

The Troubling Path Ahead for U.S.-Zimbabwe Relations

Testimony of Arthur Gwagwa of the Zimbabwe Human Rights NGO Forum,
Senate Foreign Relations Committee

SEPTEMBER 12, 2013

1. Organizational and personal Credentials

Thank you, Chairman, Ranking Member, and other members of the committee for providing Zimbabwe Human Rights Forum the opportunity to testify at this hearing on Zimbabwe. I would like to request that my statement and annexures in their entirety be submitted for the record.

My name is Arthur Gwagwa. I work as an International Advocacy Coordinator with the Zimbabwe Human Rights NGO Forum, a lead human rights coalition of 19 members and the first organization in Zimbabwe to also have a presence in the Global North. At the Forum, I conduct research, lobbying and advocacy on the human rights situation in Zimbabwe. In that role, I work closely with the EU structures, the UNHRC and USA government (USA DOS, Harare Mission and Congressional Research). I have been closely working with the EU on the Zimbabwe re-engagement issue. I am a lawyer by background, dually admitted to practice both in Zimbabwe and England.

I am based in London but I frequently travel to Zimbabwe. I maintain daily contact with local activists, civil society and church leaders, diplomats, business people, and politicians from Zimbabwe, who keep me up to date regarding the situation there.

2. Instructions

I have received instructions from Mark Kearney, a staff associate in the House Committee on Foreign Affairs, to testify before the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations on the "*Troubling Path Ahead for U.S.-Zimbabwe Relations*". I understand that my duty in presenting this report is to assist the Committee on matters within my organization's knowledge as drawn from evidence that we gather in our work with Zimbabwean civil society, government and the international community. I also understand that my duty to honestly and candidly represent the diverse views of Zimbabweans overrides any obligation to the person from whom I have received instructions and by whom I am paid.

Mr. Chairman, my testimony will set out a brief background of the USA-Zimbabwe relationship, provide a general human rights overview, outline pertinent factors for due consideration by tis Committee and finally spell out options. This testimony will make extensive reference to the attached dossiers (*appendixes 1 and 2*), which should also be admitted in evidence.

Background

The USA's policy toward Zimbabwe since 2001 has primarily been defined by

The Zimbabwe Democracy and Economic Recovery Act (S. 494) (ZDERA), which has the twin goals of providing for a transition to democracy and promoting economic recovery in Zimbabwe. ZDERA's stated policy was to "support the people of Zimbabwe in their struggle to effect peaceful, democratic change, achieve broad-based and equitable economic growth, and restore the rule of law.

The sanctions would be lifted in the event that the following conditions were met: restoration of the rule of law, including "respect for ownership and title to property, freedom of speech and association, and an end to the lawlessness, violence, and intimidation sponsored, condoned, or tolerated by the government of Zimbabwe, the ruling party, and their supporters or entities."

The other condition related to electoral conditions in 2002, and specified that Zimbabwe was to hold a presidential election that would widely be accepted as free and fair, after which the president-elect would be free to assume the duties of the office. The government of Zimbabwe immediately attacked ZDERA as racist and illegal. These accusations would eventually lay a foundation for the polarized USA-Zimbabwe relations, which generally pitted the Global North against the Global South.

Zimbabwe's compliance with conditions set out in ZDERA

The relevant questions to be asked are whether Zimbabwe has met stipulated conditions to justify a shift in policy, and if not, whether there should be a policy shift based on other grounds. Finally what impact would a shift or maintenance of the status quo have on ordinary Zimbabweans, and what impact would this have on regional and international relations?

Current human rights and political terrain

General overview

Many people in Zimbabwe had expectations that the elections would usher in a democratically elected government with an interest in addressing the country's longstanding and serious human rights issues. They thought the new government would build on the positives achieved by the inclusive government. However, that hope was extinguished by a rushed and highly flawed election. The Executive, ghost and silhouette litigants, with judicial complicity, rushed the election on the ground that a new government was constitutionally due, but has taken more than a month to appoint one. All the reforms that were achieved culminated in a seriously flawed election. The country is experiencing serious uncertainty, and a sense of desperation is palpable.

People are whispering their disappointment with ZANU PF behind closed doors as they self censor in public for fear of persecution. At the same time, state media, both print and broadcast, is awash with praises for ZANU PF and references to President Mugabe in a bid to legitimize an otherwise illegitimate election. The sustained propaganda raises fears that Zimbabwe is plunging back into being a one party state. Structural, psychological and physical reprisals continue, and in some cases, there is judicial complicity in the persecution of lawyers and dissent.

The Southern African Development Community (SADC) sub-region's position on the elections is threatening to return the country to the position it was in 2002, which pitted the Global North and Global South against one another. With the main opposition currently in a state of shock on what happened, there is an urgent need for far-reaching and non-partisan international decisions that build on gains made so far in promoting an open and politically plural society. Now is not the time for the USA to cower or whisper on Zimbabwe or hide Zimbabwe behind the Syrian agenda but to make tough sustainable choices underpinned by compassion for Zimbabwe and its people.

