

ZIM NGO BILL: DANGEROUS FOR HUMAN RIGHTS DEFENDERS
Betrays High Degree of Gvt Paranoia and Contempt For the Regional and International Community. By Arnold Tsunga and Tafadzwa Mugabe¹

Introduction

The government of Zimbabwe is on the verge of promulgating a bill titled Non-Governmental Organisation (NGO) Bill into law to provide for the “operations, monitoring and regulation of all non-governmental organisations.”² The bill once promulgated will be administered by the Minister of Public Service Labour and Social Welfare or any other Minister that the President appoints to do so. The government argues that the proposed law is meant to protect public interest by ensuring that NGOs are governed and administered properly and use donor and public funds for the objects for which they were established. An analysis of the draft bill will show on the contrary that this is a political gimmick that is meant to administratively create criminals out of hrds and NGOs so as to provide excuses for intrusion, clamp down and closures of NGOs.

Observations on the Draft NGO Bill

In terms section 2 of the draft bill, **NGO “ means** 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 any of the material, mental, physical or social needs or persons or families
- b) the rendering of charity to persons in distress
- c) the prevention of social distress or destitution or 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 provision of funds for legal aid
- f) the prevention of cruelty to or the promotion of the welfare of animals
- g) the promotion of 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 nay of the foregoing”

It is quite self evident that from the above definition that every NGO and human rights defenders “hrds” are covered directly by the NGO legislation. Since human rights are universal, interrelated and interdependent it is quite clear that by using the phrase “*promoting of and protection of human rights*” the government has targeted and included organisations that promote and protect civil and political as well as economic, social and cultural rights in the net of organisations that it wants to control.

Section 9 of the proposed NGO Legislation provides that

“1) No non-governmental organisations shall

- a) Commence or continue to **carry on its activities** or

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² Preamble to the Draft Bill.

b) **seek financial assistance from any source** (own emphasis)

Unless it has been registered in respect of the particular object or objects in furtherance of which it is constitutional

2). No person shall collect contributions from the public except in terms of this Act

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

This section makes it compulsory for all NGOs to register if they are to carry out any activities should the bill be promulgated into law. The section also creates a minefield for possible management boards of NGOs as it creates personal criminal sanctions against the board members in their individual capacities should they sit on the board of an unregistered NGO.

The proposed bill also creates a NGO Council composed of 5 civil society representatives and 9 government representatives, all appointed by and at the discretion of the Executive. The functions of the council shall *inter alia* be:

- a) "... to consider and determine every application for registration and every proposed cancellation or amendment of a certificate of registration and
- b) to conduct investigations into the administration and activities of non governmental organisations... and to take such disciplinary or other action as may be appropriate...
- c) to formulate rules for the registration or deregistration of non governmental organisations
- d) to formulate code of conduct for non-governmental organisations".

Part of the details which Directors of NGOs will be compelled to state in the applications for their organisations to be registered by the NGO Council include, in terms of section 10 of the bill "the names of, nationality and addresses of its promoters; its sources of funding; its plan of action or projected activities for the next three years; the procedure for convening meetings; the terms and conditions of office bearers and removal of such office bearers from office; disclosure provisions for all foreign donations to the organisation;" These requirements are needlessly intrusive and show an appetite on the part of government to use the law to as a tool of intelligence against the NGOs and their boards and management. The provisions are sinister.

On the issue of funding, section 17 of the bill provides that "*No local NGO shall receive any foreign funding or donation to carry out activities involving or including issues of governance*". Issues of governance are defined in section 2 as "*includes the promotion and protection of human rights and political governance issues*". In other words, if the impact of the provision is to be understood correctly, then section 17 must be read as follows: ***-No local NGO shall receive any foreign funding or donation to carry out activities involving or including the promotion and protection of human rights and political governance-*** Given that the universally accepted perception of human rights is broad enough to cover civil and political as well as

economic social and cultural rights, it is clear that the government could ban any foreign funding of any and every disliked NGO using this provision if the bill is promulgated into law. In the event that an NGO gets funding and it is deemed that the funding is unlawful by the government, the bill provides in section 28 that the Minister may order repatriation of the money back to the funding partner or may take possession of the money, securities or property and ultimately it may be paid over to the Guardian's Fund. At dissolution, the property of NGOs may be taken over by the State in terms of section 30 of the bill. The government has therefore not only angled itself for a serious intrusion into the affairs of NGOs in order to paralyse them and hrds, but also positioned itself to illicitly benefit by expropriation of assets of disliked NGOs in the real and likely event of forcible closures under the pretext that the NGOs have committed "administrative illegalities".

