

# **Zimbabwe**

## **Facts and Fictions**

**An Audit of the  
Recommendations of the  
Fact-Finding Mission of the  
African Commission  
on Human and People's Rights**

**Produced by the  
Zimbabwe Human Rights NGO Forum**

**November 2005**

# Contents

Introduction	1
On National Dialogue and Reconciliation	2
Creating an Environment Conducive to Democracy and Human Rights	11
Independent National Institutions	17
The Independence of the Judiciary	23
A Professional Police Service	32
The Media	38
Reporting Obligations to the African Commission	50
Report on the Work of NGOs in Zimbabwe to the African Commission on Human Rights	51

# Introduction

The African Commission on Human and Peoples' Rights (ACHPR) of the African Union (AU) undertook a fact-finding mission to Zimbabwe from 24 to 28 June 2002. Authorisation for this mission was given at the 29th Ordinary Session of the African Commission, held in Libya, Tripoli, following what the mission report describes as *widespread reports of human rights violations in Zimbabwe*.

The mission was led by the Vice Chairperson of the African Commission Commissioner Jainaba John. She was accompanied by Commissioner N. Barney Pitso, the Commissioner with responsibility for Zimbabwe, and Mrs Fiona Adolu, a legal officer with the Secretariat of the African Commission.

The mission was received by the President of Zimbabwe, the Government and relevant ministries and held meetings with a wide range of people, including the Chief Justice, the Speaker of Parliament, lawyers, farmers, trade unionists, political parties, churches, academics, the press and several NGOs, including womens' organisations.

Although the mission's visit was confined to Harare, mission members were satisfied that they were *able to meet the full spectrum of the social and political players in the country*. The team concluded that *there was enough evidence placed before us to suggest that, at the very least during the period under review (viz. from 2000), human rights violations occurred in Zimbabwe and that Government cannot wash its hands from responsibility for all these happenings*.

From its conclusions and findings, the mission produced recommendations under the following headings:

- National Dialogue and Reconciliation
- Creating an Environment Conducive to Democracy and Human Rights
- Independent National Institutions
- The Independence of the Judiciary
- A Professional Police Service
- The Media
- Reporting Obligations to the African Commission

The report of the Fact-Finding Mission was adopted by the African Union at its Summit on 31 January 2005. Following this, the Zimbabwe Human Rights NGO Forum (the Forum), a coalition of 16 human rights non-governmental organisations working for the elimination of organised violence and torture in Zimbabwe, undertook an audit of the recommendations of the mission to monitor the compliance or otherwise of the state with the recommendations. This report is the outcome of that process.

The Forum would like to express its sincere appreciation to the contributors who have produced a frank analysis of the status of the important recommendations of the Fact-finding Mission. They are the Media Monitoring Project of Zimbabwe (MMPZ), the National Association of Non-Government Organisations (NANGO), the Human Rights Trust of Southern Africa (SAHRIT) and the Zimbabwe Lawyers for Human Rights (ZLHR). Thanks also to Chaz Maviyane-Davies for the cover image design.

While the mission did not record a recommendation on civil society, it referred to the dynamic and diverse civil society formations in Zimbabwe and to their essential *role in upholding of a responsible society and for holding Government accountable*. We have therefore included a chapter on the work of NGOs in Zimbabwe, in the context of the recommendations of the mission.

# On National Dialogue and Reconciliation

*Further to the observations about the breakdown in trust between government and some civil society organisations especially those engaged in human rights advocacy, and noting the fact that Zimbabwe is a divided society, and noting further, however, that there is insignificant fundamental policy difference in relation to issues like land and national identity, Zimbabwe needs assistance to withdraw from the precipice. The country is in need of mediators and reconcilers who are dedicated to promoting dialogue and better understanding. Religious organisations are best placed to serve this function and the media needs to be freed from the shackles of control to voice opinions and reflect societal beliefs freely.*

## Context

As Zimbabwe entered 2005, the need for national dialogue and reconciliation was more apparent than ever. By the end of 2004, the ruling party (ZANU PF) had emerged from a bruising succession battle in which some of its key leaders had fallen victim, and in which a continuing legacy of internal ethnic struggles marked its politics. The language of desertion, betrayal, treachery and lack of patriotism remained the staple fare of ZANU PF's characterisation of perceived enemies within and outside the ruling party. Additionally, President Robert Mugabe persisted in his belief that the main opposition party, the Movement for Democratic Change (MDC), carried an external, foreign agenda, and did not qualify as a 'national' political entity. This location of the MDC outside a legitimate national discourse provided the pretext for Mugabe's continual refusal to accept the need to engage in a constructive dialogue with the political opposition. It also set the context for the international dimension of Mugabe's political message, which had emerged in the 2000 general election, marked the 2002 presidential election, and would once again be the refrain in the 2005 general election. This message constructed the political battle in Zimbabwe as essentially over the land question, and between a liberation movement and its former colonial oppressor. As Mugabe stated in December 2005: 'Leave us alone Blair with our own property. Britain belongs to the British and America to the Americans, so why worry about our country?' (*Herald*, 24 February 2005). Mugabe felt strengthened after the succession battle of December 2004, which saw his preferred candidate for the deputy presidency of his party, Joyce Mujuru, emerge the winner, thus consolidating his own hold on power.

The president of the opposition MDC, in contrast, pressed for an urgent dialogue between the two major parties. In a desperate plea in December 2004, Morgan Tsvangirai addressed Mugabe and his leadership:

*To the new ZANU PF leadership, I welcome you with the same old message. I am still holding out the olive branch. An opportunity for a rapid turnaround of our fortunes is still possible. Zimbabwe requires a soft landing.*

*May I call, once again, for a search for a political solution before it is too late. We must check our national transition in order to realise a win-win situation. There is no way out of the crisis ... we remain deeply concerned that the grass is now so dry that any form of carelessness, in particular within the next two to three months, could lead to an inferno. (Daily Mirror, 8 December 2004.)*

For the opposition there seemed little alternative to peaceful national dialogue at the end of 2004. Having suffered continuous brutalisation from various state agencies, two major election defeats under laws and conditions that precluded a free and fair poll, persistent marginalisation and

demonisation in the public broadcasting system, as well as a series of strategic blockages and blunders on its own part, the path of peaceful talks now seemed the only way forward. Confronted with a determined authoritarian state, with vast repressive capacity and an undiminished will to deploy coercion, the MDC expended its lobbying efforts in the region and internationally in attempts to push the ruling party into a national dialogue. The South African government, the key regional player in the Zimbabwean debate, and SADC (the Southern African Development Community), officially shared this objective, even as President Mbeki's policy of 'quiet diplomacy' provided essential solidarity for the embattled Zimbabwean government. For the South African government the primary imperative for much of the Zimbabwean crisis has been to ensure a stable state in Zimbabwe. In the analysis of the Mbeki Government this strategy has centred largely on a reformed ZANU PF engaging the weaker MDC in a national dialogue that would maintain the opposition in a subordinate position. From the South African government's perspective the MDC remains an unreliable factor, with no capacity to engage and control the Zimbabwean armed forces, and with too close a relationship to the western concept of 'regime change', yet with a clear national base within Zimbabwe. The central problem with the Mbeki strategy, however, has been the intransigent figure of Robert Mugabe, and key forces of support around him, who have consistently refused to provide the reform scenario that could justify 'quiet diplomacy'. Against such an entrenched unwillingness on the part of such recalcitrant forces within ZANU PF, the hope for a new dispensation of reconciliation politics in Zimbabwe has remained elusive.

At this stage it is worthwhile recalling the conditions that brought about earlier periods of reconciliation and national dialogue in post-colonial Zimbabwe. In 1980, on the basis of the 1979 Lancaster House agreement, Zimbabwe declared a policy of national reconciliation with its former settler adversaries. This policy was determined largely by the combination of national, regional and international factors that gave rise to the compromises of the Lancaster House agreement. Also, the internal dynamics of the politics of the liberation movements necessitated a period of stabilisation for ZANU PF to establish its control of the state and for Mugabe to consolidate his power within the party. However, while the policy of reconciliation resulted in a temporary peace between the nationalists and their former white settler adversaries, it was also a period in which the ZANU PF government established its pre-eminence over its rival PF-ZAPU as the party of government. The *Gukurahundi* moment represented the modality for such a consolidation, while its denouement, the 1987 Unity Accord, represented the legal framework for the incorporation and subordination of a former liberation rival. Thus, while the language of reconciliation was used to construct the interregnum relation with the former settler forces, the discourse of unity was the preferred appellation for the hegemony of ZANU PF over PF-ZAPU (Barnes, 2004). In both the policy of reconciliation and the Unity Accord, however, the common denominator was the consolidation of party/state rule by ZANU PF. From the point when the continued rule of ZANU PF was threatened in the late 1990s, the policy of reconciliation was discarded, and the notion of national unity and belonging defined and applied in increasingly selective and repressive terms. Clearly, any notion of establishing a renewed period of reconciliation politics and national dialogue must recognise these concepts as intense arenas of struggle and the basis for future consolidation.

Clarity over this issue is necessary to understand the present unwillingness of the ruling party to engage in such a national process. The Mugabe regime has consolidated its hold, both on state power and central economic resources. It is, therefore, highly unlikely that the regime will engage in any political opening up that could threaten its central power base. The basis of its power has been constructed through a large measure of coercion and violence against its citizenry, a long-term feature of liberation movement mobilisation structures. The ruling party has little proclivity, or indeed capacity, to shift the basis of its rule to a more consensual model of governance. The hope that the general election of 2005 would provide the basis for a renewed national dialogue and an opening for a renewed national and international legitimacy for the Mugabe Government

was always stacked against a plethora of obstacles, not the least of which was the ruling party's consistent use of violence as an election strategy. As Kriger has pointed out:

*Organised violence and intimidation of the opposition, albeit of varying intensity, has been a recurrent strategy of the ruling party before, during and after elections to punish constituencies that dared oppose it. ... Besides coercion, ZANU (PF) has also engaged in a political discourse that demonises its key opponents as reactionary, subversive, and often stooges of whites and/or foreigners. (Kriger, 2005, 2.)*

## **Election 2005**

It is against this background that the 2005 general election needs to be understood. All the political forces engaged in the Zimbabwean crisis had particular hopes and agendas around this election. ZANU PF hoped that the election would provide the vehicle through which it would settle its legitimacy problems at both national and international levels, while consigning the opposition MDC to an increasingly irrelevant role. To carry out this objective, ZANU PF proclaimed its official agreement to the SADC electoral guidelines agreed in Mauritius in 2004, while applying their provisions at little more than cosmetic levels in practice. Two reports on the pre-election conditions in the country provided little cause for hope. A report by the Zimbabwe Lawyers for Human Rights concluded:

*The submissions and conclusions drawn in this report present a picture that Zimbabwe has failed, on most accounts, to ensure a free and fair electoral process in the run up to the polling date of 31 March 2005. Although some efforts have been made to consider the SADC Principles, most are merely cosmetic. In view of the legislative framework, there is still a long way to go and much work to be done before such aspirations are realised. (Zimbabwe Lawyers for Human Rights, 2005, 29.)*

A report by the Zimbabwe Human Rights Forum also found little to celebrate in Zimbabwe's pre-election conditions:

*Much of the damage to the democratic process has already been done. The chief culprit this time around, ahead of violence and the closure of democratic space, is the politicisation of food handouts. (Zimbabwe Human Rights NGO Forum, 2005a, 17.)*

Notwithstanding the unfavourable electoral conditions, the opposition MDC entered the election race, after initially suspending its involvement in August 2004, until the Zimbabwean Government had shown sufficient adherence to the SADC norms and standards. The official reason given by the MDC for rescinding its suspension decision was that during consultations, its membership expressed an overwhelming resolve to participate. It is more likely, however, that the MDC's decision to participate was based on several other factors, namely, the absence of a viable alternative strategy to engage the regime, the possibility that abstention could have split the party and pressure from regional and international governments. For SADC in general and the South African Government, the election was an opportunity to bring Zimbabwe back into the fold of legitimacy and move the Zimbabwean crisis off the regional and international agenda. To achieve this objective, regional governments and the African Union (AU) were more than happy to settle for the Zimbabwe Government's minimal adherence to the SADC norms and standards as proof that Mugabe was moving towards a reform agenda. For the European Union (EU) and the United States, the election also provided a slight opportunity to bring Zimbabwe 'back into the fold', with the international community feeling increasingly frustrated over its limited success at diplomatically pressuring the Zimbabwe Government into a change

of political direction. Indeed, there were some indications of divisions within the EU over the Zimbabwean question. However, the decision to shut out a wide range of western observers, and the lack of progress in the reform of election conditions, meant there was little likelihood that the election would be favourably received by western governments.

Given the conditions under which the election took place, the outcome was predictable. ZANU PF won 78 seats (in addition to the 30 under the control of the President), the MDC 41 and 1 seat went to an Independent. Moreover, the manner in which the ruling party 'won' the election and the tone of its campaign provided little indication that ZANU PF was interested in resuming a national dialogue. A report by a coalition of Zimbabwe human rights groups characterised the outcome of the election as follows:

*The election was not, as it should have been, a contest between two political parties. The battle was really between the ruling elite and the governed. The distinction between the state and ZANU (PF) has virtually disappeared. ZANU (PF) was able to mobilise all the resources of the state, human and financial, administrative and coercive, to support its campaign. The electoral authorities made no effort to proscribe or limit abuses of this nature. This was not only a huge and unfair advantage in itself, but enabled ZANU (PF) to present itself as being the sole party with the power to deliver, and personified this in the powerful figure of Mugabe himself. In a context where a large proportion of the electorate is held hostage to government food handouts many voters, particularly those in the rural areas, find it expedient to vote not for the party they want to win, but for the party they think will win. (Zimbabwe Human Right NGO Forum, 2005b, 27.)*

A similar finding was made by another assessment of the ZANU PF victory carried out by the South African-based Institute for Democratic Alternatives in South Africa (IDASA). This report noted that while the 2005 election was less violent than in the past it was nevertheless characterised by 'some violence ... supplemented with coercion and threat, revolving strongly around the political use of food and coordinated by state agencies through ZANU PF supporters and militia'. (Reeler and Chitsike, 2005, 47.)

The tone of the ruling party's campaign left little doubt that the opposition were seen as local extensions of outside forces, bent on 'unpatriotic' intentions. As the ZANU PF election manifesto proclaimed:

*The March 2005 Parliamentary Elections are set to take place against the backdrop of greater more desperate attempt by Britain's Labour Government to effect "regime change", so that Zimbabwe is re-colonised and placed under the pliable puppet government that Blair hopes to use to restore white settler kith and kin. (ZANU PF Election Manifesto, 2005, 11.)*

The entire thrust of the ruling party's media campaign was used to divide Zimbabweans rather than provide a bridge for future dialogue and reconciliation. Even the popular music broadcast as a political tool was used to invoke memories of the liberation struggle and to link the enemies of that struggle to opposition politics in 2005. As a recent report noted about the use of radio and television jingles during the 2005 campaign:

*... nothing much has changed in terms of how music of the pre-1980 "resistance" is used, save that the colours of the enemy have slightly changed. The dichotomies and symbolism remain the same: Tsvangirai is characterised as another puppet, just like Muzorewa, Chirau, Chikerema, and Joshua Nkomo before him. The real "people" are Zanu PF. (Alexander and Raftopoulos, 2005, 56.)*

Thus the pre-election conditions, the conduct and tone of the election campaign, and the fact that the election outcome re-established the divided international position on Zimbabwe, meant that the issue of Mugabe's legitimacy and that of his Government's remained a major post-election issue. Characteristically, faced with continued international opposition the Mugabe regime did not seek a political compromise, but went on the offensive against both external and internal 'enemies'. Against the range of external forces against his Government, Mugabe repeated his accusations that those in the West who continued to oppose him did so because of his attempts to address colonial injustices, specifically around the land question. Criticisms of his governance and human rights abuses were dismissed as the hypocritical outbursts of former colonial powers. The international stand-off on the Zimbabwe question thus persisted.

Internally the Government targeted several groups. Before the election, NGOs had been under attack since 2004, in the form of an NGO Bill that threatened to shut down all civic groups receiving foreign funding for governance-related activities. This major threat to human rights NGOs kept them occupied in trying to fight the Bill for much of 2004 and early 2005, and for the most part unable to carry out their core functions in human rights work, including preparations for the election. This threat to NGO activities involved religious groups, and thus drew some churches into a dispute with the state over what they consider 'God's work', which should not be prescribed by the state. Yet, it has been observed that 'the levels of fear among priests and pastors are high and there is need to encourage and resource pro-democracy congregation and activities to counterbalance the state resources already being used to undermine the growing voices against injustice in the church arena' (Alexander and Raftopoulos, 2005, 86). Attempts by three Catholic, Anglican and Evangelical bishops in 2004 to mediate between the two major political parties came to nought (Muchena, 2004), and since the election there has been no major attempt to revive this initiative.

State attempts to destabilise the labour movement were intensified between January and July 2005. In February, the Congress of South African Trade Unions (COSATU) attempted to send a fact-finding mission to Zimbabwe to assess the alleged abuses of labour rights by the state. The COSATU delegation was deported from Zimbabwe and accused of being a US/ICFTU (International Confederation of Free Trade Unions) front to destabilise nationalist governments in the region. In the words of the state-controlled *Sunday Mail*:

*The ICFTU have for long coveted the COSATU role in the anti-apartheid struggle. COSATU had demonstrated its capacity to have street power. The ICFTU has been keen to commandeer that street power against the liberation movements in the SADC region. So now they are looking for incidents that will outrage the South African public so that they can mobilise workers to demonstrate. They wanted the Zimbabwean government to arrest the COSATU delegation or to manhandle them. (Sunday Mail, 6 February 2005)*

The Zimbabwe Congress of Trade Unions (ZCTU) also alleges that the ruling party is using four affiliates of the national body to destabilise the movement and remove its current leadership, whom it considers political enemies. In April, the President, first Vice President and Secretary-General of the ZCTU were assaulted by 50 youths 'allegedly led by a senior intelligence officer' (*Zimbabwe Independent*, 29 April 2005). The state-controlled daily paper has continuously attacked the ZCTU, criticising the leadership and calling for its resignation. As one editorial in the *Herald* read:

*The ZCTU should rid its structures of all those with political ambitions and sharks bent on enriching themselves on the poor workers' subscriptions. (Herald, 13 April 2005.)*

In May, the police raided the head office of the ZCTU in search of evidence that the labour movement was involved in foreign currency transactions and other suspected illegal activities. The movement's leadership alleged that the state was bidding to criminalise it and replace it with more pliable ZANU PF loyalists, ahead of the June 2005 International Labour Organisation (ILO) conference at which the ZCTU was due to present a critical report on state violation of workers' rights in Zimbabwe. In the words of the ZCTU secretary-general:

*Government believes that the ZCTU is a problem child that must be dealt with seriously. The whole system is meant to criminalise the ZCTU leadership ahead of the International Labour Organisation conference so that they are grounded. (The Standard, 15 May 2005.)*

In the case of both the NGOs and the labour movement, the Government has sought to severely control and undermine the critical functions of civic groups in order to increase its authoritarian grip on civil society. In addition, the Government's restrictions on the independent press were re-emphasised in the July decision of the Media and Information Commission (MIC) to refuse permission to the Associated Newspapers of Zimbabwe (ANZ) to publish *The Daily News* and *The Daily News on Sunday*. In the view of the Media Monitoring Project of Zimbabwe (MMPZ) the ruling:

*... clearly demonstrates the undemocratic authority of the MIC to circumvent the due process of law and the deeply flawed nature of the Access to Information and Protection of Privacy Act (AIPPA) that provides the MIC with this authority. Since 2003 the MIC has forced four newspapers to close down – all for reasons that do not outweigh Zimbabweans' constitutionally guaranteed rights to freedom of expression. (MMPZ, 2005.)*

These attacks on civic groups and the media indicated a shrinking of the political space in which any form of political dialogue involving civil society might occur. Significantly, however, these attacks occurred under the claim of the rule of law, a claim made historically by other authoritarian regimes. Such a claim brings to the fore the central question raised by the outstanding African social scientist Mahmood Mamdani: 'What happens when the state resorts to law to violate rights?' (Mamdani, 2002, 38.)

