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The Zimbabwean Non-Governmental Organizations Bill 2004 and International Human Rights Law/Standards

Issues, Analysis and Policy Recommendations

UNDP – Legal Unit, Zimbabwe

Working Paper for Policy Dialogue with the Government of Zimbabwe and other Stakeholders

Harare, September 2004

TABLE OF CONTENTS

List of Abbreviations

AU	African Union
CSO	Civil Society Organization
ECOSOC	Economic and Social Council
GoZ	Government of Zimbabwe
INGO	International Non-governmental Organization
MDC	Movement for Democratic Change
NANGO	National Association of Non-governmental Organizations
NCA	National Constitutional Assembly
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental Organization
NPO	Non-profit Organization
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PVO	Private Voluntary Organization
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNIFEM	United Nations Development Fund for Women
USA	United States of America
UTCAH	Technical Unit for the Coordination of Humanitarian Affairs
WHO	World Health Organization
ZANU-PF	Zimbabwe African National Union – Patriotic Front

Executive Summary

In this paper we make policy recommendations on how to address some of the concerns that have been expressed about the Zimbabwean Non Governmental Organization Bill, gazetted on 20th August 2004, (herein after the NGO Bill) from the point of view of the United Nations (UN). To do so in an informed and comprehensive manner we have carried out a legal analysis situating the NGO Bill within the national context of a polarized society with the aim of helping us appreciate the probable intent of the Bill and the stipulations thereof. We also paid considerable attention to laws and practices of other African states to ascertain their similarity or otherwise with the Bill under study.

The overarching objective, however, was to interrogate the consistency or otherwise of the NGO Bill with international human rights law/standards as expressed through the International Bill of Rights[1] and the related regional human rights regime, in this particular case the African Charter on Human and Peoples' Rights[2]. One principal reason for this approach is that international human rights law and its implementation is a *raisons d'etre* of the UN system itself, so also has the UN, it is submitted, a secondary duty in the realization of human rights standards within domestic jurisdictions of its member sates, such as Zimbabwe.

Scrutinizing the Bill on a section-by-section basis, we submitted that with the possible exception of section 9(4) and 17[3], the Bill in its totality may not be inconsistent with international human rights law. That, we noted should not be construed to mean that there could not be other concerns with Bill from point of view of Zimbabwean municipal law or any other policies and practices. We invoked an established principle in international human rights law to sustain our contention: that states do have a legitimate right, sometimes duty, to regulate all entities, including NGOs, whether local or foreign in origin, within their jurisdiction. And such actions are within the competence of sovereign states; in so far as it could be demonstrated that it is regulating with law and that law itself is within the "*margin of appreciation*" that international law confers on states, then the action is *prima-facie* lawful.

Having endeavoured to establish the legality of regulating NGOs in the general sense, a comparison of the Bill with laws and practices of other African states showed that the NGO Bill of Zimbabwe bears close resemblance to that of other African states and in fact is not dissimilar to that of some matured democratic

[1] The International Bill of Rights constitutes our legal framework of modern human rights standard. It is made up of the Universal Declaration of Human Rights 1948; the International Covenant on Civil and Political Rights 1976; and the International Covenant on Economic, Social and Cultural Rights, 1976, and the related thematic and regional human rights instruments.

[2] As at 2003, all the African states had ratified the African Charter on Human and Peoples Rights. The fact of the ratification by all states attests to the fact that the Charter is the accepted regional human rights regime. It was adopted by member states of OAU in 1981, and entered into force in 1986.

[3] These two sections are our principal concern from point of view of international human rights law /standards but we have also registered other concerns in respect of Sections 10, 24, 29 & 32, which are all discussed in detail in this paper.

states. This view not with standing, we noted that none of the states examined had in their laws stipulations such as Sections 9(4) and 17.

We sounded a word of caution with regards to the administrative procedures and transitional provisions contained in the Bill, that if they are not well managed, they could become a hindrance to the exercise of the right of forming association, and could as well have implications for established principles of rule of law. We further observed that the specific formulation of NGO laws and their varying details from state to state appears to be informed by political culture, legal traditions, and state-society relations in at given phase in a country's history. Attention was called to the justifiable grounds that states lawfully have in restricting human rights or temporarily suspending the same and the exceptions thereto; i.e. rights that are to be respected at all times, including times of national emergency.

Thereafter we revisited the two Sections of the Bill that we have expressed fundamental concerns: 9(4) and 17. By revisiting the sections and examining them in greater detail we attempted to address three fundamental questions:

- Do international NGOs working on issues that include human rights and governance have a right to operate in countries other than their own?

- Do local NGOs have a right in law to receive foreign funding or donation for activities genuinely geared towards the promotion and protection of human rights in their own countries?

- Can local NGOs successfully carry out their operations on human rights realization without donor assistance?

In attempting to address these issues a comprehensive legal analysis of the status of human rights NGOs in international law was embarked upon, relying on the legal framework of the UN and the African human rights systems. Several authorities and legitimate state practices were cited with the view to establishing that GoZ as a party to UN Conventions on human rights, a UN member state, and also a party to the African Charter would appear to be in breach, were Sections 9(4) and 17 of the Bill to pass in their current formulations into an Act. The two sections will manifestly, we contended, hinder the exercise of the right to freedom of association and assembly, amongst others, and would be a hindrance in the overall work of human right defenders, contrary to the cited authorities that bind GoZ.

A conclusion we inferred was that local human rights NGOs in so far as they are advocating for human rights within the law should, in accordance with international human rights law, be able to source foreign funding. Equally, INGOs that operate within the law or have not shown any cause that they will not operate within the law, as internationally defined, should be registered.

Finally, we subjected, pursuant to the arguments above, the two sections to a test laid down in a decision (*ratio)* of a respected and often cited case of Tanzanian Court of Appeal (Kukutia Ole Rumbun v A.G. Civil Appeal No. 32/1992). The decision grants that the state, in this case GoZ, could legislate to restrict rights in the name of principles of public interest. But then given the wide and broad scope of sections 9(4) and 17, there is a danger of lumping together "innocent NGOs" and the "targeted offender", which will not be fair. According to that reasoning such a law may be disproportional to the possible legitimate problem that it seeks to address. It also confers on the executive unfettered discretionary powers; in the sense of the definition of what is a human rights and political governance NGOs. In sum, human rights NGOs, were the Bill to pass in its current formulation into law will not be able to function.

We called attention to the overall implications of the Bill, were it to be passed into an Act, for GoZ, donors, NGOs and UN itself: it would mean that GoZ will be in breach of some of its international human rights obligations, which in turn may not augur well for the country's image internationally, a fact that could also impact adversely on multilateral and bilateral assistance. Donors cannot give funding to local NGOs working in the areas of governance and human rights. Most NGOs would cease to exist for want of funding. UN country operations in terms of working with NGOs in certain sectors as indicated may be impaired.

Consequently, we make the following recommendations:

- That the UN should take as its starting point an acknowledgement of the right of the government to legislate on the subject matter;
- That the UN should show an understanding of two distinct but related issues: concerns expressed about the heavy bureaucratic/administrative demands placed on NGOs generally by some sections of the Bill and probable illegality (in terms of international human rights law) of Sections 9(4) and 17.
- That at the first instance the UN should impress upon GoZ that it could facilitate a process of NGO self regulation working with NANGO to jointly produce an NGO Code of Conduct within 6 months an d/or alternative draft that addresses mutual concerns and interest;
- That UN should facilitate a dialogue with donor countries on good donor ship to help address some of the concerns and perceptions of GoZ as regards national security and funding of NGOs seemingly seeking state power or involved in partisan part political activities, as often stated by GoZ;
- That UN should work with all the stakeholders to present an alternative draft which narrows the scope of the two sections and yet take into consideration the concerns and perception of Goz and principles of law;
- That should the above approach not succeed for whatever reason, the minimum that the UN has to insist upon is the striking out of the Bill sections 9(4) and 17, and draw attention of GOZ to the implications of not doing that.