State of compliance with and breach of obligations

Zimbabwe has international legal obligations to ensure respect for human rights for everyone within its jurisdiction, without discrimination on the basis of gender, ethnicity, social origin, political opinion or other prohibited grounds. These human rights include the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment. They also include other human rights crucial to the election process, such as the right to freedom of expression, including freedom to seek, receive and impart information and ideas, and the rights to peaceful assembly and freedom of association. Zimbabwe has explicitly accepted obligations in regard to these rights in international and regional human rights treaties which it has ratified, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights. Both the old and the new Constitution of Zimbabwe also recognize these rights. The now defunct Global Political Agreement (GPA) of 2008, acknowledging the importance of some of these rights, called for reforms under 8 tiers, namely, Constitution, Media, Electoral, Rule of Law, Freedom of Association and Assembly, Legal and conduct of Election. Although the GPA ran its full course, it still provides an ideal benchmark on what was achieved and what is yet to be achieved in the broader reforms and legislative re-alignment discourse.

Although the number of politically motivated murders, abductions, disappearances, and cases of torture and intimidation has been drastically reduced, the overall situation is still far from perfect. There are on-going human rights abuses, including Executive interference with the independence of lawyers and judges; there was arbitrary and selective application of the law. Fundamental freedoms relating to speech, press, assembly, association, and movement as well as the right to privacy were severely restricted. ZANU-PF controlled and manipulated the political process, effectively negating the right of citizens to change their government. The military loomed large and constantly threatened that they would not accept any transfer of power away from Mr Mugabe's party, ZANU PF. There was a clamp down on human rights defenders (HRDs), civil society and non-governmental organizations, and reprisals against the opposition. The government continues to compulsorily acquire private property and to issue statements that promote economic regression and that are blatantly racist, thereby undermining minority rights.

Please see **Appendix 1** for detailed and specific instances of non-compliance with agreed reforms.

Threats to exercise of the freedom of Association, Assembly, Movement, Profession including politically motivated reprisals

The government continued to use arbitrary arrest and detention as tools of intimidation and harassment, especially against human rights defenders. The pattern of arrests, intimidation, and violence against human rights defenders, and threats of closure of organizations they work for seriously undermined the electoral environment in Zimbabwe and continue to undermine human rights after the elections.

Most of the cases are in the public domain; therefore little will be achieved in fully reiterating them here suffice it to say that they include attacks on lawyers and other human rights defenders by the police and judges, clampdown on strategic organizations and threats meant to impair their lawful activities. Attacks on the independence of the legal profession as well as the judiciary continue to undermine the efficient and effective administration of justice.

Although the actual election was held in a generally peaceful environment, structural and psychological forms of violence were employed against the people during the elections and this remains the case. The infrastructure of terror remains intact and is sporadically re-activated at the state's pleasure (ZPP Report, July 2013).

Post electoral state sponsored reprisals still persist. These include the continued detention and prosecution of opposition members who did nothing but exercise their legitimate rights to association. The cases of Morgan Komichi and Arnold Tsunga are examples. There have been attacks and threats against MDC leaders across the country including threats against Tsvangirai by war veterans that he should leave his rural home for good.

Violations of the rights to freedom of expression, access to information,

Protections from violations of freedom of expression, access to information, and press freedom are enshrined in a host of regional and international instruments to which Zimbabwe is a signatory or state party. Nevertheless, rampant violations of these recognized rights have continued unabated, particularly since election-related rhetoric began to rise in August 2012.

The unity government has failed to make any changes to repressive laws such as the Access to Information and Protection of Privacy Act (AIPPA), 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 (See page 2 Appendix 1).

Violations of private property rights

Whilst the empowerment of indigenous people might sound noble on paper, ZANU PF's policy on indiscriminate acquisition of private property, as enshrined in the *Indigenous Economic Empowerment Act*, is actually achieving the opposite result, as shown by the current unemployment rates, poor service delivery and lack of investment. This policy is furthering a culture of political patronage.

Options open to the USA.

In my discussions with Zimbabweans it appears there are three options: Firstly, the maintenance of sanctions until all agreed reforms per Appendix 1 are achieved or remedied. The second option is for the immediate removal of all sanctions, on the basis of collective but diverse reasons per Appendix 2. Finally, the USA could pursue a third option, which involves a staggered review of sanctions in response to progress.

Whichever of the above options the USA decides to follow, the same should be underpinned by universal human values as expressed in international human rights law and standards set out in treaties that Zimbabwe is party to. In the following paragraphs I will explain these three options.

First option: maintenance of sanctions until full reforms instituted

Proponents of this view would like the international community, including the USA, to ask the following question: "Has the imposition of sanctions brought about any improvements, and if yes, why should the sanctions be removed?" This position, which is founded in principle and strict adherence with undertakings, is fully backed by the dossier contained in appendix 1 and will therefore not require further expansion.

Second option: Immediate removal of sanctions

This school of thought is drawing little consensus from people, and views are often polarized. At the time of writing, it is also unclear whether those within the MDC T who were campaigning for the removal of sanctions prior to the election still hold the same view in light of the flawed election. The reasons for this view are many and varied, and *are documented on Appendix 2.*

In light of the above, should the USA completely remove the sanctions immediately? The question that arises is the extent to which the USA should rely on the SADC's judgment in shaping its own policy towards Zimbabwe. It should be noted that the SADC's approach lacks logic and places relationships above principles. The SADC's conclusion that the election was generally credible, as expressed in its September 6th Report, contradicts the position expressed in Maputo on June 15th 2013, where they agreed that the conditions prevailing in Zimbabwe were not conducive to the conduct of a free, fair and credible election.

