



INTERNATIONAL CENTER FOR CIVIL SOCIETY LAW

**304 Kyle Road
Crownsville, MD 21032, USA
+1 410 923-0543 (tel and fax)
www.iccsl.org**

Zimbabwe's Draft Non-Governmental Organisations Bill, 2004¹

**Comments by the
International Center for Civil Society Law²
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Introduction. In the past 15 years, there has been a growing awareness that basic human rights, such as the rights to freedom of expression and

¹ The text of this Bill can be found at:

http://www.kubatana.net/html/archive/legisl/040731ngobill.asp?sector=LEGISL&range_start=1.

² The International Center for Civil Society Law (ICCSL) is the only international organization working full-time on a wide range of issues related to the legal framework for civil society in countries around the world. ICCSL publishes the INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW (IJCSL) and the IJCSL NEWSLETTER (IJCSL-N). These are unique resources, providing up-to-date electronic access to emerging legal developments regarding civil society. IJCSL can be accessed at www.law.cua.edu/students/orgs/ijcsl/. IJCSL-N is available to subscribers on a monthly basis by email. For further information on ICCSL and its programs, consult www.iccsl.org (in development) or send an email to simon@law.edu.

association, are directly related to the creation of civil society. In turn, there is an increasing understanding that an independent and vigorous civil society is essential to social and economic development and the long-term success of democracy. Further, laws permitting, encouraging, and protecting civil society, when combined with other laws facilitating citizen participation—such as freedom of information and “government in the sunshine” laws—are essential to the promotion of accountability, transparency, and good governance—of government and all other institutions that affect the public interest.

The purpose of the International Center for Civil Society Law (ICCSL) is to promote knowledge and understanding of legal developments in these areas of law (collectively “civil society law” or “CSL”) and to provide information and support for the continued development of civil society law throughout the world. ICCSL accomplishes its purpose through an integrated program of publications, education, and professional development, international symposia, and technical assistance. The scope of its mandate indicates its uniqueness, and it has attracted to its ranks scores of highly committed civil society practitioners and academics from every region and continent. Many of them have joined in the preparation of these comments or have asked to be associated with them; ICCSL extends its particular thanks to the following individuals: Michel De Wolf (Belgium); Daniela País Costa (Brazil); Noshir Dadrawala (India); and Richard Rosenthal (South Africa). The principal drafters of the Report are Paul Bater, an independent legal consultant working on civil society law issues in the United Kingdom, Professor Karla W. Simon, of the Catholic University of America School of Law in the United States, and Leon E. Irish, President of ICCSL and Visiting Professor of Law at Central European University, Hungary.

This Report includes Comments, which address provisions of the Draft Non-governmental Organisations Bill, 2004 (the Draft Bill). ICCSL understands the Draft Bill is to be tabled in the next session of Parliament. The Draft Bill would replace the existing Private Voluntary Organisations (PVO) Act (1997).

The NGOs in Zimbabwe developed draft legislation within the past two years, which would have provided politically protected space for NGOs,³ but it appears that their draft was ignored by the government as it developed the Draft Bill. The memorandum explaining the Government's Draft Bill claims that it will provide "an enabling environment for the operations, monitoring and regulation of all non-governmental organizations." As this Report will demonstrate, the opposite is true.

The evident aim of the government's move to replace the PVO Act with the Draft Bill is to control NGOs and other civil society organizations in Zimbabwe, to prevent them from engaging in criticism of the current government, and to prevent their access to foreign funds.⁴ Specifically under Section 17 of the Draft Bill, both NGOs and churches⁵ will be forbidden by the law to receive foreign funding "to carry out activities involving or including "issues of governance," which the Draft Bill states includes "promotion and protection of human rights and political governance."⁶ The restrictions in the

³ See Jonah Mudehwe, "Comments on the Collaborative Efforts with the Zimbabwean Government and NGO Legislation," in 1 INT'L J. CIVIL SOC. L. 16 (October 2003), *available at* www.law.cua.edu/students/orgs/ijcsl/, which discusses the draft of the National Association of Nongovernmental Organisations (NANGO) and provides a link to it. Most recently NANGO has questioned the government's draft law. See IRIN News at http://www.irinnews.org/report.asp?ReportID=42806&SelectRegion=Southern_Africa&SelectCountry=ZIMBABWE.

