

FINAL COPY

**THE S.A.D.C. ELECTORAL PRINCIPLES AND
GUIDELINES, AND ZIMBABWE'S NEW
ELECTORAL LEGISLATION**

AN EVALUATION

Prepared by the

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EXECUTIVE SUMMARY

The purpose of this memorandum is to examine whether the new electoral legislation enacted by the Zimbabwean Parliament, the Zimbabwe Electoral Commission Act [*Chapter 2:12*] and the Electoral Act [*Chapter 2:13*] conform to the principles and guidelines for the holding elections that were adopted by SADC heads of State and government in 2004. The memorandum examines the legislation under the following general headings:

Electoral Environment

The SADC Principles and Guidelines require member States to ensure that all their citizens enjoy freedom of movement, assembly, association and expression as well as political tolerance during electoral processes. There must also be an independent judiciary.

There is little in the Zimbabwean legislation that touches on these topics, apart from a general statement of principles in section 3 of the Electoral Act. There is no enforcement mechanism, and the Electoral Commission's role is confined to registering voters, providing voter education and conducting elections. This is a flaw, likely to affect the political environment for the holding of democratic multi-party elections.

The following are of particular concern:

- *Freedom of Assembly and Association:* These freedoms are limited by the Public Order and Security Act [*Chapter 11:17*], under which the regularly ban political meetings, particularly those held by the opposition political parties mainly the MDC. The freedoms will be further eroded by the Non-Governmental Organisations Bill when it becomes law.
- *Freedom of Expression:* The Public Order stifles this right and Security Act and the Access to Information and Protection of Privacy Act [*Chapter 10:27*], which makes it an offence to publish false news. The latter Act has been used to ban the *Daily News* newspaper and to prevent foreign journalists working in Zimbabwe, since only citizens or permanent residents can be accredited as journalists for more than 30 days.
- *Political tolerance:* the ruling ZANU (PF) party has consistently shown itself intolerant of opposition, and in this it is backed by war veterans and the heads of the Defence Forces and the Police Force. The new legislation is unlikely to change the party's attitude.

Frequency of Elections

The SADC Principles and Guidelines require elections to be held at regular intervals on dates that are announced timeously.

The Zimbabwean Constitution requires elections to be held regularly: within four months after a dissolution of Parliament and within 90 days after a President's term expires or he ceases to hold office. As to timeous announcement of elections, polling must take place between 35 and 66 days after publication of a proclamation calling an election. Thirty-five days is inadequate for the holding of a general election or a presidential election, though probably enough for a parliamentary by-election; it is certainly far less than the period of three or four months suggested by the SADC Parliamentary Forum.

The President is empowered to fix the dates of parliamentary elections without consulting the Electoral Commission. The SADC Parliamentary Forum suggests that Parliament should be involved in fixing election dates.

Electoral Bodies

The SADC Principles and Guidelines require impartial, all-inclusive, competent and accountable electoral bodies to be appointed, staffed by qualified personnel.

The President appoints the chairperson of the Electoral Commission after consultation with the Judicial Service Commission; the other members are appointed from nominees put forward by Parliament's Committee on Standing Rules and Orders. Supporters or members of the ruling ZANU (PF) party dominate both the Judicial Service Commission and the parliamentary committee. Membership of the Electoral Commission is not therefore likely to be impartial or all-inclusive. Once appointed, however, the members enjoy substantial security of tenure and have to conduct themselves in an impartial manner — as do their staff.

There is a worrying duplication of roles between the new Electoral Commission and the constitutionally appointed Electoral Supervisory Commission; it is not clear how they will work together or which will have the greater authority. There is also concern over their staff: both Commissions are allowed to take on secondment members of the Defence Forces and Police Force, leading to fears that voters will be intimidated and elections "militarised". And the Electoral Commission's independence is undermined by the fact that the Minister must approve all statutory instruments made by the Commission under the Electoral Act.

Voter Education

The SADC Principles and Guidelines state that there must be voter education.

In the Zimbabwe Electoral Commission Act voter education is made the exclusive preserve of the Commission and its agents; it may not be provided by anyone other

than citizens or permanent residents, and only the Commission is allowed to receive foreign funding to provide it. These provisions are probably unconstitutional.

Election Observing/Monitoring

Under the SADC Principles and Guidelines, national and international observers and monitors must be accredited and given free access to everyone concerned in the electoral process. SADC must be invited to send a mission at least 90 days before polling. Representatives of parties and candidates must be allowed in polling stations and counting stations.

The Zimbabwean legislation is most unsatisfactory in this respect. A committee dominated by Ministerial nominees accredits observers, and only persons invited by a Minister or the Electoral Supervisory Commission may be accredited. Monitors will all be public servants.

There is no longer enough time for SADC to be given an invitation to send observers 90 days before polling, if the general election is to be held in March.

Rights of Candidates and Political Parties

Under the SADC Principles and Guidelines, all political parties must have equal access to State media and allowed freedom of campaigning. Funding of political parties must be transparent and based on agreed legal thresholds.

The Zimbabwean legislation does nothing to regulate the general political environment or to give parties access to the State media. Apart from a bland statement of principle, the Electoral Act is silent on the question of political campaigning. Public funding of political parties is governed by the Political Parties (Finance) Act [*Chapter 2:11*], which is largely transparent.

Right to Vote and to Stand for Election

The SADC Principles and Guidelines require all citizens to be given the right to participate in the political process, and an equal opportunity to vote. Participation of women, disabled persons and youth must be encouraged.

The Electoral Act requires people to be resident in a constituency to be able to vote there, since postal voting is not permitted for anyone except State employees. This means that members of the Zimbabwean “diaspora” will not be able to vote in the forthcoming election. All citizens will not therefore be able to participate in the political process.

Women are not specifically encouraged to participate in elections, though ZANU (PF) is trying to ensure a minimum number of female candidates. Disabled people may be assisted to vote if they cannot cast their ballots unaided. Youths are not encouraged:

the minimum age for voters is 18, for parliamentary candidates 21 and for presidential candidates 40.

Registration of Voters and Voters' Rolls

Under the SADC Principles and Guidelines, there must be no discrimination in voter registration and the rolls must be up-dated and accessible.

Under the Electoral Act there is no discrimination in voter registration, except between residents and non-residents, and there is elaborate provision for the up dating of voters' rolls though the rolls have in practice been allowed to get out of date. Although the Act gives people the right to obtain a copy of a voters' roll, the copy is in printed form and therefore expensive.

Voting Procedures

The SADC Principles and Guidelines require polling stations to be sited in neutral places. Measures must be taken to prevent electoral fraud, and adequate resources must be provided.

There is nothing in the Act to regulate the citing of polling stations, but the Act does lay down elaborate procedures for polling which should discourage illegal practices. In particular, the new provisions for marking voters with indelible ink visible to the naked eye are to be welcomed. There is no provision, however, for transparent ballot-boxes to be used, as recommended by the SADC Parliamentary Forum. However the Minister of Justice, Legal and Parliamentary Affairs made an undertaking that the government would use translucent ballot boxes in the forth-coming elections. (Herald, 15 December 2005) It is desirable if the provisions were contained in the Act.

Counting of Votes

Votes will be counted at polling stations in the presence of monitors, observers and candidates' representatives, as recommended in the SADC Principles and Guidelines.

Adjudication of Electoral Disputes

The Electoral Act sets up a special Electoral Court to adjudicate on challenges to election results, as required by the SADC Principles and Guidelines. The procedures laid down in the Act for the hearing of election petitions is excessively formal, however, and will probably lead to undue delays. The Act makes provision for the arbitration of electoral disputes, again as mandated by the SADC Principles and Guidelines, by requiring the Electoral Commission to set up multi-party liaison committees in every constituency with powers to mediate disputes and grievances.

Acceptance of Results

The SADC Principles and Guidelines require political parties to accept the results of elections that have been declared free and fair. The Electoral Act provides for this in a code of conduct to be observed by candidates and parties. That is about as far as the Act can go.

Generally

Although the new legislation goes some way towards meeting the SADC Principles and Guidelines, it suffers a most important drawback: if the next general election is to be held in March, the legislation has been promulgated too late for it to have any real effect on the general political environment and on the election processes. The Electoral Commission will not have the time to re-examine the voters' rolls and to put in place the procedures and staff necessary to ensure that the election is conducted freely, fairly and democratically.

INTRODUCTION

In March 2001, in Windhoek, the SADC Parliamentary Forum adopted a set of detailed norms and standards for the holding of democratic elections in the region, and in August 2004, in Mauritius, SADC heads of State and government adopted a rather more general set of principles and guidelines for the conduct of elections in member states. Member States were enjoined to implement the principles and guidelines “scrupulously”.¹ The Zimbabwean Government committed itself to implementing them, and to that end has enacted two statutes, the Zimbabwe Electoral Commission Act [*Chapter 2:12*] (Act No. 22 of 2004) and the Electoral Act [*Chapter 2:13*] (Act No. 25 of 2004).

This memorandum will examine those two Acts to establish whether, and to what extent, they will give effect to the SADC's principles and guidelines. Reference will also be made to the norms and standards of the SADC Parliamentary Forum.