In addition, the report of any SADC Election Observer Mission is supposed to make reference to the SADC Guidelines Governing the Conduct of Democratic Elections, which are supposed to act as the basis for judging the

freeness, fairness and credibility of the election. Only Botswana got it right when it emphasized the need to observe the SADC Community's shared Election Guidelines so as to ensure transparency and credibility of the entire electoral process.

Option 3: Staggered removal of sanctions in batches

This approach is underpinned by a set of principles, which include:

Post election probationary period: This approach is premised on the need to reward progress and punish intransigence. It involves gradual review of the measures in three main phases. The first phase will place the relationship with the new government on some form of probation to assess how it is performing in safeguarding its people's interests. This approach does not only look at the elections but post-electoral record.

Defining flexible benchmarks: The USA needs to review parameters set out in ZDERA through prioritization of what matters to Zimbabweans at this juncture, for example, service provision, but without sacrificing principle and universal values.

Action for action: This might mean an elaboration of the 'action for action' principle, by looking at possible lines of re-engagement with Harare and ease the sanctions gradually in response to action. However by adopting this approach, the USA should not sacrifice principles and ideals as spelt out in international standards and norms to which Zimbabwe is party to. The clarified 'action for action' approach should then be shared across the USA government departments including USADOS, USAID, National Security Council, treasury and trade departments. Sanctions could be eased in batches according to indicators set out in each phase.

Legitimacy by performance: The gradual relaxation, could for example, be in response to an improvement in the operating space for human rights defenders and implementation of laws that advance freedom of association, expression etc. This could also target ministers and ministries that have performed very well and which have not been complicity in gross human rights violations, for example tourism.

Onus on government: Zimbabwean analysts feel that the USA needs to place the onus on ZANU PF to prove that it has instituted sufficient reforms that can be reciprocated by action. Having lost legitimacy in the eyes of the international community, ZANU PF could achieve legitimacy through performance, at least among Zimbabweans. Further the Zimbabwe government must be placed in the position where it should not unjustifiably insult the USA and its diplomats.

Being cognizant of the above factors, the USA could navigate the troubling path ahead in three flexible phases:

In reality the third option could be framed as follows:

Short term (1- 6 months): The USA could, for example, look at Speaker of Parliament's maiden speech at the commencement of the eighth parliament. This will give the USA a sense of what the Speaker will issue as his priorities for parliament's legislative agenda. The short term could also address the current detentions and prosecution of HRDs and possible power sharing arrangements as well as paying close attention to the media.

Medium term (6-3 years): could look at the process of implementation of law re-alignment with the new constitution, for example POSA, AIPPA and the Interception of Communications Act. Despite the presumption of constitutionality, all these are deemed not consistent with the new constitution. The Zimbabwe government could easily come up with time lines for re-alignment, which could in turn trigger positive responses from the USA government.

Long term (3-5 years): This phase could deal with the stability of the country, internal succession plan within ZANU PF, the issue of political competition etc. There is likely to be an election in 3-5 years therefore this phase should address how this election should look like.

Investment Priority areas

Notwithstanding which of the above options the USA chooses to take, the USA government should continue supporting critical sectors that rally consensus including health care provision, food security, education, leadership development and capacity building through investment in people and tourism. It could also explore ways of ensuring that Zimbabwean diamonds are traded openly to ensure transparency in revenue collection.

At the moment, in its relationship with Africa, Europe is focusing on these priority areas:

- Food security (including climate change, agriculture, land questions);
- Socio-economic inequalities as source of poverty/ social justice;
- Peace and security governance;
- Political participation, human rights and transparency;
- Sustainable trade and investment between Europe and Africa;
- At the same time Gender and Natural resources are cross-cutting themes

America could compliment this by addressing critical areas that advance sustainable development rooted in respect for human rights. This could include:

Political pluralism: Chairman, the USA also need to continue making decisions that support advancement of human rights and political competition in Zimbabwe but not specific political parties. Without this Zimbabwe will slide into a one party state. Supporting this will create opportunities that will allow Zimbabweans to enjoy political rights.

Healing & Reconciliation: The USA should take advantage of the opportunities and mechanisms are created by the new constitution. For example, for the first time since 1980, there is likely to be conversation on

healing and reconciliation that can easily draw inter party consensus.

Rule of Law and Justice: Justice for sufferers of human rights violations and respect for the law forms bedrock for any functional society. This should be the ultimate guiding star in all decisions.

Citizenship participation: Parliament also offers opportunities for re-engagement to the extent that it is likely to be one of the remaining few battlegrounds for engagement and creation of democratic space. Avenues for citizenship participation in the rights and governance dialogue ought to be strengthened as these can help re-invigorate democracy.

Institutional reform and access to services: Zimbabwe's institutions from local authorities to central government are in need of reform in order for them to prioritise people's needs and serve common good. There is need for root and branch appraisal followed by serious capacity building including leadership training, attitude, thinking and behavior.

Service provision: This includes essential services such as health, water and power, and education.

