



the global voice of  
the legal profession

INTERNATIONAL BAR ASSOCIATION

# **AN ANALYSIS OF THE ZIMBABWEAN NON-GOVERNMENTAL ORGANISATIONS BILL, 2004**

24 August 2004





# AN ANALYSIS OF THE ZIMBABWEAN NON-GOVERNMENTAL ORGANISATIONS BILL, 2004

## A. INTRODUCTION

This is an analysis of the Non-Governmental Organisations Bill, 2004 (the ‘Bill’), which is about to be passed by the Legislature in Zimbabwe. In this analysis we made reference to this Bill, its predecessor the Private Voluntary Organisations Act, No 63 of 1966 (the ‘PVO Act’) as well as commentaries on the Bill prepared by human rights organisations and legal professionals in Zimbabwe and South Africa.

At the outset, it is critical to note that while the preamble to the Bill states that it is ‘for the registration of non-governmental organisations, to provide for an enabling environment for the operations, monitoring and regulation of all non-governmental organisations ...’, an analysis of the Bill suggests that it is a far-reaching and draconian law clearly designed to exert full and complete control over non-governmental organisations (NGOs) and other human rights and development organisations in Zimbabwe.

However, the PVO Act is almost identical to the Bill, save for certain glaring additions. Thus, while the provisions of the Bill appear to be draconian in form and in keeping with the *modus operandi* of what is generally perceived to be an oppressive regime in Zimbabwe, it is important to bear in mind that the PVO Act, in almost identical terms, has been on the Zimbabwean statute book since 1967.<sup>1</sup>

The PVO Act was drafted during the Smith regime at a time when the liberation war in Zimbabwe was beginning to gain momentum and in the context of massive military and police intervention to counter that insurgency. The questions arising are why the Mugabe regime would re-enact a draconian law drafted during the Smith regime to clamp down on opposition and why it has followed the route of virtual re-enactment rather than merely amending the PVO Act. We turn next to an analysis of the Bill and its essential additions, which significantly increase the power of government granted under the original legislation, the PVO Act.

## B. THE PREDECESSOR PVO ACT

The Bill seeks to repeal the PVO Act as a whole. As noted previously, the PVO Act commenced in 1967 during the Smith regime, which given the tenor of the PVO Act, was no doubt designed to clamp down on opposition to the Smith regime. However, the PVO Act remained on the statute book even through independence and the commencement of the Zimbabwean Constitution.

Thus, nothing turns on the mere fact that the Bill has been put into the legislative pipeline. The questions that arise relate rather to why the PVO Act was not simply amended and what the objectives are behind the changes to the existing PVO Act.

## **B1. Common Features between the PVO Act and the Bill**

The NGO Bill essentially maintains the most repressive features of the PVO Act but goes further by introducing new provisions that expand the range of organisations required to register under the law, while at the same time proscribing a broader range of NGO activity. Essential common features include a system of compulsory registration, a controlling organisation appointed by the Minister, the appointment of a registrar to coordinate registration of private voluntary organisations (PVOs), certain restrictions on fundraising, minimum standards for administration of PVOs relating to finances and accounting and processes for investigations into the affairs of PVOs, including conditions in which PVOs may be dissolved or have their registration certificates either cancelled or amended.

## **B2. Critical Additions to the NGO Bill**

The key additions in the definition section of the Bill include definitions of ‘foreign funding or donation’, ‘foreign non-governmental organisation’, ‘issues of governance’,<sup>2</sup> ‘local non-governmental organisation’ and an expansion in the definition of the organisations to which the Bill will apply.

The key difference between the definition of ‘non-governmental organisation’ in the Bill and ‘private voluntary organisation’ is its expansion to include ‘any foreign or local body’ with the additional objects of:

- ‘(g) The promotion and protection of human rights and good governance;
- (h) the promotion and protection of environmental rights and interests and sustainable development.’

In addition, clause 2(3) contains new provisions dealing with the scope of the Bill:

‘This Act shall apply to every non-governmental organisation as defined in subsection (1) whether or not its legal status within Zimbabwe is subject to any agreement with the State and whether or not its constituent deed or instrument is registered with the High Court or the Deeds Office.’

Thus, not only is the range of non-governmental institutions expanded in the Bill, the range of objectives and services performed by such NGOs has been significantly expanded to draw almost any and all local or foreign NGOs within the reach of the Bill.

