



**ZIMBABWE’S NON-GOVERNMENTAL
ORGANIZATIONS BILL:
Out of Sync with SADC Standards and a Threat to Civil
Society Groups**

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Summary

The government of Zimbabwe drafted the 2004 Non-Governmental Organizations (NGO) Bill after a four-year period of deteriorating relations with oppositional civil society organizations, including NGOs, churches, trade unions, and the independent media. The Bill will adversely affect, and effectively eliminate, all organizations involved in promoting and defending human rights. These organizations see themselves as non-partisan. The government claims, without producing evidence, that many of them have abused Western donor funds to support the opposition party, the Movement for Democratic Change (MDC). Judging from the suspension of parliamentary standing orders to permit the passage of the Bill to be fast-tracked, the ruling party, ZANU PF, appears to be in a hurry to pass the Bill ahead of the March 2005 general election.

The NGO Bill is retrogressive. It violates the right to freedom of association. It significantly extends government control over organizations provided for in the current Private Voluntary Organizations (PVO) Act, which it seeks to repeal. The PVO Act was deemed to limit civil liberties by the African Commission for Human and People's Rights. The Bill denies local NGOs that are involved in "issues of governance" access to foreign funding (clause 17) and prohibits the registration of foreign NGOs engaged in "issues of governance"(clause 9). "Issues of governance" are defined by the Bill to include "the promotion and protection of human rights and political governance issues". Like the PVO Act, the Bill gives the Minister of Public Service, Labour and Social Welfare absolute control over the appointment of the NGO Council, which decides on registration and de-registration. The Minister and the NGO Council, however, acquire new powers that they did not have under the PVO Act. New burdens are placed on non-governmental organizations, including that they must register annually and pay annual registration fees. The NGO Bill provides for an appeal process in some areas, making this the singular improvement compared with the PVO Act. However, as in the PVO Act, there is no right of appeal, other than to the Minister, for organizations that seek to challenge NGO Council decisions on registration and de-registration.

Clauses 9 and 17 of the NGO Bill violate the freedom of association enshrined in the Constitution of Zimbabwe and numerous regional and international agreements that the Government of Zimbabwe has signed, including the International Covenant on Civil and Political Rights. Clauses 9 and 17 also do not comply with international and regional guidelines such as the 2004 SADC Principles and Guidelines Governing Democratic Elections or the U.N. Declaration on Human Rights Defenders that the African Commission on Human and People's Rights reaffirmed in 2004.

Human Rights Watch urges the Government and Parliament of Zimbabwe to immediately withdraw the Bill and amend it to bring it in line with Zimbabwe's obligations under the SADC Guidelines, the U.N. Declaration on Human Rights Defenders, and international conventions that the Government has signed. Human Rights Watch also calls on the SADC members states - together and individually - to urge the Zimbabwe government to reconcile its proposed NGO law with SADC standards, including the SADC Guidelines for Democratic Elections, and in particular, the freedoms of association and expression.

Background

Political tensions in Zimbabwe between civic organizations, especially trade unions, NGOs, the independent media, and churches, escalated before and after the 2000 general election. The government accused NGOs of launching opposition political activity and threatened to clamp down on those which did not comply with the Private Voluntary Organizations Act,¹ a colonial relic which gives the government significant power to control NGOs. In its 2002 report on Zimbabwe, the African Commission for Human and People's Rights recommended that the government repeal the PVO Act because it limited civil liberties.² Since 2002, civic organizations deemed to be engaged in opposition politics have been targets of government's repressive laws, notably the Public Order and Security Act and the Access to Information and Protection of Privacy Act.³ On September 13 2002, the government issued a notice in the state newspaper, *The Herald*, warning NGOs to comply with the PVO Act and threatening that "[F]ailure to adhere to the law would result in arrests being made."⁴ The PVO Act makes it an offence to knowingly manage or control an unregistered organization or collect contributions from the public for an unregistered organization. These offences, like others in the Act, may be punished with a fine or imprisonment or both.⁵ In October 2002, President Mugabe announced that the government would scrutinize NGOs and review the laws governing them.⁶

1. Country Reports on Human Rights Practices for 2000, Zimbabwe. U.S. Department of State, February 2001, p.17.

2. Zimbabwe: NGO Bill Harbours Grave Consequences for the People. International Bar Association. August 24, 2004, footnotes 1 and 16.

3. Under the Shadow, Human Rights Watch, June 6 2003, p.6.

4. *The Herald*, September 13 2002.