### **Operation Murambatsvina**

In May 2005 the Government launched the Operation *Murambatsvina*, roughly translated as 'remove the filth', to remove informal settlements in all the major urban and peri-urban areas in Zimbabwe. The official reasons for the operation included: the arrest of disorderly urbanisation; the clamping down of illegal economic activities such as foreign currency dealings; and the reversal of environmental degradation caused by urban agricultural practices. In effect the outcome of the operation has been devastatingly destructive. According to the UN Special Envoy report, an estimated 700,000 people in the cities lost 'either their homes, their sources of livelihood or both', while a further 2.4 million people were affected indirectly. The report was unambiguous about the effects of the operation, as the first two of its findings make clear:

- i) *Operation Restore Order, while purporting to target illegal dwellings and structures and to clamp down on alleged illegal activities, was carried out in an indiscriminate and unjustified manner, with indifference to human suffering, and, in repeated cases, with disregard to several provisions of national and international legal frameworks.*
- ii) *Even if motivated by a desire to ensure a semblance of order in the chaotic manifestations of rapid urbanisation and rising poverty characteristic of African cities, nonetheless Operation Restore*

*Order turned out to be a disastrous venture based on a set of colonial-era laws and policies that were used as a tool of segregation and exclusion. (UN Special Envoy, 2005, 7.)*

The UN condemnation was echoed in several other reports. Action Aid International concluded:

*The Government of Zimbabwe failed to articulate any justifiable reasons why Operation Murambatsvina/Restore Order had to be undertaken in the manner that it was. Responses to both the government's conduct and the emerging impacts of the operation have largely been inadequate. The reasons for this inadequacy range from the current political environment in the country that restricts civic engagement, to a limited capacity to carry out policy analysis. (Action Aid, 2005, 4.)*

The Solidarity Peace Trust judgement on the operation noted there 'is no precedent in southern Africa for such a movement of people in a nation supposedly not at war with itself'. (Solidarity Peace Trust, 2005, 9.)

The section in this report dealing with the judiciary will review the legalities of this operation. For the purposes of this section, Operation *Murambatsvina* amounted to an attack on a major social and economic base of the urban sector. The attacks reaffirmed the longstanding antipathy of the Government towards urban citizens, for long regarded as enemies of the ruling party and not sufficiently grateful to 'those who brought freedom to the country', and they followed a number of years of interference with MDC-dominated urban councils. The combination of these processes has amounted to a political refusal to acknowledge the rights and representatives of large numbers of Zimbabweans citizens, thus proscribing opportunities for national dialogue. Even as the ruling party has extended the powers of traditional authorities in the rural areas, thereby failing to democratise rural governance structures, it has also contracted the space for democratic participation in the urban areas.

## **Going It Alone**

In foreclosing any new opportunities for national dialogue and reconciliation, the Mugabe Government has determined to go it alone within the country. In line with such a course, the Government has introduced the Constitution of Zimbabwe Amendment (No. 17) Bill, which effectively sounds the death knell of some of the central tenets of any modernising state. Clause 2 of the Bill will allow almost any land in Zimbabwe to be subjected to state appropriation, with no formal process being laid down for the acquisition of such land. Persons whose land is acquired under this proposed law will not be allowed access to the courts to challenge the legality of the acquisition. The enactment of such a law would grossly undermine the right to property, the economic effects of which would be disastrous, nullifying any form of security for investment and long-term economic planning. An assessment of post-election economic conditions concludes that the effects of recent economic decisions by the Government have been threefold:

*They have allowed the regime to reward its leading followers; obtain the resources needed to maintain minimal levels of state capacity; and to retain the support of the military, the police and the traditional chieftaincy. Second, they have systematically undermined the society's capacity to generate resources it needs to continue this process in the longer term, and therefore makes it more and more difficult for the regime to finance itself without inflicting further costs on the economic and social system. And third, it has involved the forcible transfer of massive resources from almost every social group in the society, and not just the white*

*commercial farmers that captured the attention of the west. Few members of the indigenous population have been able to avoid these exactions and many of them now face life-threatening and politically generated shortages of food, medicines, jobs and savings. (Brett, 2005, 5.)*

The constitutional amendment includes a proposal to re-introduce a senate, partly under the patronage of the President, which will provide yet another means of rewarding his supporters, but in conditions of economic collapse. This political trajectory indicates the ruling party's determination to turn away from the popular demand for a more open constitutional reform process that marked the period 1998–2000, thus scorning once again a major opportunity to re-engage its citizenry in a national political dialogue. Such an initiative could have resulted in a broad healing process, providing the space to navigate a new political dispensation and, with this, a path to renewed national legitimacy. The constitutional debate from 1998–2000 was the first and only substantive popular national dialogue of the post-colonial period. It was carried out in condition of relative openness, at a time when the ruling party felt compelled to engage Zimbabweans on their views of the future governance of the country. This period was a benchmark of possibility, but, as it proved, also a time of real threat to the future of ZANU PF. Since then, President Mugabe and his party have taken a decisive repressive turn in their political strategies, unwilling to risk any major opening up of political space for fear that the momentum of opposition forces could once again expose the vulnerabilities of ZANU PF rule.

For the moment therefore President Mugabe remains adamant in his isolation and in his unwillingness to talk with any national opposition forces. Instead, he is insisting that the ruling party will only speak to the MDC in Parliament. In his insistence on the 'illegitimacy' of the national opposition, Mugabe proposes that, rather than engage in any discussions with the MDC, the only person he will talk with is British Prime Minister Tony Blair. In an attack on those forces calling for ZANU PF–MDC discussions, Mugabe stated:

*Today we tell all those calling for such ill-conceived talks to please stop misdirecting their efforts. The rest of the world knows who must be spoken to. In case they do not, we tell them here at Heroes' Acre that the man to be spoken to in order to make him see reason resides in Number 10 Downing Street. This is the man to speak to and those at Harvest House [the MDC headquarters] are no more than his stooges and puppets. What does it pay us to speak to them? We would rather speak to the principal. (Herald, 9 August 2005.)*

## **Conclusion**

As the Zimbabwean crisis extends into another year, the absence of national dialogue remains a deeply disturbing feature of the political landscape. As President Mugabe and his ruling party entrench their repressive political domination, the need for new initiatives to break the legitimacy stalemate in Zimbabwe is more urgent than ever. It appears highly unlikely that internal opposition forces will in the near future be able to build up sufficient pressure to force ZANU PF into a political compromise. There is little indication that regional powers will depart from their position of solidarity with Mugabe in the current standoff with the West, whatever pressure they have put on him in private. The rapidly declining economy clearly presents the Government with enormous problems of sustainability. Such constraints however will not translate automatically into a more pliant stand on the part of the Government; rather, they will probably result in more authoritarian state reaction. There is a dangerous impasse in Zimbabwe, and the need for national dialogue has never been greater.

## References

Action Aid International, *Zimbabwe Demolitions*. AAI, Johannesburg, 2005.

Alexander Karin and Brian Raftopoulos, (eds), *The Struggle for Legitimacy: A Long-term Analysis of the 2005 Parliamentary Elections and its Implications for Democratic Processes in Zimbabwe*, Institute for Justice and Reconciliation, Cape Town 2005.

Barnes Terri, "Reconciliation, ethnicity and school history in Zimbabwe 1980–2002," in Brian Raftopoulos and Tyrone Savage (eds) *Zimbabwe: Injustice and Political Reconciliation*. IJR, Cape Town and Weaver Press Harare, 2004.

Brett E.A. "Political Victories and Economic Defeats: Managing the Post-Election crisis in Zimbabwe." Unpub paper 2005.

Kruger Norma, "ZANU (PF) Strategies in General Elections, 1980–2000: Discourse and Coercion." *African Affairs*, 104/414, pp. 1–34, 2005.

Media Monitoring Project of Zimbabwe, "Statement on Denial of an Operating License to Associated Newspapers of Zimbabwe." Harare, 19/07/05.

Mamdani Mahmood, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)." *Diacritics*, Fall 2002, Vol. 32 Nos. 3–4, pp. 33–59, 2002.

Muchena Depros, "The Church and Reconciliation: A Mission Impossible?" In Raftopoulos and Savage, *op. cit.*

Reeler Tony and Kuda Chitsike, *Trick or Treat? The Effects of the Pre-Election climate on the poll in the 2005 Zimbabwe Parliamentary Elections*. IDASA, Pretoria, 2005.

Solidarity Peace Trust, "Discarding the Filth: Operation Murambatsvina." Johannesburg 2005.

UNDP, "Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe Mrs Anna Kajamulo Tibaijuka." UN 2005.

Zimbabwe Human Rights NGO Forum, "Of Stuffed Ballots and Empty Stomachs: Reviewing Zimbabwe's 2005 Parliamentary Election and Post-Election Period." Harare, July 2005.

Zimbabwe Human Rights NGO Forum, "It's the Count that Counts: Food for Thought: Reviewing the Pre-Election Period in Zimbabwe." Harare, March 2005.

Zimbabwe Lawyers for Human Rights, "The Pre-election Period in Zimbabwe." Harare, March 2005.

ZANU PF, *Election Manifesto*, Harare, 2005.

# Creating an Environment Conducive to Democracy and Human Rights

*The African Commission believes that as a mark of goodwill, government should abide by the judgements of the Supreme Court and repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion. The Public Order Act must also be reviewed. Legislation that inhibits public participation by NGOs in public education, human rights counselling must be reviewed. The Private Voluntary Organisations Act should be repealed.*

## Compliance with Judgments of the Courts by the Government

Following the publication of the Report of the Fact-finding Mission to Zimbabwe, the Government of Zimbabwe regrettably has failed to implement this recommendation on a number of occasions. There have been five high-profile cases in which various arms of Government, including the executive, three ministries, a statutory body, local authorities and the police, have failed to comply with court orders, as described below. This non-compliance reflects a continuing trend by Government and state institutions of failing to effect rulings by the judiciary, thus reinforcing the perception of a continuing breakdown of the rule of law, a failure to respect the principle of separation of powers, and the impunity of state institutions.

*On 15 March 2005* Justice Tendai Uchena, sitting in his capacity as a judge of the newly established Electoral Court,<sup>1</sup> nullified the results of the nomination court for the Chimanimani constituency in which the presiding officer had unlawfully and unprocedurally refused to accept the nomination papers of Roy Bennett.<sup>2</sup> Bennett intended to contest the March 2005 parliamentary election as the candidate for the opposition Movement for Democratic Change (MDC).<sup>3</sup> Justice Uchena postponed the election for the Chimanimani constituency pending a fresh nomination procedure in which Bennett was to be allowed to submit his papers for nomination. A day later, the President of Zimbabwe attacked the decision of the court at a public briefing with provincial, government and party leaders at Gaza High School in Chipinge constituency. *The Herald* quoted Mugabe as saying:<sup>4</sup>

*I don't understand the court's decision. We can't be held to ransom by a man who is in prison. That is absolute nonsense. We will study the decision and appeal against it. He [Bennett] has a case to answer. Rambai muchiyenderera mberi. Proceed as if nothing has happened. Rwendo runo tinoda kutsvaira [This time around we are determined to sweep every seat.] [emphasis added]*

As a direct result of these utterances, inciting defiance of a court order, the Zimbabwe Electoral Commission filed an urgent application for review of the decision of the Electoral Court and a second urgent application for suspension of the judgment. Justice Uchena then unprocedurally suspended his own judgment, thereby removing the protection he had offered to the petitioner where his rights had been contravened. Clearly, the actions taken were a direct result of the

<sup>1</sup> The court was established under section 161 of the Electoral Act [Chapter 2:13].

<sup>2</sup> Roy Bennett was the incumbent MP for Chimanimani constituency from the Movement for Democratic Change who, at the time, was serving a jail sentence of 12 months for assaulting a fellow MP during a Parliamentary session. He was convicted and sentenced by Parliament, rather than the courts.

<sup>3</sup> *Roy Leslie Bennett v. The Constituency Elections Officer, Chimanimani Constituency* EP 1/05.

<sup>4</sup> As published in *The Herald* on 17 March 2005, in a front-page story.

public 'order' given by President Mugabe to defy the court's ruling, especially since the petition had not been opposed originally by any of the respondents, including the Zimbabwe Electoral Commission, and there had been compliance in gazetting the delayed date for a second sitting of the Nomination Court for the Chimanimani constituency in the Government Gazette subsequent to the ruling. The actions of the Zimbabwe Electoral Commission also lend credence to the imputation of lack of independence, as their response was directly linked to the assertion by the President that 'We will study the decision and appeal against it' [*emphasis added*].

**On 13 April 2005** a Norton magistrate ordered prison authorities to release two British journalists, Julian Simmonds and Toby Harnden, on bail of Z\$1 million each.<sup>5</sup> They had been arrested on 30 March 2005 whilst visiting a polling station during election proceedings in the Norton area. They were also charged with an immigration offence after it was found that their visas had expired. One Evans Siziba, an immigration official aligned to the Ministry of Foreign Affairs, prevented prison authorities from complying with the order served on them. As a result, the two accused were held in detention until the case had been finalised and they had been acquitted of the charges against them.

**On 29 June 2005**, following the attempted evictions and destruction of property of residents of Porta Farm in Harare as part of the government's Operation *Murambatsvina*, a Norton magistrate granted a provisional order against the local authorities, the police and two ministers<sup>6</sup> interdicting them from evicting and/or harassing the affected residents and from forcing the families being taken against their will to any other location, including a holding camp at Caledonia Farm in Harare. This was the third order in favour of the Porta Farm residents: the two previous High Court orders<sup>7</sup> in their favour granting similar protection had been openly and continuously defied by the government authorities during previous attempted evictions, which was the reason a further fresh application was made to the courts. Once again, the authorities ignored this third court order: officials refused to accept service at the police station, and the police present at Porta Farm indicated to the residents' legal practitioners that they were not able to read, and in any event would ignore the court order and continue acting in pursuance of the (illegal) instructions they had received from their superiors. An application for contempt of court was subsequently filed in the High Court at the end of July 2005.<sup>8</sup> The matter was heard before Justice Tedi Karwi, who dismissed the application. He refused to provide reasons however, and, to date, has failed to provide a written judgment that would form the proper basis for an appeal against his decision to the Supreme Court.<sup>9</sup> The respondents therefore continue to act unlawfully and in defiance of three court orders as of the date of publication of this audit.

**On 10 August 2005** the High Court issued a provisional order against local authorities, the Commissioner of Police and the Minister of Local Government for the immediate cessation of construction of stands on Whitecliff Farm, purportedly in pursuance of the government's contested Operation *Garikai/ Hlalani Kuhle* programme after residents had been forcibly evicted

<sup>5</sup> *The State v. Toby Harnden and Julian Simmonds* CR 256/3/05.

<sup>6</sup> *Ashtony Shumba and others v. Officer in Charge, Norton Police Station, Commissioner of Police, Minister of Home Affairs, City of Harare and Minister of Local Government, Public Works and Urban Development* Case No. 376/05.

<sup>7</sup> *Freddy Goronga and 389 other residents at Porta Farm v. The Harare City Council* Case No. HC 3177/91 per Sandura JP (as he then was); and *Felistus Chinyuku & Ors v. The Minister of Local Government, Public Works and National Housing* Case No. HC 106741/04 per Mavangira J.

<sup>8</sup> *Felistus Chinyuku and Other Residents of Porta Farm v. The Minister of Local Government and Urban Development & 3 Ors* Case No. 3225/05.

<sup>9</sup> The legal practitioners acting on behalf of the Porta Farm residents were forced to file a Notice of Appeal without having had sight of the judgment of the High Court in order to remain within the time limits prescribed by the Rules of Court to ensure that the appeal was not barred. To date, and despite repeated written and verbal requests to the judge's Clerk, the written judgement has not been forthcoming; neither have reasons been provided for the delay.

and had their property destroyed under Operation *Murambatsvina*. The judge found that this construction was being carried out on private property without the knowledge, authority or approval of the owner of the land. The judge further ordered that the houses already erected be demolished within 48 hours of service of the order on the respondents. The authorities blatantly ignored the court order and continued with construction.

In a case similar to that of the Porta Farm residents, families from Mbare high-density suburb, who had been evicted from their homes in May and June 2005 during Operation *Murambatsvina*, and who, since then, had been living in the open within the area, were once again harassed and threatened with unlawful and unprocedural eviction by officials from the City of Harare and members of the Zimbabwe Republic Police. On **10 October 2005** a provisional court order was obtained<sup>10</sup> on an urgent basis with the consent of the Commissioner of Police and the Minister of Home Affairs, and with the full knowledge of the City of Harare, preventing the unlawful removal of the residents without a valid court order first being obtained. A week later, the authorities ignored this order and sent police to demolish the temporary structures and remove the residents from the area. Again, contempt of court proceedings had to be instituted in a futile attempt to protect the affected residents.

### **Repeal of Repressive Legislation**

As of the date of publication of this audit, the Government has taken no substantive steps to repeal or amend national legislation, which is repressive in content and effect and the provisions of which run contrary to the State's obligations under the Constitution of Zimbabwe and international human rights norms and standards, especially the African Charter on Human and Peoples' Rights (ACHPR). In addition, further legislation has been promulgated and/or introduced in Parliament, whose effect is to further restrict the fundamental freedoms of the people of Zimbabwe.

The *Access to Information and Protection of Privacy Act (AIPPA) [Chapter 10:27]* remains operational and continues to be implemented in a selective manner to stifle free dissemination of information and free speech within Zimbabwe, especially through the private media. AIPPA has been amended twice since its promulgation, the second amendment<sup>11</sup> becoming effective on 7 January 2005. This Amendment does not substantively ameliorate the harsh effects of the main Act, making only cosmetic changes to the composition of the Media and Information Commission (MIC) and introducing an Independent Disciplinary Committee to deal with the suspension or dismissal of members of the MIC rather than leave this power with the Minister of Information and Publicity. It also imposes further criminal penalties on journalists who practise their profession whilst suspended by the MIC: a successful prosecution could potentially see a journalist sentenced to a fine of Z\$4 million or imprisonment of up to two years, or both. The test case in which a journalist<sup>12</sup> was being prosecuted for practicing without accreditation ended in the journalist being acquitted. Despite this, 27 other journalists charged with the same offence under AIPPA have not had charges against them withdrawn. This can be perceived to be harassment of members of the private media by using legislation to prevent them from carrying out their professional mandate. Clearly, the Government has no intention of repealing this piece of legislation. It feels it necessary to restrict further the activities of journalists and the information they can disseminate by providing harsher penalties that will perpetuate self-censorship or keep them in court defending themselves against disputed charges to avoid their punitive effects.