Culture, arts, ICTs: Culture, arts and educational exchange programs offer avenues for third tier diplomacy. The Loyola program was a shining star in the nineties. This could be bolstered through projects based on ICTs that advance social change, democracy and development.

Mr. Chairman, my duty has been to lay options I hear from Zimbabweans and not to dictate what course of action the USA should take. That decision is for the USA government. However, whatever decision the USA decides to adopt, the same should be well thought out, based on the ethic of compassion, safe guard Zimbabwe's economic interests, protect greater good and should sit in the normative framework of universal values cherished across civilizations. I would like to offer my sincere thanks once again for the opportunity to address this Committee. I am happy to respond to any questions you or your colleagues may have.

Appendix 1: Dossier of breaches relating to agreed reforms under the GPA and elections.

The Troubling Path Ahead for U.S.-Zimbabwe Relations

Zimbabwe Congressional Hearing, Foreign Relations Committee

12 September 2013

Following now is the analysis of the SADC Road map, the extent to which it was complied with and how it negatively impacted on the elections and the current environment. The Roadmap is made up of a brief Introduction and a table divided into eight parts to cover the following eight issues: Sanctions, Constitution, Media Reform, Electoral Reform, Rule of Law, Freedom of Association and Assembly, Legislative Agenda and Commitments and Actual Election.

Parts of the GPA Election Roadmap complied with.

A. Sanctions

This part of the Roadmap called for the reactivation of the Inclusive Government's Re-Engagement Committee, lobbying for the removal of sanctions by the Re-Engagement Committee, implementation by SADC of its resolutions on sanctions [These resolutions called for the lifting of "Western sanctions" on Zimbabwe and for SADC leaders to engage the international community on the sanctions issue. Neither the Roadmap, nor the corresponding article of the GPA, targets the actual lifting of sanctions, obviously in recognition of the fact that neither the Inclusive Government nor SADC can compel foreign sovereign states to lift them. [Although ZANU-PF has always described the sanctions as "illegal" because not imposed by the United Nations, those applying sanctions insist that they do so in the exercise of their sovereign rights to regulate foreign trade and entry into their territory.

Constitution

The Road Map called for the remaining seven stages of the constitution-making process described in the GPA, which in July 2011 had not been done, to be expedited. All of the stages have been implemented, albeit way behind schedule and with intense contestation.

Reforms not complied with.

Media Reform: This part of the Roadmap listed eight agreed activities:

(i) Appointment of new board for the Zimbabwe Broadcasting Corporation which was not done. According to VERITAS Trust, *as the government is the only shareholder this should have been straightforward.*

(ii) Appointment of new board for the Broadcasting Authority of Zimbabwe (BAZ), which was not done. *The existing appointments were irregular – for instance, the necessary Parliamentary preliminaries for appointing some BAZ members were not carried out.*

(iii) Licensing of new broadcasters was not effectively done. *This reform was only nominally implemented, by the licensing of two new broadcasters, which are widely regarded as not truly independent. No community radio stations have been licensed.*

(iv) appointment of new trustees for the Mass Media Trust *was not done. This Trust holds the controlling interest in the company owning the State-controlled newspaper group and is a government appointed body and trustees have been previously changed by the Government, so this could have been done.*

Items (i), (ii) and (iv) above were accepted by the negotiators, by Cabinet, and by the GPA principals. Nevertheless the ZANU PF Minister of Media, Information and Publicity refused to implement these three agreements.

(v) Establishment, by October 2011, of the Media Council of Zimbabwe. This was done, the Council having been set up very late but remains inactive. The Media Commission under the Access to Information and Protection of Privacy Act appointed the Media Council in September 2012, nearly a year after the target date of 1st November 2011. The Council should have drawn up a code of ethics for the media sector [not done] and be investigating alleged breaches of the code – which it obviously cannot do until the code is produced.

(vi) calling on foreign governments to stop hosting/funding external radio stations broadcasting into Zimbabwe. *This was not effectively done.* ZANU-PF and its Ministers did so. Other parties in the inclusive Government considered that for this to be done these stations needed to be given licenses to broadcast from within the country and that until then they will be hosted elsewhere.

(vii) Encouraging the return of Zimbabwean broadcasters running or working for external radio stations was not done. *The reforms that might have encouraged these broadcasters to return have been blocked by a ZANU-PF-controlled Ministry.*

(viii) “hate speech” in the State media *was not done. State media organs, both print and broadcasting, have conspicuously failed to honour this in respect of MDC-T and MDC Ministers.*

Electoral Reform

This part of the Roadmap lists six activities [five on which all parties agreed and a sixth on which no agreement was reached with ZANU-PF]:

(i) enactment of agreed electoral amendments. This was partly done . *This was achieved, albeit well after the August 2011 deadline, by the enactment of the Electoral Amendment Act of 2012. But this was only a start, because now, as a result of the provisions in the new Constitution for proportional representation, and elected metropolitan and provincial councils, extensive further amendments to the electoral law are essential under Legislative Agenda [see G. below]*

- (ii) voter education – 30 days duration
- (iii) mobilisation for voter registration – 60 days duration
- (iv) preparation of new voters' roll – 60 days duration
- (v) inspection of voters' roll – 45 days duration

The above were either not done or impartially done, please see a further views below. (ii) to (v) were agreed and closely related activities that required special voter registration efforts. Nothing was done until the belated and shorter than stipulated mobile voter registration exercise which began on Monday 29th April and is due to run until 19th May.