5. PVO Act, section 6(2),(3), and (3a). For other offences and penalties, see sections 10(4), 20(3), and 20.

6. Amnesty International, Rights Under Siege, May 2 2003. AI Index: AFR 46/012/2003.

The 2004 NGO Bill must be understood in the context of political polarization over the past four years. After the controversial 2002 Presidential election, the United States and the European Union imposed targeted sanctions against the government of Zimbabwe and all major Western bilateral donors stopped government-to-government assistance, opting instead to channel their aid directly through NGOs.⁷ In the diplomatic arena, the NGO Bill might be understood as the government's counter-attack on these Western punitive measures. The Bill targets Western donor-funded NGOs and churches that are active in human rights and democracy activities. While these organizations declare themselves to be non-partisan, the government has charged them with improper links to the MDC and to imperialist Western interests and money. Moreover, the government maintains that such organizations use human rights rhetoric to conceal their real objective which is regime change. To undermine national sovereignty and national security, the government claims that these organizations lie about their human rights record.⁸ British Prime Minister Tony Blair's statement in the House of Commons on June 14 2004 that his government was working closely with the opposition MDC to effect regime change in Zimbabwe was seized on by the Minister of Information and Publicity as evidence that the MDC was a British "puppet".⁹ The Minister continued: "[T]he same is true of those media houses and NGOs that support it [the MDC]."¹⁰

Zimbabwe's proposed NGO Bill is best viewed in the context of laws regulating NGOs passed by other SADC countries. Four SADC countries—Malawi, Mozambique, South

7. Department for International Development (UK), Country Profiles: Africa. Zimbabwe. 2004. <http://www.dfid.gov.uk/countries/africa/zimbabwe.asp> Accessed November 29 2004; USAID, CBJ 2005, Africa: Zimbabwe. <http://www.usaid.gov/policy/budget/cbj2005/afr/zw.html> Accessed November 29 2004.

8. For example, Ministry of Public Service, Labour and Social Welfare, Zimbabwe Standard, August 22 2004, responding to Press Statement by NANGO, "NGO Bill 2004 - A Bill That Kills When Zimbabwe Needs Life on August 15 2004. [kubatana?]; "Zimbabwe Charities Agree to Code, Ahead of Crackdown", August 30 2004 (GIN); Nathaniel Manheru, "NGO or WGO: Reality Behind Opposition to Bill, The Herald (Online), October 9 2004; "Amani Trust Fanning Political Violence", Sunday Mail (Zimbabwe), January 27 2002. http://www.kubatana.net/html/archive/hr/020128amani.asp?orgcode=ama001&range_start... Accessed November 7 2004; Adversarial NGO Report; "Zim slams 'imperialist' NGOs", News24 (South Africa), August 29 2004; "Mugabe slams cleric", News24 (South Africa), August 22 2004.

9. The exchange between Conservative Party leader, Michael Howard and Prime Minister Tony Blair, June 14 2002, column 522, UK Hansard, cited in The Zimbabwe Situation, "Monday in UK Parliament", posted June 17 2004. The Prime Minister responded to a question from Michael Howard, as follows: "On the latter two points, we work closely with the MDC on the measures that we should take in respect of Zimbabwe, although I am afraid that these measures and sanctions, although we have them in place, are of limited effect on the Mugabe regime. We must be realistic about that. It is still important that we give every chance to, and make every effort to try to help, those in South Africa-the southern part of Africa-to put pressure for change on the Mugabe regime, because there is no salvation for the people of Zimbabwe until that regime is changed." For ruling party responses, see "I'm working with MDC, admits Blair", The Herald (Zimbabwe), June 25 2004.

http://agitprop.org.au/nowar/20040625_her_working_with_mdc.php Accessed November 29 2004.

10. "I'm working with MDC, admits Blair", The Herald (Zimbabwe), June 25 2004.

http://agitprop.org.au/nowar/20040625_her_working_with_mdc.php Accessed November 29 2004.

Africa and Tanzania—have passed such laws and Namibia soon plans to introduce an NGO law. For a detailed analysis of these laws, please see the Appendix: NGO Laws: Malawi, Mozambique, Namibia, South Africa and Tanzania.

The NGO Bill

The NGO Bill was gazetted on August 20 2004. Although its stated objective is “to provide for an enabling environment for the operations, monitoring, and regulation of all non-governmental organizations,” and to repeal the PVO Act, it is more repressive than the act which it replaces.¹¹ The opposition MDC-dominated Parliamentary Legal Committee’s (PLC’s) report found that numerous clauses in the Bill violated the Constitution.¹² In an all-night session on November 16 2004, the ZANU PF majority in Parliament voted to suspend Standing Orders to enable Bills to be fast tracked and to reject the PLC’s adverse report.¹³ Seven days later, in another all-night session, Parliament passed the second reading of the NGO Bill with only one substantial amendment.¹⁴ Before the debate, the Minister of Public Service, Labour and Social Welfare, who is responsible for the administration of the NGO Bill, though the President may appoint any other Minister from time to time, withdrew his most important proposed amendment which sought to narrow the definition of “issues of governance”.¹⁵ The proposed amendments of the Acting Chairperson of the Parliamentary Portfolio Committee of the Ministry of Public Service, Labour and Social Welfare were rejected.¹⁶ The PLC must now report on the constitutionality of the proposed amendments before the Bill may return to Parliament for its third reading.