EVALUATION OF THE ZIMBABWEAN LEGISLATION AGAINST THE SADC PRINCIPLES AND GUIDELINES

The SADC principles and guidelines are set out at the end of this memorandum, in Appendix 1, and the Parliamentary Forum's norms and standards are set out in Appendix 2. The obligations they impose on member States may be summarised under the following heads: the general electoral environment; frequency of elections; electoral bodies; voter education; election observing and monitoring; the rights of candidates and political parties; the right to vote and to stand for election; the registration of voters; voting procedures; the counting of votes; the adjudication of electoral disputes; and the acceptance of the results of elections that have been declared to be free and fair.

What follows is a brief summary of SADC's requirements under each of those headings, and an evaluation of Zimbabwe's legislation, in particular the Zimbabwe Electoral Commission Act and the new Electoral Act, in the light of those requirements.

ELECTORAL ENVIRONMENT

SADC Principles and Guidelines

There must be an environment conducive to free, fair and peaceful elections.² In particular, there must be freedom of association and political tolerance.³ The

¹ Paragraph 7.1 of the SADC Principles and Guidelines.

² Paragraph 4.1.2 of the SADC Principles and Guidelines.

judiciary must be independent.⁴ Member States must safeguard the human and civil liberties of all their citizens during electoral processes, these liberties to include freedom of movement, assembly, association and expression.⁵

The Zimbabwean Situation

There is little in the Zimbabwe Electoral Commission Act or the Electoral Act to ensure an environment in which human and civil rights are fully enjoyed. The functions of the Electoral Commission are confined to registering voters, keeping voters' rolls, providing voter education and conducting elections. The Commission has no role whatever in ensuring respects for fundamental human rights such as freedom of association and expression, which are essential to the holding of free and fair elections. The nearest the Electoral Bill comes to dealing with the general electoral environment is in section 3, which sets out principles on which elections must be held. The section states that all citizens have the right to stand for office, to vote, to join political parties and to participate in peaceful political activities, and that all political parties have the right to put up candidates, to campaign freely within the law, and to have "reasonable access" to the media. The Act confines itself to a statement of those principles, however, and does nothing to ensure their implementation. All that can happen if the principles are not observed, it seems, is for the Electoral Court to set the election aside in terms of section 177 of the Act, but it can do so only if the court considers that their non-observance affected the result of the election.

The lack of some means to enforce the principles set out in section 3 of the Electoral Act is a flaw in the legislation. The freedoms specifically mentioned in the SADC principles — freedom of assembly, association and expression and political tolerance — are not fully respected in Zimbabwe, and the political environment needs to be conducive to the holding of democratic multi-party elections. Of particular concern are the following:

Freedom of Assembly and Association: The Public Order and Security Act [Chapter 11:17] gives the police wide powers to control public meetings and demonstrations. Under section 24 organisers of public gatherings, other than social gatherings, must give the police four days' notice that they are going to hold them, and failure to give notice is a criminal offence punishable by up to six months' imprisonment. Although the section does not give the police power to ban a gathering (that power is given by other sections of the Act) the police have taken the section to mean that when they are

³ Paragraphs 2.1.2 and 2.1.3 of the SADC Principles and Guidelines.

⁴ Paragraph 2.17 of the SADC Principles and Guidelines.

⁵ Paragraph 7.4 of the SADC Principles and Guidelines.

notified of a gathering they are entitled to grant or refuse permission for it to be held.⁶ Nor have they used their purported powers under the section even-handedly: they have banned numerous meetings of the opposition political parties e.g. MDC party in most cases but, so far as is known, no ZANU (PF) ones.

The Non-Governmental Organisations Bill, which has passed through Parliament but has not yet been promulgated as an Act, will further erode freedom of association by requiring all NGOs to submit to registration and obtrusive regulation by a government-controlled council. NGOs will not be allowed to receive foreign funding for activities involving human rights and good governance, and without foreign funding such activities cannot be sustained in the present economic climate.

Freedom of Expression: Both the Public Order and Security Act and the Access to Information and Protection of Privacy Act [*Chapter 10:27*] have been used to stifle freedom of the press. In terms of section 15 of the former Act it is an offence to publish a false statement that prejudices or is intended to prejudice the country's defence or economic interests, or which undermines or is intended to undermine public confidence in a law enforcement agency. Anyone contravening section 15 is liable to imprisonment for up to five years. This offence has now been incorporated into the recently passed Criminal Law Code and the maximum punishment has been increased to twenty years imprisonment.⁷

The Access to Information and Protection of Privacy Act has been used to ban the *Daily News*, the country's only daily newspaper. Under the Act it is a serious criminal offence for a newspaper to operate, and for a journalist to practise, without being registered or accredited by a Commission consisting entirely of Ministerial appointees, who are partisan and ruling party sympathisers. It is also an offence under the Act for a journalist to publish "false information"⁸, and numerous journalists working for independent newspapers have been arrested for this offence. The Act has also been used to stop most foreign journalists from operating inside Zimbabwe, since only citizens or permanent residents of Zimbabwe are entitled to be accredited as journalists for longer than 30 days.⁹

Political Tolerance: Towards 2000 and 2002 the ruling ZANU PF party did not appear to have embraced the idea of multi-party democracy but rather believes that

⁶ Regrettably, some judges have abetted the police in this erroneous view. See for example *MDC v Muzeze & Anor* HB-25-03. The judge ignored an earlier decision of the Supreme Court, *Biti & Anor v Minister of Home Affairs & Anor* S-9-02, in which the correct legal position was stated.

⁷ Section 31.

⁸ Section 64 of the Act makes it an offence, punishable by up to three years' imprisonment, for anyone knowingly to publish a false statement which threatens the interests of defence, public safety, public order or the State's economic interests, or which is injurious to the reputations of other persons. Before it was amended in October 2003, the section was much broader.

⁹ Section 79 of the Act.

because it fought and won the liberation struggle it alone has the right to rule Zimbabwe. Army commanders, the Police Commissioner and war veterans, all of whom are supporters of the ruling party, subscribe to this view and have publicly expressed this sentiment.

In the past ZANU (PF) has treated elections as battles to be won at all costs. This mind-set is illustrated by President Mugabe's utterances about the MDC before the presidential elections in 2002:

"This is total war ... this is war, it is not a game. You are all soldiers of ZANU (PF) for the people ... when the time comes to fire the bullet, the ballot, the trajectory of the gun must be true."¹⁰

"We will make them run. If they haven't run before we will make them run now.... We will not pander to them any longer. That's gone. It's finished. We are now entering a new chapter, and there will be firm government, very firm government...."

Violence has been used to intimidate voters into voting for the ruling party, to prevent opposition supporters from voting and to force the withdrawal of opposition candidates or to stop them presenting their nomination papers.¹¹

Recently the President Robert Mugabe (Herald, 23 July 2004) and Police Commissioner Chihuri (Herald 21 October 2004) made public statements denouncing violence towards the period leading to the elections which is a positive development if the implementation of it is being done than being mere rhetoric statements.

FREQUENCY OF ELECTIONS

SADC Principles and Guidelines

Elections must be held at regular intervals as provided for in the country's constitution.¹² The dates of elections must be announced timeously — which presumably means that there must be time for parties to campaign, for candidates to seek nomination and for administrative arrangements for conducting the election to be put in place.¹³

¹⁰ *Observer* (UK) 16 December 2001.

¹¹ See the reports of the Zimbabwe NGO Human Rights Forum.

¹² Paragraph 2.14 of the SADC Principles and Guidelines.

¹³ Paragraph 4.15 of the SADC Principles and Guidelines.

Zimbabwean Legislation

The Constitution of Zimbabwe lays down the frequency of parliamentary and presidential elections. A parliamentary general election must be held within four months after Parliament is dissolved or has come to the end of its five-year term¹⁴, and a presidential election must be held within 90 days after a President's six-year term of office expires or after a President otherwise ceases to hold office.

In this respect, therefore, Zimbabwe's laws comply with the SADC principles and guidelines.

The principles also require the dates of elections to be announced timeously, to give time for parties to campaign, for nominations to be made and for administrative arrangements to be put in place. Under sections 38 and 103 of the Electoral Act, nomination of candidates in parliamentary and presidential elections must take place between 14 and 21 days after publication of the proclamation calling the election, and polling must take place between 35 and 66 days after the proclamation. The minimum period, 35 days, may well be adequate for a by-election held in a single constituency, but it would probably not allow enough time for a general election or a presidential election to be held properly. It may be noted that the SADC Parliamentary Forum's Norms and Standards suggest a period of between three and four months between the announcement of a parliamentary general election and polling, to give sufficient time for the Electoral Commission to prepare for the election and to demonstrate fair play.¹⁵

It should also be noted that if the forthcoming general election is to be held in March, as has been proposed by the Government, there will be only fifty days for it to be held between the date on which Parliament resumes sitting (the 8th February) and the end of March.

The President fixes the dates for parliamentary elections, and while he is required to act on the advice of his Cabinet when doing so he is not obliged to get the approval of, or even consult, the Electoral Commission. The SADC Parliamentary Forum's norms and standards, on the other hand, suggest that Parliament should be involved in the fixing of election dates.

¹⁴ Sections 58(1) and 63(4) of the Constitution.