⁴ For a discussion of the political aspects of the legislation, see Hassan Lorgat, "Zim NGOs strangled," in the MAIL & GUARDIAN print edition for August 16, 2004, available at http://archive.mg.co.za/MGArchive/FrameSet.asp?xhitlist_q=NGOs+Zimbabwe&f=xhitlist&xhitlist_x=Advanced&xhitlist_s=contents&xhitlist_d=PrintEdition&xhitlist_hc=&xhitlist_xsl=xhitlist.t.xml&xhitlist_vpc=first&xhitlist_sel=title%3Bpath%3Brelevance-weight%3Bcontent-type%3Bhome-path%3Bhome-title%3Btitle-path&vid=MailGuard:MailGuardView&nusername=MailGuard&npassword=MailGuard.

⁵ One of the current government's most persistent critics has been the Roman Catholic Archbishop of Bulawayo, Pius Ncube, who is a prominent advocate for the human rights of ordinary Zimbabweans. The application of the law to churches is made clear by its application to religious bodies except to the extent their activities are "confined to religious work." Section 2's definition of "non-governmental organisation." In addition, it must be noted that as this draft developed it was first called the "NGOs and Churches Bill." As the NEW YORK TIMES pointed out in its recent profile, Archbishop Ncube has raised considerable sums from foreign contributors for a legal defence fund for Zimbabweans who allege human rights abuses. See NEW YORK TIMES, August 28, 2004, p. A4.

⁶ Section 2 of the Draft Bill.

Draft Bill will apply to both formal and informal associational activities other than those of a purely private nature,⁷ and the law will give essentially unbridled discretion to the government to regulate and control the activities of NGOs and the “governance-related” activities of churches. Specific comments on the various provisions are provided in this Report. Before looking into specific issues in the Draft Bill, however, the Report first details the protections afforded to the internationally recognized freedoms of association and expression and how these apply to Zimbabwe.

1. Existing Legal Protections for Civil Society in Zimbabwe.

Relevant in assessing the Draft Bill are the constitutional protections in Zimbabwe as well as the international and regional human rights protections for the rights to freedom of association, peaceful assembly, and expression under the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (ACHPR), both of which have been ratified by Zimbabwe. Established principles of international and constitutional law make it clear that the Draft Bill violates the standards for protection of the rights to freedom of expression, association, and peaceful assembly, internationally, in the region, and in Zimbabwe.

First, as to *Zimbabwe’s laws themselves: the Constitution of Zimbabwe enshrines the freedom of association in Article 21⁸ and the freedom of expression in Article 20.⁹ As*

⁷ See the discussion below of the way in which the Draft Bill defines “non-governmental organisation.”

⁸ 21) Protection of freedom of assembly and association (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.

<http://www.parlzim.gov.zw/Resources/Constitution/constitution.html>.

⁹ 20) Protection of freedom of expression (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to

comments of the Legal Resources Foundation (LRF) on the Draft Bill make clear, it is entirely consistent with these constitutional protections to require that NGOs be legally registered in Zimbabwe if they wish to obtain legal entity status. The LRF comments go on to say that “it ...follow[s] that it would be constitutional to provide for some mechanism for registration and a person or board to supervise the process. However, there is no restriction in the Constitution on the purposes for which an association may be formed. The only restrictions that may be imposed under any law are those ‘in the interests of defence, public safety, public order, public morality or public health.’ These are similar to the permissible restrictions on freedom of expression.”¹⁰

This statement is consistent with the GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, published by the Open Society Institute in March 2004 (hereafter OSI Guidelines).¹¹ According to the OSI Guidelines Section 2.2, the acquisition of legal status must not be a prerequisite for the exercise of the freedom of association. In addition, even though access to certain government privileges may be conditioned on the formation of a legal entity, it is impermissible to discriminate among organizations seeking to become legal

say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence. *Id.*

¹⁰ See Comments of the Legal Resources Foundation of 27 July 2004, available on the Kubatana website at <http://www.kubatana.net/html/archive/hr/040727lrf.asp?sector=HR>. The Government of Zimbabwe might seek to argue that the Draft Bill, which deals with registration of NGOs, does not violate Section 21(1) because Section 21(3) specifically states that “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 . . . (c) for the registration of companies, partnerships, societies or other associations of persons . . .” The exception in Section 21(3), however, applies only “except 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.” As the text makes clear, it is not reasonably justifiable in a democratic society to place all formal and informal associational activity under the discretionary control of the government.