General Comments on the Bill, NGOs and Hrds

The intended Non-Governmental Organisations (NGO) bill of 2004 in its present format constitutes a grave abrogation by the government of Zimbabwe of its responsibilities to the citizens of Zimbabwe as well as its obligation to the regional and international community. The NGO bill is meant to strangle activities of human rights defenders (hrds) in general. Hrds are usually employees of NGOs or use NGOs as a vehicle or mechanism to achieve their goals of promoting and protecting human rights. It follows that the real targets of attack by the government of Zimbabwe in contemplating such an obnoxious piece of legislation are the hrds themselves. Over the last few years the international community has increasingly acknowledged the important role that hrds play in the realisation of all human rights be they economic, social and cultural rights or civil and political rights. The international community has identified hrds as anyone who acts to address any human right or rights on behalf of individuals or groups. This is the core business of NGOs and their employees. In this context the international community has generally accepted that in the realisation of all human rights the NGOs and hrds play a critical role. The range of hrds is so wide that it includes people covering a wide spectrum of issues such as lobby activities against arbitrary arrest, detention, summary executions, organised violence and torture, female genital mutilation, forced eviction, electoral issues, prisoners rights, access to health care, children's rights, fighting against illiteracy, fighting against hunger and starvation, fighting for environmental protection, to fighting against HIV/AIDS.

The strange paradox is that hrds in every region of the world but mainly in dictatorial and undemocratic states where they are needed most have become themselves the targets of well orchestrated, systematic and sustained persecution and reprisals at the hands of the state or appendages acting with the acquiescence of the state. The persecutions have taken many forms including torture, executions, threats (of death or arrests), harassment, defamation and character assassination in the State controlled media, false arrests, detention, false trials, arbitrary searches, administrative punishments and restrictions in the enjoyment of the universally recognised rights and fundamental freedoms such as the right to freedom of expression, assembly, association, movement and in many instances protection of the law as the law is applied selectively. The persecution of hrds is normally targeted at the hrds themselves or their organisations mainly NGOs, Churches, Law Firms or Societies,

the Judiciary, Media Houses, Trade Unions or other professional bodies promoting and protecting human rights such as the Medical Profession.

The United Nations Perspectives on NGOs and hrds

The United Nations has recognised the important role that hrds play in the promotion and protection of human rights by acknowledging the following realities;

- ❖ “Implementation of international human rights standards within countries depends to a great extent on the contribution of individuals and groups (working inside as well as outside the state and support to these human rights defenders is fundamental to achieving universal respect for human rights;
- ❖ Where Governments, national legislation, the police, the judiciary and the State as whole do not provide adequate protection against human rights violations in a country, human rights defenders become the last line of defence;
- ❖ Human rights defenders are often the target of human rights violations precisely because of their human rights work and they themselves require protection.”³

As a result of this recognition the UN General Assembly adopted resolution 53/144 on 9 December 1998, 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 hrds” This declaration is not a creation of new rights but merely an articulation of “existing rights in a way that makes it easier to apply them to the practical role and situation of hrds. It gives attention, for example to access to funding by organisations of hrds...the Declaration outlines some specific duties of the State”⁴

Some of the rights of hrds that are provided for under the Declaration on hrds include the right to:

