

**The role and effectiveness of National Human Rights Commissions in advancing domestic implementation of socio-economic rights in Commonwealth Africa**

**By**

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## Declaration

I hereby declare that this dissertation is the product of my own research activity. I further declare that this dissertation has not previously been submitted for any degree or examination at the University of Pretoria or any other institution.

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## Table of contents

Declaration.....	i
Approval .....	ii
Table of contents.....	iii
Dedication .....	xii
Acknowledgements.....	xiii
Abbreviations and acronyms.....	xiv
Abstract .....	xvii
CHAPTER ONE .....	1
BACKGROUND TO THE STUDY .....	1
1.1. Introduction.....	1
1.2. Thesis statement and basic theoretical assumptions.....	22
1.2.1. Thesis statement.....	22
1.2.2. Basic theoretical assumptions.....	23
1.3. Purpose and focus of the study.....	23
1.4. Research questions.....	24
1.5. Significance of study.....	25
1.6. Limitations of the study.....	26
1.7. Clarification of terminologies .....	26
1.7.1. Socio-economic rights.....	26
1.7.2. National human rights institutions.....	27
1.7.3. Advancing implementation of socio-economic rights .....	28
1.8. Methodology of the study .....	29
1.9. Literature review .....	32
1.10. Chapter outline.....	45
CHAPTER TWO .....	30
THE CHALLENGE OF ACHIEVING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS IN COMMONWEALTH AFRICAN STATES .....	30
2.1. Introduction.....	30
2.2. Socio-economic realities of ordinary people in Commonwealth Africa....	32
2.3. The nature of socio-economic rights.....	38
2.4. Sources and legal status of socio-economic rights in Commonwealth Africa.....	40
2.4.1. International treaties and their interpretations .....	41
2.4.2. African regional treaties and the emerging jurisprudence .....	43

2.4.3.	National constitutional and legislative framework .....	45
2.5.	The legal responsibility to implement socio-economic rights .....	46
2.5.1.	The general duty to implement socio-economic rights.....	47
2.5.2.	The obligation to respect socio-economic rights .....	48
2.5.3.	The obligation to protect socio-economic rights.....	50
2.5.4.	The obligation to fulfil socio-economic rights.....	53
2.5.5.	The specific duty to implement socio-economic rights .....	55
2.5.6.	The standards of ‘progressive realisation’ and ‘availability of resources’ .....	56
2.5.7.	The minimum core obligation.....	59
2.6.	International mechanisms for advancing socio-economic rights in Commonwealth African states.....	62
2.6.1.	The individual complaint procedures.....	62
2.6.2.	The complaint procedure of the Optional Protocol to the ICESCR.....	64
2.6.3.	The complaints procedures of the African regional human rights system .....	67
2.6.4.	The inter-state complaint procedure .....	72
2.6.5.	The international reporting procedures .....	72
2.6.6.	The United Nations Human Rights Council .....	74
2.6.7.	The Universal Peer Review Mechanism.....	76
2.6.8.	The promotional activities of the African Commission.....	79
2.6.9.	The African Peer Review Mechanism .....	80
2.7.	National frameworks for domestic implementation of socio-economic rights .....	81
2.7.1.	Domestication of the international treaties on socio-economic rights.....	81
2.7.2.	Constitutionalization of socio-economic rights .....	82
2.7.3.	Directive principles of state policy .....	85
2.7.4.	National legislation on socio-economic rights.....	86
2.7.5.	Adjudication of socio-economic rights by domestic courts.....	88
2.7.6.	The executive initiatives, policies and programmes .....	89
2.7.7.	Poverty reduction strategies and processes.....	91
2.8.	Conclusion .....	92
CHAPTER THREE .....		95
THE ROLE AND RELATIVE ADVANTAGE OF NATIONAL HUMAN RIGHTS COMMISSIONS IN ADVANCING THE DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS .....		95

3.1.	Introduction.....	95
3.2.	The nature and background of NHRIs .....	96
3.2.1.	Defining NHRIs .....	96
3.2.2.	The historical development of NHRIs .....	98
3.2.3.	The conception of NHRCs.....	100
3.2.4.	The emergence of NHRCs in Africa.....	101
3.3.	NHRCs in Africa and adherence to the Paris Principles.....	104
3.3.1.	Mode of establishment of NHRCs .....	105
3.3.2.	Defined competence and powers .....	106
3.3.3.	Institutional independence and autonomy .....	109
3.3.4.	Financial independence and autonomy .....	110
3.3.5.	Composition of NHRCs .....	112
3.3.6.	Appointment and tenure of members of NHRCs.....	114
3.3.7.	Accessibility of NHRCs.....	116
3.3.8.	NHRCs’ cooperation with NGOs and other stakeholders .....	117
3.3.9.	Accountability of NHRCs.....	118
3.4.	The responsibility and competence of NHRCs to advance socio-economic rights implementation .....	121
3.4.1.	The competence to advance socio-economic rights implementation.....	124
3.4.2.	Explicit competence over socio-economic rights .....	124
3.4.3.	Implicit competence over socio-economic rights .....	125
3.5.	The comparative advantages of NHRCs in advancing socio-economic rights implementation .....	128
3.5.1	NHRCs and domestic courts.....	128
3.5.2.	NHRCs and parliamentary human rights committees.....	132
3.5.3.	NHRCs and other relevant state agencies .....	133
3.5.4.	NHRCs and NGOs .....	135
3.6.	Conclusion .....	138
CHAPTER FOUR.....		141
THE ROLE OF, MEASURES TAKEN BY, AND THE EFFECTIVENESS OF THE NIGERIAN NATIONAL HUMAN RIGHTS COMMISSION IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS.....		141
4.1.	Introduction.....	141
4.2.	The establishment and institutional structure of the NNHRC .....	142
4.2.1.	The historical origin of the NNHRC.....	142
4.2.2.	The legal status of the NNHRC .....	145
4.2.3.	The composition of the NNHRC .....	146

4.2.4.	The qualification of members of the NNHRC .....	148
4.2.5.	Appointment of members of the NNHRC .....	150
4.2.6.	The tenure of members of the NNHRC .....	153
4.2.7.	The administrative structure of the NNHRC .....	154
4.2.8.	The independence and operational autonomy of the NNHRC .....	155
4.2.9.	The financial autonomy of the NNHRC .....	157
4.2.10.	The relationship of the NNHRC with NGOs .....	159
4.3.	The challenge of implementing socio-economic rights in Nigeria.....	161
4.4.	The socio-economic rights mandate and powers of the NNHRC.....	163
4.4.1.	The constitutional framework .....	164
4.4.2.	International and regional human rights treaties framework .....	166
4.4.3.	The national legislation and policy framework.....	168
4.5.	The strategies, effectiveness and impact of the NNHRC in advancing socio-economic rights .....	172
4.5.1.	Adopting socio-economic rights as thematic areas of focus.....	172
4.5.2.	Monitoring socio-economic rights violations .....	174
4.5.3.	Receiving and treating socio-economic rights violation complaints .....	176
4.5.4.	Resolving community benefit disputes with oil companies in the Niger Delta.....	180
4.5.5.	Socio-economic rights education and advocacy .....	183
4.5.6.	The international engagements of the NNHRC on human rights.....	185
4.5.7.	The role of other related state agencies.....	186
4.6.	Factors limiting the effectiveness of the NNHRC in advancing socio-economic rights .....	190
4.6.1.	Inadequate legal recognition for socio-economic rights.....	190
4.6.2.	The challenge of inaccessibility .....	192
4.6.3.	The challenge of under-funding.....	195
4.6.4.	The challenge of inadequate institutional capacity .....	196
4.6.5.	The challenge of inadequate commitment to socio-economic rights.....	198
4.6.6.	The challenge of the federal political and governance system .....	199
4.7.	Conclusion .....	201
CHAPTER FIVE .....		204
THE ROLE OF, MEASURES TAKEN BY, AND THE EFFECTIVENESS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS.....		204
5.1.	Introduction.....	204
5.2.	The establishment and institutional structure of the SAHRC.....	205

5.2.1.	The historical origin of the SAHRC .....	205
5.2.2.	The legal status of the SAHRC .....	207
5.2.3.	The composition and qualification of members of the SAHRC .....	208
5.2.4.	The appointment and tenure of members of the SAHRC .....	210
5.2.5.	The independence and operational autonomy of the SAHRC .....	214
5.2.6.	The financial autonomy of the SAHRC .....	216
5.2.7.	The administrative structure and accessibility of the SAHRC .....	217
5.2.8.	The relationship of the SAHRC with NGOs.....	220
5.2.9.	The powers of the SAHRC .....	223
5.3.	The challenge of implementing socio-economic rights in South Africa .....	224
5.4.	The socio-economic rights mandate of the SAHRC .....	226
5.4.1.	The general mandate as relevant to socio-economic rights .....	226
5.4.2.	The Constitution of South Africa 1996.....	227
5.4.3.	International and regional treaties on socio-economic rights .....	231
5.4.4.	National laws, policies and programmes .....	233
5.4.5.	The specific mandate of the SAHRC on socio-economic rights .....	236
5.5.	The strategies, effectiveness and impact of the SAHRC in advancing socio-economic rights implementation .....	239
5.5.1.	Monitoring socio-economic rights implementation by state departments .... .....	239
5.5.2.	Receiving, investigating and settling socio-economic rights violation complaints .....	248
5.5.3.	Conducting public inquiries/hearings on socio-economic rights .....	253
5.5.4.	Judicial enforcement of socio-economic rights .....	257
5.5.5.	Socio-economic rights education and advocacy .....	261
5.5.6.	The SAHRC's engagement with Parliament on socio-economic rights .....	264
5.5.7.	Monitoring compliance with international socio-economic rights treaty obligations.....	266
5.5.8.	The promotion and protection of the right to equality .....	267
5.5.9.	The role of other relevant state agencies.....	271
5.6.	Challenges of the SAHRC in advancing socio-economic rights implementation .....	273
5.6.1.	The challenge of a wide mandate.....	274
5.6.2.	The challenge of inadequate funding and institutional incapacity.....	275
5.6.3.	The challenge of ineffective powers and social influence .....	276
5.7.	Conclusion .....	278



CHAPTER SIX.....	281
THE ROLE OF, MEASURES TAKEN BY, AND THE EFFECTIVENESS OF THE UGANDAN HUMAN RIGHTS COMMISSION IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS .....	281
6.1. Introduction.....	281
6.2. The establishment and institutional structure of the UHRC .....	282
6.2.1. The historical origin of the UHRC.....	282
6.2.2. The legal status of the UHRC .....	285
6.2.3. The composition and qualification of members of the UHRC .....	285
6.2.4. The appointment and tenure of members of the UHRC .....	287
6.2.5. The independence and operational autonomy of the UHRC .....	289
6.2.6. The financial autonomy of the UHRC .....	291
6.2.7. The administrative structure and accessibility of the UHRC.....	293
6.2.8. The relationship of the UHRC with NGOs.....	295
6.3. The Ugandan state and the challenge of implementing socio-economic rights .....	297
6.4. The socio-economic rights mandate of the UHRC .....	299
6.4.1. The Uganda Constitution of 1995.....	300
6.4.2. The national objectives and directive principles of state policy .....	303
6.4.3. International treaties.....	305
6.4.4. Domestic legislation and policy framework .....	306
6.4.5. The powers of the UHRC.....	309
6.5. The strategies, effectiveness and impact of the UHRC in advancing socio- economic rights implementation.....	311
6.5.1. Receiving and resolving complaints on socio-economic rights.....	311
6.5.2. The UHRC's tribunal.....	316
6.5.3. General monitoring of socio-economic rights implementation .....	320
6.5.4. Monitoring specific state policies and programmes on socio-economic rights .....	324
6.5.5. Monitoring parliamentary bills and legislation on socio-economic rights ... .....	327
6.5.6. Monitoring budgetary allocation to socio-economic rights .....	329
6.5.7. Participating in international human rights platforms.....	332
6.5.8. Socio-economic rights education and advocacy .....	334
6.5.9. Mainstreaming the right-based approach to development .....	338
6.5.10. The role of other relevant state agencies.....	339
6.6. The challenges of the UHRC in advancing socio-economic rights implementation .....	342

6.6.1.	The challenge of inadequate domestic legal framework on socio-economic rights .....	342
6.6.2.	The challenge of a wide mandate.....	343
6.6.3.	The challenge of inadequate powers to protect socio-economic rights ..	345
6.6.4.	The challenge of inadequate funding and capabilities .....	346
6.7.	Conclusion .....	347
CHAPTER SEVEN .....		351
FINDINGS, CONCLUSION AND RECOMMENDATIONS.....		351
7.1.	Findings.....	351
7.1.1.	The domestic legal status of socio-economic rights in CommonwealthAfrica does not affect the competence of NHRCs to advance the implementation of these rights in CommonwealthAfrica .....	351
7.1.2.	The international normative and institutional frameworks for advancing domestic implementation of socio-economic rights are relatively ineffective in CommonwealthAfrica.....	352
7.1.3.	NHRCs are suitable institutional mechanisms for advancing socio-economic rights implementation in CommonwealthAfrica.....	353
7.1.4.	NHRCs in CommonwealthAfrica apply multiple strategies to advance domestic implementation of socio-economic rights .....	354
7.1.5.	The NNHRCgenerally lack interest in and, relatively, is ineffective in advancing domestic implementation of socio-economic rights.....	355
7.1.6.	The NNHRCface various challenges that impair its potential for advancing domestic implementation of socio-economic rights.....	357
7.1.7.	The SAHRC demonstrates appreciable interest in and, relatively, is effective in advancing domestic implementation of socio-economic rights .....	358
7.1.8.	The SAHRC faces challenges that undermine its effort at advancing domestic implementation of socio-economic rights .....	361
7.1.9.	The UHRC demonstrates reasonable interest in and, relatively, is more effective than the NNHRC, in advancing domestic implementation of socio-economic rights .....	362
7.1.10.	The UHRC faces various challenges that impair its potential for advancing domestic implementation of socio-economic rights .....	364
7.1.11.	The domestic political system in CommonwealthAfrica shapes and influences states interest and attitude towards complying with their legal obligations to implement socio-economic rights .....	365
7.2.	Final conclusion .....	366
7.3.	Recommendations.....	366
7.3.1.	The need for CommonwealthAfrican states to accord explicit recognition to socio-economic rights in the domestic legal framework as justiciable rights .....	370

7.3.2.	The need for CommonwealthAfrican states to ratify the Optional Protocol to the ICESCR.....	371
7.3.3.	The need for CommonwealthAfrican states to provide NHRCs with explicit mandate to promote and protect socio-economic rights .....	372
7.3.4.	The need for NHRCs in CommonwealthAfrican to give effect to their resolutions to prioritize socio-economic rights in their activities .....	373
7.3.5.	The need for CommonwealthAfrican states to strengthen the institutional capability of NHRCs.....	373
7.3.6.	The need for CommonwealthAfrican states to provide adequate funding for NHRCs .....	374
7.3.7.	The need by CommonwealthAfrican states to ensure adequate accessibility to NHRCs .....	375
7.3.8.	The need for effective institutional support from Parliament and other relevant state organs for NHRCs in CommonwealthAfrican states.....	375
7.3.9.	The need to strengthen inter-institutional collaboration between NHRCs and other related state agencies in CommonwealthAfrican states .....	376
7.3.10.	The need for members of the public to effectively utilize NHRCs and the services they offer in CommonwealthAfrican states .....	376
7.3.11.	The need for good governance and the application of the right-based approach to development by CommonwealthAfrican states.....	377
	Bibliography .....	379
	List of treaties and other international legal instruments.....	412
	International treaties.....	412
	General Comments and Recommendations .....	414
	Resolutions and Declarations.....	415
	National Constitutions and other legal instruments .....	416
	National constitutions .....	416
	Nigerian legislation.....	417
	South African legislation .....	417
	Uganda legislation .....	418
	List of cases.....	421
	International cases.....	421
	Nigerian cases .....	421
	South African cases.....	422
	Uganda cases .....	423
	Appendix A: List of interviewees .....	<b>Error! Bookmark not defined.</b>
	Nigeria .....	424
	South Africa .....	425
	Uganda .....	425
	Appendix B: SAHRC response to research questions .....	426



## **Dedication**

This thesis is dedicated to my late father Jacob Beredugo who, although illiterate and against all odds, strove to have me educated and to my mother, Ayebadieye Edward, who toiled for my education after the death of my father.

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## Abbreviations and acronyms

African Charter	African Charter on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AICC	African Institute of Corporate Citizenship
ALN	Aids Legal Network
ANC	African National Congress
APRM	African Peer Review Mechanism
AU	African Union
BCLR	Butterworths Constitutional Law Reports
BEE	Black Economic Enforcement and Affirmation Action
CBOs	Community-Based Organizations
CC	Constitutional Court of South Africa
CCB	Code of Conduct Bureau
CDP	Criminal Defense Group
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEHURD	Centre for Health Human Rights and Development
CERD	Convention on the Elimination of all forms of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
CDD	Centre for Democracy and Development
CGE	Commission for Gender Equality
CIVHU	Commission of Inquiry on Violations of Human Rights
CLO	Civil Liberties Organization
CRP	Constitutional Rights Project
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DA	Democratic Alliance
DPSP	Directive Principles of State Policy
DRC	Democratic Republic of Congo
DIHR	Danish Institute for Human Rights
ECOWAS	Economic Community of West African States
ECOWAS Court	Community Court of Justice of the Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
FIDA	Federation of International Female Lawyers
FHRI	Foundation for Human Rights Initiative
FRER	Fundamental Rights Enforcement Rules
GDP	Gross Domestic Product
GEAR	Growth, Employment and Reconstruction
GIHR	German Institute for Human Rights
HRBAD	Human Rights-Based Approach to Development

HDI	Human Development Index
HRC	Human Rights Council
HSRC	Human Sciences Research Council of South Africa
HURDET	Human Rights Social Development and Environmental Foundation of Uganda
HURICO	Human Rights Concern of Uganda
HURINET-U	Human Rights Network Uganda
IACTHR	Inter-American Court on Human Rights
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICCRP	International Council on Human Rights Policy
ICPC	Independent Corrupt Practices and related Offences Commission
IG	Inspectorate of Government
IHRC	Irish Human Rights Commission
IMF	International Monetary Fund
IRI	International Refugee Rights Initiative of South Africa
ISER	Institute for Socio-economic Rights Uganda
ISO	Internal Security Organization
ISRDP	Integrated and Sustainable Rural Development Programme
LDC	Least Developed Countries
MDGs	Millennium Development Goals
MOU	Memorandum of Understanding
MTCT	Mother-to-Child Transmission
NDP	National Development Plan
NAPEP	National Poverty Eradication Programme Nigeria
NEEDS	National Economic Empowerment and Development Strategy
NGOs	Non-Governmental Organizations
NJI	National Judicial Institute
NP	National Party
NPS	Nigerian Prison Service
NHRC	National Human Rights Commissions
NNHRC	Nigerian National Human Rights Commission
NHRIs	National Human Rights Institutions
OAU	Organization of African Unity
ODAC	Open Democratic Advice Centre
OHCHR	Office of the High Commissioner for Human Rights
Paris Principles	Principles relating to the status and functioning of national institutions for the protection and promotion of human rights
PEAP	Poverty Eradication Action Plan (Uganda)
PHRCs	Parliamentary Human Rights Committees



PRSP	Poverty Reduction Strategies and Processes
PSC	Public Service Commission
PWDs	People living with Disabilities
RDP	Reconstruction and Development Programme
RIDS	Rural Infrastructure Development Scheme
SADC	Southern African Development Commission
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SAIFAC	South African Institute for Advanced Constitutional, Public, Human and International Law
SAIIA	South African Institute for International Affairs
SANGOCO-NET	South African National NGO Coalition
SERAC	Social and Economic Rights Action Centre
SERAP	Socio-Economic Rights and Accountability Project
SERI	Socio-economic Rights Institute of South Africa
SPII	Studies in Poverty and Inequality Institute of South Africa
SJAI	Social Justice Advocacy Initiative
SPDC	Shell Petroleum Development Corporation
TAC	Treatment Action Campaign
UCC	Uganda Constitutional Commission
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNLF	Uganda National Liberation Army
CIVHR	Commission of Inquiry on Violations of Human Rights
UHRC	Uganda Human Rights Commission
UPR	Universal Periodic Review
UPF	Uganda Police Force
UPS	Uganda Prison Service

## Abstract

For decades, widespread poverty and increasing inequality continue to wreak social deprivation and diminish the quality of life across Commonwealth African states. Given the redistributive value of socio-economic rights, the need to ensure their implementation as a relevant strategy to improve peoples' general wellbeing is unquestionable. National Human Rights Commissions (NHRCs) are uniquely relevant to advance state implementation of socio-economic rights. These institutions function in most Commonwealth African states, yet contemporary scholarship has hardly noticed the relevance and practical efforts of NHRCs in advancing the implementation of socio-economic rights. To fill this gap, this study evaluates the role and effectiveness of NHRCs in advancing domestic implementation of socio-economic rights in Commonwealth African states, using the National Human Rights Commissions (NHRCs) of Nigeria, South Africa and Uganda as case studies. Employing a mix of valuable data generated through primary and secondary sources and interviews with relevant stakeholders, including senior members and staff of the focused NHRCs and representatives of relevant NGOs, the study concludes that NHRCs are strategically valuable institutions for advancing the domestic implementation of socio-economic rights in Commonwealth African states. However, the ability of NHRCs to play an effective role in this regard is predicated on four background factors: the explicit provision of socio-economic rights as justiciable guarantees in the constitutional framework of states; the granting of explicit legal or constitutional mandate on socio-economic rights to NHRCs; strengthening the institutional architecture of NHRCs and the ability of the courts and parliament to adequately support and supplement the efforts these institutions. Therefore, the study recommends the need to ensure that these factors are provided in the legal culture and practice of Commonwealth African states in relation to the legal status of socio-economic rights and mandates of NHRCs to advance the domestic implementation of these rights.

## CHAPTER ONE

### BACKGROUND TO THE STUDY

#### 1.1. Introduction

Generally, socio-economic rights are considered as a genre of human rights, the inherent value of which is to enhance the quality of human life in terms of access to education, food, healthcare, housing, social security and water.<sup>1</sup> Socio-economic rights not only are guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>2</sup> and other international treaties, such the African Charter on Human and Peoples' Rights (the African Charter);<sup>3</sup> they are also provided for in the national constitutions of states.<sup>4</sup> Almost all Commonwealth African states have ratified the ICESCR and the African Charter,<sup>5</sup> thus consenting to be bound<sup>6</sup> and legally obliged to implement socio-economic rights at the national level.<sup>7</sup>

Generally, domestic implementation of socio-economic rights requires giving practical effect to these rights through appropriate means. The import of this is to make states fulfil their international treaty obligations under international human rights law.<sup>8</sup> As Eide argues, the transformation of socio-economic rights into positive law, whether in constitutions or in statutory law, is not enough unless these rights are realized in fact through effective practical social policy and administrative

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<sup>1</sup> G Erasmus 'Socio-economic rights and their implementation: the impact of and international instruments' (2004) 32 *International Journal of Legal Information* 243.

<sup>2</sup> Adopted 1966 GA Res 2200 (xxi) 21 UN GAOR Supp (No 16) at 49 UN Doc A/6316 (1966) 993 UNTS 3 entered into force 3 January 1976.

<sup>3</sup> 1981 OAU Doc CAB/LEG/67/3 REV 5 21 ILM 58 (1982).

<sup>4</sup> C Heyns and W Kaguongo 'Current human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 - 717.

<sup>5</sup> 49 African states, except Botswana, the Comoros, South Africa, and South Sudan, have ratified the ICESCR. All African States, except South Sudan, have ratified the African Charter. See. [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty) (accessed 8 April 2014); <http://www.achpr.org/instruments/achpr/ratification/> (accessed 8 April 2014).

<sup>6</sup> I Brownlie *Principles of public international law* 611; Article 26 of the Vienna Convention on the law of treaties prescribes that every treaty in force is binding upon the parties to the treaty and must be performed in good faith.

<sup>7</sup> Article 2(1) of the ICESCR; article 2(1) of the African Charter; A McChesney *Promoting and defending economic, social and cultural rights: a handbook* (2000) 36 – 39; P Alston and G Quinn 'The nature and scope of state parties obligations under the international covenant on economic, social and cultural rights' (1987) 9 *Human Rights Quarterly* 159-229.

<sup>8</sup> HJ Steiner, P Alston and R Goodman *International law in context: Law, politics and morals. Text and materials* (2007) 276 - 277.

actions.<sup>9</sup>No doubt, achieving this realisation would entail going beyond the symbolic endorsement of relevant treaties to taking practical steps to make these rights available to all, irrespective of background. Therefore, the test of effective implementation of socio-economic rights lies in the extent to which the benefits of these rights are enjoyed in concrete terms by the generality of the people, particularly the ordinary, vulnerable or marginalized segment of the population.<sup>10</sup> However, despite being parties to the existing international treaties on socio-economic rights, the difficulty of achieving the practical implementation of socio-economic rights has remained a major challenge for human rights in Commonwealth African states.<sup>11</sup>

Although there are several institutional mechanisms for advancing the implementation of socio-economic rights, existing academic reviews have largely focused on the role or capacity of domestic courts in respect of adjudicating these rights.<sup>12</sup> However, while the role and relevance of the judiciary, as an institutional mechanism for advancing state implementation of socio-economic rights, cannot be discounted, the reality in Commonwealth African states, and perhaps elsewhere, is that domestic courts do not generally bear direct responsibility for driving state implementation of socio-economic rights since these rights are hardly justiciable.<sup>13</sup> Basically, scholars have argued that the programmatic nature of these rights present a serious challenge to the capacity of the courts to make decisions that ultimately question the rationality or otherwise of a state's sense of judgment in the allocation and distribution of public

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<sup>9</sup> A Eide, C Krause and A Rosas (eds) *Economic, social and cultural rights: a textbook* (1995) 21.  
<sup>10</sup> D Gilligan and D Sandler 'Implementing human rights, in S Halliday and P Schmidt (eds) *Human rights brought home: socio-legal perspectives on human rights in the national context* (2004) 23.

<sup>11</sup> SC Agbakwa 'Reclaiming humanity: economic, social, and cultural rights as the cornerstone of African human rights' (2000) 5 *Yale Human Rights and Development Law Journal* 177-178.

<sup>12</sup> F Viljoen 'The justiciability of socio-economic and cultural rights: experience and problems' in Y Donders and V Volodin (eds) *Human rights in education, science and culture: Legal developments and challenge* (2007) 53-110; D Bilchitz *Poverty and fundamental rights, the justification and enforcement of socio-economic rights* (2007) 102-177; M Ssenyonjo 'Justiciability of economic and social rights in Africa: General overview, evaluation and prospects' (2004) 9 *East African Journal of Peace and Human Rights* 1-36; M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383-417; JC Mubangizi 'The protection/enforcement of socio-economic rights in Africa: lessons from the South African experience (2007) 15 *African Yearbook of International Law* 87-106 .

<sup>13</sup> S Ibe 'Beyond Justiciability: realizing the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 197.

resources among competing needs.<sup>14</sup> Evidently, efforts directed toward achieving the implementation of socio-economic rights through the courts have had only a marginal impact, if at all.<sup>15</sup>

Apparently, this is why legal scholars like Brand,<sup>16</sup> Yamin,<sup>17</sup> and Rajogopal<sup>18</sup> have lately advanced the point that facilitating the implementation of socio-economic rights by states would probably yield better outcomes with methods that are more practical than judicial. This view expresses reasonable confidence in the fundamental role non-judicial bodies, such as National Human Rights Commissions (NHRCs), Parliamentary Human Rights Committees (PHRCs), and Non-Governmental Organizations (NGOs), can play to advance state implementation of socio-economic rights at the national level through social influence rather than by coercive judicial actions.

The arguments in favour of the use of non-judicial mechanisms for the advancing socio-economic rights are increasingly gaining acceptance among scholars,<sup>19</sup> but it has been noticed that not all non-judicial bodies are well-suited to play this role effectively. Thus, it is the proposition of this study that NHRCs appear to be best suited for this role among the existing non-judicial institutional frameworks for advancing state implementation of human rights at the national level.<sup>20</sup>

In relation to Commonwealth African states, NHRCs exist in most of these states as legal entities with a responsibility to advance the implementation of human rights

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<sup>14</sup> M Stohl et al 'State violation of human rights: issues and problems of measurement' (1986) 8 *Human Rights Quarterly* 592.

<sup>15</sup> FI Michelman 'The Constitution, social rights and liberal political justifications' in D Barak-Erez and M Gross (eds) *Exploring social rights: between theory and practice* (2011) 21-23.

<sup>16</sup> D Brand 'Introduction to socio-economic rights in the South African constitution' in D Brand and C Heyns (eds) *Socio-economic rights in the South Africa* (2005) 1-20-30.

<sup>17</sup> ALYamin 'The future in the mirror: incorporating strategies for the defence and promotion of economic, social and cultural rights into mainstream human rights agenda' (2005) 27 *Human Rights Quarterly* 1220.

<sup>18</sup> B Rajogopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective' (2007) 8 *Human Rights Review* 1-50.

<sup>19</sup> M Gomez 'Social economic rights and human rights Commissions' (1995) 17 *Human Rights Quarterly* 155; S Gloppen 'Public interest litigation, social rights and social policy' Christian Michelsen Institute, Arusha Conference, New Frontiers of social policy 12-15 December 2005 20.

<sup>20</sup> LC Reif 'Building democratic institutions: the role of national human rights institutions in good governance and human rights protection' (2001) 13 *Harvard Law Review* 1.

generally.<sup>21</sup>Invariably, this also means that NHRCs can promote and protect socio-economic rights irrespective of the domestic legal status of these rights insofar as the state in question has ratified the international treaties on socio-economic rights. Therefore, unlike other related public institutions, the role of NHRCs to advance the domestic implementation of socio-economic rights in Commonwealth African states can be taken as given.<sup>22</sup>

Arguably, although there is no obvious denial of this role to NHRCs in Commonwealth African states, the problem is that most of these institutions are hardly seen to be active in advancing the implementation of socio-economic rights as much as they do in respect of civil and political rights. Apart from this inactivity raising serious doubts about their capability, scholars have also paid little attention to the role and practical efforts of NHRCs in advancing the domestic implementation of socio-economic rights as viable complementary partners to the judicial process. Consequently, whatever these institutions are doing in practical terms with respect to advancing the realisation of socio-economic rights is largely shrouded in intellectual obscurity having failed to attract any serious scholarly research or investigation.

It is against this background that the study interrogates the role and effectiveness of NHRCs in advancing the implementation of socio-economic rights in Commonwealth African states and identifies the factors that can enhance these institutions to effectively play this role and ensure the reality of socio-economic rights accountability by Commonwealth African states.

## **1.2. Thesis statement and basic theoretical assumptions**

The dissertation is predicated on the following thesis statement and theoretical assumptions:

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<sup>21</sup> CM Peter 'Human rights commissions in Africa: lessons and challenges' in A Bosl and J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 351-374.

<sup>22</sup> M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 190; See also the following documents: UN Committee on Economic, Social and Cultural Rights, General Comment 10; Guideline 25 of the Maastricht Guidelines on violations of economic, social and cultural rights (1998), United Nations Document 14/12/98.E/C.12/1998/25; The role of independent national human rights institutions in the protection and promotion of the rights of the child (15/11/2002) UN Doc CRC/GC/2002/2; Economic, social and cultural rights: Handbook for national human rights institutions, UN professional training series 12 (2005).

### **1.2.1. Thesis statement**

NHRCs are best suited to advance the domestic implementation of socio-economic rights among institutions that ensure states' accountability for human rights in Commonwealth African states.

### **1.2.2. Basic theoretical assumptions**

- (i) that the domestic implementation of socio-economic rights is a relevant strategy for eradicating poverty, inequality and enhancing the dignity and general wellbeing of ordinary people in Commonwealth African states;
- (ii) that the responsibility of NHRCs to advance the domestic implementation of socio-economic rights can be taken as given irrespective of the status of these rights in the domestic legal framework of states;
- (iii) that the prevailing legal culture and state practice in relation to the status of socio-economic rights and mandates of NHRCs in the domestic legal framework either enhances or impairs the role and effectiveness of NHRCs in advancing the domestic implementation of socio-economic rights.

### **1.3. Purpose and focus of the study**

The study reinforces the importance of socio-economic rights and the need for states in Commonwealth African states to ensure their progressive realisation in order to guarantee an improved quality of life for everyone. While acknowledging the role of other relevant bodies and mechanisms, this study explores the value of advancing the implementation of socio-economic rights through NHRCs to advance the need for NHRCs to prioritize and effectively facilitate the practical implementation of socio-economic rights in Commonwealth African countries.

Although the study interrogates general assumptions on the role and effectiveness of NHRCs in advancing socio-economic rights implementation in Commonwealth African states, it narrowly focuses on NHRCs in three countries, namely, the Nigerian National Human Rights Commissions (NNHRC), the South African Human Rights Commission (SAHRC) and the Uganda National Human Rights Commission (UHRC) for the purpose of achieving the study objectives. It is conceded that a representative

sampling of only three English speaking countries is statistically insufficient to draw or justifiably broad theoretical conclusions applicable to the entire Commonwealth African states with very pronounced socio-political, economic, cultural and linguistic diversities. However, the choice and focus on these three NHRCs are nevertheless justifiable on the following grounds:

First, the domestic legal culture on socio-economic rights in Nigeria, South Africa and Uganda are markedly different from one another with different implications on the mandate, approaches and attitude of NHRCs in relation to socio-economic rights. These differences are significant and make for a comparative analysis and justification of the background issues raised from different perspectives and state practice. In other words, the three case studies shed some light on the diversity of African experience in this regard.

Second, the three NHRCs, which were created around the same time, have operated long enough to warrant a scholarly probe into their efforts, impact and constraints in relation to their responsibilities to advance the implementation of socio-economic rights.

Third, just as socio-economic rights are universal and applicable to all countries, NHRCs as universal institutions play and carry out relatively similar roles and functions. Thus, although their activities and areas of focus are tailored to national situations, the strategies they apply, the challenges they face, as well as public expectations from them are almost common irrespective of geographical location. Thus, experiences and best practices of NHRCs easily permeate across confined borders. This being so, it is my view that theoretical deductions from the experiences of the focused NHRCs in relation to socio-economic rights in the context of the legal and political culture of these states, can to a large extent, apply to other NHRCs in Commonwealth African states, particularly those countries having a similar legal and political environment. In other words, the findings from each of the country studies provides a basis for making broad theoretical assumptions and conclusions on the relevant factors for enhancing the role and effectiveness of NHRCs in advancing the domestic implementation of socio-economic rights in Commonwealth African states.



#### **1.4. Research questions**

As its main research question, this study interrogates what role NHRCs play (or can play) in advancing domestic implementation of socio-economic rights in Commonwealth African states. In addition, the study raises and answers the following related sub-questions:

1. What is lacking in relation to current institutional efforts to advance the implementation of socio-economic rights in Commonwealth African states?
2. What is the potential role of NHRCs in advancing the implementation of socio-economic rights in Commonwealth African states?
3. What are measures applied by the NHRCs of Nigeria, South Africa and Uganda to advance the implementation of socio-economic rights?
4. How effective are the NHRCs of Nigeria, South Africa and Uganda in advancing the implementation of socio-economic rights?
5. What factors have impeded the effectiveness of the NHRCs of Nigeria, South Africa and Uganda from advancing state implementation of socio-economic rights?
6. How can NHRCs in Commonwealth African states be strengthened to effectively advance the domestic implementation of socio-economic rights?

#### **1.5. Significance of study**

Comparative case studies of this nature are useful for posing and answering new questions on the role and relevance of NHRCs in advancing state implementation of socio-economic rights. Arguably, too much emphasis on the adjudicatory processes has resulted in an overwhelming focus on the question of the justiciability of socio-economic rights as a relevant mechanism for securing the implementation of socio-economic rights at the national level. Consequently, the literature appears to be saturated with studies that examine different angles and approaches to the same issue.

Although the need for innovative approaches to the justiciability challenge cannot be ignored, there is also a clear need to branch off into more practical, conciliatory and cooperative processes of non-judicial bodies like NHRCs for advancing the implementation of socio-economic rights. Accordingly, this study constitutes a serious engagement with the search for alternative processes to litigation for holding Commonwealth African states accountable for their legal commitments to ensure the progressive realisation of socio-economic rights at the national level. This is where this study aims to make a significant contribution to the body of knowledge.

## **1.6. Limitations of the study**

The study is inherently limited in terms of its scope. Essentially, it studies how to advance implementation of socio-economic rights through the non-judicial institutional mechanism and approaches, particularly on the part of NHRCs. This means that the adjudicatory processes of the courts for achieving the implementation of these rights do not form a major part of this study, and accordingly, are not considered in detail. However, the quasi-judicial processes of NHRCs are considered to the extent of their relevance to the object of the study.