¹¹ The OSI GUIDELINES book is the only authoritative international publication that considers appropriate rules for registration, operations, and oversight of civil society organizations (CSOs) around the world. The book is available for free from ICCSL or the Open Society Institute; it can be accessed online and downloaded at http://www.soros.org/resources/Sections_publications/publications/lawguide_20040215/osi_lawguide.pdf.

entities in terms of their purposes except to the extent international standards for restrictions on the freedom of association are met. It seems clear, therefore, that the requirements contained in the Draft Bill that any formal or informal associational activity must be registered in order to operate (Section 9 (1))¹² and that any formal or informal associational activity that is not conducted exclusively by permanent residents or citizens of Zimbabwe cannot be registered if their sole or principal objects involve or include issues of governance (Section 9 (4)) would violate the Constitution of Zimbabwe if the Bill is passed into law as currently drafted.¹³

Second, in addition to protecting these rights in its Constitution, *Zimbabwe is a State Party to the ICCPR and the ACHPR, both of which guarantee the freedoms of association, expression, and peaceful assembly.* On the international level, the ICCPR's language in Articles 19, 21, and 22 makes it clear that restrictions on these rights must be narrowly crafted and that States Party have only a narrow margin of appreciation. In addition, States Party to the ICCPR are required to adopt such legislation and other measures as are necessary to effectuate these protected freedoms, which means, at the very least, that they must not impose restrictions that prevent individuals from associating freely.¹⁴ States may impose certain narrowly tailored restrictions on civic organizations exercising these rights as long as they "are necessary in a democratic society (i) in the

¹² Under Section 2 of the Draft Bill, a "non-governmental organization" is defined to mean "any foreign or local body or association of persons, corporate or unincorporated" whose objects include any of eight listed charitable or public benefit purposes. Excluded, inter alia, are "any body or association of persons, corporate or unincorporated, the benefits from which are exclusively for its own members" and "any religious body in respect of activities confined to religious work." What these definitions mean is that any formal or informal association that has objects that include issues of public interest other than the eight that are listed cannot legally exist, because Section 9(1) provides that "no non-governmental organisation shall . . . carry on its activities . . . unless it has been registered"

¹³ See Comments of Zimbabwe Lawyers for Human Rights, available on the Kubatana website at <http://www.kubatana.net/html/archive/hr/040728zlhhr.asp?sector=HR>. For a discussion of constitutional restrictions on the freedoms of association and peaceful assembly in an international context, see Norman Dorsen, Michel Rosenfeld, András Sajó, and Suzanne Baer, *COMPARATIVE CONSTITUTIONALISM*, 1306 ff (Thomson / West 2004).

¹⁴ See Sections 2 & 3 of the ICCPR, <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

interests of national security or public safety, (ii) for the prevention of disorder or crime, (iii) for the protection of public health or morals, or (iv) for the protection of the rights and freedoms of others,”¹⁵ but they may not discriminate among individuals with respect to the exercise of these rights.¹⁶ This means for example that states cannot restrict to citizens the right to create or participate in NGOs or CSOs.¹⁷

The UN General Assembly has also passed a relevant Declaration on “Human Rights Defenders,” which makes it clear that the ostensible target of the Draft Bill (the human rights community in Zimbabwe) should not be subject to the proposed restrictions. According to the declaration, “for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) to meet or assemble peacefully; [and] (b) to form, join and participate in non-governmental organizations, associations or groups”¹⁸ On a regional level, the African Charter on Human and People’s Rights protects both the freedom of association (Article 10) and the freedom of expression (Article 9).¹⁹ Since the entry into force of the ACHPR there have been several developments under its auspices that consider the importance of protecting the freedom of association.²⁰ For instance, in its 11th Ordinary Session in Tunis, Tunisia, the African Commission on Human and Peoples’ Rights (the Commission) adopted a resolution on Freedom of Association, declaring that

¹⁵ See Section 22(2) of the ICCPR, *id.*

¹⁶ See Section 2(1) of the ICCPR, *id.*

¹⁷ See *infra* for a discussion of the restrictions contained in the Draft Bill.