¹⁵ The Parliamentary Forum's Norms and Standards are set out in Appendix 2.

ELECTORAL BODIES

SADC Principles and Guidelines

To conduct elections, member States must establish impartial, all-inclusive, competent and accountable electoral bodies staffed by qualified personnel.¹⁶ Adequate resources must be applied to enable democratic elections to be held.¹⁷

Zimbabwean Legislation

The Zimbabwe Electoral Commission is established under the Zimbabwe Electoral Commission Act, with responsibility for conducting elections. Its chairperson is a judge or a person qualified to be a judge, appointed by the President after consultation with the Judicial Service Commission; the other members are appointed by the President from a list of nominees submitted by Parliament's Committee on Standing Rules and Orders.

In appointing the chairperson, the President has only to consult, not act on the advice of, the Judicial Service Commission. In any event, the JSC has on it three people who are perceived as being partisan (the Chief Justice, the Attorney-General and the Chairman of the Public Service Commission). Members of the ruling ZANU (PF) party dominate the parliamentary Committee on Standing Rules and Orders, which puts forward nominees for the other posts on the Electoral Commission. The Act does not therefore guarantee that the Commission's members will be impartial and all-inclusive.

The appointments that have been made to the Commission do nothing to dispel the suspicion that political considerations played an important role in determining their suitability. The chairman, Mr Justice Chiweshe, is a former military officer who is widely regarded as a supporter of the Government and ruling party

Although the way in which Chair of the Commission is appointed gives cause for concern, the Act does go some way towards ensuring that members and employees of the Commission carry out their functions impartially. Section 8 of the Act enjoins them to maintain strict impartiality in the exercise of their functions and to do nothing to place their independence in jeopardy. They are specifically prohibited from holding or seeking elective or political office, that is to say from holding or seeking election or appointment to the office of President, Minister, Member of Parliament, councillor in a local authority, or any office in a political party. Furthermore, members of the Commission have some security of tenure. Though a member can be removed from office for "conduct that renders him or her unsuitable as a Commissioner" — a very widely-phrased ground — the procedure for their removal

¹⁶ Paragraphs 2.1.7 and 7.3 of the SADC Principles and Guidelines.

¹⁷ Paragraph 7.6 of the SADC Principles and Guidelines.

is the same as that prescribed in the Constitution for the removal of a judge: they cannot be removed except on the recommendation of a tribunal consisting of judges and lawyers.¹⁸

Nevertheless, problems remain. One is the relationship between the Electoral Commission and the Electoral Supervisory Commission, which is established under the Constitution and is responsible for supervising the registration of voters and the conduct of elections.¹⁹ It is by no means clear how the two Commissions will work together in practice, and which Commission has the greater authority.

The staffing of the two Commissions gives further cause for concern. Under the Electoral Act both Commissions are empowered to take on secondment State employees, including members of the Defence Forces, the Police Force and the Prison Service as well as civil servants.²⁰ There have been complaints that previous elections were “militarised” through the secondment of personnel from the Defence Forces to serve as the staff of the Electoral Supervisory Commission, and that the seconded staff were partisan whose presence in polling stations was intimidatory to voters. Whatever the validity of those complaints, the Act now specifically allows such secondment to continue.

Another concern is that the Minister must approve all statutory instruments made by the Electoral Commission under the Electoral Act before they are promulgated. In other words, the Commission has no independent power to control elections through the making of regulations and other statutory instruments. The power to make statutory instruments under the Act, incidentally, seems excessively wide because the Commission has been given the same powers as the President had under the previous Act to make instruments overriding provisions of the Act itself.²¹ Such a wide power deprives the law of its certainty and undermines the rule of law.

As to providing adequate resources to enable democratic elections to be held, there is no provision in the Zimbabwe Electoral Commission Act that regulates the size of the Commission's budget. The amount it receives each year is left entirely to the discretion of Parliament.

¹⁸ See section 6 of the Act.

¹⁹ Section 61 of the Constitution.

²⁰ Sections 10 and 17 of the Electoral Act.

²¹ Section 192(4) & (5) of the Electoral Act.

VOTER EDUCATION

SADC Principles and Guidelines

There must be voter education.²²

Zimbabwean Legislation

Part IV of the Zimbabwe Electoral Commission Act places severe restrictions on the provision of voter education. The Commission itself is given primary responsibility for educating voters, and although the Commission can permit other organisations to assist it, only citizens or permanent residents, or organisations consisting entirely of citizens or permanent residents, may be given such permission. Furthermore, only the Commission is allowed to receive foreign funding for the provision of voter education.

Taken as a whole, the provisions of Part IV of the Act are not necessary and probably unconstitutional.

ELECTION OBSERVING/MONITORING

SADC Principles and Guidelines

National and other observers and monitors must be accredited. There must be a mechanism for assisting the planning and deployment of electoral observer missions,²³ and SADC must be invited to send a mission at least 90 days before polling day.²⁴ SADC Election Observation Missions should be deployed at least two weeks before polling;²⁵ they must be accredited without discrimination and allowed freedom of movement and free access to the Electoral Commission, parties, candidates, NGOs, the media and voters; they must also be allowed access to voters' rolls and applicable legislation, and must have free access to polling stations and counting centres.²⁶ The deployment of representatives of parties and candidates at polling and counting stations must be facilitated.²⁷

²² Paragraph 2.1.8 of the SADC Principles and Guidelines.

²³ Paragraph 4.1.9 of the SADC Principles and Guidelines.

²⁴ Paragraph 7.10 of the SADC Principles and Guidelines.

²⁵ Paragraph 4.1.10 of the SADC Principles and Guidelines.

²⁶ Paragraphs 7.11 to 7.19 of the SADC Principles and Guidelines

²⁷ Paragraph 7.8 of the SADC Principles and Guidelines.

Zimbabwean Legislation

The provisions regarding election observers and monitors, which are contained in the Electoral Act, not satisfactory.

Observers will have to be accredited by a committee dominated by nominees of various government Ministers, including the President's Office, and only persons invited by a Minister or by the Electoral Supervisory Commission will be eligible for accreditation.

Election monitors will be public servants appointed and deployed by the Electoral Supervisory Commission rather than by the Electoral Commission, another example of the confusion of roles between the two Commissions.

There is no provision for the monitoring of elections by representatives of non-governmental organisations, and it seems unlikely that representatives of local NGOs will be accredited as observers in time.

Although there is nothing in the Act that requires observer missions to be given free access to the Commissions, parties, candidates, NGOs, the media and voters, as required by the SADC Principles and Guidelines, there is nothing to prevent such access being granted. And the Act allows representatives of candidates to have access to polling stations when voting takes place and votes are counted, in accordance with the SADC Principles.

If the forthcoming general election is to be held in March, there will not be enough time to give SADC the 90 days' notice to send an observer mission, as required in the Principles and Guidelines.

RIGHTS OF CANDIDATES AND POLITICAL PARTIES

SADC Principles and Guidelines

All political parties must have an equal opportunity to access the State media.²⁸ Where applicable, funding of political parties must be transparent and based on agreed legal thresholds.²⁹ Candidates and political parties must be accorded freedom of campaigning and access to the media, and parties must be provided with adequate security.³⁰

²⁸ Paragraph 2.1.5 of the SADC Principles and Guidelines.

²⁹ Paragraph 4.1.6 of the SADC Principles and Guidelines.

³⁰ Paragraphs 7.4 and 7.7 of the SADC Principles and Guidelines.

Zimbabwean Legislation

As already indicated, neither the Zimbabwe Electoral Commission Act nor the Electoral Act makes adequate provision for the political and social environment in which elections take place, and there is nothing in either Act that requires political parties to be given an equal opportunity to access the State media, as required by the SADC Principles and Guidelines.

Public funding of political parties is provided for in the Political Parties (Finance) Act [*Chapter 2:11*]. The process is transparent to the extent that funds are allocated according to statutory formulae and are based on legal thresholds. The Act prohibits political parties and their members and candidates from accepting foreign funding, but both the ruling ZANU (PF) party and the opposition MDC are widely suspected of flouting this prohibition.

The SADC Principles and Guidelines require that candidates and political parties be given the right to campaign freely and be allowed access to the media. These rights have not been accorded to opposition parties in previous elections in Zimbabwe, and there is little sign that there will be an improvement in the near future. A step in the right direction is little coverage given to opposition political parties by the state media though more needs to be done. The Electoral Act confines itself to a bland statement that political parties have the right “to campaign freely within the law” and has nothing whatever to say about access to the news media or about the conduct of the media during elections. There is nothing, for example, requiring news media to treat political parties fairly and to avoid “hate speech”. There is need for an enforceable agreed code of conduct for media players to be put in place to improve the situation.

RIGHT TO VOTE AND TO STAND FOR ELECTION

SADC Principles and Guidelines

All citizens must be able to participate in the political process and there must be an equal opportunity to exercise the right to vote.³¹ The participation of women, disabled persons and youth must be encouraged.³²

Zimbabwean Legislation

The Electoral Act, in section 3, states broadly that every citizen has the right to stand for office, to cast a vote freely and to participate in peaceful political activity. Section 3 must be read subject to the Constitution, of course, and the Constitution deprives the following citizens of the right to vote or stand for election to Parliament: lunatics;

³¹ Paragraphs 2.1.1 and 2.1.6 of the SADC Principles and Guidelines.

