

## Introduction

During the previous UPR cycle, Zambia responded to 127 recommendations made by member states and accepted recommendations focused on a range of issues, including equality between men and women, violence against women, healthcare, and freedom of assembly. However, no recommendations were made concerning the electoral system in Zambia, despite Zambia's obligations and commitment to protect electoral rights as outlined in the treaties to which Zambia is a party.

Zambia has acceded to and ratified a number of international and regional treaties including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Democracy, Elections and Governance (ACDEG), the African Charter on Human and Peoples' Rights (ACHPR); the African Union Convention on Preventing and Combating Corruption; the SADC Protocol Against Corruption; the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); the Convention of the Political Rights of Women; The International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of Persons with Disabilities.

Zambia has held multi-party democratic elections since 1991, following approximately 20 years of single party rule. The Carter Center observed Zambian general elections in 1991, 2001, and 2016. The Carter Center's 2016 observation mission was limited, and focused on the pre-election and post-election periods only. While the Center's observation was limited in scope and did not include observation of election day, the Center's observations were consistent with those of Zambian citizen observers and other international observation missions. Although balloting and counting processes were largely successful on election day, the polls represented a major step backward for democratic processes. The pre-election period was significantly flawed, and failed to provide a level-playing field for political parties and candidates. Pre-electoral violence caused an increase in tension, creating a climate of fear and hindering the right of citizens to participate in the electoral process as candidates and voters. Following the election, institutions charged with resolving electoral disputes failed to uphold due process, and respect the right to an effective and timely legal remedy. The 2016 polls appear to have significantly diminished public confidence in Zambia's democratic institutions.

## Findings and Recommendations for Consideration

Based on a limited election observation mission in 2016, The Carter Center submits the following main findings for consideration.

1. *Electoral and Political Violence*

In accordance with Zambia's international obligations under the Convention for Civil and Political Rights<sup>1</sup>, the state and political parties are prohibited from advocating the use of violence. However, in the pre-election period, supporters from the two major parties, the ruling Patriotic Front (PF) and the largest opposition party, the United Party for National Development (UPND), were involved in violent clashes across the country. An opposition party parliamentary candidate for the Forum for Democracy & Development was also violently attacked during the campaign period. Many stakeholders speculated that the violence was either instigated or organized by the political parties themselves, and leaders of both parties also alleged that the clashes were instigated by the other party. While these claims could not be verified, the increased prevalence of organized political cadres wearing military fatigues had a detrimental effect on the election

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<sup>1</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, at art. 20.2. [*hereinafter* ICCPR].

environment, and led to an overall increase in election-related violence and a climate of fear. Efforts by the Election Commission of Zambia (ECZ) to obtain peace pledges from the political parties were only partially successful with five of the nine parties fielding presidential candidates signing pledges. The most significant abstention was the UPND, which declined to sign the pledge without the inclusion of clear enforcement mechanisms.

Recommendations:

- 1.1. The ECZ should engage with political parties to ensure respect for the Electoral Code of Conduct, and develop peace messaging to be disseminated around elections. Political party leaders should convey clearly to supporters that violence is not condoned.
- 1.2. Promptly investigate claims of violence instigated by political parties in the electoral period, and encourage the ECZ to sanction those who violate the Electoral Code of Conduct under the powers vested in the commission by the 2016 Electoral Process Act.

2. Freedom of Assembly

The U.N. Human Rights Committee has concluded that “freedom of expression, assembly, and association are essential conditions for the effective exercise of the right to vote and must be fully protected.”<sup>2</sup> However, during the 2016 pre-election period in Zambia, the state restricted the opposition’s ability to hold rallies. Two of the principal methods used were the denial of flight clearances for opposition party aircraft by the Zambian Air Force, and even more severely, the over-broad interpretation and inequitable application of the Public Order Act (POA) by police to deny permission for the UPND to hold rallies. The POA allows authorities to postpone or cancel large gatherings if they compromise security. On numerous occasions, the Zambian police canceled UPND events due to security concerns, while PF events were largely unaffected. On one specific occasion, the Zambian police resorted to the use of tear gas, rubber bullets, and live ammunition to disperse UPND supporters protesting the cancellation of a campaign event, resulting in the death of a UPND supporter. In addition, the Zambian Airforce consistently denied clearances for opposition aircraft, restricting the movement of opposition politicians and contradicting Zambia’s commitment to the freedom of movement.<sup>3</sup> The inequitable application of the POA, the use of force to disperse protestors and the denial of flight clearances runs counter to Zambia’s international obligations, which explicitly protects citizens’ right to assemble and candidate’s right to freedom of movement.<sup>4</sup>

In the final weeks of the campaign, the ECZ also suspended campaigning for a 10-day period in Lusaka and Namwala. While the campaign suspension restricted the freedom of assembly for all political parties participating in the polls, stakeholders reported that the hiatus helped reduce tension between political party supporters.<sup>5</sup>

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<sup>2</sup> Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1510<sup>th</sup> meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), at para. 12.