¹⁸ Section 5, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, General Assembly resolution 53/144, 8 March 1999,

[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En?OpenDocument).

¹⁹ <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.

²⁰ The Commission’s 2002 Declaration of Principles on Freedom of Expression dealt principally with media and not with individual expression, which is what is implicated by restrictions on the right to form NGOs; it is available at

<http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html>, but will not be considered further in these comments.

States Parties should not “enact provisions which would limit exercise of this freedom.”²¹

Most recently, the Commission, at its 35th Ordinary Session (21 May to 4 June 2004, in Banjul, The Gambia) reaffirmed the UN Declaration on Human Rights Defenders and its applicability to Africa.²² It also adopted a resolution, which recognized “the crucial contribution of the work of human rights defenders in promoting human rights, democracy and the rule of law in Africa.” The Commission expressed serious concern about the persistence of violations targeting individuals and members of their families, groups or organizations working to promote and protect human and peoples’ rights and by the growing risks faced by human rights defenders in Africa. The Commission also expressed concern that in several states virtual impunity exists for threats, attacks, and acts of intimidation against human rights defenders and that this has a negative impact on their work and safety.²³ In short, the Commission, the monitoring body established by the Organization of African Unity (OAU) and its successor the African Union (AU) for the promotion and protection of human rights on the African continent, has firmly associated itself with the human rights standards established by the UN and with the UN’s emphatic position on the need to protect human rights defenders and NGOs in Africa.

Third, in terms of the *acceptance of the rights to freedom of association and expression in Africa*, the political bodies of African leaders have uniformly endorsed these rights and supported protection of them. In the Grand Bay

²¹ See “Resolution on the Right to Freedom of Association,” available at http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution10_en.html.

²² See Final Communiqué from the session, available at http://www.achpr.org/english/communiques/communique35_en.html.

²³ The Commission appointed Madam Jainaba Joam as a Special Rapporteur on Human Rights Defenders in Africa for a period of two years with the mandate, *inter alia*, “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.”

Declaration of 16 April 1999 (at the close of the First OAU Ministerial Conference on Human Rights), Africa's political leaders recognized that violations of human rights in Africa are caused by, among other things, "lack of freedom of press and association." The Grand Bay Declaration called on Member States to take appropriate steps to implement the UN Declaration on Human Rights Defenders in Africa.²⁴ The Declaration also called on African states to "guarantee a free and independent press within their national borders to enable it to play a role in the promotion of human rights in Africa."²⁵ In addition, the Plan of Action that grew out of this meeting noted that promotional workshops, seminars and training courses should be held on, among other subjects, "freedom of expression, association and assembly in Africa."

AU leaders also adopted the Kigali Declaration in 2003.²⁶ This document "recognizes the important role of civil society organizations (CSOs) in general and human rights defenders in particular," "underscores the need for CSOs to be independent and transparent," and urges member states to guarantee a free and independent press.²⁷

Other recent developments show that Africa's leaders generally accept the importance of the rights to freedom of association and expression in promoting development in Africa. For example, at the recent Heads of State and Government Assembly held in Addis Ababa in July 2004, the AU adopted a resolution establishing an Economic and Social Council (ECOSOC Council) for dealing with these issues and in partial recognition of the important role that

²⁴ See Grand Bay Declaration and Plan of Action for Promotion and Protection of Human Rights, available at <http://www.africanreview.org/docs/rights/grandbBay.pdf>.

²⁵ *Id.*

²⁶ Declaration of the First AU Ministerial Conference on Human Rights in Africa held in Kigali, Rwanda in May 2003, http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/KIGALI%20DECLARATION%20as%20adopted%20in%20Kigali.pdf.