11. Non-Governmental Organisations Bill (HB 13), 2004.

12. Report of the Parliamentary Legal Committee on the Non-Governmental Organisations Bill, 2004 (H.B. 13, 2004). Tabled for debate in Parliament on November 16 2004. The report found the provisions of clauses 2, 9, 10, 11, 15, 17, 20, 22, 23, 24, 29 and 32 to be inconsistent with the Constitution.

13. Bill Watch 37, November 18 2004; Bill Watch 36, November 15 2004. Distributed by Veritas Trust.

14. Bill Watch 37. The Minister’s proposed amendment of Clause 32, the transitional clause, was accepted.

15. Bill Watch 37. Notice of Amendments During the Second Reading of the Non-Governmental Organisations Bill in Parliament on Tuesday 15th November 2004. The Minister proposed to redefine “issues of governance” to mean:

“(a) any advocacy or promotion of the freedoms of assembly and association, the freedom of expression including the right to information, the freedom of movement and the right to stand for office or vote at any national or local election;

(b) activities aimed at public transparency and accountability:

(c) strengthening public support for an understanding on anti-corruption programmes;

(d) furthering and facilitating the interests or activities of a political party.”

16. Bill Watch 37. The Report of the Parliamentary Portfolio Committee of Public Service, Labour and Social Welfare on the Non-Governmental Organisations Bill (HB 13, 2004). Presented to Parliament on Tuesday 16th November 2004 by the Hon. Ms. Mpariwa, Acting Chairperson of this Committee. Ms. Mpariwa is an MDC MP; the Chairperson, Lazarus Dokora, is a ZANU PF MP.

The main difference between the NGO Bill and the PVO Act is that the new Bill tightens the surveillance and control mechanisms of government on NGOs over the already substantial government powers of control in the PVO Act. The definition of NGOs is made wider than in the PVO Act, and the NGO Bill eliminates exemptions from registration in the PVO Act. There are new prohibitions against the registration of foreign NGOs and access to foreign funding of local NGOs engaged in “issues of governance”. The Bill increases the imbalance in the composition of the NGO Council in favor of government versus NGO representatives, augments the Council’s and the Minister’s powers to regulate the internal affairs of associations, and imposes new requirements on NGOs. The Bill improves on the PVO Act in providing an appeal process against at least some decisions.

The broader definition of NGOs and the removal of exemptions from registration

The definition of non-governmental organizations that fall under the Act is much wider than under the PVO Act and includes almost every association of civil society, including churches. Not only does the definition of non-governmental organizations introduce the distinction between local and foreign NGOs, but it covers associations whose purpose includes “the promotion and protection of human rights and good governance.”¹⁷

Foreign and local NGOs involved in issues of governance

There are entirely new provisions for all non-governmental organizations, foreign and local, working on “issues of governance.” Local NGOs are prohibited from receiving any foreign funding to carry out activities involving or including “issues of governance” (clause 17).¹⁸ Foreign NGOs are prohibited from registering if their sole or principal purposes involve or include “issues of governance” (clause 9),¹⁹ which are broadly defined to include “the promotion and protection of human rights and political governance issues”.²⁰ A local non-governmental organization must consist exclusively of permanent residents or citizens of Zimbabwe who are domiciled in Zimbabwe. Consequently, a single foreigner or even a Zimbabwean living outside the country would make the organization and its funds “foreign”.²¹

17. NGO Bill, clause 2(g).

18. NGO Bill, clause 17.

19. NGO Bill, clause 9(4).

20. NGO Bill, clause 2.

21. NGO Bill, clause 2, see interpretations of “Foreign non-governmental organization”, “foreign funding or donation”, and “local nongovernmental organization”.

The Council: its composition and appointment

The NGO Bill provides for the composition and appointment of a Non-governmental Organizations Council. The NGO Council will consist of fifteen members: five NGO representatives from organizations which the Minister considers are representative of NGOs, nine high-ranking representatives from specified Ministries, and the Registrar as an ex officio member.²²

New powers of the Council and the responsible Minister

The Bill augments the substantial powers of the Council and the Minister in the PVO Act. In particular, the Council may now cancel any registration certificate on two new grounds - if the organization has ceased to operate bona fide in furtherance of the objects for which it is registered, and if it is found guilty of maladministration.²³ “Maladministration” is given a broad definition, encompassing not only theft or misappropriation of NGO funds or property but “any contravention of any provision of a code of conduct as may be prescribed.”²⁴ The Council has the new responsibility in the NGO Bill of formulating a code of conduct for NGOs.²⁵ The Minister, rather than the Registrar as in the PVO Act, has the power to dissolve NGOs under certain conditions.²⁶ As an important aside, the state may take over property of the dissolved NGO.²⁷

New requirements for NGOs

The NGO Bill places new burdens on organizations. To apply to register, organizations must provide the names, nationality, and addresses of their promoters, their funding sources, three-year plans, and their constitutions, which must provide prescribed information.²⁸ Additionally, organizations must register annually and pay annual registration fees.²⁹ NGOs are also required to have an annual budget, identifying inter alia, local and foreign funding sources.³⁰ In the context of new burdens on NGOs and clause 9 that makes it illegal to operate without registration, it is important to note that

22. NGO Bill, clause 3(2).

23. NGO Bill, clause 11(1)(a) and 1(g).

24. NGO Bill, clause 23(1).

25. NGO Bill, clause 4(f).

26. NGO Bill, clause 29; PVO Act, section 27.

27. NGO Bill, clause 30.

28. NGO Bill, clause 10(2).

29. NGO Bill, clause 11(a) and (b).

30. NGO Bill, clause 16(2).

there is no obligation on the part of the Council to make decisions about registration within any particular time period.