"Give to Caesar what is Caesar's and to God what is God's"
Mark 12: 13-17.

Part I

1.0. Introduction

The Zimbabwean Non-Governmental Organizations Bill 2004, hereinafter the NGO Bill, has attracted passionate discussion, in fact sometimes emotions, and for very understandable reasons. As to be expected, there are already fairly good high quality analyses on the implications of the bill on the work of NGOs in the country, especially those that focus on human rights and governance issues.[4] A good number of analysts have so far focused on the political as well as the general legal and practical implications of the said NGO Bill, for the democratic space in the country.

In this paper we seek to make policy recommendations on how to address some of the concerns expressed, from the point of view of the United Nations (UN). To do so in an informed and comprehensive manner we carry out a legal analysis situating it within the national context and paying considerable attention to laws and practices of other African states. The overarching objective, however, is to interrogate the consistency or otherwise of the NGO Bill with international human rights law/standards as expressed through the International Bill of Rights[5] and the related regional human rights regime, in this particular case the African Charter on Human and Peoples' Rights[6]. One principal reason for this approach is that international human rights law and its implementation is a *raisons d'etre* of the UN system itself, so also has the UN, it is submitted, a secondary duty in the realization of human rights standards within domestic jurisdictions of its member sates, such as Zimbabwe.

The express intention and stated aim of the NGO Bill, as provided for in the preamble are to:

- *Provide for the registration of non-governmental organizations,*

[4] See for example the statement by NANGO Sunday Mail of 15th August as well as the article by columnist Professor Mahoso in the same issue; Brian Kagoro, Another One Party State Effort: Zimbabwe's NGO Legislation; July 2004; Arnold Tsunga and Tafadwa Mugabe, Zim NGO Bill: Dangerous for Human Right Defenders: Betrays High Degree of Paranoia and Contempt for Regional and International Community, August,2004; Legal Resources Foundation, The Non–Governmental Organizations Bill, 2004; Crisis in Zimbabwe Coalition, Proposed NGO Legislation, August, 2004; and Report of Meeting of Heads of NGOs, July 2004.

[5] The International Bill of Rights constitutes our legal framework of modern human rights standard. It is made up of the Universal Declaration of Human Rights 1948; the International Covenant on Civil and Political Rights 1976; and the International Covenant on Economic, Social and Cultural Rights, 1976, and the related thematic and regional human rights instruments.

[6] As at 2003, all the African states had ratified the African Charter on Human and Peoples Rights. The fact of the ratification by all states attests to the fact that the Charter is the accepted regional human rights regime. It was adopted by member states of OAU in 1981, and entered into force in 1986.

- *Provide for an enabling environment for operations, monitoring and regulation of non-governmental organizations; and*

- *To repeal the Private Voluntary organization Act, and for matters incidental thereto.*[7]

These stated aims, are, on the face of it within the competence of any sovereign state to regulate. Sovereign states have the right to regulate the activities of any entity within their jurisdiction, whether of local or foreign origin, in accordance with law. In so far as it can be shown that such regulatory regime is done in accordance with law or policies that conform to human rights law as required in a democratic society, no dispute may arise. However it is these key elements that appear to be at the centre of the controversial debates surrounding the Bill.

1.1. Structure of Paper and Approach

In order to systematically explore the issues generated by the NGO Bill, the paper is divided into ten parts, with the introduction being part one. The second part attempts to situate the Bill within the national context of a polarized society with the objective to help us appreciate the law itself and the stipulations thereof. The third part examines the regulatory regimes in other African states of which we attempt to survey the laws and policies of other African jurisdictions with view to ascertaining their similarity or difference with the Bill under discussion. In this same part, we give an over view of similar legislation in a matured liberal democratic state. Part four begins by presenting a framework of legal principles that are used to lawfully justify restrictions or temporary suspend the enjoyment of rights by states that are party to international human rights treaties. We spell out clearly the grounds for the restrictions that are permissible by law. Thereafter, we draw attention to policy reasons often assigned by governments for controlling NGOs. Counter arguments are also presented. Part five looks more closely at sections 9(4) and 17 of the NGO Bill, against the backdrop of legal principles identified in part three. Legal sources, authorities, UN System, African Commission and states' practices are referred to in evaluating the legality or otherwise of the said sections. Attention is drawn to other sources of human rights norms within the African system. Employing the same framework the status of human rights NGOs in law is investigated. This part makes the case that the said sections in their current formulations may be in probable breach of international law. Related to the issues of international law that concern is expressed, the administrative procedures are scrutinized as well with in part six the aim of finding out how they could raise concerns about principles of rule of law or claw back rights. The consistency or otherwise of the municipal law such as the NGO Bill is subjected to a test of consistency with some principles of human rights law in part seven. Part eight highlights the overall practical implications of the Bill were it to pass into an Act. We show how it will impact

[7] In respect of how the NGO Bill adequately addresses the lacuna or limitations of the Private Voluntary Act, or any other mischief we defer to our Zimbabwean colleagues. See Legal Resources Foundation, NGO Bill 2004, and Crisis in Zimbabwe Coalition, cited above, note 1.

upon the GoZ, NGOs, donors and the UN itself. The final parts, nine and ten, summarize the key issues, conclude and make recommendations respectively.

Part II

2.0. The National Context

Laws, such as the NGO Bill, are informed in their drafting and intent by a national context but equally like most legislative initiatives they also often draw from experiences that pertain elsewhere. However, understanding the national context invariably helps in appreciating the law itself and the provisions thereof. It is also not a secret that judges themselves pay considerable attention to the national situations when giving interpretation to promulgated laws.

Coming at the time that the political landscape is characterized by polarization and distrust, and an atmosphere where civil society's perception is that government has been clawing back on basic human rights, the debates around the NGO Bill and its intent are bound to be controversial, generating passion and in fact deep seated emotions. Equally it cannot be gain said that the drafters of the Bill were very mindful of the context when crafting its contents as it stands now.

Contemporary Zimbabwean society is highly polarized, of which no entity within the society, whether national or international, is immune from the divisions and strong positions on issues. These divisions are manifesting themselves in high levels of distrust, suspicion, and the reading of conspiracy theories into every acts of all parties.

Two levels of conflict have dominated the country since 2002: the conflict between the opposition MDC, its supporters, former minority commercial farmers, some civic groups and GoZ on one hand, and the second level of conflict is between the Government and the Western donor countries, notably UK and USA. In the view of the Government, though, there is actually one level of conflict, that between itself and the international donor community who impacts on local organizations. As such according to the government perceptions, what appears to be an internal conflict is to all intents and purposes part and parcel of the machination of the Western donor countries to effect regime change using local forces as surrogates, all because of the land reform programme that started in 2000.

Related to this is the objective historical, social, economic, and political context that produced the MDC opposition party. Between 1998 and 2000 the CSOs visibly forged an alliance with students, trade unions in the form of the NCA to initially demand constitutional reform. Bouyed by the success of the 'No' vote against the Government in the constitutional referendum, it was this alliance that gave birth to the MDC which demanded political change away from the *de facto* one party, ZANU-PF PF, monolithic dominance. The role of international donors during this period also deserves mention. While both the government

Commission and the NCA received some funding, it is a well-known fact that some of the donors who supported the constitutional reform process injected more funds into the NCA process. For this reason the donor community is regarded with suspicion by the GoZ.

More importantly the historical alliance between the MDC and civil society has come to haunt civil society organizations by giving rise to the perception that they are partisan with a political agenda of wanting to help the MDC to capture state power with funds sourced from Western donor countries, are portrayed as craving for regime change in the hallowed name of human rights and civic education, GoZ opines.