The study is limited in terms of geographical scope to Commonwealth African states and in terms of institutional specifics to the NHRCs of Nigeria, South Africa and Uganda, which are all Commonwealth English-speaking countries. This means that Africa's geographical north is outside the study. Furthermore, NHRCs from French and Portuguese speaking countries within Commonwealth African states are outside the scope of the study. The study is further limited by the narrowness of the case studies that focus only on three countries of the Commonwealth African states.

## **1.7. Clarification of terminologies**

### **1.7.1. Socio-economic rights**

The term 'socio-economic rights' is simply an abridgement of the words 'social and economic rights,' which are used as a short form to describe aspects of the bundle of human rights comprehensively expressed in the ICESCR as social, economic and cultural rights. Generally, it has become customary for scholars to deliberately disarticulate cultural rights from the composite pack of rights in the ICESCR and conflate the rights dealing with the social and economic wellbeing of people simply as

‘social-economic rights.’ Thus, the unity between social and economic rights is inherent in the common purpose they are expected to serve. This is why scholars like Conde asserts that the term ‘socio-economic rights’ encompasses the set of rights ‘whose purpose is to assure that human beings have the ability to obtain and maintain a minimum decent standard of living consistent with human dignity.’<sup>23</sup>

The study equally adopts the term ‘socio-economic rights’ within the context set out above and aligns itself with the existing consensus that socio-economic rights are those human rights that deal with the material wellbeing of the people.<sup>24</sup> However, what counts as material to the wellbeing of the people is relative, but there are some specific rights within the genre of socio-economic rights that are considered as fundamental to promoting and sustaining a dignified standard of living for every human being which the state is required or obliged to satisfy. These are not just rights in abstract terms but constitute the basic needs of citizens.<sup>25</sup>

Accordingly, references to socio-economic rights in this study are tied to those rights that impact directly on improving the material welfare of the people and place both a legal and moral burden on states to satisfy these needs among those who lack the ability to provide for themselves without assistance. These are the rights to an adequate standard of living, including, food, water, and shelter; the right to health; the right to education and the right to social security as guaranteed by the ICESCR, the African Charter and other international treaties, as well as by some national Constitutions.

### **1.7.2. National human rights institutions**

The term ‘national human rights institutions’ generally refers to bodies lawfully established by government for the specific purpose of promoting and protecting human rights.<sup>26</sup> Arguably, these institutions are not difficult to identify because of their common characteristics yet, the term in its loose form embraces every state

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<sup>23</sup> VH Conde, *A handbook of international human rights terminology* (2004) 55.

<sup>24</sup> Brand (n 16 above) 3.

<sup>25</sup> K Boon ‘The role of courts in enforcing economic and social rights’ (2007) 39 *George Washington University International Law Review* 449.

<sup>26</sup> B von Tigerstrom ‘Implementing economic, social and cultural rights: the role of national human rights institutions’ in I Merali and V Oosterveld (eds) *Giving meaning to economic, social and cultural rights* (2004) 8 9.

agency with an identical institutional role and responsibilities, including the NHRCs, the Ombudsman, Human Rights Advisory Committees and even parliamentary standing committees on human rights. However, even if their functions sometimes overlap the fact that these other institutions bear different names typifies their apparent differences in terms of what specific or targeted role they play and what they can accomplish. Therefore, the study is not about all categories of NHRIs but only the NHRCs that have the promotion and protection of human rights as their core and direct mandate. For this purpose the study uses the term ‘NHRIs’ largely as a direct or synonymous reference to NHRCs with a comprehensive mandate in terms of the Paris Principles to promote and protect human rights generally.

### **1.7.3. Advancing implementation of socio-economic rights**

The concise Oxford Dictionary defines ‘implementation’ to mean ‘the performance of an obligation.’<sup>27</sup> While this study acknowledges the fact that it is government, and not NHRIs that bear the responsibility to implement socio-economic rights under the various international human rights treaties, it nevertheless adopts Steiner, Alston and Goodman’s scholarly exposition of the concept of ‘implementation.’ According to the authors, implementation ‘refers to the means by which socio-economic rights can be given practical effect and governments held accountable to fulfil their obligations.’<sup>28</sup> As Humphrey asserts, implementation of human rights includes ‘a cluster of institutions and procedures for the control and supervision of treaty with a view to making them work in practice.’<sup>29</sup>

Therefore, although the state bears direct responsibility to implement socio-economic rights, the fact is that the implementation matrix accommodates the active presence, relevance and influence of state institutions. Thus, as institutional actors within the international and national human rights system, NHRCs are expected to drive, facilitate and enforce state implementation of socio-economic rights and nothing more. The study perceives this role as significant and proceeds on the assumption that the effectiveness of NHRCs in this regard is pivotal to achieving the practical implementation of socio-economic rights in Africa. Accordingly, this study reckons

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<sup>27</sup> Concise Oxford Dictionary (1999) 712.

<sup>28</sup> Steiner; Alston and Goodman (n 8 above).

<sup>29</sup> JP Humphrey ‘The implementation of international human rights law’ (1978-79) 24 *New York Law School Review* 11 44.

the concept of implementation as what NHRCs can legitimately do to facilitate and achieve the practical enjoyment of socio-economic rights by ordinary people.

### **1.8. Methodology of the study**

A study of this nature must necessarily rely on relevant academic and other material from diverse sources in order to dissect and understand the issues raised by the research questions. Consequently, alongside adopting qualitative tools such as surveys, field observations as well as, interviews to collect relevant information, data and materials from multi-disciplinary sources, the study utilizes theoretical, descriptive and comparative approaches to evaluate the available information, literature and materials collected before making deductions.

From the outset, the study embarks on the clarification of some dominant theoretical terms or concepts, such as ‘socio-economic rights,’ the ‘obligation of states to implement socio-economic rights’ and the facilitation role of ‘NHRIs.’ The study identifies and explains the meaning and context under which these terms are used, understood and evaluated in relation to the study’s objectives, with emphasis on the relevance and reality of socio-economic rights and the inextricable obligation on Commonwealth African states to implement these rights to improve the living condition of ordinary people and the equally fundamental role of NHRIs to advance states’ compliance with their responsibility to ensure the gradual and sustainable realisation of these rights.

These goals are followed by a descriptive survey of the socio-economic situation in Commonwealth African states and the existing international and national human rights legal and institutional framework for advancing the implementation of socio-economic rights across the continent. This survey was done not only to establish the basis for interrogating the responsibility of states but also to advance and support the hypothesis that NHRCs are better situated in comparative terms than other relevant public institutions to advance the progressive realisation of socio-economic rights in Commonwealth African states.

In doing so the study relied on a wide range of relevant primary and secondary sources, including international and regional human rights treaties, national

constitutions, textbooks, scholarly articles in journals, annual reports and other reports of NHRCs, as well as, some case law. The study also benefited from other relevant sources, including informed opinions and commentaries in magazines, newspapers, social bulletins, seminars, conferences and working papers, unpublished dissertations, and online resources from the internet. Thousands of pages of the materials and datasets from both primary and secondary sources were exhaustively scrutinized and reviewed over the period of the study on the strength of their material relevance not only to the numerous factual, legal and evidential issues raised by the study but also to support the deductions, findings and conclusions reached on the issues considered in each chapter of the study.

Apart from desktop research the study comprises some fieldwork in all the three countries in focus, that is, Nigeria, South Africa and Uganda. A major part of the fieldwork entailed conducting interviews with relevant stakeholders. Accordingly, interviews were carried out with members and management staff of the NHRCs, NGOs, human rights activists and other stakeholders, including ordinary people. In order to achieve the purpose of the study the interviews were conducted mostly with structured protocols and oral responses and the observations were collected.

In all, over 20 representatives of NGOs working in the field of socio-economic rights and individuals from different socio-economic backgrounds, and senior members of the NHRCs of the three focused countries were interviewed.<sup>30</sup> The NGOs and the stakeholders interviewed were purposely selected in terms of the relevance of their activities or positions to the study, although the selection of some of the individual participants was random. Thus, the quest for a dispassionate and reliable input limited the study to interviewing and interacting with NGOs considered credible and active in the field of socio-economic rights. This constraint accounts for the limited number of NGOs the study interacted with. For instance, in Nigeria only two NGOs, namely, the Social and Economic Rights Action Centre (SERAC) and the Socio-economic Rights and Accountability Project (SERAP) widely acknowledged as active in socio-economic rights advocacy and enforcement, were considered relevant. The interviews sought to extract candid views, experiences and perceptions on a wide range of issues,

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<sup>30</sup> The list of interviewees is provided as 'Appendix A' on page 442 of the thesis

including the relationship of these NGOs with the NHRIs, the institutional structure, level of independence as well as their activities, if any, effectiveness, impact and limitations in advancing socio-economic rights implementation.

Apart from the NGOs, interviews were carried out with members and staff of the NHRCs of Nigeria, South Africa and Uganda. Although the SAHRC allowed only a single middle level staff member to meet with the researcher, the Commission made up for this omission by requesting written questions to which it promptly provided written responses. Furthermore, the lack of access to sufficient oral testimonies from the SAHRC was largely obviated by the relative availability of substantial critical literature on the SAHRC and its activities.

In Nigeria, the researcher met with and held several interviews and discussion sessions with senior management staff of the Commission, including its Executive Secretary. In Uganda, although a secured appointment with some of the Commissioners was aborted at the last minute, the researcher met and interviewed very senior staff of the UHRC. Most interestingly, all the organizations, institutions and individuals interviewed cooperated and freely expressed their opinions, comments, arguments and submissions in response to the issues raised and the questions posed during the interview or discussion sessions.

The interviews, which were subjected to further analysis and verification against relevant literature and other available information, assisted in shedding significant light on the relative factors that enhance or delimit the effectiveness of the NHRCs under focus. Thus, as well as assisting in filling identified gaps and missing links in the existing literature and other documentary materials, the oral interviews and discussions further assisted in paving the pathway to the study's findings, conclusions and recommendations.

Finally, a study of this nature is expected to be descriptive, comparative, analytical as well as prescriptive. Hence, the descriptive approach is used in each of the relevant chapters to describe, establish and link the issues raised and discussed to the object of the study. The descriptive and comparative approaches are used in each country studies to describe and analyse the institutional structure of the existing NHRCs, its

implications for their effectiveness, the nature and impact of the strategies that they deploy and what they are able to achieve in advancing the implementation of socio-economic rights in the socio-political context of these countries.

From analysing the identified similarities and differences in institutional legal background, institutional structure, approaches and strategies, the study synthesises appropriate inferences on the factors that enhance or impair the role and effectiveness of NHRCs in advancing the domestic implementation of socio-economic rights. Finally, the observations, findings and conclusions from each of the country studies are pulled together to justify the recommendations on how NHRCs in Commonwealth African states can become effective in advancing the implementation of socio-economic rights at the national level.

## **1.9. Literature review**

The existence of a generous mass of materials on socio-economic rights and NHRIs is not disputed. Also readily available, but at a limited scope, are general materials specific to the NHRCs of Nigeria, South Africa, and Uganda. What appear grossly lacking are materials specific to the role of NHRIs in advancing the implementation of socio-economic rights in Africa. Therefore, to a reasonable extent, this research work constitutes an addition to the existing body of literature on the role of NHRIs in Africa. The study is original in context but, nevertheless, it relied to a reasonable degree on material sources from other jurisdictions to the extent that they are relevant for achieving the study objectives. This is in addition to references to the plethora of existing materials on the general and multi-dimensional discourses on human rights in relation to NHRIs.

As noted in the background section, the dominant theoretical concepts of this study are socio-economic rights and their realisation through the agency of NHRIs. Both concepts undoubtedly have received a considerable degree of scholarship. However, as is customary, scholars have treated the concepts and the emergent issues in ways and dimensions that are quite different from one another and also different from the focus of this study. For this purpose and on this score, the historical accounts about



the origin of socio-economic rights presented in the works of Donnelly,<sup>31</sup> van de Vyver,<sup>32</sup> Byrnes<sup>33</sup> Barak-Erez and Gross<sup>34</sup> are not directly relevant to this study. So also are the arguments on the nature and legitimacy of socio-economic rights, in the sense that the difficulties they highlight serve to contradict rather than advance the positive position that states must be held accountable to their international legal obligations to implement these rights irrespective of their nature or legal status in the domestic framework.

However, there is a consensus among scholars that socio-economic rights are indeed a genre of human rights alongside civil and political rights. Generally, regarded as second generation human rights, most scholars see these rights as intrinsically valuable for advancing and sustaining human wellbeing and dignity. For instance, Gewirth's essay not only captures the felt experiences of ordinary people, the millions who live in conditions of abject poverty with practically little and unstable access to the basic human necessities like food, water, shelter, healthcare and education, but also asserts that the poor have moral rights which impose correlative duties on states to assist the poor to overcome their conditions of poverty and inhuman existence. He further argues that this responsibility is far from being an imperfect duty of charity, humanity or social solidarity; it is a perfect, stringent and enforceable duty of justice.<sup>35</sup>

Beirne subtly denounces the greater attention often accorded to civil and political rights as opposed to socio-economic rights and further argues whereas, all rights are independent and indivisible, that socio-economic rights have more profound effect as agents for change since they affect the lives of the greatest number of people and thus, if promoted and protected, they could put pressure on a state to change its attitude

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<sup>31</sup> J Donnelly 'Human rights and dignity: an analytic critique of non-Western conceptions of human rights' (1982) 76 *American Political Science Review* 303-316.

<sup>32</sup> JD van de Vyver 'The biding force of economic and social rights listed in the Universal Declaration of Human Rights (2008) 30 *Hamline Journal of Public Law and Policy* 125.

<sup>33</sup> A Byrnes 'Second-class rights yet again? Economic, social and cultural rights in the report of the national human rights consultation' (2010) 33 *University of New South Wales Law Journal* 191.

<sup>34</sup> D Barak-Erez and AM Gross 'Do we need social rights? Questions in the era of globalization, privatization, and the diminished welfare state' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 8.

<sup>35</sup> A Gewirth 'Why rights are indispensable' (1986) 95 *Oxford University Journal* 327 332.

towards the implementation of all categories of human rights.<sup>36</sup> To Rittich, socio-economic rights are not just about the provisions of basic needs or safety nets for indigents; they also serve as proxies for egalitarian social values and operate as measures for engendering our commitment to relative social equality.<sup>37</sup> For Barak-Erez and Gross, fundamental rights cannot be compartmentalized into categories because all rights are social by nature since no rights have meaning outside the social context. Further, they assert that socio-economic rights are equally as important as civil and political rights and often the necessary precondition for the enjoyment of the latter.<sup>38</sup>

Related to these works are the scholarly works of Gauri, Minkler, and Heyns and Kaguongo that consider the significance of socio-economic rights in national constitutions. Gauri's exploratory work revealed that about 167 constitutions provide for socio-economic rights in one or another specific form, either as express rights or as directive principles.<sup>39</sup> He argues for the responsibility of states to implement these rights and asserts that even when socio-economic rights are configured as directive principles they still impose general responsibilities on states to implement them. Minkler, for his part, focuses on the relationship between the constitutional guarantee of socio-economic rights and the state's efforts to fulfil them in practice. After reviewing the efforts of different countries in this regard, he concludes that the implementation of socio-economic rights evidentially fares better in countries with concrete protection for these rights in their domestic legal framework.<sup>40</sup> Similarly, Heyns and Kaguongo surveyed the provision of socio-economic rights in African Constitutions and found that these rights are easily discernible either as substantive rights or fundamental objectives and directive principles of state policy in the

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<sup>36</sup> M Beirne 'Social and economic rights as agents for change' in C Harvey (eds) *Human rights in the community: rights as agents of change* (2005) 43.

<sup>37</sup> K Rittich 'Social rights and social policy: transformations on the international landscape' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 107 109.

<sup>38</sup> D Barak-Erez and AM Gross 'Do we need social rights? Questions in the era of globalization, privatization, and the diminished welfare state' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 8.

<sup>39</sup> V Gauri 'Social rights and economics: claims to health care and education in developing countries' in P Alston and M Robinson (eds) (2005) *Human rights and development. Towards mutual reinforcement* 65 72.

<sup>40</sup> L Minkler 'Economic rights and political decision making' (2009) 32 *Human Rights Quarterly* 368.

constitutions of virtually all African states.<sup>41</sup> Clearly, these arguments, particularly, on the nature, relevance and existence of socio-economic rights in the domestic legal framework of African states, resonate with the study's theoretical foundation on the socially transformative value of socio-economic rights and the need for African states to ensure their practical implementation. However, the views and arguments they offer consider the subject matter from perspectives that are different from this study. In particular, none of the articles considers links or establishes any relationship between socio-economic rights and NHRIs.

Michelman, Gargarella, Domingo, and Roux,<sup>42</sup> Gauri and Brinks,<sup>43</sup> and Langford<sup>44</sup> have examined the institutional relevance of the courts in adjudicating socio-economic rights. For instance, Michelman sees constitutionalizing socio-economic rights as something positive; nevertheless, he posits that this invariably results in making courts play a role they are not suitable for.<sup>45</sup> However, Michelman's leanings towards the non-justiciability of socio-economic rights are not shared by Gargarella, Domingo, and Roux.<sup>46</sup> For them, courts can be socially transformative when made to enforce socio-economic rights. Gauri and Brinks<sup>47</sup> and Langford<sup>48</sup> belong to the same school of thought that socio-economic rights are amenable to judicial actions and, in fact, are being successfully litigated in several countries across the globe. Shany also examines the issue of justiciability of socio-economic rights, but strictly from an international law perspective.<sup>49</sup> Christensen<sup>50</sup> Davies,<sup>51</sup> Gutto,<sup>52</sup> Mbazira, and

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<sup>41</sup> C Heyns and W Kaguongo 'Current human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 – 717.

<sup>42</sup> R Gargarella, P Domingo and T Roux *Courts and social transformation in new democracies: an institutional voice for the poor?* (2006) 20.

<sup>43</sup> V Gauri and DM Brinks (eds) (2008) *Courting social justice: judicial enforcement of social and economic rights in the developing world* 1.

<sup>44</sup> M Langford (ed) (2008) *Social rights jurisprudence: emerging trends in international and comparative law* 3.

<sup>45</sup> FI Michelman 'The constitution, social rights and liberal political justification' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 21 23.

<sup>46</sup> Gargarella et al (n 41 above) 20.

<sup>47</sup> V Gauri and DM Brinks (eds) (2008) *Courting social justice: judicial enforcement of social and economic rights in the developing world* 1.

<sup>48</sup> M Langford (ed) (2008) *Social rights jurisprudence: emerging trends in international and comparative law* 3.

<sup>49</sup> Y Shany 'Stuck in a moment in time: The international justiciability of economic, social and cultural rights' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 77.

<sup>50</sup> EC Christiansen 'Using constitutional adjudication to remedy socio-economic injustices: comparative lessons from South Africa' (2008) 13 *University of California Journal of International Law and Foreign Affairs* 364.

Pieterse<sup>53</sup> consider the issue of justiciability of socio-economic rights from a restrictive South African constitutional perspective and argue that adjudication is a veritable means of redressing the fundamental issues of social injustice and economic inequality in South Africa. Similarly, Mubangizi<sup>54</sup> examines the justiceability of socio-economic rights by comparing the practice in five African states; Ebobrah<sup>55</sup> and Ibe<sup>56</sup> present their arguments for and against the justiciability of socio-economic rights in terms of a specific focus on the Nigerian Constitution.

Arguably, this study agrees with the general view that the courts constitute important institutional mechanisms for advancing the implementation of socio-economic rights, since adjudication is a process available to both the courts and everybody, including NHRIs, to utilize to advance relevant objectives. All such related materials are relevant to this study, mostly for the sake of making a comparative analysis and reaching appropriate conclusions in relation to the existing institutional frameworks for advancing the realization of socio-economic rights. To that extent the relevance of related materials to the study is profound. However, as already explained, the role of the judiciary in advancing socio-economic rights is an insignificant part of this study. Indeed, one of the objectives of the study is to establish that as opposed to NHRIs the role courts can play to advance or achieve domestic implementation of socio-economic rights is limited. Therefore, there is a gap in the literature which stems from the greater emphasis on the institutional relevance of the courts to the exclusion of NHRIs in the existing discourse on achieving the practical implementation of socio-economic rights. This emphasis clearly limits the influence and utility of these important works in relation to the scope, purpose and outcome of this study.

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<sup>51</sup> DM Davies 'Socio-economic rights: the promise and limitations - the South African experience' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 192.

<sup>52</sup> SBO Gutto 'Beyond justiciability: challenges of implementing/enforcing socio-economic rights' (1998) 4 *Buffalo Human Rights Law Review* 79.

<sup>53</sup> M Pieterse, 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383.

<sup>54</sup> JC Mubangizi 'The protection/enforcement of socio-economic rights in Africa: lessons from the South African experience (2007) 15 *African Yearbook of International Law* 87-106.

<sup>55</sup> ST Ebobrah 'The future of economic, social and cultural rights litigation in Nigeria' (2007) 1 *College of Advance Legal Studies Review of Nigerian Law and Practice* 108 113.

<sup>56</sup> S Ibe 'Beyond justiciability: realizing the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 197.

The existing body of scholarship in relation to NHRIs is considerably great and still growing. However, like on every other contemporary issue, authors and commentators differ from one another in terms of the particular issues they address or the ideas and arguments they canvass. For instance, Cardenas's most recent book is a seminal work on NHRIs scholarship.<sup>57</sup> She presents a comprehensive overview of NHRIs worldwide, paying both quantitative and qualitative attention to the motivations for their creation, the institutional architecture, and their role as agents of accountability, as well as the essential parameters for assessing their effectiveness with practical examples of best practice on the one hand, and worst practice on the other, as lessons for tomorrow. Also, Goodman and Pelgram edited a collection of essays involving 13 different authors on NHRIs, which offer various insights into the role of NHRIs in state compliance with international human rights norms as well as in socializing domestic actors and institutions within the thematic framework of human rights, state compliance and social change.<sup>58</sup> Earlier, Hatchard, Ndulo and Slinn had also articulated the relevance of NHRIs in advancing states' accountability in relation to human rights and good governance in Commonwealth states.<sup>59</sup> These works are significant contributions to the general literature on the establishment, role, and effectiveness of NHRIs in different national and international jurisdictions.

Sidoti explores the relationship between NHRIs and the international human rights system and asserts the inextricable link between the reason for their existence and their roles as mechanisms for advancing the diffusion of international norms into domestic political and social systems. He argues, among other points, that NHRIs undoubtedly have become entrenched as inevitable actors and contributors to the development of international instruments and standard setting on human rights on the global stage.<sup>60</sup> In another contribution Cardenas examines the creation of NHRIs under different national and international political conditions in order to situate the

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<sup>57</sup>S Cardenas *Chains of justice: the global rise of state institutions for human rights* (2014) 3-4.

<sup>58</sup> R Goodman and T Pelgram 'Human rights, state compliance, and social change: assessing national human rights institutions' in R Goodman and T Pelgram (eds) (2012) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) p 1-28.

<sup>59</sup> J Hatchard, M Ndulo and P Slinn *Comparative constitutionalism and good governance in the Commonwealth* (2004) 210

<sup>60</sup> C Sidoti 'National Human Rights Institutions and the international human rights system' in R Goodman and T Pelgram (eds) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) 93.

motivations for their establishment and argues that NHRIs that are shaped by social forces outside the state are less influential on state behaviour.<sup>61</sup>

Similarly, Burdenkin,<sup>62</sup> Hucker,<sup>63</sup> Kumar,<sup>64</sup> Livingstone and Murray,<sup>65</sup> Mulgan,<sup>66</sup> Murray,<sup>67</sup> Reif,<sup>68</sup> and Smith<sup>69</sup> in their contributions examine the generic role of NHRIs and the formal factors for ensuring their effectiveness, otherwise called ‘the Paris Principles’, in terms of the establishment, composition, appointment, competence and responsibilities, guarantees of independence, mandate and powers, and quasi-jurisdictional authority. The central theme in most of these articles is to give unqualified endorsement to the Paris Principles as the barometer for measuring the effectiveness or otherwise of NHRIs. Reif, for instance, argues that these institutions cannot function effectively at the national level unless they are established and enabled to operate in strict compliance with the standards of the Paris Principles. This view also forms the basis of Whiting<sup>70</sup> and Scripati’s<sup>71</sup> assessment of the effectiveness or otherwise of the Malaysian and Indian NHRCs respectively.

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<sup>61</sup> S Cadenas ‘National human rights institutions and state compliance’ in R Goodman and T Pelgram (eds) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) 1.

<sup>62</sup> B Burdekin ‘Basic concepts of a national human rights commission: an international perspective’ in SI Rachagan and R Tikamdas (eds) *Human rights and the national commission* (1999) 65.

<sup>63</sup> J Hucker ‘Bringing rights home: the role of national human rights institutions’ in F. Butler (ed) *Human rights protection: methods and effectiveness* (2002) 29-24.

<sup>64</sup> CR Kumar ‘National human rights institutions and economic, social, and cultural rights: Toward the institutionalization and developmentalization of human rights’ (2006) 28 *Human Rights Quarterly* 755.

<sup>65</sup> S Livingstone and R Murray ‘The effectiveness of national human rights institutions’ in Simon Halliday and Patrick Schmidt (ed) *Human rights brought home: socio-legal perspective* (2004) 137.

<sup>66</sup> M Mulgan ‘Implementing international human rights norms in context: the role of a national institution’ (1993) 5 *Canterbury Law Review* 1.

<sup>67</sup> R Murray (2007) *The role of national human rights institutions at the international and regional levels: The experience of Africa* 3.

<sup>68</sup> LC Reif ‘Building democratic institutions: the role of national human rights institutions in good governance and human rights protection’ (2001) 13 *Harvard Law Review* 1.

<sup>69</sup> A Smith ‘The unique position of national human rights institutions: a mixed blessing?’ (2006) 28 *Human Rights Quarterly* 904.

<sup>70</sup> A Whiting, ‘Situating suhakam: human rights debate and Malaysia’s national human rights commission’ (2003) 39 *Stanford Journal of International Law* 72.

<sup>71</sup> V Sripati ‘India’s national human rights commission: a shackled commission?’ (2000) 18 *Buffalo International Law Journal* 3.

Scholars like Pelgram<sup>72</sup> and Okafor and Agbakwa<sup>73</sup> subtly disagree with the dominant conception of an ideal NHRI. While acknowledging the importance of the Paris Principles, they argue that clothing NHRIs in the formal architectural garb of the Paris Principles does not necessarily guarantee effective performance of responsibilities. Both authors examine the gap that exists between formal rules and accepted informal practices and conclude that the local social and political conditions under which NHRIs operate are crucial to their effectiveness and what they are able to achieve. For Okafor and Agbakwa the determinant factor in the effectiveness of NHRIs is how they are committed to empowering the ‘voices of suffering.’ By having no less than 18 recommendations, Murray’s detailed work is instructive on the criteria and factors for assessing the effectiveness of NHRIs. She argues that while the Paris Principles are an appropriate starting point, for assessing the effectiveness of NHRIs, they are neither sufficient nor exhaustive. According to her, this is because ‘they focus more on factors relevant to the establishment of such bodies, rather than how they perform once created.’<sup>74</sup> Even Reif in her recent contribution seems to have altered her original view on the sanctity of the Paris Principles as the conventional and convenient template for assessing the effectiveness of NHRIs. Her recent view seems to be that arguments about the extent to which different models of these institutions fit into the normative assumptions of the Paris Principles are becoming less relevant as more and more of these institutions keep emerging; noting that adopting a restrictive approach to the definition of NHRIs, indeed, may undermine other relevant factors in the implementation of human rights.<sup>75</sup>

There are other important materials on NHRIs in relation to different specific jurisdictions in the world. For instance, Carver focuses on the historical origin and proliferation of NHRIs in Central and Eastern Europe. In linking their creation to the domestic processes of constitutional reform, he explores the potential of these

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<sup>72</sup> T Pelgram ‘National human rights institutions in Latin America: politics and institutionalization law’ in R Goodman and T Pelgam (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 210.

<sup>73</sup> CO Okafor and SC Agbakwa ‘On legalism, popular agency and “voices of suffering”: The Nigerian national human rights commission in context’ (2002) 24 *Human Rights Quarterly* 662.

<sup>74</sup> R Murray ‘National human rights institutions: criteria and factors for assessing their effectiveness’ (2007) 25 *Netherlands Quarterly of Human Rights* 169-220.

<sup>75</sup> LC Reif ‘The shifting boundaries of NHRI definition in the international system’ in R Goodman and T Pelgam (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 52.

institutions to become agents of social change in the former communist states.<sup>76</sup> For their part, Renshaw and Fitzpatrick write on the evolution, relevance and justifications for the creation of NHRCs in the Asia Pacific Region.<sup>77</sup> Pelgram's contribution is on the transformative utility of NHRIs and their relationship with other institutions in Latin America.<sup>78</sup> Wouters and Meuwissen contributions featured comparative works of different authors on the European and international perspectives of NHRIs.<sup>79</sup> Peter summarizes the origin, types and functions of the NHRIs in some African countries.<sup>80</sup> Dike limits his work to the role, activities and performance of the Kenya National Commission on Human Rights.<sup>81</sup> Bossman evaluates the protective role of the Ghanaian Commission on Human Rights and Administrative Justice.<sup>82</sup> Walters's article concentrates on the role and activities of the Namibian Human Rights Commission.<sup>83</sup>

These materials all relate to the role, relevance and activities of NHRIs, either generally or in relation to different geographical jurisdictions or specific states. Thus, while these articles are quite informative and important their influence on this study is limited by several factors, including scope, jurisdiction and objectives.

There are also literary works in relation to the NHRCs of the focused countries of this study. For instance, Okafor, Agbakwa, Durojaye, and Mbelle are some of the authors with materials on the NNHRC. Okafor and Agbakwa's article examines the NNHRC's role, approach and achievements in advancing the rights of 'voiceless'

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<sup>76</sup> R Carver 'National human rights institutions in central and Eastern Europe: The Ombudsman as agent of international law' in R Goodman and T Pelgam (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 181.

<sup>77</sup> C Renshaw and K Fitzpatrick 'National human rights institutions in the Asia Pacific Region: Change agents under conditions of uncertainty' in R Goodman and T Pelgam (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 150.

<sup>78</sup> Pelgram (n 70 above) 210.

J Wouters and K Meuwissen (eds) *National Human Rights Institutions in Europe: Comparative and international perspectives* (2013) 1

<sup>80</sup>CM Peter 'Human Rights Commissions in Africa: Lessons and Challenges' in A Bosl and J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 351-374.

<sup>81</sup> C Dike 'Deflection or activism? The Kenya national commission on human rights in focus' (2006) 1 *Essex Human Rights Review* 40.

<sup>82</sup> A Bossman 'The protection role of the Ghana human rights commission' in BG Ramcharam (ed) *The protection role of national human rights institutions* (2005) 57.

<sup>83</sup> J Walters 'The protection and promotion of human rights in Namibia: The constitutional mandate of the ombudsman' in N Horn and A Bosl (eds) *Human rights and the rule of law in Namibia* (2008) 121.



people,<sup>84</sup> but it is not a major work on the Commission's activities with regard to advancing the implementation of socio-economic rights in Nigeria and is of limited relevance the study. Durujaye compares the NNHRC with the SAHRC in relation to their roles and effectiveness in advancing reproductive rights.<sup>85</sup> This work is also narrow in terms of focus and scope as against this study. This same qualification equally applies to Mbelle's article which is about the role of the NNHRC in advancing peace building in Nigeria.<sup>86</sup> These earlier studies touch on one of the institutional objects of this study, but leave a reasonable gap for the present study to fill.

With reference to Uganda, Hatchard, Makubuya, Matshekga, and Sakeggya are some of the authors that have published articles exclusively on the UHRC. Hatchard's article generally considers different aspects of the Commission, including its origin, powers, composition and functions; it does not deal with the Commission's practical works on socio-economic rights.<sup>87</sup> Mukubuya's article addresses perceived threats to the continuous existence of the UHRC through reviewing the implications of the attempt by Parliament to abolish the Commission and transfer its functions to the Inspectorate of Government.<sup>88</sup> The article gives an insight into the functioning of the UHRC but does not discuss that body's potential or actual role in advancing the implementation of socio-economic rights. Matshekga compares the Ugandan NHRC with the SAHRC in terms of their independence only and the extent to which they are able to exercise their powers and institutional independence.<sup>89</sup> Sekaggya considers the composition, powers, and functions of the Ugandan NHRC and the extent to which it has advanced its protective mandate over human rights violations in Uganda.<sup>90</sup> These

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<sup>84</sup> CO Okafor and SC Agbakwa (n 71 above) 662-685.

<sup>85</sup> E Durojaye 'Turning paper promises to reality: national human rights institutions and adolescents' sexual and productive rights in Africa' (2008) 26 *Netherlands Quarterly of Human Rights* 547.

<sup>86</sup> N Mbelle 'The national human rights commission of Nigeria: valuable but struggling to enhance relevance; in M Paarlevliet, et al (eds) *National human rights institutions in Africa: defenders of human rights, managers of conflict, builders of peace* (2005) 41.

<sup>87</sup> J Hatchard 'A new breed of institution: the development of human rights Commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission' (1999) 32 *Comparative and International Law Journal of South Africa* 28.

<sup>88</sup> AN Makubuya 'National human rights institutions under fire: the Uganda human rights commission on the brink' (2004) 10 *East African Journal of Peace and Human Rights* 78.

<sup>89</sup> J Matshekga 'Tootless bulldogs? The human rights commissions of Uganda and South Africa: a comparative study of their independence' (2002) 1 *African Human Rights Law Journal* 68.

<sup>90</sup> M Sekaggya 'The protection role of Uganda human rights commission' in BG Ramcharam (ed) *The protection role of national human rights institutions* (2005) 165-617.

articles are relevant in that, like this study, they deal with the UHRC. Otherwise their content, scope and targeted outcome are clearly different from those of this study.

Heyns, Sarkin, Newman, Liebenberg, Klaaren, Ebadolahi, Murray, and Thipanyane have specific articles on the SAHRC. Heyns's article discusses the potential role and effectiveness of the specific mandate of the SAHRC in monitoring state implementation of socio-economic rights under section 183(4) of the 1996 Constitution of South Africa.<sup>91</sup> Sarkin essentially reviews the legal provisions concerning the appointment of members to the constitutional Chapter 9 institutions, including the SAHRC and further argues on the need to reformulate the appointment process to guarantee greater independence and insulate the Commission from executive influence.<sup>92</sup> Newman espouses the outcome of the four succeeding exercises of the SAHRC's monitoring of the implementation of socio-economic rights.<sup>93</sup> Liebenberg proposes the normative framework that the SAHRC can use to identify violations of socio-economic rights when examining the information received pursuant to its primary mandate to monitor the implementation of socio-economic rights under section 183(4) of the 1996 Constitution of South Africa.<sup>94</sup>

Klaaren acknowledges the relevance of the powers of the South African Human Rights Commission under section 183(4) of the Constitution but argues that the violation approach adopted by the Commission to monitor the implementation of socio-economic rights makes the Commission act like an agency for the enforcement of human rights rather than one that should concentrate on promoting human rights. Hence, he proposes that that Commission should leverage the relevance of the Promotion of Access to Information Act of 2000 to advance its mandate to monitor and promote the implementation of socio-economic rights by the state.<sup>95</sup> Ebadolahi, in

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<sup>91</sup> C Heyns 'Taking socio-economic rights seriously: the "reporting procedure" and the role of the South African human rights commission in terms of the new constitution' (1999) 30 *De Jure* 195.

<sup>92</sup> J Sarkin 'Reviewing and reformulating appointment processes to constitutional (chapter nine) structures' (1999) 15 *South African Journal on Human Rights* 587.

<sup>93</sup> DG Newman 'Institutional monitoring of social and economic rights: a South African case study and a new research agenda' (2003) 19 *South African Journal on Human Rights* 189.

<sup>94</sup> S Liebenberg 'Violations of socio-economic rights: the role of the South African human rights commission' in P Andrews and S Ellmann (eds) *Post-apartheid constitution's perspectives on South Africa's basic law* (2001) 405.

<sup>95</sup> J Karen 'A second look at the South African human rights commission, access to information, and the promotion of socioeconomic rights' (2005) 27 *Human Rights Quarterly* 539.

his contribution, endorses the complementary role and relationship between the judiciary and the courts in enforcing socio-economic rights and argues that the courts would make greater progress in enforcing these rights if they apply the structural interdict remedy and work harmoniously with the SAHRC to implement their interdictory orders after litigation.<sup>96</sup>

Murray's earlier article examines the role of the SAHRC and other Chapter 9 institutions in advancing democracy, good governance and human rights in South Africa pursuant to their respective mandates.<sup>97</sup> Thipanyane evaluates the key challenges for securing the effectiveness of NHRIs in enhancing the socialization of universal human rights in Africa using the approach of the SAHRC as a paradigm. Finally, Klaaren's second work is a brief historiography of the South African Human Rights Commission after 10 years of its existence with emphasis on its origin, institutional structure, powers and functions.<sup>98</sup> Equally worthy of note is the recent comparative work of Okafor which, like this study, evaluates the institutional structure and relative effectiveness of the Nigerian, South African and Ugandan National Human Rights Commissions as agents of change and the voice of the oppressed majority, although limited in scope.<sup>99</sup>

These materials, articles and commentaries on the three NHRIs that this study focuses, are all relevant to the study, especially for evaluating and making relevant deductions on the institutional architecture, the material conditions and the operational environment of the Nigerian, South African and Ugandan NHRCs. However, like other articles that have been considered, the issues raised and considered in these works do not cover the specific gap and in the specific way that this study addresses the issues. Furthermore, none of these materials sets out to comprehensively examine the practical activities, effectiveness, and impact of each of

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<sup>96</sup> M Ebadolahi 'Using structural interdicts and the South African human rights commission to achieve judicial enforcement of economic and social rights in South Africa' (2008) 83 *New York University Law Review* 1565.