Significantly, the definition of NGOs has been extended to include trusts registered with the Master. This means that unlike the definition of PVOs, the implications for the law of trusts are

extraordinary: every property holding, business or family trust will be required to register with and submit to the control and discipline of the Council.

More importantly, the wide definition of NGOs could conceivably include every type of body, association or institution, provided its objectives or aims fall within the objectives of NGOs in the definition, unless excluded as listed in section 1 or 'as may be prescribed'. It is thus not inconceivable that law societies or other advocacy bodies such as voluntary associations of advocates may be brought within the reach of the Bill, to the extent that their objectives include one or more of the wide categories in the definition of NGOs, unless excluded 'as may be prescribed'.

The PVO Board is replaced with an NGO Council in the Bill. The regulatory functions of the NGO Council is predominantly the same as the PVO Board except that the composition of members no longer includes representatives from each of the provinces and the number of representatives from Ministries has been expanded to include representatives from the Ministries of Youth and Gender Affairs, Local Government, Information and Publicity and the Office of the President and Cabinet. The total number of members on the NGO Council in the Bill will thus be 14, five representatives from NGOs and the remainder from governmental ministries and the Registrar. These numbers assume significance because the quorum of the NGO Council is eight.

The most significant additional powers given to the NGO Council are powers of investigation into maladministration, improper conduct of members and staff of NGOs and contraventions of the Code of Conduct, which it has the power to formulate without any input from civil society or NGOs. In addition, the NGO Council is also charged with the formulation of rules for the 'registration or deregistration of non-governmental organisations'. The regulatory and oversight body in the Bill thus has substantially more powers than the predecessor PVO Board.

The most significant difference between the PVO Act and the Bill is the Bill's prohibition on the registration of a foreign NGO if its sole or principal objects involve or include 'issues of governance'.<sup>3</sup> 'Issues of governance' include 'the promotion and protection of human rights and political governance issues'.<sup>4</sup>

This prohibition will effectively bring to an end the operation of any, if not all, foreign NGOs to the extent that their activities are not regulated by the Privileges and Immunities Act<sup>5</sup> and fall within the 'the promotion and protection of human rights and political governance issues'. Thus, international NGOs such as the Konrad Adenauer Foundation will have to cease operations in Zimbabwe once the Bill is enacted. Many other well-known international aid and relief organisations will also be hit by this widely stated prohibition on foreign NGO activity.

This prohibition is underscored by a prohibition on foreign funding in a new section that provides:<sup>6</sup>

'No local non-governmental organisation shall receive any foreign funding or donation to carry out activities involving or including issues of governance.'

Having regard to the wide import of the definition of 'issues of governance' it is immediately obvious that many, if not all, the NGOs or other humanitarian or relief agencies operative in Zimbabwe which receive foreign funding will be precluded from receiving and accepting any further foreign funding. The likelihood of survival of NGOs heavily reliant on foreign funding will thus be almost impossible.

Another addition in the Bill is the inclusion of certain presumptions to assist the state in prosecuting contraventions of the Bill. This is significant because one of the presumptions<sup>7</sup> states that in a prosecution in terms of section 26(2) [falsely representing an association with an NGO to a member of the public], a certificate produced to the court by a person which has been signed by the Registrar which states that at the time of the alleged offence no such NGO was registered in terms of the Act or had applied for registrations, 'it shall be presumed unless the contrary is proved that the organisation was not in existence at the time.'<sup>8</sup>

### B3. Objectives of the Bill

It is thus obvious that the key differences between the PVO Act and the Bill may be categorised as follows:

- (a) An expanded definition of NGOs means that the Bill will regulate a far wider range of NGOs than was possible in the past;
- (b) The wide definition of NGOs effectively means that all voluntary associations, NGOs or other bodies and institutions may be susceptible to the Bill to the extent that some of their objectives and activities can be linked to those defined in the definition of NGOs;
- (c) The additional powers of investigation into 'maladministration'<sup>9</sup> and to expand the scope of the legislation, through formulating further, legally binding codes, given to the regulatory body, means that the NGO Council has far wider, virtually open-ended powers to control the fate and activities of NGOs when compared to its predecessor;
- (d) The Bill is clearly targeted at foreign NGO activity in Zimbabwe and effectively prohibits such activity; and
- (e) The Bill prohibits foreign funding, which means its aim is to prevent any and all foreign assistance from entering Zimbabwe. This raises serious concerns that organisations working on some of the most critical support projects in Zimbabwe – eg food distribution, AIDS relief, and political violence reporting – which are at present almost entirely foreign funded, may be closed. The inevitable consequence will be that less information on domestic human rights and governance conditions or activities will be reported on and the government will, as a result, be less accountable to its people.

