement comprehensive reforms that address three pillars: 1) legislative reform; 2) institutional reform focusing on replacement of partisan government officials and personnel; and 3) the establishment of robust monitoring and enforcement mechanisms. Focusing on the legislative and administrative reforms pillar alone will not transform Zimbabwe's political terrain and human rights environment.

A central aspect of any meaningful reform should focus on appointing to key positions in government highly qualified and politically independent individuals. Personnel changes should particularly apply to the army, the police, the attorney general's office, the registrar general's office, and staff at the secretariat of the Zimbabwe Electoral Commission.

SADC Mediation

Beginning with its Livingstone resolutions of March 31, 2011, the SADC has called on Zimbabwe to fully implement agreed reforms in the GPA to end violence and follow a benchmarked roadmap to free and fair elections that includes the finalization of the constitution.⁷² The SADC's position on Zimbabwean elections is informed by its principles governing the conduct of democratic elections, which include full participation of the citizens in political processes; freedom of association; political tolerance; equal opportunity for all political parties to access the state media; equal opportunity to exercise the right to vote and be voted for; independence of the judiciary; and impartiality of the electoral institutions.⁷³

Subsequent resolutions, including the August 18, 2012 SADC Summit Communique, have urged the unity government partners "to develop a roadmap together with timelines that are guided by requirements of the processes necessary for the adoption of the constitution and the creation of conditions for free and fair elections to be held."⁷⁴ Furthermore, as the guarantors of the GPA, SADC leaders committed to assist the parties in every way possible to reach a position where a credible election enables Zimbabwe to set out on the road to stability and progress.

In August 2012 leaders of the southern Africa regional bloc noted the continued non-implementation of agreed resolutions on Zimbabwe. The SADC again urged GPA partners to immediately strengthen JOMIC, in terms of the Livingstone resolution to appoint a team of officials to monitor the GPA, so that the SADC team can assist, on a regular basis, in the advancement and consolidation of the work of that committee and help create an atmosphere conducive to the establishment of a level political field, leading to a free and fair election.⁷⁵

⁷² "Summit of the Organ Troika on Politics, Defence and Security Cooperation," SADC communiqué, March 31, 2011.

⁷³ "SADC Principles and Guidelines Governing Democratic Elections," Mauritius, August 2004, <http://www.sadc.int/english/key-documents/principles-and-guidelines-governing-democratic-elections/> (accessed September 14, 2012).

⁷⁴ "Final Communiqué of the 32nd Summit of SADC Heads of State and Government," Maputo, Mozambique, August 18, 2012.

⁷⁵ Ibid.

SADC leaders have taken the first important step of publicly stating the need for Zimbabwe to establish preconditions for the holding of credible, free and fair elections. These have been strong words from the SADC, but words not backed by action. Successive SADC resolutions on Zimbabwe have gone without implementation.

It is the lack of a robust implementation mechanism for its decisions that severely weakens the SADC's positive stand on Zimbabwe. SADC leaders have failed to maintain pressure on ZANU-PF and other GPA partners to implement agreed GPA reforms and create the environment for the holding of elections that fully comply with SADC's principles and guidelines on the conduct of democratic elections.

Should the unity government fail to take appropriate steps to institute key human rights reforms ahead of the elections, the SADC should lead the international community in taking appropriate and effective measures against those unity government officials responsible. Although the SADC Principles and Guidelines Governing Democratic Elections are simply guidelines with no legal force, the SADC still has a range of measures that it can invoke against those responsible for the violation of its standards including suspension of a state from membership and imposition of sanctions.⁷⁶

To effectively promote adherence to the GPA, the SADC should, in line with its principles and guidelines on the conduct of democratic elections, ensure that it closely observes and monitors Zimbabwe's next elections. Prior to the calling of elections, the SADC should independently examine conditions on the ground and certify that the environment is conducive to the holding of democratic elections. The SADC Election Observer Mission for the June 2008 presidential runoff election concluded that "the pre-election phase was characterized by politically motivated violence, intimidation, and displacements," and that the process leading up to the presidential run-off elections held on June 27, 2008, did not conform to SADC Principles and Guidelines Governing Democratic Elections, although the election day was peaceful.⁷⁷ The SADC should deploy its observer mission in Zimbabwe early and in sufficient numbers to facilitate effective monitoring of the pre-election period that has in the past been characterized by violence and intimidation.

⁷⁶ SADC suspended Madagascar from membership following a military coup there in March 2009.

⁷⁷ SADC 2008 runoff election Observer Mission Report, Harare, June 29, 2008.

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RACE AGAINST TIME

The Need for Legal and Institutional Reforms Ahead of Zimbabwe's Elections

Zimbabwe's unity government, which consists of the former ruling Zimbabwe African National Union–Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) factions, is failing to implement reforms agreed under the Global Political Agreement aimed at preparing the country for credible, free, and fair elections. Many Zimbabweans in and out of the country are concerned that without the implementation of necessary reforms there will be widespread human rights violations ahead of, during, and after the elections expected to take place in 2013.

Race Against Time: The Need for Legal and Institutional Reforms Ahead of Zimbabwe's Elections examines, among other things, the key laws affecting elections in Zimbabwe, and other laws and regulations impacting on human rights, including the current and draft constitutions.

Human Rights Watch calls on Zimbabwe's unity government to urgently implement legislative and institutional reforms to ensure a level playing field for all political parties. The unity government should ensure that relevant institutions such as the police, the judiciary, and the electoral commission rigorously implement appropriate laws and processes to prevent violence, hold accountable perpetrators of abuses, and make certain that political parties and candidates enjoy equal access to the media. The Southern African Development Community (SADC) should independently assess and certify that conditions are right for the holding of elections that comply with the SADC Principles and Guidelines Governing Democratic Elections before it clears Zimbabwe to hold elections.



Residents of Zimbabwe's capital, Harare, line up to cast their vote in the country's presidential election on June 27, 2008.

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