<sup>97</sup> C Murray 'The human rights commission et al: what is the role of South Africa's Chapter 9 institutions?' (2006) 9 *Potchefstroom Electronic Law Journal* 1-26.

<sup>98</sup> J Klaaren 'South African human rights commission' in S Woolman, M Bishop and J Brickhill (eds) *Constitutional Law of South Africa* (2012) 24c.

<sup>99</sup> OC Okafor 'National human rights institutions in Anglophone Africa' in R Goodman and T Pegrum (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 124-149.

the NHRCs of Nigeria, South Africa and Uganda in advancing the progressive realization of socio-economic rights in their respective jurisdictions. Clearly there is a major distinction to be drawn between the study and these materials, the content of which does not consider issues bordering on the role of national human rights institutions in advancing the implementation of socio-economic rights on the African continent.

Further contributions to the literature are the works of Kumar, Tigerstrom, Nowosad, and Kjaerum that deal directly with the issue of whether NHRIs have a role in advancing socio-economic rights. Accordingly, Kumar reflects of the social expectations from NHRIs and their responsibility in the realisation of socio-economic rights through the promotion of good governance and mainstreaming human rights in public administration.<sup>100</sup> Similarly, Tigerstrom argues that the responsibility of NHRCs to monitor and encourage states to comply with their international obligations under the ICESCR implicitly makes the promotion and protection of socio-economic rights an integral part of their mandates, whether or not this is formally expressed.<sup>101</sup> Nowosad advances a similar point of view based on the natural inclination for NHRCs in Latin America to assume a broader responsibility of promoting and protecting all categories of human rights, including socio-economic rights, even without express legal authority.<sup>102</sup> Kjaerum simply argues that NHRCs can be valuable partners with the state in the fulfilment of socio-economic rights, adding that ‘such cooperation can span from general advisory, monitoring and consultative activities, to other initiatives that can help bridge the gap between the government and civil society.’<sup>103</sup>

The utility of these materials to the study is undeniable but they suffer from being based on generalized assumptions not grounded in clear empirical findings regarding the practical activities of NHRCs on socio-economic rights. These findings are to the

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<sup>100</sup> CR Kumar ‘National human rights institutions and economic, social and cultural rights: toward the institutionalization and developmentalization of human rights’ (2006) 28 *Human Rights Quarterly* 755.

<sup>101</sup> Tigerstrom (n 25 above) 139.

<sup>102</sup> O Nowosad ‘National institutions and the protection of economic, social and cultural rights’ in BG Ramcharam (ed) *The protection role of national human rights institutions* (2005) 179 -192.

<sup>103</sup> M Kjaerum ‘National human rights institutions implementing human rights’ in M Bergsmo (ed) *Human rights and criminal justice for the downtrodden: Essays in honour of Asbjorn Eide* (2003) 631.

fulcrum of the present study. Furthermore, the authors approach is descriptive rather than comparative which is the perspective of this study. Finally, the robust literature on the role of NHRIs in advancing the implementation of socio-economic rights at the domestic level is acknowledged; however, the scope and focus of most of these publications are clearly narrow and objectively different from the present study. Most especially, none of them touches on the practical experiences and best practice of specific NHRIs, like the NHRCs of Nigeria, South Africa and Uganda, in advancing the implementation of socio-economic rights. These materials are limited in scope, jurisdiction, objective and outcome as against this study. Consequently, this study fills the identified gap in the existing literature.

### **1.10. Chapter outline**

The study comprises seven chapters. Each chapter deals with one or more of the issues presented by the thesis questions. Chapter 1 is essentially the introduction, which gives an insight into the motivation for the study. It focuses on the background statement of the study by analysing the theoretical basis for NHRCs to advance the domestic implementation of socio-economic rights. As well as elaborating on the purpose and scope of the study, the significance of the study, and the research questions, the chapter clarifies some of terms, provides the limitations to the study, and refers to the methodology applied as well as offers a detailed literature review. It ends with an outline of the chapters that constitute the entire study.

On a theoretical level chapter 2 considers socio-economic deprivation and the challenges before African states to implement socio-economic rights as a panacea. The chapter starts with arguments on the nature of socio-economic rights as a genre of substantive rights under international human rights law. This is followed by a consideration of the sources of socio-economic rights in Africa, the socio-economic challenges facing the continent, and the general and specific obligation to implement these rights at the national level. Finally, the chapter undertakes a brief survey of the existing policy, and the legal and institutional framework and mechanisms at the national and international level for advancing state implementation of socio-economic rights in Africa, and zeros in on the need to depart from traditional judicial action to

non-adjudicatory mechanisms and their potential for advancing socio-economic rights implementation in Commonwealth African states.

Chapter 3 considers the nature, characteristics and evolution of NHRIs in Africa. It also evaluates the Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights and provides a cursory survey of the extent they have influenced the institutional design of NHRCs across Africa. As well as examining the competence and responsibility of NHRCs to advance the implementation of socio-economic rights, the chapter considers the interrelationship between and the relative advantage of NHRCs over other relevant bodies, like the judiciary, PHRCs and NGOs, in advancing the realisation of socio-economic rights at the national level.

Chapter 4 examines in detail the role and effectiveness of the Nigerian National Human Rights Commission in advancing the practical implementation of socio-economic rights in the country. Among other issues, the chapter addresses the historical origin, establishment and structural characteristics of the Commission. It evaluates the nature, legal status and sources of socio-economic rights in Nigeria in relation to the express and implied mandate of the Commission. Furthermore, the chapter considers the practical efforts and effectiveness of the Commission in advancing the implementation of socio-economic rights in Nigeria, as well as the challenges. The chapter concludes with the argument that although the NNHRC has a legal mandate to advance socio-economic rights, it has largely been inactive in the discharge of this important responsibility due to a number of delimiting factors.

Chapter 5 considers the role and effectiveness of the South African Human Rights Commission in advancing the practical implementation of socio-economic rights in the country. Accordingly, it discusses the historical origin, establishment and structural elements of the Commission against the prescriptions of the Paris Principles. Furthermore, the chapter considers the legal sources of socio-economic rights as well as the special mandate of the Commission to advance the implementation of these rights before evaluating the practical measures taken by the Commission to advance socio-economic rights. Finally, the chapter notes that the SAHRC has the most comprehensive mandate to advance the implementation of

socio-economic rights in Africa but argues that although the Commission continues to discharge this mandate its impact has been minimal due to the challenges that it faces.

Chapter 6, the last of the case studies, also evaluates the role and effectiveness of the Uganda Human Rights Commission in advancing the practical implementation of socio-economic rights in the country. The chapter examines the historical origin, the establishment and the structural characteristics of the Commission in relation to the Paris Principles. It evaluates the nature, legal status and sources of socio-economic rights on which the Commission can predicate its mandate to advance socio-economic rights implementation in Uganda. Furthermore, the chapter equally evaluates the measures taken by the Commission to advance the practical realisation of socio-economic rights, the outcomes and the challenges limiting the Commission's effectiveness. The chapter notes that even without an express constitutional mandate over socio-economic rights, the UHRC has been very active in promoting and protecting socio-economic rights, although the outcome has been mixed.

As the last part of the study, chapter 7 summarizes the study's findings, and presents a conclusion and recommendations. Essentially, it offers an in-depth evaluation of the findings and conclusions deduced from the discussions and arguments of the thesis and makes both specific and general recommendations for enhancing the role and effectiveness of NHRCs in advancing the implementation of socio-economic rights. The specific recommendations apply to each of the three NHRCs of the study; the general recommendations apply to NHRCs generally across Commonwealth African states, and even beyond. Finally, the chapter advances the need for Commonwealth African states not only to give priority to socio-economic rights and improve peoples' general wellbeing but also to strengthen the normative and institutional framework for NHRCs in order to be able to execute their mandates on socio-economic rights effectively.

## CHAPTER TWO

### THE CHALLENGE OF ACHIEVING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS IN COMMONWEALTH AFRICAN STATES

#### 2.1. Introduction

Everyone needs adequate food, decent accommodation, quality education and healthcare in order to live a normal healthy life. Accordingly, it is self-evident that any state that denies its citizens access to the basic essentials of life is flawed and unjust. Generally, socio-economic rights are acknowledged as agents for change. They have potentials for achieving the redistribution of wealth and for improving the material conditions of people who live in the fringes of human existence.<sup>1</sup> Thus, it is safe to argue that the realisation of socio-economic rights by states is not just a necessity; it is a *sine qua non* for protecting ordinary people against material deprivation and to advance access to socio-economic justice.<sup>2</sup>

The fact that socio-economic injustice is pervasive in Commonwealth Africa cannot be denied. Despite the unity in human rights under international human rights law, socio-economic rights have largely not received serious attention from Commonwealth African states.<sup>3</sup> For instance, as consistently indicated by the UN Human Development Reports, socio-economic rights, especially of the most vulnerable groups such as the poor, women, children, the aged and those living with disabilities have been neglected by African states. As visible as these challenges are, most, if not all, Commonwealth African states have demonstrated a clear lack of political will to address the situation.

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<sup>1</sup> M Beirne 'Social and economic rights as agents for change' in C Harvey (ed) (2005) *Human rights in the community: rights as agents of change* 44 46.

<sup>2</sup> SO Ilesanmi 'Leave no poor behind: globalization and the imperative of socio-economic and development rights from an African perspective' (2004) 32 *Journal of Religious Ethics* 72.

<sup>3</sup> See the 1993 Vienna Declaration and Programme of Action on Human Rights adopted 25 June 1993: <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>. See also, the preamble to the African Charter, which asserts the indivisibility and universality of civil and political rights and economic, social and cultural rights in their conception, application and satisfaction.



This situation exists even though there is a clear recognition of the need to implement socio-economic rights by Commonwealth African states. Arguably, this is evident from a number of factors, including the wide-spread ratification of the relevant international treaties on these rights and the tremendous expansion of the normative and institutional framework for advancing the implementation of these rights.<sup>4</sup> What this situation implies is that the mere ratification of international treaties on socio-economic rights is not sufficient. There has to be compliance with the terms of these treaties through effective domestic implementation.<sup>5</sup> Such compliance entails ensuring that the norms and standards embodied in these treaties find concrete expression at the domestic level meaningfully to improve the lives and living conditions of ordinary people.<sup>6</sup>

This chapter considers the challenge facing Commonwealth African states in implementing socio-economic rights. Accordingly, it examines the socio-economic realities of Africa, and thereafter, proceeds to consider nature of socio-economic rights to establish their legal status and relevance under international human rights law. This is followed by a consideration of the sources of socio-economic rights in Commonwealth Africa. This is important; not only are sources the legal foundation of rights but the nature of the source determines the quality of the right and the manner in which it can be implemented through the national legal and policy frameworks.

Then the study examines the responsibility of states to implement these and considers the specific obligation to respect, protect, fulfil and promote socio-economic rights. Also considered in this segment are the concepts often associated with the implementation of socio-economic rights, that is, the concepts of ‘progressive realisation,’ the ‘minimum core obligation,’ and ‘available resources’ in relation to the responsibility and capability of states to implement these rights.

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<sup>4</sup> C Heyns ‘The African regional human rights system: The African Charter’ (2003-2004) 108 *Pennsylvania State Law Review* 679-702.

<sup>5</sup> B Simmons *Mobilizing for human rights: international law in domestic politics* (2009) 125 -126.

<sup>6</sup> M Dennis and D Stewart ‘Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?’ (2003) 98 *American Journal of International Law* 462 464.

The final part of the chapter evaluates the existing normative and institutional mechanisms, other than national human rights institutions, for advancing the progressive implementation of socio-economic rights in Commonwealth Africa. The essence is to consider the relative viability of these mechanisms and create an entry point for a consideration of role and relevance of NHRCs in advancing the domestic implementation of socio-economic rights. The chapter concludes with a summary and some insights into the next chapter.

## **2.2. Socio-economic realities of ordinary people in Commonwealth Africa**

Apart from the end to colonisation, the return to democratic rule in the last two decades by Commonwealth African states ranks as a major achievement on the African continent.<sup>7</sup> Lately, the economic outlook of Commonwealth African states is said to be improving.<sup>8</sup> These are significant developments, especially against the back-ground that democracy and good governance foster human rights and societal wellbeing.<sup>9</sup> Generally, human rights are concerned with human dignity, freedom, equality and accountability.<sup>10</sup> They serve to fulfil one basic goal: that people should have a claim to social arrangements that secure for all a life of dignity. As Agbakwa asserts, ‘governance ceases to be meaningful when the majority of the people are put in a situation where they cannot appreciate the value of life, let alone, enjoy its benefits.’<sup>11</sup>

In Commonwealth Africa the state is central to economic growth and development. Consequently, the wellbeing of ordinary citizens is inextricably linked to capacity of states to protect human rights and deliver basic services necessary for a dignified life. This means that the language and logic of human rights inherently obligate

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<sup>7</sup> PN Langa ‘The role of the constitution in the struggle against poverty’ in S Liebenberg and G Quinot (eds) *Law and poverty: perspectives from South Africa and beyond* (2012) 4 6.

<sup>8</sup> African Economic Outlook <http://www.africaneconomicoutlook.org/en/> (accessed April 8 2014).

<sup>9</sup> AM Abdellatif ‘Good governance and its relationship to democracy and economic development’ (2003) *Global forum III on fighting corruption and safeguarding integrity* 6.

<sup>10</sup> See the Preamble of the UDHR, which affirms that, ‘all human being are born free and equal in dignity and rights.’ Consequently, the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

<sup>11</sup> SC Agbakwa ‘Reclaiming humanity: economic, social, and cultural rights as the cornerstone of African human rights’ (2000) *5 Yale Human Rights and Development Law Journal* 177 181.

Commonwealth African states not only to acknowledge but also to respect and protect everyone's existence and inherent dignity.<sup>12</sup> Arguably, human dignity suffers in states where denial of socio-economic rights is profound. The Constitutional Court of South Africa poignantly declares:

Human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in (the Constitution). The realisation of these rights is also the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potentials.<sup>13</sup>

In the 1990, Africa ranked as the continent with most people living below the poverty line.<sup>14</sup> Two decades later, despite some remarkable gains in economic growth, little appears to have changed in the socio-economic reality of ordinary people on the continent. The statistics show that Africa has the Least Developed Countries (LDC) in the world.<sup>15</sup> Presently, it harbours 29 per cent of the world's 1.6 billion people living in multidimensional poverty<sup>16</sup> and between 29-33 per cent of the poorest billion people in the world.<sup>17</sup> According to the World Bank, although poverty is declining, Africa, and Commonwealth African states in particular, still has 'the highest poverty rate in the

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<sup>12</sup> S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 2-3.

<sup>13</sup> *Government of the Republic of South Africa v Grootboom* 2001 (4) SA 46 (CC) para 23.

<sup>14</sup> 'Human development report 1990' *United Nations Development Programme* available at <http://hdr.undp.org/en/reports/global/hdr1990>.

<sup>15</sup> The countries are Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Togo, Uganda, United Republic of Tanzania, and Zambia: available at UN List of Least Developed Countries <http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> (accessed 20 March 2014).

<sup>16</sup> United Nations Development Programme (UNDP) Report 2013 available at <http://www.undp.org/content/undp/en/home/librarypage/hdr/human-development-report-2013/> (accessed 8 April 2014).

<sup>17</sup> 'Oxford Poverty and Human Development Initiative' (OPHI) *Oxford University* available at <http://www.ophi.org.uk/wp-content/uploads/8-pager-13-May-internet.pdf?79d835> (accessed 7 June 2014).

world, with 47.5 percent of the population living on \$1.25 a day; this represents 30 percent of the worlds' poor.<sup>18</sup>

Poverty has been described as 'a human condition characterized by a sustained or chronic deprivation of the resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.'<sup>19</sup> Thus, poverty in Commonwealth African states is not just about income poverty. It includes constraints on liberty, choices, capability, and equality of opportunity.<sup>20</sup> It is also about lack of access to basic social services, such as adequate food, drinking water, housing, health care, and education, as well as the denial of opportunities to live a decent life and have greater freedom, autonomy, self-respect and dignity.<sup>21</sup>

The statistics further portray Africa as a continent with poor socio-economic welfare indicators. For instance, over 340 million people, reportedly, have no access to clean drinking water.<sup>22</sup> Despite remarkable progress full enrolments in primary education by 2015 remains a dream. According to Africa Learning Barometer, an estimated 61 million children of primary school age, that is, one out of every two children, have no access to basic education and, thus, will reach their adolescent years unable to read, write, or perform basic numeracy tasks.<sup>23</sup>

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<sup>18</sup> 'African development indicators' *World Bank*: 2012/2013 3 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/13504/9780821396162.pdf?sequence=1> (accessed 15 April 2014).

<sup>19</sup> Statement Adopted by the Committee on Economic, Social and Cultural Rights P 8, May 4, 2001, available at <http://www.unhchr.ch/tbs/doc.nsf/0/518e88bfb89822c9c1256a4e004df048?Opendocument>.

<sup>20</sup> AM Piccard 'The United States' failure to ratify the international covenant on economic, social and cultural rights: Must the poor be always with us?' (2010) *St. Mary's Law Review on Minority Issues* 1 6.

<sup>21</sup> MC Nussbaum and R West 'Jurisprudence and gender: defending a radical liberalism' (2008) 75 *University of Chicago Law Review* 985 994. She sees liberalism as enjoining the treatment of all human beings as having equal worth and deserving of equal respect in the distribution and enjoyment of social goods.

<sup>22</sup> UN water.org; <http://water.org/water-crisis/water-facts/water/>.

<sup>23</sup> JW van Fleet and K Watkins 'Africa Learning Barometer' available at <http://www.brookings.edu/research/interactives/africa-learning-barometer> (accessed 12 March 2014).

The healthcare challenge is enormous as well. Recent research carried out by the Economist reveals that Africa's healthcare delivery is precarious and characterized by inadequate infrastructure, skilled healthcare workers and crucial medicines, resulting in unequal access to treatment.<sup>24</sup> Furthermore, public spending on health is insufficient and, in the absence of public health coverage, the poorest Africans have little or no access to healthcare.<sup>25</sup> This situation is accompanied by a lack of access to the fundamental prerequisites of healthcare, that is, clean water, sanitation and adequate nutrition.<sup>26</sup> Furthermore, Africa alone, among the regions of the world, is not on track to cut child malnutrition by half by 2015.<sup>27</sup> The World Bank appreciates the relative progress the continent has made so far with respect to some of the MDGs, such as gender parity, primary school completion, access to safe water, and extreme poverty reduction; nevertheless, it asserts Africa visibly lags behind in the in health-related MDGs, particularly maternal mortality, with respect to the 2015 targets.<sup>28</sup> What is deducible from these statistics is the fact that despite expansions in the normative and institutional architecture for achieving the progressive implementation of human rights in the African human rights system, poverty stemming from the neglect, abuse and denial of socio-economic rights across the continent is widespread.

Poverty, Mubangizi asserts, 'is in itself not only a denial of human rights, it also erodes or nullifies the realisation of both socio-economic and civil and political rights.'<sup>29</sup> Viljoen asserts that poverty remains the 'greatest threat to and source of human rights violation in Africa.'<sup>30</sup> Obviously, poverty, and the deplorable socio-economic and socio-cultural

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<sup>24</sup> The Economist 'The Future of healthcare in Africa: A report from the Economist Intelligence Unit' at 4 available at [http://www.economistinsights.com/sites/default/files/downloads/EIU-Janssen\\_HealthcareAfrica\\_Report\\_Web.pdf](http://www.economistinsights.com/sites/default/files/downloads/EIU-Janssen_HealthcareAfrica_Report_Web.pdf) (accessed 14 March 2014).

<sup>25</sup> The Economist 'The Future of healthcare in Africa: A report from the Economist Intelligence Unit' at 4 available at [http://www.economistinsights.com/sites/default/files/downloads/EIU-Janssen\\_HealthcareAfrica\\_Report\\_Web.pdf](http://www.economistinsights.com/sites/default/files/downloads/EIU-Janssen_HealthcareAfrica_Report_Web.pdf).

<sup>26</sup> The Economist 'The Future of healthcare in Africa: A report from the Economist Intelligence Unit' at 4 available at [http://www.economistinsights.com/sites/default/files/downloads/EIU-Janssen\\_HealthcareAfrica\\_Report\\_Web.pdf](http://www.economistinsights.com/sites/default/files/downloads/EIU-Janssen_HealthcareAfrica_Report_Web.pdf).

<sup>27</sup> 'World development indicators' (WDI) *World Bank*: 2013 3.

<sup>28</sup> African development indicators (n 18 above) 149.

<sup>29</sup> Mubangizi 'Know your rights: exploring the connections between human rights and poverty reduction with specific reference to South Africa' (2005) 21 *South African Journal on Human Rights* 32.

<sup>30</sup> F Viljoen *International human rights law in Africa* (2012) 481.

factors it engenders,<sup>31</sup> are responsible for most of the human rights abuses that ordinary people, including women and children, continues to experience in their daily lives across Commonwealth Africa.<sup>32</sup> Thus overcoming poverty is important to the enjoyment of socio-economic rights.<sup>33</sup>

Sen has argued overcoming the scourge of poverty requires a surgical operation on the 'major sources of unfreedom,' which include political tyranny, poor economic opportunities, systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive states.<sup>34</sup> According to the 2013 HDI report, the top 15 countries that successfully reduced their deficit in the HDI even though their growth rate in income per capita averaged merely 1% to 2% in the last decade, did so by giving priority attention to 'state investment in peoples' capabilities, especially health, education and nutrition.'<sup>35</sup> However, a World Bank research shows that these issues for decades have remained within the 'low priority circle' of Commonwealth African states, coupled with weak responses and ineffective implementation of relevant policies.<sup>36</sup>

At this point the value of implementing socio-economic rights becomes a fundamental issue. Liebenberg argues, the value of socio-economic rights is not necessarily in the demand for the provision of socio-economic goods and services but 'on what they enable human beings to do and to be.'<sup>37</sup> Arguably, the primary and paramount interest of socio-economic rights is to improve the lives and living conditions of the vast majority of people in the world who are subjected to a ruinous and unedifying existence as a result of the failure of the state to respect and protect the right of every single person to live in

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<sup>31</sup> Such as violence, early or forced child marriages, female genital mutilation and denial of inheritance rights, which represent serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health. See Report of the Special Rapporteur on Health Paul Hunt UN Doc/ E/CN.4/2004/49 para 25.

<sup>32</sup> O Nnaemeka and J Ezeilo *Engendering human rights: Socio-economic realities in Africa* (2005) 5

<sup>33</sup> S Wilson and J Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' in S Liebenberg and G Quinot (eds) *Law and poverty: perspectives from South Africa and beyond* (2012) 222-223.

<sup>34</sup> A Sen *Development as freedom* (1999) 3.

<sup>35</sup> 'Human development report 2013' *United Nations Development Programme* 64 available at <http://hdr.undp.org/en/2013-report>.

<sup>36</sup> African development indicators (n 18 above) 149.

<sup>37</sup> S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1-2-3.

dignity and happiness.<sup>38</sup> Consequently, the implementation of socio-economic rights is not just a factor in achieving the eradication of poverty, it is also an important factor in restoring the dignity of the human person in societies, which remains a major challenge that virtually all states in Commonwealth Africa presently face.<sup>39</sup>

Opschoor argues that demands on states to utilize available resources to deliver nutritious food for the hungry, healthcare for the sick, education for the illiterate, decent shelter for the homeless, gainful jobs for the unemployed, social security for the aged, infirm, and vulnerable, and clean water for everybody cannot be equated to acts of favour. Rather, doing these things is a fulfilment of a legal duty to secure a life of dignity, freedom and equality for all and protect the poor and the vulnerable from living a dehumanizing existence.<sup>40</sup> Gewirth asserts that the duties imposed by rights are necessary burdens on the duty-bearer which limit his freedom of action by requiring that he conducts himself in ways that directly benefit the right-holder.<sup>41</sup>

Thus, as poverty and socio-economic deprivation continue to reduce the quality of life of ordinary people, Commonwealth African states must acknowledge the way forward is to accept their responsibility to implement socio-economic rights. Furthermore, relevant human rights institutions and social actors must continue to drive home the point that the non-translation of socio-economic rights into a reality in the lives of ordinary people in Commonwealth African states constitutes a grave injustice that must be addressed without further delay.<sup>42</sup> It is argued, these actions present the most viable way to overcome the scourge of poverty and the resultant socio-economic deprivation affecting ordinary people across the African continent generally, and Commonwealth African states, in particular.

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<sup>38</sup> M Dennis and D Stewart (n 6 above) 464.

<sup>39</sup> KR Hope 'The poverty dilemma in Africa: towards policies for including the poor' progress in development studies' (2004) available in <http://pdf.sagepub.com/content/4/2/127>.

<sup>40</sup> H Opschoor, 'Economic, social and cultural rights from an economist's perspective' in K Arts and P Mihyo (ed)(2003) *Responding to the human rights deficit: essays in honour of Bas de Gaay Forman* 73 80-81.

<sup>41</sup> A Gewirth 'Why rights are indispensable' (1986) 95 *Oxford University Journal* 327 332.

<sup>42</sup> KG Young 'Freedom from want and economic and social rights: frame and law' (2009) 24 *Maryland Journal of International Law* 182 192.

### 2.3. The nature of socio-economic rights

In formal terms, ‘socio-economic rights’ refers to the category of human rights that are concerned with improving human social and economic conditions, as enunciated in the Universal Declaration of Human Rights (UDHR) and, more specifically and elaborately, guaranteed as substantive rights, in the ICESCR and, to some extent, in other related treaties, like the African Charter. These treaties not only confer legal entitlements to socio-economic rights on every single individual but also impose a binding legal duty on state parties to ensure that people have equitable access to these rights through progressive implementation.<sup>43</sup>

Despite their universal legitimacy under international human rights law, some scholars remained doubtful of the legitimacy of socio-economic rights as against civil and political rights.<sup>44</sup> They argue that socio-economic rights, though desirable, cannot be legitimate human rights that impel a binding duty on states. Unlike civil and political rights, which are essentially rights of non-interference, socio-economic rights, being rights to provisions, require substantial resources and positive state action for their realisation.<sup>45</sup> Further, they argue that socio-economic rights are devoid of normative clarity and therefore, are judicially unenforceable;<sup>46</sup> asserting further that to subject such rights to judicial resolution is to draw the judiciary into the politics of determining among competing social priorities for scarce state resources, a responsibility it is effectively incompetent to perform.<sup>47</sup>

The arguments against the legitimacy of socio-economic rights are pragmatic, international jurisprudence and the practical adjudication of these rights in some national

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<sup>43</sup> MK Addo *International law of human rights* (2006) xxviii.

<sup>44</sup> M Cranston ‘Are there human rights?’ (1983) 112 *Daedalus: Human Rights* 1-17.

<sup>45</sup> A Flew ‘What is a right?’ (1979) 13 *Georgia Law Review* 1117 at 1135. In Cranston’s words: ‘the traditional political and civil rights are not difficult to institute. For the most part, they require governments and other people generally, to leave a man alone. The problem posed by claims to economic and social rights, however, are of another order altogether. How can governments of those parts of Asia, Africa and South America, where industrialization has hardly begun be reasonably called upon to provide social security and holidays with pay for millions of people who inhabit those places and multiply so swiftly?’

<sup>46</sup> D Beetham ‘What future for economic and social rights’ (1995) 18 *Political Studies* 41.

<sup>47</sup> FI Michelman ‘The constitution, social rights and liberal political justification’ in D Bara-Erez and A Gross (eds) *Exploring social rights: between theory and practice* (2011) 21 23.



jurisdictions has largely deflated their legal potency. Socio-economic rights as formulated may lack normative clarity or specificity, but they are as accepted and as important as civil and political rights, having evolved out of the same roots and assumed a common identity as indivisible, interrelated and interdependent.<sup>48</sup> Furthermore, both rationally and practically there is a consensus that negativity of obligations is not an ingredient exclusive to civil and political rights. Neither is positivity of obligations exclusive to socio-economic rights. Both civil and political rights and socio-economic rights generate negative and positive obligations, as well as costing money to realize, though the latter, in context may cost much more.<sup>49</sup> The question of resource dependency relates more to the degree to which states can progressively fulfil their obligation of results than to conduct, that is, failing to apply the available resources for the purpose. Apart from the fact that states have different capabilities to deliver on human rights generally, the implementation of aspects of socio-economic rights does not depend exclusively on the positive application of resources. Therefore, socio-economic rights can be implemented using the common legal and practical mechanisms for effecting the implementation of human rights generally, including approaches that require structured accountability in resource allocation and other policy initiatives toward the realisation of these rights.<sup>50</sup>

Furthermore, as Tasioulas argues, ‘whether a right exists in law is a question different from whether it is justiciable or (legally) enforceable.’<sup>51</sup> The fact that socio-economic rights exist as substantive legal rights in international treaties and bind all state parties to these treaties is no longer a matter for debate.<sup>52</sup> The issue of whether socio-economic rights are amenable to judicial or other means of enforcement is beyond doubt, at least in

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<sup>48</sup> The 1993 Vienna Declaration of Universality, indivisibility and interrelatedness of human rights; See also, the preamble to the African Charter on Human and Peoples’ Rights, which states that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and the satisfaction of economic, social and cultural rights is guaranteed for the enjoyment of civil and political rights.

<sup>49</sup> F Viljoen ‘The justiciability of socio-economic and cultural rights: experience and problems’ in Y Donders and V Volodin *Human rights in education, science and culture: legal developments and challenge* (2007) 53 90-97.

<sup>50</sup> A Klein ‘Judging as nudging: new governance approaches for the enforcement of constitutional social and economic rights’ (2008) 39 *Columbia Human Rights Law Review* 351.

<sup>51</sup> J Tasioulas, ‘The moral reality of human rights’ in TW Pogge (ed) *Freedom from poverty as a human right* (2007) 75 84.

<sup>52</sup> Dennis and Stewart (n 6 above) 514.

some jurisdictions.<sup>53</sup> Socio-economic rights, or aspects of them, have been brought before national courts and effectively litigated in several jurisdictions even where such rights are not expressly incorporated in the constitutional bill of rights.<sup>54</sup> However, the issue here is not about the justiciability of socio-economic rights as justiciability is but just one of the several means of advancing the domestic implementation of these rights.<sup>55</sup> The issue is about the relevance of these rights and the obligation of states to implement them, which bears little relevance, if at all, to theoretical arguments about their imprecise nature or legal status in domestic jurisdictions.

#### **2.4. Sources and legal status of socio-economic rights in Commonwealth African states**

In Commonwealth African states, socio-economic rights derive from a miscellany of sources, ranging from existing international treaties to national legislative and policy frameworks. Although the UDHR and the ICESCR are the major sources for socio-economic rights at the international level, several other significant sources contextualizing socio-economic rights have emerged over time. These new sources cut across international,<sup>56</sup> regional,<sup>57</sup> and national jurisdictions.<sup>58</sup> Arguably, the decentralization and contextualization of the legal sources of socio-economic rights at the international level are indeed, positive developments which create multiple

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<sup>53</sup> M Langford *Social rights jurisprudence: emerging trends in international and comparative law* (2008) 91-120.

<sup>54</sup> A. Nolan et al. 'The justiciability of social and economic rights' 15 *CHRGJ working paper* (2007)19.

<sup>55</sup> Y Shany 'Stuck in a moment in time: the international justiciability of economic, social and cultural rights' in D Bara-Erez and A Gross (eds) *Exploring social rights: between theory and practice* (2011) 77-83.

<sup>56</sup> The Convention on the Elimination of all forms of Racial Discrimination (CERD), opened for signature 21 December 1965 660 UNTS 195 (entered into force 4 January 1969); the Convention on the Elimination of all kinds of Discrimination against Women (CEDAW) opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); the Convention on the Rights of the Child (CRC), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); the Convention on the Rights of persons with Disabilities (CRPD), opened for signature 30 March 2007, ATS 12 (entered into force 3 May 2008).

<sup>57</sup> The European Social Charter (revised) opened for signature May 3 1996 CETS 166 (entered into force July 1 1999); the additional protocol to the American convention on human rights in the area of economic, social and cultural rights (the protocol of San Salvador) opened for signature November 17 1988, 28 ILM 156 (entered into force November 16 1999); the African Charter on Human and Peoples' Rights adopted 27/6/1981, entered into force 21/10/1986; The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11/7/2003, entered into force 25/11/2005; and the African Charter on the Rights and Welfare of the Child, adopted 11/7/1991, entered into force 29/11/1999.

<sup>58</sup> Social-economic rights are recognized in several domestic constitutions and laws across the world.

international jurisdictional platforms for holding states accountable to their socio-economic obligations.<sup>59</sup> Below are some of the known sources of socio-economic rights that apply to Commonwealth African states.

#### 2.4.1. International treaties and their interpretations

The UDHR and the ICESCR not only are the primary sources of socio-economic rights at the international level, they remain the main sources from which all the other socio-economic rights instruments and institutions derive inspiration.<sup>60</sup> The ICESCR not only guarantees socio-economic rights, it also imposes general and specific obligations on state parties to implement these rights.<sup>61</sup> The substantive socio-economic rights guaranteed by the ICESCR include the right to work,<sup>62</sup> the right to just and favourable conditions of work,<sup>63</sup> the right to form trade unions and to strike,<sup>64</sup> the right to social security, including social assurance,<sup>65</sup> the right to protection and assistance to the family, including assistance for mothers and children,<sup>66</sup> the right to adequate standard of living including adequate food, clothing and housing, and continuous improvement of living conditions,<sup>67</sup> the right to the enjoyment of the highest attainable standard of physical and mental health,<sup>68</sup> and the right to education.<sup>69</sup>

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<sup>59</sup> MK Mbondenyi 'Invigorating the African system on human and peoples' rights through institutional mainstreaming and rationalisation *selected works* (2009) 1- 45.

<sup>60</sup> The UDHR, though not a treaty is widely accepted as a binding instrument of international customary law. See JD van der Vyver 'The binding force of the economic and social rights listed in the Universal Declaration of Human Rights' (2008) 30 *Hamline Journal of Public Law* 1 7. Socio-economic rights proclaimed under the UDHR include, the right of everyone to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The following African States, namely Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Congo, Democratic Republic of Congo, Gabon, Guinea, Madagascar, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Somalia, and Togo have the UDHR expressly incorporated into their national constitutions. See BA Simmons 'Should states ratify? Process and consequences of the optional protocol to the ICESCR' (2009) 27 *Nordic Journal of Human Rights* 64-81 66.

<sup>61</sup> Article 2(1) of the ICESCR.

<sup>62</sup> Article 6 of ICESCR.

<sup>63</sup> Article 7 of ICESCR.

<sup>64</sup> Article 8 of ICESCR.

<sup>65</sup> Article 9 of ICESCR.

<sup>66</sup> Article 10 of ICESCR.

<sup>67</sup> Article 11 of ICESCR.

<sup>68</sup> Article 12 of ICESCR.

<sup>69</sup> Article 13 of ICESCR.

Apart from the UDHR and the ICESCR, the Convention for the Elimination of Racial Discrimination, (CERD),<sup>70</sup> the Convention on the Elimination of all kinds of Discrimination against Women (CEDAW),<sup>71</sup> the Convention on the Rights of the Child (CRC),<sup>72</sup> the Convention on the Rights of Persons with Disabilities (CRPD),<sup>73</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW),<sup>74</sup> provide and protect the socio-economic rights of specific, marginalised and vulnerable persons, such as women, children, persons living with disabilities, and migrant workers. Thus, they constitute international normative sources for these rights.

Also relevant is the jurisprudence that has so far emanated from the interpretations of these treaties by the various international treaty bodies such as the UN Committee on Economic, Social and Cultural Rights (CESCR),<sup>75</sup> the UN Committee on the Elimination of Discrimination against Women, (the UN Committee on CEDAW),<sup>76</sup> the UN Committee on the Convention on the Rights of the Child (the UN Committee on the Child),<sup>77</sup> and the UN Committee on the Convention on the Rights of People with Disabilities (the UN Committee on CERD).<sup>78</sup> These international treaty bodies have, through general comments<sup>79</sup> and recommendations,<sup>80</sup> provided normative clarity to

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<sup>70</sup> Opened for signature 21 December 1965 660 UNTS 195 (entered into force 4 January 1969) the Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, ATS 12 (entered into force 3 May 2008).

<sup>71</sup> Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>72</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>73</sup> Opened for signature 30 March 2007, ATS 12 (entered into force 3 May 2008).