<sup>10</sup> *Zvikomborero Mashonganyika and 251 Others v. Commissioner of Police & Minister of Home Affairs & City of Harare* HC 5060/05.

<sup>11</sup> Access to Information and Protection of Privacy Amendment Act No.21 of 2004.

<sup>12</sup> Kelvin Jakachira of the now defunct *Daily News*.

On 16 February 2005 the *Broadcasting Services (Access to radio and television during an Election) Regulations, 2005* were promulgated by Extraordinary Government Gazette.<sup>13</sup> In terms of the regulations, the public broadcaster was obliged to provide 'equal opportunities' to political parties for election broadcasts, public debates on policy and news coverage in the run up to the March 2005 parliamentary elections. Although these regulations did, on the face of it, seem to open up the democratic space and allow for some measure of exercise of freedom of expression and information, they came too late to be of any substantive effect. In addition, this public arena was out of reach of most political parties, save for the ruling ZANU PF, due to the prohibitive costs of air time, vague restrictions on what would be accepted by the public broadcaster on the basis of 'quality standards' and that the actual broadcasts did not comply with the provisions for balanced, fair, complete and accurate news reports. An additional drawback has been that these regulations are only effective 'during an election period', which renders the government's sincerity in protecting the right to freedom of expression of its people and allowing them to receive information that will allow them to make informed decisions at the polls at all times highly questionable.

The *Public Order and Security Act (POSA) [Chapter 11:17]* likewise remains on the statute books and has, in fact, been amended to tighten the restrictions on publication or communication of false statements prejudicial to the state<sup>14</sup> and of undermining the authority of, or insulting, the President.<sup>15</sup> The Parliament of Zimbabwe is currently considering the *General Laws Amendment Bill*, which seeks, *inter alia*, to increase upwards the penalty provisions for various activities criminalised under the Act. Some examples of the intended increased penalties include the following: causing disaffection among Police Forces or Defence Forces (raised from Z\$20 000 to Z\$4 million); publication or communication of false statements prejudicial to the state (raised from Z\$100 000 to Z\$10 million); undermining the authority of, or insulting, the President (raised from Z\$20 000 to Z\$2 million); public violence (raised from Z\$100 000 to Z\$15 million); gatherings conducing to riot, disorder or intolerance (raised from Z\$50 000 to Z\$10 million); undermining police authority (raised from Z\$20 000 to Z\$4 million); and failure to notify a regulating authority of the holding of a public gathering (raised from Z\$10 000 to Z\$1 million). This Bill will be passed in the current session of Parliament.

The *Miscellaneous Offences Act (MOA) [Chapter 9:15]*, part of a vast array of security legislation used ruthlessly by the previous illegal regime of Ian Smith before Independence to clamp down on the activities of liberation activists, has never been repealed. Instead, it is finding ever-increasing popularity with law enforcement agents seeking to suppress popular association, expression and movement. This legislation is often favoured for use against human rights defenders, who continue to be arrested, detained and then made to pay admission of guilt fines under the MOA for public violence or conduct likely to cause public disorder. The payment is made not because the targeted human rights defenders are guilty of the alleged conduct, but rather to avoid detention in holding cells whose conditions amount to cruel, inhumane and degrading treatment or punishment – effectively 'buying their freedom'. As in the case of the POSA, the authorities are presently seeking to increase the severity of the penalties for various offences listed under the Act by way of the General Laws Amendment Bill.

Despite the recommendations of the Fact-finding Mission, the *Private Voluntary Organisations Act* regrettably has not been repealed. The President did not sign the much-contested Non-Governmental Organisations Bill within the time period stipulated in the Constitution of Zimbabwe. Instead, the Bill was referred back to Parliament for further amendment, although the President's official reasons for failing to sign the Bill have never been made public. It is generally

<sup>13</sup> SI 22 of 2005.

<sup>14</sup> Section 15.

<sup>15</sup> Section 16.

believed that the Bill's failure was a major victory for civil society due to coordinated NGO sector activism and opposition, and that the dangers effectively no longer exist. This is far from reality. A considerable number of organisations ceased operations during this period due to uncertainty over their future; others cut the numbers of staff to the bare minimum; yet others have refrained from hiring new personnel due to continued uncertainty over the future of their organisations. Funding for projects and activities has also been seriously reduced because of concerns about performance and sustainability in light of the repressive operating environment. Civil society was forced to divert its attention from core business, especially those dealing with human rights, humanitarian and governance issues, in order to preserve themselves. The threat of the Bill's reintroduction in Parliament continues to restrict organisations in their day-to-day activities and has not provided a conducive environment in which to promote and protect human rights in Zimbabwe.

*Constitutional Amendment (No. 17) Bill* was introduced on 15 July 2005 and sought to make wide-ranging intrusions into basic human rights guaranteed under the current Constitution of Zimbabwe, as well as various international human rights instruments to which Zimbabwe is a state party. Opposition political parties and civil society organisations roundly criticised the Bill, calling for its condemnation and rejection. Activities included demonstrations by constitutional reform activists, women's groups, and lawyers; petitions were presented to the Speaker of Parliament, the Chief Justice and the President of Zimbabwe by a significant number of legal practitioners, all Law Society councillors and by the Southern African Development Community (SADC) Lawyers' Association and the East African Bar Association. Written and oral submissions were presented to the portfolio committee on Justice, Legal and Parliamentary Affairs by a wide range of organisations and professional bodies at a public hearing held in Harare. Nevertheless, the Bill was passed after a parliamentary two-thirds majority was achieved, with MPs voting on party lines. The President assented to the Bill on 14 September 2005, less than a month after the Bill had been introduced.

Constitutional Amendment (No. 17) Act *inter alia* has the following impact:

- i It has deprived the courts of the jurisdiction to consider legal challenges filed against compulsory state acquisition of land, thus denying individuals (landowners and individuals and communities dispossessed of their land during the colonial era) their fundamental right to secure protection of the law, and the right to have their cause heard before competent national institutions. In the past, the African Commission on Human and Peoples' Rights has held such denials of the jurisdiction of the courts to be in contravention of Article 7 and Article 26 of the African Charter.
- ii It reconstitutes the bicameral Parliament disbanded in 1987 by introducing the Senate and the House of Assembly. Both houses will allow for non-constituency 'representatives' to be appointed by the executive, in contravention of the right to participate freely in governance of the country and to choose freely one's representatives. It also imposes fiscal obligations on the state that are ill afforded at a time when Zimbabwe is in serious economic and social decline.
- iii It restricts freedom of movement by empowering the state to prevent Zimbabwean citizens from leaving the country when it feels that to do so would be against, *inter alia*, the 'national interest', or 'the public interest or the economic interests' of the state. These vague and undefined grounds will allow the state unfettered discretion on whose movements will be restricted. Government officials have, indeed, confirmed that the provision will be used to prevent human rights and opposition political activists from publicising human rights

violations, criticising government policies and calling for action against the authorities in the international arena. The mere threat of having one's passport or travel documents withdrawn will lead inevitably to self-censorship – an undeniable restriction on the fundamental freedoms of association, assembly and expression of the affected activists.

This Act, the speed in which it was pushed through Parliament and signed by the President, and the failure by the executive and legislative arms of government to take into account the views of the public, and of civil society representatives, indicates that the Government is still intent on utilising repressive and undemocratic legislation to maintain its authority and perpetuate the interests of a select few.

The Government can be seen; therefore, to have failed to implement any of the recommendations of the fact-finding team. For this reason, the environment remains oppressive and is not in any way conducive to democracy and the promotion and protection of human rights.

# Independent National Institutions

*Government is urged to establish independent and credible national institutions that monitor and prevent human rights violations, corruptions and maladministration. The Office of the Ombudsman should be reviewed and legislation which accords it the powers envisaged by the Paris Principles adopted. An independent office to receive and investigate complaints against the police should be considered unless the Ombudsman is given additional powers to investigate complaints against the police. Also important is an Independent Electoral Commission. Suspicions are rife that the Electoral Supervisory Commission has been severely compromised. Legislation granting it greater autonomy would add to its prestige and generate public confidence.*

## The Office of the Ombudsman

Regrettably the Ombudsman's office has not undergone any significant reform since the publication of the Report of the Fact-Finding Mission of the African Commission on Human and Peoples' Rights.

Two established Ombudsman's offices operate in the main cities of Harare and Bulawayo, and two more have been recently set up in Mutare and Gweru. Little information has been availed to the public about this office and its functions, and few people are even aware of its existence. It has failed to publicise its activities or to take concerted action to investigate any human rights violations that have been reported to its officers due to its restrictive mandate in terms of who it can investigate, its perceived and practical lack of independence, and also due to a lack of financial and human resources.

A recruitment drive was carried out in early 2005 to attract legal and investigative officers, but the increase in personnel has not led to a proportionate increase in efficiency or delivery of services. No effort has been made to attend to the outstanding reports: the last published report covered activities for 1996. No efforts have been made to reform the office in a manner that guarantees its independence, shows commitment to the investigation and resolution of reported human rights abuses, and guarantees accountability to the public.

In terms of the Constitution of Zimbabwe the appointment and removal procedures<sup>1</sup> still occur at the discretion of the President, which allows for an unacceptable level of executive interference in the affairs of a supposedly independent body. Its functions<sup>2</sup> only relate to the investigation of injustices due to administrative procedures where a judicial remedy does not exist, and/or allegations of violations of the Declaration of Rights perpetrated by an officer, person or authority in the various ministries or government departments. The constitutive Act<sup>3</sup> removes the following categories of persons from the Ombudsman's reach: the Defence Forces; the Police Force; the Prisons Service; the President and his personal staff; the Attorney-General; the Secretary of Justice, Legal and Parliamentary Affairs, and the staff of the ministry in relation to any prosecution, civil action or legal advice provided to government authorities; and judicial officers. Human rights violations by persons or institutions other than those specified under the Constitution and the constitutive Act cannot be entertained or investigated. This would include human rights violations perpetrated by political activists, youth militias, and purported 'war veterans' amongst others.

The human rights violations that have occurred in Zimbabwe since the run up to the 2000 parliamentary elections, where a considerable number of politically motivated incidents were

<sup>1</sup> Section 107.

<sup>2</sup> Section 108.

<sup>3</sup> Ombudsman Act [Chapter 10:18].

reported, can therefore not be, and have not been, investigated. Most of the violations reported to human rights organisations and those arising during court proceedings have allegedly been perpetrated by the very groups protected from investigation by the enabling legislation. For this reason the victims of political violence during the 2000 elections were forced to submit a communication to the African Commission on Human and Peoples' Rights (ACHPR):<sup>4</sup> the prosecution of the responsible individuals was unduly prolonged (if such prosecutions occurred at all), no information as to progress was being furnished by the authorities to the affected families, and claims for compensation could not be effectively pursued. No independent national institution was available to protect the families and individuals affected. Likewise, in the 1980s, following the massive human rights violations perpetrated in Matabeleland and Midlands provinces, the Ombudsman could not investigate allegations that the Defence Forces were involved in the atrocities committed upon ordinary Zimbabweans, as they were exempt under the legislation. This has also been the case with regard to the government's latest initiative codenamed Operation *Murambatsvina*: the actions of the police, who have been intricately involved in the evictions, harassment of communities and destruction of property cannot be investigated as they are protected under the constitutive Act; thus redress through such an institution remains a mirage.

Without an appropriate independent body to investigate allegations of human rights violations levelled against the police force, the culture of impunity will continue to be reinforced and the violations are unlikely to cease.

When measured against the Paris Principles, the Office of the Ombudsman clearly falls far short of the minimum standards required of a national human rights institution. By failing to address the inadequacies, the Government continues to perpetuate a culture of impunity: human rights violations continue to go unaddressed; there is no institution that acts as a source of human rights information for the Government and the people of Zimbabwe; no assistance is offered in funding or carrying out human rights education and promotion activities. In the specific case of Zimbabwe, the office has failed to intervene on several key pieces of legislation that violate fundamental human rights norms and standards or to provide opinions and/or advice to state institutions where judicial pronouncements, delays, or disregard of court orders has rendered people susceptible to human rights violations.

Until such time as the Act is amended to allow for independent investigations of the activities of bodies that have been actively involved in perpetrating or condoning human rights violations, as well as to address the shortcomings in compliance with the Paris Principles, there cannot be said to exist in Zimbabwe an independent national human rights institution. The Office of the Ombudsman can, at this stage, make no meaningful contribution to the protection and promotion of human rights in the country. In addition, it should be noted that, even if substantive amendments are to be made to the enabling legislation in future, the Government must apportion sufficient resources to allow the Office of the Ombudsman to carry out its duties efficiently, effectively and within a stipulated and reasonable timeframe.

### **An Independent Electoral Institution**

The Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections<sup>5</sup> require the existence of impartial and competent national election authorities able to act independently in ensuring free, fair and peaceful elections. Without the existence of such minimum standards, an individual is unable to exercise her/his right to participate freely in the

<sup>4</sup> *Zimbabwe Human Rights NGO Forum v. The Republic of Zimbabwe* Communication No. 245/02.

<sup>5</sup> Adopted by the SADC Summit in Mauritius in August 2004.

government of the country, either directly or through freely chosen representatives, as is guaranteed under the African Charter.<sup>6</sup>

Prior to the March 2005 parliamentary elections, the Electoral Supervisory Commission (ESC), was the 'supreme' electoral body, as established by the Constitution of Zimbabwe.<sup>7</sup> Although its independence is guaranteed under the Constitution, the nomination of the commissioners is under the direct control of the President of Zimbabwe. As an interested party in all elections in which the ruling party contests, such a discretionary power is unacceptable, as it could potentially allow the President to influence the commissioners in favour of candidates of his party or to overlook electoral irregularities that may arise. Without an amendment of the appointment procedure to address these concerns, the ability of the ESC to carry out its functions without fear or favour remains subject to scrutiny and criticism.

Despite these serious and public concerns, the ESC remained in place during the recent parliamentary elections in March 2005. However, the Zimbabwe Electoral Commission (ZEC) was also established before these elections, purportedly as the body bearing responsibility for the preparation and conduct of the elections, tasked with ensuring that the polls were conducted efficiently, freely, fairly, transparently and in accordance with the law.<sup>8</sup> Its mandate replicates many of the functions of the ESC. In addition, several other electoral institutions remained in place, which resulted in a duplication and multiplicity of roles and general confusion as to which institution bore overall responsibility for ensuring free and fair elections. For example, the head of the Delimitation Commission, Justice George Chiweshe, was also later appointed as the chairperson of the ZEC, opening up the possibility of a conflict of interest if the results of the delimitation process are challenged. Other electoral institutions that added to the confusion included the Office of the Registrar-General and the Election Directorate. The Registrar-General has publicly stated that he is a supporter of the ruling party, and therefore his impartiality has been irretrievably compromised. Given that his office is responsible (together with overlapping responsibilities of the ZEC) for voter registration and inspection of the voters' roll, this process is open to criticism. The Election Directorate adds even more personnel and institutions into the overall implementation of the elections. With so many players involved, it was difficult, if not impossible, to establish who bore overall responsibility for the management of the elections. This was roundly criticised by election observer missions and civil society organisations alike.<sup>9</sup>

In September 2005 the Constitutional Amendment (No.17) Act came into force. *Inter alia*, the Act<sup>10</sup> disbanded the ESC and replaced it with a new Zimbabwe Electoral Commission,<sup>11</sup> which bears responsibility for the preparation, conduct and supervision of all elections. As with the ESC, however, its independence is subject to debate. Although candidates are submitted in terms of the Standing Rules and Orders, which allow for elected parliamentary opposition representatives to input into the nominees, eventual approval comes, once again, from the President, and allows for the possibility of unnecessary interference in parliamentary proceedings. The President also fixes the commissioners' terms of office, remuneration and allowances. The Minister of Justice, Legal and Parliamentary Affairs also has considerable powers to call special meetings and scrutinise the

<sup>6</sup> Article 13.1 of the African Charter on Human and Peoples' Rights.

<sup>7</sup> Section 61 of the Constitution of Zimbabwe establishes the ESC.

<sup>8</sup> The Commission derived its existence from the Zimbabwe Electoral Commission Act [Chapter 2:12].

<sup>9</sup> *Report of the African Union Observer Team on the Parliamentary Elections in the Republic of Zimbabwe Held on 31<sup>st</sup> March 2005; Report on the 2005 Parliamentary Elections (Zimbabwe)* prepared by the Zimbabwe Lawyers for Human Rights; *Report on Zimbabwe's 2005 General Elections* prepared by the Zimbabwe Election Support Network.

<sup>10</sup> Section 17 thereof.

<sup>11</sup> The Zimbabwe Electoral Commission, as set out under the Constitutional Amendment (No.17) Act, bears minor differences from that constituted under the Zimbabwe Electoral Commission Act, but the general functions and appointment procedures remain unchanged.

proceedings of the ZEC. The possibility exists, therefore, for much state interference through these channels, which impacts on the independence of the electoral bodies, perceived and actual.

Insofar as the Constitutional Amendment (No. 17) Act has removed one of the two competing electoral bodies charged with the general management of elections, its failure to remove the other electoral institutions referred to previously remains an insurmountable obstacle in assuring voters and society at large that a single electoral institution is running elections and is accountable to the electorate. In addition, its perceived lack of independence (bolstered by the inadequate manner in which the body has dealt with, and resolved, allegations of electoral irregularities in the aftermath of the elections in March 2005) can only add to these concerns.

Until such time as there exists only one electoral institution, which is appointed and carries out its business independently, publicly and transparently and is seen to be free from the possibility of executive and/or ministerial interference and therefore impartial, Zimbabwe cannot be said to have an independent electoral institution. The state has failed to comply with the recommendations of the Fact-Finding Mission of the ACHPR in this regard.

### **The Judicial Services Commission**

The Judicial Services Commission (JSC) derives its power from the Constitution of Zimbabwe.<sup>12</sup> It is headed by the Chief Justice of Zimbabwe and other commissioners include the chairman of the Public Services, the Attorney General and up to three others. The President of Zimbabwe is directly involved in the appointment of all individuals: the Chief Justice is appointed by the President, in consultation with the JSC;<sup>13</sup> the chairman of the Public Service Commission is appointed by the President directly;<sup>14</sup> the Attorney-General is appointed in similar manner to the Chief Justice.<sup>15</sup> All other members of the commission are also direct presidential appointees.

Where such a body, tasked with the appointment of judicial officers, as well as all matters relating to their employment, discipline and conditions of service, depends on the patronage of the executive for its very existence, its ability to act independently and impartially must be questioned, especially where judicial officers have been asked to consider human rights violations or corruption or maladministration by state actors. The judiciary cannot be seen to be regulated through a body with such clear links to the executive, as this impacts directly on perceptions of its independence and impartiality, its ability to conduct its business without fear or favour, and the very principle of separation of powers. It also impacts negatively on the development of a rights-based jurisprudence in Zimbabwe, to the detriment of the nation and the region as a whole.

The fact that the provisions relating to the mandate of the JSC have been expanded/clarified in the latest constitutional amendment indicates that, although the state may be willing to provide it with more powers to discipline judicial officers, it is unwilling to provide a transparent and accountable process of appointment, ensure its substantive independence, and elect officers through a public procedure that ensures transparency and allows the citizenry to be assured that the officers are not subject to the control of any other state authority.