The human rights discourse has not been spared the controversy, but has also been dragged into the conflict, in which GoZ argues that the Western donor countries invoke civil and political rights in a punitive manner against countries that do not adhere to their a-historical, liberal notions of human rights which tend to give secondary priority to social and economic rights. In the view of GoZ it is economic and social rights, through mechanisms such as land reform that should be prioritized in an under- developed country such as Zimbabwe.

Most CSOs and Western donor countries refute these arguments as a charade by the ZANU-PF government to stay in power despite being challenged since 1999 by mass action that led to the creation of the MDC as an opposition party. In the view of the MDC, some civic groups and western donor countries, given the time that ZANU-PF had been in power, the accelerated land reform process in 2000 was a desperate last minute attempt by the ZANU-PF government to cling on to power. They contend that feeling seriously challenged particularly by the 'No' vote, that ZANU-PF had to find ways to regain credibility and tighten its hold on power. The passage of laws such as the Public Order and Security Act, 2002; the Access to Information and Protection of Privacy Act, 2003, and the Broadcasting Services Act 2001 and Private Voluntary Organisation Act , are viewed as pieces of legislation with the singular intent of constraining the political space in which opposition political parties and civic groups to operate. The NGO Bill, they contend, read together with the mentioned legislations and its timing, demonstrates that it is aimed singularly at creating a climate for ZANU-PF to win the March 2005, parliamentary elections.

The above analysis seeks to show that one specific challenge arising from this context is the difficulty of engaging parties in a "scientific", sober objective and impartial analysis of the Bill in question without mudslinging or incurring one form of accusation r the other.

Part III

3.0. The NGO Bill and Legitimate State Practices[8]

[8] Legitimate state practices within the province of international relations may themselves be source or evidence of international law.

The totality of the Bill and its express objectives are not inconsistent with international human rights standards.[9] Scrutinizing the NGO Bill on a section by section basis, it must be stated that States do have a legitimate right, sometimes duty, to employ national laws to define and regulate NGOs generally or any entity whether of local or foreign origin. Such actions are within the scope of the exercise of sovereign rights by states. In so far as States regulate such entities by law and such laws in question are within the "*margin of appreciation*"[10] that international human rights law confer on States, then state actions may be *prima facie* legitimate. In respect of NGOs, regulations normally take the form of: NGOs providing evidence of substantive objectives they intend to pursue within the jurisdiction of the state party; the procedure to be followed; how it is to be governed and managed; the competent state body to carry out the registration; the mode of registration; mandatory disclosure of sources of funding; presentation of annual financial and narrative reports; the state or a relevant department having the authority to inspect or appoint an auditor to inspect books to ascertain proper book keeping; mechanism to dissolve or suspend the NGO; State officials often have discretionary powers conferred upon them by statute to make further regulations as they think fit and proper; Criminalization of certain acts by the statutes, such as non–compliance with stated objectives, improper bookkeeping, misrepresentations etc.

Granted that these are the practices of states, including some matured democratic states, then it is submitted that with possible exception of sections 9 and 17 which manifestly breach international human rights law, were the Bill to pass into law, the regulations stipulated by sections: 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 25, 26, 27, and 28, may not in their general formulations be inconsistent with international standards and practices of states. We add readily though, for the avoidance of any doubt, that the fact that the mentioned sections are not necessarily inconsistent with international law does not mean that they, the sections, may not present administrative difficulties for NGOs. Or inconsistency with municipal law. The administrative procedures may become an issue of human rights law if it could be shown that they have become obstacles to the realization of a human right. We shall revisit the two controversial sections (9 and 17) in question in more detail below.

3.1. Laws and Practices of other African States

An examination of legislation on Non-governmental organizations in other African jurisdictions shows close similarity to the NGO Bill under discussion. The specific formulation of these and their detail may vary from state to state informed by political culture, legal traditions, and state–society relations at a given phase in a country's political history. Generally they range from practices where the state is relatively less interventionist in the activities of NGOs such as

[9] See supra note X, which calls attention to t he fact that they may be other types of concern that individuals and organizations may have in respect of the Bill and municipal law and policies.

[10] This is the lawful scope that a state party to an international human rights treaty is permitted to promulgate municipal law or embark upon policies that are informed by specific country situations. It is an adaptation of international human rights law to local conditions.

South Africa, through intermediate cases such as Kenya, to a much more state interventionist approach such as Angola.

In South Africa the relevant statute is the Non Profit Organizations (NPO) Act of 1997. It provides in Chapter 1 Article 1, a definition of what constitutes a non-profit organization, broad enough to encapsulate trusts companies, or "other association of persons" established for a public purpose. Articles 4-10, regulate mode of governance; articles 12-16, spell out the procedure of registration, of which a prospective NPO must apply for registration providing information such as its constitution to the director of a directorate with the statutory authority of registration. The registration could be cancelled by the director for non compliance, with a possibility of appeal; Article 20 makes it clear that non compliance may become a subject of police criminal investigation and false information and misrepresentation may constitute grounds for de-registration; Article 26, confers on the sector minister discretionary powers to " make regulations that are necessary or expedient in order to achieve the objects of the Act;"; Article 22 provides avenues of redress to an aggrieved organization or individuals. In Article 11, there is no evidence of prohibiting sourcing of external funding. At least it is silent on that subject.

In Kenya NGOs are governed by the Non-Governmental Organization Co-ordination Act No 19 of 1990. In addition to the statute there is also an NGO Council Code of Conduct as well as rules and regulations pertaining to the NGO Council. Section 2 of the Act defines what constitutes an NGO, fairly comprehensively to allow a number of associations, both international and national, to pass the test of the definition. The management or governance of NGOs is vested in an NGO board with a chairperson appointed by the President of the Republic. The sector minister also appoints between 5 to 7 persons to the board. There is a strong involvement of government departments such as Foreign Affairs, Office of the President, National Treasury, Social Services, and the Attorney General. Section 22 makes it an offence for an NGO to operate without being duly registered and certified as such. The board may as stated in section 14 and 16, refuse to register an NGO, if it is satisfied that it is not in national interest to do so or because false information has been provided. The board may also cancel a certificate of an NGO for non-adherence to objectives. An aggrieved NGO may appeal to the sector minister. The Act is silent on the sourcing of funding by NGOs; therefore whatever is not prohibited is allowed.

Angola presents a classic case of strong state intervention. The NGO sector is regulated by Council of Ministers Decree No: 84/02, 31 December 2002. NGOs are defined by Articles 7-10, as national, international and foreign, and gives a comprehensive list as to the sectors that fall within the scope of work of NGOs. NGOs are coordinated by the Ministry of Social Affairs and Re-integration, through a Technical Unit for the Coordination of Humanitarian Affairs, the UTCAH. In accordance with articles 6 the UTCAH is empowered to define programmes for NGOs to the extent that they are complimentary to government actions, including determining the regions and provinces that the NGOs should operate. It has a board made up of 15 representatives of various government ministries. Procedure for registration is provided for by Articles 13 – 17. The

statute empowers government bodies to investigate and inspect NGO activities including demanding that they undergo independent auditing. NGOs can be suspended once a court orders that its activities are prejudicial to national sovereignty and integrity. Article 20 requires NGOs to seek approval from the Ministry of Social Affairs before they can raise funds from either international or national sources. [11]

3.2. Matured Democratic States

It is also worth examining how matured democratic countries regulate voluntary associations, bearing in mind that most African states have a legal tradition of received laws from former colonial powers or the metropolis. For example, the legal framework for regulating NGO activities in the UK is the Charities Act of 1993.The Act confers substantial powers upon a Commissioner and the Secretary of State in ensuring that the activities and operations of charities or NGOs in this usage, are in consonance with the object and provisions of the said Charities Act. Consequently, there are stipulations defining what constitutes a charity for purposes of the Act, the procedure for registration, the required management structure constituted by trustees. No person who has been disqualified from being a trustee of a charity by court of law should be appointed a trustee. Trustees created by a charity have a duty in accordance with section 41 to keep proper accounts of the charity. The Secretary of State has discretionary powers to prescribe sets of rules for the preparation of financial statements of a charity. The Commissioner is empowered under the Act to appoint a receiver or manager to charity that in his or her opinion are not complying with the object of the Act.