<sup>3</sup> ICCPR, *supra* note 1, at art. 12

<sup>4</sup> ICCPR, *supra* note 1, at art. 21

<sup>5</sup> Nine political parties fielded presidential candidates. Thirteen political parties and 110 independents participated in the parliamentary polls.

Recommendations:

- 2.1. Provide a level playing field to all political parties and candidates by ensuring equitable application of the Public Order Act and campaign regulations.
- 2.2. Sanction political parties and candidates that violate the Electoral Code of Conduct to discourage violence and intimidation during the campaign period.
- 2.3. Support the police and military to provide fair, equitable and non-partisan public security during the campaign period and polls and to remain consistent with the Electoral Code of Conduct.

3. Equality between men and women in electoral politics.

While the Zambian Constitution,<sup>6</sup> the ICCPR<sup>7</sup>, CEDAW<sup>8</sup>, and the Convention on the Political Rights of Women<sup>9</sup> guarantee women the equal right to stand for elected office, constitutional educational requirements for candidacy disadvantage women in Zambia's political sphere. Before the 2016 elections, the Zambian parliament passed a constitutional amendment and implementing legislation requiring that all parliamentary and presidential candidates have a grade 12 education. Given the systemic gender imbalance in the Zambian education system, far fewer women have completed a grade 12 (G12) education, leaving many women ineligible for office. The requirement also limits the participation of rural citizens. The Zambia National Women's Lobby, which advocates for female candidates, reported that the passage of the G12 requirement disqualified 95 percent of the women whom it was helping pursue candidacy. In addition to the education requirement, all candidates must also pay a relatively large fee for candidate nomination. These fees are non-refundable and present an unreasonable barrier to candidacy for women, youth, and rural citizens. Ultimately, these requirements contributed to the low number of female representatives in Zambian politics, with women occupying only 26 of the 156 seats in parliament.

Recommendations:

- 3.1. Take active steps to increase access to quality education for women and girls to enable all persons to participate effectively in society, including in the electoral processes to choose government representatives. Make secondary education generally available and accessible to all by every appropriate means.
- 3.2. Reconsider the constitutionally mandated requirements for candidacy to allow greater numbers of women as well as rural citizens to run for office.
- 3.3. Reduce candidacy fees and allow their payment on either the local or national level to create greater access for women, youth, and rural citizens to run for office.

4. The use of state resources in election campaigns.

Throughout the 2016 election cycle, sitting Zambian politicians made use of state resources to promote their own candidacy. On August 8, 2016, three days before election day, the

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<sup>6</sup> Zambia Constitution, 24 Aug 1991, Article 23.

<sup>7</sup> ICCPR, *supra* note 1, at art. 3, 25

<sup>8</sup> Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, at art. 7

<sup>9</sup> Convention on the Political Rights of Women, 193 U.N.T.S. 135, entered into force July 7, 1954, at art. 2

Constitutional Court ruled that several government ministers had abused their position by remaining in public office following the dissolution of the parliament. The court ruled that the ministers' mandate had expired when the parliament was dissolved, and requested return of salaries and allowances paid after that period. However, the ruling was issued after ministers had campaigned and continued in their official governing capacity for a substantial period of the campaign, receiving increased public exposure and access to public resources as a result of their positions. The scope and impact of the misappropriation of state resources is unknown. The courts have annulled the election of two of the nine ministers who were re-elected to parliament, in part as a result of their "undue advantage in the election."<sup>10</sup>

The misuse of state resources undermines Zambia's commitment to genuine elections,<sup>11</sup> and violates the state's obligations under the U.N. Convention Against Corruption.<sup>12</sup> Following the 2016 constitutional amendments, legislation regulating campaign expenditures and reporting should have been adopted. However, no such law was enacted prior to election day. This gap left an important aspect of the electoral process unregulated, circumventing transparency and accountability, and leaving the process vulnerable to the undue influence of money.<sup>13</sup> The incumbent party enjoys significant exposure and resources as a result of its public office. This dynamic, which is amplified by the ruling party's use of state resources in the campaign, necessitates further the need for clear, enforceable regulations.

#### Recommendations:

4.1. The parliament should pass legislation and allocate the necessary resources to regulate campaign expenditures and prevent corruption and misuse of government resources in campaign financing. The law should include limits on campaign spending and a mechanism for transparent publication of all financing of campaign activities, and should grant the ECZ or the Court of Accounts enforcement powers.

#### 5. Freedom of the press.

The ICCPR specifically protects freedom of expression,<sup>14</sup> yet the Zambian government actively suppressed media during the 2016 election cycle. In the run up to the election, the Zambian Revenue Authority (ZRA) targeted an opposition leaning newspaper publication, *The Post*, for past-due tax liabilities, while pro-government media firms with similar liabilities were left untouched. The ZRA seized *The Post's* offices and equipment, limiting the publication to limited print runs and online reporting. During the electoral period, the Independent Broadcasting Authority (IBA) also suspended the broadcasting licenses of Muvi-TV, Komboni Radio, and

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<sup>10</sup> On November 22, 2016, the High Court dissolved the parliamentary seat of Minister of Higher Education Nkandu Luo due to a "failure of ECZ officials to properly handle the electoral process" and that the minister enjoyed an "undue advantage in the election" because she was a serving minister at the time of the polls. On Nov. 22, 2016, the Lusaka High Court nullified the parliamentary election of Margaret Mwanakatwe in part due to illegal use of government resources during the campaign and benefits received as a result of her ministerial position. Both candidates have lodged appeals with the Constitutional Court. As of the drafting of this report on March 28, 2018, no further decisions have been posted to the Constitutional Court's website regarding the two cases.