### **The Anti-Corruption Commission**

The Anti-Corruption Commission (ACC) derives its existence from the Constitution of Zimbabwe.<sup>16</sup> The Minister of Special Affairs in Charge of Anti-Corruption and Anti-Monopolies Programme

<sup>12</sup> Section 90 thereof.

<sup>14</sup> Section 74(1) *ibid.*

<sup>13</sup> Section 84(1) of the Constitution of Zimbabwe

<sup>15</sup> Section 76(2) *ibid.*

<sup>16</sup> Section 108A.

introduced the Anti-Corruption Commission Bill in Parliament on 26 March 2004<sup>17</sup> and it became law in January 2005.<sup>18</sup> The ACC was then established and commissioners have since been appointed. The ACC is chaired by former Comptroller and Auditor-General Eric Harid; other members are Senior Assistant Commissioner Casper Khumalo, lawyers Johannes Tomana and Kuziwa Nyamwanza, Retired Brigadier Elasto Madzingira, businesswoman Alice Nkomo, educationist Bessie Nhandara and Juliet Machoba, the events coordinator of the Zimbabwe International Book Fair.

In terms of the Constitution the ACC has a mandate to:

- 1 combat corruption, theft, misappropriation, abuse of power and other improprieties in the conduct of affairs in both the public and private sectors; and
- 2 make recommendations to the government and to organisations in the private sector on measures to enhance integrity and accountability and to prevent improprieties.

Further powers under the constitutive Act<sup>19</sup> allow the ACC, *inter alia*, to:

- 1 promote the investigation of serious cases of corruption and fraud;
- 2 make proposals for the elimination of corruption in the public and private sector;
- 3 promote awareness among the public of the causes and effects of corruption on society;
- 4 monitor and examine the practices, systems and procurement procedures of public and private institutions;
- 5 enlist and foster public support in combating corruption in society;
- 6 educate the public on the dangers of corruption in society;
- 7 instruct, advise and assist any officer, agency or institution on the elimination or minimisation of corruption;
- 8 receive and investigate any complaints alleging any form of corruption;
- 9 investigate any conduct of any person whom the Commission has reason to believe is connected with activities involving corruption;
- 10 assist in the formulation of practices, systems and procurement procedures of public and private institutions with a view to the elimination of corrupt practices;
- 11 recommend to Parliament that government ratify and domesticate relevant international legal instruments aimed at combating corruption.

In addition the constitutive Act bestows powers on the members of the ACC similar to those of the police, as set out in the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The Act further makes reference to the state's obligations under the SADC Protocol against Corruption.<sup>20</sup>

All members of the ACC are presidential appointees, and their employment, remuneration and allowances are within the discretion of the President. Termination or suspension of membership is done through an Independent Disciplinary Committee comprising three members, all of whom are again appointed by the President. Issues therefore arise, again, as to the independence of commissioners who are at the very least perceived to have been appointed on the basis of political patronage and who are at risk of losing their positions if they act in a manner contrary to the wishes of the executive, or who undertake investigations and/or prosecutions against those individuals or bodies that have a link (direct or indirect) to the ruling party or the executive. This severely limits the effectiveness of the ACC and gives rise to the unfortunate situation whereby state institutions and actors, as well as parastatals and other bodies with links to these organs, will not be investigated in an impartial and transparent manner.

<sup>17</sup> Anti-Corruption Commission Bill, HB 3 of 2004, under General Notice 222 of 2004.

<sup>18</sup> Anti-Corruption Commission Act, 2004.

<sup>19</sup> Sections 11 and 12.

<sup>20</sup> Signed on 14 August 2001 in Blantyre, Malawi.

Further, the reports of the commission are not presented directly to Parliament, as would be the ideal. Instead, the Minister is able to peruse the report, make “comments”, and then present both to the legislative organ.<sup>21</sup> This allows for unacceptable ministerial interference in the machinations of the ACC.

Whilst it is commendable that the state has taken measurable steps to put in place legislation that allows for positive action to be taken in combating corruption, the effectiveness of the ACC has been hamstrung by legislative interference in its independence and impartiality. It is recommended that the issues of appointment to the Commission, the conditions of service and the reporting structures be reviewed to address the limitations and thus allow this body to investigate and take action against those in protected positions who have used their position and patronage to continue with activities that continue to affect negatively the development and the prosperity of the nation.

It can therefore be concluded that, since the publication of the Report of the Fact-Finding Mission, the state has failed to take positive and adequate steps to ensure that independent national institutions exist or have been strengthened to monitor human rights violations, corruption and maladministration, and to ensure that all elections held in Zimbabwe allow people to elect representatives without fear and that the outcome is a free expression of their will. Whilst the executive and the legislature vacillate in their attempts to secure political interests, positions and the self-perpetuation of privileged sectors and individuals, the ordinary people of Zimbabwe continue to experience violations of their fundamental rights as guaranteed under both the Constitution of Zimbabwe and the African Charter on Human and Peoples’ Rights.

<sup>21</sup> Section 17.

## The Independence of the Judiciary

*The judiciary has been under pressure in recent times. It appears that their conditions of service do not protect them from political pressure; appointments to the bench could be done in such a way that they could be insulated from the stigma of political patronage. Security at Magistrates' and High Court should ensure the protection of presiding officers. The independence of the judiciary should be assured in practice and judicial orders must be obeyed. Government and the media have a responsibility to ensure the high regards and esteem due to members of the judiciary by refraining from political attacks or the use of inciting language against magistrates and judges. A Code of Conduct for Judges could be adopted and administered by the judges themselves. The African Commission commends to the Government of the Republic of Zimbabwe for serious consideration and application of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Commission at its 33rd Ordinary Session in Niamey, Niger in May 2003.*

The independence of the Judiciary is constitutionally guaranteed in Zimbabwe.<sup>1</sup> In addition the State, having ratified the African Charter on Human and Peoples' Rights, has an obligation to ensure that every individual has the right to have her/his cause heard by way of an appeal to competent national organs, and/or by an impartial court or tribunal.<sup>2</sup> A further obligation exists in terms of Article 26 thereof, which provides:

*State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter*

The Report of the Fact-Finding Mission itself recommended that the Government seriously consider and apply the Principles and Guidelines on the Right to Fair Trial and Legal Assistance as a means of giving substantive effect to its obligations under the Charter.

Regrettably the situation in respect of the Judiciary seems only to be deteriorating further as time progresses. Since January 2005, the superior courts have reinforced the perception that they lack independence and impartiality and are unable to deliver justice, especially to those who have approached the courts seeking to have their fundamental rights protected or reinforced, or where a remedy has been sought for damage already suffered. Where judicial officers have attempted to give effect to the rights of victims, court orders have been ignored or intentionally and blatantly disregarded. In the most serious affront on the principle of separation of powers and the rule of law, the state has gone on to oust completely the jurisdiction of the courts to deal with certain categories of cases. Zimbabwe has therefore experienced a dearth in the development of a rights-based jurisprudence, whilst access to justice has been severely impaired.

<sup>1</sup> Section 79B of the Constitution of Zimbabwe states that, *In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.*

<sup>2</sup> This is guaranteed under Article 7.1 of the African Charter on Human and Peoples' Rights.

## **Appointments, Judicial Tenure and Security and Removal from Office**

Judges are appointed by the President, after consultation with the Judicial Services Commission.<sup>3</sup> The Judicial Service Commission comprises six members, four of whom are directly appointed by the President, and two of whom are appointed by the President by virtue of their holding office to which they are likewise appointed by the President, in consultation with others. Therefore the Commission is directly or indirectly under the influence of the Executive, which materially affects its independence. In addition the Government has not put in place provisions dealing with the procedure for selection, or guidelines for the conducting of the selection process. Therefore the process is still open to attack on the basis that judicial officers are being appointed on the basis of political patronage.

Although the Constitution ensures security of tenure, the disciplinary and removal processes are both again controlled, directly or indirectly, by the Executive. Where the issue of removal of a judge from office arises, the Constitution allows the President both to raise an objection and subsequently select and appoint a disciplinary tribunal where there is an alleged inability by a judicial officer to discharge her/his functions, or where there has been “misbehaviour”.<sup>4</sup> In addition, by virtue of the latest amendments<sup>5</sup> to the Constitution of Zimbabwe, the Judicial Service Commission is now also empowered to deal with issues relating to the employment, discipline and conditions of service of judicial officers and persons employed in the office of the Ombudsman.<sup>6</sup> Thus there is a choice (or potential for conflict) between the establishment of an *ad hoc* disciplinary tribunal, or the referral of the matter to the Judicial Service Commission. In both instances, however, the disciplinary body is subject to executive interference.

There therefore remain two serious and unmitigated dangers: that members of the Judiciary will be appointed on the basis of perceived political affiliation or because they are considered to hold interests or viewpoints that will advance government policy and/or protect state players in positions of privilege; and that any members of the Judiciary who conduct themselves in a manner which puts such considerations in question can easily be removed by the Executive, acting through organs such as the Judicial Service Commission or disciplinary tribunals which are tainted with excessive Executive interference.

In this regard, the continuing case of High Court Judge, Justice Benjamin Paradza, proves a useful study. In 2003 Justice Paradza was arrested in his chambers at the High Court in Harare on allegations of subverting the course of justice and charged under the Prevention of Corruption Act. However, the fact that he was arrested shortly after ordering the release of the opposition Movement for Democratic Change Mayor Elias Mudzuri from police custody created a fair perception that he was being targeted for ruling against ZANU-PF and going against the wishes of the Executive in the matter. It has been able to use the Constitution and the provisions for a disciplinary tribunal to the state’s advantage to ensure that he remains, to date, suspended from office and subject to an inquiry, which is reported in the media in an impartial manner, which tends to incite opinion against him. The manner in which he has been treated, including his detention in conditions which the Constitutional Court found to amount to cruel, inhuman and degrading treatment, has served as a useful but frightening reminder of how a judge can be treated should the state machinery feel that a “wrong” decision has been made.

A further concern is that the Judiciary is not adequately protected against unwarranted attacks from the other two pillars of government. Although avenues for the pursuit of remedies for contempt of

<sup>3</sup> Section 84 of the Constitution of Zimbabwe.

<sup>4</sup> Section 87(1) of the Constitution of Zimbabwe.

<sup>5</sup> Constitutional Amendment (No. 17) Act, 2005.

court exist, they have proven to be either ineffective or the process has taken too long to offer any substantive protection. Again, while the Judicial Service Commission should be the organ, which protects the interests and the dignity of the Judiciary, it may be unable to act in an impartial manner for fear of being seen to be acting against the wishes of the Executive, to whom they owe their position.

In the absence of transparent procedures for appointment of judicial officers and a reformed Judicial Service Commission whose members are appointed in a public process, which is transparent and accountable, which is not answerable to the Executive or dependent on its patronage, and which is able to protect the interests of judicial officers in their capacity as a separate arm of government, the Judiciary in Zimbabwe can neither be considered impartial nor able to deliver justice without fear or favour. Until such time as these processes are addressed, therefore, judges will be considered to be tainted and unable to effectively carry out their mandate.

## Attacks on the Judiciary

### 1 The Ouster of the Jurisdiction of the Court

Perhaps the greatest assault on the Judiciary which has manifested itself since the publication of the Report of the Fact-Finding Mission in January 2005 has been the promulgation of the Constitutional Amendment (No. 17) Act. Signed into law by the President on 14 September 2005, the amendment ousts the jurisdiction of the courts to consider challenges to the acquisition of land by the State by any persons having a right or interest in the land.<sup>7</sup>

Effectively, at least 5,000 cases which were pending in the Administrative Courts in Zimbabwe have since been withdrawn as a consequence of this constitutional amendment. Confusion abounds as to whether the litigants will be able to recover their wasted legal costs, let alone deal with the implications of such withdrawals, which effectively allows the constitutional amendment to operate with retrospective effect.<sup>8</sup> There is also concern as to the impact of the amendment, which affects all forms of property holders, including dispossessed communities who lost their property during the colonial era and who may wish to claim entitlement to their land in the future.<sup>9</sup>

The implications of an ouster of the jurisdiction of the courts have been considered on several occasions by the African Commission on Human and Peoples' Rights,<sup>10</sup> which has concluded that such action taken by the executive or legislative arms of government violates Article 7 of the African Charter. The Commission has, in all cases, strongly recommended an end to this practice, which removes entire areas of law from the jurisdiction of the ordinary courts.

<sup>6</sup> Section 18 of the Constitutional Amendment (No. 17) Act, 2005.

<sup>7</sup> Section 2, which inserts a new section 16B in the Constitution, dealing with 'Agricultural land acquired for resettlement or other purposes', states in the relevant portion of section 16B(3)(a): ... a person having any right or interest in the land shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.

<sup>8</sup> The African Commission on Human and Peoples' Rights has stated: *To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequences for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights. The nullification of the suits in progress thus constitutes a violation of article 7(1)(a).* in *Constitutional Rights Project and Another v. Nigeria* (2000) AHRLR 235 (ACHPR 1999).

<sup>9</sup> However, this latter issue falls outside the scope of this report, which focuses on the effects of this legislative and executive action on the Judiciary.

<sup>10</sup> *Civil Liberties Organisation v. Nigeria* (2000) AHRLR 188 (ACHPR 1995); *Constitutional Rights Project and Another v. Nigeria*, op. cit.; *Civil Liberties Organisation v. Nigeria* (2000) AHRLR 243 (ACHPR 1999); *Centre for Free Speech v. Nigeria* (2000) AHRLR 250 (ACHPR 1999); *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000).

It is not the first time in which the Constitution has been amended in order to circumvent the jurisdiction of the courts; it is, however, the first time that the courts have been completely and unilaterally prevented from exercising their judicial and constitutionally guaranteed powers in the determination, protection and enforcement of fundamental human rights, and in which they have been unable to protect themselves from such attack.<sup>11</sup>

This development has been condemned by the legal profession in Zimbabwe, as well as their peers within the region and throughout Africa. Over 120 legal practitioners from around Zimbabwe signed a petition calling upon Members of Parliament to refuse to consent to the Bill, and calling on the Chief Justice to take a firm public position demanding that the independence and integrity of the Judiciary be reaffirmed and upheld, and that the government comply with its constitutional and international obligations in relation to upholding the principle of the separation of powers. A similar petition was submitted by the full complement of Councillors of the Law Society of Zimbabwe. A supporting petition was presented by the SADC Lawyers Association, which encompasses all the Law Societies and Bar Associations within the SADC. After the Bill was passed in Parliament, the East African Bar Association and the Law Societies of Ethiopia, Kenya, Tanganyika, Uganda, and Zanzibar presented a petition to the President of Zimbabwe (and appropriate organs of the African Union, the SADC and the United Nations), calling specifically on the President not to assent to the Bill and urging intervention from the various organs. Regrettably, despite all the combined efforts, the Bill became operative after President Mugabe signed it on 14 September 2005. The Judiciary has failed to address the legal profession about these serious implications and no guidance or protection has been forthcoming from the Judicial Service Commission or the Ministry of Justice, Legal & Parliamentary Affairs.

It is clear that the Judiciary has suffered a severe blow to its dignity and independence, and even clearer that the Government is the leading player in its emasculation. What remains now is to highlight the insincerity of the Government in protecting and upholding the rule of law and independence of the Judiciary, and seeking further protective measures through the African Commission on Human and Peoples' Rights.

## **2 Defiance of Judicial Orders**

There has been an ongoing pattern of defiance of judicial orders from as far back as 1999, when the army and police refused to obey an order of the Supreme Court to produce journalists Mark Chavunduka and Raymond Choto in court after they had been illegally abducted and held by military personnel in connection with a story they had published about a failed coup in Zimbabwe.<sup>12</sup> At the time, the legal profession and the Judiciary alike were shocked and outraged at the defiance of a judicial order and the failure of the other arms of government to respect the authority of the courts. The full bench of the Supreme Court addressed the President and sought a reaffirmation of respect for the independence of the Judiciary and its protection against attack.

<sup>11</sup> There is a trend whereby the Constitution has been amended and other legislation or regulation in terms of presidential powers has been introduced to circumvent a decision made by the Judiciary (an example being when the Supreme Court found the death penalty to be unconstitutional, and it was reintroduced by way of Constitutional amendment), or to prevent the Judiciary from being allowed to exercise its function and consider cases with a considerable impact on fundamental human rights and freedoms (an example being when the President promulgated a decree purporting to nullify election petitions lodged by the opposition Movement for Democratic Change challenging the results of around 39 constituencies after the 2000 parliamentary elections. The Supreme Court subsequently found that the decree was *ultra vires* and allowed the petitions to continue).

<sup>12</sup> *Mark Chavunduka and Raymond Choto v. Ministry of Defence* (2000) ZLR (SC).

Regrettably the attacks on the Judiciary and the defiance of court orders have been unrelenting and are now endemic within Zimbabwe's legal landscape. Since January 2005, there have been at least five high-profile cases in which various arms of Government, including the Executive, three Ministries, a statutory body, local authorities and the Police, have failed to comply with Court Orders.<sup>13</sup> These have been reported under a separate section of this Audit, and reference can be made to the relevant extracts in this regard.

An older, but still unresolved issue which is of particular concern due to its clear public interest arose during the adjudication of the election petition relating to the 2000 parliamentary election in the Buhera South constituency.<sup>14</sup> High Court judge, Justice James Devittie, handed down a damning judgment relating to the criminal activities that arose prior to the June 2000 poll. Two opposition Movement for Democratic Change activists, Blessing Chiminya and Talent Mabika, were extra-judicially executed by being burnt alive by named ruling party ZANU-PF activists. Justice Devittie used his powers under the Electoral Act [*Chapter 2:01*] to refer the matter to the authorities for investigation and prosecution of the accused persons. To date the law enforcement authorities, including the police and the Attorney General's office have failed to do so. This failure on the part of the authorities has been repeated on many occasions and has caused the Zimbabwe Lawyers for Human Rights (ZLHR) to communicate with both institutions to enquire as to progress and request details of all investigations undertaken and efforts made to bring these various perpetrators to justice. To date the directions, as well as the ZLHR correspondence has been ignored. This has lent itself to a real perception of impunity for perpetrators of political violence. If such criminal behaviour continues to be tolerated there is a very real probability that ordinary citizens attempting to exercise their right to political participation will remain unprotected by law enforcement authorities, and therefore effective civic and political participation will continue to remain illusory.

Despite the recommendations of the Fact-Finding Mission to Zimbabwe, there has been no effort to address this growing culture of impunity; instead there is a concerted effort to ensure that no court rulings will be respected where they do not further the interests of the state. The general public, having witnessed this blatant disregard for the rule of law and the sanctity of the courts, has in turn engaged in increasingly anarchic behaviour which has destroyed the very fabric of our orderly society. The more vulnerable sectors of society have gone to the other extreme: they have become increasingly hesitant (in some cases even completely unwilling) to approach the courts for protection and/or relief where their rights have been violated as they have lost faith either in the courts' ability to deliver justice, or in the commitment of the executive to enforce the orders emanating from the Judiciary.

The Judiciary itself is partly responsible for the escalation in impunity. No public statement has been made by the Bench to assert and call for the reaffirmation of its independence; efforts by the Law Society and senior members of the Zimbabwe Lawyers for Human Rights to engage the Chief Justice of Zimbabwe and the Judge President of the High Court have been met by a resounding silence and apathy. Unless the attitude of the Judiciary itself changes, and without a corresponding change from the Executive, the situation is only likely to deteriorate further in the months to come.