³² Paragraph 7.9 of the SADC Principles and Guidelines.

prisoners serving sentences of six months or more; persons found guilty of electoral offences and declared disqualified by a court; persons who within the previous five years have been expelled from Parliament; and persons who have been held in preventive detention for six months or more.³³

More importantly, the Electoral Act lays down residence qualifications for voters: unless a person is resident in a constituency he or she is not entitled to be registered as a voter there nor may he or she vote in an election.³⁴ Postal voting is not an option for anyone except those who are absent from their constituencies on election duty or as members of the Defence Forces, the Police Force or the Prison Service, or who are outside Zimbabwe on Government service.³⁵ This limitation on postal voting is of greater significance in Zimbabwe, perhaps, than in other SADC countries because a great many citizens — over three million by some estimates — have left Zimbabwe in recent years to escape economic hardship. By insisting on residence qualifications the Act disenfranchises these emigrants. It may be a coincidence, but most of the emigrants are thought to be supporters of the opposition MDC party. As to the grant of postal voting facilities to Government employees, there were allegations after the past two elections that members of the Defence Forces were made to cast their postal ballots in the presence of senior officers who ensured that they voted for the President and his party.

It cannot therefore be said that all citizens are able to participate in the political process and have an equal opportunity to vote, as laid down in the SADC Principles and Guidelines.

Regarding the participation of women, disabled persons and youth, the Electoral Act states in section 3 that all citizens are entitled to stand for office and cast their votes without distinction as to gender or disability. There is nothing in the Act to encourage women specifically to stand for office, but it is to be noted that ZANU (PF) has insisted that women must be adequately represented among the candidates it will put forward in the forthcoming election. As for disabled persons, there is provision in the Act for them to be assisted to vote by polling officers;³⁶ it would be better perhaps if such voters had been allowed to choose a relative or friend to assist them. Youths are not encouraged: persons under the age of 18 are not allowed to vote at all, and no one under the age of 21 can stand for Parliament.³⁷ The minimum age for a presidential candidate is 40.³⁸

³³ Paragraph 3 of Schedule 3 to the Constitution.

³⁴ Section 23(1) of the Electoral Act.

³⁵ Section 71 of the Electoral Act.

³⁶ Section 60 of the Electoral Act. An election monitor and a police officer must be present when the voter is assisted — it is not clear what the presence of the police officer is supposed to achieve.

³⁷ Paragraphs 2 and 3 of Schedule 3 to the Constitution.

³⁸ Section 28(1)(b) of the Constitution.

REGISTRATION OF VOTERS AND VOTERS' ROLLS

SADC Principles and Guidelines

There must be no discrimination in the registration of voters, and voters' rolls must be up-dated and accessible.³⁹

Zimbabwean Legislation

The only discrimination, which the Electoral Act allows in the registration of voters, is in regard to residence qualifications. As noted above, only persons who are resident in a constituency may be registered as voters in that constituency.⁴⁰ Citizens who live outside the country, therefore, cannot be registered as voters.

There is elaborate provision in the Act for the continuous up dating of voters' rolls, but in practice the rolls have been allowed to get out of date. Periodical re-registration exercises have not cured the problem. The state of the voters' rolls may be due to administrative inefficiency, but it has inevitably led to allegations of fraud and deliberate manipulation of the vote.

As to the accessibility of voters' rolls, section 21 of the Electoral Act requires all rolls to be kept open to free public inspection at the offices of constituency registrars. If anyone requests a copy of a roll and pays "the prescribed fee", the Electoral Commission must cause the roll to be printed and provided to the person within a reasonable time.⁴¹ This sounds good on paper but does not work so well in practice. Printing costs are prohibitively high in Zimbabwe and printing a voters' roll takes an appreciable time. Although the Registrar-General keeps the voter's rolls in electronic form, the office has refused to provide an electronic copy when asked to do so in terms of the equivalent provision in the previous Act.

VOTING PROCEDURES

SADC Principles and Guidelines

Polling stations should be sited in neutral places.⁴² All necessary measures and precautions must be taken to prevent fraud, rigging or other illegal practices during the electoral process.⁴³

³⁹ Paragraphs 4.1.3 and 4.1.4 of the SADC Principles and Guidelines.

⁴⁰ Section 23 of the Electoral Act.

⁴¹ Section 21(4) of the Electoral Act.

⁴² Paragraph 4.1.7 of the SADC Principles and Guidelines.

⁴³ Paragraph 7.5 of the SADC Principles and Guidelines.

Zimbabwean Legislation

The Electoral Act makes no provision regarding the places at which polling stations may be established, apart from stating that they must be sited at “convenient places”.⁴⁴ Under the previous Act there was provision for mobile polling stations to be established, but there is no equivalent in the new Act. This is a welcome development, because mobile polling stations were difficult to monitor and gave rise to suspicions of vote rigging.

The Act sets out in considerable detail how votes are to be cast, and if these procedures are observed they will certainly discourage illegal practices. In particular, the provision for marking voters with indelible ink to ensure that they do not vote more than once has been improved. In previous elections people who had cast their votes were marked with ink that was visible only under ultra-violet light, and before anyone was given a ballot-paper he or she was required to insert his or her hand into a box that illuminated the hand with ultra-violet light. The only person who could tell whether or not a person had already voted was the official who had charge of the box. Under the present Act the mark must be readily visible in daylight to the naked eye,⁴⁵ so it will be apparent to everyone in a polling station — officials, monitors and observers alike — and multiple voting will be that much more difficult to achieve.

Nevertheless, there is likely to be a problem with ballot boxes. The SADC Parliamentary Forum recommended that opaque wooden ballot boxes should be discarded in favour of transparent ones. There is nothing in the Electoral Act to prevent transparent boxes being used, and regulations could be made requiring their use, but it would have been better if the requirement was stated in the Act itself. As it is, with the forthcoming general election looming so soon, there is no sufficient time to put in place this recommendation.

COUNTING OF VOTES

SADC Principles and Guidelines

Votes must be counted at polling stations.⁴⁶

Zimbabwean Legislation

Under section 62 of the Electoral Act, votes are counted at polling stations, in the presence of polling officers, monitors, observers and the candidates and their election agents.

⁴⁴ Section 51(1) of the Electoral Act.

⁴⁵ Section 56(5) of the Electoral Act.

⁴⁶ Paragraph 4.1.8 of the SADC Principles and Guidelines.

ADJUDICATION OF ELECTORAL DISPUTES

SADC Principles and Guidelines

There must be an opportunity to challenge the election results in accordance with the law.⁴⁷ Competent legal entities must be established to arbitrate electoral disputes.⁴⁸

Zimbabwean Legislation

The Electoral Act allows candidates, but no one else, to challenge election results through petitions to the Electoral Court, a new court established by the Act. The court will consist of one or more judges appointed by the Chief Justice, and those judges may in turn secure the appointment of assessors to assist them in their decisions. The procedure for the trial of election petitions is essentially the same as in the previous Act and is excessively formal. There is little chance that election petitions to the Electoral Court will be dealt with much more quickly than the petitions launched after the general election in 2000 — many of which have not yet been disposed of.

As in the previous Act, elections may be set aside by the Electoral Court on the ground that the successful candidate or his agents were guilty of offences known collectively as corrupt practices⁴⁹, or on the ground of non-compliance with the Act which affected the result of the election and meant that the election was not conducted in accordance with the principles laid down in the Act.⁵⁰

Provisions for the arbitration of electoral disputes were inserted in the Act rather as an afterthought, and are contained in the Third Schedule. The Electoral Commission will have to appoint multi-party liaison committees for each constituency in an election, and those committees will try to resolve disputes and grievances relating to the electoral process and, where necessary seek the Commission's assistance in mediating disputes. These committees are a welcome development, and they may indeed be able to reduce political tension and violence if the Commission can give them enough authority to ensure that all parties involved respect their decisions.

⁴⁷ Paragraph 2.1.10 of the SADC Principles and Guidelines.

⁴⁸ Paragraph 7.3 of the SADC Principles and Guidelines

⁴⁹ Section 155 of the Electoral Act.

⁵⁰ Section 177 of the Electoral Act.

ACCEPTANCE OF RESULTS

SADC Principles and Guidelines

There must be acceptance of election results by political parties concerned, once the election has been declared free and fair by the Electoral Commission.⁵¹

Zimbabwean Legislation

The Fourth Schedule to the Electoral Act sets out a code of conduct for political parties and candidates; paragraph 4(d) requires them to accept the result of an election, or challenge the result by due process of law.

That seems to be about as far as the Act can go in ensuring that parties and candidates accept electoral defeat.

CONCLUSION

In general it can be said that the new electoral legislation goes some way towards meeting the SADC Principles and Guidelines. There are respects, admittedly important ones, in which the legislation falls short of SADC's requirements. For example, the Electoral Act fails to address the general political environment, it imposes severe restrictions on the provision of voter education and on the accrediting of monitors and observers, it limits postal voting, and it is silent on the material from which ballot boxes may be made. Even taking those defects into account, however, the legislation represents a considerable advance on the previous law.