There is a special provision for voter registration in paragraph 6 of the Sixth Schedule of the new Constitution: "The Registrar-General of Voters, under the supervision of the Zimbabwe Electoral Commission, must conduct a special and intensive voter registration and a voters' roll inspection exercise for at least thirty days after the publication day" ["publication day" is the day the Act for the new Constitution is gazette. This was not properly done, please see special section on elections below.

(vi) staffing of Zimbabwe Election Commission (ZEC) was not agreed and not done. *No agreement was reached on this issue. ZANU-PF negotiators rejected MDC-T's proposal to have ZEC staff recruited afresh by the new Zimbabwe Electoral Commission. ZEC key senior staff remained largely as they were for the problematic 2008 elections.*

Rule of Law

Most a activities in this section did not get the agreement of all three parties and the two that did (i) and (vi), were phrased in vague and general terms, with action to be undertaken by the GPA principals and timeframes to be determined by them:

(i) Attorney-General and security force chiefs. *The principals were to meet the officials concerned to ensure "full commitment" by the Attorney-General, Commissioner-General of Police and heads of other security and intelligence institutions "to operate in a non-partisan manner consistent with the GPA". There were some efforts on the part of the MDCs but none successful.*

(ii) security forces to be told to publicly pledge respect for Constitution, rule of law etc. This was not agreed and not done.

(iii) state-sponsored violence to be ended was not agreed and not done, though there was reduction in overt violence during the elections.

(iv) deployment of security personnel for political purposes to be stopped was not agreed and therefore not done.

(v) special Act for Central Intelligence Organization to be passed was not agreed and therefore not done.

(vi) impartiality of State institutions was not done. *The principals were to put in place mechanisms to ensure the impartiality and observance of the rule of law by State organs and institutions as required by GPA Article 13 – including special training for the uniformed forces in human rights and objective, impartial performance of their duties. Statements by senior police and military*

officers, and overall police and military conduct, justify the conclusion that there has been little, if any, serious effort to bring about the changes envisaged by these activities.

Freedom of Association and Assembly

This part of the Roadmap covered complaints from the MDC parties about abuse of the Public Order and Security Act [POSA] by the police. Only activity (i) was agreed:

(i) Meetings of the GPA Principals and the GPA negotiators with the Commissioner-General of Police *was not effectively done. If any full structured meetings ever took place, they seem to have been ineffective. Complaints have continued from civil society and political parties [except ZANU-PF] about police administration of POSA provisions about meetings and processions, even during the lead-up to the Referendum of 16th March, when “No Vote” campaigners found their activities frustrated by police and also towards the elections.*

(ii) POSA Amendments were not agreed and not done. *MDC-T and MDC proposals for amendments to or review of POSA were rejected by ZANU-PF. And the MDC-T’s Chief Whip’s Private Member’s Bill to amend POSA, introduced in late 2009 and actually passed by the House of Assembly, has been effectively blocked by ZANU-PF maneuvering in the Senate.*

G. Legislative Agenda and Commitments

This part of the Roadmap called for legislation on actions (i) to (vi) and action by the President on (v):

(i) realignment of laws with new Constitution, and addressing of transitional arrangements. *The implementation is pending. This should be well under way by now. The timeline agreed in the Roadmap was “within 60 days from Referendum”. This target date, was meant to be 16th May 2013. As the substantive provisions of the draft constitution have been known since last year, this legislation should be ready. But there is no sign in the pipeline of the necessary Bill for amending the Electoral Act, or of Bills dealing with the new metropolitan and provincial councils and changes to local government laws, or any other transitional issues. [See Constitution Watch 26/2013 of 8th May for an outline of necessary legislative changes.]. On 6 September 2013, Zimbabwe National Liberation War Veterans Association chairperson Cde Jabulani Sibanda said the new constitution should be amended to reverse all compromises that do not sit well with ZANU PF.*

(ii) enactment of Human Rights Commission Bill by September 2011. This was done late and unsatisfactorily. *The Bill was enacted, in 2012, well after the deadline. But the Act that emerged lacked provisions ensuring the independence of the Commission, fell short of international legal best practice for human rights institutions, and financial support to operationalize it was not forthcoming. This led to the resignation of the Commission’s distinguished and experienced chairperson, Professor Reg Austin.*

(iii) amendment of section 121(3) of the Criminal Procedure and Evidence [CPE] Act to confine it to specific prescribed offences *was not done*. This called for agreement by September 2011 on amendments to restrict the application of section 121(3) of the Act, the provision hitherto much abused by prosecutors to block grants of bail by magistrates. But no agreement was reached, and an MDC-T Private Member's Bill to repeal section 121(3) has stalled.

(iv) enactment of agreed amendments to the Electoral Act by September 2011 was done but late and more changes are still necessary. This now duplicates activity (i) under E. Electoral Reform [see comment under that head].

(v) appointment of Anti-Corruption Commission by September 2011 was done. There was an existing Anti-Corruption Commission, which was replaced with new commissioners within the deadline.

Actual Elections

The Election Roadmap was signed at Harare on 6th July 2011 by the six party negotiators and subsequently endorsed by the party principals and SADC.