Right of Appeal

The NGO Bill provides for the right of appeal to an Administrative Court against decisions on “maladministration”,³¹ the suspension of executive members,³² and the dissolving of an organization.³³ The PVO Act did not provide for the right of appeal to an Administrative Court for decisions on suspending members or dissolving organizations and did not provide for decisions on maladministration. The NGO Bill is thus an improvement over the PVO Act with respect to the provision of a right of appeal to an Administrative Court. However, like the PVO Act, the Bill provides no comparable appeal process against Council decisions on the rejection, cancellation, or amendment of registration, where the only appeal lies to the Minister.³⁴ Similarly, the Bill makes no provision for an appeal procedure against the decisions of the Registrar to convert a branch of an NGO into an independent and separate organization if the Registrar determines a branch is not subject to control and direction of that organization.³⁵

Assessing the NGO Bill

The NGO Bill does not comply with Zimbabwe’s human rights commitments in its Constitution and regional and international agreements and guidelines³⁶ such as the

31. NGO Bill, clause 23.

32. NGO Bill, clause 24. In 1995 the Minister exercised his power to suspend the executive members of the National Council of the Association of Women’s Clubs in 1995. The matter was challenged in the Supreme Court which ruled that the provision was unconstitutional because it did not provide for a fair hearing of the suspended members. However, section 21 of the PVO Act was not changed. See Supreme Court ruling in case of National Council of the Association of Women’s Clubs (1997). Source: Interights Commonwealth Human Rights Law 11, February 11 1997. *Holland & Orr v Minister of the Public Service, Labour and Social Welfare* (1997).

33. NGO Bill, clause 29.

34. NGO Bill, clause 15.

35. NGO Bill, clause 20.

36. Among other agreements that Zimbabwe has signed and that clauses 9 and 17 in the NGO Bill compromise are the African Charter on Human and People’s Rights (Articles 10, 11), the International Covenant on Civil and Political Rights (Articles 19, 21, 22), and the International Covenant on Economic and Social Rights (Article 2(3)). Clauses 9 and 17 in the NGO Bill are also at odds with the African Union’s NEPAD (New Partnership for Africa’s Development), the official program for Africa’s economic renaissance. The NEPAD Declaration on Democracy, Political, Economic and Corporate Governance emphasizes the importance of respect for human rights, good governance, and the rule of law as a basis for sustainable economic development. African states agreed to “facilitate the development of vibrant civil society organizations” in order “to promote and protect human rights.” See Comments on the NGO Bill, 2004. Submitted by the Human Rights Trust of Southern Africa (SAHRIT). To the Parliamentary Portfolio Committee on Public Service, Labour and Social Welfare.

government of Zimbabwe's commitments to SADC agreements and the UN Declaration on Human Rights Defenders. Zimbabwe's NGO bill on its surface appears to be far more intrusive on the rights of freedom of association and expression than the NGO laws in Malawi, Mozambique, Tanzania, and South Africa

The Constitution and international and regional agreements and guidelines

The provisions of the NGO Bill that prohibit local NGOs engaged in "issues of governance" from having access to foreign funds (clause 17) and that deny registration to foreign NGOs involved in "issues of governance" (clause 9) are contrary to the right to freedom of association in section 21 of the Constitution of Zimbabwe and the right to freedom of expression in section 20.³⁷ While it is constitutional to legislate for the registration of associations³⁸ there is no restriction in the Constitution on the purposes for which an association may be formed.³⁹ According to the Constitution, 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" or to protect the rights of freedom of other persons and they must be shown to be reasonably justifiable in a democratic society.⁴⁰ These are similar to the permissible restrictions on freedom of expression.⁴¹

It is unreasonable to suspend the right to freedoms of association and expression on the grounds that some NGOs are allegedly receiving foreign funding for human rights work but are diverting the funds to opposition political parties. If some NGOs are using Western donor funds to support opposition parties, then the appropriate government remedy would be to prohibit NGOs from engaging in partisan politics. The proposed amendments by the Acting Chairperson of the Parliamentary Portfolio Committee also sought to prohibit NGO involvement in partisan politics.⁴² The NGO laws in Malawi, Tanzania, and Mozambique all provide for such restrictions on NGO activity without

September 2004; Zimbabwe's Draft Non-Governmental Organisations Bill, 2004. Comments by the International Center for Civil Society Law, September 2004.