Particularly noteworthy is that Charities are bound by the Act to disclose their sources of funding. Section 41(2)(a) calls on Charities to provide records of: "Entries showing from day to day all sums of money received and expended by the Charity and matters in respect of which receipts and expenditure takes place".

The Act makes certain conduct of Charities an offence which if convicted makes one liable to imprisonment or with the option of a fine or both. They are mainly offences committed under section 5(4), which include, soliciting for money or property for personal benefit. Section 11 also criminalizes an act by any person who knowingly or recklessly supplies false information. Such person could be imprisoned if convicted, for a maximum period of two years. Equally it is an offence for any one to part with property belonging to a charity without the Commissioner's approval. Section 49, makes it mandatory for charities to produce their annual financial statement, failure of which is an offence. Refusing a public inspection of accounts of a charity that one is a trustee or director of, may constitute an offence under section 47. So also is it a criminal offence for a person who has been disqualified by a court to become a trustee after disqualification. Such conduct could attract an imprisonment for a period not exceeding six months. In all cases, probable criminal acts as stated in the cited sections no proceedings will be instituted without the consent of the Director of

[11] See generally a comparative study of the various NGO Bills carried out by the Legal Unit, August, 2004.

Public Prosecution (DPP), as contained in section 94. Section 92 provides avenues for redress by any aggrieved person or persons.

Regulating the activities of NGOs throws into sharp focus the perennial tension between rights of individuals, peoples and organizations, and the intervention by the state into affairs of society in the name of national security, public order, public morality, health etc; in a democratic society the issue becomes when such an intervention is legitimate and justifiable and when it is not.

3.3. NGO Regulation under African Regional Human Rights Regime

There is some authority to suggest that the NGO Bill in question may in its general character conform to resolutions and practices of the African Commission on Human and Peoples' Rights, the regional human rights regime. In a resolution passed on the co-operation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission, done in Banjul the Gambia, on 31st October 1998, the latter expressed concern that:

"*Some of these NGOs on occasion, have been found to use their grants……for purposes other than the promotion and protection of human rights. The fear, therefore that some of them may have either changed their mandate or shifted their focus to issues other than human rights become legitimate.*"

Pursuant to this resolution, the African Commission at its 25th Ordinary Session held in Bujumbura, Burundi, from 26 April – 5th May, 1999 decided on new criteria for the granting of Observer Status to NGOs. In an annexed Chapter 1 to the resolution, the Commission provided, among other things, the following:

Chapter 1 paragraph 2:

"*All organizations applying for observer status with the African Commission consequently, should:*

(a) Have objectives and activities in consonance with the fundamental principles and objectives of enunciated in the OAU Charter and the African Charter on Human and Peoples' Rights;
(b) Be organizations working for human rights;
(c) Declare their financial resources."

For purposes of this paper Sub- paragraph 3(b) is also instructive, it calls on NGOs wanting an observer status with the Commission to provide:

"*A statute, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as statement of its activities.*"

It goes on to demand from all prospective NGOs to provide the secretariat of the commission with an activity report and future plans and field of activities, then the Chapter goes on to state clearly that

"*No application for Observer Status shall be put forward for examination by the commission without having been previously processed by the secretariat.*"

In other words unless an NGO complies with these regulations, some of which bears close resemblance to the NGO Bill in question, it will not be "registered".

Part IV

4.0. Justifiable Legal Grounds for Restriction of Rights

What we have sought to demonstrate with the cited laws and practices of other African states, and even that of UK, as a matured democratic state, and the resolutions of the African Commission, is that States as parties to international human right treaties may have justifiable grounds to regulate the activities of NGOs or restrict rights including freedom of association which appears to be the right in question here, subject to certain conditions. The justifiable grounds for lawful restrictions are:

- In accordance with Article 4 of the International Bill of Rights, a state party to the Covenant on Civil and Political Rights could derogate from its human rights obligations during times of emergency which threatens the life of a nation, once the state of emergency is proclaimed and the UN Secretary General duly notified, then the obligation to protect certain rights could be temporarily set aside.[12]

- A state party may also when signing, ratifying, acceding to an international human right treaty such a Bill of Rights, enter some reservations.[13]

The main justifiable grounds of restrictions on the otherwise exercise of rights are:

- The interest of national security;
- Public Order (Order publique);
- Public Safety;

[12] There are certain rights that a state can never legally derogate from whatever the circumstances, these rights are contained in the International Covenant on Civil and Political Rights as: Article 6, on right to life; Article 7, freedom from torture, inhuman and degrading treatment; Article 8, freedom from slavery , slave practices and slave trade; Article 11 the right not to be imprisoned because of an inability to fulfill contractual obligations; Article 15 criminalizing an offence retroactively; Article 16, equality before the law; and Article 18, freedom of thought, conscience and religion.

[13] A state when signing, ratifying, accepting, approving or acceding to a treaty, may enter reservations on some aspects or paragraphs of the treaty instrument. Again there are exceptions, and they are:
1. when prohibited by the treaty; 2: when only specific reservations are allowed; 3: when the reservation is incompatible with the objective of the treaty.

- Protection of Public health;
- Protection of public morals, and
- Protection of rights of others.

With respect to the African human rights system, the only grounds for justifiable restrictions of rights is provided for in Article 27(2), which states that the rights contained in the Charter: "*Shall be exercised with due regard to the rights of others, collective security, morality and common interest.*" In sharp contrast to the UN Bill of Rights the African Charter does not allow states to derogate from their obligations even during times of emergencies.

Thus, each time that a state promulgates a law or embarks upon a policy that is restrictive of a right or even derogates from it, that state must show with evidence and in accordance with due process, (including the courts system or another competent judicial or quasi judicial body) that one or more of the conditions stated above exist(s) so as to warrant the temporary restriction. Accordingly, the state party, in this case, GoZ has to shoulder the burden of proof that a right or sets of rights it is restricting at any point in time must be justified on the grounds of one or more of the above mentioned principles. In addition to possible legal grounds for regulation, issues of policy are raised as well.

4.1. Government–NGO Relations: Assigned Policy Reasons for Control

Reasons assigned generally by governments for regulating NGOs:

- That they, the States, are sovereign and have ultimate responsibility for all that happens within their jurisdiction, and not NGOs;
- That they have been elected with a particular programme of action as contained in party's manifesto so NGOs have to compliment or fall in line;
- That it is they, the government, that are accountable to the electorate and not the NGOs;
- That since September 11th 2001, national security has become the imperative for tighter regulations and control in some African and Western democratic countries because of the belief that Al Qa'eda network has infiltrated some organizations purporting to be NGOs.

With respect to African states the following additional reasons assigned by governments are:

- That multilateral and bilateral donors channel funds away from the state to NGOs; it is viewed in terms of *zero sum game* of which what ever goes to NGOs is a lost to the state and vice versa;
- That NGOs are increasingly behaving like "parallel governments";
- That NGO work does not compliment government, but in some instances willfully undermine government;

- That NGOs are loyal to their respective donors not to the government, and some of the governments read into that relationship national security implications. [14]

The basis of some of these policies are challenged by some activists and scholars. It is argued that the post-colonial African state, like its colonial predecessor, is very distrustful of civil society. The reason being that the post colonial state on the morrow of political independence started embarking upon a twin project of nation building and economic development in order, as the governments argued then, to catch up with the developed countries. In the process all forms of pluralism were suppressed for fear that it will undermine the state building project thereby making governments very assimilationist, and viewing with suspicion any organization or association within society that it did not fully control. In the Cold War years may be for justifiable reasons there was always the fear by the newly independent states that the state system has been infiltrated by external forces through CSOs.