<sup>13</sup> These include the following cases: *Roy Leslie Bennett v. The Constituency Election Officer, Chimanimani Constituency* EP1/05; *The State v. Toby Harnden and Julian Simmonds* CR 256/3/05; *Ashtony Shumba and Other Residents of Porta Farm v. Officer in Charge, Norton Police Station, Commissioner of Police, Minister of Home Affairs, City of Harare and Minister of Local Government, Public Works and Urban Development* Case No. 376/05; *Felistus Chinyuku and Other Residents of Porta Farm v. The Minister of Local Government and Urban Development & 3 Ors* Case No. 3225/05; and *Zvikomborero Mashonganyika and 251 Others v. Commissioner of Police & Minister of Home Affairs & City of Harare* HC 5060/05.

<sup>14</sup> *Tsvangirai v. Manyonda* 2001 (1) ZLR 295.

### 3 Executive Interference in the Judiciary

The issues of administrative interference by the Executive in the affairs and functions of the Judiciary have been previously addressed. In addition the Executive has shown a relentless appetite for public criticism, through the publicly owned but state-run print and broadcasting media, of certain decisions of the Judiciary in sensitive matters where judges have ruled against what are perceived to be state interests. This has not abated since January 2005, and has had the continued effect of instilling fear in judicial officers and thus interfering with their impartiality and ability to fulfill their mandate without fear or favour.

Two situations serve to illustrate how the Executive has disregarded recommendations to refrain from making political attacks or incitement against judges or magistrates.

#### (a) Outright Executive Intimidation and Manipulation

An opposition Member of Parliament, Roy Bennett, submitted his nomination papers to contest as the MDC candidate for Chimanimani constituency in the March 2005 parliamentary elections. His nomination papers were rejected by the presiding officer as, at the time, he was serving a term of imprisonment imposed by Parliament for assault; Bennett challenged this refusal to accept his application.

Electoral Court judge, Justice Tendai Uchena, found in a well-reasoned judgment<sup>15</sup> that Bennett was qualified to stand as a candidate and that the decision of the Nomination Court should be set aside. He set a new date for the election in Chimanimani constituency, namely 30 April 2005. On 17 March 2005 the President was publicly quoted<sup>16</sup> criticising the ruling as “madness”. He went on to state at a meeting of provincial, government and party leaders in Chipinge:

*I don't understand the court's decision. We can't be held to ransom by a man who is in prison. That is absolute nonsense. We will study the decision and appeal against it. He [Bennett] has a case to answer. Rambai muchienderera mberi. Proceed as if nothing has happened.*

Shortly thereafter the Zimbabwe Electoral Commission (ZEC), one of the Respondents (which had not even opposed the initial application) filed an appeal for Review of Justice Uchena's decision. The Commission also lodged an urgent application that the ruling of the Electoral Court be suspended pending the hearing of the review. This caused an unprecedented situation where a judge was made to suspend his own judgment pending its review. The President – not a party to the proceedings – could only be seen as having influenced the ZEC to take action which they had not wished to take themselves (they had complied with the judge's order to publish fresh notices for a new Nomination Court and new date for the Chimanimani constituency election, and had not noted an appeal against the decision until well after the President made his public declarations).

In light of the history of executive and legislative interference in the independence of the functions of the Judiciary, it becomes clear that the Executive unprocedurally and in contravention of the principle of separation of powers interfered in the administration of justice in this matter. There is no reason to believe that similar tactics will not be employed in future actions where the interests of the state or the ruling party are threatened.

<sup>15</sup> *Roy Leslie Bennett v. The Constituency Election Officer, Chimanimani Constituency* EP1/05.

<sup>16</sup> *The Herald* 17 March 2005.

There exist on the various benches today – although in the minority – magistrates and judges with courage to interpret and apply the law without fear or favour, and they are to be commended. However the concern remains that the attacks on the Judiciary by other organs of state have and will continue to negatively interfere with the administration of justice. Criticism is neither outlawed nor unwelcome, but should not be intemperate and intended to interfere with the separation of powers.

(b) Inappropriate handling of cases involving the protection of fundamental human rights and freedoms  
When the Government and local authorities launched their purported “clean-up” campaign under the banner of Operation *Murambatsvina* and Operation Restore Order on 19 May 2005, many lawyers lodged urgent applications with the High Court and Magistrates’ Courts around the country in efforts to protect the interests of clients who had been subjected to unplanned forced evictions, destruction of property and livelihoods, physical assaults and intimidation, and internal displacement without due process and in contravention of a myriad of rights protected under the Constitution as well as the African Charter on Human and Peoples’ Rights. Actions were also taken up on behalf of affected vulnerable groups, including children who had their schooling interrupted, the elderly, women-headed households, and the sick who had their treatment programmes disrupted by the actions of the state.

The response of the High Court was most distressing. Cases filed on an urgent basis have been ignored and remain unresolved to date.<sup>17</sup> Other cases were dismissed with minimal consideration and judgments, which fail to address key arguments and fly in the face of rights-based jurisprudence.<sup>18</sup> The Supreme Court has failed to consider matters relating to the rights of people affected by Operation *Murambatsvina* on an urgent basis. The attitude of the superior courts has been one of apathy, delay and diversionary tactics. It has given rise to the perception of judicial indifference to human suffering and constructive barricading of the courts against cases raising human rights issues. On the other hand, the Magistrates’ Courts have offered speedy and effective relief to the affected parties around the country. Matters are heard within 48 hours of being filed, and provisional orders have been granted in favour of the vulnerable groups. A possible reason for this disparity (and the general tendency of magistrates to deliver justice in a more independent and impartial manner) could be found in the fact that they do not rely on the Executive for their continued existence, and their remuneration, benefits and allowances are likewise not dependent on their performing their duties in a manner considered favourable to the state’s interests.

It is interesting to note that when it became apparent that the Magistrates’ Courts had been providing protection and relief to affected groups, the judicial officers were issued with a directive removing their jurisdiction in all matters relating to Operation *Murambatsvina* and involving the local

<sup>17</sup> In the case of *Batsirai Children’s Care v. Minister of Local Government and Urban Development & 4 Ors* HC 2566/05 urgent relief was sought against the continuing eviction of children, including those orphaned by HIV/AIDS, who had been living in an orphanage run by Dominican sisters. The matter was set down before Justice Benjamin Hlatshwayo in late May 2005. To date, the judge has continuously postponed the matter, which has had the effect of exposing the children to further human rights violations and ever-deteriorating living conditions.

<sup>18</sup> See, for example, the matter of *Dare Remusha Cooperative v. Minister of Local Government, Public Works and Urban Development* HC 2467/05, where Justice Tedi Karwi stated: *It would be naïve for me to conclude my judgment without mentioning the fact that the action taken by the respondents, however, has caused untold suffering to a number of people. I am told by the applicant that a lot of people have obviously been displaced and appear to have nowhere to go. Many have been sleeping in the open and the cold weather. Many school going children are not going to school. It is my considered view that, notwithstanding the fact that the action taken and the manner in which it was taken was lawful, hardships which have befallen the affected people would have been avoided by giving adequate notice to the affected people to relocate and re-establish themselves. A few days’ notice was, in my view, not adequate. Be that as it may, I find that the application is devoid of merit...* [emphasis added]. This is now on appeal to the Supreme Court in Case No. SC 169/05.

authorities.<sup>19</sup> Once again, the resort to an ouster of the courts' jurisdiction to deal with contentious issues can be clearly noted.

There have been other instances of executive interference (direct or indirect), which have prevented the Judiciary from exercising their functions in an independent and impartial manner conducive to the fair administration of justice. The Government has not been sincere or committed to re-affirming the inviolability of the courts and publicly assuring the people that they respect the separation of powers and the rule of law. This needs to be urgently addressed.

### **Professional Conduct of Judicial Officers**

No measures have been put in place by judicial authorities to adopt and enforce a Code of Conduct. It is submitted that, until such time as measures exist to address the shortcomings currently being experienced within Zimbabwe relating to access to justice, judicial independence and substantive delivery of justice, then the symptomatic lawlessness, impunity and deterioration of human rights standards will continue. Judges have a lot of pressure brought to bear on them, from the moment of appointment, throughout each case in which unnecessary executive and media scrutiny is brought to bear on them, through to harassment, intimidation and threats of removal where they deliver justice in a manner incompatible with contaminated political interests. However, judges themselves have acted in a manner, which places their impartiality in question. They have refused or decided against implementing rights-based approaches and remedies in their jurisprudence; they have delayed urgent and vital matters of public interest unnecessarily; they have failed to provide written judgments in important cases, or where an appeal seems likely due to the contentious nature of the matter; they have been reactionary rather than exhibiting the traits of judicial activism so necessary in a legal jurisdiction which has failed to uphold the fundamental rights and freedoms of its people; they have failed to speak out when their authority has been questioned, criticised, and even removed. The legal profession has made commendable attempts to support and protect this third arm of government, but where the people with a direct interest in its survival are unable or unwilling to assist, and where the state continues to attack them relentlessly, and then the very principle of constitutionalism becomes obsolete.

In summation, the Government has failed to implement any recommendations intended to secure or strengthen the independence of the Judiciary. For some years now, it has considered this arm of government as a huge threat to the status quo and to political interests. With the latest ouster of the jurisdiction of the courts still fresh in the minds of the legal profession and the general public, it is clear that serious and urgent interventions must be made and serious pressure must be brought to bear on the government to undertake wholesale reform of the institution. A failure to do this will result in ever-growing impunity and lawlessness, as well as the further decline of the morale of vulnerable individuals and groups who can see no value in pursuing legal remedies as there seems to be no substantive delivery of justice. At present, however, the position remains as stated in the Report of the Fact-Finding Mission to Zimbabwe by the United Nations Special Envoy on Human Settlements Issues in Zimbabwe:

*The legal context for Operation Restore Order should be seen against a background of a general deterioration of the rule of law in Zimbabwe. Disregard for laws and court orders during the Fast Track land reform programme set a dangerous precedent. It also sent a signal that the rule of*

<sup>19</sup> This was confirmed to legal practitioners from Zimbabwe Lawyers for Human Rights when attempts were made to file a case in the Harare Civil Magistrates' Courts seeking relief for a group of displaced families from Mbare high-density suburb, who were again being threatened with forced eviction from the open spaces they had since been occupying: see *Zvikomborero Mashonganyika and 251 Ors v. Commissioner of Police and 2 Ors* HC 5060/05.

*law could be subject to selective interpretation and application, paving way for the excesses now committed under the clean-up operation, including destruction of legal businesses and homes paying taxes to local authorities ... The Government of Zimbabwe should set a good example and adhere to the rule of law before it can credibly ask its citizens to do the same.*

*There is general concern that the High Court's failure to safeguard the right of the victims of the Operation [Murambatsvina] reaffirms the argument that the Zimbabwean Judiciary has generally failed to act and be seen as custodians of human rights in Zimbabwe and that there has been a regrettable failure by members of the Bench to remain independent from the national and local politics of the day. The general view among many stakeholders is that this has had a severe impact on the rule of law and the administration of justice, and has caused the ordinary person on the street to lose faith in achieving justice through legal channels<sup>20</sup>*

<sup>20</sup> Tibaijuka, A. K. *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe* 18 July 2005.

## A Professional Police Service

*Every effort must be made to avoid any further politicisation of the police service. The police service must attract all Zimbabweans from whatever political persuasion or none to give service to the country with pride. The police should never be at the service of any political party but must at all times seek to abide by the values of the Constitution and enforce the law without fear or favour. Recruitment to the service, conditions of service and in-service training must ensure the highest standards of professionalism in the service. Equally, there should be an independent mechanism for receiving complaints about police conduct. Activities of units within the ZRP like the law and order unit which seems to operate under political instructions and without accountability to the ZRP command structures should be disbanded. There were also reports that elements of the CIO were engaged in activities contrary to the international practice of intelligence organisations. These should be brought under control. The activities of the youth militia trained in the youth camps have been brought to our attention. Reports suggest that these youth serve as party militia engaged in political violence, The African Commission proposes that these youth camps be closed down and training centres be established under the ordinary education and employment system of the country. The Africa Commission commends for study and implementation the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (otherwise known as the Robben Island Guidelines) adopted by the African Commission at its 32nd Ordinary Session held in Banjul, The Gambia in October 2002.*

The Zimbabwe Republic Police (ZRP) was established in 1980 after the country's independence, succeeding the British South African Police (BSAP), a heavily militarised police force that had absolutely no oversight mechanism for accountability. The ZRP comprises 23,879 police officers, giving a ratio of 1 police officer to 523 civilians. It falls under the Home Affairs Ministry and is governed by the Police Act. At the helm of the organisation is a police commissioner, deputised by four deputy commissioners responsible for operations, human resources, administration and crime.

The ZRP is divided into specialised units, namely the Duty Uniform Branch (DUB), the Police Protection Unit (PPU), the Support Unit (a paramilitary branch of the organisation) Criminal Investigation Department (CID), the Staff Branch and the Technicians' Branch.

In responding to the recommendations of the African Commission on Human and Peoples' Rights (ACHPR), we will take into consideration the context in which the ZRP has had to work. In particular, we note that the ZRP had for a long time operated under declared and undeclared states of emergencies. Coupled with the vagaries of the liberation war and post-independence internal disturbances in the absence of systems for accountability, these factors created a culture of impunity amongst the force. More fully, the ZRP's wide discretionary powers with extensive powers of arrest and detention have led to the force being high handed in the way it operates in many ways more or less in a paramilitary fashion. The working history of this police force is thus replete with instances of excessive use of force. There is a dearth of evidence in this regard, especially where the police have been sanctioned to engage in combat, including the enforcement of curfews. At times, the police have given the impression that they were an extension of the army.

After the contentious liberation struggle and the unfortunate disturbances in Matabeleland, it was necessary for the police to receive human rights training. The structure of command and the manner

of operations were clearly ill suited to prepare police officers to exercise their duties in a manner that would entail respect for human rights as a policing function. To date, the ZRP has managed to incorporate human rights training into pre-service and in-service training programmes, although these initiatives have not yet translated into practical implementation of the programmes. We have to question the extrinsic factors inhibiting translation of the theoretical training into actual practice.

The report of the African Commission on Human and Peoples' Rights (ACHPR) should be considered within the context of the following further historical developments in the country.

### **Political Environment**

The police in Zimbabwe work in a highly polarised political environment. The Commissioner of Police has publicly declared his allegiance to the ruling political party. This polarisation puts the police in a difficult and awkward situation whereby it is difficult, if not impossible, to distinguish between party political issues and their professional duties as envisaged by their constitutional duties. The perception of the general public is that the ruling party expects the police to enforce its wishes. At times, these wishes are even inconsistent with the national legal framework.

### **Land Issue**

The land issue created a number of complications for the police. The Government asserted that the land issue was a political issue and not a policing issue. In accordance with due process rights and 'the rule of law' principle, those adversely affected by this exercise sought the protection of the law and legitimately expected protection from the police. This scenario is simply indicative of a problem that dates back to the colonial period. The most glaring manifestation of this unfortunate situation is the continual disregard of court orders (even after the recommendations of the ACHPR).

### **Police Perception of Human Rights**

Our observation is that the police hold a peculiar perception of the concept of human rights. It seems to us that the police have behaved as if human rights have no place in policing matters that are politically contentious. We believe this view is erroneous: human rights are not incompatible with policing duties, whatever the circumstances. Utterances by senior police officers insinuating that human rights are oppositional politics are unfortunate.

### **Use of Force and Firearms**

Allegations have been made that the police use excessive force when investigating crimes, effecting arrest and dispersing demonstrations. In Zimbabwe this problem of excessive use of force is compounded by legislation; whilst evidence produced through torture is inadmissible, exhibits procured illegally are admissible and this tends to encourage unorthodox means of procuring evidence. No evidence on the ground suggests that the situation has changed since the ACHPR recommendations.

### **Obedience to Superior Orders**

Most police officers have the erroneous belief that their actions in pursuance of superior orders are always legitimate and justified. Areas where superior orders have caused abuse include unlawful arrests, torture, dispersing crowds, detention and the use of force and firearms. A close analysis of the situation reveals clear political fingerprints interfering in policing duties as the principal cause of lack of professionalism within the force. No reform is targeted at addressing this problem.

In the circumstances our observations are as follows.

## Politicisation of Police

### ACHPR Recommendation

*Every effort must be made to avoid further politicisation of the police service. The police service must attract all Zimbabweans from whatever political persuasion or none to give service to the country with pride. The police should never be at the service of any political party but must at all times seek to abide by the values of the Constitution and enforce the law without any fear or favour.*

### SAHRIT's<sup>1</sup> Observation

In the period immediately after the report, some changes were made regarding the conduct of the police, with a marked decrease in the number of politically motivated arrests. In the past, politically motivated arrests had been recorded in large numbers. This was particularly the case in the period towards the run up to the elections and after the elections. The pre- and post-2005 election period, however, was characterised by relative peace. It is not clear whether the decrease in politically motivated cases was due to any reform within the police force or whether this was due to other macro changes in the broader body politic extrinsic to the operations of the police.

It remains uncontested that the Commissioner of Police is still sympathetic to the ruling ZANU PF party. This is supported by his sentiments that every member of the ZRP should support the ruling party. In 2002 and up to 2004, it was alleged that officers suspected to be members or supporters of the opposition Movement for Democratic Change (MDC) were transferred from urban areas to remote parts of the country such as Binga or Tuli (where the amenities of life are generally inadequate) in a bid to frustrate them into resigning.

Selective application of the law by police has remained rampant as evidenced by their reluctance to give clearance to opposition parties to hold rallies, notably the 2005 parliamentary elections. According to media reports, the MDC in 2002 was denied 60 rally campaigns. There is no recorded evidence of any significant number of refusals to clear a rally for the ruling party.

According to Amnesty International, in 2002 alone, there were more than 1,046 reported cases of torture and at least 58 politically motivated deaths committed by war veterans, youth militia, police CIO and army. It seems to us that the police are still liable for acts of commission and omission in failing to protect citizens from violations by third parties. Worse still, the state, through the police, appears to acquiesce to breaches of the law. A classical example is the participation of the police in an illegal operation code named *Operation Murambatsvina*.

In March 2003, during parliamentary by-elections held in Kuwadzana and Highfield, two high-density Harare suburbs, several opposition supporters were assaulted, arbitrarily arrested and reportedly tortured while in police custody. It has been suggested that the ruling party was engaged in a concerted effort to intimidate and deter opposition supporters from voting. The police failed to protect those who were affected.

Officials and members of the Progressive Teachers Union of Zimbabwe (PTUZ) who participated in a national teacher's strike in October 2002 were arbitrarily arrested and beaten by police. Raymond Majongwe, the PTUZ Secretary General, was reportedly tortured in police custody following his arrest on 16 October 2002.

<sup>1</sup> Southern Africa Human Rights Trust.

Police dispersed student protests with excessive force. Student leaders from the University of Zimbabwe (UZ) and Zimbabwe National Students Union (ZINASU) encountered repeated harassment and arrests at the hands of the police. On 2 June 2003, police broke up student demonstrations using excessive force. Civil society organisations and human rights activists, such as Dr. Lovemore Madhuku of the National Constitutional Assembly (NCA) and Dr. John Makumbe of Transparency International, have been victims of arbitrary arrests, the former having been subjected to assault and torture on some of the numerous occasions on which he has been arrested.