However, in one important respect, not apparent from the provisions of the Acts themselves, the legislation falls far short of the SADC requirements. If the forthcoming general election is to be held in March, the legislation has been promulgated late to ensure implementation of the law. It is unlikely that the political environment can be reformed between now and March to ensure that all parties have equal access to the media and are able to campaign peacefully without interference. Members of the Electoral Commission have only just been appointed so, assuming that polling in the election will be held on the weekend before Easter, they will have only eight weeks in which to appoint staff and assign them to posts and duties throughout the country, to examine voters' rolls and ensure that they are correct, to liaise with the political parties that are likely to contest the election, and to do the hundred and one other things that will be necessary to ensure that the electoral process is under the Commission's control. With the best will in the world, they will not be able to do all those things in time.

That, more than anything in the legislation itself, is the real concern.

⁵¹ Paragraph 2.1.9 of the SADC Principles and Guidelines.

APPENDIX 1: SADC PRINCIPLES AND GUIDELINES GOVERNING DEMOCRATIC ELECTIONS

1. Introduction

SADC region has made significant strides in the consolidation of the citizens' participation in the decision-making processes and consolidation of democratic practice and institutions. The Constitutions of all SADC Member States enshrine the principles of equal opportunities and full participation of the citizens in the political process.

The Southern African countries, building upon their common historical and cultural identity forged over centuries, agreed to encapsulate their commonality into a single vision, that of a SHARED FUTURE. In this context, in 1992 the Southern African countries meeting in Windhoek, the Republic of Namibia, signed a Treaty establishing the Southern African Development Community (SADC).

Article 4 of the Treaty stipulates that “human rights, democracy and the rule of law” are principles guiding the acts of its members. Article 5 of the Treaty outlines the objectives of SADC, which commits the Member States to “promote common political values, systems and other shared values which are transmitted through institutions, which are democratic, legitimate and effective. It also commits Member States to “consolidate, defend and maintain democracy, peace, security and stability” in the region.

The Protocol on Politics, Defence and Security Cooperation provides that SADC shall “promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charter and Conventions of the Organization of African Unity [African Union] and the United Nations.”

In addition, the Strategic Indicative Plan for the Organ (SIPO), as the implementation framework of the Protocol, emphasizes the need for democratic consolidation in the region. The development of the principles governing democratic elections aims at enhancing the transparency and credibility of elections and democratic governance as well as ensuring the acceptance of election results by all contesting parties.

The Guidelines are not only informed by the SADC legal and policy instruments but also by the major principles and guidelines emanating from the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa – AHG/DECL.1 (XXXVIII) and the AU Guidelines for African Union Electoral Observation and Monitoring Missions – EX/CL/35 (III) Annex II.

2. Principles for Conducting Democratic Elections

- 2.1 In the event a Member State decides to extend an invitation to SADC to observe its elections, this shall be based on the provisions of the Protocol on Politics, Defence and Security Cooperation.
- 2.2 SADC Member States shall adhere to the following principles in the conduct of democratic elections:
 - 2.1.1 Full participation of the citizens in the political process;
 - 2.1.2 Freedom of association;
 - 2.1.3 Political tolerance;
 - 2.1.4 Regular intervals for elections as provided for by the respective National Constitutions;
 - 2.1.5 Equal opportunity for all political parties to access the state media;
 - 2.1.6 Equal opportunity to exercise the right to vote and be voted for;
 - 2.1.7 Independence of the Judiciary and impartiality of the electoral institutions; and
 - 2.1.8 Voter education.
 - 2.1.9 Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.
 - 2.1.10 Challenge of the election results as provided for in the law of the land.

3. Mandate and Constitution of the SADC Observers Mission

- 3.1 In the event a Member State deems it necessary to invite SADC to observe its elections, the SADC Electoral Observation Missions (SEOM) have an Observation role. The mandate of the Mission shall be based on the Treaty and the Protocol on Politics, Defence and Security Cooperation.
- 3.2 The Chairperson of the Organ shall officially constitute the Mission upon receipt of an official invitation from the Electoral Authority of a Member State holding the elections.
- 3.3 The Chairperson of the Organ shall mandate the Executive Secretary to issue a Letter of Credential to each Member of the SEOM prior to their deployment into the Member State holding elections.

- 3.4 The constitution of the Mission should comply with the SADC policies relating to gender balance. While recognising that the Members of the Mission may come from different political parties in the home countries, they should behave as a team.

4. Guidelines for the Observation of Elections

- 4.1 SADC Member States shall be guided by the following guidelines to determine the nature and scope of election observation:
- 4.1.1 Constitutional and legal guarantees of freedom and rights of the citizens;
 - 4.1.2 Conducive environment for free, fair and peaceful elections;
 - 4.1.3 Non-discrimination in the voters' registration;
 - 4.1.4 Existence of updated and accessible voters roll;
 - 4.1.5 Timeous announcement of the election date;
 - 4.1.6 Where applicable, funding of political parties must be transparent and based on agreed threshold in accordance with the laws of the land;
 - 4.1.7 Polling Stations should be in neutral places;
 - 4.1.8 Counting of the votes at polling stations;
 - 4.1.9 Establishment of the mechanism for assisting the planning and deployment of electoral observation missions; and
 - 4.1.10 SADC Election Observation Missions should be deployed at least two weeks before the voting day.

5. Code of Conduct for Election Observers

- 5.1 The code of conduct for the elections observers of SADC are consistent with those of the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa - AHG/DECL. 1 (XXXVIII). In this regard, the SADC Election Observation Missions shall adhere to the following code of conduct:
- 5.1.1 Must comply with all national laws and regulations;
 - 5.1.2 Shall maintain strict impartiality in the conduct of their duties, and shall at no time express any bias or preference in relation to national authorities, parties and candidates in contention in the Election process. Furthermore they will not display or wear any partisan symbols, colours or banners;

- 5.1.3 Shall neither accept nor attempt to procure any gifts, favours or inducements from a candidate, their agent, the parties or any other organisation or person involved in the electoral process;
- 5.1.4 Shall immediately disclose to the relevant SADC structures any relationship that could lead to a conflict of interest with their duties or with the process of the observation and assessment of the elections;
- 5.1.5 Will base all reports and conclusions on well documented, factual, and verifiable evidence from multiple number of credible sources as well as their own eyewitness accounts;
- 5.1.6 Shall seek a response from the person or organisation concerned before treating any unsubstantiated allegation as valid;
- 5.1.7 Shall identify in their reports the exact information and the sources of the information they have gathered and used as a basis for their assessment of the electoral process or environment;
- 5.1.8 Shall report all information gathered or witnessed by them honestly and accurately;
- 5.1.9 Shall, when meeting election officials, relevant state authorities and public officials, parties, candidates and their agents shall inform them of the aims and objectives of the SEOM;
- 5.1.10 May wish to bring irregularities to the attention of the local election officials, but they must never give instructions or countermand decisions of the election officials;
- 5.1.11 Will carry any prescribed identification issued at all times, and will identify themselves to any interested authority upon request;
- 5.1.12 Will undertake their duties in an unobtrusive manner, and will not interfere with the election process, polling day procedures, or the vote count;
- 5.1.13 Will refrain from making personal or premature comments or judgements about their observations to the media or any other interested persons, and will limit any remarks to general information about the nature of their activity as observers;
- 5.1.14 Must participate in the briefings/training provided by the SEOM;
- 5.1.15 Must provide their reports on time to their supervisors and attend any debriefings as required; and
- 5.1.16 Should work harmoniously with each other and with observers from other organisations in their area of deployment.

6. Rights and Responsibilities of SADC Election Observers

- 6.1 The rights and responsibilities of the SOEM are based on the SADC experience and the AU Guidelines for Electoral Observation and Monitoring Missions. Accordingly the following shall be the rights and responsibilities of the SADC Elections Observers:
- 6.1.1 Freedom of movement within the host country;
 - 6.1.2 Accreditation as election observers on a non-discriminatory basis;
 - 6.1.3 Unhindered access to and communicate freely with the media;
 - 6.1.4 Free access to all legislation and regulations governing the electoral process and environment;
 - 6.1.5 Free access to electoral registers or voters' roll;
 - 6.1.6 Unimpeded and unrestricted access to all polling stations and counting centres;
 - 6.1.7. Communicate freely with all competing political parties, candidates, other political associations and organisations, and civil society organisations;
 - 6.1.8. Communicate freely with voters without prejudice to the electoral law proscribing such communication in order to protect the secrecy of the vote;
 - 6.1.9 Communicate with and have unimpeded and unrestricted access to the National Election Commission or appropriate electoral authority and all other election administrators;
 - 6.1.10. The SEOM shall be headed by an appropriate official from the Office of the Chairperson of the Organ who shall also be the spokesperson of the Mission;
 - 6.1.11. Send regular reports on the electoral observation process to the Representative of the Organ on issues that may require urgent consideration;
 - 6.1.12 Issue a statement on the conduct and outcome of the elections immediately after the announcement of the result; and
 - 6.1.13 Prepare a Final Report within 30 (thirty) days after the announcement of the results.