<sup>74</sup> Opened for signature 18 December 1990, it entered into force 1 July 2003.

<sup>75</sup> Established under UN ECOSOC resolution 1995/17 28 May 1985 available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>.

<sup>76</sup> Established under article 2 of the Optional Protocol to CEDAW UN Doc./ARES/54/4 adopted 15/10/1999, entered into force 22/12/2000.

<sup>77</sup> Established under article 43 of the CRC.

<sup>78</sup> Established under article 34 of the CRPD.

<sup>79</sup> For instance, see UN CESCR General Comment 3: The Nature of States Parties' Obligations UN Doc.E/C/1991/23); UN CESCR General Comment 4: The Right to Adequate Housing UN Doc. FE/C/1992/23); UN CESCR General Comment 5: Persons with Disabilities Document E/1995/22); UN CESCR General Comment 6: The Economic, Social and Cultural Rights of Older Persons Document E/1996/22; UNCESCR General Comment 9 the Domestic Application of the ICESCR UN Doc. E/C.12/1998/24; UN CESCR General Comment 12: The Right to Adequate Food UN Doc.E/C.12/1999/5; UN CESCR General Comment 13: The Right to Education UN Doc.

socio-economic rights and the nature and scope of the obligations they entail, thereby dispelling notions of imprecision of standards often associated with these rights. The general comments and recommendations are regarded generally as authoritative interpretations of the respective substantive treaty provisions and thus constitute relevant sources for socio-economic rights.<sup>81</sup> Additionally, these international treaties and general comments serve as aids to the construction of regional,<sup>82</sup> sub-regional, and domestic legal instruments on human rights.<sup>83</sup> They also serve as guides to public bodies in exercising discretionary powers and to the utilization of a rights-based approach to the implementation of socio-economic rights.<sup>84</sup>

#### **2.4.2. African regional treaties and the emerging jurisprudence**

At the African regional level the African Charter is the most authoritative legal source for human rights.<sup>85</sup> In addition to affirming the indivisibility of human rights, the African Charter guarantees specific socio-economic rights, although on a lesser scale than the ICESCR. The socio-economic rights it provides for include the right to work under equitable and satisfactory conditions and to receive equal pay for equal work,<sup>86</sup> the right to enjoy the best attainable state of physical and mental health<sup>87</sup> and the right to education.<sup>88</sup> Although the right to shelter, the right to clean water, and the right to nutritious food are not expressly provided for by the African Charter, the African

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E/C.12/1999/10; UN CESCR General Comment 14: The Right to the Highest Attainable Standard of Health UN Doc. E/C.12/2000/4; UNCESCR General Comment 15: The Right to Water UN Doc. E/C.12/2002/11; and UN CESCR General Comment 18: The Right to Work UN Doc. E/C.12/GC/18UN.

<sup>80</sup> UN Committee on CEDAW General Recommendation 24 1999: On Women and Health; UN Committee on CEDAW General Recommendation 27 2010: On Older Women and Protection of their Human Rights; and UN Committee on General Recommendation 28 2010: On Core Obligations of states.

<sup>81</sup> Mechlem (n 25 above) 924-929.

<sup>82</sup> Viljoen (n 30 above) 325; article 60 of the African Charter .

<sup>83</sup> OVC Okene and BC Eddie-Amadi 'Bringing rights home: the status of international legal instruments in Nigerian domestic law' (2010) 3 *Journal of African and International Law* 409 413.

<sup>84</sup> W Nagan 'Implementing the African renaissance: making human rights compliance for the new millennium' in Ssenyonjo, M (ed) *30 years after the African Charter on Human and Peoples' Rights* (2004) 2.

<sup>85</sup> C Heyns *Human Rights in Africa* (2004) 106.

<sup>86</sup> Article 15 of the African Charter.

<sup>87</sup> Article 16 of the African Charter.

<sup>88</sup> Article 17 of the African Charter.

Commission says that they are inherent in and, thus, are available as part of the socio-economic rights the African Charter guarantees.<sup>89</sup>

Other African regional treaties from which socio-economic rights originate are the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>90</sup> which guarantees the right to education and training,<sup>91</sup> the right to economic and social welfare,<sup>92</sup> the right to health, including sexual and reproductive health,<sup>93</sup> the right to food security,<sup>94</sup> and the right to adequate housing for African women,<sup>95</sup> and the Protocol to the African Charter on the Rights and Welfare of the Child<sup>96</sup> which guarantees the socio-economic right to education<sup>97</sup> and the right to health for the African child.<sup>98</sup>

These treaties constitute primary sources within the African regional human rights system for the specific socio-economic rights they guarantee. They also complement the African Charter by obviating the limited expression of substantive socio-economic rights in that treaty. However, the African Charter remains the prominent source as even the sub-regional ECOWAS Court of Justice relies on it as the foundation for the human rights it adjudicates.<sup>99</sup> Nevertheless, as Viljoen elaborates, the extent to which the African Charter and other regional treaties can bear direct influence on the domestic human rights system depends on their legal status in the domestic legal framework.<sup>100</sup>

Similar to the UN human rights system, the jurisprudence arising from African regional human rights treaty bodies such as the African Commission, the African Court of Justice

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<sup>89</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* Communication no 1196/56; AHRLR 60.

<sup>90</sup> Adopted on 11 July 2003 and entered into force on 25 November 2005.

<sup>91</sup> Article 12 of the treaty.

<sup>92</sup> Article 13 of the treaty.

<sup>93</sup> Article 14 of the treaty.

<sup>94</sup> Article 15 of the treaty.

<sup>95</sup> Article 16 of the treaty.

<sup>96</sup> Adopted on 13 July 1990 and entered into force on 28 November 1999.

<sup>97</sup> Article 11 of the treaty.

<sup>98</sup> Article 14 of the treaty.

<sup>99</sup> ECOWAS Treaty, section 4(g).

<sup>100</sup> Viljoen (n 30 above) 525- 527.

and Human Rights, the Committee on the Rights and Welfare of the Child, and the ECOWAS Court of Justice developed from the exercise of their interpretative<sup>101</sup> and quasi-judicial mandates<sup>102</sup> constitutes a primary source for socio-economic rights in relevant cases.<sup>103</sup> For instance, both the African Commission<sup>104</sup> and the ECOWAS Court<sup>105</sup> have interpreted aspects of socio-economic rights under the African Charter, establishing the nature of the obligations of states, upholding the binding effect of the African Charter and the duty of African states to implement the socio-economic rights it guarantees.

It is through the interpretation of the African Charter that the norm has been established that socio-economic right to shelter, the right to clean water, and the right to food are part and parcel of the African Charter.<sup>106</sup> Furthermore, the liberal and positive jurisprudence of the African Commission on the exhaustion of local remedies has widened its door to the settlement of socio-economic rights disputes.<sup>107</sup> Furthermore, the Committee on the Rights and Welfare of the Child has both interpretative and quasi-judicial power. Thus, any jurisprudence that emanates from it constitutes a referential source for children's socio-economic rights in Africa.<sup>108</sup>

### 2.4.3. National constitutional and legislative framework

The effective protection of human rights generally not only depends on the extent to which states comply with their international human rights obligations but also the extent to which the rights are respected and protected in the domestic legal framework.<sup>109</sup> This

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<sup>101</sup> Article 45(3) of the African Charter.

<sup>102</sup> Article 47 of the African Charter.

<sup>103</sup> ECOWAS Treaty, section 4(g).

<sup>104</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* Communication no 155/96; (2001) AHRLR 60.

<sup>105</sup> *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria and Another* Case No ECW/CCJ/APP/0808 (2009).

<sup>106</sup> *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria and Another* Case No ECW/CCJ/APP/0808 (2009).

<sup>107</sup> F Viljoen 'Admissibility under the African Charter' in R Murray and M Evans (eds) *The African Charter on Human and Peoples' Rights: the system in practice 1986-2000* (2002) 62.

<sup>108</sup> Article 45(3) of the African Charter and article 42(c) of the African Charter on the Rights and Welfare of the Child mandate the African Commission and the Committee on the Rights and Welfare of the Child to interpret any provisions of their respective charters.

<sup>109</sup> M Sepulveda et al. *Human Rights Reference Hand Book* (2004) 443.

protection can be achieved through national constitutions or in some specific national legislation. As Gauri shows, socio-economic rights are expressly provided for in several national constitutions in different forms across the world,<sup>110</sup> including Africa.<sup>111</sup> Viljoen also notes that geographically, the reach of socio-economic rights is very wide in Africa: more than half African constitutions have these rights provided in one form or the other.<sup>112</sup> Socio-economic rights are also provided for and protected by legislation in several national jurisdictions. However, within the domestic hierarchy of norms, the constitution ranks above legislation as the most fundamental norm.<sup>113</sup> Consequently, socio-economic rights expressly guaranteed in national constitutions attract the greatest respect in the national legal framework.<sup>114</sup>

Viljoen advances the view that ordinary legislation is a better source of justiciable socio-economic rights than a constitution being more dependable in providing realistic redress or remedies and less vague than constitutional provisions.<sup>115</sup> Nevertheless, both are primary sources within the national legal frameworks for the socio-economic rights they guarantee and protect. However, the most limiting factor with regard to constitutions in relation to Commonwealth Africa is the fact that most existing constitutions do not expressly guarantee socio-economic rights as substantive rights. This limits the utility of national constitutions as primary sources for socio-economic rights.<sup>116</sup>

## 2.5. The legal responsibility to implement socio-economic rights

Sub-Saharan African states, as parties to the international treaties on socio-economic rights, bear the following legal obligations to implement socio-economic rights:

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<sup>110</sup> V Gauri Social rights and economics: Claims to health care and education in developing countries' in P Alston and M Robinson (ed) (2005) *Human rights and development: Towards mutual reinforcement* 65.

<sup>111</sup> C Heyns and W Kaguongo 'Current human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 – 717.

<sup>112</sup> Viljoen (n 30 above) 549.

<sup>113</sup> FI Michelman (n 47 above) 21.

<sup>114</sup> M Jean-Bernard 'National systems for the protection of human rights' in Symonides, J (ed) (2003) *Human rights: International protection, monitoring, and enforcement* 257.

<sup>115</sup> Viljoen (n 30 above) 457.

<sup>116</sup> F Viljoen (n 30 above) 552.



### 2.5.1. The general duty to implement socio-economic rights

The idea that every human right is characterized by a set of correlative, interrelated and interdependent obligations initially espoused by Shue,<sup>117</sup> further developed by Eide,<sup>118</sup> later adopted by the Committee on Economic, Social and Cultural Rights,<sup>119</sup> and further embraced by the African Commission in the well-known case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (SERAC case)*<sup>120</sup> has become firmly rooted in the normative frame of international human rights law. These are the obligation to *respect, protect, and fulfil* human rights. The African Commission added the obligation to *promote* as a distinctive duty, but this duty is otherwise stated to be implicit in the duty to fulfil.<sup>121</sup> Arguably, in my opinion, this view is correct, because each duty implies the other to some degree. Thus, fulfilling these rights also creates awareness about them. However, the taxonomy of four distinct obligations is also used in the South African constitutional framework.<sup>122</sup>

Coomans argues that these distinct obligations are useful not only for appreciating treaty obligations but also for deciding whether a state's action, policy and practice conform to any or all of these treaty obligations.<sup>123</sup> Ashford, similarly, argues that human rights are, at their core, claim rights with corresponding duties. Thus, 'they are justified claims to something, and they are justified claims against some duty bearer(s) to perform or refrain from some action.'<sup>124</sup> As duty bearers under the ICESCR and the African

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<sup>117</sup> Shue originally argues in his authoritative book that every human right entails correlative duties which are (i) duties to avoid depriving; duties to protect from depriving; and duties to aid the deprived. See H Shue *Basic rights, subsistence, affluence and the United States foreign policy* (1980)52.

<sup>118</sup> Eide adopted it in his 1987 Final report to the UN on the right to adequate food as a human rights UN Doc/CN.4/sub.2/1987/23: A Eide, C Krause and A Rosas (eds) *Economic, social and cultural rights: A textbook* (1995) 35-58).

<sup>119</sup> The Committee on Economic, Social and Cultural Rights adopted and applied this characterization in the interpretation of obligation of States under the ICESCR in General Comments 11, 13, 14, 15, 16, 17, 18 and 19.

<sup>120</sup> Communication no 155/96 AHRLR 60.

<sup>121</sup> GJH Van Hoef, 'The legal nature of economic, social and cultural rights: a rebuttal of some traditional views' in P Alston and K Tomasevski (eds) *The right to food* (1984) 97 106-108.

<sup>122</sup> Section 7(2) of the Constitution of the Republic of South Africa 1996 provides that the State must respect, protect, promote and fulfil the rights in the constitutional bill of rights.

<sup>123</sup> F Coomans, 'The Ogoni case before the African commission on human and peoples' rights' (2003) *52 The International and Comparative Law Quarterly* 749 754.

<sup>124</sup> E Ashford 'The duties imposed by the human right to basic necessities' in T Pogge (ed) (2007) *Freedom from poverty as a human right* 183 184.

Charter,<sup>125</sup> Commonwealth African states have primary responsibility to respect, protect, and fulfil socio-economic rights. Viljoen describes the duty to respect as ‘primary’ the duty to protect as ‘secondary’ and the duty to fulfil as ‘tertiary’,<sup>126</sup> which implies a hierarchical arrangement. What is to be respected, protected and fulfilled are the basic international norms and standards embodied in each of the socio-economic rights treaties states have ratified. These generic obligations, which encompass both negative and positive duties,<sup>127</sup> are considered as binding irrespective of the status of socio-economic rights in the domestic legal system.<sup>128</sup> The failure to comply with any of the treaty obligations constitutes a violation under international human rights law.<sup>129</sup> Most importantly, compliance with these obligations should result in the practical realization and enjoyment of socio-economic rights at the national level.

### **2.5.2. The obligation to respect socio-economic rights**

The obligation to respect requires states to refrain from interfering with the enjoyment of socio-economic rights.<sup>130</sup> According to the African Commission ‘the obligation to respect entails that the state should refrain from interfering in the enjoyment of fundamental human rights; it should respect rights holders, their freedom, autonomy, resources, and liberty of their action. Thus, with respect to social-economic rights, this means that the state must respect the free use of resources owned or at the disposal of the individual alone or in any form associating with others, including the household of the family, for the purpose of rights-related needs’,<sup>131</sup>

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<sup>125</sup> Section 1 states that parties to the African Charter ‘shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them’. Section 1 implies both the negative duty to respect, and the positive duties to protect, promote and fulfil.

<sup>126</sup> Viljoen (n 30 above) 461.

<sup>127</sup> IE Koch ‘Dichotomies, trichotomies or waves of duties?’ (2005) 5 *Human Rights Law Review* 81-103.

<sup>128</sup> Consequently, by Sections 27 of the Vienna Convention on the law of treaty, a state cannot adduce deficiencies in its own law to evade obligations it has undertaken under international law.

<sup>129</sup> Section 26 of the Vienna Convention on the law of treaties prescribes that every treaty in force is binding upon the parties to the treaty must be performed in good faith; Guideline 6 of the Maastricht Guidelines on the violation of social, economic, and cultural rights; The African Commission emphasized in the *SERAC case* (n 120 above) that in ratifying the African Charter, State parties committed themselves to achieving these four duties, which are non-derogable.

<sup>130</sup> A Eide et al (n 118 above) 36.

<sup>131</sup> The *SERAC case* (n 120 above).

The obligation to respect essentially imposes a negative duty of abstention, forbearance or non-interference.<sup>132</sup> It requires Commonwealth African states to refrain from doing anything, directly or indirectly, either by way of legislation, acts, policies, or practices that could deprive individuals, groups or communities from enjoying their socio-economic rights.<sup>133</sup> Conversely, the satisfaction of this duty requires states to adopt and implement positive legislation, policies and programmes that ensure the progressive realisation and enjoyment of socio-economic rights by the citizens.<sup>134</sup> Sub-Saharan African states not only must abridge the right of the citizens to public participation, they must also facilitate and create economic, social and political conditions that empower people to provide for themselves.

States must respect the rights of citizens to associate and organize freely so that citizens can freely assert their socio-economic rights entitlements from the state.<sup>135</sup> Further, when entering into bilateral or multilateral agreements with other states, international bodies, other entities and multinational corporations, Commonwealth African states must take into account their legal obligation to respect socio-economic rights.<sup>136</sup>

In sum, the obligation to respect socio-economic rights is violated, if a state, for instance, denies its citizens physical access to schools, healthcare, water, shelter, and electricity services;<sup>137</sup> or close down schools, universities or business premises for a prolonged

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<sup>132</sup> M Craven *The international convention on economic, social and cultural rights. A perspective on its development* (1995) 111.

<sup>133</sup> In *Velasquez-Rodriguez v Honduras* IACTHR Series C 4 (29 July 1988) para 175 the Inter-American Court elaborated that ‘This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.

<sup>134</sup> D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in D Brand and C Heyns (eds) *Socio-economic rights in the South Africa* (2005) 1 20-30.

<sup>135</sup> United Nations, *Economic, social and cultural rights: handbook for national human rights institutions: Professional training series 12* (2005) 23.

<sup>136</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 14 para 50.

<sup>137</sup> In *DRC v Burundi, Rwanda & Uganda* Communication No. 229/99, the African Commission concluded that the stopping of essential services in a hospital constituted a violation of the right to health.

period of time; and suspends or adopts laws<sup>138</sup> or policies that unjustifiably interfere with, abridge or terminate the enjoyment of existing socio-economic rights.<sup>139</sup> Arguably, these are frequent happenings in Commonwealth Africa. Only recently, universities in Nigeria were closed down for five months as a result of the state's failure to meet union demands for improved funding.<sup>140</sup>

### 2.5.3. The obligation to protect socio-economic rights

The obligation to protect socio-economic rights obliges states to prevent the violation of socio-economic rights, either by individuals or by non-state actors. Eide describes this duty as the 'most important aspect of state obligations.'<sup>141</sup> Starmer, on his part, premises its foundation on the fact that unrestrained 'acts of private individuals can threaten human rights just as much as the acts of state authorities.'<sup>142</sup> Van Hoef also argues that the obligation to protect makes it imperative for states to take steps through legislation or otherwise to 'prevent or prohibit others (third parties) from violating recognized rights and freedoms.'<sup>143</sup>

Like the negative duty to respect, the duty to protect compels different sub-streams of responsibility on states.<sup>144</sup> These include the enactment and implementation of appropriate laws to guarantee, outlaw or prevent the violation of socio-economic rights by the state, its agents or non-state actors to promptly and effectively respond to violation

<sup>138</sup> In *Naphtha v Schoeman* (2005) 1 BCLR 78 (CC) October, 2004, the Constitutional Court of South Africa held that the duty to respect the right of everyone to have access to adequate housing is breached by the provisions of the Magistrates' Courts Act, which allowed the sale of a person's house to satisfy a judgment debt, without judicial supervision.

<sup>139</sup> For instance, in holding Nigerian to be in breach of its obligation to respect the socio-economic rights of the Ogoni minority people in the *SERAC* case (n 120 above) the African Commission stated: 'At the minimum the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family, household or community housing needs.'

<sup>140</sup> Channels 'ASUU suspends strike after 5 months' available at <http://www.channelstv.com/home2013/12/17/asuu-suspends-strike-after-5-months/>.

<sup>141</sup> Eide et al (n 118 above) 37.

<sup>142</sup> K Starmer 'Positive obligations under the convention' in J Jowell and J Cooper (eds) *Understanding human rights principles* (2001) 139.

<sup>143</sup> GJH Van Hoef, (n 121 above) 108.

<sup>144</sup> Starmer (note 142 above) 146.

of socio-economic rights and to provide access to effective, appropriate and adequate legal and practical remedies for all persons who may suffer socio-economic rights violations.<sup>145</sup> The African Commission asserted this point in as follows: the duty to protect under the African Charter obliges the state to ‘protect right-holders against other subjects by legislation and provision of effective remedies.’<sup>146</sup> The obligation of the state includes taking measures to protect beneficiaries of the protected rights against political, economic and social interferences and maintaining legal frameworks that enable individuals to freely realize exercise or enjoy their rights and freedoms.<sup>147</sup> For instance, the state must ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their socio-economic rights and thus is responsible for violations that result from their failure to control the behaviour of non-state actors, as of matter of strict liability.<sup>148</sup> In *Commission Nationale des Droits de l’Homme et des Libertes v Chad*<sup>149</sup> the state had argued that it had no control over human rights violations committed by other entities. The African Commission held, if a state neglects to ensure the protection of the rights under the African Charter, this could constitute a violation even if the state or its agents are not the immediate cause of the violation.

Eide’s assertion that the duty to protect is the most important aspect of state obligations has profound implications for Commonwealth African states, where the combination of poor governance systems, escalating corruption, mismanagement of state resources, wrong-headed economic policies, and weak state institutions are causing socio-economic misery for millions of ordinary people.<sup>150</sup> Everywhere in Commonwealth Africa states the poor are exploited by employers, are unprotected by the state and, disproportionately

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<sup>145</sup> In *Amnesty International v Sudan* communication no: 48/90, 50/91, 52/91, 89/93 (1999), where it was alleged that civilians in areas of civil conflict were being subjected to summary extra-judicial executions, the African Commission held that ‘even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law.’

<sup>146</sup> The *SERAC* case (n 120 above).

<sup>147</sup> The *SERAC* case (n 120 above).

<sup>148</sup> The *SERAC* case (n 120 above).

<sup>149</sup> *Commission Nationale des Droits de l’Homme et des Libertes v Chad* Communication no 74/92 (1995).

<sup>150</sup> O Ezekwesili, ‘Africa development indicators: Silence and lethal how quite corruption undermines Africa’s development efforts’ (2010) vii.

bear the socio-economic cost of bad governance in the absence of social safety nets. At the same time their labour subsidises the wasteful lifestyle of a ruling and corrupt elite.<sup>151</sup> Domestic workers, the self-employed, civil servants, farm workers, street cleaners and factory workers, no group is adequately protected by the state against socio-economic exploitation.<sup>152</sup> Thus, the obligation to protect requires Commonwealth African states to ensure that private actors act in conformity with human rights obligations under the law and protect individuals' socio-economic rights from being violated by third parties, such as companies, multi-national corporations<sup>153</sup> and other private entities such as employers, landlords, teachers, nurses, doctors and any other person or entity whose conduct or activity is capable of violating an individual's socio-economic right.<sup>154</sup> Apart from taking appropriate measures to protect and prevent third parties from violating the socio-economic rights of others, Commonwealth African states must ensure, where such infringements occur, that there are credible and effective mechanisms for correcting or redressing such violations, including monitoring, investigation, prosecution, and other appropriate legal remedies for victims.<sup>155</sup>

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<sup>151</sup> A case in point is the recent revelation by the Public Protector that the President of South Africa spent 240 million rand to upgrade a security house in his private residence, while also benefiting personally from the apparent scam. Yet, this is a country where unemployment presently stands above 20 per cent and poverty and inequality have climbed to epidemic levels. See The Public Protector 'Secure in comfort: Report on the investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of public works at and in respect of the private residence of President Jacob Zuma at Nkandla in KwaZulu-Natal province 2013/14' available at [http://www.publicprotector.org/library%5Cinvestigation\\_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf](http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf).

<sup>152</sup> D du Toit (ed) *Exploited, undervalued-and essential: domestic workers and the realization of their rights* (2013) 5-9.

<sup>153</sup> R Herz, 'Holding multinational corporations accountable for human and environmental rights abuses' in D Barnhizer (ed) (2001) *Effective strategies for protecting human rights: Economic sanctions, use of national courts and international fora and coercive power* 263-264.

<sup>154</sup> A Nolan, 'Addressing economic and social rights violations by non-state actors through the role of the State: A comparison of regional approaches to the obligation to protect' (2009) 9 *Human Rights Law Review* 225 – 455. In the SERAC case (n 120 above) the African Commission specifically grounded violation of the African Charter against Nigeria on the factual and evidential failure of the Nigerian State to regulate and prevent the negative conduct and consequences of a private oil prospecting company.

<sup>155</sup> M Sseyonjo *Economic, social and cultural rights in international law* (2009) 24; AM Senda, 'The responsibility of States for actions of transnational corporations affecting social and economic rights: A comparative analysis of the duty to protect' (2009) 15 *Columbia Journal of European Law* 33.

#### 2.5.4. The obligation to fulfil socio-economic rights

The obligation to fulfil requires states to play a positive and practical role in ensuring the realisation and enjoyment of socio-economic rights by the citizens. According to Eide, the general obligation to fulfil in relation to socio-economic rights embodies three distinct but interrelated sub-strands of duties: duty to *facilitate* access to the enjoyment of socio-economic rights, duty to *provide* socio-economic rights to those who are unable to provide for themselves and duty to *promote socio-economic rights* through education and other means.<sup>156</sup>

The African Commission asserts that the duty to fulfil inspires ‘a positive expectation that states will move its machinery towards the actual realisation of socio-economic rights.’<sup>157</sup> Therefore, compliance with this obligation requires Commonwealth African states to adopt positive measures: legislative, administrative, budgetary, judicial, promotional and other measures, ranging from the regulation of the economy to direct provision of basic socio-economic infrastructure such as public schools, health care facilities, clean water, electricity and sanitation.

There seems to be consensus among scholars that the obligation to facilitate the enjoyment of socio-economic rights is more compelling on states under the ICESCR as against the obligation to provide socio-economic rights, which is more of a residuary responsibility and becomes obligatory only in circumstances where self-provision is impossible or difficult to attain as due to extreme poverty or other delimiting disabilities.<sup>158</sup>

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<sup>156</sup> Eide et al (n 118 above) 39.

<sup>157</sup> The *SERAC* case (n 120 above).

<sup>158</sup> M Sepulveda ‘The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights (2003) 242; Eide (n 118 above) 37; S Borelli ‘Positive obligations of states and the protection of human rights’ (2006) 15 *Interights Bulletin* 101-103; AD Olinga ‘The African Charter on Human and Peoples’ Rights and positive obligations’ (2006) 15 *Interights Bulletin* 117-120; C Mbazira ‘The enforcement of socio-economic rights in the African human rights system: Drawing inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa’s evolving jurisprudence’ unpublished PhD thesis, University of Pretoria, 2003 15.

In Commonwealth Africa, however, violation of socio-economic rights is endemic as only fractions of the population have access to the enjoyment of these rights. The majority lacks even the capability for self-provision and, therefore rely almost entirely on the state to rescue them from the scourge of poverty and socio-economic deprivation. Under such circumstances, it is argued that the obligation is more compelling for Commonwealth African states to treat both sides of the issue with equal seriousness by implementing sound social policies and programmes that facilitate peoples' access to the acquisition of basic education, the capability and a viable opportunity to live a meaningful life of dignity, as well as, allocating adequate resources for direct provision of socio-economic goods and services to all those who are incapable of providing for themselves. This conclusion clearly resonates with social policies that promote free and compulsory education, free access to a minimum supply of water, and free provision of healthcare to children, houses and social security to the aged and infirm, as well as payment of low tariffs for electricity consumption for those in severe need and who cannot afford economic rents on these services.

The associated obligation to promote requires states to raise the consciousness of people about the existence and benefits of human rights. The African Commission emphasizes that this obligation is necessary in order to break the circle of ignorance considered to be a main hindrance to the implementation and enjoyment of human rights across the African continent.<sup>159</sup> In the context of Commonwealth Africa where the language of human rights is generally, hardly spoken or understood,<sup>160</sup> even amongst the educated, the need to promote socio-economic rights across the full spectrum of the society, including judges, lawyers, legislators, administrators, public policy decisions makers and government employees remains fundamental.<sup>161</sup>

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<sup>159</sup> See the African Commission's recommendations on modalities for promoting human and peoples' rights available in <http://www.achpr.org>.

<sup>160</sup> CD Odinkalu 'Why more Africans don't use human rights language' (1999) *Human rights dialogue: Carnegie Council for Ethics in International Affairs* 1.

<sup>161</sup> Sepulveda et al (n 158 above) 434.



### 2.5.5. The specific duty to implement socio-economic rights

Human rights guaranteed under international treaties have to be implemented so that the right-holders can practically claim the benefits conferred. Therefore, the effective realisation and enjoyment of international human rights in any state generally depend on the extent to which these rights and the standards they embody are implemented by the state.<sup>162</sup> All international human rights treaties oblige states effectively to implement the human rights they guarantee at the national level.<sup>163</sup> For instance, article 2 of the ICSECR provides:<sup>164</sup>

Each State party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical to the maximum of available resources with a view to achieving progressively the full realisation of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative means.

As well as the ICESCR, the African Charter and other relevant treaties enjoin states to give practical effect to the socio-economic rights they guarantee.<sup>165</sup> Both instruments recommend the adoption of legislative means, in particular, and other means in general. Such other means could be administrative or judicial, as well as policy, economic, social, educational and promotional.<sup>166</sup> Although there is no stipulation regarding the preferred measure for securing the implementation of socio-economic rights, the UN CESCR enjoins, whatever measure is adopted, it must be adequate and effective.<sup>167</sup> The CESCR further emphasizes that domestication of socio-economic rights is desirable and even indispensable in certain circumstances.<sup>168</sup> Also, the South African Constitutional Court states that measures designed to implement socio-economic rights are unreasonable if

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<sup>162</sup> Sepulveda et al (n 158 above) 443.

<sup>163</sup> Article 2 of the ICCPR; article 2 of CEDAW; article 2 of CRC; and article 4 of CRPD.

<sup>164</sup> Article 2 of African Charter.

<sup>165</sup> Article 3 of the ICESCR; article 1 of the African Charter.

<sup>166</sup> Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights UN Document E/CN.4/1987/17 para 17; Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No 16 (Rev 1): The Committee on Economic, Social and Cultural Rights* (1991) <http://www.ohchr.org/english/about/publications/docs/fs16.htm>.

<sup>167</sup> CESCR General Comment 10 para 8.

<sup>168</sup> For instance, the prevention of discrimination in the provision of socio-economic rights is better achieved with framework legislation.

they do not address the needs of the ordinary people who are desperately in need of access to those rights.<sup>169</sup>

In addition to the legal duty to implement socio-economic rights, Commonwealth African states have committed themselves through solemn declarations to ensure the effective implementation of all human rights constituted in international treaties.<sup>170</sup> The ICESCR recognizes the financial and technical implications of socio-economic rights. Therefore, it enjoins states to seek development assistance and cooperation from developed countries to implement these rights. It is acknowledged that socio-economic rights cannot be decreed into existence but achieved progressively within the limits of available resources. Thus, although there is a clear legal duty on Commonwealth African states to implement socio-economic rights, the political will to comply with or translate such commitments into practical reality has always been the issue.

#### **2.5.6. The standards of ‘progressive realisation’ and ‘availability of resources’**

The implementation of socio-economic rights requires states to direct available resources towards the *progressive realisation* of these rights. The fact that socio-economic rights are subject to gradual or progressive implementation clearly means that states do not bear immediate responsibility to ensure the full realisation of socio-economic rights.<sup>171</sup> Thus, Commonwealth African states are at liberty to implement socio-economic rights at a pace allowed by the maximum of resources at their disposal. This being so, it means that expected outcomes cannot be uniform but relative to the degree of resources that are actually and efficiently committed by each state to the implementation of these rights.<sup>172</sup>

However, progressive realisation means that socio-economic rights can fully be achieved over time. According to the CDESCR, the concept of progressive realisation imposes a

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<sup>169</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (2001) 1 SA 46; CC (2000) BCLR 1169 (CC) para 41.

<sup>170</sup> Grand Bay (Mauritius) Declaration and Plan of Action (1999); the Kigali Declaration (2003); and the Solemn Declaration on Gender Equality in Africa (2004).

<sup>171</sup> CDESCR General Comment 3 para 10.

<sup>172</sup> A Chapman, and S Rusell, *Core obligations: building a framework for economic, social and cultural rights* (2002) 7.

‘specific and continuing’ or ‘constant and continuing’,<sup>173</sup> duty on states ‘to move as expeditiously and effectively as possible’ towards the full realisation of socio-economic rights.<sup>174</sup> Fundamentally, progressive realisation does not allow for any regressive measures.<sup>175</sup> Furthermore, the CESCR emphasizes that some degree of socio-economic rights, such as the minimum core obligations and non-discriminatory provisions, are immediately realizable.<sup>176</sup> Equally worthy of note is the enactment of framework legislation on socio-economic rights, which can be done with minimal financial costs and delay.<sup>177</sup>

While availability of resources is critical and may bear on the level of implementation of socio-economic rights,<sup>178</sup> the resource equation does not detract from the treaty obligation on Commonwealth African states to move effectively and expeditiously towards the full realisation of socio-economic rights.<sup>179</sup> In *Purohit v Gambia* (*Purohit* case) the African Commission held that the fulfilment of the state’s obligation regarding the right to health is determined by considering the fact whether a state has taken ‘concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.’<sup>180</sup> This decision may imply that states need not do more than what the maximum of available resources can afford it is simply unacceptable for Commonwealth African states with a relatively poor resource base to do nothing to improve their resource situation. In the first place it is incumbent on them to mobilize all available resources, including financial,

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<sup>173</sup> CESCR General Comment 15 para 18.

<sup>174</sup> CESCR General Comment 12 para 44.

<sup>175</sup> The CESCR has cautioned that such measures ‘would require the most careful consideration and would need to be fully justified by reference to the totality of rights provided for in the covenant and in the context of the full use of the maximum available resources.’ See CESCR General Comment 3 para 10.

<sup>176</sup> Sections 2(2) of the ICESCR enjoins against discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

<sup>177</sup> M Ssenyonjo ‘Justiciability of economic and social rights in Africa: General overview, evaluation and prospects’ (2004) 9 *East African Journal of Peace and Human Rights* 1 24-25.

<sup>178</sup> G Erasmus ‘Socio-economic rights and their implementation: The impact of and international instruments’ (2004) 32 *International Journal of Legal Information* 243 253-254.

<sup>179</sup> CESCR General Comment 3 para 9.

<sup>180</sup> Communication no. 241/2001; (2003) AHRLR 96 para 84.

natural, human, technical, technological, and informational resources,<sup>181</sup> from both domestic and external sources, such as taxation, export earnings, and appropriate development levies and assistance, to implement socio-economic rights. Furthermore, Commonwealth African states can seek co-operation and resource assistance from richer states, both within and outside the continent. Richer states theoretically are obliged to provide such assistance,<sup>182</sup> although no such legal duty on richer states to provide development assistance to poor or developing countries is yet to be clearly established.<sup>183</sup> Consequently, reliance on unreliable external resources can only be taken as complementary to mobilizing and efficient utilization of domestic resources.

In any event, it has been stated that a lack of adequate resources in itself is not an excuse for a state to refrain from taking specific, concrete and targeted steps towards the implementation of socio-economic rights. As the CESCR has emphasized, where lack of resources becomes an issue, a state must demonstrate that every effort has been made to use all available resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>184</sup> In other words, states with limited resources must prioritize their expenditure in favour of socio-economic rights.<sup>185</sup>

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<sup>181</sup> RE Robertson, 'Measuring State compliance with the obligation to devote the "maximum available resources" to realizing economic, social, and cultural rights' (1994) 16 *Human Rights Quarterly* 693-698.

<sup>182</sup> CESCR General Comment 3 para 14: 'international cooperation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States.'; F Coomans 'The extra-territorial scope of the International Covenant on Economic, Social and Cultural Rights in the work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review*, 1-35 27; O De Schutter; et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', (2012) 34 *Human Rights Quarterly* 1084-1169.

<sup>183</sup> P Alston and G Quinn 'The nature and scope of states' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156-229 at 186-97; D Jamieson 'Duties to the distance: aid, assistance and interventions in the developing world' (2005) 9 *The Journal of Ethics* 151 166-168; M Sepúlveda, 'The obligations of "international assistance and cooperation" under the International Covenant on Economic, Social and Cultural Rights: A possible entry point to a human rights based approach to Millennium Development Goal 8' (2009) 13 *International Journal of Human Rights* 86-109; M Hesselman 'Sharing international responsibility for poor migrants? An analysis of extra-territorial socio-economic human rights law' (2013) 15 *European Journal of Social Security* 187-194.

<sup>184</sup> CESCR General Comment 3 para 10.

<sup>185</sup> Section 10(3) of the Protocol to the African Charter on the Rights of Women in Africa admonishes African states to reduce military expenditure significantly in favour of spending on social development in general and the promotion of women rights in particular.