The irresistible inferences to be drawn from this analysis are that the Bill has been drafted as a targeted attack on NGOs pursuing objectives adverse to existing governmental policy and on foreign

NGO activity in Zimbabwe. The objective is thus to silence dissent in a key component of civil society by excessive regulation and wide-ranging powers to discipline and close down NGO activity.

## **C. ANALYSIS OF THE BILL**

### **C1. Part I: Preliminary (and Definitions)**

NGOs are defined as:

‘any foreign or local body or association of persons, corporate or unincorporated, or any institution, the objects of which include or are one or more of the following –

- (a) the provision of all or any of the material, mental, physical or social needs of persons or families;
- (b) the rendering of charity to persons or families in distress;
- (c) the prevention of social distress or destitution of persons or families;
- (d) the provision of assistance in, or promotion of, activities aimed at uplifting the standard of living of persons or families;
- (e) the provisions of funds for legal aid;
- (f) the prevention of cruelty to, or the promotion of the welfare of, animals;
- (g) the promotion and protection of human rights and good governance;
- (h) the promotion and protection of environmental rights and interest and sustainable development;
- (i) such other objects as may be prescribed;
- (j) the collection of contributions for any of the foregoing; ...<sup>10</sup>

As is evident, the wide definition of NGOs includes any and all welfare, human rights, humanitarian, aid or developmental organisations, which are not established by the Zimbabwean Government or which are not otherwise organs of state, to the extent that their objectives or activities can be linked to any one of the categories in the definition.

### **C2. Part II: Non-Governmental Organisations Council and Registrar of Non-Governmental Organisations**

Sections 3 to 15 in Part II of the Bill establish a Non-Governmental Organisations Council (the ‘Council’) and a Registrar of Non-Governmental Organisations. The composition of the Council includes representatives from government Ministries as well as five representatives from NGOs or associations ‘which the Minister considers are representative of non-governmental organisations’.<sup>11</sup> The Minister charged with the administration of the Act is the Minister of Public Service, Labour

and Social Welfare or any other Minister to whom the President may assign the administration of the Act. Included in the representatives from governmental Ministries is a representative from the Office of the President and Cabinet.

Although sections 3(3)-(4) provide for nominations for appointments to the Council, those nominations may be rejected by the Minister and will ultimately be accepted if ‘in his or her opinion’, they ‘are suitable and available for appointment as members of the Council’. Thus, the composition of the Council is ultimately a matter of Ministerial prerogative and choice.

It is notable that only the highest ranking bureaucrats, that is, those at the level of Permanent Secretary or above, are eligible for appointment to this Council. In this highly polarised political context, this raises the serious concern that these persons are likely to be persons closely linked to and supportive of the ruling regime, who can be expected to use the extensive powers granted to them under this legislation in a partisan manner.

The Council is tasked with wide-ranging functions in section 4, including consideration and determination of applications for registration, investigations into maladministration of NGOs and to take disciplinary or other action as a result of such investigations. The Council will also be responsible for the formulation of a code of conduct for NGOs.

Thus, the Council will be responsible for all aspects of the life-span of NGOs, including registration, deregistration and investigatory matters into maladministration and the imposition of disciplinary sanctions. The Council is funded by government, which may include money from the government ‘of any country’.

### **C3. Part III: Registration of Non-Governmental Organisations**

Part III prescribes a process of registration for NGOs. Section 9(1) makes registration with the Council mandatory and prohibits any non-governmental activity in the absence of such registration.

Section 9(2) prohibits the collection of financial contributions from the public, except for fund-raising as permitted in terms of the Act. Section 9(3) is a far-reaching provision, which provides:

‘No person shall in any manner take part in the management or control of a non-governmental organisation, knowing that the organisation is contravening subsection (1).’

Such activities are offences with criminal penalties comprising fines and/or imprisonment in terms of section 9(5) of the Bill.

Section 10 deals with registration requirements and requires NGOs to disclose in applications for registration, *inter alia*, the following:

- ‘(a) the names, nationality and addresses of its promoters;
- (b) its sources of funding;
- (c) its plan of action or projected activities for the next three years.’

Subsection (10) (4) provides for public notification of an application for registration of a NGO in a national newspaper or in a newspaper circulating in the relevant area and subsection (9) (5) provides for a process of public objections to such registration. This will no doubt provide fertile ground in a country wracked by divisive political interests to ensure that NGOs perceived to be unfriendly to those in power are prevented from operating in the absence of a certain degree of public support.