7. Responsibilities of the Member State Holding Elections

- 7.1 Take necessary measures to ensure the scrupulous implementation of the above principles, in accordance with the constitutional processes of the country;
- 7.2 Establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters and compilation of voters' registers, would be addressed;
- 7.3 Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
- 7.4 Safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes as provided for under 2.1.5 above;
- 7.5 Take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security;
- 7.6 Ensure the availability of adequate logistics and resources for carrying out democratic elections;
- 7.7 Ensure that adequate security is provided to all parties participating in elections;
- 7.8 Ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/or other observers/monitors;
- 7.9 Encourage the participation of women, disabled and youth in all aspects of the electoral process in accordance with the national laws;
- 7.10 Issuing invitation by the relevant Electoral Institutions of the country in election to SADC 90 (ninety) days before the voting day in order to allow an adequate preparation for the deployment of the Electoral Observation Mission;
- 7.11 Ensure freedom of movement of the members of the SEOM within the host country;
- 7.12 Accreditation of the members of the SEOM as election observers on a non-discriminatory basis;

- 7.13 Allow the members of the SEOM to communicate freely with all competing political parties, candidates, other political associations and organisations, and civil society organizations;
- 7.14 Allow the members of the SEOM to communicate freely with voters except when the electoral law reasonably prescribes such communication in order to protect the secrecy of the vote;
- 7.15 Allow the members of the SEOM an unhindered access to and communicate freely with the media;
- 7.16 Allow the members of the SEOM to communicate with and have unimpeded access to the National Election Commission or appropriate electoral authority and all other election administrators;
- 7.17 Allow the members of the SEOM free access to all legislation and regulations governing the electoral process and environment;
- 7.18 Allow the members of the SEOM free access to all electoral registers or voters' list;
- 7.19 Ensure that the members of the SEOM have an unimpeded and unrestricted access to all polling stations and counting centres.

APPENDIX 2: SADC PARLIAMENTARY FORUM : NORMS AND STANDARDS FOR ELECTIONS IN THE SADC REGION

*Adopted by the SADC Parliamentary Forum Plenary Assembly on the 25 March 2001
in Windhoek, Namibia.*

Updated by the committee – 05.12.00 and 06.12.00 (Siavonga, Zambia)

A. INTRODUCTION

The experience gained by the SADC Parliamentary Forum in observing elections in Namibia, Mozambique, Zimbabwe and Mauritius is quite revealing. There have been significant gains in promoting democratic governance in the SADC region since the advent of the re-introduction of multi-party politics in the early 1990s. Periodic elections are being conducted nearly every five years. In a few cases, elections have resulted in the change of Governments in a peaceful manner. Indeed, most SADC countries are making progress in managing succession peacefully. In addition, some of the elections have produced balanced parliamentary representation which reflect the broad spectrum of the different shades of opinions in a country. Some of the one party dictatorial constitutions have been duly amended to reflect the new dispensations. Regrettably, however, neither the constitutions, nor the electoral

systems or the practices of most institutions have been aligned to the new multi-party democratic culture. This applies to intra-party democracy or lack of it across the board. Levels of tolerance of contesting views are still too low as well as the empowerment of women to participate in decision-making process in Government. Furthermore, a lot still remains to be done to improve the political environment in which elections are conducted and to ensure that the existing legal and institutional frameworks work independently and impartially. There is still need to address issues relating to levelling the playing field for all the players contesting elections, inequality in the funding of political parties, inadequate access to state-owned media and election related violence. What is being said above is not equally applicable to all countries. We must record, for example, the well-known fact that some countries in the SADC region have served as models of democratic governance for over three decades, namely Botswana and Mauritius, both of which have made phenomenal economic gains. In addition, the new democratic states which emerged in the 1990s in the southern part of Southern Africa have brought in new systems and practices which promote legitimate elections and electoral institutions such as independent electoral commissions. The above observations are fully documented in reports on elections in the four countries named above and on research done by the Electoral Institute of Southern Africa (EISA) on the state of elections in the SADC region as a whole.

As its contribution to the emergence of plural, multi-party democracy, the SADC Parliamentary Forum has taken a keen interest in election observation and electoral processes. The immediate objective of election observation is to determine the openness, freeness and fairness of elections in the SADC Region. However, the long term goal is to use lessons learned and experiences gained in election observation to help in strengthening the democratic processes and transparency in the conduct of elections in SADC countries. Furthermore, it is expected that observation will enable the SADC Parliamentary Forum to develop a procedural manual with guidelines for observer missions. It is against this background that the workshop was being held.

The purpose of the workshop was to use the lessons learned and experiences gained in election observation in Namibia, Mozambique, Mauritius and Zimbabwe to make implementable recommendations to SADC Government leaders and SADC Parliaments.

The recommendations that were finally made at the end of the workshop are targeted at strengthening electoral institutions, reforming outdated legal frameworks and electoral practices, and entrenching the democratic process in the conduct of elections thus minimizing disputes over the outcome of elections among contesting political parties. The recommendations which form part of this report if accepted are expected to significantly contribute to political stability in Southern Africa.

B. PREAMBLE

Cognisant of the above situation, we, the election observer delegations of the SADC Parliamentary Forum created pursuant to Article 10(6) of the SADC Treaty:

- **Recalling** the Commitment of the Heads of States and Government to democracy and to the individual's inalienable Right to participate by means of free and democratic processes in framing the society in which he or she lives; and to peace and stability in the SADC region; the Windhoek Declaration on Freedom of the Press; the Blantyre Declaration on Gender Equality of 1997; the Harare Declaration of 1991 and other International Conventions and Instruments to which all SADC countries are Signatories;
- **Recalling** the provisions of Article 5 of the Constitution of the SADC Parliamentary Forum which, *inter alia*, calls for the promotion of the principles of human rights and democracy and the encouragement of good governance, transparency and accountability within the SADC region.
- **Recalling** the role of the SADC Parliamentary Forum in Election Observation in the SADC region; for the purpose of institutionalising and strengthening electoral institutions including democratic processes

DO HEREBY make the following recommendations relating to elections and individual rights; elections and the Government; and fostering transparency and integrity in electoral process.

C. RECOMMENDATIONS

Part 1 : Elections and Individual Rights

1. Registration and Nomination

Problem

While Voter registration is a prerequisite to smooth elections it is common knowledge that some individuals intending to exercise their right to vote or to be voted as candidates in an election have been prevented from doing so through cumbersome voter registration requirements, nomination technical details, removal from the voters' register, intimidation through political violence and kidnapping of candidates. For a voter to be properly identified as a national of a particular state, there is need to have an identity.

Recommendations

The right to vote and to be voted for should be accepted as a birth right in accordance with the Universal Declaration of Human Rights and the Convention on the Elimination of all Forms of Discrimination Against Women. Therefore, eligible individuals should have the right to non-discriminatory voter registration and nomination procedures. This right should be enshrined in the constitution of a country.

- i. There should be provisions and practical for continuous voter registration and an undated voters' role register must be made available to all stakeholders in the elections.
- ii. During the nomination and selection of candidates all political parties contesting elections must ensure adequate gender balance in compliance with the SADC Blantyre Declaration on Gender and Development (1997) calling on all political parties contesting an election to commit themselves to a minimum of 30 per cent women party candidates by the year 2005.
- iii. Provision be made for people with disability to participate fully in the electoral process.
- iv. Provisions should be made to ensure that prospective voters are provided with a form of national identity card in good time for registration.

2. Voting and Secrecy

Problem

There are numerous cases in our countries whereby eligible voters have been unable or prevented from exercising their right to vote through violence, lack of information on location of polling stations, intimidation and misinformation.

Furthermore, there are situations whereby the secrecy of the ballot has been severely compromised by making voters queue behind their party candidates, village headmen and threats based on the ability of competing candidates/parties to use modern communication equipment to tell which way a voter has voted.

Recommendations

- i. The right of eligible individuals to vote unimpeded and the right to vote in secrecy in a ballot box should be protected and enshrined in the constitutions of the SADC countries.
- ii. Any measures such as political violence, kidnapping, murder, threats and sanctions such as denial of development opportunities in opposition controlled areas that prevent eligible individuals to register to vote and to vote in secrecy should be perpetually outlawed by SADC member states
- iii. Illiterate persons, old people and persons with disabilities should be given assistance when voting by persons of their choice.

3. *Freedom of Association and Expression*

Problem

It is common in some of the SADC countries that members of the electorate belonging to other parties have been intimidated, beaten up, tortured and even murdered for belonging to opposing parties and for openly expressing their support for their preferred party. Yet one of the fundamental principles of multi-party democracy and political development process is that there should be freedom of association and expression. This principle is violated from one election to another.

Recommendations

- i. The sanctity of the freedom of association and expression should be protected and strictly adhered to.
- ii. Relevant electoral laws and code of conduct should provide for this sanctity.
- iii. Governments should establish by law *ad hoc* Electoral Tribunals to enforce electoral laws and codes of conduct during elections. They should deal with election conflicts.