37. Constitution of Zimbabwe, section 21(1) and section 20.

38. Constitution of Zimbabwe, section 21(3)(c).

39. Zimbabwe: NGO Bill Harbours Grave Consequences for the People. International Bar Association. August 24, 2004.

40. Constitution of Zimbabwe, section 21(3)(a) and (b).

41. Constitution of Zimbabwe, section 20.

42 The Report of the Parliamentary Portfolio Committee of Public Service, Labour and Social Welfare on the Non-Governmental Organisations Bill (HB 13, 2004). Presented to Parliament on Tuesday 16th November 2004 by the Hon. Ms. Mpariwa, Acting Chairperson of this Committee. See the proposed amendments to clauses 9 and 17 which change the broad definition of "issues of governance" to target the participation of NGOs in partisan politics.

interfering with the right to freedom of association and freedom of expression [see Appendix].

Clauses 9 and 17 in the NGO Bill are not consistent with SADC agreements on human rights. The 1992 Treaty establishing the SADC stipulates that “human rights, democracy and the rule of law” are principles guiding the acts of its members.⁴³ The Protocol on Politics, Defence and Security Cooperation provides that SADC shall “promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charter and Conventions of the Organization of African Unity [African Union] and the United Nations.”⁴⁴ The SADC Principles and Guidelines Governing Democratic Elections commit member states holding elections to protect “the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression...during electoral processes...”⁴⁵

Clauses 9 and 17 in the NGO Bill also do not comply with Zimbabwe’s obligations as a UN member state to uphold the UN Declaration on Human Rights Defenders. The UN Declaration, which the UN General Assembly adopted in a resolution on December 9 1998, merely articulates the existing rights of human rights defenders and the duties of states in a way that is easier to apply to the practical role and situation of human rights defenders. The rights of human rights defenders include the right to form associations and non-governmental organizations and to meet or assemble peacefully. The duties of the state include “To adopt such legislative, administrative and other steps as may be necessary to ensure effective implementation of rights and freedoms.”⁴⁶

Overview of NGO Laws in Malawi, Tanzania, South Africa and Tanzania

In all four countries, Malawi, Tanzania, South Africa and Tanzania, the introduction of an NGO law was preceded by extensive consultations between the government and the NGOs. Malawi, Tanzania, and South Africa all impose time limits on the bureaucracy in the registration and de-registration of organizations. Malawi and Tanzania prescribe a

43. See reference to Article 4 of the Treaty in SADC Principles and Guidelines Governing Democratic Elections. August 17 2004. [CHECK] http://www.swradioafrica.com/pages/sadc_elections.htm Accessed September 21 2004.

44. Ibid.

45. Ibid, 7.4. See also 2.1.2.

46. Arnold Tsunga and Tafadzwa Mugabe, Zim NGO Bill: Dangerous for Human Rights Defenders. Zimbabwe Lawyers for Human Rights. July 28, 2004. The African Commission on Human and People’s Rights, the monitoring body of the African Union, reaffirmed the UN Declaration on Human Rights Defenders in June 2004.

role for non-governmental organizations to regulate themselves while South Africa hopes NGOs will choose self-regulation. In all the cases, the Ministers play the primary or even only role in appointing regulatory authorities. In Malawi and Tanzania, however, the Ministers make appointments after consulting or seeking recommendations from NGOs. Malawi and South Africa have established an appeal process to enable aggrieved organizations to challenge decisions on their registration or de-registration. Malawi avoids criminalizing statutory offences, making offences subject only to fines. With one exception, South Africa makes criminal offences only for organizations that engage in fraud.

None of the laws regulating NGOs in Malawi, Mozambique, South Africa, and Tanzania seek to cut off access to foreign funding for any reason. Indeed, the explicit premise behind regulating NGOs in these SADC countries is often to create NGOs as legal entities and thereby enable them to attract more donor funds. The laws in these SADC countries never seek to discriminate against NGOs whose purpose is to engage in activities related to “issues of governance” – “the promotion and protection of human rights and political governance issues.” Zimbabwe’s NGO Bill diverges markedly from these more desirable SADC standards.

Recommendations

To The Government and Parliament of Zimbabwe

- Withdraw the proposed NGO Bill and amend it to bring it in line with Zimbabwe’s obligations under its Constitution, international human rights standards, the SADC Guidelines, and the UN Declaration on Human Rights Defenders.

Reforms should include:

- Removing the provisions that deny local NGOs whose purposes include “issues of governance” access to foreign funding and that prohibit the registration of foreign NGOs involved in “issues of governance”.
- Transforming the NGO Council into a more independent body that would promote a more positive climate between the government and NGOs. In particular, changes should reduce the Minister’s power to control appointments to the NGO Council,

creating a role for NGOs to provide input into the selection of the Council, and improving the balance of government and NGO representatives on the Council.