The election conducted on the 31st July 2013 was fraught with very serious breaches of Zimbabwe's Electoral Act, Constitution and SADC Guidelines. The manipulation of the electoral process by Zanu PF and its functionaries within Government and the military had an impact on the result. An analysis of Reports produced by the Zimbabwe Election Support Network, civil society organizations, view of ordinary Zimbabweans, professionals and lawyers a number of breaches were identified which include:

Breaches relating to the Electoral Act and Constitution

PRE ELECTION

1. Illegal proclamation of the Election itself

President Mugabe's proclamation of the election date was in breach of section 31H of the previous Lancaster House Constitution (which provision was still in force at the time the proclamation was made) in that he did not consult Cabinet before making the declaration as he was obliged to.

2. Illegal use of the Presidential Powers Act and regulations to amend the Electoral Act

On the 13th June 2013 President Mugabe amended the Electoral Act by means of three Electoral Amendment Regulations (Statutory Instruments 87, 88 and 89 of 2013). He made these amendments in terms of the Presidential Powers (Temporary Measures) Act. The amendments introduced wide-ranging changes to Zimbabwe's electoral law and practice. In doing so he was

in breach of Section 157(1) of the Constitution and Section 4(2)(c) of the Presidential Powers (Temporary Measures) Act itself. These both specifically state that the Electoral law cannot be made by regulations promulgated in terms of the Presidential Powers Act and must be made by a specific Act of Parliament.

3. Breach of Section 6(3) of the 6th Schedule as read with section 155(2)(a) of the Constitution

Voter registration exercise

Section 6(3) of the 6th Schedule of the Constitution states that “the Registrar General, under the supervision of the Zimbabwe Electoral Commission, must conduct a special and intensive voter registration and a voters roll inspection exercise for at least 30 days after the publication day)of the new Constitution)”. The Registrar General of Voters very seriously breached this provision across the country. Most urban centres across the country were affected. The Registrar General located insufficient numbers of registration centres in urban areas, often in remote sites and processing of applications was extraordinarily slow. This has resulted countrywide in tens, if not hundreds, of thousands of citizens effectively being disenfranchised because they were not given an opportunity to register in urban areas. Serious anomalies have resulted with for example some rural provinces such as Mashonaland West (in the past a Zanu PF stronghold) registering almost 3 times the numbers of new voters than Harare the capital (an MDC T stronghold). The Constitutional provision is clear – it was to be “intensive” and was to last “30 days”.

Voters roll

An analysis of the only electronic voters roll available prepared prior to the intensive voter registration exercise done by the Research and Advocacy Unit revealed serious discrepancies between information and statistics from the census and that appearing on the voters’ roll.

4. Disproportionate increase of number of Polling Stations around 1 Brigade Barracks

Whilst the ZEC is entitled to determine the number and location of polling stations its actions in determining the location of new polling stations needs scrutiny. The disproportionate increase in the number of polling stations around the Barracks was inexplicable. The increase in the number of polling stations around the Barracks was completely out of proportion to the general trend of increasing the number of polling stations. One possible and reasonable conclusion to be drawn is that the number of polling stations situated close to the Barracks was specifically selected to enable security forces to manipulate the vote.

5. Breach of Section 61(4)(b) and (c) of the Constitution – freedom of expression and the media

Sections 61(4)(b) and (c) of the Constitution state that all “State owned media of communication” must be “impartial” and afford a “fair opportunity for the presentation of divergent views and dissenting opinions”. As you may be aware there are no independent radio and television stations in Zimbabwe. The only television station is the State owned ZBC. Although there are two nominally independent radio stations, namely Star FM and ZiFM, the former is owned by the Zimpapers Group, which is essentially State owned, and the latter is owned by Supa Mandiwanzira the Zanu PF candidate for Nyanga South.

The ZBC news bulletins were blatantly partisan for the entire electoral period. ZBC TV and radio has been blatantly biased in favour of Zanu PF and have not allowed a fair opportunities for the presentation of divergent views and dissenting opinions. The meetings of MDC Presidential candidate Professor Welshman Ncube have virtually been totally ignored by the ZBC. Although more coverage has been given to MDC T Presidential candidate Morgan Tsvangirai such coverage has been given has been obviously biased and has not given the fair opportunity guaranteed by the Constitution.

6. Biased application of Section 152 of the Electoral Act

Section 152 of the Electoral Act states that “from the date on which an election is called until its result is declared, no person shall deface or remove any billboard, placard or poster published, posted or displayed by a political party or candidate contesting the election.” It was this provision, which was used by the ZRP against the MDC election campaign distribution coordinator Malthus Ncube. He was arrested, detained overnight and prosecuted.

There no prosecutions for ZANU PF operatives and supporters who tore down MDC posters especially in Hatfield, Harare.

7. Breach of Section 21(6) and (7) of the Electoral Act by the ZEC

Zimbabwe’s Electoral Act obliges the ZEC to supply both contesting parties and candidates with copies of both paper and electronic copies of the voters roll. Access to the voters roll is arguably the most important right in any democratic election.