Furthermore, socio-economic rights are not necessarily entirely claims to the free provision of goods and services. Although this forms part of the obligation to fulfil in residuary circumstances, the primary burden on states is more the creation of the right socio-economic environment for development, implementing the right policies and programmes with a focused attention on fair and equitable distribution of national income and the facilitation of everyone's access to these rights.<sup>186</sup> In Commonwealth Africa it appears that the tension between socio-economic rights and implementation is not the result of an absolute lack of resources but turns more on other factors, including lack of political will or commitment, the rampant misapplication or misdirection of available resources to funding unnecessary military expenses and the kleptomaniacal character of public office holders and the governing elites.<sup>187</sup>

#### **2.5.7. The minimum core obligation**

It is often assumed that a major yardstick for the implementation of socio-economic is the availability of resources. However, because states possibly can claim a lack of resources as an alibi to shield them from criticism for their failure to implement socio-economic rights, the CESCRC adopted the minimum core obligation principle to thwart the use of a lack of resources as an excuse to avoid the effective implementation of socio-economic rights.<sup>188</sup> Generally, the minimum core principle imposes on every state a duty to 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' guaranteed by international treaties on socio-economic rights. According to CESCRC, 'a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most

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<sup>186</sup> C Apodac, 'Measuring the progressive realisation of economic and social rights' in S Hertel and L Minkler (eds) *Economic rights conceptual, measurement, and policy issues* (2007) 165. Also in *Government of the Republic of South Africa v Grootboom & Ors*, (note 147 above) para 78-79), the Constitutional Court held that the obligation to fulfil socio-economic rights involves in part adopting and implementing a reasonable and workable national plan for progressive meeting the housing needs of everybody including the vulnerable poor.

<sup>187</sup> SC Agbakwa (n 11 above) 189.

<sup>188</sup> C Mbazira 'Translating socio-economic rights from abstract rights to fully fledged individual rights: Lessons from South Africa' (2006) 12 *East African Journal of Peace and Human Rights* 183.

basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.<sup>189</sup>

As Bilchitz notes the concept simply underscores the fact that it is unconscionable to allow people to live without sufficient resources to maintain their survival.<sup>190</sup> To him, the minimum core ‘represents the standard of socio-economic provision necessary to meet peoples’ minimum needs.’<sup>191</sup> It is the lowest level of provision that is considered acceptable.<sup>192</sup> Its importance lies in its objective which, as Mbazira states, is to translate rights ‘from abstract entitlements to concrete rights that guarantee concrete individual goods and services.’<sup>193</sup>

Dankwa, Flinterman, and Leckie argue that every state that accepts international human rights obligations consents to remain bound by ‘the basic minimum obligations under all circumstances, including during periods characterized by resource scarcity.’<sup>194</sup> Thus, the duty to provide irreducible essential levels of each socio-economic right is not subject to progressive realisation.<sup>195</sup> It is immediate and binding on states ‘regardless of its level of economic development’<sup>196</sup> and ‘irrespective of the availability of resources, or any other factors and difficulties.’<sup>197</sup> Even if a state is in serious financial difficulty or strained

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<sup>189</sup> UN CESCR General Comment 3 para 10; Committee on Economic, Social and Cultural Rights General Comment 12 para 28; UN CESCR General Comment 14 para 18.

<sup>190</sup> D Bilchitz, ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence (2004) 19 *South African Journal of Human Rights* 15.

<sup>191</sup> D Bilchitz, ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 119 *The South African Law Journal* 484 487.

<sup>192</sup> G Bueren ‘Combating child poverty – human rights approaches’ (1999) 21 *Human Rights Quarterly* 205.

<sup>193</sup> Mbazira (n 188 above) 199.

<sup>194</sup> V Dankwa; C Flinterman, and S Leckie, ‘Commentary to the Maastricht guidelines on violations of economic, social and cultural rights’ (1998) 20 *Human Rights Quarterly* 717.

<sup>195</sup> E Brems, ‘Human rights: minimum and maximum perspectives’ (2009) 9 *Human Rights Law Review* 349 355.

<sup>196</sup> Limburg Principles (n 166 above) para 25–28.

<sup>197</sup> The Maastricht guidelines on violation of economic, social and cultural rights paras 9–10 available at [http://www.humanrightsimpact.org/resource-database/publications/resources/view/48/user\\_hria\\_publications/](http://www.humanrightsimpact.org/resource-database/publications/resources/view/48/user_hria_publications/) (accessed 12 January 2011)

circumstances<sup>198</sup> it must strive to ensure that basic socio-economic rights and services are fulfilled, especially for the vulnerable members of the society.<sup>199</sup>

The CESCR has defined minimum core obligations of states with respect to the right to education, the right to adequate food, the right to the highest attainable standard of health, the right to water, and the right to work.<sup>200</sup> Commonwealth African states therefore, are bound to meet the minimum core obligations of each of those rights for their citizens. The extent to which they have done so is a matter for empirical evaluation. However, in South Africa, the Constitutional Court was not persuaded by the minimum core precept and, instead, endorsed the reasonableness approach to the provision of socio-economic rights. Though this approach has attracted some criticisms,<sup>201</sup> it has also been justified within the context of the provisions of the South African Constitution.<sup>202</sup>

Nevertheless, the concept of ‘minimum core’ obligations is useful for achieving the prioritization and channelling of resources towards fulfilling socio-economic rights for everyone in a developing continent like Africa where there is a constant tension between available resources and mismanagement of these resources. Indeed, under the minimum core obligation, even the poor and the most vulnerable are assured of enjoying some degree of the basic essentials for a life of dignity. A failure to meet its contents

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<sup>198</sup> According to the CESCR ‘even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant right under the prevailing circumstances.’ See CESCR General Comment 6 para 11.

<sup>199</sup> R Balakrishnan and D Elson ‘Auditing economic policy in the light of obligations on economic and social rights’ (2008) 5 *Essex Human Rights Review* 16.

<sup>200</sup> CESCR 12: The right to adequate food, E/C.12/1999/5; 6 *International Human Rights Report* 902 (1999) para 8; UN CESCR Comment 13: The right to education, E/C.12/1999/10; 7 *International Human Rights Report* 303 (2000) para. 57; CESCR General Comment 14: The right to the highest attainable standard of health, E/C.12/2000/4; 8 *International Human Rights Report* 1 (2001) paras 43 and 44; CESCR General Comment 15 (2002): The right to water, E/C.12/2002/11; 10 *International Human Rights Report* 303 (2003) para. 37; CESCR General Comment 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, E/C.12/GC/17; 13 *International Human Rights Report* 613 (2006) para. 39; and CESCR General Comment 18 (2006): The right to work, E/C.12/GC/18; 13 *International Human Rights Report* 625 (2006) para.31 Minimum/Maximum Perspectives 355.

<sup>201</sup> D Bilchitz (n 190 above) 484; J Dugard, ‘Twenty years of human rights scholarship and ten years of democracy’ (2004) 20 *South African Journal of Human Rights* 345 348.

<sup>202</sup> K Lehmann ‘In defence of the constitutional court: litigating socio-economic rights and the myth of the minimum core’ (2006-2007) 22 *American University International Law Review* 163 182.

constitutes the severest deprivation of socio-economic rights, particularly among the poor and vulnerable who, because they cannot on their own provide for themselves, depend on the state for provision.

## **2.6. International mechanisms for advancing socio-economic rights in Commonwealth Africa**

Apart from national human rights institutions, the implementation of socio-economic rights is driven in several Commonwealth African states through a mixed-bag of mechanisms, some of which are contentious. While some of these mechanisms are treaty-based and restricted in terms of jurisdiction, others are existing institutional measures adopted within the international human rights system to advance the implementation of human rights. Though the existing mechanisms are all operational, recurrently, issues are raised concerning their efficacy in relation to their suitability for advancing the implementation of socio-economic rights.

### **2.6.1. The individual complaint procedures**

Presently, there are eight international treaties that provide for individual complaint procedures under the UN human rights system.<sup>203</sup> The following are directly relevant for advancing socio-economic rights implementation: the new Optional Protocol to the ICESCR (OP-ICESCR);<sup>204</sup> the Optional Protocol to the CEDAW;<sup>205</sup> Article 14 of CERD; Section 77 of CMW; and the Optional Protocol to CRPD.<sup>206</sup>

After exhausting all available local remedies, individuals from states that are parties to these treaties can lodge a complaint against their states before the treaty bodies or Committees supervising these treaties over the violation of their protected socio-

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<sup>203</sup> See United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 30 March 2014). Others are the First Protocol to the ICCPR, Article 28; the CAT, Article 17(1), and the International Convention for the Protection of All Persons from Enforced Disappearance, Article 26.

<sup>204</sup> Article 1(1) of the Optional Protocol to the ICESCR available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> (accessed 14 April 2014).

<sup>205</sup> Article 1(1) of the CEDAW available at <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm> (accessed 14 April 2014).

<sup>206</sup> Article 1 of the CRPD available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx> (accessed 14 April 2014).



economic rights.<sup>207</sup> Once the treaty body finds the complaint admissible it will be transmitted it to the state party for comment within a stated time frame. Once the state party replies, the reply from the state will be sent to the complainant to respond to the comments of the state party. After which, the Committee will proceed to decide the case on the merits. If it finds the state party liable, it will make its findings and give the state party time within which to provide information on the steps it has taken to give effect to its findings and decisions.<sup>208</sup>

According to Steiner individual complaint procedures are useful in at several ways: to do justice in the individual case within its jurisdiction and to that extent vindicate the rule of law; to protect fundamental human rights under the respective treaty through deterrence and associated modification of behaviour and to develop, clarify, interpret or explain the respective treaty so as to engage the treaty bodies in an ongoing, fruitful dialogue with states parties, nongovernmental and intergovernmental institutions, advocates, scholars, and students.<sup>209</sup>

However, amongst other conditions, access to these committees is conditional upon the exhaustion of local remedies.<sup>210</sup> This is a major obstacle to overcome before accessing their jurisdictions and this takes quite a lot of time. Also, they are open only to persons whose states have ratified the respective optional protocols establishing the communication processes.<sup>211</sup> As Viljoen observes, African states hardly accept individual complaints under optional protocols because of the inherent potential that they could be exposed to public embarrassment.<sup>212</sup> Furthermore, the findings and decisions of these bodies are merely advisory and incapable of being realistically enforced against the state. Thus, although they are useful mechanisms for advancing the implementation of socio-

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<sup>207</sup> Mechlem (n 25 above) 914.

<sup>208</sup> Viljoen (n 30 above) 335.

<sup>209</sup> H Steiner 'Individual claims in a world of massive violations: what role for the human rights committee in P Alston and J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 31 39.

<sup>210</sup> Article 4 of Optional Protocol to CEDAW.

<sup>211</sup> Article 1 of Optional Protocol to CRPD.

<sup>212</sup> Viljoen (n 30 above) 146.

economic rights, by their nature they are difficult to access and not practically effective.<sup>213</sup>

### **2.6.2. The complaint procedure of the Optional Protocol to the ICESCR**

The complaint process of the ICESCR established under the Optional Protocol to the ICESCR is the most direct international adjudicatory platform for advancing state implementation of socio-economic rights. Under this platform the CDESCR is obliged to receive and consider communications<sup>214</sup> from individuals or groups of individuals for the alleged violation of any of the socio-economic rights against a state party to the Optional protocol to the ICESCR.<sup>215</sup> As is the case with other similar processes, a communication can be submitted for and on behalf of such individuals or groups of individuals either with or without their consent, provided, in the case of the latter, the agent can justify why he or she acted without first receiving the consent of the victims.<sup>216</sup>

Also, as is customary with international human rights adjudication processes, a communication is incompetent unless preceded by exhaustion of all available local remedies unless such local remedies are unreasonably prolonged.<sup>217</sup> Nevertheless, a communication is expressly inadmissible if it is not submitted within one year after the exhaustion of domestic remedies, except if the delay is otherwise justified;<sup>218</sup> the facts of the matter occurred before the Optional Protocol of the ICESCR enters into force in respect of the respondent state party unless those facts continued after that date;<sup>219</sup> the matter has already been examined by the CDESCR or has been or is being examined under another procedure of international investigation or settlement;<sup>220</sup> the communication is incompatible with the provisions of the ICESCR;<sup>221</sup> it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass

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<sup>213</sup> Mechlem (n 25 above) 293-294.

<sup>214</sup> Article 1(1) of the Optional Protocol to the ICESCR.

<sup>215</sup> Article 2 of the Optional protocol to the ICESCR.

<sup>216</sup> Article 2 of the Optional Protocol to the ICESCR.

<sup>217</sup> Article 3(1) of the Optional Protocol to the ICESCR.

<sup>218</sup> Article 3(2)(a) of the Optional Protocol of the ICESCR.

<sup>219</sup> Article 3(2)(b) of the Optional protocol to the ICESCR.

<sup>220</sup> Article 3(2)(c) of the Optional Protocol to the ICESCR.

<sup>221</sup> Article 3(2)(d) of the Optional Protocol to the ICESCR.

media;<sup>222</sup> it is an abuse of the right to submit a communication;<sup>223</sup> or it is from an anonymous source or not in writing;<sup>224</sup> or where the communication does not reveal that the author has suffered a clear disadvantage.<sup>225</sup> Arguably, the CESCR would follow the existing robust jurisprudence on the exhaustion of local remedies in the consideration of matters brought before it.

The CESCR upon the receipt of any communication and, before considering the merits, has the discretion to request the respondent state to take interim measures in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.<sup>226</sup> It could also initiate a friendly settlement between the parties.<sup>227</sup> After the exchange of communications and deciding on admissibility, the CESCR may proceed to examine the matter on the merits and transmit its views and recommendations to the parties,<sup>228</sup> including requesting the respondent state to take appropriate remedial measures, the implementation of which the CESCR has to monitor through follow-ups.<sup>229</sup>

Langford describes the formal adoption of the Optional Protocol to the ICESCR as 'historic.'<sup>230</sup> Pillay sees it as an achievement of 'momentous importance and a milestone in the international human rights system.'<sup>231</sup> Also, for Chenwe<sup>232</sup> and Coomans<sup>233</sup> the adoption has given greater international legitimacy to the ICESCR and brought it on a par with the ICCPR. Several other scholars have been upbeat about its inherent potential in advancing domestic implementation of socio-economic rights. Cahn, for instance, views the Optional Protocol as having the prospect of bringing international justice one step

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<sup>222</sup> Article 3(2)(e) of the Optional Protocol to the ICESCR.

<sup>223</sup> Article 3(2)(f) of the Optional Protocol to the ICESCR.

<sup>224</sup> Article 3(2)(g) of the Optional Protocol to the ICESCR.

<sup>225</sup> Article 4 of the Optional Protocol to the ICESCR.

<sup>226</sup> Article 5 of the Optional Protocol to the ICESCR.

<sup>227</sup> Article 7 of the Optional Protocol to the ICESCR.

<sup>228</sup> Article 8 of the Optional Protocol to the ICESCR.

<sup>229</sup> Article 9 of the Optional Protocol to the ICESCR.

<sup>230</sup> M Langford 'Closing the gap? An introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27 *Nordic Journal of Human Rights* 1 2.

<sup>231</sup> Statement by the High Commissioner for Human Rights, Ms. Navanethem Pillay, *Official Records*, 65th Plenary meeting, U.N. Doc. A/63/PV 66, Wednesday 10 December 2008, 3pm.

<sup>232</sup> L Chenwe 'Correcting the historical asymmetry between rights: the Optional Protocol to the Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Journal* 23-51.

<sup>233</sup> F Coomans 'The International Covenant on Economic, Social, and Cultural Rights: from stepchild to full membership of the family' in Gomez, I and De Feyter, K (eds) *International human rights law in a global context* (2009) 6.

closer for millions of excluded persons, groups, and communities worldwide.’<sup>234</sup> Simmons regards the individual complaint mechanism as an important complement to the oversight work of the treaty committees, which would stimulate a clearer understanding of what socio-economic rights entail and ‘what constitutes a good faith effort on the part of states parties to comply with their international legal obligations.’<sup>235</sup> Similarly, Langford holds the view, while the Optional Protocol to the ICESCR will not solve all the problems of the world, that it can surely contribute to improving the enjoyment of socioeconomic rights at the domestic level, recognizing not only the rights of victims of socio-economic rights violations to be heard but also giving ‘renewed hope to the millions of human beings who still do not enjoy the rights recognized in the Covenant.’<sup>236</sup>

No doubt the complaint mechanism of the ICESCR, which entered into force on 5 May 2013, provides an international platform for victims of socio-economic rights violations to seek redress and effective remedies at the international level. However, in relation to the millions of socio-economic violations in CommonwealthAfrica, this optimism seems a long way from reality. Out of the 15 states that, so far, have ratified the Optional Protocol to the ICESCR, only Gabon is from Africa.<sup>237</sup> This is despite the fact that African countries effectively participated in the entire process that led to its adoption. Thus, encouraging CommonwealthAfrican states to ratify the Optional Protocol to the ICESCR is an important responsibility for African NHRCs and NGOs. Otherwise, ordinary people in CommonwealthAfrica, whose socio-economic rights are violated with impunity, will continue to be excluded from its benefits.<sup>238</sup>

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<sup>234</sup> C Cahn ‘UN human rights council approves legal mechanism to provide international remedy for violation of economic, social and cultural rights’ (2008) *Housing and ESC Rights Quarterly* 6

<sup>235</sup> Simmons (n 58 above) 64 67.

<sup>236</sup> C de Albuquerque ‘Chronicle of an announced birth: the coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—the missing piece of the international bill of human rights’ (2010) 32 *Human Rights Quarterly* 144 177.

<sup>237</sup> Ratification status as at 27 June 2014 available at [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-3-a&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en).

<sup>238</sup> L Chenwe ‘An appraisal of international law mechanisms for litigating socio-economic rights with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court’ in S Liebenberg and G Quinot (eds) *Law and poverty: perspectives from South Africa and beyond* (2012) 241 242.

### 2.6.3. The complaints procedures of the African regional human rights system

Complaint processes available under the African human rights system for advancing socio-economic rights include those of the African Commission, the African Court,<sup>239</sup> the African Children's Charter Committee,<sup>240</sup> the ECOWAS Community Court of Justice,<sup>241</sup> the East African Court of Justice<sup>242</sup> and the Southern African Community Tribunal (SADC Tribunal)<sup>243</sup> These institutions and processes offer opportunities for advancing the implementation of socio-economic rights through the consideration and resolution of socio-economic rights complaints.<sup>244</sup> The African Commission, in particular, has actively demonstrated a positive disposition towards the implementation of socio-economic rights. For instance, its decisions in the *Purohit* case<sup>245</sup> and the *SERAC case*<sup>246</sup> are instructive.<sup>247</sup>

<sup>239</sup> Article 7 of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights.

<sup>240</sup> Established under the ACRWC.

<sup>241</sup> Established under Article 6(1)(e) of the Revised ECOWAS Treaty.

<sup>242</sup> Established under Article 9 of the Treaty for the Establishment of the East African Community.

<sup>243</sup> S Ebobrah 'Human rights developments in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 233 239. The SADC Tribunal was established in 1992 by Article 9 of the SADC treaty, but now appears to have been put at abeyance. See Human Rights Watch Regional Court's future hangs in the balance available at <http://www.hrw.org/news/2011/08/11/sadc-qa-tribunal>.

<sup>244</sup> C Courtis, 'Courts and the legal enforcement of economic, social and cultural rights: comparative experiences of justiciability' (2008) Report written for the International Commission of Jurists 101.

<sup>245</sup> The *Purohit* case (n 180 above).

<sup>246</sup> The *SERAC* case (n 120 above).

<sup>247</sup> Also, though not directly related, the Commission's decisions in the following cases also have some implications for socio-economic rights protection. In *Union Interafricaine des Droits de l'Homme v Angola* (2000) *African Human Rights Law Report* 18, the African Commission held that mass expulsion of any category of persons violates a range of human rights in the African Charter, including the socio-economic rights to property, work, education and health; In *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, (2000) *African Human Rights Law Report* 227, the African Commission ruled that sealing up of newspaper offices and premises amounts to violation among others of the right to work. In *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000), May 11, 2000, where allegations of large slave labour and exploitation was levelled against the Mauritania, the African Commission held that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore held that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man contrary to the rights enshrined in the African Charter. In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaïre*, Comm. Nos. 25/89, 47/90, 56/91, 100/93 (Joined) (1995) October 1995 para 48 the African Commission concluded that the closure of universities for two years amounted to a serious and massive violation of the right to education under the African Charter on Human and Peoples' Rights.

In the *SERAC* case the Ogoni people of the Niger Delta area of Nigeria filed a communication with the African Commission which alleged that Shell Petroleum Development Corporation (SPDC) polluted and degraded their environment, destroyed their food sources and caused severe health problems for the people by the oil prospecting and exploitation activities. They further alleged that their peaceful protest against the continued destruction of their environment and means of livelihood was met with a reign of terror and destruction by elements of the Nigerian security forces placed at the disposal of SPDC by the Nigerian Government. As a result, several of their villages and homes were destroyed and burnt down.

Those who tried to return to rebuild their houses were prevented from doing so by the security forces. They further alleged that, apart from condoning and facilitating the destruction of their environment, villages and homes, that the Nigerian government failed to monitor the operations of SPDC to ensure compliance with necessary safety standards; inform the Ogoni people of the dangers of oil exploitation and failed to investigate and punish those responsible for the attacks and destruction of their villages and homes.

Consequently, they concluded that the actions of the SPDC and the Nigerian government violated, amongst other things, their rights to health, their right to healthy environment, the right to housing, and the right to food under the African Charter. In its landmark ruling the Commission agreed with the submissions of the Ogoni people and held that the socio-economic rights of the Ogoni people to adequate housing and food were violated in the process of oil production. It held, although the right to housing is not expressly included in the African Charter, that the right to housing can be deduced from sections 14, 16 and 18(1) of the African Charter.<sup>248</sup>

The African Commission found that the Nigerian government failed to respect the housing rights of the Ogoni people by destroying their houses, preventing them from

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<sup>248</sup> The right to property, the right to health and the right to the protection of the family unit, respectively.

rebuilding their destroyed houses and forcefully evicting them from their homes.<sup>249</sup> It further held that the state had the obligation to ‘prevent the violation of any individual’s right to housing by any other individual or non-state actors like landlords, property developers, and land owners. It stated further that if such violations occur it is the state’s responsibility to take appropriate steps to prevent further deprivation and also ensure access to legal remedies.<sup>250</sup>

Furthermore, the African Commission held that the right to food is implied in sections 4, 16, and 22 of the African Charter, noting that the African Charter and international law ‘require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.<sup>251</sup> It then issued specific orders requesting the Nigerian government to stop attacks on the people, investigate and bring those responsible for the attacks to justice, pay adequate compensation to the victims and ensure that environmental impact assessments are carried out and provide the local people with accurate information on inherent environmental and health risks relating to oil operations.

The African Court has contentious, advisory and conciliatory jurisdictions in respect of all human rights, including rights in ‘any other relevant human rights instrument ratified by the State concerned,<sup>252</sup> which can be invoked to advance the implementation of socio-economic rights. As Viljoen notes, the Court has a much wider subject-matter jurisdiction beyond the African Charter that gives it the leeway to adjudicate socio-economic rights cases following the direction of the African Commission.<sup>253</sup>

At the apex of regional judicial institution with self-enforcement powers, the relevance of the African Court for advancing the implementation of socio-economic rights is

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<sup>249</sup> The *SERAC* case (n 120 above) 62.

<sup>250</sup> The *SERAC* case (n 120 above) 77.

<sup>251</sup> The *SERAC* case (n 120 above) 65.

<sup>252</sup> See Article 7 of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples’ Rights.

<sup>253</sup> Viljoen (n 30 above) 435 and 461); G Naldi and K Magliveras ‘Reinforcing the African human rights system of human rights: the protocol on the establishment of a regional court of human and peoples’ rights’ (1998) 16 *Netherlands Quarterly of Human Rights* 435.

important. Not only will it advance the implementation with its adjudicatory and advisory proceedings, the decisions of the court constitute primary normative benchmarks on socio-economic rights to guide sub-regional and national courts as well as administrative bodies across the continent.<sup>254</sup> However, the Court reportedly lacks universal regional acceptance and as yet, has dealt with no cases.<sup>255</sup> So its relevance will be determined only in the future.

Among sub-regional judicial platforms, the ECOWAS Court of Justice alone has a specific mandate to protect fundamental human rights guaranteed under the African Charter. Accordingly, it has been active in executing its novel mandate by adjudication all categories of human rights, including socio-economic rights. The court's recent decision against Nigeria on the violation of the right to education in the case of *Registered Trustees of the Social and Economic Rights Accountability Project (SERAP) v Nigeria*<sup>256</sup> is a signpost to its positive disposition towards the protection of socio-economic rights within the West African sub-region.

International adjudicatory processes are seemingly useful for obtaining socio-economic justice where the domestic legal framework cannot offer satisfaction. However, their ability to advance the implementation of socio-economic rights at the national level is inherently limited by their status as supranational institutions. First, they are located at too remote a distance from the victims of socio-economic rights violations and, therefore, literally are inaccessible. Although centralization is an inherent feature of supranational courts, nevertheless, it is a major barrier with regards to ordinary people accessing them. Second, since necessarily, they are not courts of first instance, access to them is almost always conditional on the exhaustion of available domestic remedies. This situation is a major disincentive as not many people will have the capacity to pursue a single socio-economic matter through such a long judicial journey, except if it is of profound

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<sup>254</sup> W Nagan 'Implementing the African renaissance: making human rights compliance for the new millennium' in Ssenyonjo, M (ed) (2004) *30 years after the African Charter on Human and Peoples' Rights* (2004) 2.

<sup>255</sup> Viljoen (n 30 above) 456 and 460.

<sup>256</sup> ECW/CCJ/JUD/18/12 (2012).



significance.<sup>257</sup> The only exception in this regard is the ECOWAS Court of Justice where the exhaustion of available local remedies is not a precondition to accessing the court. Indeed, for Nigerians, the court is relatively closer and easily accessible to them since it is located in the country's capital city of Abuja. Third, part from the onerous conditions for accessing these courts, their inability to enforce their own judgments, recommendations or awards also undermines their usefulness and attraction as judicial platforms for the resolution of socio-economic rights disputes.<sup>258</sup>

Arguably, these problems and difficulties are responsible for the virtual dearth of socio-economic rights complaints in the dockets of the existing supranational human rights adjudication bodies<sup>259</sup> despite the widespread violation of these rights in Commonwealth Africa.<sup>260</sup> Besides, these institutions are created to play mainly residuary or complementary roles in promoting and protecting human rights. They cannot be expected in real terms to impact profoundly at the national level within individual states. Arguably, while these institutions are quite relevant in overcoming prevailing prejudice against the justiciability of socio-economic rights in the countries where socio-economic rights are not justiciable,<sup>261</sup> they do not necessarily qualify as effective institutional platforms for advancing the practical implementation of socio-economic rights at the national level.

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<sup>257</sup> The African Commission, being a supranational quasi-judicial institution, for which a complainant's right of access is tied primarily to the exhaustion of local remedies, will be unattractive to a Nigerian where the process of exhausting local judicial remedies could take an unpleasantly prolonged time, which may not necessarily be 'too prolonged' in the estimation of the Commission to warrant admissibility.

<sup>258</sup> M Hansungule 'African courts and the African Commission on human and peoples' rights' in A Bosl and J Diescho (eds) (2009) *Human rights in Africa: a perspective on their protection and promotion* 233 255.

<sup>259</sup> Viljoen (n 30 above) 460; It should be noted that out of over 300 cases submitted to the African Commission very few of them relates to socio-economic rights. Socio-economic violations mostly affect ordinary people who cannot afford the luxury of pursuing claims on such an expensive platform. Even NGOs cannot afford and need adequate external funding before they are able to lodge complaints before the Commission on behalf of poor litigants.

<sup>260</sup> S Amadi 'Pragmatic and conceptual paralysis in protecting and promoting economic, social and cultural rights in Africa in Hurilaws (ed) *Enforcing economic, social and cultural rights in Nigeria: rhetoric's or reality?* (2005) 63.

<sup>261</sup> C Courtis (n 244 above) 101.

#### **2.6.4. The inter-state complaint procedure**

Apart from individual communications, the Optional protocol to the ICESCR<sup>262</sup> and the African Charter<sup>263</sup> provide for the possibility of state parties lodging complaints against other state parties under an inter-state party procedure. This procedure, like the individual complaint procedure, can be used to advance the implementation of socio-economic rights, but by states themselves. However, recourse to this mechanism is quite unlikely to take place and, thus, is not viable.

#### **2.6.5. The international reporting procedures**

Several of the international treaties on human rights provide for a system of periodic reporting under which state parties are obliged to submit reports to the supervising treaty body on the domestic implementation of these treaties. For instance, the ICESCR stipulates that states parties shall 'submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights.'<sup>264</sup> In addition to their own rules of procedures, each treaty body has provided general guidelines on the form and contents of state reports.<sup>265</sup> Besides receiving and examining state reports, the treaty bodies have powers to conduct a public inquiry into reports of grave or systematic violations of human rights.<sup>266</sup> The inquiry processes enable treaty bodies to conduct confidential investigations into serious violations and transmit their comments or recommendations to the affected state party for appropriate response.

As parties to the relevant international treaties guaranteeing socio-economic rights, Commonwealth African states are obliged to submit periodic reports detailing the implementation of socio-economic rights to the CESCR,<sup>267</sup> the CEDAW,<sup>268</sup> the

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<sup>262</sup> Article 10 of the Optional protocol to the ICESCR.

<sup>263</sup> Article 45 of the African Charter.

<sup>264</sup> Article 6 of the ICESCR.

<sup>265</sup> Compilation of Guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties UN Doc HRI/GEN/2/Rev.2) & UN HRI/GEN/3/Rev.1.

<sup>266</sup> Article 8 of Optional Protocol to the CEDAW.

<sup>267</sup> Article 16 – 25 of the ICESCR.

<sup>268</sup> Article 18 of CEDAW.

CRC<sup>269</sup> and the CRPD.<sup>270</sup> A similar obligation is also imposed on Commonwealth African states under the African Charter<sup>271</sup> and the African Children's Rights Charter.<sup>272</sup> When submitted, these reports are critically analysed by the relevant treaty body which provides feedback with comments, concluding observations, and recommendations, which are intended to prod states to comply with their human rights treaty obligations.

Bulto notes, the reporting and inquiry procedures provide ample opportunities for independent introspective assessment and engagement with African states by treaty bodies with a view to persuading them to take appropriate measures to remedy shortcomings or lapses in the implementation of socio-economic rights identified in reports or during investigation.<sup>273</sup> Over the years, the relevant treaty bodies have applied the international reporting procedure to scrutinize reports submitted by African states with an appropriate response on the need for them to effectively comply with their treaty obligations to implement socio-economic rights. Similarly, the African Commission has been using the reporting procedure to highlight, engage and encourage African states to implement socio-economic rights.<sup>274</sup>

However, because they essentially serve to initiate, facilitate and engage states in constructive dialogue, the international reporting mechanisms are considered as weak and ineffective in advancing state implementation of measures advancing socio-economic rights.<sup>275</sup> First, their effectiveness depends on the cooperation of the states, which is often lacking by most Commonwealth African states. Second, the reports generally reflect the opinions of the states and so lack credibility. Third, compliance with the reporting obligations among Commonwealth African states is haphazard and often marginal. Hansungule observes, most African states are in clear and contemptuous violation of their

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<sup>269</sup> Article 44 of the CRC.

<sup>270</sup> Article 35 CRPD.

<sup>271</sup> Article 62 of the African Charter.

<sup>272</sup> Article 43 of the African Children's Rights Charter.

<sup>273</sup> TK Bulto 'Beyond the promises: resuscitating the state reporting procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57-58.

<sup>274</sup> F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 110-118.

<sup>275</sup> M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882-915.

treaty obligations by being either several years late in submitting their reports or simply not submitting any reports at all.<sup>276</sup> Therefore, with such inherent but fundamental weaknesses the international reporting mechanisms, like the international contentious processes, lack sufficient impetus to effectively advance the implementation of socio-economic rights at the national level.

#### **2.6.6. The United Nations Human Rights Council**

Created by the UN General Assembly on 15 March 2006 as an inter-governmental body within the UN system, the Human Rights Council (HRC) of 47 UN member states, elected by the UN General Assembly,<sup>277</sup> has a mandate to strengthen the promotion and protection of human rights around the world.<sup>278</sup> It also addresses specific cases or situations of human rights violations and makes appropriate recommendations to the UN General Assembly.<sup>279</sup> The HRC executes its mandate through three mechanisms under its institution-building package: the Universal Periodic Review, which functions to assess the human rights situation in every UN member state; the Advisory Committee, which provides expertise and advice on thematic human rights issues; and the Complaint procedure, which receives and considers human rights violation complaints from individuals and organizations.<sup>280</sup>

Furthermore, the HRC works with the UN Special Procedures, which works through special rapporteurs, special representatives, independent experts and working groups to monitor, examine, advise and publicly report on thematic issues on human rights situations in specific countries.<sup>281</sup> Although the special procedures are appointed by the HRC, they are not staff of the UN and do not receive remuneration but undertake to be independent, efficient, honest, impartial, and always act in good faith.<sup>282</sup> Basically, their

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<sup>276</sup> Hansungule (n 258 above) 256-257.

<sup>277</sup> UN General Assembly Resolution 60/251 para 7 available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251\\_En.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf) (accessed 12 April 2014).

<sup>278</sup> UN General Assembly Resolution 60/251 para 5.

<sup>279</sup> UN General Assembly Resolution 60/251 para 5.

<sup>280</sup> United Nations Human Rights Council: Institution-Building' (HRC resolution 5/1) available at [ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_5\\_1.doc](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc) (accessed 12 April 2014).

<sup>281</sup> HRC resolution 5/1 para 39.

<sup>282</sup> HRC resolution 5/1 paras 39 and 46.

functions include undertaking country visits, acting on individual complaints by sending communication to states over alleged human rights abuse, conducting thematic studies and convening expert consultations. They also contribute to the development of international human rights standards, engage in advocacy, raise public awareness, and provide advice on technical cooperation.

The complaint procedure receives and considers communications from individuals, groups, or non-governmental organizations that claim to be victims of human rights violations, or that have direct, reliable knowledge of such violations ‘occurring in any part of the world and under any circumstances,’<sup>283</sup> provided they meet the usual admissibility criteria associated with such procedures, including the exhaustion of domestic remedies unless it appears that such remedies will be ineffective or unreasonably prolonged.<sup>284</sup> An admissible complaint is considered by two distinct working groups: the working group on communications, which examines the communications, and the working group on situations which brings consistent patterns of gross and reliably attested violations of human rights to the attention of the Council.<sup>285</sup>

As part of the UN human rights system the mandate of the HRC extends to the promotion and protection of all human rights including socio-economic rights. Little is known about its activities on socio-economic rights, but at least some of the thematic mandates it has worked on clearly relate to socio-economic rights. These include, the special rapporteur on the human right to safe drinking water and sanitation (2008); the working group on the issue of discrimination against women in law and in practice (2010), the independent expert on the issue of human rights obligation relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012); and the independent expert on the enjoyment of all human rights by old persons (2013).<sup>286</sup>

Despite the fact that communications are allowed from individuals and NGOs, the reality is the the HRC is not a viable platform for individual redress since its objective is to

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<sup>283</sup> HRC resolution 5/1 para 85.

<sup>284</sup> HRC resolution 5/1 para 87.

<sup>285</sup> HRC resolution 5/1 para 91 – 98.

<sup>286</sup> See <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx> (accessed 12 April 2014).

determine a consistent pattern of gross and reliably attested violations. What it does upon admitting any communication is to appoint an independent expert to monitor and report back on the situation, take the matter up under its special procedure or recommend to the OHCHR to provide technical assistance or advisory services to the state concerned. Consequently, while the HRC constitutes an additional platform that promotes and protects human rights at the international level, its effectiveness in relation to socio-economic rights, in particular, is quite limited. Clearly, the HRC is more of a political mechanism as it is states-centric and weakened by the prolonged time it takes merely to consider issues.

### **2.6.7. The Universal Peer Review Mechanism**

The Universal Periodic Review (UPR) for advancing human rights implementation at the national level was established by the Human Rights Council in 2006. Resolution 60/251 of the UN General Assembly mandated the HRC to ‘undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.’<sup>287</sup> The UPR process was formally inaugurated in 2007 under HRC resolution 5/1, which created an all-inclusive platform for all member states of the UN collectively to review the human records of each state.<sup>288</sup> The first circle of the UPR started in 2008 with the review of the first set of states.<sup>289</sup>

Generally, the process, which was supervised by a 47 member Working Group of the HRC, involved three fundamental steps. The first step required the state under review to provide a self-assessment of its own human rights record by declaring what actions it has taken to implement human rights or to overcome existing challenges to the enjoyment of

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<sup>287</sup> UN General Assembly Resolution 60/521 para 5(e) available at <http://ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (accessed 12 April 2014).