²⁷ *Id.* at ¶'s 28, 29.

civil society plays in promotion and protection of all human rights.²⁸ The AU has also created NEPAD (New Partnership for Africa's Development) as the official program for Africa's economic revival. NEPAD emphasizes the importance of observance of human rights, good governance, and the rule of law as a basis for sustainable economic development. In the context of NEPAD, African states agreed to "facilitate the development of vibrant civil society organizations" in order "to promote and protect human rights."²⁹

In sum, to the extent that the Draft Bill improperly restricts the rights to freedom of association and expression and the rights of all individuals in Zimbabwe to form and operate associations without government interference, it is inconsistent with the international and regional protections for those rights as well as with the protections provided by the Constitution of Zimbabwe. ICCSL has engaged in research and technical assistance efforts in various countries in sub-Saharan Africa (e.g., Angola, Botswana, Cameroon, Ethiopia, Ghana, Kenya, Malawi, Namibia, South Africa, Tanzania, and Zimbabwe). Although not all legislation adopted in those countries meets the high standards proclaimed in regional documents with regard to protecting and upholding the freedoms of association, expression, and peaceful assembly,³⁰ it can easily be said that none of the listed countries has been so blatantly involved in attempts to silence critical NGOs as has Zimbabwe. The next sections of the Report discuss the various ways in which the Draft Bill is deficient.

²⁸ See Decisions of the AU Summit, available at <http://www.africa-union.org/AU%20summit%202004/Assm/Assembly%20Decisions%20-Final.pdf>.

²⁹ See NEPAD Declaration on Democracy, Political, Economic, and Corporate Governance, available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/au/H3_nepad.pdf, ¶ 15..

³⁰ In its first issue IJCSL published comments on the "NGO Act" in Tanzania, indicating considerable concern with the way in which certain aspects of that legislation were drafted. See Leon E. Irish and Karla W. Simon, "The Nongovernmental Organizations Act 2002 for the United Republic of Tanzania," 1 INT'L J. CIVIL SOC. L. 71 (January 2003), available at www.law.cua.edu/students/orgs/ijcs/. More recently ICCSL has noted that the Government of Tanzania appears to have a greater interest in creating an enabling environment for a strong civil society in that country. See IJCSL-N for August 2004.

2. Detailed Discussion of the Bill.

A. Part I, Section 2 (Interpretation)

- i. Section 2 of the Bill, which includes many of the definitions that are used throughout, is the first place where problems arise. As has already been discussed, the definition of “non-governmental organization” applies to both formal and informal associational activities other than those of a purely private nature.³¹ The law essentially gives unbridled discretion to the government to regulate and control the activities of formal and informal associations involving issues of public interest, including the “governance-related” activities of churches. Under well-established principles of international law, informal associations are permitted to exist without any formal registration.
- ii. Another problem in Section 2 is raised by the definition of “foreign funding or donation” means any funding or donation by any person who is not a permanent resident or domiciliary of Zimbabwe, any company not incorporated and doing business in Zimbabwe, and any association, formal or informal, that does not consist exclusively of permanent residents or citizens of Zimbabwe.³² This definition is so broad that, in addition to typical donations coming from overseas, any funds received from foreign members of a church that is active in Zimbabwe or from a company doing business in Zimbabwe that is not incorporated there is included. And, if “person” is interpreted to include legal persons, which is likely, any grant or donation from a bilateral or multilateral donor or a private foundation would be regarded as a foreign donation.

There are, of course, legitimate concerns about some kinds of foreign funding, especially in the context of crime or terrorism, but this issue is being

³¹ See note 11 *supra* and the accompanying text.

³² See

http://www.kubatana.net/html/archive/legisl/040731ngobill1.asp?sector=LEGISL&range_start=1.

addressed appropriately in most countries by legislation that deals specifically with NGOs and charities.³³ It is obvious, however, from the breadth of the definition of foreign funding and from the way it plays into the requirement in Section 10 that an NGO must disclose all foreign contributions it receives that the concern in Zimbabwe is not crime or terrorism but rather challenges to the existing government in terms of the way in which it is governing Zimbabwe.