Applications for registration are submitted by the Registrar to the Council, which may approve registration or 'reject the application if it appears to the Council that the organisation is not operating *bona fide* in furtherance of the objects stated in its application for registration.'<sup>12</sup> The jurisdictional facts necessary for the exercise of this power are widely stated and capable of justification by just about any means by the Council.

Section 11 provides for the cancellation or amendment of certificates of registration at any time by the Council on grounds, *inter alia*, that the organisation has ceased to operate in a *bona fide* manner in furtherance of its objectives or if it is found guilty of maladministration in terms of section 23.

Before cancelling or amending a certificate of registration the Council must give notice to the NGO and give it an opportunity to make representations in the matter. A failure by a director of an NGO to comply with the request from the Registrar to lodge with him any certificate for the purposes of cancellation or amendment, is treated as a criminal offence in terms of section 11 (4).

Section 12(2) provides:

'Any person who in any manner takes part in the management or control of a registered non-governmental organisation, knowing that such organisation is contravening the provisions of subsection (1) [carrying on activities except under registered name] shall be guilty of an offence and liable of a fine not exceeding level four or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.'

Upon deregistration of an NGO, restoration of registration is controlled by section 14, which provides for a reapplication process.

Section 15 provides for appeals from any decision of the Council relating to the rejection of an application for registration or to a cancellation, amendment, surrender or restoration of a certificate of registration. However, such appeal is to the Minister, who is responsible for the composition of the Council in the first place. Given the Council's advisory role to the Minister<sup>13</sup> and the fact that the Council will comprise ministerial appointees, it is debatable whether an independent judgment will be exercised on appeal.

#### C4. Part IV: Administration of Non-Governmental Organisations

Part IV of the Bill deals with the administration of NGOs and sets standards for the keeping of books, accounts and records.

However, section 17 provides:

‘No local non-governmental organisation shall receive any foreign funding or donation to carry out activities involving or including issues of governance.’

This far-reaching provision effectively means that foreign funding on any issue relating to issues of governance will effectively be prohibited. ‘Issues of governance’ includes ‘the promotion and protection of human rights and political governance issues’. Obviously, this definition is far reaching and could extend to any and all aspects of the work of the range of NGOs identified in the legislative definition of NGOs. It is certainly broad enough to permit the Executive or indeed the Council to reach a decision that the provision of humanitarian aid, involving as it does the promotion and protection of human rights, falls within the concept of ‘issues of governance’. This section could easily be used to prohibit aid from foreign countries that are critical of Zimbabwean policies or foreign aid to NGOs that are critical of governmental policies. This will no doubt affect a wide range of local and internationally funded NGOs currently providing humanitarian and relief aid in Zimbabwe, apart from those engaged in advocacy and human rights education, such as voter education.

While section 19 permits the establishment of NGO branch committees, section 20 permits the Registrar, after consultation with Council, to determine that any branch of an NGO ‘which is not subject to the control and direction of that organisation shall, for the purposes of this Act, be deemed to be an independent and separate non-governmental organisation’. It is not immediately clear what the purpose of this provision is, except perhaps to prevent NGOs from growing too large and establishing a national presence. Significantly, no criteria or other jurisdictional facts are specified in section 20 to guide the exercise of this far-reaching power. It is conceivable that this provision may be used to interfere with the internal affairs of an NGO and to fragment and divide organisations.

Section 21 provides for audits of accounts and a system of reporting within three months after the end of each financial year and consequential reporting to the Council.

Section 22 permits the inspection and examination of accounts at the instance of the Minister who may appoint any officer in the public service as an inspecting officer to undertake all aspects of investigations into the affairs or activities of NGOs, including examining all documents, books, accounts and other documents relating to the financial or other affairs of any NGO and must thereafter to report to the Registrar.

Clearly, the language of section 22 is far wider than the heading to that section which links such inspections to examination of accounts and financial affairs. However, the text of section 22 permits

inspectors ‘to inspect any aspect of the affairs or activities’ of any NGO, which obviously extends beyond mere examination of accounts. The Council is accordingly vested with extraordinarily wide powers of investigation which will render all activities of NGOs, including private, confidential or sensitive and strategic matters, open to scrutiny and investigation by government officials.