- ❖ To seek the protection and realisation of human rights at the national and international levels;
- ❖ To conduct human rights work individually and in association with others
- ❖ To form associations and non-governmental organisations
- ❖ To meet or assemble peacefully
- ❖ To seek, obtain, receive and hold information relating to human rights
- ❖ To develop and discuss new human rights ideas and principles and to advocate their acceptance
- ❖ To submit to governmental bodies and agencies and organisations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may impede the realisation of human rights
- ❖ To offer and provide professionally qualified legal assistance or other advice and assistance in defence of human rights
- ❖ To attend public hearings, proceedings and trials in order to assess their compliance with national law and international human rights obligations

³ Fact Sheet 29 Human Rights Defenders: Protecting the Right to Defend Human Rights; United Nations

⁴ Fact Sheet 29 (supra)

- ❖ To benefit from an effective remedy
- ❖ To the lawful exercise of the occupation of profession of human rights defender
- ❖ To effective protection under national law in reacting against or opposing, through peaceful means, act or omissions attributable to the State that result in violations of human rights;
- ❖ To solicit, receive and utilise resources for the purposes of protecting human rights (including the receipt of funds from abroad)⁵

Some of the duties of the State provided for in the Declaration are the duty:

- ❖ To protect, promote and implement all human rights
- ❖ To ensure that all persons under its jurisdiction are able to enjoy all social economic, political and other rights and freedoms in practice
- ❖ **To adopt such legislative, administrative and other steps as may be necessary to ensure effective implementation of rights and freedoms** (our own emphasis)
- ❖ To provide an **effective remedy** for persons who claim to have been victims of human rights violation
- ❖ To conduct prompt and impartial investigations of alleged violations of human rights
- ❖ To take all necessary measures to ensure the protection of every one against violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration
- ❖ To promote public understanding of civil, political, economic social and cultural rights;
- ❖ To ensure and support the creation and development of independent national institutions for the promotion and protections of human rights such as ombudsmen or human rights commissions.
- ❖ To promote and facilitate the teaching of human rights and at all levels of formal education and professional training.⁶

African Regional Perspectives on NGOs and Hrds

At the regional level, the African governments have acknowledged the importance of NGOs and hrds in the promotion and protection of human rights.

The African Commission on Human and Peoples' Rights meeting at its 35th Ordinary Session held from 21st May to 4th June 2004, in Banjul, The Gambia reaffirmed the UN Declaration on hrds and adopted a resolution on hrds in terms of which it recognised "the crucial contribution of the work of human rights defenders in promoting human rights, democracy and the rule of law in Africa" and expressed serious concern "about the persistence of violations targeting individuals and members of their families, groups or organisations working to promote and protect human and peoples' rights and by the growing risks faced by human rights defenders in Africa" further "noting with deep concern that impunity for threats, attacks and acts of intimidation against human rights defenders persists and that this impacts

⁵ Fact Sheet 29 (Supra) See articles 1,5,6,7,8,9,11,12 and 13 of Declaration

⁶ Fact Sheet 29 (Supra) See articles 2,9,12,14 and 15 of Declaration of hrds.

negatively on the work and safety of human rights defenders”. Consequently the ACHPR appointed “Madam Jainaba Joam as a Special Rapporteur on Human Rights Defenders in Africa for a period of two years with *inter alia* the mandate to cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders and other stake holders; [and to] raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa”. It is therefore quite evident that the ACHPR as the monitoring body established by the AU to promote and protect human rights on the African continent has firmly associated itself with the UN on the protection of the operating space of hrds and NGOs in the world. There is no doubt that the proposed NGO legislation is contrary to international standards and norms.

At the political level the Organisation of African Unity called on Member States “to take appropriate steps to implement the UN Declaration on Human Rights Defenders in Africa”. This was in Mauritius in what is now known as the Grand Bay (Mauritius) Declaration. The African leaders also adopted the Kigali Declaration, which recognises “the important role that the human rights defenders play in the promotion and protection of human rights in Africa”. At the recent AU Heads of State and Government Assembly held in Addis Ababa July 2004, the AU adopted a resolution on the establishment of an Economic and Social Council (ECOSOC Council) comprising of Civil Society Organisations in recognition of the important role that civil society plays in promotion and protection of all human rights. The AU adopted NEPAD at its Maputo summit as the official programme for Africa’s economic revival. NEPAD emphasises the importance of observance of human rights, good governance and the rule of law as a basis for sustainable economic development. NEPAD specifically realises and acknowledges the importance of NGOs and civil society in sustainable economic development. It follows therefore that the way that the ACHPR has looked at the question of hrds and NGOs is consistent with the political expectations and expressions by the AU leaders. The proposed NGO bill falls way short of the commitments that the Zimbabwean government has to the rest of the regional and international community.