- iii. The definition of “non-governmental organisation” (NGO) lists 8 specific categories of not-for-profit purposes, a residual category of such other purposes as may be prescribed, and a general category of fundraising for any of the foregoing purposes. The 8 listed categories are by no means exhaustive and, in the absence of further purposes being prescribed, would not cover significant areas of not-for-profit activity, such as science, art, culture, education, and historic preservation.
- iv. Another problem lies in narrowness of the exception for religious bodies to the extent they engage in activities that are not “confined to religious work.” The efforts of religious bodies to help the poor and those who are otherwise disadvantaged are generally regarded as charitable rather than religious activities. This definition will mean that most religious bodies will be required to register under the Draft Bill, which would violate the normal separation of church and state.

B. Part II The Council

This part of the Bill deals with the registration and oversight of NGOs. As stated in the OSI Guidelines Section 3.5, public oversight of NGOs is quite important to their proper functioning. Whereas the existing PVO Act

³³ The Financial Action Task Force (FATF) of the OECD has issued guidelines on money laundering that deal specifically with non-governmental organizations and the roles that may play. See <http://www1.oecd.org/fatf/> for a discussion of these issues and suggestions for ways to implement the FATF guidelines in legislation.

established a PVO Board, the proposed legislation will establish a “Non-governmental Organisations Council.” The Council will have representation from 9 ministries and 5 NGO representatives from nominations made by NGOs. The Council is given broad powers to register and deregister NGOs and exercise oversight over them. With the exception of the specific issues raised below, this Part of the Draft Bill is consistent with general recommendations for the operations of an NGO registration and oversight agency

Section 3. Although the Draft Bill does provide that the Minister selecting members for the Council ³⁴ shall make appointments “from among persons nominated for that purpose by the appropriate organisation, association or Ministry,” the Draft Bill also makes it clear that the Minister may decline to appoint any nominee, may appoint a person who has not been nominated if he considers that person is “representative of non-governmental organisations,” and, after requesting nominations and not getting satisfactory ones, the Minister may appoint individuals “whether or not, in his opinion, the person so appointed is able to represent the views of the body whose nominations were called for.”³⁵ These provisions represent a cleverly written charade, for, while appearing to provide independent NGO representatives, they would allow the Minister to appoint nominal “representatives” of NGOs who have not been nominated by NGOs, are opposed by NGOs, and do not represent the views of NGOs. The Draft Bill, in short, does not assure independent representation by NGOs and is highly objectionable for that reason. The approach of the Draft Bill is inconsistent with established practice for commissions of this sort, which ordinarily have independent NGO representation (e.g., the Charity Commission of England and Wales and the NGO Commission in Moldova). In fact, in some countries the government has delegated the registration and oversight of NGOs

³⁴ Who shall be the Minister of Public Service, Labour and Social Welfare “or any other Minister to whom the President may, from time to time, assign the administration of this Act;” Section 2.

³⁵ Section 3(2)(a) & (4).

to entities that are outside government.³⁶ We suggest that the Draft Bill be amended to assure that there is truly independent NGO representation on the Council.

Section 4 describes the functions of the Council, one of which is to “promote and encourage the co-ordination of the activities of registered non-governmental organisations having similar or related objects.” Under this rubric the Council might well refuse to register an organization if another with the “same or related objects” already exists, or force an independent NGO to be merged with one that works in the same field but toes the Government’s line. This provision should be eliminated. It is desirable, in fact, to encourage competition among NGOs in the same field, for the “nonprofit marketplace” will assure greater efficiency and responsiveness to public needs.

In addition, this section empowers the Council to “formulate a code of conduct for non-governmental organizations.” The majority of members of the Council are drawn from government ministries and cannot be expected to know or understand the problems and challenges of NGOs well enough to craft an appropriate code of conduct for them. It would be preferable to have the code of conduct adopted by the NGOs themselves, though, once drafted, it would not be inappropriate to empower the Council to enforce it.