## **C5. Part V: Administration of Non-Governmental Organisations**

Section 23 provides far-reaching powers of investigation by the Council into ‘maladministration’. Maladministration extends beyond theft or misappropriation of funds to include:

- ‘(b) any improper conduct on the part of an officer, employee or member of the executive committee of a non-governmental organisation which –
  - (i) prevents the organisation from carrying out the objects for which it was registered; or
  - (ii) would justify the cancellation of the organisation’s certificate of registration in terms of section eleven;
- (c) any contravention of any provision of a code of conduct that may be prescribed.’

Manifestly, therefore, maladministration includes anything that might be perceived as undesirable or as improper conduct as described in the Council’s code of conduct or perceived to be by those in power.

Some reference is made in section 23 to the rules of natural justice and the right to be heard in the course of an investigation into an NGO but the ultimate appeal once more is to the Minister, subject to a further appeal to the Administrative Court against any decision of the Minister.

Subsection 24 deals with the suspension of an executive committee of an NGO and the appointment of trustees of NGOs at the instance of the Minister. This power may be exercised whenever an investigation has revealed serious maladministration in the NGO or:

- ‘It is in the public interest for all or any of the members of the organisation’s executive committee to be suspended.’

The concept ‘public interest’ is plainly wide and tantamount to an open licence to suspend executive NGO members and to replace them with state-appointed trustees. Against this backdrop, the right to be heard in later subsections may in practice mean very little. What is clear is that it will be easy for those in power to assume control of NGOs by suspending executive committee members and installing ‘trustees’.

Section 26 provides for general offences and penalties and provides wide-ranging criminal offences and penalties for failure to comply with provisions of the Act. The offences created are broadly framed and, in many cases their exact scope is unclear. For example, the Bill makes it an offence to breach a ‘code of conduct’ which is not detailed in the Bill. This runs contrary to the

principle of the rule of law, that law must be adequately accessible and sufficiently precise to enable the ordinary citizen to regulate his conduct in accordance with such law.

It is clear that this lack of precision in the wording of many of the offences created in this Act is designed to criminalise as broad a range of conduct and implicate as broad a range of persons as may be expedient to a government wishing to target specific organisations or individuals.

Section 27 deals with matters of evidence and provides certain presumptions to assist in the prosecution of criminal offences. Again, here it is notable that there is a deliberate reversal of the burden placed upon the State to prove culpability which goes against accepted standards for criminal law. The inclusion of such provisions violates the presumption of innocence and the right to a fair trial. It leads us to draw the inference that these provisions are designed to facilitate and secure convictions under this legislation.

Section 28 deals with the consequences of an unlawful collection of contributions. This includes the power of the Minister to direct that those funds be delivered to government. This will no doubt occasion concern amongst international donor organisations, given that funds intended to assist victims of state sponsored human rights violations may be appropriated by the state.

Section 29 gives the Minister the power to dissolve certain NGOs and dispose of its assets ‘if it ceases to function and the persons responsible in terms of its constitution for dissolving the organisation fail or are unable to dissolve it within six months thereafter.’

Section 31 provides far-reaching regulatory powers for the Minister to make regulations providing for all aspects of the activities of NGOs, including collection of contributions and ‘any other matter which in turns of this Act is required or permitted to be prescribed ... and generally for the better carrying out of the objects and purposes of this Act.’ This regulatory power is supported by the power to provide penalties for contraventions, which include imprisonment.

## **D. IMPLICATIONS OF THE BILL**

### **D1. Freedom of Association**

The right to associate freely is a key foundational value in any democracy. It is a right recognised and enshrined in section 21 of the Constitution of Zimbabwe.<sup>14</sup> Freedom to associate implies not only the right to commence an association, but also the right to continue that association. The Constitution of Zimbabwe permits derogation of the right to of free assembly and association only to the extent that such law or conduct is ‘reasonably justifiable in a democratic society’.

Having regard to the apparent purposes of the Bill and the manifest limitations on free association and assembly that its provisions entail, including the criminalisation of the free exercise of the basic individual right to associate with whoever one chooses and prohibition on foreign funding and foreign NGO activity in Zimbabwe. The government of Zimbabwe has not provided any compelling or legitimate justification for placing such severe restrictions on this basic right.

Therefore, it cannot be said that the Bill is reasonably justifiable in a democratic society.

In our view, therefore the Bill violates the Zimbabwean Constitution in numerous respects and, in addition, represents a flagrant disregard of Zimbabwe's regional and international obligations.

## D2. Democracy and Good Governance

The preamble to the Bill declares its purpose as being to provide for the registration of NGOs and 'to provide for an *enabling environment* for the operations, monitoring and regulations of *all* non governmental organisations' (emphasis added).