<sup>288</sup> ‘Reviewing the review: The first session of the universal periodic review the Human Rights Council’ *Commonwealth Human Rights Initiative* available at [http://www.humanrightsinitiative.org/cwhra/docs/reviewing\\_the\\_universal\\_periodic\\_review\\_mechanism.pdf](http://www.humanrightsinitiative.org/cwhra/docs/reviewing_the_universal_periodic_review_mechanism.pdf) (accessed 10 March 2014)

<sup>289</sup> Redondo, ED ‘The universal peer review of the UN Human Rights Council: an assessment of the first session (2008) 7 *Chicago Journal of International Law* 721.

human rights in the country, including socio-economic rights. The state presentation is immediately followed by a collective engagement and dialogue and the assessment of the state under review by other member states present with a view to making recommendations for improving the human rights situation.<sup>290</sup> The dialogue and assessment are based on three basic documents: the national report containing the information compiled and submitted to the HRC by the state under review; an information pack compiled from reports of treaty bodies, special procedures and other relevant UN official documents; and a summary of information produced by the OHCHR from credible information provided by other stakeholders, particularly NGOs, civil society groups and NHRIs.<sup>291</sup> Finally, the session ends with the production of an ‘outcome report’ drafted by a group of three states, the *troika*, selected from the members of the HRC by drawing of lots.<sup>292</sup>

The outcome report, which encapsulates the issues, concerns, recommendations and conclusions offered by the state delegations during the interactive dialogue, is submitted to the plenary of the HRC for adoption and formal decision.<sup>293</sup> The state under review is then obliged to write to the HRC indicating whether it accepts or rejects the recommendations.<sup>294</sup> Furthermore, states are given between four to five years to implement the accepted recommendations and voluntary commitments. The first circle of the UPR ended in 2011 with the review of all 192 members of the UN. Thus, the next phase is focusing on reviewing ‘the implementation of the accepted recommendations and the development of human rights situations in the states that have been reviewed.’<sup>295</sup>

The outcome report and recommendations are considered credible having come from a factual, open, transparent and collective process. Although, Nowak notes that the UPR is important because states take the UPR more seriously than the international reporting procedure before treaty bodies, nevertheless, he opines that it is flawed in the sense that

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<sup>290</sup> HRC resolution 5/1 para 20 -25.

<sup>291</sup> HRC resolution 5/1 para 15.

<sup>292</sup> HRC resolution 5/1 para 18.

<sup>293</sup> HRC resolution 5/1 para 28-29.

<sup>294</sup> HRC resolution 5/1 para 30.

<sup>295</sup> HRC Declaration 17/119 of 17 June 2011.

the performance of states is assessed not by independent experts but by other states.<sup>296</sup> Also, Frouville is not comfortable with the fact that the UPR depends on the goodwill of the state, thus, is of little use if states are not willing to participate.<sup>297</sup>

However, the UPR process is seen by other observers as a major innovation in UN human rights system that is driven nationally by various stakeholders through consultations between the state and other stakeholders, including NHRIs and NGOs. For Tomuschat, the UPR is fundamental for epitomizing the unity of human rights.<sup>298</sup> The fact that the process allows for the review of the enjoyment of all human rights, including socio-economic rights, makes it an important mechanism for facilitating the domestic implementation of socio-economic rights. Redondo also argues, apart from providing an alternative forum for the assessment of human rights around the world, that the UPR provides a holistic approach to both socio-economic and civic and political rights, based on inter-governmental dialogue with the participation of other relevant stakeholders, including NGOs.<sup>299</sup>

Arguably, the UPR deserves every positive appraisal given its cardinal objectives, which are to improve the human rights situation on the grounds, to fulfil a state's human rights obligations and commitments, to assess positive developments and challenges faced by the states, to enhance a state's capacity and need for technical assistance, to share best practice among states and other stakeholders, to support cooperation in the promotion and protection of human rights, and to encourage states' to fully cooperate and engage with the HRC, other human rights bodies and the OHCHR.<sup>300</sup> However, the extent to which it can facilitate the implementation of socio-economic rights is limited since its effectiveness is largely dependent on the cooperation of states, which much be coupled

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<sup>296</sup> M Nowak 'It is time for the world court of human rights' in MC Bassioni and W Schabas (eds) *New challenges for the UN machinery* (2011) 17-23.

<sup>297</sup> O de Frouville 'Building a system for the protection of human rights: The way forward' in MC Bassioni and W Schabas (eds) *New challenges for the UN machinery* (2011) 241-253.

<sup>298</sup> C Tomuschat 'Universal periodic review: a new system of international law with specific ground rules' in U Fasternrath et al (eds) *From bilateralism to community interest: essays in honour of Judge Bruno Simma* (2011) 609-615.

<sup>299</sup> ED Redondo 'Is there life beyond naming and shaming in human rights implementation' (2012) 4 *New Zealand Law Review* 1-28-30.

<sup>300</sup> HCR resolution 5/1 para 4.



with a genuine intention to address or to comply with the recommendations and the commitments they voluntarily acceded to during the review.

### **2.6.8. The promotional activities of the African Commission**

The African commission's mandate includes carrying out human rights promotional activities. The specific promotional activities of the Commission include collecting documents, undertaking thematic studies and research on African problems in the field of human and people's rights, organising seminars, symposia and conferences, disseminating relevant information and encouraging national and local institutions to promote and protect human rights.<sup>301</sup> The Commission carries out its promotional activities through its commissioners, special rapporteurs, and working groups. Some of the working groups<sup>302</sup> and special rapporteurs<sup>303</sup> are working in the areas relating to socio-economic rights. Furthermore, the Commission has adopted several resolutions and declarations,<sup>304</sup> and conducted fact-finding missions on human rights to several countries in relation to socio-economic rights, as well as published reports on their findings and recommendations.<sup>305</sup> There is no doubt that the African Commission's promotional activities are relevant to advancing the implementation of human rights in Africa. However, like the afore-mentioned processes, the promotional activities of the African Commission have limited impact on individual states. Besides there is a need for it to do more with respect to socio-economic rights in view of the widespread violation of this category of rights across the African continent.

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<sup>301</sup> Article 45(1) of the African Charter empower the African Commission to national and local institutions concerned with human and people's rights, and should the case arise, give its views and make recommendations to governments.'

<sup>302</sup> There are working groups on 'economic, social and cultural rights in Africa'; 'indigenous populations/communities in Africa'; 'the Robben island guidelines'; and 'death penalty in Africa.' Africa.' 'the 'violation of human and people's rights in Africa by non-state actors in the context of the African Charter on Human and Peoples' Rights.'

<sup>303</sup> There are special rapporteurs on 'the rights of women in Africa'; 'prisons and conditions of detention in Africa'; freedom of expression in Africa'; 'human rights defenders in Africa'; 'refugees. Asylum seekers, migrants and internally displaced persons in Africa'; and 'summary, arbitrary and extra-judicial executions in Africa.'

<sup>304</sup> The Commission has adopted over 80 resolutions, some of which are on socio-economic rights. See [http://www.achrpr.org/English\\_info/resolutions\\_en.html](http://www.achrpr.org/English_info/resolutions_en.html) (accessed 12 May 2014)

<sup>305</sup> Its activities are usually published in its activity reports available at its website (n 304 above).

### 2.6.9. The African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is a complementary institutional mechanism ‘voluntarily acceded to by member states of the African Union (AU) as an African self-monitoring mechanism’ meant to influence ‘improvements in country’s practices and policies in compliance with agreed African best practices.’<sup>306</sup> Fundamentally, the APRM provides an opportunity for participating states to appraise and measure the extent to which they have complied or are complying with their international human rights treaty obligations.<sup>307</sup> Apart from reviewing and analysing the status of substantive rights, the APRM panel may also focus attention on the specific rights of vulnerable groups such as women, children and persons living with disabilities.<sup>308</sup>

To some extent, therefore, the APRM mirrors the reporting procedures of treaty bodies in the sense that it acts as a platform for states to be subjected to some degree of self and public scrutiny and accountability<sup>309</sup> with respect to the existing legislative, policy and institutional framework, if any, for giving effect to the human rights obligations under the relevant treaties.<sup>310</sup> However, unlike the reporting procedures, which to some extent are compulsory and designed to be a regular exercise, the APRM is entirely voluntary, well-nigh irregular, and far weaker in its operations. Consequently, apart from its inherent weaknesses that obviously discount it as a suitable mechanism for advancing the implementation of human rights, some scholars are genuinely sceptical about the commitment of African states to the success of the APRM process.<sup>311</sup>

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<sup>306</sup> APRM Base Document para 1 accessible at: <http://www.dfa.gov.za/au.nepad/nepad49.pdf> (accessed 12 January 2014).

<sup>307</sup> VO Nmehielle ‘(2003) ‘African Union and Africa Renaissance: A new era for human rights protection in Africa?’ 7 *Singapore Journal of International and Comparative Law* 412 432.

<sup>308</sup> So far the reviewing process has covered not less than 17 countries, out of which six; Algeria, Ghana, Kenya, South Africa, and Rwanda have had their reviews finalized.

<sup>309</sup> B Gawanas ‘The African Union: concepts and implementation mechanisms relating to human rights’ in A Bosl and J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 135 152.

<sup>310</sup> APRM Base Document (n 306 above) 23

<sup>311</sup> M Killander ‘The African peer review mechanism and human rights: the way forward’ (2008) 30 *Human Rights Quarterly* 41 75; CFJ Doebbler ‘A complex ambiguity: the relationship between the African Charter on Human and Peoples’ Rights and other African Union initiatives affecting respect for human rights.’ (2003) 13 *Transnational Law and Contemporary Problems* 8 23.

## **2.7. National frameworks for domestic implementation of socio-economic rights**

Viljoen posits, ‘the ultimate test of international human rights law is the extent to which it takes root in national soil.’<sup>312</sup> Obviously, the possibility of this assertion becoming a reality starts with effective implementation. Basically, states have the discretion to adopt whatever measures they consider appropriate to implement socio-economic rights. Accordingly, Commonwealth African states are implementing socio-economic rights or their values in different ways, largely influenced by the status of these rights in the legal systems of the respective states. The existing national mechanisms for advancing the implementation of socio-economic rights across Commonwealth Africa take at least seven forms, as discussed below.

### **2.7.1. Domestication of the international treaties on socio-economic rights**

Domestication is the pathway to achieving the purpose of socio-economic rights under international human rights law. As Henkin asserts ‘the purpose of international human rights law is to influence states to recognize and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions, and to incorporate them into national ways of life.’<sup>313</sup> Otherwise, the socio-economic rights conferred on individuals by the relevant international treaties may remain meaningless in practical terms.<sup>314</sup>

Domestication of international human rights norms takes place through legislative, executive, judicial and political internalization processes.<sup>315</sup> Thus, international human rights norms are domesticated when they are explicitly entrenched in national constitutions or embedded in domestic legislation or when domestic judicial decisions incorporate international human rights norms into domestic law or if the executive and

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<sup>312</sup> F Viljoen (n 30 above) 517.

<sup>313</sup> L Henkin ‘International human rights as “rights.”’ (1979) 1 *Cardozo Law Review* 425 – 498.

<sup>314</sup> Domestication simply refers to the internalization of international treaty norms and standards so that they become an integral part of the domestic legal system.

<sup>315</sup> HH Koh ‘How is international human rights law enforced?’ (2003) 74 *Indiana Law Journal*, 1397 1413.

administrative agencies accept and adopt these norms to direct and drive government's social policy objectives.

The domestication of international treaties on socio-economic rights is considered important, desirable and encouraged by the respective treaty bodies, especially the CESCR and the African Commission, for the implementation of socio-economic rights. Generally the concepts of *dualism* and *monism* regulate states' domestication of international treaties. In Commonwealth African states in which monism are practiced, the constitutional framework allows for the automatic incorporation of ratified treaties into the domestic legal framework. For instance, the Central African Republic and Rwanda expressly incorporate the ICESCR into their constitutional frameworks. This presupposes that the ICESCR, the African Charter and all other international and regional treaties embodying socio-economic rights are part of the domestic legal framework, although they have not been effective in that status.<sup>316</sup> The situation is the same in the dualist Commonwealth African states where, to date, none of them has domesticated any of the relevant international treaties on socio-economic rights. Nigeria is an exception so far as it has domesticated only the African Charter.<sup>317</sup>

Important as these treaties are to the realisation of socio-economic rights, it is unfortunate that both the ICESCR and the African Charter are still denied effective legal status in the domestic legal framework of almost all Commonwealth African states. However, this does not affect the role and responsibility of NHRIs to use these treaties to ensure states' accountability for socio-economic rights.

### **2.7.2. Constitutionalization of socio-economic rights**

Constitutionalization of socio-economic rights entails their entrenchment in the constitution of a state.<sup>318</sup> When entrenched in a national constitution, socio-economic rights become an integral part of the constitution, constituting claim-rights that are

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<sup>316</sup> F Viljoen (n 30 above) 522.

<sup>317</sup> F Viljoen (n 30 above) 533.

<sup>318</sup> N Udombana, 'Social rights are human rights: actualizing the rights to work and social security in Africa' (2006) 39 *Cornell International Law Journal* 181 205.

binding on all the organs of government and are enforceable.<sup>319</sup> Furthermore, once entrenched as constitutional rights their existence as substantive rights endures through time and so, can only be modified or repealed through some special and rigid procedures. Thus, the most concrete and enduring manner of domesticating international human rights norms and standards is to have such rights and standards incorporated into the national constitution.<sup>320</sup> A review of African constitutions shows that socio-economic rights are provided for either explicitly as substantive rights or implicitly as directive principles of state policy.<sup>321</sup> For example, the following socio-economic rights can be identified either expressly or implied from national constitutions across Africa: the right to work and its ingredients,<sup>322</sup> the right to education,<sup>323</sup> and the right to health.<sup>324</sup> Others

<sup>319</sup> S Hertel and L Minkler 'Economic rights: the terrain' in S Hertel and Minkler (eds) *Economic rights conceptual, measurement and policy issues* (2007) 25.

<sup>320</sup> The South African Constitution, and the Canadian Charter of Rights and Freedoms examples direct constitutional implementation of international human rights norms and standards.

<sup>321</sup> C Heyns and W Kaguongo (n 111 above) 673 – 717.

<sup>322</sup> Algeria, sections 55-56; Angola, sections 36, 46; Benin, section 8; Burkina Faso, sections 18-21; Burundi, section 54, 57; Cape Verde, sections 60-66; Central African Republic, sections 9-10; Chad, sections 28, 31-32; Congo, sections 24, 28; Cote d'Ivoire, sections 7, 17; Democratic Republic of Congo, section 35; Djibouti, section 15; Egypt, section 13; Equatorial Guinea, section 25; Eritrea, section 21(3) (5); Ethiopia, section 41(1)(6)&(7); Gabon, section 1(7); Ghana, section 24; Guinea, section 18; Guinea Bissau, sections 36-37A; Kenya, section 41; Libya, section 4; Madagascar, sections 27, 29, 31-32; Malawi section 95, 31; Mali, sections 17, 19-20; Morocco, section 12; Mozambique, sections 84-87; Niger, section 25-26; Rwanda sections 37-38; Sao Tome and Principe, sections 41-42; Senegal, sections 8, 25; Seychelles section 35; Somalia sections 14, 18; South Africa, section 23; Swaziland, section 32; Tanzania, sections 22-23; Togo, sections 37, 39; and Uganda, section 40.

<sup>323</sup> Algeria, section 53; Angola, sections 28(2) and 49; Benin, sections 8, 12-14, 40; Burkina Faso, sections 18, 27; Burundi, section 34 and 44; Cape Verde, sections 49, 77; Central African Republic, section 7; Chad, section 35; Congo, section 23; Cote d'Ivoire, section 7; Democratic Republic of Congo, sections 43-45; Egypt, sections 18-21; Equatorial Guinea, section 23; Eritrea, section 21(1) (5); Ethiopia, section 41(4); Gabon, section 1(16), 18-19; Ghana, section 25; Guinea, 21; Guinea Bissau, section 41; Kenya, section 43 (f); Libya, section 14; Madagascar, sections 23, 24, Malawi section 13 and 25; Mali, section 17; Mozambique, sections 52 and 92; Namibia, section 20; Niger, section 33; Sierra Leone, section 9; South Africa, section 29; Sudan, section 13, 14, and 28; Tanzania, 11; Togo, sections 35, and Uganda, section 30.

<sup>324</sup> Algeria, section 53; Angola, section 47; Benin, sections 8, 12-14, 40; Burkina Faso, sections 18, 26; Burundi, section 55; Cape Verde, section, 70; Congo, section 30; Cote d'Ivoire, section 7; Democratic Republic of Congo, section 47; Egypt, sections 16-17; Equatorial Guinea, section 22; Eritrea, section 21(1) (5); Ethiopia, section 41(4); Gabon, section 1(8), The Gambia, section 216(4) of DPSP; Ghana, section 25; Guinea, section 15; Guinea Bissau, section 39; Kenya, section 43(a); Lesotho, section 27 of DPSP; Libya, section 15; Madagascar, sections 19; Malawi section 13(c) of DPSP; Mali, section 17; Mozambique, section 89; Namibia, section 95 of DPSP; Niger, section 11; Nigeria, section 17(3)(d) of DPSP; Rwanda section 41; Sao Tome and Principe, sections 49; Senegal, section 8; Seychelles, section 29; Sierra Leone, section 8(3)(d); Somalia section 26; South Africa, section 27(1)(a)(3); Sudan, section 13 of DPSP; Swaziland, section 60(8) of DPSP; Togo, section 34; and Zambia, section 112(d).

are the right to social security,<sup>325</sup> the right to shelter/housing,<sup>326</sup> the right to food/nutrition,<sup>327</sup> the right to clean safe water,<sup>328</sup> and the right to property.<sup>329</sup>

The constitutionalization of socio-economic rights represents an acknowledgement of their importance and the need to secure them within the constitutional framework. Since the constitution is supreme, the substantive socio-economic rights provided therein impose constitutional obligations and duties on all organs of government.<sup>330</sup> As Ocran argues, if socio-economic rights are entrenched in constitutions, ‘it will be no justification in constitutional terms to say that there are no funds for that commitment.’<sup>331</sup> Thus, providing constitutional guarantees for socio-economic rights is necessary for achieving the realisation of these rights. However, as Viljoen correctly observes, only a handful of constitutions in Commonwealth Africa provide for socio-economic rights as substantive constitutional rights and, even then, mostly in vague terms.<sup>332</sup> Arguably, this factor limits the extent to which African national constitutions can influence the progressive realisation of the these rights.

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<sup>325</sup> Algeria, section 59; Angola, section 47; Burkina Faso, sections 18; Cape Verde, section 69; Chad, section 40; Democratic Republic of Congo, section 36; Egypt, sections 17; Eritrea, section 21(2) (5); Ethiopia, section 90(1) of DPSP; Gabon, section 8; The Gambia, section 216(5); Ghana, section 37(6) of DPSP; Guinea, section 17; Guinea Bissau, section 37(3); Kenya, section 43(e); Madagascar, section (30); Mali, sections 17; Mozambique, section 95; Namibia, section 95(f);(g) of DPSP; Rwanda section 14; Sao Tome and Principe, section 43; Seychelles section 37; Somalia section 26; South Africa, section 27(1)(c); Sudan, section 11 of DPSP; Tanzania, section 11(1) DPSP; Togo, section 33; Uganda, section XIV of DPSP; and Zambia, section 1212(f) of DPSP.

<sup>326</sup> Burkina Faso, section 18; Cape Verde, section 71; Democratic Republic of Congo, sections 43-45; Ethiopia, section 90 DPSP; Gambia, sections 18-21 DPSP; Kenya, section 43(c); Mali section 17; Nigeria, section 16(2) DPSP; Sao Tome and Principe, section 48; Seychelles section 34; South Africa, section 26; Uganda, section 41 DPSP.

<sup>327</sup> Ethiopia, section 216(4) DPSP; Gambia, section 90 DPSP; Kenya, section 43(d); Malawi, section 13; Namibia, DPSP; Nigeria, section 16(2) DPSP; South Africa, section 27; Uganda, sections 21 and 22 DPSP. See also M Vidar ‘State recognition of the right to food at the national level’ Research paper no. 2006/6, United Nations University (2006) accessible at [www.wider.unu.edu](http://www.wider.unu.edu).

<sup>328</sup> Democratic Republic of Congo, Ethiopia, Nigeria and South Africa.

<sup>329</sup> This is provided in the constitutions of virtually all African States.

<sup>330</sup> Michelman (n 47 above) 23.

<sup>331</sup> M Ocran ‘Socio-economic rights in the African context: Problems with concept and enforcement.’ (1990) 5 *Loyola University International Law Review* 1 5.

<sup>332</sup> Viljoen (n 30 above) 548-549.

### 2.7.3. Directive principles of state policy

Socio-economic rights exist in the constitutional framework of some African states, not as directive principles of state policy (DPSP).<sup>333</sup> When socio-economic rights manifest as directive principles in national constitutions, such principles are basically not justiciable, although fundamental for the governance of the state.<sup>334</sup> As Oyewo states, ‘all responsibilities enumerated without sanction as far as the fundamental obligations of the Government are concerned and to us they look like sterile law notwithstanding the fact that it places observance and conformity of its provisions on all organs of government, with all authorities and persons exercising legislative, executive or judicial powers.’<sup>335</sup>

Although the pervasive expression of socio-economic rights as DPSP in the constitutional framework of Commonwealth African states is seen by some scholars as a setback to the effective implementation of these rights,<sup>336</sup> however, in reality, DPSP are not completely worthless.<sup>337</sup> As constitutional prescriptions, they are meant to guide all organs of government in the performance of their functions. Thus, the legislature and the executive must consider and apply them in their legislation and policy agenda. Similarly, the judiciary could apply them to interpret relevant constitutional provisions. Thus, although not binding, the moral weight they impose is fundamental to ensuring good governance and the implementation of social policies that benefit the poor.<sup>338</sup> In India, for instance, the judiciary has transformed the status of the DPSP to the point where they are

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<sup>333</sup> Presently, Gambia, Ghana, Lesotho, Liberia, Namibia, Nigeria, Sierra Leone, Uganda, Tanzania and Zambia have socio-economic rights provided in the constitutional framework not as substantive rights, but mostly as directive principles of state policy.

<sup>334</sup> F Viljoen (n 30 above) 551.

<sup>335</sup> A Oyewo *Constitutional law and practice in Nigeria* (2000) 87.

<sup>336</sup> D Lowe ‘Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees’ (2006) 69 *Saskatchewan Law Review* 39- 78.

<sup>337</sup> H Schwsectionz, ‘Do social and economic rights belong in a constitution?’ (1994) 10 *American University Journal Law and Policy* 1233 at 1240; DM Davis ‘The case against the inclusion of socio-economic rights in a bill of rights except as directive principles’ (1992) 8 *South African Journal on Human Rights* 475- 490. Gauri asserts that understanding socio-economic rights not as ‘binding constraints,’ but ‘high priority goals’ is both meaningful and useful because fulfilling these rights becomes a global burden, not just the responsibility of individual states. He however He admitted however that this view could indeed be problematic in the sense that, ‘the fact that no actor bears responsibility for them means that coordinating a response might be difficult.’ See V Gauri ‘Social rights and economics: Claims to health care and education in developing countries’ in P Alston and M Robinson (ed) *Human rights and development. Towards mutual reinforcement* (2005) 65 72.

<sup>338</sup> L Minkler ‘Economic rights and political decision making’ (2009) 32 *Human Rights Quarterly* 368 381.

considered to be as relevant as fundamental human rights.<sup>339</sup> Thus, the Indian Supreme Court can review executive policies or legislation to ensure that the DPSP are ‘taken into account as a relevant consideration’ in exercising discretionary powers.<sup>340</sup>

In Commonwealth Africa, it is apparent that the purpose and obligatory effect of DPSP are yet to be recognized by state organs.<sup>341</sup> Even the courts easily defer to the position that DPSP cannot support legally enforceable rights, thereby allowing the executive unquestionable discretion over the social policies the DPSPs embody.<sup>342</sup> Against this background, the decision by the Ghanaian Supreme Court that the DPSPs do not only constitute guidelines for government organs but are also directly enforceable unless otherwise constitutionally prohibited,<sup>343</sup> provides a stimulus to a possible positive change in judicial attitude towards the justiciability of the DPSPs in African jurisdictions in the near future. In any event, the DPSPs preclude resort to legal action only as a means for enforcing the obligations they impose. Therefore, for NHRCs, the socio-economic rights obligations constituted under the DPSPs constitute serious state obligations, the realization of which they can legitimately advance through various practical means.<sup>344</sup>

#### **2.7.4. National legislation on socio-economic rights**

With the progressive consolidation of democracy on the African continent, both the organization of government and the society as a whole are now regulated by laws in most Commonwealth African countries. As a primary organ of government the legislature bears profound responsibility for ensuring the implementation of socio-economic rights

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<sup>339</sup> B De Villiers, ‘Directive principles of state policy and fundamental rights: the Indian experience’ (1992) *South African Journal on Human Rights* 29-49.

<sup>340</sup> *Delhi Development Horticulture Employee’s Union v Delhi Administration* (1993) 4 LRC 192.

<sup>341</sup> E Wiles ‘Inspirational principles or enforceable rights: The future for socio-economic rights in national law’ (2006-2007) 22 *American University International Law Review* 35 59.

<sup>342</sup> In *Khathang Tema Batsokoli and Another v Maseru City Council and Others*, Case (CIV) 4/05, CONST/1/2004, at para 20 the Court of Appeal in Lesotho held that a discretionary power can only be successfully challenged if its exercise violated a justiciable right.

<sup>343</sup> *Ghana Lotto Operators Association and 6 Others v National Lottery Authority* (2007-2008) SCGLR 1088.

<sup>344</sup> Albie Sachs’s prognosis that the exercise of ‘the right to vote, the right to make one’s voice to be heard and the right to demonstrate in the streets are absolutely fundamental for the enforcement of social and economic rights’ aptly applies equally to the relevance of DPSP. See A Sach ‘Enforcement of social and economic rights’ (2007) 22 *American University International Law Review* 673 705.



through the enactment of relevant legislation. As Kent observes, though internationally recognized rights can be realized within nations even if those rights are not articulated in national law, ‘they are much more likely to be realized when there is well-crafted law regarding these rights at the national level.’<sup>345</sup> Viljoen also posits that national legislation remains the most effective normative framework to advance the implementation of socio-economic rights.<sup>346</sup> Furthermore, virtually all the international human rights treaties underscore the centrality of the legislature and the indispensability of legislation in advancing the implementation of socio-economic rights at the domestic level.<sup>347</sup> Therefore, the relevance of legislation for achieving the direct implementation of socio-economic rights appears to be settled.

However, the potency of national legislation for the implementation of socio-economic rights in Commonwealth Africa appears limited in several respects. First, national legislation is subject to the constitution and can, unlike constitutionally entrenched rights, easily be abrogated by ordinary subsequent legislation. Second, there is hardly any identity of purpose between the contents of national legislation and international human rights treaties norms and standards because the content of national legislation is most often not completely influenced by any positive commitment to the fulfilment of socio-economic rights obligations imposed by international human rights instruments. Furthermore, apart from the fact that such legislation is scanty on the statute books of most Commonwealth African states, it usually applies to some narrow areas of social policy alone and quite is easily susceptible to internal politics that negatively affect its implementation.<sup>348</sup>

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<sup>345</sup> G Kent *Freedom from want: the human rights to adequate food* (2005) 73-74.

<sup>346</sup> Viljoen (n 30 above) 547.

<sup>347</sup> Article 2 paragraph 1 of the ICESCR; article 2 of the African Charter; article 2 of the CRC. Further, in UN Committee on Economic, Social and Cultural Rights General Comments 3, the CESCR also emphasized the desirability and even the indispensability of legislation for achieving the implementation of socio-economic rights.

<sup>348</sup> For instance, the implementation of the universal basic education Act in Nigeria has more or less been enmeshed in political choices and preferences leading to policy inconsistencies, reversals and progressive decline in budgetary allocations by successive administrations.

Thus, though national legislation unquestionably constitutes the most important mechanism for driving the progressive realisation of socio-economic rights, it can be more effective in CommonwealthAfrica when it is applied without constitutional strictures, which unfortunately, is not a common phenomenon yet. Thus, there is a need to accord legal recognition to socio-economic rights so as to enhance their implementation in CommonwealthAfrica. As Pieterse observes, giving legal status to socio-economic right will at least empower the neglected and impoverished and give political legitimacy to demands for the satisfaction of their, otherwise over-looked, material needs.<sup>349</sup>

### **2.7.5. Adjudication of socio-economic rights by domestic courts**

An integral responsibility of domestic courts is to ensure that human rights guaranteed in the national constitutional and legislative frameworks are protected and violations redressed with appropriate remedies.<sup>350</sup> Accordingly, domestic adjudication is acknowledged as a veritable means of holding states to be accountable to their legal obligations to implement socio-economic rights. Where domestic courts are competent and active, the litigation of socio-economic rights provides an opportunity for the internal resolution of such disputes, which obviates the necessity of approaching international or sub-regional courts. For instance, in South Africa domestic courts are seen to be willing, relative to other CommonwealthAfrican countries, to intervene and resolve socio-economic rights cases and give positive orders on access to healthcare, housing<sup>351</sup> and water,<sup>352</sup> thereby putting to rest some of the arguments often expressed against the justiciability of socio-economic rights.<sup>353</sup>

However, what is apparent is that the role domestic courts can play in advancing the implementation of socio-economic rights is limited. First, socio-economic rights either

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<sup>349</sup> M Pieterse, 'Eating economic and social rights: The usefulness of rights talk in alleviating social hardship revisited.' (2007) 29 *Human Rights Quarterly* 796-797.

<sup>350</sup> UDHR: article 9; ICCPR: article 2; and African Charter: article 25.

<sup>351</sup> *Joseph v The City of Johannesburg* (2010) (4) SA 55 (CC).

<sup>352</sup> *Lindiwe Mazibuko and Others v City of Johannesburg & Others* Case CCT 39/09 (2009) ZACC 28.

<sup>353</sup> As Viljoen cautions: 'To the extent that courts keep their decisions about the 'fulfilment' of socio-economic rights within the interpretative confines of national law, allegations of political legitimacy or about the separation of powers are also less likely to arise.' See Viljoen (n 30 above) 571.

are not available in the domestic legal framework as substantive legal rights, or exist mostly in forms that exclude the courts from adjudicating over them. The result is deliberately to exclude domestic courts from playing any positive role with respect to the implementation of socio-economic. Furthermore, in Commonwealth Africa, even the courts appear to have seemingly settled on the wrong view that they lack either the institutional legitimacy or the legal competence to adjudicate socio-economic rights simply because these rights are not legally recognised under the domestic legal system. Hence they continue to resist the transformative examples of the Indian judiciary, which utilizes an integrated approach to further the interest of these rights and the wellbeing of ordinary citizens by holding the state to be accountable for socio-economic rights within the framework of the DPSPs through an expansive interpretation of the right to life.<sup>354</sup>

However, in countries such as South Africa judicial decisions constitute a primary source for advancing the implementation of socio-economic rights. Consequently, although adjudication by domestic courts is relevant for advancing the implementation of socio-economic rights, this mechanism is largely not yet available in an effective form in most of the Commonwealth states of Africa.

#### **2.7.6. The executive initiatives, policies and programmes**

The executive arm of government bears responsibility with regard to the implementation of human rights in any state. At the international level the executive is required to take appropriate and effective measures to ensure national compliance with international human rights obligations. Similarly, at the national level the executive is required not only to uphold the constitution and its human rights guarantees but also to apply the relevant legislations to ensure the effective observance and enjoyment of human rights by the citizens.

In Commonwealth African states, the role of the executive in ensuring the implementation of socio-economic rights is profound. Domestic constitutions confer responsibilities on the executive branch to negotiate and ensure the ratification of all international human

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<sup>354</sup> J Kothari 'Social rights litigation in India: developments of the last decade' in D Barak-Erez and AM Gross (eds) *Exploring social rights: between theory and practice* (2011) 172 174-175.

rights treaties.<sup>355</sup> When such treaties have been ratified the executive bears the primary responsibility to implement them through the legislative, policy, administrative and institutional frameworks of governance and to submit regular reports to the respective international treaty bodies both on the measures adopted and the impact of such measures in enhancing the enjoyment of the rights by the citizens. Similarly, the functions and powers of the executive within the domestic constitutional framework includes initiating, assenting to and implementing domestic legislations,<sup>356</sup> developing and implementing national social policies,<sup>357</sup> as well as proposing and implementing the annual national budget when approved by Parliament.

These responsibilities and powers make the executive a vital institution for ensuring effective fulfilment of state socio-economic rights obligations under international human rights treaties. This it can do in a number of ways, ranging from putting in place appropriate legal, social and economic conditions that create and enhance access to these rights to prioritizing social policies and investing adequate public resources for the provision of public schools, healthcare services, safe drinking water and affordable housing and sanitation. The executive can also enhance the implementation of socio-economic rights by upholding the rule of law, the fair administration of justice,<sup>358</sup> and ensuring that human rights monitoring institutions are adequately provided with material and financial resources to function effectively.<sup>359</sup>

In Commonwealth Africa, there is not a complete lack of executive efforts to achieve the implementation of socio-economic rights through executive actions, including the ratification of relevant treaties. Arguably, executive policies and programmes are not specifically carried out with an intention to implement socio-economic rights. However, whatever the reason behind them, the ultimate effect of social policies and programmes is the implementation of socio-economic rights. Thus, the most important factor for

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<sup>355</sup> Sections 231 of the 1996 Constitution of South Africa.

<sup>356</sup> Sections 84(a) and (b) of the Constitution of South Africa.

<sup>357</sup> Sections 85(2)(b) of the 1996 Constitution of South Africa.

<sup>358</sup> C Apodaca 'The rule of law and human rights' (2003) 87 *Judicature* 292 293-294.

<sup>359</sup> LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2001) 13 *Harvard Law Review* 16-23.

achieving this is the political will to prioritize social policy in favour of achieving expeditious realisation of socio-economic rights. This factor is what is lacking in most instances and the reason for NHRCs to monitor state compliance with its legal obligations to implement socio-economic rights. However, despite executive efforts in Commonwealth African states, the impact has been far less than impressive. Public spending on socio-economic rights is inadequate.<sup>360</sup> Nevertheless, the role good executive governance can play to implement socio-economic rights remains very important.<sup>361</sup>

### **2.7.7. Poverty reduction strategies and processes**

Poverty is identified as a major hindrance to the enjoyment of socio-economic rights.<sup>362</sup> In Africa millions of people cannot access quality education and healthcare, decent housing, nutritious food and safe drinking water simply because they are too poor to provide these basic necessities for themselves.<sup>363</sup> Thus, the eradication of poverty is a human rights issue in the context that the outcome will lead to the enjoyment of civil, political and socio-economic rights.

Poverty Reduction Strategies and Processes (PRSP) are policy strategies directed at investing public funds in policies and programmes that engender poverty reduction. The World Bank and International Monetary Fund's model on PRSP prescribes the integration of a human rights-based approach to development and requires the entire process to be participatory, involving all the stakeholders and external development partners.<sup>364</sup> This inclusiveness provides an opportunity for all stakeholders to focus on how best to tackle poverty through the human rights framework.

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<sup>360</sup> K Hope 'Toward good governance and sustainable development: the African peer review mechanism' (2005) 18 *Governance International Journal on Policy, Administration and Institutions* 283 284.

<sup>361</sup> O Chukwumerije 'Peer review and the promotion of good governance in Africa' (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 49 63-65.

<sup>362</sup> A Donald and E Mottershow *Poverty, inequality and human rights: do human rights make a difference?* (2009) 11.

<sup>363</sup> 'Human development report 2010' United Nations Development Programme available at <http://hdr.undp.org/en/content/human-development-report-2010> (accessed 14 April 2011).

<sup>364</sup> S Fukuda-Parr 'Human rights and national poverty reduction strategies: conceptual framework for human rights analysis of poverty reduction strategies and reviews of Guatemala, Liberia and Nepal' (2007) *Economic rights working papers no. 2* 6.

Consequently, PRSP can lead to an increase in government's interest in poverty issues; the prioritization in social policy and increased public expenditure in such areas as, education, health, water, agriculture and rural development that impact on poverty reduction; and increased civil society engagement in poverty debates and monitoring public planning, budgeting and expenditure on poverty reduction.<sup>365</sup> The implication is that states where PRSP are in place and effectively implemented should be able to prioritize socio-economic rights in such schemes and improve the socio-economic conditions of the poorest and most vulnerable.

Several countries in CommonwealthAfrica have initiated PRSP in accordance with the World Bank and IMF models.<sup>366</sup> However, there have always been issues with effective funding and implementation of such schemes. Apart from inadequate funding, corruption and inefficient utilization of available funds for the specific purpose have led to failure to realize set targets in this regard.

## **2.8. Conclusion**

Socio-economic rights embody basic needs, the denial of which constitutes a profound assault on human dignity. Virtually all CommonwealthAfrican states have ratified the ICESCR and the African Charter, both of which guarantee socio-economic rights. As parties to these, and other relevant international and regional treaties on socio-economic rights, CommonwealthAfrican states acknowledge the general or specific obligation to ensure the progressive realisation of socio-economic rights. However, what has been visible is that the majority of ordinary people continue to live in abject poverty and deprivation across CommonwealthAfrica. Arguably, the poor living conditions of ordinary people could be linked to the impunity with which they are denied the opportunity to enjoy their socio-economic rights. Thus, while the need to improve the living conditions of ordinary people justifies the implementation of socio-economic

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<sup>365</sup> R Driscoll and A Evans *Second generation poverty reduction strategies* (2004) 2-4 available at [www.prspsynthesis.org](http://www.prspsynthesis.org).