Section 8 quite appropriately requires the Registrar to keep a public register of all registered NGOs, though it appears that the Draft Bill requires the Registrar to make public only the “registration of an organisation under this section and the objects in respect of which it has been registered.”³⁷ Especially in the case of public interest NGOs, it would be desirable to include more details. Further, although the Draft Bill provides that the Register will be open to any member of the public during business hours, no provision is made for obtaining

³⁶ The examples of this practice are the Philippines Council for NGO Certification and the Pakistan Centre for Philanthropy. More information on these two bodies is available on their websites at www.pcnc.com.ph/ and www.pcp.org.pk/certification.htm.

³⁷ Sections 8(2) & 10(9).

copies of entries in the Register and the Draft Bill permits the Registrar to impose a fee for examining the Register.³⁸

C. Part III. Registration

Section 9. NGOs to be registered

As discussed in the general comments, under Section 9(4) of the Draft Bill a human rights NGO cannot be registered if it is a foreign NGO, and a domestic NGO is treated as a foreign NGO if any of its members or directors is not a permanent resident or citizen of Zimbabwe domiciled in Zimbabwe.³⁹ It is a denial of the right to freedom of association to deny foreigners who are living legally in Zimbabwe the right to participate in a formal or informal association that concerns itself with issues of human rights and governance.

Section 10. Registration

- i. Clause (3) (j) requires that an NGO's constitution include "disclosure provisions for all foreign donations to the organization." This is a curious requirement, and is not one that is commonly found in laws prescribing the terms for the constitutions of registered organizations. The intent appears to be to make an organization obligate itself disclose the nature and sources of all foreign donations. If the required "disclosure" includes public disclosure, this requirement violates the usual confidentiality accorded to contributors. Would the failure to include such a provision be grounds for denying registration? Since so much discretion is granted to the Registrar and the Council in terms of denying registration, one can imagine that failure to deal with the issue of foreign funds might well be used against NGOs that appear to the government to be suspicious.

³⁸ Section 8 (3).

³⁹ See text *supra* at notes 2 & 11, and note 11 *supra*.

- ii. Under Section 10(4) each NGO seeking registration is required at its own expense to publish a notice that it has applied for registration, and any person may lodge an objection within 60 days of publication. No time limits placed on the Registrar's review of an application or the Council's review of the Registrar's recommendation, however, and no provision is made for default registration. This is a serious failure. See OSI Guidelines Section 3.1 E.
- iii. Under Section 10(6) the Registrar may require any NGO seeking registration "to supply any further information in connection with its application which he may deem necessary." Since this power can be exercised on a case-by-case basis, it gives the Registrar a weapon that can be used to burden and delay the registration of an NGO that is not popular with the government.

Section 11. Cancellation and Amendment

This section grants broad discretion to the Council to cancel or amend an NGO's registration certificate. It is clearly warranted to allow special sanctions for violations of provisions of the legislation governing NGOs, but the harshness of the penalty of canceling or involuntarily amending a registration certificate should be reserved for only the most significant violations, and then only after notice and an opportunity to correct.⁴⁰

In addition, some of the grounds for cancellation seem unwarranted. For example, Section 11(1)(b) permits cancellation of the registration "if any remuneration or reward, which in the Council's opinion is excessive in relation to the total value of the contributions received by the organisation concerned, is retained or received by any person other than the person for whose benefit the contributions were intended." While it is extremely important for the law to require that contributions be used for their intended purposes and to spell out

⁴⁰ Section 11(3) gives an NGO the right to state reasons why it should not be de-certified, but the Draft Bill does not require that it be given an opportunity to correct.

standards of reasonable compensation, together with corrective measures,⁴¹ it seems misguided and unduly harsh to permit the de-registration an organization for one instance, perhaps quite small, if misapplication of contributions or inappropriate compensation.

Section 15. Appeals

Although it is clear that reasons must be stated for denying registration or ordering de-certification,⁴² the Draft Law provides only that appeals against decisions of the Council lie to the responsible Minister.⁴³ It is unclear whether there is a right of appeal from decisions of the Minister to the courts. There should be a right of appeal to the courts with respect to any decision that is adverse to an NGO, and the standard for such appeals should be whether the Council applied the law incorrectly, not whether there has been an abuse of discretion.