The expression 'enabling environment' is one that has gained currency in declarations and instruments of both the African Union and SADC.<sup>15</sup> In some instances the 'enabling environment' envisaged involves the enactment of appropriate legislation to give expression to the treaty obligations undertaken by assenting to declarations of the AU or SADC.<sup>16</sup>

The NEPAD Declaration on Democracy, Political, Economic and Corporate Governance<sup>17</sup>, commits members of the African Union to the promotion of democracy, good governance and the promotion and protection of human rights.<sup>18</sup>

In declaring their commitment to the protection and promotion of human rights, members states agreed to 'facilitate the development of vibrant civil society organisations, including strengthening human rights institutions'. In addition member states reaffirmed their support for the African Charter and the African Commission.

These commitments were carried further by the creation of an African Peer Review Mechanism by which member states would seek to ensure that policies and practices of participating states conform to the agreed standards contained in the Declaration on Democracy and Good Governance.

Although the Zimbabwean Government has not acceded to the Memorandum of Understanding entered into by states participating in the Peer Review Mechanism, it is nevertheless bound as a member of the African Union and NEPAD to give effect to the Declaration on Democracy.

As such its obligation to facilitate the development of vibrant organs of civil society is to create an 'enabling environment' for organs of civil society in which the fundamental right of persons to associate freely, to gather and to express themselves in and through organisations of their choice is embodied in domestic law.

It is remarkable and indeed self-defeating that the Zimbabwean Government seeks, through this legislation, to draw a distinction between governance and humanitarian issues, by permitting one form of foreign support and not the other. The thinking of most donors on these issues is that the matter of receiving foreign aid is inseparable from the matters of governance. Foreign aid in all its forms is viewed as a temporary solution, with the ultimate aim being long-term national security and prosperity, which cannot be attained without good governance. There is a real danger that, as a

consequence of this legislation, there will be massive loss of foreign aid to Zimbabwe, thus seriously worsening the human condition of many ordinary Zimbabwean people.

The right to freedom of association is embodied in numerous international instruments,<sup>19</sup> and these instruments provide the essential content of the domestic legislative environment that is envisaged by both the AU and SADC.

The UN General Assembly adopted Resolution 53/144 on 9 December 1998 dealing with ‘the declaration on the rights and responsibility of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms’ commonly known as the ‘Declaration on human rights defenders’.

This declaration obliges states to assist and promote the activities and functions of human rights defenders and other related NGOs the ultimate protection and realisation of human rights at the national and international levels. The Bill quite clearly undermines those objectives.

The African Commission on Human and People’s Rights at its 35th ordinary Session in the middle of 2004 reaffirmed the UN Declaration on Human Rights Defenders and adopted a resolution on human rights defenders in terms of which it recognised ‘the crucial contribution of the work of human rights defenders in promoting human rights, democracy and rule of law in Africa’. It also expressed concern about ‘the persistence of violations targeting individuals and members of their families, groups or organisations working to promote and protects human and people’s rights by human rights defenders in Africa.’

The African Commission on Human and People’s Rights is a monitoring body established by the African Union to promote and protect human rights on the African continent and has formally associated itself with the United Nations on the protection of NGO and human rights defenders. Once more, the Bill seeks to achieve precisely the opposite objectives and if anything flies in the face of regional standards for the protection and proliferation of human rights defenders and NGOs operating in the region.

In this instance the ‘enabling environment’ that the Bill seeks to establish constitutes an abrogation of the fundamental right to freedom of association.

Not only does the Bill provide far-reaching powers of control and investigation, it seeks to regulate all aspects of NGOs and, in particular, human rights and development organisations in Zimbabwe.

It does so, as the above outline of its provisions demonstrates, by compelling registration of organisations and criminalising non-compliance with the Bill; exercising executive control over the registration of organisations through a Council appointed by the Minister and dominated by Ministerial representatives; by restricting and controlling access to finance and by placing all aspects of the administration of private sector organisations under the control and supervision of Ministerial appointees who are granted boundless discretionary power through the provisions of this legislation.

A comparison of the Bill with the South African Non-Profit Organisations Act, No 71 of 1997 reveals the full extent to which the Zimbabwean Bill seeks to establish a stranglehold over ‘non-governmental organisations’. The South African Non-Profit Organisations Act provides for a voluntary system of registration with certain incentives for registering. It is credibly designed to facilitate and enhance NGO activity and section 3 thereof expressly records the state’s responsibility to non-profit organisations in the context of an ‘enabling environment’:

‘Within the limits prescribed by law, every organ of state must determine and coordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of non-profit organisations to perform their functions.’