PART 2 : Elections and the Government

1. *Commitment to Pluralism, Multi-party Democracy and Politics*

Problem

The meeting welcomed the commitment to pluralism and multi-party democracy in the first place by all SADC countries. However, the meeting noted that there is still inadequate and lip service commitment to multi-party democracy and politics among some of our leaders and politicians. They talk democracy but use undemocratic means to gain or remain in power. Yet the success of multi-party democracy and politics depends to a large extent on Government, political parties and other stakeholders committing themselves to upholding the values and practices that go with these concepts. The existence and sustainability of pluralism, multi-party democracy and politics again depends on the Government's belief in a democratic culture and wish to practice democracy. It calls for the Government to be tolerant of opposing political views and to harmoniously co-exist with opposition political parties.

Recommendation

The concepts of pluralism, multi-party democracy and politics should be enshrined in the constitution as the preferred form of political development and a basis for good governance. All stakeholders should commit themselves to pluralism, multi-party democracy and politics as a condition for participating in the political process of the country.

2. Date of Elections

Problem

In most SADC countries the date as to when elections are held is a prerogative of the ruling party if not of the President or Prime Minister. The announcement for when the elections will take place is often not made in good time and as such does not allow all stakeholders to prepare for elections. This has been one of the many sources of election conflicts resulting in some opposition parties boycotting the elections.

Recommendations

- i. SADC Governments should ensure that the dates for general election are fixed by provisions in their Constitutions or electoral laws.
- ii. If this is not possible the Head of Government should be required by the electoral law to give adequate notice of not less than 90 days (3 months) and not more than 120 days (4 months) from the date of dissolution of Parliament for an election date to give sufficient time to the Electoral Commission to prepare for the elections and to demonstrate fair play. Updated by the committee.
- iii. The Parliament of each SADC State should be involved in the alteration or fixing of election dates.

3. Misuse of Public Resources and Funding of Political Activities

Problem

In most countries the ruling party and its government seek an unfair advantage over opposition parties through the use of public funds and assets for its political activities, particularly meeting campaign expenses. When opposition parties get a share of public funds, there are complaints that such funds are inadequate, payment is delayed and given at the will of the ruling party to the disadvantage of opposition parties.

Recommendations

- i. In the interest of creating conditions for a level playing field for all political parties and promoting the integrity of the electoral process, parties should not use public funds in the electoral process. The electoral law should prohibit the Government to aid or to abet any party gaining unfair advantage.
- ii. Where a policy decision is taken to financially support political parties with taxpayers' money, which is necessitated by the poor resource background of most political parties, an agreed upon formula must be used and adhered to in allocating funds to the contesting parties. A commonly used formula is according to the number of seats each party holds in Parliament.
- iii. Those countries that are not yet funding contesting political parties should introduce the necessary legislation to do so in order to foster uniformity and levelling the playing field.

- iv. There must be accountability in the use of public funds.

4. Government, Political Parties, NGOs and the Media

Problem

In the majority of SADC countries the state owned media is controlled by Government. This often causes imbalance in the playing field between the stakeholders mainly the ruling party and opposition parties. It contributes to lack of transparency through selective reporting. Where the opposition parties are given air time, it is too short and the timing may be inappropriate. The recent emergence of a vibrant private media has greatly contributed to some balance in political coverage of both ruling and opposition parties.

Recommendations

- i. Governments should take the emergence of private media as a healthy development in the institutionalisation of the democratic process and the conduct of elections and should therefore refrain from taking decisions and actions that thwart the development of a strong private media. There should therefore be a domestic information law that reaffirms the existence of private media.
- ii. Governments should take cognisance of the fact that the involvement of political parties in the electoral process fosters the transparency of the system and generates public confidence in the system. Opposition parties should therefore also be given equal opportunity and agreed upon time and space on the state owned media to put forward their announcements and broadcasts and advertisements. This is a true test of the Government's commitment to pluralism and multi-party democracy and a democratic political process.
- iii. The role of the civil society, mainly in election monitoring and civic education, should be recognised by Governments.

5. Electoral Commissions

Problem

Electoral Commissions do play a very important role in the preparation for and conduct of elections. However, the establishment, composition, status, independence, impartiality and professionalism of some of the Electoral Commissions have come under serious scrutiny and doubts particularly from opposition parties and members of the public. These commissions are accused of being pro the ruling party that has appointed them.

Recommendations

- i. In the interest of promoting and entrenching pluralism, multi-party democracy and the integrity of the electoral process, the complete independence and

impartiality of the Electoral Commission in dealing with all political parties should be reaffirmed in the constitution.

- ii. The commissioners should be selected by a panel of judges set up by the Chief Justice or the equivalent, on the basis of the individual's calibre, stature, public respect, competence, impartiality and their knowledge of elections and political development processes. The selection of commissioners should be done in consultation with all political parties and other interested stakeholders. The selected commissioners are to be approved by Parliament.
- iii. To further enhance the independence and impartiality of the Electoral Commission it should have its own budget directly voted for by Parliament and not get its allocation from a Ministry or a Government Department.
- iv. The Electoral Law should empower the Electoral Commission to recruit and dismiss its own support staff on the basis of professionalism and competence rather than getting seconded staff from Ministries and Departments. Such staff have no loyalty to the Electoral Commission.
- v. Security of tenure of electoral commissioners should be entrenched in the constitutions of the SADC countries.

Part 3 : Fostering Transparency and Integrity in the Electoral Process

It is necessary to start this section by defining what the terms transparency, levelling the playing field and free and fair elections mean in the context of managing elections. These concepts are important in fostering transparency and integrity in the electoral process.

Transparency

Transparency refers to the degree of openness in the election process. It is important in the conduct of elections in that it enables the public at large, political parties and candidates to be informed on a timely basis about developments concerning electoral matters. It is a confidence building measure.

Level Playing Field

In the context of elections, the expression "level playing field" refers to a requirement that the election rules and regulations apply fairly to all political parties and candidates. It requires that the Electoral Commission deals openly and on equal terms with each of the political parties to enhance transparency.

Free and Fair Elections

Whether elections are free and fair is a judgmental position on the whole process of conducting elections.

Problem

Experience has so far shown that the above three concepts feature prominently when elections are held in any of the SADC countries.

Opposition parties often complain about the lack of transparency in the manner in which Electoral Commissions manage elections, the playing field being skewed in favour of the ruling party and for the losing parties the elections being not free and fair. What is discussed below are some ingredients of good practices that Governments should seriously consider adopting to enhance transparency, ensure a level playing field, and guarantee free and fair elections.

1. Registration of Voters

Problem

Registration of voters in SADC countries is a once off thing, done when elections are imminent. Experience shows that this practice leaves out a substantial proportion of eligible voters. A properly compiled register of voters provides a sound basis for the organisation of free and fair elections. The compilation of a satisfactory voters' register is a biggest test of the impartiality and technical competence of the Electoral Commission.

Recommendation

Registration of voters should therefore be a continuous exercise and not just wait for an election.

2. Voter Education

In some cases voters' education is left to NGOs and political parties. Due to lack of funds it is inadequately funded and poorly managed.

Recommendation

The Electoral Commission should be required by law to provide for a satisfactory and adequately funded voter education programme that helps voters to be acquainted with the voting procedures and other aspects of civic awareness.

3. Boundary Delimitation Commissions

Problem

The main function of a Boundary Delimitation Commission is to draw the boundaries of constituencies in a fair manner applying a stipulated formula such as the electoral

quota which uses the average electorate of the constituencies as the basic size of the electorate to be placed in a constituency. Experience has shown that this is not always adhered to. Updated by the committee.

Recommendations

- i. In the interest of promoting plural, multi-party democracy and enhancing integrity of the electoral process, the independence and impartiality of the Boundary Delimitation Commission in drawing up constituency boundaries should be reaffirmed in the constitutions of SADC countries. The tenure of office of the Commissioners should be guaranteed in the Constitution. The drawing up of constituency boundaries should be left to the technical competence of the Boundary Delimitation Commission without political interference. The Commission should consult stakeholders in this process.
- iv. Gerrymandering should be outlawed.
- v. Recommendations of the Boundary Delimitation Commission should not be altered by any stakeholder.

4. Nomination Process

Problem

The nomination process has been a vulnerable stage in election preparation. Prospective candidates have been prevented from submitting their nomination papers due to violence, procedural deficiencies and inadequate role of the courts.

Recommendation

It is therefore recommended that technical requirements/rules should be kept to the absolute minimum. The Electoral Commission should have powers to extend the time for a particular nomination centre and prospective candidates should have the right to appeal to the High Court.

5. Election Campaign

Problem

Election campaign in a number of SADC countries is often riddled

- with violence, murder, intimidation, destruction of property,
- unequal access to state owned media and accusations by opposition parties of a lack of a “level playing field” among the parties contesting an election.(updated by the committee)

Recommendations

The Electoral Commission and all stakeholders in the electoral process should therefore be required by law and be empowered to ensure that political parties and candidates should denounce violence in elections in order to ensure that:

- unimpeded freedom of campaign throughout the country;
- free and unimpeded access to Voters' Rolls;
- all Government Security Forces should act impartially and professionally;
- Presidential candidates must be provided with free and adequate security during the election process;
- equal and free access to the state owned media;
- a code of conduct developed through consensus from all political parties to guide behaviour in the conduct of campaigns; and
- reasonable safeguards at political meetings, rallies, polling stations and party premises.

The *ad hoc* Electoral Tribunal shall enforce the foregoing recommendations.