Since February 2003, Women of Zimbabwe Arise (WOZA) activists have been arrested by the police. They have been subjected to intimidation, harassment and ill treatment by police officers. The women have been arrested while taking part in peaceful protests in response to the worsening social, economic and human rights situation in the country.

Police have attempted to deny detained activists access to legal advice. At times, lawyers acting for WOZA have been subjected to harassment by police. In 2005, The Public Order and Security Act (POSA) was used to detain protestors arbitrarily.

Politically motivated arrests, however, declined before the 2005 parliamentary elections, largely due to political leaders on both divides denouncing violence in all its forms. The other reason for the decline is that no major elections took place since the recommendations were made public. It is noteworthy that the ZRP remains highly politicised in favour of the ruling party and views any form of criticism or opposition as a threat.

## **Recruitment, Conditions of Service, Training**

### **ACHPR Recommendation**

*Recruitment to the service, conditions of service and in-service training must ensure the highest standards of professionalism in the service.*

### **SAHRIT's Observation**

SAHRIT has been working with the ZRP on a human rights programme. Whilst we have not been privy to the police selection process, we do note that the ZRP has over the years managed to recruit using a strict appointment by merit system. One has to have 5 ordinary-level passes, which include English and mathematics, with a pass of C or better. Allegations that graduates of the National Youth Service programme were getting preferential treatment for recruitment began to emerge after the 2000 elections. These graduates do not always possess these qualifications. Further, we note with concern that a significant number of these graduates are believed to be ZANU PF party supporters. After the fact-finding report, however, the total number of recruits into the service decreased.

ZRP was among the first police organisations in the region to implement a human rights programme and to make it mandatory that all promotional exams incorporate a component on human rights. The events since the 2000 Constitutional Referendum have severely damaged the otherwise good name that the ZRP had earned over the years. Little has since happened to restore the good name. Promotion in the force is through exams undertaken at regular intervals. There are allegations that high-ranking officials were promoted on the basis of their war veteran status. This is highly irregular and compromises the integrity of the police.

The ZRP is alleged to be using torture as a means of investigating and obtaining information or confessions from accused persons (see reports by The Human Rights NGO Forum).

In the Zengeza by-election of 27–28 March 2004, riot police allegedly were involved in the assault of a woman who was nine-months pregnant. The assault of this obviously pregnant woman does not seem to be an isolated event.

Cases of corruption within the police are rampant at roadblocks and national borders among other areas. Owing to economic hardships, the number of ZRP officers implicated in cases of corruption is on the increase. It is on the record that on 15 March 2003 the police assaulted about 60 National Constitutional Assembly (NCA) members attending an evaluation exercise before arresting 14 of them. The 14-member police gang broke into four of the NCA offices, and later it was discovered that a mobile phone belonging to advocacy officer Ernest Mudzengi and about \$750,000 in cash were missing. Organizational reports, computer diskettes and financial statements also disappeared.

Recently, police ransacked the residence of Topper Whitehead, the MDC election expert, later confiscating computer equipment believed to have contained valuable evidence that could be used in election petitions currently pending in the courts.

There is potential for reform of the ZRP. In the run up to the 2005 parliamentary elections the Commissioner of Police is on record advocating zero tolerance to violence. This is highly commendable.

## **Complaints against the Police**

### **ACHPR Recommendation**

*Equally, there should be an independent mechanism for receiving complaints about police conduct. Activities of units within the ZRP, like the Law and Order Unit that seems to operate under political instructions and without accountability to the ZRP command structures, should be disbanded.*

### **SAHRIT's Observation**

SAHRIT notes that this recommendation has not been implemented. There have been moves at regional level (SARPCCO) to introduce a programme on police and civilian oversight mechanisms. It remains to be seen whether ZRP will embrace this regional initiative.

There is still no independent mechanism for receiving complaints about police conduct as recommended by the Fact-Finding Mission. The Law and Order Unit remains under political instructions. Some opposition MPs and activists allege that they have experienced torture and degrading punishment under this unit.

One cannot help but note the crumbling of order under the recently ended Operation Restore Order, whose implications are there for the whole world to see. The effect of the operation was to violate a range of human rights and fundamental freedoms in contravention of a series of regional and international human rights instruments to which Zimbabwe is party. In the main, this operation failed to guarantee 'security of the person'. The operation also compromised the right to life. 'Five people have died so far ...' said Assistant Commissioner Wayne Bvudzijena in reference to the operation. Furthermore, 700,000 people were displaced and are now homeless. The ZRP played a significant role in this mayhem.

Inconsistent with the police's role of maintaining order, under Operation *Murambatsvina* the ZRP actually contributed to disorder.

## Central Intelligence Organisation

### ACHPR Recommendation

*There were reports that elements of the Central Intelligence Organisation (CIO) were engaged in activities contrary to international practice of intelligence organisations. These should be brought under control.*

### SAHRIT's Observation

The CIO activities are so clandestine that SAHRIT has no clear picture as to what the organisation is purported to have done outside its jurisdiction. Thus, all information about CIO activities is based on unsubstantiated rumours and press reports. It is difficult to assess changes. The Zimbabwe *Independent* of 5 August 2005 reported on a case wherein it is alleged that the Registrar-General's office invited the office of the President to 'deal' with an opposition official who is involved in a crucial election petition currently before the courts.

## Youth Militia

### ACHPR Recommendation

*The activities of the youth militia trained in the youth camps have been brought to our attention. Reports suggest that these youth serve as party militia engaged in political violence. We propose that these youth camps be closed down and that training centres be established under the ordinary education and employment system of the country. We commend for study and implementation the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (otherwise known as The Robben Island Guidelines) adopted by the African Commission at its 32<sup>nd</sup> Ordinary Session held in Banjul, The Gambia, in October 2002.*

### SAHRIT's Observation

The programme and activities of the youth militia seem to have declined, probably more out of budgetary constraints as opposed to a response to the recommendation of the ACHPR. Youth camps have not closed down as recommended by the ACHPR, but they have decreased in number especially after the 2002 presidential elections.

## Conclusion

ZRP has the potential to implement the recommendations of the ACHPR, but a number of issues inhibit them from doing so. These could be understood within the context of Zimbabwe's historical development from 2000. Any change that ZRP can effectively implement in compliance with the recommendations of the ACHPR can only be achieved within the broader context of Zimbabwe's political situation. At the core of the organisation's problems is the political environment in which it is now finding itself regime policing. The problems the organisation also faces should be understood within the context of the laws that the organisation is obliged to enforce. Laws such as POSA and AIPPA, which are in contravention of international human rights standards, make their work and observance of human rights difficult, particularly in light of the expectation that the police will act on the whims of politicians.

In view of the above observations, we can safely argue that the ZRP has only applied some of the recommendations on paper as findings on the ground show otherwise. There is an urgent need for the ZRP to implement these recommendations.

# The Media

*A robust and critical media is essential for democracy. The government has expressed outrage at some unethical practices by journalists, and the Access to Information Act was passed in order to deal with some of these practices. The Media and Ethics [sic] Commission that has been established could do a great deal to advance journalistic practices, and assist with the professionalisation of media practitioners. The Media and Ethics [sic] Commission suffers from the mistrust on the part of those with whom it is intended to work. The Zimbabwe Union of Journalists could have a consultative status in the Media and Ethics [sic] Commission. Efforts should be made to create a climate conducive to freedom of expression in Zimbabwe. The POSA and Access to Information Act should be amended to meet international standards for freedom of expression. Any legislation that requires registration of journalists, or any mechanism that regulates access to broadcast media by an authority that is not independent and accountable to the public, creates a system of control and political patronage. The Africa Commission commends the consideration and applications of the Declaration on The Principles of Freedom of Expression in Africa adopted by the 32nd Ordinary Session of the African Commission in Banjul, October 2002.*

## Overview of Freedom of Expression in Zimbabwe<sup>1</sup>

Freedom of expression and of information, historically fragile in Zimbabwe, has been increasingly restricted in recent years. This right, as protected by Article 9 of the African Charter on Human and Peoples' Rights and domestically guaranteed under Section 20 of the Constitution of Zimbabwe, has been chiefly violated by the promulgation of legislation and amendments to those statutes that heavily curtail media freedom and the free flow of information. Such legislation includes the Broadcasting Services Act [Chapter 12:06] (BSA) of 2001, the Access to Information and Protection of Privacy Act [Chapter 10:27] (AIPPA) and the Public Order and Security Act [Chapter 11:17] (POSA), both enacted in 2002, and more recently, the Criminal Law (Codification and Reform) Act [Chapter 9:23] of 2005.

In the six-month period between 1 February and 31 July 2005 at least 49 journalists have been arrested under AIPPA for practising journalism without accreditation. The Government-appointed Media and Information Commission (MIC) has also used the provisions of AIPPA to close down yet another independent newspaper, *The Weekly Times*, on 25 February 2005, further suppressing free expression in Zimbabwe. Prior to this, the MIC had already shut down three other independent newspapers under the same Act: *The Daily News* (September 2003), *The Daily News on Sunday* (September 2003) and *The Tribune* (June 2004).

POSA has been used to stop peaceful demonstrations and public meetings, including church meetings. It has also been used on numerous occasions to prevent political rallies organised by the opposition. Excessive force continues to be a trademark of the police in breaking up public meetings and dispersing demonstrators. Human rights defenders have been routinely arrested and detained under POSA for attempting to exercise rights to freedom of expression, association and assembly. Most of these have been detained and eventually released without charge.

<sup>1</sup> This section has been prepared by the Media Monitoring Project Zimbabwe, an independent Trust that works to promote responsible journalism through research and monitoring of news and current affairs in the media. MMPZ promotes public awareness of the right to information and freedom of expression through its advocacy programme.

Citizens who utter statements that may be construed as insulting the President or undermining his authority, even if they are not published in the press, are also liable to prosecution and may be fined or imprisoned under the POSA or the Criminal Law (Codification and Reform) Act. Several such cases have occurred since POSA became law in January 2002.

While selective application of draconian legislation has been the chief means of violating media freedoms and the right to free expression, extra-legal attacks on these rights have also been commonplace during the last five years. Violations have included assault, raids on journalists' offices and homes, and bombing of offices and a printing press belonging to independent media houses. Arrests have yet to be made in connection with the bombing of offices belonging to *The Daily News* in 2000 and 2002, of *The Daily News* printing press in January 2001 and of the premises of the private radio station, *Voice of the People* (VOP) in August 2002.

A *de facto* monopoly of broadcast media persists in the country despite a Supreme Court ruling in 2000 that declared this monopoly to be unconstitutional. The BSA was subsequently enacted, ostensibly to provide a framework for the regulation of a diverse broadcast media. However, the regulations under the Act extend far beyond the mere administrative regulation of the airwaves, providing Government with the means to control applications and their review, as well as the proposed content of aspirant broadcasters. The Broadcasting Authority of Zimbabwe (BAZ) is not an independent body (it is established and appointed by Government) and has rejected applications for licences in some instances, while failing to process applications it had called for on other occasions.

In addition to Zimbabweans having no access to alternative electronic media, Government continues to abuse public broadcast media, using it as a propaganda tool for the ruling party thereby compromising the public's ability to access fair, balanced and accurate information through this national public resource.

An environment wholly un conducive to free expression persists in Zimbabwe under the control of a Government enforcing policies seemingly calculated to severely limit fundamental liberties. There have ultimately been no concrete steps taken by the Government of Zimbabwe to respect or protect the right of the individual *to receive information ... to express and disseminate his opinion* as stipulated by Article 9(1) and 9(2) of the African Charter to which Zimbabwe is party.

## **Developments Following the Fact-Finding Mission**

Before examining the recommendations of the African Commission's Fact-Finding Mission and examining to what extent they have been implemented, it is important to highlight developments in Zimbabwe impacting on the exercise of freedom of expression and of information since the visit of the Fact-Finding Mission in June 2002.

Between June 2002 and December 2004 the media in Zimbabwe continued to operate in a restrictive environment presided over by then Minister of Information, Jonathan Moyo. Government, the Zimbabwe Republic Police and other groups acting with Government acquiescence, subjected the private media to sustained attack, branding them as *weapons of mass deception*.<sup>2</sup> What follows is a brief synopsis of events between June 2002 and December 2004.<sup>3</sup>

<sup>2</sup> Media Monitoring Project Zimbabwe, Media Weekly Update 2004-38, Monday 20 September – Sunday 26 September 2004.

<sup>3</sup> Information on violations of freedom of expression during this period is taken from and has been more extensively documented by the Media Monitoring Project Zimbabwe in its *Public Information Rights Forum (PIRF) – Public Information Rights Violations Reports* covering this period and the Media Institute of Southern Africa in its annual publication, *So This Is Democracy?: State of Media Freedom in Southern Africa* (MISA, 2002, 2003, 2004).

## June 2002 – December 2002

- On 16 June 2002 three employees of *The Daily News* were arrested while covering a meeting of the opposition party. Reporter Guthrie Munyuki, photographer Urginia Mauluka and driver Shadreck Mukwecheni were reportedly assaulted by the police with Munyuki sustaining a fractured wrist.
- On July 4 2002 Chris Gande, a reporter for *The Daily News* was charged under Section 80, subsection 1(b) of AIPPA for writing falsehoods.
- The offices of private radio station *Voice of the People* (VOP) were bombed on 29 August 2002. The bombing followed a raid by the police on VOP's offices in July. No arrests have ever been made in connection with this case, as is the case in the bombing of *The Daily News* offices in February 2002 and *The Daily News* printing press in January 2001.

## January – December 2003

- On 3 January 2003 Norma Edwards, editor, and Kennedy Murwira, reporter, of the Masvingo weekly, *Masvingo Mirror*, were arrested under section 80 of AIPPA for allegedly publishing falsehoods.
- On 19 January 2003, 530 copies of *The Daily News* were seized from vendors and set ablaze by ZANU PF youths in Midlands.
- On 21 January, 2003 Bester Ngoro, a photographer with *The Daily Mirror*, was assaulted by ZANU PF supporters in Kuwadzana.
- On 19 February 2003 Philemon Bulawayo, a photographer with *The Daily News*, was arrested and assaulted while attempting to photograph people in a food queue.
- On 18 March 2003 Philemon Bulawayo was again arrested and assaulted for covering a mass demonstration. Gugulethu Moyo, ANZ's legal adviser, was also subsequently arrested and assaulted when she went to the police station to represent her client, Bulawayo.
- Stanley Karombo, a freelance journalist, was arrested on 19 March 2003 for practising journalism without accreditation. He was detained for five days before being released on bail.
- On 16 May 2003, Andrew Meldrum, a foreign correspondent of *The Guardian*, was deported in defiance of more than three High Court orders barring his deportation.
- ZANU PF supporters reportedly destroyed thousands of copies of *The Daily News* on 2 and 3 June, the first two days of a protest action organised by the opposition party, Movement for Democratic Change. No arrests were reported in connection with the incident.
- In September 2003 *The Daily News* and its sister paper, *The Daily News on Sunday* were closed down for publishing illegally without a licence. Associated Newspapers of Zimbabwe (ANZ), publishers of both papers, had sought to register with the MIC following a Supreme Court ruling that the requirement for registration was constitutional. The MIC refused to grant ANZ a licence and closed down the papers. The papers published again on 25 October 2003 following a ruling handed down by the Administrative Court on 24 October permitting them to do so, but were forcibly shut down again after that.

- On 22 October 2003 freelance journalist, Newton Spicer, and *Zimbabwe Independent* journalist, Blessing Zulu, were arrested while covering a demonstration by the National Constitutional Assembly.

January – December 2004

- Iden Wetherell, editor, Vincent Kahiya, news editor, and Dumisani Muleya, chief reporter of the *Zimbabwe Independent* were arrested and detained on 10 January 2004 for publishing a story that alleged the President had commandeered an Air Zimbabwe plane to travel to Asia. The journalists were charged under Section 80 of AIPPA.
- Soldiers reportedly assaulted Richard Musazulwa, a reporter with *The Standard*, on 19 April 2004 for writing a story claiming that 65 army recruits had fled training.
- On 10 June 2004 the MIC banned the weekly newspaper, *The Tribune*, from operating for a year for violating Section 67 of AIPPA. The MIC cancelled Africa Tribune Newspapers' (ATN) registration certificate because ATN was said to have failed to inform the MIC of changes to its ownership, to respond to questions from the MIC, and *knowingly* employed an unaccredited journalist. This decision was contested before the High Court and upheld on 21 July.
- Desmond Kwande, a photographer with *The Daily Mirror*, freelance photographer Tsvangirai Mukwazhi and *Reuters* photographer Howard Burditt were arrested on 5 October 2004 while covering a demonstration by Women of Zimbabwe Arise (WOZA) against the Non-Governmental Organisations Bill.

In the three years between the Fact-Finding Mission's visit and the publication of its report, the right to freedom of expression became increasingly controlled; attacks on media practitioners were carried out in a climate of impunity.

## Findings and Recommendations

The findings of the Fact-Finding Mission were consistent with assertions repeatedly made by Zimbabwean civil society that Government has, since 2001, embarked on a process of promulgating legislation calculated to severely limit civil liberties, including freedom of expression. The Fact-Finding Mission pointed to the promulgation and selective application of these laws and concluded that these had a '*chilling effect*' on freedom of expression and introduced a cloud of fear in media circles.<sup>4</sup>

The Fact-Finding Mission made the following recommendations regarding freedom of expression and the media environment in Zimbabwe:

- 1 The Media and Information Commission *should advance journalistic practices, and assist with the professionalisation of media practitioners*. In addition the Zimbabwe Union of Journalists should have a *consultative status with the Media and Ethics Commission [sic]*.
- 2 Create a climate conducive to freedom of expression in Zimbabwe.
- 3 The Public Order and Security Act and the Access to Information and Protection of Privacy Act should be amended to meet international standards for freedom of expression. *The Government*

<sup>4</sup> Report of the Fact-Finding Mission to Zimbabwe, 24–28 June 2002.

*should repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion.*

- 4 Address legislation that *creates a system of control and political patronage* by requiring the registration of journalists, or regulation of access to broadcast media by an authority that is independent and accountable to the public.
- 5 Consider and apply the Declaration on the Principles on Freedom of Expression in Africa adopted by the 32nd Ordinary Session of the African Commission in Banjul, October 2002.

### **The Government of Zimbabwe's Response**

The Government received the Fact-Finding Mission's recommendations concerning the media with contempt analogous to that displayed to the report in general. The existence of violations of the rights to freedom of expression, association and media freedom was rejected wholesale. What is, however, of key importance is that the Government of Zimbabwe *being a signatory to the African Charter on Human and Peoples' Rights ... undertook to be bound by the decisions and recommendations of the African Commission.*<sup>5</sup>

While the State asserted that all problems or violations contained in the Report of the Fact-Finding Mission had arisen out of the land issue, it is beyond any stretch of the imagination that such violations could be considered to be *intricately related* to land reform. It is consequently inconceivable that *mop-up operations* in this regard would address the restrictive media environment and the general suppression of the free flow of information that prevails in Zimbabwe. Any attempts to bring Zimbabwe into line with international standards of freedom of expression would, of necessity, begin with an examination of the actual causes of the current constraints.