In many respects, the Zimbabwe NGO Bill is the antithesis of this – it is self-evidently restrictive and prohibitive rather than ‘enabling’.

### D3. Challenging the Constitutionality of the Bill?

Although it is beyond the scope of this analysis to fully detail the social, political and legal context within which this Bill has been prepared, it is essential to note that it is one marked by a systematic assault on the civil and political rights of Zimbabweans,<sup>20</sup> the most notorious recent example relating to governmental control over the independent media in Zimbabwe. The Access to Information and Protection of Privacy Act, 2002, is one law in a series of laws passed in recent times, which effectively enable the Zimbabwean Government to exert a stranglehold over various forms of media, media associations and the free flow of information and reporting. Given the precedent of what a compulsory registration and regulatory regime meant for the media sector, it strengthens the fear that this legislation will be used to eliminate or constrain organisations viewed by the ruling government as being in opposition to government policies.

As the analysis of the Bill has demonstrated, it infringes the right to freedom of association, and indeed other rights, enshrined in the Zimbabwean Constitution. However, any constitutional challenge to the Bill is likely to be a protracted and difficult exercise. The approach of Zimbabwean Supreme Court in *Associated Newspapers of Zimbabwe (PVT) Ltd v Minister for Information and Publicity in the President’s Office and Others*, 2004 (2) SA 602, is instructive and indicative of the extent to which the doctrine of ‘rule of law’ in Zimbabwe has been subverted to ‘rule by law’.

In *Associated Newspapers*, a constitutional challenge to the Access to Information and Protection of Privacy Act, by an independent association of newspapers was dismissed because the applicants had not registered in terms of the very Act that they sought to have declared unconstitutional. In this regard, the Zimbabwean Supreme Court upheld a point *in limine* that:

‘The applicant is approaching this court with dirty hands and is not entitled to relief from this court ... [t]he applicant chose to disrespect the law by deliberately refraining from applying for registration as prescribed because it resolved unilaterally that it cannot, in its alleged conscience, obey such a law.’<sup>21</sup>

Effectively, this means that the law in Zimbabwe as it stands is that constitutional challenges to legislation such as the proposed Bill cannot be brought by those affected by the law until such time until they have in fact complied with the registration and other requirements of that law!<sup>22</sup>

The decision in *Associated Newspapers* thus means that any challenge by an NGO to the Bill, would first have to be preceded by the NGO bringing the challenge, having to comply with all aspects of the registration and other requirements of the Bill. Thus an NGO that is entirely reliant on international donor funds for humanitarian or other relief work in Zimbabwe would first have to comply with the prohibition on receiving international donor funds prior to challenging that very section! Obviously, that means that the constitutional challenge could never be brought.

## **E. CONCLUSION**

One of the commentaries provided to us records that the stated governmental objective is to fast track the Bill into law as soon as possible. If this is the case, it would support the inference that the Bill is nothing more than a further attempt by the Zimbabwean Government to exert a stranglehold on those perceived to be in opposition to government and government policies.

We are supported in that conclusion by the fact that President Mugabe is reported to have said on 20 July 2004, in his speech to Parliament on the new Bill:

‘Non-governmental organisations must be instruments for betterment of the country and not against it. We cannot allow them to be conduits of foreign interference in national affairs.’

More recently, the government Ministry which will be responsible for administering this legislation, the Ministry of Public Service, Labour and Social Welfare, issued a public statement, part of which disclosed that:

‘The mischief which the Government wants to rid is that of foreign donors employing local puppets or other to champion foreign values, much to the detriment of national security.’<sup>23</sup>

Clearly then, the Bill extends the scope of the Government’s assault on sources of opposition and information even further, namely to human rights groups and other organs of civil society.

In the ultimate analysis, not only is the Bill in flagrant violation of international and regional human rights standards and norms, it also represents a decisive rejection of the terms of the Constitution of Zimbabwe, which provide for the right to freedom of expression, association and assembly. That attitude can only be described as contemptuous of the rule of law and of regional and international standards of governance and of the protection of human rights.