Objectively some of the governments saw such associations as centrifugal to the new fragile postcolonial state. The concept of state security, it was argued, was therefore overstretched to cover all organizations and activities within society that the state did not approve of. Human rights organizations until as recently as 1990's, were viewed as subversive and injurious to the state building project. In sum, civil society and state relations in post colonial Africa have never been cordial but riddled with mutual suspicion, albeit they have improved considerably since the end of the Cold War[15].

Part V

5.0. Sections 9 and 17 Revisited: Probable Breach of International Standards

Against the backdrop of the foregoing analysis of the country context, practices of other African states, outlined principles, legal framework and policies, we revisit sections 9 sub-section 4, and section 17.
Section 9(4) stipulates that: "*No foreign non-governmental organization shall be registered if its sole or principal objects involve or include issues of governance.*"

Section 17, states that: "*No local Non–governmental organization shall receive foreign funding or donation to carry out activities involving or including issues of governance.*" According to section 2 of the interpretative section, issues of

[14] These views are synthesized from several secondary sources, monitoring of media that covers Africa, and also from first hand discussions with some politicians in West Africa, East Africa and SADC Countries and missions abroad.
[15] For in depth understanding and insights into some of the issues raised by state –society relations in Africa and its historical dynamics, see for example: Kofi Kumado and Nana K.A. Busia Jr, The Impact of Developments in Eastern Europe on Democratization Process in Africa: An Exploratory Analysis in: Bard Andreassen and Theresa Swinehart (eds) Human Rights in Developing Countries, Strasbourg, Engel Publishers, 1991.

governance "*includes promotion and protection of human rights and political governance issues*".

The interpretative section when it comes to operationalizing what constitutes governance is not very helpful, as it presents us with a circular logic by defining governance as *political governance*. Does it mean partisan politics? If that had been used then the section would have given rise to a different issue[16]. Sections, 9(4) and 17, should be read together, and when read as such they appear to be inconsistent with international human rights law. They could constitute a serious hindrance to the realization of the International Bill of Rights and the related rights in the African Charter on Human and Peoples' Rights, which instruments Zimbabwe has ratified.

In respect of section 9(4), a foreign NGO could argue that as an NGO, human rights is neither its sole nor principal object but only incidental or peripheral, and therefore should be allowed by the Council and Registrar to register in accordance with section 10. Whereas this could be tried, it leaves prospective NGOs with very thin legs to stand on. This give rise to a much more fundamental question: given the definition of international human rights law in our contemporary world, is there any NGO whose operations or activities could not be construed as amounting to the promotion and/or protection of human rights? For sometime now human rights norms and standards have been held to be interdependent and interrelated. Hence economic, social and cultural rights are no more rights than civil and political rights.

In Africa not only has there emerged a consensus about the inter-dependence of the three generations of rights, in fact they stand on an equal legal footing[17]. Under the African system the right to form an association is a human right as the right to food and right to development. Meaning, that NGOs working for example on: prevention of torture, cannot receive foreign funding just as those working in food distribution and development sectors. Conceptually the African notion of human rights is much more comprehensive and has a wider scope than the UN or other human rights regional regimes.

As made crystally clear at the onset we, UN, object to the two said sections that seek to refuse registration of certain INGOs and also ban Local NGOs from sourcing international funding, and thus poses the question:
what objective criteria will be used in defining the NGOs that are allowed to operate and those that are not? A narrower definition, or broader definition of

[16] If the drafters had used the words partisan party politics or an NGOs overtly seeking state power, then they will have been a legitimate grounds not for them to be registered as NGOs .But political governance is a notion that does not lend itself to an agreeable definition so, the Bill does not help clarifying the notion of political governance.

[17] In human rights parlance the first generational rights, refers to the type of rights contained in the International Covenant on Civil and Political Rights, like right to assembly, association , expression, to vote and be voted for, etc. Under the African Charter these sets of rights are provided for in Articles 2 to 13. The Second Generation of rights are the Economic, Social and Cultural Rights, such as right to food, education, housing, work, etc. These rights provided for by articles 14 to 18. There are also what are termed third generational or solidarity rights, contained in articles 19 to 24, they are rights exercised collectively by peoples', it includes rights such as the right to self determination, to good environment, development, etc.To say that they stand on an equal legal footing means that they are justiciable and can as such become the subject of litigation at a judicial or quasi-judicial body.

human rights, as explained above. Is the Council or Registrar going to adopts a narrow concept of human rights as under the ICCPR or the much broader definition as provided for by the African human rights system.

These fundamental questions remain unaddressed, they are:

- Do local NGOs have a right to receive foreign funding or donation for activities that are genuinely geared towards the promotion and protection of human rights in their own countries?

- Do international NGOs working in mainly and solely and principally on human rights have the right to operate in countries other than their own?

- Can NGOs successfully function without the assistance of international donors. In other words can the Government or the private sector be expected to make meaningful financial contributions for this kind of work given the financial constraints bedeviling both sectors.

We are all too aware of the fact that GoZ is not saying that NGOs cannot operate within its jurisdiction, what it is saying is that INGOs whose work is mainly about human rights cannot, and local NGOs can operate only when they do not source funding from foreign sources.

To answer these questions adequately, we examine in greater detail the legal status of human rights NGOs in international law.

5.1. The Status of Human Rights NGOs in International Law

Admittedly, the traditional view of international law made it the preserve of sovereign states, and as such NGOs had no "standing" or legal recognition. However, there has been significant evolution in human rights law since 1945, with NGOs and even individual persons, becoming equally recognizable legal actors in international law.

In undertaking a legal analysis of NGOs in international law and thus the implications of sections 9(4) and 17, it is important to draw on our identified framework of legal sources and standards within which we will situate our analysis and critique. We here draw on the UN promulgated norms on human rights and legal norms and practices emanating from the African regional human rights system.

In Article 71 the UN Charter accords recognition to the work of NGOs within the UN system. It provides clearly that the Economic and Social Council (ECOSOC) makes a suitable arrangement of consultation with NGOs. This relationship was re-affirmed in resolution 1296 (XLIV) of 23rd May 1968. Again after a thorough review in 1996, the Council adopted yet another resolution that year, 1996/31 which created varying categories and status for NGOs. NGOs role in the UN

system is so important that they, the NGOs, have participated actively in special sessions of the General Assembly. Meaning as far back as 1945, the role of NGOs within the UN normative legal system had been recognized. The practices and un-codified conventions of the UN are such that NGOs are consulted by both Charter and Treaty based bodies[18]. UN agencies such UNICEF, WHO, UNFPA, UNIDO, have established operational and working relations with NGOs. In some cases like UNDP where there is no formal consultative relationship between itself and the NGOs, there is often a Memorandum of Understanding to cooperate in specific areas[19]. In more recent times, in 1993, during the UN Conference on Human Rights in Vienna, the assembled states, NGOs, multi-lateral agencies and other inter-governmental bodies adopted a declaration stating clearly in no uncertain terms the important role that human rights NGOs play in the realization of human rights. The meeting therefore re-affirmed the commitment of the UN and its member states to create an enabling climate for NGOs who are genuinely working in the area of human rights to enjoy the protection of all the rights enunciated in the International Bill of Rights and the laws of the respective member states.[20]

In a UN General Assembly meeting held in December 1998, the Assembly of member states adopted a resolution to defend human rights defenders entitled: "*Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to promote and protect universally recognized human rights and fundamental freedoms*". The said declaration, in its preamble, recognized the role that human rights associations are playing to promote the respect for human rights at both national and international levels. Article 1 of the declaration confers on NGOs and individuals, whether in association with others or as individuals, to promote and to strive for the protection and realization of human rights and fundamental freedoms at national and international levels. Article 7 accords the NGOs the right to advocate for human rights. Article 8 provides clearly that human rights NGOs should not be discriminated against in their access to government and the conduct of their affairs. Article 12(2) imposes a duty upon the States to ensure the protection of human rights defenders against "*de facto or de jure adverse discrimination, or any other arbitrary action as a consequence of his or her legitimate exercise of rights referred to in the Declaration.*"

In view of the stipulations of Section 17 of the NGO Bill, it is worth calling attention to provisions of Article 13 of the Declaration, it provides that:

[18] Charter based bodies are human rights bodies created by the UN Charter of 1945, such as the Human Rights Commission, the Sub-commission on Prevention of Discrimination and Protection of Minorities; and the treaty bodies are those that have come into existence as a result of treaties signed by member states of the UN, that include, the Human rights Committee created to supervise the implementation of the treaty on International Covenant on Civil and Political Rights, the Committee of the Rights of Children also created under the Convention on the Rights of the Child, 1999, etc.