<sup>366</sup> Kenya (First medium term plan, 2008-2012) available at [www.planning.go.ke](http://www.planning.go.ke) (accessed 10 January 2012); Tanzania (National strategy for growth and reduction of poverty NSGRP 2005); Niger (Accelerated Development and Poverty Reduction Strategy 2008 – 2012); Final report of mid-term review of the poverty reduction strategy paper 2007–2011.

rights, but the reality is that these rights are hardly implemented as gruelling poverty continues to ravage most Commonwealth African societies.

It is conceded that socio-economic rights have some peculiar features when compared to civil and political rights. They are more programmatic, resource-dependent and speak to the collective rather than the individual. Their nature has lent credence to the view that socio-economic rights should not be considered as being or be placed on the same level as civil political rights in terms of implementation. While the debate continues, the emerging consensus emphasises that socio-economic rights and civil and political rights are inextricably linked: the two sides of the same coin. Therefore, both sets of rights are important and worthy of equal attention.

Furthermore, arguments about the legitimacy of socio-economic rights are irrelevant in the face of the impressive ratification by Commonwealth African states of the ICESCR, the African Charter, and other associated international legal instruments recognizing and guaranteeing these rights. Besides the existing international and regional decisions on these rights by international treaty bodies and human rights courts, these rights are now commonly found in the constitutional, legislative and policy frameworks of most states across Commonwealth Africa. Arguably, this situation nullifies arguments that tend to devalue the obligation of states to implement socio-economic rights at the national level.

It is pertinent to note that the ratification of international treaties on human rights is not just a symbolic exercise. Clearly, ratification raises legitimate expectations from the citizens, in particular, and the international community in general, that the state will fulfil the terms of the treaty through effective legislative, policy and administrative measures for the benefit of the rights holders. It is against this backdrop that human rights law imposes the obligation on states to respect, protect, and fulfil socio-economic rights the moment they accede to such treaties.

However compliance with these obligations is subject to certain qualifications. Under the ICESCR socio-economic rights are to be implemented through a progressive process and

as dictated by available resources. Although this is not a requirement under the African Charter, the programmatic nature of these rights clearly limits the capacity of Commonwealth African states to implement socio-economic rights wholesale. Furthermore, while availability of resources is important, lack or scarcity of resources may be only an extenuating factor. It will never justify a complete failure to implement these rights as less resource endowed states are at liberty to seek international assistance and cooperation to advance the implementation of these rights. Besides, there is a minimum threshold below which states cannot descend in failing to implement these rights. Also, the relative lack of appreciable implementation does not mean that the constitutional, legal and instrumental frameworks for achieving the progressive implementation of socio-economic rights do not exist in Commonwealth Africa. Beyond ratification the various treaties can be domesticated. Furthermore, these rights can be expressly provided for or guaranteed in the national constitutional framework, either as substantive rights or as statutory rights through legislation. They can also be advanced through the oversight actions of the legislature, executive policies, projects and programmes, and also by the adjudicatory actions of domestic courts.

However, legislation and state policies are not self-executing. Thus, there must be the political will on the part of the state to implement the relevant laws and policies on these rights. Also, with the domestic legal framework of Commonwealth African states hardly recognizing socio-economic rights as legal rights, achieving an effective implementation of the rights will depend more on creating a culture of respect for human rights across the entire social spectrum. This is where the role and relevance of NHRCs among other national institutions with responsibility for advancing the implementation of these rights becomes the central issue of this study. While the legislature, the executive the judiciary and even civil society constitute valuable institutional frameworks for advancing socio-economic rights implementation; NHRCs appear to be better suited to mainstream socio-economic rights across the broad spectrum of society. Accordingly, the next chapter extensively considers the relevance and suitability of NHRCs as against other relevant state institutions and other bodies for advancing the domestic implementation of socio-economic rights in Commonwealth Africa.



## CHAPTER THREE

### THE ROLE AND RELATIVE ADVANTAGE OF NATIONAL HUMAN RIGHTS COMMISSIONS IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS

#### 3.1. Introduction

NHRCs exist in virtually all Commonwealth African states signifying a widespread acceptance of these bodies. Their primary role is to promote and protect all categories of international human rights at the national level. However, the impression is often created that socio-economic rights do not properly fit into the mandate of NHRIs, particularly, if the enabling statute fails clearly to express them as part and parcel of the 'human rights' mandate. Therefore, there is a perception that these rights are often neglected in the activities of most NHRCs. This perception may be correct but there is also a noticeable shift in direction as some NHRCs are seen to be giving at least some attention to the promotion and protection of socio-economic rights in Commonwealth Africa and across the world. This chapter evaluates the interrelationship and difference between NHRIs and other public bodies, including the judiciary, Parliamentary Human Rights Committees (PHRCs), and NGOs in promoting and protecting socio-economic rights with a view to establishing the extent to which NHRCs are considered, in a relative context, to be more suitable than these other bodies in advancing the domestic implementation of socio-economic rights.

The chapter starts with a brief introduction to the historical development of NHRIs as an idea and their subsequent emergence and diffusion across the world, including Commonwealth Africa, as institutional mechanisms for the promotion and protection of human rights. The introduction provides the background to the choice of NHRCs as the focus of the study among the various other related bodies that coexist within the common institutional framework as NHRIs. Accordingly, the brief introduction of the concept of NHRIs is immediately followed by a survey on the emergence of NHRCs in Commonwealth Africa and their purpose. The next segment examines the essential factors for guaranteeing the effectiveness of NHRCs, otherwise known as the Paris Principles, and provides a brief survey to show the extent to which NHRIs in Africa generally

conform to these factors. This overview is intended to underscore the relevance of the Paris Principles as essential foundational building blocks of the structural construction of NHRCs, the absence of which is generally taken to be inimical to the effectiveness of these institutions.

The segment that follows considers the legal basis for the competence of NHRCs to promote and protect socio-economic rights, whether or not this power is expressed in their remits. The emphasis here is on the argument that all NHRCs have implicit responsibility to advance the domestic implementation of socio-economic rights when the mandate is not expressly given, insofar as a state has ratified the ICESCR, in particular, and other related international treaties. This responsibility is irrespective of the status of these rights in the national level legal framework. The chapter further argues that the mandate for NHRIs to promote and protect socio-economic rights is intrinsic, although an express determination is preferable to avoid ambivalence or create excuses for inaction.

Given the focus of the study, which aims to reinforce arguments on the relevance and effectiveness of non-adjudicatory mechanisms in the promotion and protection of socio-economic rights, the last part of the chapter compares the distinctive roles, interrelationship, and relative strengths and weaknesses that exist between NHRCs and other relevant bodies with at least some responsibility to promote and protect socio-economic rights at the domestic level, such as the judiciary, the PHRCs and NGOs. The essence is to establish, support and underscore the view that NHRCs have relative advantages over these other related state agencies and NGOs for advancing the progressive realization of socio-economic rights at the national level. Finally, the chapter ends with a brief conclusion and some reference to the contents of the succeeding chapters.

## **3.2. The nature and background of NHRIs**

### **3.2.1. Defining NHRIs**

Scholars have defined NHRIs in different, but seemingly identical terms. For instance, Pohjolainen describes NHRIs as independent bodies established by a national

government for the specific purposes of advancing and defending human rights at the domestic level.<sup>367</sup> Tigerstrom simply describes NHRIs as a broad category of institutions that may exercise a variety of functions for the protection of human rights at the national level.<sup>368</sup> For Scripati, NHRIs are fundamental building blocks for human rights protection.<sup>369</sup> Cardenas argues that NHRIs are permanent government administrative bodies responsible for promoting and protecting human rights or for implementing international human rights norms domestically.<sup>370</sup> What may count as the dominant definition is given by the erstwhile UN Human Rights Centre, which comprehensively describes NHRIs as bodies ‘established by government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.’<sup>371</sup>

While there is not yet a uniform definition for NHRIs,<sup>372</sup> what is clear is that the existing definitions are not radically different. At least they are all unanimous in identifying and exposing the dominant features of NHRIs. For instance, they all commonly define NHRIs in terms of their status as government or state created and sponsored institutions but operating independently of the state and other state bodies, such as the executive, the legislature and the judiciary,<sup>373</sup> on the one hand, and, in terms of their functions, as institutions with the primary responsibility for the promotion and protection of human rights at the national level, on the other. Finally, both their creation and the functions, including their powers, must be enabled by a legal instrument. Thus, what constitutes an

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<sup>367</sup> AE Pohjolanen *The evolution of national human rights institutions: the role of the United Nations* (2006) at 1 available at <http://www.nhri.net/pdf/EvolutionofNHRIs.pdf/>.

<sup>368</sup> B von Tigerstrom ‘Implementing economic, social and cultural rights: the role of National Human Rights Institutions’ in I Merali and V Oosterveld (eds) *Giving meaning to economic, social and cultural rights* (2004) 139.

<sup>369</sup> V Scripati ‘The Indian national human rights commission: strengths and weaknesses’ in L Birgit, L Lone and Y Kristine (eds) *National human rights institutions Articles and working papers* (2001) 151.

<sup>370</sup> S Cardenas *Chains of justice: the global rise of state institutions for human rights* (2014) 7; S Cardenas ‘Transgovernmental activism: Canada’s role in promoting national human rights commissions’ (2003) 25 *Human Rights Quarterly* 775 778.

<sup>371</sup> The UN Office of the High Commission for Human Rights Handbook on NHRIs, (hereinafter referred to as the OHCHR Handbook on socio-economic rights) 29.

<sup>372</sup> G de Beco ‘National human rights institutions in Europe’ (2007) 7 *Human Rights Law Review* 331; Cardenas (n 4 above) 7.

<sup>373</sup> A Philips and C James *The future of UN human rights treaty monitoring* (2000) 202.

NHRI is easily discernible from these three basic qualities, that is, a government or state funded body, established and empowered by law, to promote and protect human rights.<sup>374</sup>

However, the argument is often made that certain related national institutions cannot truly be identified as NHRIs in its extensive meaning even if their functions relate to the promotion and protection of human rights. According to Dickson, national institutions with highly circumscribed mandates or functions do not necessarily qualify as NHRIs but rather as special institutions.<sup>375</sup> While not discounting Dickson's arguments, Cardenas attributes this dichotomy to the tendency of the UN human rights system and, to some extent, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), for according recognition to NHRIs based on their degree of compliance with the Paris Principles. She adds, however, that an institution can function effectively as a NHRI even if it is not accredited by the ICC.<sup>376</sup>

Dickson may be correct in his view but this study defers to Cardenas's viewpoint. It is difficult to deny the identity of NHRIs to special or thematic national institutions simply because of the narrowness of their mandate even when their fundamental functions are to promote and protect human rights. In the circumstance it is much safer to categorize NHRIs than to attempt to eliminate some, in as much as the common factor that binds all NHRIs is the direct responsibility to promote and protect human rights and the only difference may be in their powers and levels of capability.

### **3.2.2. The historical development of NHRIs**

Some scholars have extensively documented the historical development of NHRIs.<sup>377</sup> Suffice it to say that the idea of creating NHRIs as vital mechanisms for promoting and

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<sup>374</sup> M Nowak 'National Human Rights Institutions in Europe: Comparative, European and international perspectives' in J Wouters and K Meuwissen (eds) *National human rights institutions in Europe: Comparative European and international perspectives* (2013) 13; JA Mertus *Human rights matters* (2009) 3.

<sup>375</sup> B Dickson 'The contribution of human rights commissions to the protection of human rights' (2003) *Public Law* 272 273.

<sup>376</sup> S Cardenas 'The Shifting boundaries of NHRI definition in the international system' in R Goodman and T Pelgram (eds) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) 52-55; S Cardenas (n 4 above) 8.

<sup>377</sup> Pohjolainen (n1 above) 5; De Beco (n 6 above) 332- 333.

protecting international human rights norms at the national level was first conceived and nurtured into reality within the UN human rights system.<sup>378</sup> As the idea became fully developed and accepted, it culminated in the adoption of the *Principles relating to the status and functioning of national institutions for the protection and promotion of human rights*,<sup>379</sup> by the UN Commission for Human Rights and the General Assembly.<sup>380</sup> The 1993 Vienna World Conference on Human Rights not only affirmed and reinforced the important role NHRIs can play in promoting and protecting international human rights but also called on states to strengthen them to enable them play this significant role.<sup>381</sup> Since then, there has been phenomenal increase in the establishment of NHRIs by states across the globe.<sup>382</sup> Their roles and relevance have continuously received positive endorsements from the various bodies within the international and national human rights systems. Indeed, apart from the UN treaty bodies,<sup>383</sup> the various UN organs have continued to strengthen the existing NHRIs ‘through standard setting, capacity building, network facilitating and membership granting.’<sup>384</sup>

Various reasons influence states to establish NHRIs. Cardenas argues that the UN show-cased NHRIs as democratic institutions that member-states needed to establish as a ‘sign of commitment to international norms, and the emblem of membership in a liberal community of states.’<sup>385</sup> Basically, the desire to gain international legitimacy, respect and acceptability as a liberal state,<sup>386</sup> has been argued as a major factor that motives states to

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<sup>378</sup> Mertus (n 8 above) 2.

<sup>379</sup> Hereinafter, referred to as ‘the Paris Principles.’ These principles are the products of the first international workshop on national institutions for the promotion and protection of human rights, convened by the Commission on Human Rights in October 1991 and hosted in Paris by the CNCDDH.

<sup>380</sup> UN Human Rights Commission Resolutions 1992/54, 3 March 1992; E/CN.4/RES/1992/54; UN General Assembly’s Resolution 48/134 20 December 1993 A/RES/48/1.

<sup>381</sup> See para 36 part I, Vienna Declaration and Programme of Action, 25 June 1993 A/Conf.157/23; 1-1 *International Human Rights Report* 240 (1994).

<sup>382</sup> De Beco (n 6 above) 334.

<sup>383</sup> See the UN Committee on Economic, Social and Cultural Rights General Comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights, 10 December 1998, HRI/GEN/Rev.7 at 59; 6 IHRR 899 (1999); and Committee on the Rights of the Child General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child 15 November 2000, HRI/GEN/1/Rev. 7 at 301; 10 IHRR 317 (2003).

<sup>384</sup> S Cardenas, ‘Emerging global actors: the United Nations and national human rights institutions’ (2003) 9 *Global Governance* 23.

<sup>385</sup> Cardenas (n 30 above) 27-34.

<sup>386</sup> T Franck *The power of legitimacy among nations* (1990) 202.

establish NHRIs even if they do not truly believe in their relevance.<sup>387</sup> Other reasons, such as the desire for states to exercise internal ‘control over human rights dialogue’ or the desire to deflect criticisms of poor human rights records, have also been advanced as possible motivations for states to create NHRIs.<sup>388</sup> In recent times it has become customary to establish NHRIs as part of a democratic constitutional change<sup>389</sup> or as part of post-conflict peace-building agreements.<sup>390</sup> Whatever reasons that inform their establishment, the fact is that NHRIs now exist in record numbers in all the regions of the world and, as Cardenas further argues, ‘even when they reflect simple window dressing, or attempts to appease international critics, their existence is still consequential.’<sup>391</sup>

### 3.2.3. The conception of NHRCs

NHRCs are one form or category of NHRIs. They are commonly identified as the model of NHRIs articulated in the Paris Principles, but are particularly prevalent in Commonwealth countries. The nomenclature is also widely embraced in Francophone countries. Basically, NHRCs differ from other NHRIs in terms of the breadth of their mandates, powers, and personal jurisdiction.<sup>392</sup> For instance, although the trend is now changing,<sup>393</sup> a typical *ombudsman* has no direct or specific human rights mandate except in isolated cases where such a mandate is so expressly conferred on it by law.<sup>394</sup> Its functions, primarily, to address cases involving abuse of power or maladministration by public officers.<sup>395</sup>

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<sup>387</sup> T Pegram ‘Diffusion across political systems: The global spread of national human rights institutions’ (2010) 32 *Human Rights Quarterly* 729.

<sup>388</sup> M Brodie ‘Progressing norm socialization: why membership matters. The impact of the accreditation process of the international coordinating committee of national institutions for the promotion and protection of human rights’ (2011) 80 *Nordic Journal of International Law* 143–192 147.

<sup>389</sup> R Murray *The role of national human rights institutions at the international and regional levels: the experience of Africa* (2007) 3.

<sup>390</sup> The National human rights commissions of Burundi, Nepal and Rwanda are all products of post-conflicts peace agreements.

<sup>391</sup> S Cadenas ‘National human rights institutions and state compliance’ in R Goodman and T Pelgram (eds) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) 1 29.

<sup>392</sup> J Hatchard, M Ndulo and P Slinn *Comparative constitutionalism and good governance in the Commonwealth* (2004) 210

<sup>393</sup> Elizondo and Aguilar (n 14 above).

<sup>394</sup> De Beco (n 6 above) 336.

<sup>395</sup> LC Rief *The ombudsman, good governance and the international human rights system* (2004) 7-9; G Elizondo and I Aguilar ‘The ombudsman institution in Latin America: minimum standards for its

Furthermore, NHRCs are also different from the *specialised human rights institutions*, the *human rights advisory committees* and the *human rights institutes*. Interestingly, a *hybrid human rights institution*, such as the Ghanaian Commission on Human Rights and Administrative Justice, has a more diverse mandate than a typical NHRC, as it combines the functions of an ombudsman with the promotion and protection of human rights.<sup>396</sup> In contrast, *specialized human rights institutions* differ from NHRCs for having very narrow mandates that restrict them to some limited human rights issues mostly affecting the interest of socially disadvantaged groups, such as ethnic, linguistic and religious minorities, indigenous populations, aliens, migrants, immigrants, refugees, children, women, the poor and the disabled.<sup>397</sup> Similarly, the *human rights advisory councils* and the *human rights institutes and centres* have restrictive mandates confining them to provide mostly educational and advisory services as opposed to NHRCs that carry out both promotional and protective functions.

Unlike other categories of NHRIs, the scope, powers and jurisdiction of NHRCs straddles the promotion and protection of all categories of human rights, including socio-economic rights in both the public and private sectors.<sup>398</sup> Consequently, NHRCs enjoy a far greater degree of social recognition, relevance and importance than other NHRIs in both the UN human rights system and the ICC.<sup>399</sup>

### 3.2.4. The emergence of NHRCs in Africa

As in other parts of the world, the diffusion of NHRIs in the last decade of the 20th century also had a significant implication in Africa.<sup>400</sup> Togo was a pioneer in this

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existence' in L Birgit, L Lone and Y Kristine (eds) *National human rights institutions: articles and working papers* (2001) 215-216.

<sup>396</sup> S Cardenas 'Adaptive states: The proliferation of national human rights institutions' *Carr Center for Human Rights policy working paper* (2004) 13.

<sup>397</sup> R Craver (ed) 'Performance and legitimacy: national human rights institutions' *International Council on Human Rights Policy* (2000) 3.

<sup>398</sup> Mertus (n 8 above) 3.

<sup>399</sup> J Hatchard, M Ndulo and P Slinn (n 26 above) 210

<sup>400</sup> CM Peter 'Human Rights Commissions in Africa: Lessons and Challenges' in A Bosland J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 351-374); Human Rights Watch *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) 3.

direction with the creation of the National Commission for Human Rights and Freedoms in 1987.<sup>401</sup> Since then, not less than 41 African states have established NHRIs, namely:<sup>402</sup> Algeria,<sup>403</sup> Angola,<sup>404</sup> Benin,<sup>405</sup> Burkina Faso,<sup>406</sup> Burundi,<sup>407</sup> Cameroon,<sup>408</sup> Cape Verde,<sup>409</sup> Central African Republic<sup>410</sup> Chad,<sup>411</sup> Congo Brazzaville,<sup>412</sup> Cote d'Ivoire,<sup>413</sup> Djibouti,<sup>414</sup> Democratic Republic of Congo,<sup>415</sup> Egypt,<sup>416</sup> Ethiopia,<sup>417</sup> Gabon,<sup>418</sup> Ghana,<sup>419</sup> Kenya,<sup>420</sup> Liberia,<sup>421</sup> Madagascar,<sup>422</sup> Malawi,<sup>423</sup> Mali,<sup>424</sup> Mauritania,<sup>425</sup>

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- <sup>401</sup> Commission Nationale des Droits de l'Homme established by Act no. 87—09 of 1987 and re-established by Organic Act 96-12 of 1996 in terms of Sections 156-158 of the Constitution. However, Cardenas has argued that Africa's first NHRI is Senegal's human rights committee established in 1970. See Cardenas (n 4 above) 80-81.
- <sup>402</sup> The surveys shows that Botswana, Gambia, Equatorial Guinea, Guinea, Lesotho, Swaziland, Seychelles, and Trinidad and Tobago are yet to establish NHRCs.
- <sup>403</sup> The National Consultative Commission for the promotion and protection of Human Rights (*Commission Nationale Consultative de promotion et de protection des Droits de l'Homme Palais du people*) established by Presidential decree no. 92-77 of 22 February 1992.
- <sup>404</sup> Justice and Rights Omdusman (*Provedor de Justiça e de direitos*) established by law 5/06 of 2005 pursuant to Section 142-144 of the Constitution.
- <sup>405</sup> The Benin Human Rights Commission (*Commission Beninoise des Droits de l'Homme*) established by Act 89/004 of 12 May 1989.
- <sup>406</sup> National Human Rights Commission of Burkina Faso (*Commission Nationale des Droits de l'Homme*) established by Law no. 062-2005/AN of 21 December 2005.
- <sup>407</sup> Independent National Human Rights Commission (*Nationale Indépendante des Droits de l'Homme*) established by Law no 1104 of 5 2011.
- <sup>408</sup> The National Commission on Human Rights and Freedoms established by Decree no 90-1459 of November 8, 1990.
- <sup>409</sup> The National Commission on Human Rights and Citizenship (*Commission Nationale des Droits de l'Homme et du Citoyen*) established pursuant to Decree-Law No. 38 of 2004.
- <sup>410</sup> National Human Rights Commission (*Commisson Nationale des Droits de l'Homme*) established by Law no. 96.003 of 10 January 1996.
- <sup>411</sup> National Commission on Human Rights Commission and Freedoms (*Nationale des Droits de l'Homme et des Libertes*) established by Law no. 31/PP/94 of 9 September 1994.
- <sup>412</sup> National Human Rights Commission (*Commission Nationale des Droits de l'Homme*) established by Law no. 5 of 2003.
- <sup>413</sup> National Human Rights Commission (*Commission Nationale des Droits de l'Hommes*) established by decision no 2005-81/PR of 15 July 2005.
- <sup>414</sup> National Human Rights Commission (*Commission Nationale des Droits de l'Hommes* established by Presidential Decree no. 8 of April 2008.
- <sup>415</sup> National Observatory of Human Rights (Office National des Droits de l'Homme) established by law 04/20 of 2004.
- <sup>416</sup> The National Council for Human Rights established by law 94 of 2003.
- <sup>417</sup> The Ethiopia Human Rights Commission established by proclamation pursuant to Sections 55(14) of the Constitution of 2002.
- <sup>418</sup> National Human Rights Commission (*Commission Nationale des Droits de l'Homme*) established by Law 19/2006 of 3 January 2006.
- <sup>419</sup> The Commission on Human Rights and Administrative Justice established by Act 456 of 1993 pursuant to under Sections 216-230 of the 1993 constitution of Ghana.
- <sup>420</sup> Kenya National Commission on Human Rights established by the Kenya National Commission on Human Rights Act of 2000.
- <sup>421</sup> The Independent National Commission for Human Rights established by the Human Rights Act of 1997.



Mauritius,<sup>426</sup> Morocco,<sup>427</sup> Namibia,<sup>428</sup> Niger,<sup>429</sup> Nigeria,<sup>430</sup> Mozambique,<sup>431</sup> Rwanda,<sup>432</sup> Senegal,<sup>433</sup> Sierra Leone,<sup>434</sup> South Africa,<sup>435</sup> South Sudan,<sup>436</sup> Sudan,<sup>437</sup> Tanzania,<sup>438</sup> Tunisia,<sup>439</sup> Uganda,<sup>440</sup> Zambia,<sup>441</sup> and Zimbabwe.<sup>442</sup>

Cardenas links the creation and proliferation of NHRIs across the world, including Africa, to three normative ambiguities: when states are making or designing new constitutions or post-conflict peace agreements (regulatory moments), when states are acting in response to or in compliance with external treaty obligations, and during periods of systemic abuse of human rights that makes the appeasement of local and international critics highly desirable.<sup>443</sup> Mertus simply attributes their diffusion across the continent to the influence of the global human rights movement.<sup>444</sup> Both arguments are correct in my view. Given the hitherto generally poor human rights records of African states, the

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<sup>422</sup> National Human Rights Commission (Commission Nationale des Droits de l’Homme) established by Decree 96.282 of 18 December 1996.

<sup>423</sup> The Malawi Human Rights Commission established under Section X1 of the Constitution of 1994

<sup>424</sup> National Human Rights Commission (Commission Nationale des Droits de l’Homme) established by Law 15 of 2009.

<sup>425</sup> The National Commission for Human Rights (Commission Nationale des Droits de l’Homme) established by law 15 of 2006.

<sup>426</sup> The Mauritius Human Rights Commission Act of 1998.

<sup>427</sup> Human Rights Advisory Council of Morocco established by decree 1 of 1990.

<sup>428</sup> Namibian National Human Rights Commission established by the Ombudsman Act of 1990.

<sup>429</sup> National Commission for Human Rights and Fundamental Freedoms (Commission Nationale des Droits de l’Homme et des libertés fondamentales) established by law no. 2001-23 of 10 August of 2001.

<sup>430</sup> The Nigerian National Human Rights Commission established by Decree no 22 of 1995.

<sup>431</sup> National Human Rights Commission established by Law no. 33 of 2009.

<sup>432</sup> The Rwandan National Human Rights Commission established by law 4/99 of 1999.

<sup>433</sup> The Senegalese Committee for Human Rights established by law 4 of 1997.

<sup>434</sup> The Human Rights Commission of Sierra Leone established by National Commission for Democracy and Human Rights Act of 1996.

<sup>435</sup> The South African Human Rights Commission established by section 181(1)(b) of the 1996 Constitution.

<sup>436</sup> The Sudan Advisory Council for Human Rights created by Presidential Decree of 1994.

<sup>437</sup> The South Sudan Human Rights Commission established by Section 145 of the Transitional Constitution of the Republic of South Sudan of 2011.

<sup>438</sup> The Commission for Human Rights and Good Governance Act of 2001.

<sup>439</sup> The High Committee on Human Rights and Fundamental Freedoms established by law 16 of 2008

<sup>440</sup> The Ugandan Human Rights Commission established under section 51 of the 1995 Constitution of Uganda.

<sup>441</sup> The Permanent Human Rights Commission established by the Human Rights Commission Act of 1996.

<sup>442</sup> The Zimbabwe Human Rights Commission Act of 2012.

<sup>443</sup> Cardenas (n 4 above) 107-108.

<sup>444</sup> Mertus (n 8 above) 7.

consent to establish these institutions shows a desire among the modern leaders of the African continent to turn a new page and build a new political and social relationship with the rest of the world, anchored in the democracy, the rule of law and respect for human rights. As Olowu notes, whether activated by genuine intentions for human rights or for appeasement purposes, ‘all that is certain is that the establishment of human rights commissions became in vogue in African countries in the 1990s.’<sup>445</sup>

Therefore, suffice it to say that NHRIs exist in Commonwealth Africa in different forms as complementary state institutions for the promotion and protection of all categories of human rights at the national level. Presently, the Network of African National Human Rights Institutions as a regional platform for inter-institutional links, partnership and cooperation among African NHRIs. The network works primarily to strengthen the capacities of NHRIs on the continent and meets periodically to discuss common issues and challenges and the exchange of best practice.

### **3.3. NHRCs in Commonwealth Africa and adherence to the Paris Principles**

The Paris Principles emphasize that NHRCs should have the competence and capacity to promote and protect human rights effectively. The relevance of these principles stems from the fact that they have acquired universal status as ‘internationally agreed minimum standards’ for the establishment, operation and assessment of NHRCs.<sup>446</sup> Accordingly, they provide the conceptual foundation as universal norms for securing the effectiveness of NHRCs.<sup>447</sup> These factors relate to the mode of establishment, mandate, independence, composition, as well as the powers and resources of NHRCs. Thus, the dominant conception is that NHRCs without or substantially deficient in the Paris principles are considered to be potentially weak, dysfunctional and ineffective.<sup>448</sup> As a matter of fact, complying with the Paris Principles comes with international recognition and privileges for NHRCs, including being accorded accreditation status and speaking rights by the

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<sup>445</sup> D Olowu *Integrative right-based approach to human rights development in Africa* (2009) 107

<sup>446</sup> V Haasz ‘The role of NHRIs in the implementation of UN guiding principles’ (2011) 14 *Human Rights Review* 165.

<sup>447</sup> Murray (n 23 above) 4.

<sup>448</sup> Murray (n 23 above) 4.

HRC, the ICC and the African Commission.<sup>449</sup> Even membership of the African Network for NHRIs is based on compliance with the Paris Principles.<sup>450</sup>

However, being minimum benchmarks, states are at liberty to adopt them with necessary modifications provided their essence is not substantially compromised.<sup>451</sup> Although a survey of NHRIs in Africa expectedly shows varying degrees of compliance with the Paris Principles, uniformity of compliance is not expected, especially on a continent with diverse political, economic social, religious and cultural backgrounds, experiences and challenges. The following evaluates the level at which some of the existing NHRIs in Africa conform to the Paris Principles.

### 3.3.1. Mode of establishment of NHRCs

The Paris Principles prescribes the establishment of NHRCs through the framework of a national constitution, legislation or decree.<sup>452</sup> This process envisions that establishing NHRCs within the framework of a constitution is bound to guarantee perpetual existence, continuity, and independence for such institutions given the difficult process associated with amending national constitutions.<sup>453</sup> However, Smith argues that similar guarantees of continuous existence can be secured with national legislation,<sup>454</sup> which indeed, is the common practice although such institutions are considered less secure.<sup>455</sup> What is considered most inappropriate is to establish NHRCs through arbitrary processes, like executive decrees or orders under which the continuous existence of such institutions

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<sup>449</sup> The Paris Principles are used by the United Nations International Coordinating Committee of National Human Rights Institutions ('ICC') as criteria to accord status to NHRIs. It has three criteria of membership; "A", (an institution is compliant with the Paris Principles), "B" (an institution is not fully compliant with the Paris Principles, but has the status of "observer") or "C" (an institution is not compliant with the Paris Principles"). Only "A" status national institutions have the right to appear before the UN Human Rights Council.

<sup>450</sup> Sections 7 of the Constitution of the Network of African National Human Rights Institutions

<sup>451</sup> De Beco (n 6 above) 333.

<sup>452</sup> Paris Principles para 2.

<sup>453</sup> R Murray 'National human rights institutions: criteria and factors for assessing their effectiveness' (2007) *Netherlands Quarterly of Human Rights* 189 195; Cardenas (n 4 above) 9; B Lindsnaes and L Lindholt 'National human rights institutions: standard-setting and achievements' in B Lindsnaes, L Lindholt and K Yigen (eds) *National human rights institutions: articles and working papers* (2001) 14.

<sup>454</sup> A Smith 'The unique position of national human rights institutions: a mixed blessing?' (2006) 28 *Human Rights Quarterly* 904 914.

<sup>455</sup> For instance, the existence of a constitutive legislation did not prevent the President of Niger Republic from disbanding the country's National Human Rights Commission in 2010.

remains clouded and uncertain.<sup>456</sup> A survey of NHRCs in Commonwealth Africa shows that most of them are established by national legislation;<sup>457</sup> quite a few are established by the national constitution as well as by ordinary legislation.<sup>458</sup> Very few are established by executive decrees.<sup>459</sup> Thus, the general conclusion is that NHRCs in Africa substantially comply with the Paris Principles in terms of mode of establishment.

### 3.3.2. Defined competence and powers

It is another fundamental requirement of the Paris Principles for NHRCs to be given ‘as broad a mandate as possible as precisely defined by the enabling law.’<sup>460</sup> Apart from preventing possible conflicts with the work of other bodies, a broad mandate empowers NHRCs to promote and protect all categories of human rights, except in the circumstances where there is an express exclusion.<sup>461</sup> Invariably, it is inappropriate to give a narrow or restrictive mandate to NHRCs as correspondingly, this will limit their capacity to promote and protect all categories of human rights.

However, the reality is that the mandate of NHRCs is determined by the enabling law, which is often conditioned by the human rights priorities of states and leads to variation in mandate among NHRCs. Accordingly, while some NHRCs have free-standing mandates that allow them to deal with all categories of human rights, including socio-economic rights,<sup>462</sup> some others have mandates that are attached or restricted to the promotion and protection of some specific human rights, such as civil and political rights

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<sup>456</sup> Smith (n 88 above) 914.

<sup>457</sup> U Spliid *The compliance of the constituent documents of the West African and Central African national human rights institutions with the Paris Principles: a descriptive analysis* (2009) 10.

<sup>458</sup> Ghana, Kenya, Malawi, Niger, South Africa, Togo, Uganda and Zambia.

<sup>459</sup> Algeria, Burkina Faso, Cameroon, Guinea, Mali, Mauritania, Morocco, and Nigeria. See also U Spliid (n 91 above).

<sup>460</sup> Paris Principles, Sections 2.

<sup>461</sup> B Lindsnaes, L Lindholt and K Yigen ‘National human rights institutions: an input to the discussions on the establishment and development of the functions of national human rights institutions’ (2001) in B Lindsnaes, L Lindholt and K Yingen (eds) *National human rights institutions: articles and working papers* (2001) 87

<sup>462</sup> Section 184 of the Constitution of South Africa; section 7 of South African Human Rights Commission Act 1994; section 52(1) of the Ugandan constitution of 1995.

only,<sup>463</sup> or to human rights guaranteed either by the national constitution<sup>464</sup> or by both the national constitution and international human rights treaties.<sup>465</sup>

Furthermore, the Paris Principles prescribe adequate powers for NHRCs effectively to execute their mandates.<sup>466</sup> Thus, NHRCs with a mandate to protect human rights would naturally have powers to investigate human rights violations in addition to receiving and treating human rights violation complaints from the public. For instance, the NHRCs of Kenya, Ghana, Nigeria, South Africa and Uganda have powers to require and enforce the production of documents and other evidence, to compel witnesses to give testimonies, to enter and search premises, and to impose appropriate penalties.<sup>467</sup> In contrast, NHRCs with purely promotional mandates, such as the Sudan Advisory Council for Human Rights and the National Human Rights Advisory Committee of Morocco, do not have powers to investigate or receive individual complaints on human rights violation. The consequence is that the latter are relatively not as active in protecting human rights since their work is restricted mainly to educational, research and advisory functions.<sup>468</sup>

As the survey of NHRCs shows, variation in the scope of mandates is a common feature among NHRIs in Africa. For instance, the NHRCs of Benin Republic, Ethiopia, Gabon, Ghana, Kenya, Malawi, Mauritania, Mauritius, Niger, Nigeria, South Africa, Tanzania, Zambia, and Zimbabwe are conferred with a seemingly broad mandate to promote and

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<sup>463</sup> For instance, section 2 of the Malaysian Human Rights Commission Act of 1999 defines human rights as ‘those fundamental civil and political liberties listed in Part II of the Constitution.’

<sup>464</sup> See the jurisdiction of the Canadian Human Rights Commission under the Canadian Human Rights Act 1977.

<sup>465</sup> For instance, the Indian National Human Rights Commission (INHRC) has jurisdiction over human rights under both the national constitution and other rights ‘embodied in the International Covenants and enforceable by courts in India.’ Section 12 of the Indian Human Rights Commission Act 1993 See also the jurisdiction of the Australian Human rights and Equal Opportunities Commission under of the Human Rights and Equal Opportunities Act, 1986; Sections 75(22) of the Argentina Constitution, which incorporates nine international human rights treaties and gives national Defensor del Pueblo of Argentina jurisdiction over civil and political rights, socio-economic rights, as well as third generation rights.

<sup>466</sup> Paris Principles para 1.

<sup>467</sup> The protection mandates of some NHRIs, such as the NHRIs of Uganda, Malawi, Tanzania and Zambia are further enhanced by virtue of the quasi-judicial authority conferred on them by the enabling legislation.