24 August 2004

## Notes

- 1 We note, however, that the Executive Summary of the Report of the Fact-Finding Mission to Zimbabwe (24-28 June 2002) by the African Commission on Human and Peoples' Rights recorded in paragraph 6:

‘There has been a flurry of new legislation and the revival of the old laws used under the Smith Rhodesian regime to control, manipulate public opinion and that limited civil liberties. Among these, the Mission’s attention was drawn to the Public Order and Security Act, 2002 and the Access to Information and Protection of Privacy Act, 2002. These have been used to require registration of journalists and for prosecution of journalists for publishing “false information”. All these, of course, would have a “chilling effect” on freedom of expression and introduce a cloud of fear in media circles. The Private Voluntary Organisations Act has been revived to legislate for the registration of NGOs and for the disclosure of their activities and funding sources.’
- 2 ‘Issues of governance’ are defined as ‘... the promotion and protection of human rights and political governance issues’. This definition is important because section 9(4) which is a new section provides:

‘No foreign non-governmental organisation shall be registered if its sole or principal objects involve or include issues of governance.’

The prohibition on foreign NGOs is so extensive as to be almost prohibitive of foreign NGOs in their entirety.
- 3 Section 9(4).
- 4 Section 1: definition section.
- 5 Definition of NGO.
- 6 Section 17.
- 7 Section 27(2)(b).
- 8 This type of ‘reverse onus’ provision was declared unconstitutional by the South African Constitutional Court in several cases, *inter alia*, because it shifted the burden of proof of one of the elements of an offence which thereby violated the presumption of innocence and the inviolable principle that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt. See, for example, *S v Zuma* 1995 (2) SA 642 CC.
- 9 Section 23.
- 10 but does not include –
  - ‘(i) any international organisation or institution whose privileges, immunities rights and obligations in Zimbabwe are governed by the Privileges and Immunities Act [Chapter 3:03];
  - (ii) any governmental or quasi-governmental organisation or institution whose legal status is that of an instrumentality or arm of any foreign government;
  - (iii) any institution or service maintained and controlled by the State or a local authority; or
  - (iv) any religious body in respect of activities confined to religious work; or
  - (v) any educational trust approved by the Minister; or
  - (vi) any body or association of persons, corporate or unincorporate, the benefits from which are exclusively for its own members; or
  - (vii) any health institution registered under the Health Professions Act [Chapter 27:19], in respect of activities for which it is required to be registered under that Act; or
  - (viii) any body or association in respect of activities carried on for the benefit of a hospital or nursing home which is approved by the Minister; or
  - (ix) any political organisation in respect of work confined to political activities; or
  - (x) the Zimbabwe Red Cross Society established by the Zimbabwe Red Cross Society Act [Chapter 17:08]; or
  - (xi) such other bodies, associations or institutions as may be prescribed; ...’.
- 11 Section 3(2)(a).
- 12 Section 10(7).
- 13 Section 4(c).
- 14 Section 21 provides:
  - ‘(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.
  - (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.
  - (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
    - (a) in the interests of defence, public safety, public order, public morality or public health;
    - (b) for the purpose of protecting the rights or freedoms of other persons;
    - (c) for the registration of companies, partnerships, societies, or other associations of persons, other than political parties, trade unions or employers’ organisations; or
    - (d) that imposes restrictions on public officers; except in so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
  - (4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.’
- 15 The SADC Social Charter adopted by the SADC Council of Ministers, commits member states to creating an ‘enabling environment’ consistent with the ILO Conventions on freedom of association, the right to organise and collective bargaining. Many of the obligations created by the terms of the Social Charter are directly in conflict with the regime of control that the Bill seeks to establish for NGOs.

- 16 One of the recommendations of the African Commission on Human and People's Rights Fact Finding Mission to Zimbabwe (24-28 June 2002) was recorded on p18 of the Executive Summary as follows:
- 'The African Commission believes that as a mark of goodwill, government should abide by the judgments of the Supreme Court and repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion. The Public Order Act must also be reviewed. Legislation that inhibits public participation by NGOs in public education, human rights counselling must be reviewed. The Private Voluntary Organisations Act should be repealed.'
- 17 Adopted by Heads of State and Governments participating in the augural Assembly of the African Union, Durban, July 2002.
- 18 Articles 13, 14 and 15 of the Declaration.
- 19 The right to freedom of association is recognised in each of the Universal Declaration of Human Rights (Article 20), the International Covenant on Civil and Political Rights (Article 22), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11) and the African Charter on Human and People's Rights (Article 10).
- 20 *Supra*, note 1.
- 21 At 605G-I.
- 22 *The Chronicle*, Zimbabwe, 23 August 2002 'NGO Bill to ensure Accountability'