[19] see Report of the Secretary-General, on Arrangements and Practices for Interaction of NGOs in all activities of the UN system, item 58 provisional agenda, UN Doc,A/53/170 1998.

[20] see the Vienna Declaration and Programme of Action, UN.Doc A/Conf.157/24(1993).

"*Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means...*"

In so far as it could be shown that the purpose is genuinely for human rights promotion then, the said association of people do have a right to seek funding without which their objective of working for the improvement of human rights cannot be realized.

Specific rights of the International Covenant on Civil and Political Rights may be violated, they are: Article 22, which guarantees freedom of association with others, and 22(1), provides clearly that: "*No restrictions may be placed on the exercise of the right other than those prescribed by law and which are necessary in a democratic society and in the interest of national security, public safety, public order(ordre publique), protection of rights and freedoms of others.*"

The implication here is that the justification that GoZ may have in restricting freedom of association, such as denying the local human rights NGOs access to foreign funding, or denying INGOs the right of registration, is to show that one or several of the justifiable grounds stated in the article exists to restrict the right. Until that can be shown, it may constitute a *prima facie* violation. And it is only those NGOs that act contrary to the justifiable grounds of restrictions that need to be restricted but not all organizations in that sector lest it may give rise to a claim of discrimination.

The other rights likely to be violated therefore should the Bill be passed is common article 2[21], which calls upon state parties like GoZ to undertake to ensure that all persons within their jurisdiction do not suffer any form of discrimination on any grounds what so ever such as opinion or national origin. Human rights and political governance NGOs may argue that because of the opinion they hold on issues of human rights and political governance they are being discriminated against contrary to the provisions common article 2. In the same way also INGOs could argue that in spite international and universal character of human rights law, they, as international NGOs, are being denied registration as prospective human rights NGOs on grounds of their national origin, thus discrimination.

5.2. The Status of NGOs under the African Human Rights System

Under the African system, the African Commission on Human and Peoples' Rights, which is the body entrusted with implementing human rights in Africa, has developed an institutionalized relationship with human rights NGOs where it meets the NGOs every 6 months, two or so days prior to the statutory sessions of

[21] Mostly articles which deal with the principle of non discrimination in human rights treaties are inserted in article 2, so human rights scholars often talk about common article 2, to signify non discrimination principle on the other side of equality

the Commission. More than that, Article 45 (1) (C)[22] of the African Charter on Human and Peoples' Rights has been construed by the Commission to mean a legal relationship with NGOs, thereby giving NGOs a legal standing. So also have there been several resolutions[23] by the Commission on how to cooperate with NGOs. The Commission's Rules of Procedure, Rule 75, states that NGOs granted Observer Status by the Commission, may participate in the public sessions of the Commission. In terms of Rule 76, the Commission may consult NGOs directly or indirectly. During its 11th Ordinary Session held in Tunis, Tunisia, in 1992, the Commission reiterated its desire to cooperate with African NGOs in the promotion and protection of human rights on the continent. Further to that, in its Mauritius Plan of Action for the period between 1996 and 2001, adopted at its 20th Session in Mauritius, the Commission decided to work with NGOs in Africa so as to establish appropriate mechanisms for the promotion and protection of human rights in Africa.

Pursuant to the implementation of UN Declaration on Rights of Human Rights Defenders in Africa, the African Commission at its 35th Ordinary Session in Banjul, The Gambia, between 21st May and 4th June 2004, resolved on the protection of human rights defenders and also put forward a new mechanism for their full protection. The resolution further called upon member states to:

" *...to ensure the protection of human rights defenders and to include information on measures taken to protect human rights defenders in their periodic reports"*

Article 62 of the African Charter makes it mandatory for all state parties, such as GoZ, to present every two years legislative and other measures they have taken with the view to giving effect to the rights and freedoms guaranteed by the Charter. According to the Commission's guidelines, when state parties are reporting on Article 10, (which deals with freedom of association*)* they should, among other requirements, *"provide information about the status of organizations (NGOs) working for human rights including efforts made for their establishment and improvement"*[24].

Article 10 of the African Charter may therefore be violated should the NGO Bill be passed. It provides that: "*Every Individual shall have the right to free association provided that he abides* by *the law*.[25]" In March 1992, the African

[22] Article 45 (1)(C) provides that: The functions of the Commission shall be:
1. To promote human and Peoples Rights and in particular:
(c) Co-operate with other African and international institutions concerned with the promotion of human and peoples rights.

[23] Under the African Human rights system because of the absence of court, it is resolutions and comments and other principal statements which are the authoritative sources for interpretation of articles of the Charter. "case-law".

[24] Guidelines on State Reporting drawn up at its Fourth Ordinary Session of the African Commission on Human and Peoples' Rights held in Cairo, Egypt, 17-26 October 1988.

[25] The law here is the margin appreciation or ought to be as described above. Other scholars contend that this could be a claw back clause, a clause which restricts or negates the effect of a right by over –qualifying it through such phrases as "conditions laid down by law", "Prescribed by law". See for example Evelyn A. Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures, Martinus Nijhoff Publishers, 1996. To judge whether such a clause is one within the margin of appreciation or a claw back clause depends on the entire context of the law.

Commission passed a resolution elaborating on the scope of the right; it laid down the principle that state laws could not be used to abridge or limit the exercise of the right[26]. In other words except GoZ can show cause that the association of NGOs will be injurious to the right of others or national security or public order, then no restriction such as non registration of INGOs working mainly on human rights, or denial of foreign funding to local human rights NGOs may not be justified. Since such a law will , it is submitted, amount to limitation or abridgement.
The non-discrimination principle as contained in Article 2, may also be violated if Sections 9(4) and 17 were to be passed in their current draft for the same reasons assigned under common Article 2 of the International Covenant on Civil and Political Rights.

5.3. Other African Normative Sources

There are other normative sources in addition to African human right system that guarantee human rights protection and more importantly, in respect of the issue under scrutiny, recognize the uninhibited role of NGOs in realizing the promotion of human rights in the continent.

The African Committee of Experts on Rights and Welfare of the Child, the implementing body created under the African Charter on Rights and Welfare of the Child, which entered into force in 2003, has in its Rule 34 of its Rules of Procedure, accorded NGOs the right to participate in sessions of the Committee, including sessions to interpret the provisions of the Children's Charter.

In the preamble to the amended treaty of the Southern African Development Community, of 1992, it provides in paragraph 8, that people in the region shall be involved in the process development and integration, particularly through " the guarantee for democratic rights, and observance of human rights and rule of law." Article (4 c) enjoins member states to act in accordance with principles of human rights, amongst others. Finally but rather more specifically, Article 23 states clearly that SADC countries in pursuance of their objectives shall involve the people of the SADC region as stakeholders and Article3 (b) and 3(c), defines key stakeholders to include: civil society and non-governmental organizations , respectively.

Under NEPAD 2001, African member states are called upon in paragraph 49 and 79, to place a lot of premium on human rights protection in their development and governance programmes.