The Government's contention was that the only piece of legislation passed that affected media freedoms was AIPPA, and that this did not infringe on these freedoms in any way. Furthermore, in apparent justification of any undue restrictions that AIPPA may impose, the Government was keen to point out that the Act had been moulded along the lines of Canadian legislation and was certainly constitutional.

In its response, the State contends that there was no regulatory environment for the media prior to the enactment of AIPPA. The advent of AIPPA was cited as a necessary defence for the Government in the face of articles *intended to misinform the public in an effort to tarnish the image of the Government and destabilise the country with the ultimate objective to unseat the Government.*

The Government maintained that subsequent amendments to AIPPA are constitutional and that the rest of the Act's provisions are in line with the Constitution as upheld by the Supreme Court. However, in reality AIPPA still falls far short of international standards of freedom of expression and information. Amendments made to AIPPA have merely served to further work against media freedoms and access to information. The right to information as provided for under AIPPA *is so thoroughly undermined by the very broad regime of exclusions and exceptions ... as to render the right essentially nugatory.*<sup>6</sup>

<sup>5</sup> Response by the Government of Zimbabwe to the Report of the Fact-Finding Mission, 24–28 June 2002.

<sup>6</sup> *The Access to Information and Protection of Privacy Act: Two Years On*, MISA Zimbabwe and Article 19, September 2004.

## Implementation of the Recommendations

The Media and Information Commission *should advance journalistic practices, and assist with the professionalisation of media practitioners*. In addition, the Zimbabwe Union of Journalists *should have a consultative status in the Media and Ethics Commission [sic]*.

The Media and Information Commission, since its formation and most certainly since the adoption of the report of the Fact-Finding Mission, has, by and large, failed to *advance journalistic practices, and to assist with the professionalisation of media practitioners*. AIPPA gives the MIC power to *enforce professional and ethical standards in the mass media*<sup>7</sup> with the objective of developing *mass media that uphold professional and ethical codes of conduct*. However, the MIC has, instead, focused on undermining free expression through its attacks on the private media while acquiescing to grossly unprofessional conduct by state-owned media.

The Zimbabwe Union of Journalists still has no input into the affairs of the MIC, or into its constitution. Without any provision for consultation with stakeholders in the media fraternity regarding appointments to the MIC, and its operations, the MIC continues to function as a non-representative body.

The Minister of Information remains responsible for appointing the MIC *after consultation with the President and in accordance with any directions that the President may give him*.<sup>8</sup> Thus the mere manner in which the MIC is constituted makes it likely that the body will lack independence and impartiality. No attempt has been made to address this anomaly since the enactment of AIPPA. On the contrary, AIPPA was amended in October 2003 to remove the requirement that three members of the MIC be nominated by journalists or media associations.

The MIC is currently constituted as follows:

Chairperson:	Tafataona Mahoso	(Media lecturer, Harare Polytechnic)
	Rino Zhuwarara	(Chief Executive Officer of public broadcaster, Zimbabwe Broadcasting Holdings)
	Sephath Mlambo	(Principal of Upper Bulawayo United College of Education)
	Pascal Mukondiwa	(a former editor of <i>The Sunday Mail</i> )
	Alpinos Makoni	(a former officer in the Ministry of Information)
	Jonathan Mapenduka	(a former assistant editor of <i>The Chronicle</i> )
	Daphne Tomana	(wife of ZANU PF lawyer Johannes Tomana)

The MIC currently stands as a body that is appreciably biased in favour of the incumbent government. Indeed, since its formation, the MIC has subjected privately owned media to harassment, intimidation and censure for alleged violation of AIPPA while allowing the government-controlled media to get away with the commission of similar offences. The excessively restrictive provisions of AIPPA that allow the MIC to drastically curtail the activities of media service providers and journalists for what are in reality petty administrative offences are part of a system that is designed to undermine democratic norms of press freedom and the free flow of information and are an affront to freedom of expression in Zimbabwe.

<sup>7</sup> Access to Information and Protection of Privacy Act Section 39 (1) subsection (j).

<sup>8</sup> See Section 40 (2) subsection (3) of the Access to Information and Protection of Privacy Act.

*Efforts should be made to create a climate conducive to freedom of expression in Zimbabwe*

Contrary to the recommendations of the Commission in the Report of the Fact-Finding Mission, no effort has been made by the State to create a climate conducive to freedom of expression in Zimbabwe. This right remains heavily restricted and its exercise is entirely at the Government's discretion. The following is a summary of key events between January and September 2005 that demonstrate Government's reluctance to comply with this recommendation.

Information Rights Violations January 2005 – September 2005<sup>9</sup>

- 5 January 2005. MIC chairperson, Dr Tafataona Mahoso, threatens to shut down weekly newspaper, *The Weekly Times*, in a letter dated 5 January 2005. Mahoso accused the paper of *running political commentary through and through* instead of general news. The paper was also accused of failing to lodge copies with the MIC before the first issue went on sale.
- 25 January 2005. Police in Marondera arrest MDC MP for Kuwadzana, Nelson Chamisa, for allegedly inciting violence against the ruling party. It was alleged that Chamisa had uttered words *with an effect of inciting public violence* at an MDC Youth Forum meeting in Hwedza Constituency on 22 January. Chamisa is said to have told the youths, *if someone attacks you, do not break your legs trying to run away*. Chamisa was released without charge on 26 January after the public prosecutor found that there was insufficient evidence of a criminal offence having been committed.
- 25 February 2005. The MIC cancelled the registration certificate of *The Weekly Times* after it had published only eight issues because of *misrepresentations or non-disclosure of material facts by the owners* in violation of Section 71 (1) (a) of AIPPA.<sup>10</sup> Dr Mahoso reportedly stated that the paper had also misled the MIC by undertaking to *focus on developmental journalism, bound by the ideals of impartial reporting and accurate gathering of news ... [but] the core values, convictions and overall thrust of the paper were narrowly political, clearly partisan and even separatist, in contrast to what had been pledged in the registration papers*.
- 14 February 2005. Police raided the offices of three Zimbabwean foreign correspondents: Angus Shaw (*Associated Press*), Jan Raath (*The Times* of London and *Deutsche Presse Agentur*) and Brian Latham (*Bloomberg Economic News (SA)*) and photographer Tsvangirai Mukwazhi, claiming they were investigating a number of possible offences, including spying. The newsmen's offices were again raided the next day with police conducting a lengthy search for evidence of *illegal activities*.
- 14 March 2005. The Supreme Court handed down a controversial ruling on a constitutional challenge against sections of AIPPA by Associated Newspapers of Zimbabwe (ANZ). The Court upheld the constitutionality of 11 of the 13 contested clauses of AIPPA and effectively endorsed the MIC's closure of *The Daily News* and *The Daily News on Sunday* in September 2003 for failure to comply with the law.

<sup>9</sup> Information on these incidents is taken from *Public Information Rights Forum (PIRF) – Public Information Rights Violations reports* by the Media Monitoring Project Zimbabwe.

<sup>10</sup> Section 71 (1) (a) stipulates that, *Subject to this section, the Commission may, whether on its own initiative or upon the investigation of a complaint made by any interested person against the mass media service, suspend or cancel the registration certificate of a mass media service if it has reasonable grounds for believing that – (a) the registration certificate was issued in error or through fraud or there has been a misrepresentation or non-disclosure of a material fact by the mass media owner concerned.*

- 31 March 2005. Two foreign journalists were arrested and detained under AIPPA for 13 days accused of covering the Zimbabwean parliamentary election without MIC accreditation. They were later acquitted by the court but deported by the authorities shortly afterwards.
- 2 April 2005. A Swedish journalist accredited to cover the parliamentary election, Fredrick Anders Sperling, was deported for allegedly trying to *stage-manage an incident aimed at tarnishing the government* in violation of an unspecified section of AIPPA. Sperling had been interviewing a former Norton commercial farmer and the farm workers who used to work for him.
- 5 April 2005. MDC activist Artwell Murungweni appeared in court facing charges of denigrating President Mugabe. He was charged with breaching POSA.
- 18 April 2005. Clifford Ruhukwa was arrested and charged under POSA for insulting President Mugabe in Chitungwiza.
- 13 July 2005. The MIC refused to restore the licence of the weekly newspaper, *The Tribune*, for not providing sufficient proof of capital to sustain its business.
- 18 July 2005. The MIC refused to grant ANZ, publishers of *The Daily News* and *The Daily News on Sunday*, a licence to publish. The refusal contravened a Supreme Court ruling directing the MIC to consider a fresh (*de novo*) application for a licence from ANZ. The MIC's reasons for denying ANZ a licence lacked a basis at law and seemed designed to unduly delay the applicant's exercise of constitutionally guaranteed rights.<sup>11</sup>
- 4 August 2005. *Daily Mirror* photographer, Desmond Kwande, was arrested by Harare Municipal Police for taking photographs of the destitute and the blind. Despite his being an accredited journalist, the Municipal Police detained Kwande for more than three hours while interrogating him.
- 19 August 2005. Gweru-based editor of *The Sun* newspaper, Willie Mponda, became the first journalist to be convicted under AIPPA. The State alleged that a story run by the paper about a Gweru woman who committed suicide when her business was destroyed during Operation Murambatsvina was inaccurate. According to the police, the woman's name had been cited incorrectly as had her reasons for committing suicide. Mponda published a retraction when he became aware of the story's inaccuracies, but this was cited as an admission of guilt. He was fined Z\$100 000.
- 16 September 2005. The BAZ declined to issue a commercial television licence to Munhumutapa African Broadcasting Corporation (MABC). The BAZ stated that the MABC application was not granted because the applicant had failed to demonstrate that it had the financial resources to operate a television station and that it owed the Zimbabwe Broadcasting Corporation (predecessor to ZBH) an undisclosed amount of money.
- 22 September 2005. The Administrative Court deferred a hearing of an appeal by ANZ *because of a shortage of assessors*.

<sup>11</sup> The MIC denied ANZ a licence on the grounds that it published without a licence in 2003, failed to deposit copies of its newspaper with the MIC and employed unaccredited journalists. All these reasons would have fallen away had the MIC considered the application *de novo* as directed by the Supreme Court.

- 30 September 2005. The *Zimbabwe Independent* reported that the Central Intelligence Organisation had tightened its grip on the ownership and control of the independent Zimbabwe Mirror Newspapers Group by forcing out the group's CEO and editor-in-chief, Ibbo Mandaza.

The Public Order and Security Act and the Access to Information and Protection of Privacy Act should be amended to meet international standards for freedom of expression. *The Government should repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion.*

AIPPA and POSA in their current form still fall far short of international standards of freedom of expression. Citizens who utter statements that may be construed as insulting the President or undermining his authority, even if they are not published in the press, are also liable to prosecution and may be fined or imprisoned under Section 16 of POSA.

In addition to POSA and AIPPA, the Criminal Law (Codification and Reform) Act, gazetted on 3 June 2005, strengthens existing limitations of the public's right to free expression. Clause 31 of the Act imposes a fine of Z\$5 million or a jail sentence of up to 20 years or both for anyone *who publishes or communicates false statement* that are perceived to be *prejudicial to the State*. Clause 33 of the Act also imposes stiffer penalties for anyone convicted of *publicly making or publishing a statement (including any act or gesture) that is deemed to be undermining the authority of or insulting the presidency*.

The following individuals were recently arrested, charged and subsequently convicted of uttering statements insulting or undermining the President:

- Reason Tafirei (November 2004). Tafirei was arrested on November 10, 2004 after a ZANU PF official overheard him telling other passengers on a bus that *Mugabe is a dictator who rules by the sword while Tony Blair is a liberator*. Tafirei pleaded guilty and was sentenced to an effective sentence of four months community service.
- Arnold Bunya (December 2004).
- Kapikinyu Murewa (February 2005). Kapikinyu was arrested for uttering statements perceived to be insulting to the President in a commuter bus.
- Artwell Murungweni (April 2005).

The provisions of POSA that facilitated the arrests of the four persons above remain in place precisely to *freeze the free expression of public opinion*, in the words of the Fact-Finding Mission.

*Address legislation that "creates a system of control and political patronage" by requiring the registration of journalists, or regulation of access to broadcast media by an authority that is independent and accountable to the public.*

Nothing has been done to rectify the situation in which the MIC under AIPPA, and the Broadcasting Authority of Zimbabwe under the Broadcasting Services Act, preside over oppressive systems of control designed to foster political patronage. Both the MIC and the BAZ are accountable directly to Government and not to the public.

The MIC, empowered by Section 39 (1) subsections (i), (n), and (p), Section 66 of AIPPA, decides, according to ostensibly random criteria, which newspapers may operate following registration and which journalists may practice their profession through the process of accreditation. Accreditation is by no means a mere administrative formality. The Permanent Secretary for Information must recommend the accreditation and the Information Minister must approve the accreditation.<sup>12</sup>

Subsequent to such registration and accreditation the MIC, under Sections 64, 69 and 71, has sweeping disciplinary powers over registered newspapers and accredited journalists and may withdraw journalists' accreditation or cancel newspapers' operating licences if they are deemed to have committed an offence. In addition, AIPPA was amended in January 2005 to impose a custodial sentence of up to two years or a fine, or both, on journalists who practice without accreditation.

*Consider and apply The Declaration of Principles on Freedom of Expression in Africa (The Declaration) adopted by the 32nd Ordinary Session of the African Commission in Banjul, October 2002.*

It does not appear that the Government has ever seriously applied itself to giving *practical effect to these principles*. Zimbabwe's performance against some of the main tenets of the Declaration is measured as follows:

#### Guarantee of Freedom of Expression

Freedom of expression and information is guaranteed under Zimbabwean law. Even though the Constitution guarantees this right,<sup>13</sup> the law has been actively undermined by legislation that even Parliament's Legal Portfolio Committee has declared unconstitutional. The courts have failed to protect this right by making rulings that further undermine free expression. For example, on 5 February 2004, the full Supreme Court bench, with one dissenting judgement, ruled that while Section 20(1) of the Zimbabwe Constitution guarantees freedom of expression, *it does not expressly guarantee the exercise of that right through any means of one's choice. I see nothing in the language of s 20(1) that suggests that the legislature intended to confer on an individual a constitutional entitlement to work as a journalist.*<sup>14</sup>

#### Interference with Freedom of Expression

Zimbabweans continue to be subjected to undue restrictions and arbitrary interference with their freedom of expression that serves no *legitimate interest* and certainly cannot be justified in a democratic society.

#### Diversity

Rather than promoting diversity and ensuring that a wide range of information and sources of information is available to its population, the Zimbabwean Government has undertaken a campaign to increasingly restrict information available to the public.

<sup>12</sup> Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, SI 169C of 2002.

<sup>13</sup> Section 20(1) of the Zimbabwean Constitution states: *Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*

<sup>14</sup> See Justice Godfrey Chidyausiku, Judgement No. S.C. 136/02, 5 February 2004. In dissenting, Justice Wilson Sandura found that Section 79 of AIPPA requiring journalists to register with the MIC contravened the Constitution because *there is no rational basis for distinguishing the practice of journalism from the exercise of the right to freedom of expression, because the two are inextricably intertwined.*

### Freedom of Information

The right to information is guaranteed, *prima facie*, under AIPPA. However, AIPPA is incongruent with the principles that such a law should espouse in that the law makes it difficult for the public to access information held by public bodies rather than facilitating this process. Furthermore, public bodies in Zimbabwe have tended to hide information rather than make attempts *to actively publish important information of significant public interest*.

### Private Broadcasting

A *de facto* State monopoly over broadcasting still persists in Zimbabwe in direct violation of a Supreme Court finding five years ago that its monopoly was unconstitutional. Potential independent broadcasters have been continuously frustrated and effectively prevented from operating. The monopoly of the State-controlled Zimbabwe Broadcasting Holdings (ZBH) appears set to persist for the foreseeable future contrary to Article 5 of the Declaration of Principles on Freedom of Expression in Africa that condemns *a State monopoly over broadcasting as being incompatible with the right to freedom of expression*. The refusal by the BAZ on 16 September to grant a licence to MABC reinforces the State's position as unwilling to allow alternative broadcast media.

The only alternative broadcast media available to Zimbabweans are two private radio stations that broadcast from outside Zimbabwe, Studio 7 and SW Radio Africa.

### Public Broadcasting

The Ministry of Information has, since 2000, increasingly meddled with the editorial independence of the public broadcaster, Zimbabwe Broadcasting Holdings (ZBH) thereby failing to abide by the requirements of the Declaration to protect the public broadcaster *against interference, particularly of a political or economic nature*. Undue interference with ZBH by the Ministry of Information remains a concern. Deputy Information Minister Bright Matonga has reportedly been interfering directly with the editorial content of ZBH. It was alleged that Matonga was *personally editing stories for the main 8pm bulletin* because he was not happy with the way ZBH was *covering and reporting the government's ongoing blitz on flea markets and perceived illegal settlements, claiming the coverage was unacceptable to the ruling ZANU PF*. Such excessive and unjustifiable manipulation of the public broadcaster's output perpetuates the abuse of ZBH as a *conduit of government propaganda*.<sup>15</sup>

During election periods in particular, ZBH has provided biased and politically partial information. Most recently, following analysis of media coverage, the Media Monitoring Project Zimbabwe (MMPZ) concluded that *the national broadcaster, ZBH, failed in carrying out its public mandate to provide 'balanced, fair, complete and accurate' coverage of the March 2005 parliamentary election campaign*. MMPZ's monitoring showed that the public broadcaster's election coverage remained heavily biased in favour of the ruling party, ZANU PF, as has been the case with all elections for which the organisation has monitored media coverage since 2000. Between 26 February and 29 March 2005,<sup>16</sup> ZBH allocated 11 hours and 29 minutes (93%) of its main news bulletins to ZANU PF while 54 minutes (7%) were given to the MDC.

### Print Media

As discussed in depth earlier a registration system is in place that *imposes substantive restrictions on the right to freedom of expression*. In addition, government-controlled print media are frequently subject to undue political interference.

<sup>15</sup> The Media Monitoring Project Zimbabwe, Monday 30 May – Sunday 5 June 2005, Weekly Media Update 2005-20.

<sup>16</sup> This is defined, in the Broadcasting Services Act, as the *election period* during which the ZBH was obliged to *give reasonable and equal opportunities for the broadcasting of election matter to all parties contesting the election*.

### Promoting Professionalism

The right to practice journalism has been turned into a privilege in Zimbabwe. Undue legal restrictions subject Zimbabweans' ability to express themselves through the practice of journalism to the whims of a Media and Information Commission that lacks independence and impartiality.

### Attacks on Media Practitioners

Not only has the State failed to protect media practitioners from intimidation and threats to their rights, it has been one of the main agents responsible for their violation. (In addition to the material destruction of communications facilities, the State has used repressive legislation to unduly restrict the practice of independent journalism, freedom of expression and the free flow of information to the public.)

With regard to the bombing of offices of *VOP* and *The Daily News* and *Daily News* printing press, the State has certainly displayed a *failure to investigate and punish the perpetrators and ensure that the victims have access to effective remedies.*

### **Concluding Remarks**

It is manifestly evident that instead of attempting to implement the recommendations of the Fact-Finding Mission of June 2002 in order to create an environment conducive to freedom of expression in Zimbabwe, the Government has strengthened repressive laws and taken action that has had exactly the opposite effect. In particular, the unduly restrictive provisions of AIPPA and POSA have been reinforced rather than repealed, and together with the Broadcasting Services Act, they form the backbone to legislation that unduly restricts and controls Zimbabwe's print and electronic media and gags the public voice.