- Simplifying the requirement for NGO registration by eliminating the requirements that NGOs register annually and pay an annual registration fee, and mandating time limits to expedite decisions on registration and de-registration. Organizations that do not receive a decision on their registration request by a specific period should be deemed to be officially registered.
- Instituting an appeals procedure to an independent administrative body to facilitate impartial adjudication of appeals against the decisions of the Minister and the NGO Council.
- Eliminating the principle of criminal liability for statutory offences that improperly infringe upon fundamental rights, including the rights to freedom of association and expression.

To SADC and its members - together and individually

- Engage and urge the government of Zimbabwe to reconcile its proposed NGO law with SADC standards, including SADC Principles and Guidelines Governing Democratic Elections, and in particular, the freedoms of association and expression.

Appendix: NGO Laws: Malawi, Mozambique, Namibia, South Africa and Tanzania

Malawi, Mozambique, South Africa, and Tanzania all have laws regulating NGOs. Namibia is considering a new policy and law for civil society organizations. The following discussion highlights key aspects of the existing or planned legal frameworks in these five SADC countries. Of particular interest are the consultation process between NGOs and the government in establishing the regulatory framework, the nature of the requirement to register, the composition of the regulating authority, bureaucratic discretion in registration matters, the authority granted to NGOs to regulate themselves, the appeal process against the decisions of the regulating authority, the nature of statutory offences and penalties, and restrictions on NGO fundraising and foreign NGOs.

Malawi

The Non-Governmental Organisation Act in Malawi was introduced in 2001, after six years of extensive consultation with non-governmental organizations.⁴⁷ The Act makes it mandatory for NGOs to register, but provides for exemptions, including for informal organizations that do not have a written constitution.⁴⁸ The ten-member Board has three ex-officio members, who are the Secretaries of three Ministries, and seven members - at least three must be women - whom the Minister appoints in consultation with the Council for Non-Governmental Organisation in Malawi (CONGOMA), the designated NGO coordinating body.⁴⁹ The Minister, in consultation with CONGOMA, may remove and replace any of the seven appointees while only the Board may remove the ex officio members.⁵⁰

The Board registers and regulates NGO operations.⁵¹ No NGO may be registered under the Act unless at least two directors or trustees are citizens of Malawi.⁵² An NGO's application for registration must include approval from the Ministry responsible for the activities to be undertaken by the NGO, proof of membership in CONGOMA, a plan of the activities which the NGO intends to undertake, the NGO's source of funding, a statement that the NGO shall not engage in "partisan politics including

47. "Civil Society Appeal on the NGO Bill No.19 of 2000", Daily Times (Malawi), January 10 2001. <http://chambo.sdn.org.mwngo/bill-2000/appeal.html>. Accessed November 18 2004.

48. Non-Governmental Organizations Act, 2001, section 5 and section 20.

49. Ibid, section 7 and section 24.

50. Ibid, section 9.

51. Ibid, section 18.

52. Ibid, section 20(2).

electioneering and politicking”, and personal details, including the nationalities of the trustees, directors and other executive board members.⁵³ The Board must decide on the application for registration within a specified time period.⁵⁴ Failure to comply with the provisions of the Act and engagement in partisan politics are the main grounds for the Board to cancel or suspend registration.⁵⁵ NGOs may appeal a Board decision to cancel or suspend registration to the High Court for judicial review.⁵⁶ The Act permits registered NGOs to engage in public and other forms of fundraising, provided they comply with the prescribed reporting requirements.⁵⁷ An NGO which contravenes the provisions of the Act shall be guilty of an offence and liable on conviction to a fine.⁵⁸

Mozambique

The government of Mozambique has mandatory registration for foreign but not local NGOs. A law, Decree 55/98, regulates the registration and activities of foreign NGOs. The preamble to the law justifies the need for the establishment of a legal framework for foreign NGOs because of their complementary role to government initiatives in rehabilitation and development. The decree defines NGOs as non-profits involved in emergency programs, rehabilitation or development. Foreign NGOs must apply to the Minister for Foreign Affairs and Cooperation for authorization to work in Mozambique. Authorization is provided to NGOs whose activities conform with the Government program. According to the law, foreign NGOs must work for the creation of capacity within the Mozambican partner organizations and thereby ensure the sustainability of their activities. The Ministry issues two-year renewable permits to those NGOs who are authorized to register. Foreign NGOs are forbidden to conduct or promote acts of a political nature. Foreign employees working for foreign NGOs must conform with the Labor Law, Decree 8/98. Inter alia, the partner organization and the foreign NGO must verify that no Mozambican has the necessary qualifications before an expatriate may be hired.⁵⁹ While there is no mandatory registration for local NGOs, a large percentage do register with the Ministry of Justice, apparently because registration ensures greater donor funding.⁶⁰

53. Ibid, section 20(3).

54. Ibid, section 20(4).

55. Ibid, section 23(1).

56. Ibid, section 23(4).

57. Ibid, section 33.

58. Ibid, section 34.

59. This paragraph relies on the following sources: An English copy of Decree 55/98 provided by World Vision Mozambique; MS Mozambique Annual Report 1999 <http://mozambique.ms.dk/mainpapers/mozrep99.htm> Accessed November 15 2004; Mozambique. Country Reports on Human Rights Practices - 2003. Released by the Bureau of Democracy, Human Rights, and Labor. February 25 2004.