The Constitutive Act of the African Union, 2002, states its objectives in Article 3, and paragraph (h) is explicit in providing that: the objective of the Union is to "*promote and protect human and peoples rights...*". The AU passed a resolution

[26] Resolution on the Right to freedom of association of ordinary session of the African Commission on Human and Peoples Rights, 29th March 1992, Tunis, Tunisia, published in Participation of Non Governmental Organizations (NGOs) in the work of the African Commission on Human and Peoples Rights, Compilation of Documents, ISJ, Geneva, 1994, p40.

in July 2004 according recognition for creation of an Economic and Social Council (ECOSOC) constituted by civil society organizations and social movements in Africa to play a pivotal role in many sectors including human rights promotion and protection.

The African –Caribbean-Pacific –European Union , thus the ACP-EU, Partnership –Agreement, signed in Cotonou, Benin, 2000, in its preamble makes references to the UN Charter, and the numerous human rights conventions and regional human rights treaties, such as the African Charter on Human an d Peoples ' rights, as broad normative framework for the partnership. The treaty gives place of prominence to the role of non state actors, and call upon member states, in Article 4, to work with them, in a complimentary manner, when determining their development strategies and principles. Article 8(7) makes representatives of civil society organizations as actors in a political dialogue process that the signatories to the treaty are to engage in.

Since 1945, human rights law has incrementally kept traditional concept of sovereignty of state at bay; states cannot invoke "internal affairs" or domestic jurisdiction when it comes to international human rights law to prevent international scrutiny of their compliance or otherwise the standards contained therein. The question sometimes as to the role of other sovereign states in the protection of human rights in states [27] other than their own remains a difficult but relevant one.

Part VI

6.0. Administrative Procedures and Principles of Rule of Law

Cardinal principles of rule of law include: citizens' ability to predict the law with reasonable certainty; the lawful exercise of discretionary powers vested in the executive; and the expeditious delivery of justice, among others.

[27] Admittedly this is a very complex legal issue that does not lend itself to any easy solution. However it is very clear under Chapter 7 of the UN Charter that anytime acts of a state constitute or is likely to constitute a threat to regional peace and security then, the UN member states through the Security Council could act collectively to restore international peace and security. This may imply the use of force and therefore not necessarily a peacetime situation as envisaged, but nevertheless it indirectly establishes a principle of collective responsibility of states to prevent human rights violations in member states based on the premise that systematic human rights violations result in violent conflicts and thus injurious to regional peace and security. The danger here is selectivity by hegemonic powers in international relations and therefore the likelihood of political exploitation of this principle against weak peripheral states. This can make it a very dangerous and risky legal concept to espouse, useful as it could be elsewhere. Again, the concept of inter-state complaints, where one state can complain that rights in the Charter are not being complied with by another member state suggests (as is provided for in the African Charter on Human and Peoples' Rights, Article. 47) that a state party when they have good reasons to believe that another is not living up to its Charter obligations may complain to a treaty supervisory body. The inference to be made of this is that states have an interest in another state's human rights situation, and thus a very loose sense of collective responsibility of states in the protection of rights in jurisdictions other than their own. For a discussion of some aspects of these complex issues and their implications, see *Nana K. A. Busia, Jr,*
Towards A Framework for The Protection of Academic Freedom i n Africa in: State of Academic Freedom in Africa, CODESRIA Book Series, 1995.

Although UN's principal concern with the Bill has to do with the sections indicated and their probable inconsistency with international human rights law, we are also concerned that depending upon how some of the administrative procedures are handled, it may have implications for the general principles of rule of law or even be seen to claw back on some rights.
Sections 9 and 10, provides for the registration of NGOs and should be read together with the transitional provisions. Within 30 days of lodging an application the NGO has to publish a notice which contains prescribed information in a national news paper, and any person from the general public may lodge an objection with the registrar within 60 days setting out the grounds on which the objections are made. The Registrar in turn will forward the application together with the received objections to the NGO Council, which may or may not approve, although if rejected applicant will be notified, there is no time frame spelt out. There is lack of certainty and a fear that such an administrative procedure could lead to misunderstandings.

The transitional provisions of the Bill states in section 32 that only NGOs who are registered under the PVO Act shall be deemed to have registered. The issue becomes those who registered under the different legal regimes at the time that it was lawful to do so should not be made to wait *ad ifinitum* thus suffering unduly or being denied registration *simpliciter*. It is recommended that each organization once they comply should be made to register accordingly.
Section 27, which deals with evidence and presumptions in prosecution of certain criminal offences under the Bill, is drafted in a way that contravenes the established principles of fair trial: once the individual or organization is to shoulder the burden of proof, an apparent departure from the presumption of innocence rule. Related to that is the lack of clarity of the appeal procedure which runs through sections 24 and 29. Although there is an inherent power of judicial review in respect of decisions made by the minister, although there is an inherent power of judicial review of common law, it is proposed that it is stated clearly in the Bill for the avoidance of any doubt.

Part VII

7.0. The Test of Consistency and Critique

It was laid out at the onset of this paper that the state has a right to regulate the activities of all entities, including NGOs within its jurisdiction, and this it must do in accordance with the law, and the law is the domestic or municipal law. Once a state can show that the formation of any association purporting to be a human rights NGO is conducting itself in a way that is at variance with national security, public safety, morality and rights of others, then in a democratic society, and can be proven in accordance with due process, then it can intervene to restrict rights. But the state must do so in accordance with certain laid down principles for it to be justified.

Does this therefore make sections 9 (4) and 17 justifiable? So far no evidence has been led to show that the entire NGOs in the area of human rights and political

governance, who are sourcing funding from foreign donor organizations have conducted them selves in a manner that contravenes the laws of the state. And even if some of the NGOs, and not all, have contravened the law; the Bill in question is too broad in scope and all encompassing to the extent that both prospective and existing NGOs would be affected by it. It may therefore, in a democratic society, appear unfair and there is a test that exists to find out how fair or otherwise such laws promulgated by the state should conform to international human rights law. In other words, when can municipal law regulating and restricting rights available at the international level be said to be justified or consistent with human rights law.
In the case of *Kukutia de Rumbun v. Attorney-General,* the Court of Appeal of Tanzania tried to answer this question when it ruled that any such domestic law must fulfill three conditions before it can be regarded as lawfully restrictive or rights, and thus in accordance with international human rights law:

The conditions are:

- *The law should make adequate safeguards against arbitrary decisions that may be made by those entrusted with the enforcement of that law.*
- *The said law should not offend the proportionality test or reasonableness test – that is, the law should not be too broadly drafted so as to net the innocent as well as the targeted offenders. In other words, the means employed by the government to implement matters in public interest should be no more than is reasonably necessary to achieve a legitimate objective.*
- *The law in question should not offend the principles of natural justice.*

And it is for the state to prove on the balance of probabilities that the said law fulfils the three conditions.[28]

Part VIII

8.0. Overall Implications

Should the NGO Bill be passed in its current formulation, without addressing the specific concerns the UN has expressed (9(4), 17), the implications are several, notably:

- Government of Zimbabwe will be in *prima facie* breach of its international human rights obligations that binds it as of custom and treaty. Member states of the UN are bound by the Universal Declaration of Human Rights 1948, (UDHR) as of customary international law. GoZ will also be in breach of its treaty obligations as contained in the UN Covenant on Civil and Political Rights, 1976, which it ratified in 1991, and the African Charter on Human and Peoples' Rights, ratified in 1995. Finally, GoZ will be in violation of the various resolutions and declarations cited above in part three.

[28] Kukutia Ole Rumbun v A.G, Civil Appeal No. 32/1992.

- GoZ may be acting contrary to the intent and position espoused in NEPAD instrument 2001, the Constitutive Act of the AU, 2002, and SADC treaty 1992, all of which make a strong linkage between human rights, regional security and economic development.