Why the Government of Zimbabwe would pass such Legislation.

It is submitted that this new law is motivated by a number of factors, some of which are

- 1) A desire by government to restrict democratic space and reduce scrutiny of its human rights record.
- 2) A desire by government to further limit enjoyment of universally recognised rights and fundamental freedoms by the people of Zimbabwe.
- 3) To create a black out of news on Zimbabwe filtering out to the regional and international community.
- 4) To reinforce an uneven playing field in matters of political governance and maintain the *status quo*.

The immediate motivation to fast track the bill into law before the 2005 Parliamentary Elections seems to be particularly a vindictive and punitive response to the adverse report by the African Commission on its fact finding mission to Zimbabwe.

Evidence that the government was bent on targeting NGOs that they disliked first manifested itself in real terms in September 2002 when the government placed adverts

in the local newspapers calling on NGOs to register in terms of the PVO Act when it was not necessary for NGOs to do so in law and in fact. The government has frequently accused local NGOs and hrds as working against the interests of Africa and as agents of imperialism.⁷ The September 11 2002 events in the USA have also been taken advantage of by the government to apply pressure on hrds in Zimbabwe. The use of the word “terrorists” is now quite generous to include some of the work of hrds in Zimbabwe. An example of government propaganda against hrds and civil society comes in the form of an advert the Department of Information in the Office of the President and Cabinet placed in the public media after mass stayaways, which reads;

“On March 18 and 19, terrorists, thugs and lawless elements using brutal tactics of Rhodesian Selous Scouts conspired with so called civil society, opposition press, self-proclaimed human rights activists and some church groups to unleash violence and thuggery on ordinary people under the guise of mass action.

Where and what is the connection between human rights and the mass violence of attempting to derail a passenger train ferrying innocent people? That is sheer massive violence!

TIME NOW FOR ACTION AGAINST MASS VIOLENCE!”⁸

On 8 August 2003 the state controlled Media Information Commission’s Dr Mahoso alleged that MISA, by not registering under AIPPA “have defied legislation and they too have the status of an outlaw”.⁹ Further on 23 August 2003 the Justice Minister said NGOs ought to be accountable to the state. This was because government perceived NGOs as partner of the opposition.¹⁰ On 5 April 2004, the state controlled The Herald reported that “the opposition MDC was heavily funded by NGOs from its inception in 1999 and many church leaders have been using the pulpit to further the ambitions of the opposition party...The bill would require all churches and NGOs that come into the country to follow the government structures when doing their work” citing Minister Mangwana in support of the story.¹¹

The recent adverse report by the ACHPR on the Human rights situation in Zimbabwe is also used as justification to clamp down on NGOs. According to the Herald of 6 July 2004 “the report was similar to reports produced by the British funded Amani Trust, which is well known for its anti-Zimbabwe stance and falsifying the situation in the county”. The Sunday Mail of 11th July 2004 carried a story on how the Zimbabwe Association of Doctors for Human Rights (ZADHR) was a political outfit which was instrumental in the compilation of the ACHPR’s report on gross human rights abuses

²⁹ The Daily Mirror 23/04/03; The Herald 23 April 2003; The Sunday Mail 20 April 2003 Financial Gazette 24/April 2003.