Section 21(6) and (7) of the Electoral Act states as follows:

“(6) Within a reasonable period of the time after nomination day in an election, the Commission shall provide -

(a) free of charge, to every nominated candidate, one copy in electronic form

of the constituency voters roll to be used in the election for which the candidate has been nominated; and

(b) at the request of any nominated candidate, and on payment of the prescribed fee, one copy in printed form of the constituency voters roll to be used in the election for which the candidate has been nominated.

(7) Where a voters roll is provided in electronic form in terms of subsection (3), (4) or (6), its format shall be such as allows its contents to be searched and analysed:

Provided that—

(i) the roll may be formatted so as to prevent its being altered or otherwise tampered with;

i. the Commission may impose reasonable conditions on the provision of the roll to prevent it from being used for commercial or other purposes unconnected with an election.”

Despite repeated requests made in writing and verbally both to the ZEC by the two MDC's neither were supplied with an electronic copy of the voters roll as is their right prior to the election or at all. **Indeed a week after the election there is still no sign of the electronic voters roll. ZEC cited logistical problems for its failure to comply with the law.** The failure by the ZEC to comply with Section 21 of the Electoral Act is a very serious breach of the Act but also of the entire electoral process. The provision of a voters roll goes to the very heart of the electoral process in all democracies but especially in Zimbabwe where repeated elections over the last 13 years have been marred by allegations and proof of electoral fraud centered on the manipulation and distortion of the voters roll. In short the failure by ZEC to comply with Section 21 (6) and (7) of the Electoral Act renders the entire election illegal and at the very least means that it could no longer be viewed as free and fair.

POST COMMENCEMENT OF VOTING

1.1. Turning away of voters

On the 31st July 2013 at least some 300 000 potential voters were turned away for various reasons, ranging from their names being moved from their wards to other constituencies while names of many others were not on the roll despite having been registered or having inspected the voter's roll prior to the elections. A substantial number of people voted using fake voter registration slips even though their names did not appear on the voters' roll. The ZEC itself admitted that 304890 voters were turned away countrywide.

1.2. Poor quality ink and poor lighting in tents

The ink used to mark voters in terms of Section 56(4)(b) of the Electoral Act

(to indicate that a voter has voted) was sub standard and washed off easily. Each voter was required to dip a finger in pink ink. However this ink came off very easily and even using normal soap it came off with a few washes. Anyone using an appropriate chemical would be able to easily remove the ink and then vote again, and again.

That situation was compounded by the fact that many of the polling stations were in tents with very poor lighting even at midday which made it virtually impossible for polling officers to adequately check that potential voters did not vote more than once.

1.3. Absence of ultraviolet light detectors

Historically polling stations in Zimbabwe have always had ultraviolet light detecting machines to check whether potential voters have ink on their fingers. These machines of course provide the most secure manner of checking whether a potential voter has already voted. For reasons, which have not been explained by the ZEC, there was not a single machine used in most constituencies. The absence or non-use of these machines seriously compromised the legitimacy of the elections and would have been a key component in the facilitation of double voting.

2.4. Presence of Police during the count in breach of Section 62 of the Electoral Act

Zimbabwe's Electoral Act makes it clear that the roll of the Police is solely confined to keeping order at polling stations. Despite these clear provisions of the law police officers were heavily involved in the process in every single polling station

1.5 Breach of SADC Guidelines, sections 68& 69 of the constitution and rules of natural justice

SADC guideline 2.1.7 provides for the independence of the Judiciary and impartiality of the electoral institutions. The approach and attitude of the High Court toward the MDC applications for information and material that is necessary for the prosecution of the petition demonstrated the uneven ground upon which they were expected to operate thus confirming the fear of judicial complicity in manipulating the electoral process.

Section 69 of the new constitution guarantees the right to a fair hearing. It provides that "in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law".

Further the conduct of ZEC and its senior officers cited in the petition was inconsistent with the requirements for administrative justice as provided for in Section 68 of the new constitution. That provision provides that "every person has a right to administrative conduct that is lawful, prompt,

efficient, reasonable, proportionate, impartial and substantively and procedurally fair”.

On lawfulness, ZEC failed to provide the MDC with material such as an electronic copy of the voters’ roll despite the fact that the MDC had a legitimate expectation that ZEC would discharge its functions fairly and efficiently but this clearly has not been the case.

CONCLUSION

From this report it will be apparent that the electoral process was subverted through a detailed and carefully laid plan executed with military precision by a variety of Government offices and institutions. This involved the systematic and deliberate breach of a variety of laws contained in the both the Electoral Act and the Constitution. At the core of this was the non-availability of the voters roll in electronic format which, had it been available, would have exposed much of the electoral fraud.

Appendix 2: Dossier of documented reasons on why Zimbabweans feel sanctions should be removed

The Troubling Path Ahead for U.S.-Zimbabwe Relations

Zimbabwe Congressional Hearing, Foreign Relations Committee

12 September 2013

The people I interviewed through random but strategic sampling feel that sanctions should be removed for the following reasons:

1. Some feel that maintenance of the status quo would increase the tension between Harare and Washington. This tension has existed since 2001, and is disruptive as the ordinary people are affected far more than the political elite, who are cushioned by diamond revenue and their control of acquired farms and indigenized businesses. Sanctions have boosted rent seeking behavior whereby those with connections in the diamond mines are trading diamonds on the parallel market and lining their pockets, whilst some goods from Zimbabwe continue to find their way to the west via proxies, for example Zimbabwean vegetables being sold through Kenya. There are ordinary Zimbabweans who have bought into President Mugabe's sanctions rhetoric hook, line and sinker. If the USA were to maintain its sanctions it would need to convince the ordinary people through facts and figures that the USA has continued to support the people of Zimbabwe. Without control of the media, it will be difficult for the USA to disseminate such information sufficiently.