- GoZ will be acting contrary to the UN General Assembly decision 52/453 of 19 December 1997, which mandated the Secretary –General to prepare and circulate a report on: *"Strengthening the UN System, through arrangements and practices for the interaction of non-governmental organizations in all activities of the UN System*." Pursuant to that SG's report was published on 10th July 1998,[29] and the report demonstrated beyond any doubt UN's commitment to ***"****seek the participation and contribution of NGOs in its work."* The UN in Zimbabwe work with NGOs as partners and/or legitimate stakeholders in national development and as implementing agents for some of UN in country projects.

  Even if a narrow definition of human rights is adopted, it means UNICEF, UNIFEM, OHCHR, UNHCR as UN agencies will be in breach of the law were they to fund projects or engage the services of, or give any donation to local NGOs, and to an international NGO whose principal or sole object is to work on human rights and political governance. Should the said sections be given a broader interpretation of human rights in the sense of three generations[30] of rights as provided for in the African Charter then UNAIDs, WFP, ILO, may all be equally affected because they will be giving grants or donations to organizations working for the right to health, food, and work, respectively.

- Several NGOs will have to close down for lack of funding. If a broader definition of human rights and political governance NGOs are adopted then most NGOs will be affected. As stated elsewhere under the African human rights system, human rights have a much wider definition, which means that NGOs are working in the sectors that relate to the three generations of rights. It is also inconceivable to expect the NGOs to receive funding from GoZ and/or private sector given the current economic challenges.

- Donor countries will be acting in contravention of the Bill should they knowingly give donation or funding to local NGOs working in the area of human rights and political governance. The difficulty for donors though is the absence of an objective definition of what constitutes political governance, they cannot develop criteria for funding. The Bill as stated above does not define the concept. Nor does it operationalize human rights adequately; again the question will arise as to whether narrow definition of human rights is that which is to be adopted or a much broader definition for purposes of funding.

[29] A/53/150.
[30] See footnote 12 for definition of three generations of human rights.

- The Bill may create a perception that GoZ wants to narrow the democratic space because of the forthcoming parliamentary elections. This may not augur well for the country's image internationally, and invariably impacts adversely on bilateral and multilateral assistance.

Part IX

9.0. Summary of Key Issues and Conclusions

The objective of this paper was stated clearly at the outset: as a critical inquiry into the consistency or otherwise of the NGO Bill with international human rights law and standards as expressed through the International Bill of Rights and the related regional human rights regimes, in the case of Africa, the African Charter on Human and Peoples' Rights. In order to present a persuasive case, we shed considerable light on the national context so as to enable us appreciate the passion that has shrouded the discussions on the Bill. Polarization, distrust and absence of a dialogue emerged as dominant characteristics of contemporary Zimbabwean society, thereby deepening the suspicion about the actual intent of the Bill.

Thereafter, we scrutinized the Bill on section by section basis; we submitted that with the possible exception of section 9(4) and 17, the Bill in its totality may not be inconsistent with international human rights law. We invoked an established principle in international human rights law to sustain our contention: that states do have a legitimate right, sometimes duty, to regulate all entities, including NGOs, whether local or foreign in origin, and such actions are within the scope of sovereign states in so far as it can be demonstrated that it is regulating with law and that law is within the "*margin of appreciation*" that international law confers on it, then the action is *prima-facie* lawful.

Having endeavoured to establish the legality of regulating NGOs generally, we surveyed the laws and practices of other African states and what came out clearly was that the NGO Bill of Zimbabwe bears close resemblance to that of other African states and in fact is not dissimilar to that of some matured democratic states. This view not with standing, we noted that none of the states examined had in their laws stipulations such as sections 9(4) and 17.

We also sounded a word of caution that the administrative procedures contained in the Bill, if not well managed, could become a hindrance in the exercise of the right of forming association, and could as well have implications for established principles of rule of law. We further observed that the specific formulation of laws regulating NGOs and their varying details from state to state is informed by political culture, legal traditions, and state-society relations in at given phase in a country's history. Attention was called to the justifiable grounds that states lawfully have in restricting human rights or temporarily suspending the same; we quickly pointed out the exceptions, i.e. rights that are to be respected at all times, including times of national emergency.

Related to this we looked at the main policy reasons governments assign for controlling NGOs. Equally we looked at the rebuttal of some of the reasons from point of view of NGOs.
Then, we revisited sections 9(4) and 17, examining the sections in greater detail by trying to show the implications were it to pass as part of the Act. In view of the stipulations of the two sections we attempted to address three fundamental questions:

- Do local NGOs have a right to receive foreign funding or donation for activities geared to wards the promotion and protection of human rights in their own countries?
- Do international NGOs working on issues that include human rights and governance have a right to operate in countries other than their own? and
- Can local NGOs successfully function in their work on human rights realization without donor assistance?

In trying to address these issues we undertook a comprehensive legal analysis of human rights NGOs and international law relying on legal framework of the UN and the African human rights systems. Several authorities and legitimate state practices were cited with the view to establishing that GoZ as a party to UN Conventions on human rights and a member state, and also a party to the African Charter would appear to be in breach were sections 9(4) and 17 to pass as an Act. The two sections will manifestly hinder the exercise of the right to freedom of association and would be a hindrance in the work of human right defenders contrary to the cited authorities that bind GoZ.

A conclusion to be inferred is that local human rights NGOs in so far as they are advocating for human rights within the law should, in accordance with international human rights law, be able to source foreign funding. Equally, INGOs that are likely to operate within the law or have not shown any cause that it will not operate within the law as internationally defined in the previous sections of this paper should be registered.

Finally, we subjected, further to the arguments above, the two sections to the test laid down in the ratio in the respected and often cited case of Tanzanian Court of Appeal. Granting that the state, in this case GoZ, could legislate to restrict rights in the name of the cited principles of public interest. Given the wide scope of sections 9(4) and 17 and the sections are too broad thereby the danger of lumping together innocent NGOs and the “targeted offender”. It is seemingly disproportional to the problem that it seeks to address. It also confers on the executive unfettered discretionary powers in the sense of the definition of what is a human rights and political governance NGO. In sum human rights NGOs will not be able to function.

We called attention to the overall implications of the Bill, were it to pass into an Act, for GoZ, donors, NGOs and UN itself: it would mean that GoZ will be in breach of some of its international obligations, which in turn may not augur well

for the country's image internationally, a fact that could also impact adversely on multilateral and bilateral assistance. Donors cannot give funding to local NGOs working in the areas of governance and human rights. Most NGOs would cease to exist for want of funding. UN country operations in terms of working with NGOs in certain sectors as indicated may be impaired.

Consequently, UN should use its good offices to get the two sections in question redrafted to reflect our concerns. This calls for a strategy. To that we turn.

Part X

10.0. Recommendations

Preliminary: Although the NGO Bill is only a gazetted Bill, but not an Act of parliament as yet and therefore not a law in force at this stage, it is nevertheless proposed that it is better to negotiate now with GoZ, rather than wait for it to pass, after which the process of repealing will itself be more difficult if not impossible. The following are recommended:

- That the UN should take as its starting point an acknowledgement of the right of the government to legislate on the subject matter;

- That the UN should show an understanding of two distinct but related issues: concerns expressed about the heavy bureaucratic/administrative demands placed on NGOs generally by some sections of the Bill and probable illegality (in terms of international human rights law) of Sections 9(4) and 17.

- That at the first instance the UN should impress upon GoZ that it could facilitate a process of NGO self regulation working with NANGO to jointly produce an NGO Code of Conduct within 6 months an d/or alternative draft that addresses mutual concerns and interest;

- That UN should facilitate a dialogue with donor countries on good donor ship to help address some of the concerns and perceptions of GoZ as regards national security and funding of NGOs seemingly seeking state power or involved in partisan part political activities, as often stated by GoZ;

- That UN should work with all the stakeholders to present an alternative draft which narrows the scope of the two sections and yet take into consideration the concerns and perception of GoZ and principles of law;

- That should the above approach not succeed for whatever reason, the minimum that the UN has to insist upon is the striking out of the Bill sections 9(4) and 17, and draw attention of GOZ to the implications of of not doing that.