## Reporting Obligations to the African Commission

*The African Commission notes that the Republic of Zimbabwe now has three overdue reports in order to fulfil its obligations in terms of Article 62 of the Africa Charter. Article 1 of the Africa Charter states that State Parties to the Charter shall “recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.” Article 62 of the Africa Charter provides that each State Party shall undertake to submit every two years “a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.” The African Commission therefore reminds the Government of the Republic of Zimbabwe of this obligation and urges the government to take urgent steps to meet its reporting obligations. More pertinently, the African Commission hereby invites the Government of the Republic of Zimbabwe to report on the extent to which these recommendations have been considered and implemented.*

It is a cause for concern to civil society that the Government of Zimbabwe had three overdue reports to fulfil its obligations in terms of Article 62 of the African Charter at the time of the Fact-finding Mission.

However, it is a matter of public record that the State has drafted a report entitled *7th, 8th and 9th Combined Report of the Republic of Zimbabwe*. It is not known whether this report has been submitted to the African Commission for consideration at the 38th Ordinary Session in Banjul in November/December 2005.

The Report covers Civil and Political Rights; Social, Economic and Cultural Rights; People’s Rights; Specific Duties of the State; Racial Discrimination and Elimination of All Forms of Discrimination Against Women.

The Conclusion of the Report draws attention to several measures which have been put in place to ensure the protection and promotion of human rights since Zimbabwe submitted her last Report, noting that by enshrining the Bill of Rights into the national Constitution, Zimbabwe has shown commitment to the protection and promotion of the human rights of her people.

# **Report on the Work of NGOs in Zimbabwe to the African Commission on Human Rights**

*Submitted by the National Association of Non-Governmental Organisations*

## **Introduction**

Over the years, civil society organisations (CSOs) worldwide have been in the spotlight for their involvement in human rights, democracy and good governance programmes, apart from the conventional welfare role of complementing government efforts in delivering social services. As a result of being part of civil society, a sizeable number of non-governmental organisations (NGOs) have become prominent human rights defenders. Unfortunately, this new thrust for NGOs has not been understood clearly or received favourably. Instead, it has provoked hostility and generated paranoia within government structures. Over-reaction on the part of Government has unfortunately almost strangled, rather than enabled or regulated, NGO operations.

The shrinking space for NGOs in Zimbabwe to operate effectively is a worrisome development. It is increasingly becoming an uphill task for NGOs to be involved in the promotion and protection of human rights, let alone in governance and democracy issues. There is evidence of systematic and deliberate attacks on NGOs by the Government of the ruling party, ZANU PF. As a result, relations between NGOs, especially with those whose main objectives revolve around human rights, democracy and good governance, and the Government of Zimbabwe have turned sour.

Over the past years, the NGO sector has been threatened by a plethora of factors that continue to make the environment unfriendly. Suspicion and mistrust, especially by Government, is deepening, thereby justifying the promulgation of repressive laws and incessant propaganda against NGOs. In the mind of the Government, NGOs, because they are largely foreign funded, are allies of the opposition party and of the western powers believed to favour regime change.<sup>1</sup>

Against this background, NGOs in Zimbabwe note with grave concern the violations of the freedoms of association, assembly and expression, all of which are enshrined in regional and international human rights instruments and, perhaps most disappointingly, embedded in the Zimbabwe Constitution. Further, targeted attacks, torture and all other forms of harassment on CSO leaders have critically crippled civic activities. A set of tools, chief among them repressive laws, manipulation of the law enforcement agencies, the judiciary and the public service as well as propaganda against CSOs have been shrewdly used to curtail civic activity.

Recognizing the intensifying levels of attacks on CSOs, sometimes personalised, and implications thereof to personal security and to national development that appear unabated, complicated by some kind of impunity on the part of the perpetrators, the NGO community finds it necessary and timely to bring this to the attention of the African Commission on Human and Peoples' Rights.

## **NGO Operations in Zimbabwe**

The NGO sector has re-engineered itself in order to respond to social, economic and political decadence manifesting itself in gross human rights abuses and violations, deepening poverty, complex humanitarian crises, democracy deficits and multi-faceted forms of inequality and exploitation.

<sup>1</sup> According *the Herald* of 16 March 2005, the Zimbabwe Congress of Trade Unions was actually barred from participating in the March 2005 general elections for being 'highly partisan and political'.

NGOs are constituted in different shapes and sizes and offer unique interventions. They are also registered differently.<sup>2</sup> There are many ways of classifying NGO operations. One way to do this is through thematic sectors. Using this criterion, common thematic sectors are as follows: HIV and AIDS, disability, gender, economic development, rural and urban development, relief, children and youth, environment and health. Interventions are equally diverse and varied. Programmatic focus includes public policy advocacy, research, documentation, service delivery, training and capacity building.

Development approaches by NGOs continue to change however. For instance, global discourse on development has now espoused a rights-based approach to development work. This is in terms of social, economic, cultural, civil and political rights. As a result, many NGOs are involved, in one way or another, in the promotion and protection of human rights. The difference only lies in the scope and focus of any given NGO.

Concerning rights-based approaches to programming, interventions have ranged from high-level policy advocacy to grassroots-level interventions such as spearheading the rights of specific groups. These could be, for example, child rights, rights of people living with HIV and AIDS, women's rights and rights of people living with disabilities.

It is important to note that Zimbabwe signed the International Convention on Economic, Social and Cultural Rights (ESCR) in 1991. Under the auspices of the United Nations' International Convention on Economic, Social and Cultural Rights the focus has been one of taking a human rights approach as the centre for the Millennium Development Goals to which Zimbabwe is a signatory under the United Nations Millennium Summit.

Suffice it to say that the proliferation and work of NGOs is triggered and sustained by the consistent failure of Government to deliver basic services and to support the realisation of all human rights. Consequently, apart from complementing government efforts in service delivery, NGOs have, on several occasions, courageously questioned and in some cases exposed excesses by the Government of Zimbabwe. There is general consensus, amongst NGOs in Zimbabwe that the crises are rooted in the governance and political problems in the country. Such positions have unfortunately attracted the wrath of the government.

### **The Policy and Legal Framework**

As if Zimbabwe is not a signatory to the many regional and international human rights treaties, covenants or conventions, it is regrettable that the Government of Zimbabwe has used the paraphernalia of domestic policies and laws to silence dissenting voices and resultantly prop up the ruling party.

Section twenty-one (21) of the Zimbabwe Constitution guarantees the protection of freedom of assembly and association. It reads as follows:

*Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interest.*

<sup>2</sup> Most NGOs are registered under the Private Voluntary Organisations Act of 1996 (PVO Act). Recognizing the many limitations of the law including narrow definition of an NGO, inefficient and cumbersome registration procedures, sweeping Ministerial powers, to mention a few factors, most national NGOs have resorted to registering through the High Court as Trusts or simply to get a memorandum of understanding (MOU) with any line ministry.

The African Charter on Human and People's Rights (ACHPR) states that

*Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*

As far back as 1995, the Government of Zimbabwe amended Electoral Regulations [Electoral (Amendment) Regulations 1/95, Statutory Instrument 70/95] to incorporate civic society into the election process, especially as election monitors. In 2000, it came up with the Electoral (Amendment) Regulations 7/2000 Statutory Instrument 161A/2000 that affirmed the role of civic society in elections. This is augmented by Statutory Instrument 41B/2002 that provides for the accreditation of observers from civic society organisations.

Section 7 of the Southern African Development Community (SADC) Guidelines and Principles Governing Democratic Elections calls for the full participation of citizens in political processes and for member states to safeguard the human and civil liberties of all citizens, including the freedom of movement, assembly, association, expression and campaigning. CSOs have emerged as the key instruments to facilitate the realization of these freedoms and rights.

It is saddening to note that the reality on the ground blatantly contradicts the spirit of promoting free and fair elections, epitomised in the SADC guidelines, through democratised processes in which citizens are empowered and given the space to be active players in political processes.

Had the Non-Governmental Organisations Bill [2004] that passed through its final reading in Parliament on 9 December 2004 received the assent of the President it was going to negate all the above provisions and serve as the death-knell of civil society organisations. The Bill had categorically stated that no local non-governmental organisations should receive foreign funding to carry out activities to do with the promotion and protection of human rights or be involved in issues of governance. At the same time the Bill had stated that no foreign NGO was going to be registered for the above purposes.

The move to ban funding in these areas was going to reduce the capacity of NGOs to deal with a whole range of rights, which cover political, economic and social rights. By virtue of being involved in advocacy, NGOs are inclined to delve into issues of governance. For instance, independent budget analysis projects are tantamount to involvement in governance issues, cognizant of the fact that transparency and accountability matters will inevitably be raised in the process.

The NGO Bill had an effect even though it did not become law. It was widely noted as the latest threat to NGOs following the numerous repressive laws such as the Public Order and Security Act (POSA), the Access to Information and Protection of Privacy Act (AIPPA) and the Broadcasting Services Act, to mention only a few.

In summation, the NGO community is disappointed that nothing has been done by the Government to implement recommendations in the ACHPR report of the 2002 Fact-Finding Mission on the human rights situation in Zimbabwe. In particular, on the work of NGOs, the ACHPR observed that there are various pieces of legislation *that inhibit public participation by NGOs in public education and human rights counselling* that need to be repealed urgently. The Commission went on to recommend that even the Private Voluntary Organisations Act (PVO Act) should be repealed.

### **Violations of Freedom of Assembly**

Ever since the promulgation of POSA, it has become virtually impossible for CSOs to hold public meetings, protests, demonstrations or any form of procession unless they are in support of a

government position or programme. Individuals and institutions seeking to engage in any of the above activities are required to seek police clearance.

On many occasions, various civil society groups such as the National Constitutional Assembly, Crisis Coalition, ZimRights, the Zimbabwe Congress of Trade Unions (ZCTU) have been refused permission to engage in demonstrations. In April this year, the ZCTU was denied permission to engage in a peaceful protest to press for the restoration of the rule of law, the lowering of high taxation rates and to call upon government to resolve the economic problems. A number of organizations had pledged to support such a noble cause and had shown solidarity with the labour movement. Regional and international solidarity statements were received at the ZCTU offices from recognized labour movements like the Congress of South African Trade Unions (COSATU).

The police foiled efforts by the union to proceed with the protest and arrested labour movement leaders including Lovemore Matombo, President of ZCTU, Wellington Chibhebhe, Secretary General of ZCTU, Raymond Majongwe, Secretary General of the Progressive Teachers Union, and other unnamed trade union activists country wide.

The members of the Women of Zimbabwe Arise (WOZA) have again and again been arrested for protesting against social injustices and suffering imposed (by the Government of Zimbabwe through wrong policy choices) on the people of Zimbabwe. In August 2004, a group of women, including the National Coordinator of WOZA, Jenni Williams, was arrested for holding a peaceful march from Bulawayo to Harare in protest against enactment of the NGO Bill.

WOZA was concerned that the Bill was going to impact heavily on women and children, generally viewed as major beneficiaries of NGO activities. To WOZA, the Bill was thus a direct attack on the livelihoods of a sizeable number of women in Zimbabwe. Many people were arrested, and human rights lawyers found themselves stretched to provide adequate service to all those arrested.

National Constitutional Assembly (NCA) Chairperson Dr Lovemore Madhuku was arrested by the police more than 20 times for allegedly organising illegal demonstrations. He was arrested for contravening the draconian Public Order and Security Act (POSA) by demonstrating at the public hearing on the Constitution of Zimbabwe Amendment (No. 17) Bill on 18 August 2005. Madhuku was arrested with 22 other NCA members who had taken part in the demonstration at Africa Unity Square near Parliament. More than 100 members had gathered at the square when police descended on the demonstrators and arrested some of them.

### **Violations of Freedom of Association**

The NGO Bill emerged as a direct attack on citizens' freedom of association. The NGO Bill would make it mandatory for all formations or groupings of citizens to be registered. Registration remains entirely the prerogative of government and, in most cases, has favoured those organisations not critical of the state.

In rural areas for instance,<sup>3</sup> citizens are not free to associate with NGOs, labelled by government as extensions of the opposition party; Movement for Democratic Change (MDC).

The Bill, widely condemned as repressive and unconstitutional, it can be argued, implied an end to freedom of association since individuals would only associate with anyone who has the government's stamp of approval.

<sup>3</sup> Most people in rural areas support the ruling ZANU PF party. Through government propaganda, they have been made to believe that NGOs and donors are agents of imperialists who are working with MDC to oust the President. As a result they are very sceptical of NGOs.

## Harassment of NGOs

Through the use of state machinery, especially the police, government takes advantage of repressive laws such as POSA and the outdated Private Voluntary Organisation Act (PVO Act), to systematically harass NGO personnel. Police have visited and searched offices, without notice or adequate documentation of specific NGOs in many instances. On several occasions, the police raided and physically attacked members of staff of the National Constitutional Assembly, the Amani Trust,<sup>4</sup> ZimRights, Media Institute for Southern Africa (MISA), among others.

In April 2005, Zimbabwe Republic Police officers purporting to be from the Ministry of Social Welfare demanded to inspect ZimRights' books of accounts and audit its activities. As a legally constituted and registered institution, such an invasion of private space and infringement was unjustifiable since the police were acting without a court order. There were no actual or reasonably anticipated breaches of peace or criminal activity at ZimRights' premises. In any case, the police detail did not specify their mission.<sup>5</sup>

The main reasons behind the continued attacks and harassment of NGOs was summed up by the former Minister of Public Service Labour and Social Welfare Paul Mangwana when he said that 'NGOs and donors have funded the opposition and anti-government activities in the name of democratisation'.<sup>6</sup>

## State Interference with NGO Activities

At the close of 2004, the Government embarked on an unconstitutional probe on NGOs<sup>7</sup> that resulted in about 30 NGOs being searched, interrogated and forced to disclose all confidential information.<sup>8</sup> The directors of the Girl Child Network and the Farm Orphan Support Trust, for example, testified to the horrible experiences they had during the probe. The former had her private property, including the bedroom, searched and nothing sinister was found.

The manner in which the probe was done, not mentioning its failure to pass the constitutionality test, is evidence of the intrusive tendencies of Government and the sweeping ministerial powers that render all NGOs vulnerable to abuse by the state. This clearly underscores the point that the NGO sector is really under siege.

It is also important to note that the NGO Bill was going to give the Government power to run all NGOs by allowing it unfettered powers to inspect, monitor, invade, split and dictate what happens in NGOs. This is similar to the powers of the Minister of Local Government to remove elected councillors and replace them with his own appointees.

## Stringent Operational Requirements

In what appears to be a deliberate strategy to frustrate NGOs and to discourage them from reaching out to a wider community, especially in rural areas, the local authorities have been instructed to demand Memorandums of Understanding (MOUs) from any NGO that seeks to operate in their area. The line minister and the governor of the province are expected to approve the MOUs. It is difficult to imagine, for example, a situation whereby an organisation such as Heifer Project

<sup>4</sup> Amani Trust was finally forced to close offices as a result of persistent harassment of staff, uncalled for police raids and media attacks. Its mission was to provide relief and rehabilitation services to victims of organised political violence.

<sup>5</sup> ZimRights News Alert, 19 July 2005 – 'Police force entry into ZimRights Offices'.

<sup>6</sup> 'Some NGOs funded the opposition – Mangwana, *Daily Mirror*, 7 March 2005.

<sup>7</sup> *The Herald* 8 and 16 March 2005.

<sup>8</sup> The probe on NGOs was ostensibly aimed at investigating the use of approximately US\$88 million allegedly received under the United Nations Consolidated Appeal Process for Humanitarian aid for which NGOs failed to account. Ironically, most of the NGOs probed had not received any of those funds.

International, working in more than 20 districts, would have to come up with a corresponding number of MOUs.

In some districts, NGO offices have been raided by groups of people who claim to be war veterans demanding to see registration certificates and MOUs. Organisations whose offices have been invaded include the Intermediate Technology Development Group in Mutare–Chimanimani, Gwanda Aids Network in Matabeleland and the Catholic Development Commission and the Catholic Commission for Peace and Justice in Binga. In 2003, Christian Care vehicles in Matabeleland were impounded and later released for allegedly being driven by an officer believed to be sympathetic to the MDC.

NGOs operating at grassroots level are forced to attend all meetings, including those of ZANU PF, even though not directly linked to their work. Absenteeism is tantamount to sabotaging Government programmes and taking sides with the MDC.

The net effect of the above has been to stifle NGO operations and to grossly dampen civic activity.

### **Propaganda against NGOs**

NGO operations and their public image have been seriously dented by spirited efforts by the Government to paint NGOs as agents of imperialism through the opposition party, the Movement for Democratic Change (MDC). The incessant media blitz against NGOs, especially through state-owned media, has bred apathy and limited cooperation with CSOs by the ordinary public. Over the years, it has become very difficult for citizens to freely associate with NGOs.

A culture of fear is being entrenched in citizens, especially when they rekindle memories of the 2000 and 2002 general elections marred with torture, politically motivated violence and numerous deaths.<sup>9</sup> In rural areas, ordinary people cannot readily accept donations from NGOs, fearing victimisation for allegedly working in cahoots with enemies of the state – NGOs and the MDC.

### **Conclusion**

Noting the increased attack on NGOs, the shrinking space and general deterioration of relations between NGOs and Government, it is of paramount importance that the Government of Zimbabwe take appropriate action to create a conducive operating environment for NGOs.

In particular, the NGOs in Zimbabwe, call upon Government to:

- Significantly amend the NGO Bill of 2004 with a view to incorporating views of CSOs on such matters as the definition of an NGO, issues of governance, foreign funding, transitional mechanisms and ministerial powers. The objective here is to come up with enabling NGO legislation that will pave the way for the creation of a supportive operating environment.
- As a matter of urgency, repeal a set of all draconian laws especially POSA, AIPPA, the Miscellaneous Offences Act, Broadcasting Services Act. The above laws have manifestly suffocated citizens' rights of assembly, association and expression.
- Open up a dialogue between government, political parties, CSOs and other stakeholders to deal with the rife paranoia and impasse characterising NGO–state relations.
- Develop a comprehensive NGO policy, arrived at through broad-based consultative processes, to govern NGO operations. The current situation where a paraphernalia of policies, in most cases conflicting and disabling, are used does not produce effective service delivery by NGOs.

<sup>9</sup> Zimbabwe Lawyers for Human Rights 2000 and 2002 Election Reports.

## **Additional Reading Material**

NANGO, 2005, Petition to the President on the NGO Bill.

Zimbabwe Election Support Network, September 2004, Submission to the Parliament of the Republic of Zimbabwe on the NGO Bill.

<http://www.zesn.org.zw>

Zimbabwe Humanitarian Policy on Development Assistance.

Zimbabwe NGO Bill (2004)

<http://www.nca.org.zw>

<http://www.zlhr.org.zw>

Zimbabwe Lawyers for Human Rights, September 2004, Submission to the Parliament of the Republic of Zimbabwe on the NGO Bill.

NANGO, 2004, Child Friendly National Budget Initiative, Lessons, Achievements and Challenges.

Zimbabwe Human Rights NGO Forum, Open letter to President Mugabe, 18 March 2005, calling upon Zimbabwe to implement the African's Commission's recommendations.

Report of the African Commission's Fact finding Mission on the human rights situation in Zimbabwe.

ZCTU Press statement, *Daily Mirror*, Friday, 11 March 2005.