D. Part IV Administration

Section 17. Foreign funding

This is the section that forbids a local NGO from receiving “any foreign funding or donation to carry out activities involving or including issues of governance. “ As previously discussed, this provision violates not only the protections for the rights to freedom of expression and association in Zimbabwe’s Constitution but also its international law obligations as well.

Section 21. Audits

It is an unreasonable burden to impose a requirement that every NGO, regardless of size, be audited annual by a registered public auditor. Such audits are expensive and should only be imposed on NGOs above a designated monetary threshold or if the NGO receives grant money to pay for such an audit.

⁴¹ See Chapter 5 of the OSI GUIDELINES for examples of rules that might be applied in such circumstances.

⁴² Sections 10 (8) & 11 (3).

⁴³ See note 33 supra.

Moreover, three months is an unreasonably short period in which to complete an audit, especially of a large NGO.

Section 22. Inspections

The Minister's right to instigate an individualized inspection or examination of an NGO should only be exercisable where due cause is shown, and the courts should be allowed to quash investigations undertaken frivolously or for purposes of harassment.

E. Part V. Miscellaneous

Section 26 General offences and penalties

Under the Draft Bill individuals could be imprisoned for such offenses as misrepresenting that he is associated with an NGO or raising funds for an unregistered NGO. Imprisonment is an inappropriate penalty to impose for violations of a civil law such as this. Fines are appropriate, but the imprisonment sanctions should be deleted.

Section 30 Disposal of assets of NGOs

The Draft Bill provides that any surplus assets arising on the dissolution of a NGO will vest in the state as *bona vacantia* unless its constitution provides otherwise. It should instead provide that surplus assets will go only to an NGO with the same or similar purposes as designated in the NGO's constitution or by resolution of the board of directors, and that they shall revert to the state only in the absence of a valid designation..

Conclusion. One interpretation of the Draft Bill is that associations are seen by the Government of Zimbabwe as being either political opponents that need to be suppressed or mere offshoots of the government. Missing entirely is a sustained effort to provide an enabling legal environment for the rights of citizens working independently but together to define their concept of the public

good and to meet the needs of others. While it may be in the narrow self-interest of the government to have semi-independent organizations that assist it in accomplishing its tasks, limiting permitted NGOs to such a small compass does little to foster private initiative or a vibrant civil society.

Further, the broader self-interest of the government and society would be better served by a more liberal and enabling law. As the experience of other countries has shown, the not-for-profit organization (NPO) sector can be very innovative, it can provide outlets for new ideas to be nurtured, and it can sometimes deliver services more inexpensively than government agencies. According to the OSI GUIDELINES there are many reasons why a country should want to have laws that encourage independent NPOs to exist. These include encouraging pluralism, promoting respect for the rule of law, promoting economic efficiency, and addressing “public sector market failure.”⁴⁴

It is wholly inappropriate and a violation of Zimbabwe’s Constitution and its obligations under international law for the law to prohibit any informal associational activity that deals with an issue of public interest. It is startling to see a draft law that seeks to control or prohibit the charitable and public benefit activities of religious organizations. It is shocking to see an NGO law proposed in the 21st century that does not allow the registration of an NGO in order to promote science, culture, art, education, or historic preservation. Finally, it is an issue of particular concern to note that the Bill reflects a deep suspicion of foreign NGOs and foreign funders. NGOs should have the right to raise funds from any sources that do not implicate relevant considerations with regard to criminal activity or terrorism. But the Draft Bill evidences a deep-seated suspicion of any foreign attention or criticism. The laager mentality reflected in the Draft Bill does not speak well for the future of democracy and civil society in Zimbabwe.

⁴⁴ OSI GUIDELINES, *supra* note 5, Chapter 1.

In the view of ICCSL the Draft Bill has fundamental and unacceptable defects and deficiencies. It should not be presented to Parliament, and a sincere attempt should be made to develop new draft legislation through a cooperative effort between the NGOs and the government.⁴⁵

⁴⁵ IJCSL has been reporting on a similar effort in Ethiopia, where the NGOs and the Ministry of Justice have established a joint drafting team. For further information on the developments in Ethiopia, consult the website of the Christian Relief and Development Association at <http://www.crdaethiopia.org/>.