³⁰ The Daily Mirror 23/04/03; The Herald 23/04/03; The Sunday Mail 20/04/03 Financial Gazette 24/04/03

⁹ Zimbabwe Independent August 8, 2003 p3

¹⁰ The Herald quoted the Minister of Justice Patrick Chinamasa as follows, “NGOs should be accountable to the government of the day. We cannot allow a situation where NGOs operate in our country like misguided missiles”

¹¹ The Herald 5 April 2004 quoted Minister Of Public Service Labour and Social Welfare, Paul Mangwana as follows “Some NGOs and churches are causing too much confusion in the country because they are converting their humanitarian programmes into politics...The government cannot allow that to happen, so we saying they should go under scrutiny where we revise all the modalities of their operations in the country”

in Zimbabwe¹². Another state controlled newspaper, The Sunday Mail of 11 July 2004 had its lead opinion state that “Those who followed the debate regarding the selection of those commissioners who visited Zimbabwe and the Secretariat staff will have realised the dangers which would have emanated from the composition and the likelihood of the Zimbabwean opposition and “NGO” sector influencing the report or re-writing the report. Reading through the report, one detects the hand of a known Zimbabwean lawyer and the Amani racists”¹³. The comment in the 11 July 2004 edition of the Sunday Mail alleged that Nordic NGOs and the British funded the African Commission.¹⁴ On 18 July 2004 the Sunday Mail reported that the Minister of Local Government Public Works and National Housing had accused NGOs of creating parallel governance structures in their areas of operation in an effort to help the opposition to destabilise the country instead of fulfilling their mandate.¹⁵

Implications for NGOs

It is to be noted that this is not the first time that the government of Zimbabwe has promulgated a piece of legislation in order to curtail the work of hrds and the organisations in which they work. The most infamous piece of legislation that has similar provisions and purpose as the draft NGO Bill is the Access to Information and Protection of Privacy Act (AIPPA) which was promulgated on 15 March 2002 a few days after the disputed Presidential election results were announced. The temptation to protest against this bill, which the ANZ did in relation to AIPPA is high but the price like in the ANZ can also be high. As Geof Feltoe¹⁶ noted

“after the Access to Information and Protection of Privacy Act came into operation, the ANZ believed that its fundamental rights would be seriously prejudiced if it registered under the Act. It was of the opinion that if it subjected itself to the controls contained in the Act its right to freedom of expression would be drastically curtailed and it would be hamstrung in disseminating information to its readers. It believed that the Minister and the Commission responsible for applying the controls were partisan and highly biased against the private media in general and the *Daily News* in particular

¹² The news paper reported that “The Zimbabwe Association of Doctors for Human Rights, an obscure political group of medical doctors has renewed efforts to join the Zimbabwe Medical Association amid reports that ZADHR was instrumental in the compilation of the African Commission on Human and Peoples Rights report alleging human rights abuses in Zimbabwe...The Zimbabwean government has accused some western governments, most notably those of Britain and the USA, of working with lawyers, NGOs some journalists in the privately owned press and civic groups to demonise the government in efforts to effect an illegal regime change. The ZADHR is believed to be one of the vehicles through which the forces are trying to spread malicious reports about the human rights situation in the country”

¹³ The Sunday Mail quotes the ZANU PF senior member William G Nhara as saying “ Konare, a French and a latter-day USA protégé, is dancing to the tune of his USA and EU masters... What is disturbing about the early days of Konare in office is that he demonstrates a complete naivety about African politics...There is an axis of neo-colonialism permeating the structures of the AU and the real Africans, like Zimbabweans should stand up and fight... The current axis of evil at the AU involve Konare (Mali), Mazimaka (Rwanda) Deputy Chair, and Dr Vogt (Nigeria) Cabinet Director... What has become apparent is the fact that Southern Africa is of no consequence to the developments at the AU secretariat.”

¹⁴ The state controlled Sunday Mail reported, “The language and conclusion reached by the Commission are no different from that of Blair and his puppets in this country.”

¹⁵ The Sunday Mail of 18 July 2004 citing Minister Chombo had the headline “Fall in Line or close, Govt tells NGOs. Unregistered and political set-ups face stern action.”

¹⁶ Geof Feltoe is a professor at law lecturing at the University of Zimbabwe.

and that the controls would therefore be applied in a biased and prejudicial way against it.