<sup>11</sup> ICCPR, *supra* note 1, Art. 25.

<sup>12</sup> UN CAC, Art. 17, 19.

<sup>13</sup> According to estimates in a ZEIC report, PF spent approximately USD 6 million and UPND USD 5 million on their campaign. The report further stated that due to the closed nature of the campaign framework, Zambia has not been able to track expenditures by political parties adequately during elections.

<sup>14</sup> ICCPR, *supra* note 1, at art. 19

Itezhi-Tezhi Radio for reporting on the election in an unprofessional manner. Regardless of the merits of the allegation, the IBA failed to follow proper procedures, which require those accused to be afforded the opportunity to correct improper behavior, before a suspension is given. Muvi-TV and Komboni Radio challenged the suspension in front of the High Court. Initially the appeal was unsuccessful, but the Court later lifted the suspensions when the media houses acknowledged the circumstance that triggered the IBA suspensions.

Recommendations:

5.1. Ensure that the freedom of the press is protected, and that laws are fairly enforced on a non-partisan basis.

5.2. Ensure pluralistic access to the media and other means of communication.

6. Access to and efficacy of electoral dispute resolution mechanisms.

In Zambia, electoral disputes can be addressed by a number of different mechanisms depending on the nature of the dispute. However, these mechanisms fail to satisfy Zambia's international obligations to provide a fair and public proceeding, including ample time for all parties to prepare, and an effective and timely decision.<sup>15</sup>

The High Court is responsible for hearing complaints and petitions on the National Assembly elections and referenda. Petitioners are guaranteed to have the Court hear their case within 90 days of their petition, but Zambian law does not provide a deadline for issuing the final decision.<sup>16</sup> Instead, article 73 of the Zambian Constitution states that parliamentarians, who are the subject of a petition being considered by the High Court, will remain in office until the Court rules on the case.

Prior to the 2016 election cycle, the Zambian National Assembly amended the constitution to form a Constitutional Court to hear cases related to the presidential and parliamentary elections. The court was intended to have 13 justices, but by election day the president had appointed only six justices. Though the appointees were confirmed by parliament, many stakeholders expressed concern regarding their impartiality. In total the Court received 30 petitions prior to election day. Due to logistical problems, operational challenges, and a lack of institutional experience, several of the cases were pending before the court on election day. In the post-election period, the opposition UPND filed a petition with the Constitutional Court challenging the outcome of the presidential election and alleging serious irregularities in the counting and tabulation process, among other issues. Although Zambia's constitution requires the Constitutional Court to hear electoral petitions within 14 days of their filing, it is silent as to the timeframe in which the court is required to issue a ruling. The court exacerbated the problem by not defining clear timelines at the outset that would have allowed sufficient time for procedural matters and the hearing. Much of the court's deliberations were done in chambers, closed to the public. After allowing two extensions to the timeline that it subsequently revoked, the court dismissed the petition by a majority decision on the technicality that the petitioner failed to present its case within the 14-day timeline. The court ultimately failed to hear evidence on the merits of the petition and to rule on the validity of the elections, denying the petitioner due process and access to an effective and timely legal remedy.

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<sup>15</sup> ICCPR, *supra* note 1, at art. 14

<sup>16</sup> Article 73 of the Constitution

Empowered by the 2016 Electoral Process Act, the ECZ also formed dispute resolution bodies at the district and national level called conflict management committees (CMCs). While CMCs' decisions were not legally binding, these committees were formed to bypass lengthy court proceedings to provide rapid resolution to electoral disputes. Unfortunately, CMC proceedings were not made public and many district level committees could not issue timely decisions, as they had to seek guidance from the national CMC. This caused significant delays, which forced some plaintiffs to seek redress in the courts. However, in at least one case, the court refused to hear the case, because it had not been heard by a CMC.

Recommendations:

- 6.1. Ensure that candidates, voters and other electoral stakeholders who perceive that their rights or freedoms are violated have access to a fair hearing within a reasonable amount of time, and are accorded an effective remedy.
- 6.2. Ensure that all court proceedings, including hearing, findings, evidence and legal reasoning, are made public. The state should err on the side of transparency unless exceptional reasons exist of moral, public order, national security, the interests of private lives of the parties, or special circumstances when public hearings would be prejudicial to justice.
- 6.3. Establish deadlines for final decisions from CMCs and courts in electoral dispute cases to meet obligations for equality under the law, and effective and timely legal remedy.