60. Management of Social Transformations (MOST). Discussion paper - No.56. Governance, Civil Society and NGOs in Mozambique by Stefano Bellucci (UNESCO, 2002) SHS-2002/WS/7.

Namibia

The government of Namibia is in the process of consulting with civil society organizations to develop a partnership policy. In this context, the National Planning Commission will facilitate access to donor funds for civic organizations. A major feature of the policy calls for a review of the current laws and regulations affecting civic organizations. The review will be undertaken by an Advisory Committee composed of government representatives and civic organizations under the 1994 National Planning Commission Act. The goal is to formulate a Registration Act that will harmonize and consolidate existing laws regulating civic organizations and will establish a transparent registration process under the control of a single agency. The new law will seek to establish minimum criteria for competence and governance, enhance transparency and accountability, and improve coordination within the sector. The proposed legislation will respect the independence and autonomy of “genuine” organizations. Registration will be voluntary. The premise is that registration and a legal status will enable NGOs to attract more donor funds. The review will decide on the extent to which both registration of local organizations may be decentralized and civic organizations, through voluntary codes and a representative body such as (Namibia Non-Governmental Organisations’ Forum (NANGOF), may be permitted to participate in self-regulation.⁶¹

South Africa

The Nonprofit Organisations Act No.71 of 1997, which came into operation in South Africa on September 1 1998, was a result of a long process of negotiations between the state and civil society organizations.⁶² The Act hopes to set and maintain adequate standards of governance, accountability and transparency by creating a voluntary registration facility for NPOs. The Minister for Welfare and Population Development must establish a Directorate within the national department and must designate an employee of the national department as the Director. For an NPO to register, its founding document or constitution must comply with various requirements. The only grounds for the Directorate to refuse to register an NPO is if it is not satisfied that the NPO has complied with the mandatory registration requirements. Time limits are specified for administrative action in the registration process. For example, the Director must consider and decide on an application to register within two months of receiving an application. Registered NPOs must comply with information and reporting

61. The following paragraph relies on a draft document, Government of the Republic of Namibia, Civic Organisation Partnership Policy. National Planning Commission, 2004.

62. This paragraph relies chiefly on Guide to the Nonprofit Organisations (NPO) Act and the Nonprofit Organisations Act, 1997. <http://www.etu.org.za/toolbox/docs/building/guide.html> Accessed November 11 2004.

provisions and formalities. Non-compliance may result in the cancellation of registration.

NPOs can appeal to an Arbitration Tribunal against the Directorate's decisions on registration and de-registration. The Minister appoints at least seven persons to constitute a panel of arbitrators, following a public and transparent nomination process. The chairperson, designated from the members of the panel by the Minister, appoints no more than three panelists to serve on the Arbitration Tribunal. The Act also provides for offences and penalties. It is an offence to cause an NPO, when it is being wound up or dissolved, to transfer its remaining assets other than to an NPO having similar objectives. The only other offences in the statute arise from an NPO's fraudulent practices, such as falsely misrepresenting itself as being registered. The penalties for a person convicted of an offence in terms of the Act may be a fine or imprisonment or both.

Tanzania

The Non-Governmental Organizations Act, 2002 in Tanzania was preceded by the promulgation of a national policy on NGOs which was the product of consultations between the NGOs and the government.⁶³ The Non-Governmental Organizations Co-ordination Board which regulates NGOs consists of ten members.⁶⁴ The chair is appointed by the President, on the recommendation of the Minister responsible for NGOs. The Minister appoints four NGO representatives, on the recommendation of the National Council for Non-Governmental Organizations (the Council), an umbrella organization for non-governmental organizations established in terms of the Act, and five government representatives.⁶⁵

The Act provides for mandatory registration.⁶⁶ At least one founding member must apply for registration with the necessary information such as the organization's constitution, and the personal particulars of office-bearers and founding members.⁶⁷

63. The United Republic of Tanzania. Vice-President's Office. The National Policy on Non-Governmental Organizations. November 2001. The initial public consultation on the draft law gave way to the government closing the process. See Comments of Professors Leon E. Irish and Karla W. Simon, *The Non-Governmental Organizations Act, 2002, for the United Republic of Tanzania*. Gazetted in the Official Gazette 4 October 2002. 1 Int.J.Civ Soc.Law available at <http://www.law.edu/journal/ijcsl>.

64. The Non-Governmental Organizations Act, 2002, for the United Republic of Tanzania. The composition and method of appointment of the Board is set out in the Schedule, under section 6(1), paragraph 1.