The ANZ did not, however, adopt the stance that it would simply ignore the new law and dare the authorities to prosecute them. Instead it approached the Supreme Court for a ruling upon the constitutionality of the law. Essentially it challenged the provisions relating to the registration of newspapers and control of newspapers by the government appointed Media and Information Commission. It also raised objections to the requirement for registration that it disclose its private business operations and financial details, and that it submit the curricula vitae of all its managers and directors, and to disclose the political affiliations.”

The Supreme Court ruled that the ANZ had openly defied the law by failing to register under AIPPA as required and therefore had approached the Court with “dirty hands”. Consequently the Supreme Court refused to grant the ANZ audience in the constitutional challenge and ruled that the ANZ was operating outside the law. The Court operated on the basis that once a law is promulgated, then there is a presumption that it is constitutional unless the Court rules it to be unconstitutional. In the circumstances, citizens are compelled to comply with such law even if they believe it to be unconstitutional before they can be given audience to challenge it in the Supreme Court. Thereafter the police promptly sealed off the premises of ANZ and its printing press and forcibly stopped publications of the Daily News and The Daily News on Sunday. In other cases, BSA was used to forcibly shut Capital Radio, Joy TV and Mhunumutapa broadcasters leaving the state controlled ZBC with the monopoly over electronic media. AIPPA was also used with judicial sanction to close another independent newspaper, The Tribune.¹⁷

In the circumstances if the bill is enacted into law, then the implications are that all NGOs will have to register in terms of the NGO law, failing which they will be closed. It will not matter that the NGOs view the registration requirement as unlawful because in terms of the “dirty hands” doctrine, they will be required to first register before they can be entitled to challenge the legislation in a court of law. Further, failure to register will open up senior employees and board members of unregistered NGOs to personal criminal sanctions.

Conclusion

The proposed NGO Legislation is calculated at limiting the individual as well as the collective enjoyment of universally recognised rights and fundamental freedoms of expression, assembly and association of the citizens of Zimbabwe. This is all in glaring contravention of the Constitution of Zimbabwe, which provides for the right to freedom of expression, association and assembly. It is regrettable that the

¹⁷ On 23 July 2004, ZLHR issued a statement on the closure of the Tribune Newspaper part of which read “The decision to uphold the Tribune’s closure by the courts is in this context regrettable and seriously undermines the enjoyment by Zimbabweans of rights enshrined in the constitution and international instruments that Zimbabwe has signed and ratified. That another independent newspaper is forcibly closed within 1 year of the closure of another in circumstances where a court judgement will be used as justification therefor is a serious indictment on the independence of the judiciary in Zimbabwe.”

government of Zimbabwe is deciding to pass such a law when there has been substantial condemnation of its predecessors the Public Order and Security Act (POSA)¹⁸, the Access to Information and Protection of Privacy Act (AIPPA), the Broadcasting Services Act (BSA). Further the government just recently promulgated the Criminal Procedure and Evidence Amendment Act (CPEAA), which has the effect of ousting the power of the courts to grant bail in certain cases and is susceptible to selective application to target perceived government opponents. All these Acts, which constitute an axis of repression, complement the policy of government aimed at systematically clamping down on hrds and shrinking the democratic space in which human rights defenders operate. The importance of enjoyment of the right to freedoms of assembly and expression was aptly summed up in *South African National Defence Force Union Vs Minister of Defence* as follows:

*‘these rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, **but to establish associations and groups of like-minded people to foster and propagate such opinions.** The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even when these views are controversial’¹⁹*

The government’s intention to pass such legislation coupled with its reaction to the African Commission’s report betrays a high degree of government paranoia to hrds, civil society (NGOs) and contempt for the regional and international community.

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¹⁸ ZLHR reported in its annual report on the Human Rights Defenders Project that a total of 274 human rights defenders were arrested and detained under POSA and while 332 under the Miscellaneous Offences Act in 2003

¹⁹ See *South African National Defence Force union Vs Minister of Defence* 1999 (4) SA 469 (CC)