2. Related to the first point is the problem that ZANU PF is likely to escalate its indigenization rhetoric, action against foreign owned banks, and assault on foreign controlled corporate entities. With the MDC severely weakened, ZANU PF does not have its usual punch bag therefore most of its vitriol would be directed to foreign owned entities. It remains to be seen if the USA will be able to keep up with this intensified rhetoric. Some people interviewed think the USA should re-engage for greater good and simply accept that "this is the way African leaders are, they can not be changed but whatever we do, we do it for the people of Zimbabwe". This group feels that Zimbabwe's political narrative for another 5 years or so will not be complete without the war veterans generation as they carry the grand narrative and cultural repertoire.

3. Another threat to the sanctions regime emanates from Zimbabwe's bureaucrats; mostly ZANU PF aligned civil servants who currently preside over state institutions. This group enjoyed middle class status before 2001. They sent their children to predominantly white schools but saw their status either being eroded or threatened when Zimbabwe descended into chaos. This group of people feels that when President Mugabe was unopposed he was a good man and Zimbabwe was in a good place. These people constitute a small but significant number since they run the very institutions that we expect to deliver services to Zimbabweans. On their part, they feel that the MDC got its strategy wrong from its inception when it called for sanctions as a way of putting pressure on Zimbabweans to change their government through democratic means. They do not buy into the democratic project or the concept

of neo-liberalism. This group justifies their rent seeking behavior to sanctions. They also feel that the decline in health service delivery is linked to the sanctions. This group also includes a few middle class Zimbabweans who emigrated to the west and ended up being marginalized in their host countries. These classes accuse the West of duplicity and think that neo-liberalism the Washington Consensus does not work in Africa. While some of these people dislike ZANU PF, they are proponents of African renaissance.

In my extensive discussions with the above groups, it is my view that most of them are hypocritical to the extent that the first class of bureaucrats including government ministers heavily subscribe to western values and send their children to western schools and universities yet they hate the West. The latter group of emigrants is equally hypocritical in the sense that most of them are intellectuals who benefitted from Western Scholarships and rather than return home to help in development efforts, decided to remain in the West. If they had returned home as per the terms of their scholarships, they would not be complaining about ills such as social exclusion and marginalization.

4. There are many within the two MDCs who are opposed to the sanctions. For example, Tendai Biti led a campaign for the removal of sanctions when he was finance minister. When he met the IMF chief Christine Lagarde, he demanded that the international community ought to treat Zimbabwe like an equal. He emphasized the need for the international community, especially western countries and multilateral institutions, to respect the agreed benchmarks and not to shift goal posts in their re-engagement with Zimbabwe.

5. There are some within the opposition and civil society organizations that are of the view that sanctions have actually helped Mugabe. This reason is tied to the manner in which civil society should relate to the new government. Civil society will need to work collaboratively with the government towards legislative and policy reforms. However, the government might avoid instituting necessary reforms by using sanctions as a scapegoat. ZANU PF has survived in the past because of scapegoating and has cleverly pitied the Global North and Global South.

6. Policies that are formulated on the basis of a Western conception that sanctions would work in predominantly agrarian countries such as Zimbabwe in the same way they would work in East Europe is misplaced. Unlike in urbanized societies, where sanctions might cajole people to protest and push for reforms, conditions are different in a country such as Zimbabwe where rural based populations have other livelihood means aside from bread, therefore the absence of bread in the shops will not prompt them to stage street protests. This was the MDC's original plan that they are now backtracking on as they have realized that it doesn't work.

7. Although America does not have trade interests in Zimbabwe in comparison with oil producing countries, America and Britain's stances have actually boosted the Zimbabwean-Chinese relationship. China has been heavily investing in Zimbabwe, especially in the diamond industry, without any respect for human rights. By allowing the Chinese to take over in this way,

there is a palpable danger that Zimbabwe will increasingly gravitate towards communism, with devastating effects on sub-regional stability.

8. The SADC has also been pushing for the removal of sanctions. From the SADC's point of view, it would appear that the possibility of a free and fair election was totally out of the picture in the presence of sanctions. Although the SADC goes through the motions, calling for summits on Zimbabwe and offering the MDC a listening ear, it is quite clear that they place their traditional relationship with ZANU PF before democratic principles. To the SADC, Zimbabwe is no different from Kenya, Tsvangirai is no different from Raila Odinga, and in the same way sanctions are no different to the ICC indictment of Kenyan leaders. In the face of such perceived threat from the West, they close rank in private and behave otherwise in public. They are duplicitous and hypocritical in their call for reforms. Zimbabwe is currently in the position that it was in 2002, and this is unhelpful. However unlike in 2002, the USA does not have interlocutors in the region and this puts it in a conundrum of sorts, as it cannot call upon president Zuma. This removes its entry point and the SADC's position means that there is no longer any leverage except Botswana, which doesn't have much influence on the regional block.