65. *Ibid.* The National Council for Non-Governmental Organizations is established in terms of section 25(1) of the Non-Governmental Organizations Act, 2002.

66. *Ibid.*, section 11(1).

67. *Ibid.*, section 12(2).

The Act stipulates time periods within which the Board must accept a registration application or notify an applicant of a rejection.⁶⁸ To reject an application, the Board must be satisfied that the activities of the organization are not in the public interest or are contrary to written law, or that the application has false or misleading information, or that the organization should not be registered on the Council's recommendation.⁶⁹ An applicant who is dissatisfied with the Board's decision to reject an application or to suspend or cancel registration may apply to the Board to review its earlier decision.⁷⁰ Alternatively, the applicant may appeal to the Minister who, within two months, must make a determination.⁷¹ The Minister may uphold, reject, or vary the Board's decision, require it to revise or review its decision, or require it to get further information from the appellant before further consideration.⁷²

The National Council for NGOs, composed of NGO appointees to represent their interests,⁷³ must establish rules of procedure for efficient administration and co-ordination of the activities of NGOs,⁷⁴ develop and cause to be adopted a code of conduct, and establish other regulations to facilitate self regulation of NGOs.⁷⁵ The Board must approve the code of conduct.⁷⁶ NGOs registered in terms of the Act may engage in legally acceptable fundraising activities.⁷⁷ International NGOs, defined as organizations that are established outside the mainland of Tanzania,⁷⁸ must foster and promote the capacities and abilities of other NGOs, participate in the activities of the Council, and not create competition or misunderstanding among NGOs.⁷⁹ The Act provides for offences and penalties.⁸⁰ An NGO commits an offence if it forges a document for the purpose of seeking registration, makes false statements, conducts fundraising activities contrary to the Act, operates without registration, or violates the code of conduct, regulations or rules made under the Act. The penalty for an offence may be a fine or imprisonment or both.

68. Ibid, sections 13 and 14(2).

69. Ibid, section 14.

70. Ibid, section 16(1).

71. Ibid, section 16(2).

72. Ibid, section 16(2) and (4); section 21 (5) and (6).

73. Ibid, section 25.

74. Ibid, section 26(2).

75. Ibid, section 27(1).

76. Ibid, section 28(1).

77. Ibid, section 32.

78. Ibid, section 2.

79. Ibid, section 31(c).

80. Ibid, section 35.

International NGOs, defined as organizations that are established outside the mainland of Tanzania,⁸¹ must foster and promote the capacities and abilities of other NGOs, participate in the activities of the Council, and not create competition or misunderstanding among NGOs.⁸²

Comparing and Contrasting NGO Laws in the Five SADC Countries

Malawi and South Africa, and to a lesser extent Tanzania, engaged in serious consultations with civil society before introducing their laws to regulate NGOs, and Namibia is involved in intense consultations on its proposed new law.

Malawi and Tanzania have mandatory registration. Malawi will only register NGOs if at least two directors or trustees are citizens of Malawi, but the law makes provision for exemptions. South Africa has voluntary registration, and Namibia intends to follow suit. Mozambique has a dual registration regime: mandatory registration for foreign NGOs and voluntary registration for local ones.

Ministerial influence in the appointment of members of the registration body is high. In Tanzania, the Minister appoints four members on the recommendation of the legally designated NGO Council. Malawi's Minister appoints seven members and must merely consult with the designated NGO body.

South Africa, Malawi, and Tanzania all have laws that impose time limits on the bureaucracy that makes decisions about registration.

Appeal processes for organizations to challenge decisions on registration vary. South Africa provides for an Arbitration Tribunal appointed by the Minister to hear appeals, Malawi permits appeals to the High Court for judicial review, and Tanzania merely allows the aggrieved organization to request a Board review of its decision or to appeal to the Minister.

The extent to which the laws of different countries criminalize statutory offences differs. The NGO law in Malawi provides for statutory offences which may only be punished by imposing a fine. The South African law creates offences primarily for fraud, which is made punishable by either a fine and or imprisonment. The only other offence that the law creates is for the transfer of NGO assets other than to another NGO with similar

81. Ibid, section 2.

82. Ibid, section 31(c).

objectives when the organization is being wound up or dissolved. This offence is a violation of a provision that organizations must insert in their constitutions when they seek registration. The Tanzanian legislation creates numerous statutory offences which are liable to punishment by a fine or imprisonment or both.

In Tanzania and Malawi, the laws impose specific duties on foreign NGOs, which are defined as being established outside the respective territories. Foreign NGOs in Mozambique will only be authorized to operate if they conform to the government program, create capacity in local partners, and avoid participation in politics. In Tanzania, foreign NGOs must promote the capacities of other NGOs, participate in the NGO Council, and not create competition or misunderstanding among other NGOs. With respect to fundraising, Malawi and Tanzania permit registered NGOs to engage in legal fundraising activities. In Namibia and South Africa, the premise of voluntary registration is that it will enable NGOs to attract more donor funds.