6. Funding of Political Campaigns

Problem

The funding of election campaigns is an area where the misuse of public funds is common and the playing field is not even. Experience in most countries is that the ruling party is well resourced (financially and assets wise) while opposition parties are poorly funded. Ceilings on political expenditure are either not there or ignored by all. The rich engaged in lavish expenditure to win votes.

Recommendation

The Electoral Commission should therefore be legally empowered to prohibit certain types of expenditures so as to limit the undue impact of money on the democratic process and the outcome of an election. It should be empowered to ensure that proper election expenses returns are submitted on time, to inspect party accounts, and for parties to have properly audited and verified accounts.

7. Role of the Courts

Experience shows that the courts come into the electoral process in terms of:

- i. handling appeals during the registration and nomination stages;
- ii. dealing with election offences; and
- iii. attending to election petitions.

Problem

In most countries the courts are either under-funded or understaffed or too bureaucratic to deal promptly with election petitions and offences. Yet the courts are an important player in ensuring a plural and multi-party democratic process.

Recommendations

- i. The courts should be strengthened in terms of both human and financial resources to enable them adequately to deal with election petitions and offences and to ensure a level playing field and free and fair elections.
- ii. There must be time limits for resolving election petitions.
- iii. In enhancing democracy all election petitions should be subject of judicial review.
- iv. All cases emanating from electoral petitions should be subject to electoral review.

8. The Electoral Commission and the Media

Problem

Technical competence, impartiality in dealing with political parties and independence of government control are not the only qualities of a good Electoral Commission. Good relations with the media is a desirable quality in that it fosters public confidence in the electoral process. Experience from the SADC countries is that the relations between the Electoral Commission and the private media is not only a good one. Yet the media plays an important role in terms of fostering the integrity and transparency of the Electoral Commission and on building public confidence in the activities of the Commission. Therefore, the Electoral Commission and the media should view themselves as allies and not as adversaries in the institutionalisation of the democratic process in the conduct of elections.

Recommendations

The following good practices are offered for adoption by Electoral Commissions in our Region:

- i. periodic meetings with representatives of the media at every important stage of the electoral process as a way of communicating with the general public; and
- iv. general media briefings and general statements to the media to avoid misrepresentation.

9. Polling Stations

Problem

In some SADC countries, polling stations are in private houses, shops and stores. This compromises the integrity of the voting process and the secrecy of the ballot.

Recommendation

Polling stations should be public places such as schools, tents and mobile vehicles that are neutral.

10. Ballot Boxes

Problem

The nature of ballot boxes has become the subject of concern in the voting process. Some countries still use opaque wooden boxes which defeat the call for transparency in the electoral process. Other countries are a step ahead in that they use transparent ballot boxes in line with the general call for transparency in the electoral process.

Recommendation

Those SADC countries that still use opaque wooden ballot boxes are urged to discard them in favour of transparent ballot boxes.

11. Counting of Votes

Problem

The counting of votes is another area in the electoral process riddled with accusations of elections being rigged in favour of the winning party. The system of transporting ballot boxes from polling stations to a central counting centre creates opportunities for missing ballot boxes and other ballot boxes being sneaked in. This is a violation of free and fair elections.

Recommendations

- i. The counting of votes should be done at the polling station where the candidates and/or their election agents are present. Such candidates and agents should be allowed to remain with the boxes from closure of polling station to counting of the votes.
- ii. There should be immediate release of official election results on completion of counting, signed by returning officers and confirmed by party agents.
- iii. Verification and reconciliation of ballots should be done before counting begins and this should be done in the presence of candidates and all their agents.
- iv. In the event of a long lapse of time between the completion of voting and the commencement of the counting, the ballot boxes should be sealed and opened in the presence of all polling agents.

- v. The Electoral Commission should prepare and make available a time-table of the electoral process, including the acquisition of electoral materials, packaging and distribution to polling centres. The time-table, including all stages of electoral events should, by law, be made accessible to all stakeholders.

12. Acceptance of Election Results

Problem

It is common in some SADC countries that both ruling and opposition parties do not easily accept election results. Some ruling parties as well as opposition parties do not accept the legitimacy of each other. In some cases, opposition parties are denied funds that are due to them. The tendency therefore is for opposition parties to act outside parliamentary jurisdiction.

Recommendations

- i. The culture of accepting election results should be cultivated and encouraged, especially when election observers have certified the results as free and fair.
- ii. Political parties contesting elections must accept defeat after fair contests.

13. Managing Post Election Conflicts

Problem

Lack of confidence, trust and dialogue has led to conflicts among political leaders before, during and after elections.

Recommendations

- i. There is need for consensus building.
- ii. There is need to create an institutional machinery at the SADC Parliamentary Forum level to handle conflicts that arise before, during and after elections.
- iii. SADC countries should work out a mechanism of ensuring that there is a harmonious relationship and cooperation between the ruling parties before and after elections.

14. Role of Observers

Problem

There is a growing realisation among SADC countries that have embraced multi-party democracy that the presence of observers (local, regional and international) generates confidence in the political process and international standing of the country. It often assists the electorate and the losing political parties and candidates to accept the election results if the election is judged by the observers to have been held under legitimate conditions. However, what is disputed is what constitutes free and fair

elections and on the part of the host government who should be allowed to observe the elections. Some international bodies and local observers are suspected of having their own agenda and may not be impartial and have therefore been barred by host governments from observing the elections.

Recommendations

Despite these concerns, election observers should be accepted as part of the process to institutionalise multi-party democracy and as a mechanism to persuade governments to adhere to the ingredients of free and fair elections. These ingredients include:

- i. acceptance by all political parties that all eligible citizens have had a fair opportunity to register as voters and to cast their votes;
- ii. political parties contesting the election having a fair opportunity to campaign including an equitable access to the state owned media;
- iii. the Government of the day creating a “level playing field” condition in which all political parties have the opportunity to put their policies and programmes to the electorate;
- iv. the removal of any existing state of emergency before an election campaign begins;
- v. certification by all Polling Agents that the Voting was free and fair at respective polling stations;
- vi. the acceptance by the host government of election observers as a factor in fostering transparency, integrity and in institutionalising the democratic process in the conduct of elections.

15. The Role of the SADC Parliamentary Forum in Election Observation

Problem

The Forum has been experiencing difficulties in some member countries in respect of timely accreditation; confusion about who has authority to invite the Forum to observe the Elections; and a common understanding of how the lessons from observing elections are shared with the stakeholders. A problem also exists in SADC because of the absence of a regional body that can assist in resolving electoral disputes.

Recommendations

- (i) The SADC Parliamentary Forum should continue to observe elections so as to promote democratic practices and sustainable peace in the region in line with the objectives of the Forum.
- (ii) SADC Parliamentary Forum Observer Missions should observe the pre-election (including voter registration), election, and post-election periods. The

timing of the pre-election entry point shall be determined by the Secretariat in consultation with stakeholders.

- (iii) The SADC Parliamentary Forum should widely circulate its election Observation Reports and engage stakeholders in the aftermath of elections.
- (iv) All Governments should endorse a standing invitation to the SADC Parliamentary Forum to observe elections whenever they are held in any SADC country without having to wait for a formal invitation from the host Government.
- (v) In line with the SADC Declaration which *inter alia* calls upon all Governments to ensure the full participation of women with a minimum of 30% of women in all areas of decision making, including Parliaments. The reform of all laws that impede the full participation of women in elections, electoral processes and management of elections. To this end, each and every recommendation automatically incorporates provisions that are designed to advance the women's role in the governance of SADC countries.

16. Code of Conduct for the Forum as Regional Observers

Problem

Whereas observers have the noble duty to see that elections are held in a free and fair atmosphere it does not mean that they are 100% impartial. Some election observers may have their own hidden agendas. They therefore cannot carry out their work without some guidelines on their behaviour. However, SADC Parliamentary Forum undertakes to observe elections impartially in line with the Constitution and Code of Conduct for the Forum.

Recommendations

Election results should be accepted by both ruling and opposition parties and what is due to opposition parties should be given without delay in accordance with the law. It is therefore recommended that Governments should take a policy position recognising the role of observers, as long as:

- (i) observers must be non-partisan at all times and seen to be so; they should not express partisan political views whether by word, symbol, conduct, song or otherwise; to respect the laws of the host Government; to respect the role, status and authority of the Electoral Commission and presiding officers at all times not to communicate with the voters at any time within the precincts of the polling station; not to interfere in the electoral process at any time; and to channel any complaints that they may have to the relevant Government and electoral officials.

Laws

Problem

Some of the electoral laws are cumbersome and bureaucratic. This leads to the difficulties of attainment of good electoral standards and norms within the region.

Recommendation

There is need to harmonize SADC countries electoral laws. This will enhance and promote the attainment of plural politics, democracy, peace and stability in the SADC region.

D. CONCLUSION

The above recommendations on norms and standards in conducting plural and multi-party elections, if adopted and implemented by the SADC Governments, would certainly go a long way to entrenching a democratic culture, in minimising conflict and contributing to political stability and peaceful development in Southern Africa.

The SADC Parliamentary Forum should set up a monitoring mechanism to ensure successful implementation of the recommendations.