<sup>468</sup> Cardenas and Flibbert ‘National human rights institutions in the Middle East’ (2005) 59 *Middle East Journal* 411 412.

protect human rights generally, the NHRCs of Algeria, Chad, Morocco and Tunisia have narrow mandates that restrict them to promotional or advisory activities.<sup>469</sup> Similarly, the NHRCs of Kenya, Uganda, Tanzania, and Nigeria have mandates that extend to monitoring states' compliance with international human rights treaty obligations,<sup>470</sup> the Ethiopian NHRC has a mandate that severely confines it to the promotion and protection of human rights recognized under the national constitution,<sup>471</sup> even though the term 'human rights' is defined to include international agreements ratified by the country.<sup>472</sup>

Most NHRCs in Commonwealth Africa have discernibly robust human rights mandate. However, what is not very clear in most of them is whether the scope of their mandates extends to the promotion and protection of socio-economic rights against a backdrop that this set of rights is clearly not recognized as human rights in the national legal framework of most African countries. Although the Commonwealth Best Practice Book suggests that human rights in relation to the mandate of NHRCs be defined 'not only by reference to domestic law, but also by reference to all international human rights instruments, whether or not acceded to by the state,'<sup>473</sup> it is more convincing to say that the scope of human rights in the national constitution remains the most relevant factor for delineating the actual mandate of NHRCs. For instance, in Nigeria, the expressed mandate of the Commission incorporates socio-economic rights by reference to the ICESCR in the enabling legislation, yet the constitution fails to recognize these rights as legally enforceable rights. This situation remains a potent challenge to the Commission's mandate over socio-economic rights protection. Arguably, most other NHRCs in Commonwealth Africa face a similar conundrum whether their mandates truly and uncontestedly extend to socio-economic rights. Thus as Murray correctly observes, it is ideal for NHRCs to have both 'promotional and protective powers, and ideally the power to deal with all human rights recognised by international law, including economic, social and cultural rights, to which NHRCs may be particularly well suited.'<sup>474</sup>

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<sup>469</sup> Cardenas and Flibbert (n 102 above).

<sup>470</sup> For instance see section 5(1)(a) of the Nigerian National Human Rights Commission Act 1995

<sup>471</sup> Section 6(1)(2) of Proclamation 2000 establishing the Commission.

<sup>472</sup> Section 2 of Proclamation 2000 establishing the Commission.

<sup>473</sup> Commonwealth Secretariat *National Human Rights Institutions: Best Practice* (2001) 18.

<sup>474</sup> Murray (n 87 above) 201.

### 3.3.3. Institutional independence and autonomy

Given that the activities and actions of NHRCs are directed mostly at the state, it is only apposite for NHRCs to be independent of the state for effectiveness. Thus, institutional independence is a fundamental prescription of the Paris Principles for securing and insulating NHRCs from executive pressure, influence and control in the exercise and performance of their powers and functions.<sup>475</sup> However, given their deferential position in relation to the state it is a major challenge, in most cases, for NHRCs to attain complete institutional independence and autonomy from the state.<sup>476</sup>

The concept of institutional independence and autonomy embraces legal, administrative, operational and financial aspects. For NHRCs, having legal autonomy entails exercising a distinct legal personality and powers to sue and be sued, acquire property and enter into legal relations in their own name. Apparently, this is not a problem in Africa as most of the existing NHRCs have autonomous legal status under the various founding legislation.<sup>477</sup> Similarly, administrative or operational autonomy refers to the legal powers of NHRCs to take and act on their decisions independently of any state authority but subject to the law.<sup>478</sup> It also entitles NHRCs to have the ability to employ, assign responsibilities, remunerate and discipline their staff, make their own rules of procedure and publish their recommendations without subjecting such actions to prior review or approval by any other state agency or authority.<sup>479</sup> Administrative and operational autonomy are considered absent in all situations where the actions or decisions of NHRCs are subjected to the supervisory jurisdiction of government officials, ministries or departments.<sup>480</sup> Even when there are legal guarantees of institutional independence and autonomy, attention is usually focused on the extent to which it is seen to be enjoyed

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<sup>475</sup> Paris Principles para 4.

<sup>476</sup> Smith (n 92 above) 915.

<sup>477</sup> Section 3(1) of Ethiopian Human Rights Commission Establishment Proclamation Act, 2002; Section 1(2) of the Nigerian National Human Rights Commission Act of 1995. Even if this is not expressly stated in the enabling law, the fact that they are created by law or the constitution is sufficient to clothe them with legal personality.

<sup>478</sup> J Hatchard, M Ndulo and P Slinn (n 26 above) 221-227

<sup>479</sup> OHCHR Handbook on socio-economic rights (n 5 above) 71.

<sup>480</sup> OHCHR Handbook on socio-economic rights (n 5 above) 40.

and exercised in practice. As with legal autonomy, the constitutive legislation also determines the extent of administrative or operational autonomy conferred on NHRCs.

In the case of Africa, the independence and autonomy status of NHRCs is a mixed-bag. For instance, the NHRCs of Cameroon, Gabon, Ghana, Guinea, Nigeria, Sierra Leone, and South Africa have explicit guarantees of institutional independence and autonomy in their enabling statutes, which ostensibly insulates them from being subjected to the direction or control of any other authority except the Constitution and the law.<sup>481</sup> However, it appears that majority of NHRCs in Africa do not have a legal guarantee of institutional independence and autonomy. Worse still is the experience of the NHRCs of Chad and Algeria where the lack of independence and autonomy from the state is quite visible. For instance, the NHRC of Chad is attached to the office of the Prime Minister;<sup>482</sup> while that of Algeria is expressly placed under the supervision of the state President.<sup>483</sup> These scenarios clearly negate the Paris Principles on the need to guarantee institutional independence and autonomy for NHRCs.

#### **3.3.4. Financial independence and autonomy**

NHRCs cannot function effectively without adequate financial resources.<sup>484</sup> It is also argued that financial autonomy is necessary to prevent the agenda or priorities of NHRCs from being determined or set by politicians or government departments instead of the institutions themselves. Further, it enables them to achieve a high level of activity, professionalism, and results.<sup>485</sup> Accordingly, the Paris Principles emphasizes that NHRCs must be enabled to function independently without any financial control that might affect their independence.<sup>486</sup> The Commonwealth Best Practice Handbook similarly prescribes that ‘nothing in the enabling legislation relating to fiscal autonomy should require the

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<sup>481</sup> The NHRC of Togo (Sections 156 – 157 of the 1992 Constitution); the NHRC of Gabon (Section 20 of Decree 001037/RR 2000); See also Spliid (n 95 above) 10-12.

<sup>482</sup> Section 2 of Act 31/PR/94 of 1994.

<sup>483</sup> Section 2 Decree 92-77 of 1992.

<sup>484</sup> B Pityana ‘National institutions at work: The case of the South African Human Rights Commission,’ in B Lindsnaes, L Lindholt and K Yigen (eds) *National human rights institutions: articles and working papers*(2001)53.

<sup>485</sup> Lindsnaes, Lindholt and Yigen (n 95 above) 22.

<sup>486</sup> Paris Principles para 4.



institution to act in accordance with the directives of the national government or any of its department or agencies.<sup>487</sup>

Although, NHRCs are virtually funded by states, the funding pattern must not be such that compromises their independence. Thus securing financial autonomy for NHRIs goes beyond listing the sources of funds in the enabling legislation. The OHCHR Handbook on socio-economic rights prescribes that funds meant for NHRCs should be drawn from the consolidated fund of the central budget and released directly to their accounts, and not through proxy government ministries or departments.<sup>488</sup> Also, NHRCs should have powers to prepare and defend their annual budgets directly before Parliament, attaching their budgets to government ministries may create the impression of a lack of independence even where there may be no actual interference from the government.<sup>489</sup>

Furthermore, states are obliged to ensure an adequate allocation of funds to NHRCs so that they can conveniently fund their minimum operational costs and expenditure, such as payment of staff salaries and training, payment of commissioners' remuneration and office accommodation and the specific activities generated by their mandates, as well as the cost of maintenance of communication facilities such as telephone and internet services.<sup>490</sup> Indeed depriving NHRCs of adequate financial resources is the easiest way of rendering them practically dysfunctional.<sup>491</sup> Consequently the financial buoyancy of NHRCs could be a measure of the seriousness states attach to the goals of establishing these institutions in the first place. The central question is the appropriation and release of adequate funds directly to the NHRCs from the national coffers without any impediments by the government.<sup>492</sup> Generally, states are the primary source of funding for

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<sup>487</sup> Commonwealth Best Practice Handbook para15.

<sup>488</sup> OHCHR Handbook on socio-economic rights (n 5 above) 73; Commonwealth Best Practice Handbook 28.

<sup>489</sup> OHCHR Handbook on socio-economic rights (n 5 above) 41.

<sup>490</sup> Hatchart, Ndulo and Slinn (n 26 above) 217-218; ICC Sub Committee's General Observations para 26.

<sup>491</sup> Peter (n 34 above) 368.

<sup>492</sup> In ICC General Observations 2.10, it is stated that where administration and expenditure of funds is regulated by the executive, such regulation must not affect the ability of the NHRI to function independently and effectively.

NHRCs.<sup>493</sup> Some NHRCs have provisions in the relevant laws obligating the government to provide funding for their operations,<sup>494</sup> others have no such statutory obligation imposed and, thus, depend on subsidies from the state.<sup>495</sup> For most NHRCs in Commonwealth Africa the funds or subsidies allocated to them by the state constitute their total annual operational budget, although some do have powers to raise funds from other sources.<sup>496</sup> Furthermore, while some NHRIs have powers to present their budgets directly to Parliament, others do not have such powers and have to pass their budgets through proxy sources such as the ministries of finance or justice.<sup>497</sup> Even those that have a legal guarantee for direct financial resources, accessing approved funds is often difficult because of problems associated with low budgetary performance and bureaucratic bottlenecks.<sup>498</sup>

As Pityana notes, lack of access to the consolidated revenue fund for their financial requirements is a common problem among NHRCs in Africa.<sup>499</sup> Arguably, the result is that NHRCs in Africa are generally underfunded and, consequently, are under-staffed, unable to attract or retain quality staff, open new offices or spread their presence in other parts of the country. The relatively poor funding from states makes African NHRIs seek and rely on external donor assistance to fund some of their programmes which is often insufficient.<sup>500</sup>

### 3.3.5. Composition of NHRCs

NHRCs cannot function unless composed of members with the requisite knowledge, experience and attitude for human rights protection. Apart from strengthening the

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<sup>493</sup> The enabling laws also provides for the source or sources of funding for NHRIs.

<sup>494</sup> For instance, see section 36 Ethiopian National Human Rights Commission Proclamation of 2000; Mauritania section 13 of the Decree concerning the reorganization of the Commission for Human Rights, the fight against poverty and integration of 2000; Niger section 23 of the National Commission for Human Rights and Fundamental Freedoms Act 1998); and Togo section 25 of the National Commission on Human Rights Act of 1996.

<sup>495</sup> For instance, Cape Verde and Chad.

<sup>496</sup> Such as the human rights fund of the NNHRC established under section 15 of the National Human Rights Commission (Amendment) Act of 2010.

<sup>497</sup> See for instance, Mauritania section 12 of the enabling Act.

<sup>498</sup> Pityana (n 118 above).

<sup>499</sup> Pityana (n 118 above).

<sup>500</sup> Hatchard, Ndulo and Slinn (n 26 above) 218.

independence of NHRCs, the character and quality of composition may also influence the functions they decide to give priority attention.<sup>501</sup> The Paris Principles demand that the composition and appointment of members of NHRCs should ‘ensure the pluralist representation of the social forces involved in the protection and promotion of human rights.’<sup>502</sup> The social forces referred to are NGOs, trade unions, social and professional organizations as well as those with a particular focus on vulnerable groups, and representatives of ‘trends in philosophical or religious thought.’<sup>503</sup> The Commonwealth Best Practice Book recommends that the composition of members should reflect the ‘gender balance, the ethnic diversity of the society and the range of vulnerable groups’ in the society.<sup>504</sup>

Since there are no specific criteria regarding the composition of NHRCs, states can choose whichever composition they consider suitable. However, the Paris Principles caution, that although governmental representation in NHRCs is not improper; it is more acceptable for them to participate only in an advisory capacity.<sup>505</sup> Furthermore, while a pluralistic composition has the advantage of providing opportunity for members to draw from each other’s background, experience and expertise, it is difficult to have the sort of broad representation recommended by the Paris Principles without creating Commissions that may become too expensive to maintain and too unwieldy to manage efficiently. Conversely, while a small composition may, relatively, be considered to be more manageable and less expensive to maintain,<sup>506</sup> the danger exists that institutions with narrow representation may be confronted with questions about their legitimacy and general acceptability.<sup>507</sup> For example, the Board of the Danish Institute for Human Rights has a compositional structure that is not too large yet takes the pluralism of the Danish society into consideration. It is made up of 12 members, six of whom are nominated by

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<sup>501</sup> De Beco, (n 6 above) 340.

<sup>502</sup> Paris Principles para 4.

<sup>503</sup> OHCHR Handbook on socio-economic rights (n 5 above) 82.

<sup>504</sup> Commonwealth Best Practice Handbook 15.

<sup>505</sup> Paris Principle para1(e).

<sup>506</sup> K Yigen ‘Guarantees of independence of national human rights institutions: Appointment and dismissal procedures of leading members’ in B Lindsnaes and L Lindholt (eds) *National Human Rights Institutions: Sections and working papers* (2001) 65.

<sup>507</sup> Yigen (n 140 above) 62.

the country's universities, while the other six are nominated by the Centre Council which consists of representatives of about 55 NGOs, political parties in parliament, government ministries and individuals with knowledge of human rights.

A survey of NHRCs in Africa shows that the composition of the governing boards of these institutions is visibly diverse. Although the mode and number of the composition naturally differ, some having more inclusive representation than others, the enabling legislation of existing NHRCs provides for a pluralistic composition. This notwithstanding, it seems that only few African countries provide for a broadened representation that captures the wider spectrum of social forces,<sup>508</sup> including trade unions,<sup>509</sup> women,<sup>510</sup> human rights NGOs and professionals.<sup>511</sup> The common practice is for the enabling law to state the maximum number of members of the commission, which ranges from as low as four<sup>512</sup> to as high as forty-five,<sup>513</sup> and leave the quality of representation to be selected by the appointing authority. Basically, what is clear is that the constitution of NHRCs is not a uniform process. Thus, compliance with the Paris Principles among NHRCs in Africa varies from state to state.

### 3.3.6. Appointment and tenure of members of NHRCs

Apart from stating that the appointment of members of NHRCs should be by means of election or otherwise<sup>514</sup> and 'effected by an official act, which shall establish the specific duration of the mandate'<sup>515</sup> the Paris Principles gives no clear directions on the appointment, tenure and termination of the appointment of members.<sup>516</sup> Nevertheless, the appointment and tenure of members of NHRCs is fundamental to securing operational

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<sup>508</sup> In Australia, India and New Zealand commissioners are appointed to represent vulnerable groups such as minorities and women in the commissions. France and Denmark ensures that NGOs are appointed in the governing boards to represent vulnerable groups in society.

<sup>509</sup> Chad provides for the appointment of trade union members and NGOs into the commission

<sup>510</sup> Cote d'Ivoire and Sierra Leone provide specifically for the appointment of a minimum of 2 women on the governing board.

<sup>511</sup> Benin Republic allows for the appointment of 1/3 of the 42 constituent members to be human rights NGOs. It also provides for the representative appointments of magistrates, advocates and doctors.

<sup>512</sup> Sections 2(2)(3) of Mauritius National Human Rights Act of 1998.

<sup>513</sup> The Republic of Benin Commission on Human Rights Act of 1989 section 5.

<sup>514</sup> Paris Principles para 1.

<sup>515</sup> Paris Principles para 1.

<sup>516</sup> Paris Principle para 1.

autonomy and effectiveness. This is because public confidence in the integrity of the governing board would be enhanced if the procedure for appointment is open, transparent and democratic. Furthermore, a fixed or determinate tenure and strict disciplinary procedures are relevant to guarantee institutional stability, loyalty and the commitment of members to the institution and its goals. Accordingly, states are advised to ensure that the method, criteria and duration of appointments, as well as reasons for the removal of members of NHRCs, are clearly laid down in the founding statute.<sup>517</sup> Although the tenure of the governing board of NHRCs could be short or long, it has been argued that a longer tenure is preferable because it is more likely to ensure stability, better planning and execution of responsibilities than a shorter tenure which may not give members sufficient time to settle into their work and be effective.<sup>518</sup> As Reif argues, a secure tenure insulates members from arbitrary removal and positively projects a Commission as ostensibly independent while giving the members the comfort of mind and body to operate.<sup>519</sup>

In Africa, the procedure for appointment, tenure and discipline of members of the governing board or commissioners of NHRCs is mostly provided for in the constitutive statutes. In Ghana for instance, the power to appoint the commissioners is vested in the President, who exercises it in consultation with the Council of State.<sup>520</sup> A similar situation also regulates the appointment of the governing council in Nigeria, South Africa, and Tanzania where the President appoints on the recommendation of the National Assembly.<sup>521</sup> Also, in Gabon, Senegal and Mauritania the executive has the final say in the appointment of members of the commission, while in Togo the ultimate power to appoint is vested in the legislature.<sup>522</sup>

A common factor in the appointment processes of NHRCs in Africa is that civil society groups are not allowed to make any input. Those who get appointed invariably owe a

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<sup>517</sup> R Craver (ed) *International Council on Human Rights Policy: assessing the effectiveness of national human rights institutions* (2005) 4-15.

<sup>518</sup> De Beco (n 6 above) 322.

<sup>519</sup> LC Reif 'Building democratic institutions: the role of national human rights institutions in good governance and human rights protection' (2001)13 *Harvard Law Review* 17.

<sup>520</sup> Sections 1, the Ghanaian Commission on Human Rights and Administrative Justice Act of 1993

<sup>521</sup> Section 2(3) of the Nigerian National Human Rights Commission Amendment Act of 2010.

<sup>522</sup> Spliid (n 91 above) 14.

measure of loyalty to the government; a situation which is often decried.<sup>523</sup> Although it has been proposed that the legislature rather than the executive should have the sole prerogative of appointing members of NHRCs<sup>524</sup> in order to insulate the commission from executive influence, it also is not fool-proof against political manipulation. Thus, as Murray argues, what is preferable is a democratic process involving the executive, the legislature, NGOs and the media in order to give credibility to both the process and the outcome.<sup>525</sup> Bolivia and Nicaragua are examples of good practices in civil society participation in the appointment of members of NHRCs. In Bolivia the enabling Act empowers civil society to challenge the appointment into the Commission of any person they consider unsuitable.<sup>526</sup> In Nicaragua candidates for membership of the Commission are nominated by parliament but in consultation with civil society organizations.<sup>527</sup> These are best practices worth integrating into the appointment processes of African NHRCs.

### 3.3.7. Accessibility of NHRCs

The degree of accessibility of NHRCs to the public is an important factor for assessing their effectiveness.<sup>528</sup> NHRCs, to some extent, are considered effective if they are readily accessible to the public at large, including the poor and vulnerable members of society, in particular, whose rights they have been established to promote and protect.<sup>529</sup> As emphasized in the OHCHR handbook, accessibility ‘requires that people know of the national institution and its role, that they are able to make physical contact with it and that they are treated appropriately when they are in contact with its officers.’<sup>530</sup> Therefore, it is imperative for NHRCs to enhance their accessibility with the diffusion of offices throughout the country, including rural areas.<sup>531</sup> Besides, such offices must be

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<sup>523</sup> Hatchard, Ndulo and Slinn (n26 above) 212

<sup>524</sup> OHCHR Handbook on socio-economic rights (n 5 above) 112

<sup>525</sup> Murray (n 87 above) 196.

<sup>526</sup> Section 7 of the Ombudsman Act of Bolivia.

<sup>527</sup> Section 138 of the Constitution and section 8 of the Law of the Ombudsman for the Defence of Human Rights.

<sup>528</sup> Murray (n 87 above) 216-217.

<sup>529</sup> MM Mohamedou ‘The effectiveness of national human rights institutions’ in in B Lindsnaes; L Lindholt and K Yigen (eds) *National human rights institutions: articles and working papers* (2001) 52-53.

<sup>530</sup> OHCHR Handbook on socio-economic rights (n 5 above) 37.

<sup>531</sup> The Ethiopian national human rights commission, which is located only in Addis Ababa in such a vast country, is clearly inaccessible.

conveniently located in places that can easily be accessed by all,<sup>532</sup> including people with disabilities and those who rely on public transportation.<sup>533</sup>

Furthermore, NHRCs could enhance their accessibility by reaching out to their constituents using various communication processes, including local languages, to adequately inform and educate the people about the services they offer and how they can be accessed. Thus, apart from having staff with a friendly disposition, allowing members of the public to obtain information or lodge complaints via the internet or e-mails; production and nation-wide distribution of complaint procedure manuals, practical tool kits and handbooks on the functions and operations of the institution are some of methods for enhancing the accessibility of NHRCs.<sup>534</sup>

In Commonwealth Africa, most of the enabling laws address the issue of accessibility of NHRCs by providing for the opening of regional offices across the country.<sup>535</sup> The NHRCs of Ghana, Nigeria, South Africa, and Uganda are examples of NHRCs with regional offices to enhance their visibility and accessibility to the public in all parts of the country. These offices, although are quite limited relative to geographical size and population of some of these countries. However, to open as many functional offices as necessary across the state may also be difficult because of the cost factor. However, the increasing deployment of internet services by NHRCs is also helping to improve the accessibility of these institutions across Africa, particularly to urban dwellers where internet penetration is relatively better.

### **3.3.8. NHRCs' cooperation with NGOs and other stakeholders**

In order to be effective and achieve tangible results NHRCs need to work with all stakeholders within the human rights system. Accordingly, the Paris Principles emphasize that an effective national human rights institution must establish and strengthen

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<sup>532</sup> Commonwealth Best Practice Book 31.

<sup>533</sup> Commonwealth Best Practice Book 32.

<sup>534</sup> OHCHR Handbook on socio-economic rights (n 5 above) 38.

<sup>535</sup> Section 12(2)(a) of the Tanzanian Commission for Human Rights and Good Governance Act of 2001; Section 10 of the Ghanaian Commission on Human Rights and Administrative Justice Act of 1995.

cooperative relationships with the international and regional human rights system as well as other relevant national organizations and groups such as NGOs, intergovernmental departments, local communities and ordinary citizens.<sup>536</sup>

NHRCs need adequate information and funding for their operations; require positive responses to their recommendations, and need appropriate facilities to enter into cooperative relationships with multilateral and regional bodies to advance their work. These things may be difficult or impossible to achieve without the support and cooperation from NGOs, relevant inter-governmental departments, communities and the international institutions that are involved in the promotion and protection of human rights, including the NHRCs of other countries.

However, the ability to enter into a mutually beneficial partnership and cooperative relationship with other national and international institutions may also depend on whether or not they are conferred with the mandate or powers to do so.<sup>537</sup> In Africa, some NHRCs such as those of Benin, Mali, Sierra Leone, Congo and Gabon have explicit mandates to partner with other relevant bodies;<sup>538</sup> the enabling law is silent in Ghana in this respect. In Cameroon the NHRC may be able to enter into cooperative relationships at the international levels provided it informs the ministry of foreign affairs about its international contacts. The requirement is stricter in Cote d'Ivoire, where the NHRC must seek and obtain prior approvals from the government before entering into such relationships. Arguably, such restrictions, as Spliid correctly notes, undermine the independence of the affected NHRCs.<sup>539</sup>

### 3.3.9. Accountability of NHRCs

NHRCs are required by the Paris Principles to enhance their legitimacy and effectiveness by being accountable. For NHRCs, accountability is multidimensional: they must legally justify their existence, relevance and funding to the legislature and the government; they

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<sup>536</sup> Paris Principles para 3(e).

<sup>537</sup> Spliid (n 91 above) 15.

<sup>538</sup> Spliid (n 91 above) 15.

<sup>539</sup> Spliid (n 91 above) 16.



must also render similar accounts to the public at large, particularly those whose rights they are established to protect. As Smith submits, ‘NHRI have multiple accountabilities: “downwards” to their partners, beneficiaries, staff, and supporters; and “upwards”: to their funders, parliament, and host government.’<sup>540</sup> Finally, they must be accountable to their local and international partners, benefactors, staff and even observers.

Legal and financial accountability obligates NHRCs to subject their operational and financial activities to legislative and public scrutiny. This obligation is usually achieved through the presentation of annual and special reports on their operations and expenditure either to the legislature or to government for consideration. When such reports are presented it is imperative for the legislature or other legitimate authorities to thoroughly examine their content and, where necessary, raise incidental issues with respect to the effectiveness and efficiency in the performance of their functions, as well as the management of human, material and financial resources.<sup>541</sup>

When accountability is in issue, the legitimacy and credibility of NHRCs are the factors at stake.<sup>542</sup> Thus, NHRCs are expected to be open and transparent in the way and manner they manage resources, conduct their operations, and discharge their responsibilities. As emphasized in the report of Human Rights Watch ‘by not making statements or reports public, a human rights commission is hampered in its ability to be seen by the public as a protector of their rights, and may even be complicit in the secrecy that protects perpetrators of human rights violations. Transparency should be an indispensable part of a commission’s work.’<sup>543</sup>

Therefore, in addition to making presentation of reports to formal bodies, it is important for NHRCs to make their reports, research findings and recommendations available to the public for constructive debate, criticism and comments. Furthermore, NHRCs can deepen the accountability process by subjecting themselves to external and internal audit for the

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<sup>540</sup> Smith (n 92 above) 906.

<sup>541</sup> Commonwealth Best Practice Handbook 27.

<sup>542</sup> Smith (n 92 above) 917.

<sup>543</sup> Human Rights Watch report (n 40 above) 3.

purpose of assessing the quality, quantity and effectiveness of their procedures, processes, operations and programmes. The outcome of such an evaluation contributes not only to improving efficiency and quality of service delivery but also enables them to constantly review their activities to ensure that they remain focused on their primary mandate and objective<sup>544</sup>

In Africa, NHRCs generally are required to be publicly accountable under the enabling laws. For instance, in Zambia the NHRC is required to submit annual reports on its operational and financial activities to the President, who shall lay the report before the National Assembly.<sup>545</sup> In Tanzania, the commission is obligated to be financially accountable to the National Assembly<sup>546</sup> by submitting an annual report to the President, the content of which the National Assembly is required to debate.<sup>547</sup> Similarly, the Ugandan NHRC is required to submit annual reports with appropriate findings and recommendations on the state of human rights and freedoms to Parliament.<sup>548</sup> Such accountability obligations are also imposed on the NHRCs of Algeria,<sup>549</sup> Ghana,<sup>550</sup> Kenya,<sup>551</sup> Mauritius,<sup>552</sup> Rwanda<sup>553</sup> and South Africa.<sup>554</sup> In contrast, no such reporting activities are required from the NHRCs of Chad, Ethiopia, Mauritania, Niger and Togo. In Morocco, the opinions of the commission may be published on the instruction of His Majesty, the King.<sup>555</sup> The implication is that these institutions are not obliged to account either to the government or to the public. This situation significantly contributes to the erosion of public legitimacy and respectability in these institutions.

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<sup>544</sup> Z Majodina 'Parliamentary accountability mechanisms for poverty reduction: the case for South Africa' *A presentation to the social forum* (2005) 3.

<sup>545</sup> Section 25 of the *Zambian Human Rights Commission Act of 1996*.

<sup>546</sup> Section 30 of the *Commission for Human Rights and Good Governance Act of 2001*.

<sup>547</sup> Section 33 of the *Commission for Human Rights and Good Governance Act of 2001*.

<sup>548</sup> Section 52(2) of the *Ugandan Constitution of 1996*.

<sup>549</sup> Section 6 *Presidential Decree establishing the National Monitoring Body for Human Rights of 1992*.

<sup>550</sup> Section 7(1)(h) *The Commission on Human Rights and Administrative Justice Act of 1995*.

<sup>551</sup> Section 21, *Kenya National Commission on Human Rights Act of 1996*.

<sup>552</sup> Section 11, *Mauritius National Human Rights Commission Act of 1998*.

<sup>553</sup> Section 10 of the *National Unity and Reconciliation Commission Law of 1999*.

<sup>554</sup> Section 15, *National Human Rights Commission Act of 1996*.

<sup>555</sup> Section 7 of the *Human Rights Advisory Council of Morocco Decree 1 of 1990*.

In summary, a majority of the NHRCs in Africa reasonably comply with the provisions of the Paris Principles to various degrees. Presently, 18 African NHRCs are on a category ‘A’ accreditation status; seven and two respectively are in categories ‘B’ and ‘C’ with the ICC.<sup>556</sup>

### **3.4. The responsibility and competence of NHRCs to advance socio-economic rights implementation**

Although states bear the responsibility to implement socio-economic rights the practical commitment to do so has always been problematic on the part of Commonwealth African states. The people for whom these rights are to be provided lack the legal capability to enforce states’ compliance with their legal obligations to implement these rights. Therefore, there is an ever present necessity to engage, persuade, and even pressurize states to comply with their legal obligations to implement socio-economic rights on the one hand, and an equally important need to sensitize, educate and empower ordinary people about their legitimate claims to these rights and how they can demand and or enforce them against the state, on the other. The outcome of both functions should be the envisaged implementation of socio-economic rights.

As institutions specifically created and dedicated to the promotion and protection of human rights generally, NHRIC have a general responsibility to advance socio-economic rights implementation. This responsibility has been expressed and affirmed by the UN CESCR in General Comment 10, the UN Human Rights Commission in several of its resolutions, the opinions of academics<sup>557</sup> and asserted as well by the NHRCs themselves. For instance, in General Comment 10, the CESCR not only emphasizes the point that ‘NHRIs have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights,’<sup>558</sup> but also enjoins these institutions to ‘give maximum attention to socio-economic rights in all there relevant activities.’<sup>559</sup> The

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<sup>556</sup> As at 28 January 2014; See OHCHR document accreditation status of NHRIs available at [www.ohchr.org](http://www.ohchr.org)(accessed 5 March 2014).

<sup>557</sup> Tigerstrom (n 2 above) 139.

<sup>558</sup> CESCR General Comment 10.

<sup>559</sup> CESCR General Comment 10.

emphasis here is on the need for NHRCs to give reasonable attention to socio-economic rights.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,<sup>560</sup> as well as a number of resolutions of the United Nations,<sup>561</sup> also stress the responsibility of NHRIs to address violations of socio-economic rights as vigorously as they address violations of civil and political rights. Furthermore, it is becoming common for international treaties to oblige states to entrust responsibilities to NHRCs to promote and protect the human rights they guarantee. For instance, the CRPD obliges states to maintain, strengthen, designate or establish one or more independent mechanisms, including national institutions, to promote, protect and monitor implementation of treaty obligations.<sup>562</sup> The African Charter also enjoins states to ‘allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms it guarantees.’<sup>563</sup> Furthermore, although not expressly provided for in the CRC, the UN Committee on the Rights of the Child also emphasises the role of NHRIs in advancing the rights guaranteed by the CRC.<sup>564</sup> The implication of all these injunctions is that NHRCs have an international legal responsibility to promote and protect the socio-economic rights guaranteed by the relevant treaties states have ratified.<sup>565</sup>

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<sup>560</sup> Guideline 25 of the Maastricht guidelines on violations of economic, social and cultural rights (1998) 14/12/98.E/C.12/1998/25.

<sup>561</sup> UN Commission for Human Rights resolutions: 2010 A/RES/64/161; 2008 A/RES/63/172; 2008 A/RES/63/169; 2005 S/RES/60/154; 1999 A/RES/54/176; 1997 A/RES/51/128; and 1995A/RES/50/176.

<sup>562</sup> Article 33(2) of the ICPD.

<sup>563</sup> Article 26 of the African Charter.

<sup>564</sup> UN Committee on CRC General Comment: The role of independent national human rights institutions in the protection and promotion of the rights of the child (15/11/2002) CRC/GC/2002/2.

<sup>565</sup> For instance, participants at the Commonwealth conference on the role of national institutions not only underscored the relevance of NHRIs for entrenching the universality, interdependence and indivisibility of human rights and the maintenance of good government,’ but also advised NHRIs to employ all available means to deal with socio-economic rights irrespective of the legal status of these rights in the domestic legal framework. See Commonwealth Secretariat (2001), pages 33-34. Also, the International Council on Human Rights Policy recommended that “national human rights institutions should address socio-economic rights” by identifying areas of exclusion and appropriately develop policy proposals to deal with those rights. See International Council on Human Rights Policy (ICPR), Assessing the effectiveness of national human rights institutions (2005) 18-19

Arguably, the mandate to promote and protect socio-economic rights inheres in their functions, which is the purpose for their creation in the first place. Thus, this presumptive competence to advance every human right, including socio-economic rights, naturally attaches to NHRCs except otherwise expressly excluded. This view is supported by the exemplary activities of some NHRCs around the world that are seen to be advancing the implementation of socio-economic rights without a positive mandate to that effect. Some of these NHRCs include the Afghan Independent National Human Rights Commission,<sup>566</sup> the Danish Institute for Human Rights (DIHR),<sup>567</sup> and the Irish Human Rights Commission (IHRC),<sup>568</sup> the Korean HRC,<sup>569</sup> the New Zealand Human Rights Commission (NZHRC),<sup>570</sup> and the Mexican NHRC,<sup>571</sup> among several others.

Although there are several other NHRCs around the world that do nothing about socio-economic rights, the point being made here is that lack of an explicit mandate is not a conclusive bar for NHRCs with a broad mandate on human rights to neglect or ignore the promotion and protection of socio-economic rights. Arguably, this fact is not lost on African NHRIs. For instance, in the Abuja Declaration NHRCs in Africa not only resolved to ensure that socio-economic rights becomes a key component of their action plans, but also agreed to: monitor the state of socio-economic rights in their countries and make appropriate reports and recommendations to governments, to advocate for special attention and the inclusion of disadvantaged persons in governments' policies and programmes, to review current policies and legislation which undermine the realization of socio-economic rights and make appropriate recommendations to governments, to ensure their full compliance with the Paris Principles, to share each other's experiences of

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<sup>566</sup> The Afghanistan Independent Human Rights Commission Annual Report 2009 .

<sup>567</sup> Mertus (n 8 above) 30.

<sup>568</sup> A Connelly 'The Irish human rights commission and the implementation of economic, social and cultural rights' Report of the proceedings international round table on national institutions implementing economic, social and cultural rights (2005) 75-70.

<sup>569</sup> C Park 'Economic, Social and Cultural Rights State Obligations and National Human Rights Commission of Korea Report of the proceedings international round table on national institutions implementing economic, social and cultural rights (2005) 54 – 58.

<sup>570</sup> D Pickard 'The New Zealand Human Rights Commission and the implementation of economic, social, and cultural rights' Report of the proceedings international round table on national institutions implementing economic, social and cultural rights (2005) 89 – 94.

<sup>571</sup> S Campos 'National Commission of Human Rights in Mexico on the protection of economic, social and cultural rights' Report of the proceedings international round table on national institutions implementing economic, social and cultural rights (2005) 95-104.

best practices in the implementation of socio-economic rights and to ensure the adoption of the Optional Protocol to the ICESCR.<sup>572</sup>

This means that NHRCs across Africa widely recognize and accept their inherent responsibility to advance the realization of socio-economic rights, irrespective of the domestic status of these rights. The fact that this acceptance is not widely expressed in practice in terms of according equal promotion and protection to both civil and political rights and socio-economic rights in their actions and activities does not erase this responsibility. Arguably, once established, the duty to promote and protect all categories of human rights, including socio-economic rights, automatically attaches to every NHRC, except expressly excluded by law.

#### **3.4.1. The competence to advance socio-economic rights implementation**

While NHRCs have a general responsibility to promote and protect socio-economic rights, this is not what happens in practice in respect of them. Being creation of law, NHRCs can only perform functions and exercise powers allowed by the enabling statutes and the Constitution.<sup>573</sup> Consequently, the question whether NHRCs have the actual responsibility to act positively on socio-economic rights depends on whether or not they have such competence either expressly conferred by law or inherently derived.

#### **3.4.2. Explicit competence over socio-economic rights**

Although NHRIs are established to promote and protect human rights generally, there are noticeable differences in their legally expressed mandates. Thus, although the mandate of some NHRCs is elastic enough to cover all categories of human rights,<sup>574</sup> it is also not unusual for some to have competences that are restricted by statute to specific human rights<sup>575</sup> or to the human rights of some specific group of persons, or to human rights

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<sup>572</sup> The 5<sup>th</sup> conference of African national human rights institutions held in Abuja Nigeria November 2005 (the Abuja Declaration) available at [www.nanhri.org](http://www.nanhri.org).

<sup>573</sup> OHCHR Handbook on NHRIs and socio-economic rights (n 5 above) 46. In *Simon v Commission for Human Rights* 222 SCRA 117 (1994) the Supreme Court held that the Philippines national human rights commission investigation powers are limited by the national constitution to civil and political rights only.

<sup>574</sup> Section 41 of the Constitution of Argentina of 1994.

<sup>575</sup> The mandate of the NHRC of Canada is restricted to civil and political rights only.

contained in some specific human rights instruments.<sup>576</sup> Thus, NHRCs could have an explicit and unequivocal legal competence to advance the implementation of socio-economic rights. For instance, the jurisdiction of the national *Defensor del Pueblo* of Argentina expressly covers civil and political rights, socio-economic rights, as well as ‘third-generation’ rights.<sup>577</sup>

In Commonwealth Africa, the express mandate of the SAHRC over socio-economic rights at least, is beyond any debate.<sup>578</sup> So also are the competences of the NHRCs of Ghana and Uganda over limited aspects of socio-economic rights.<sup>579</sup> Where this is the situation, these Commissions are expected to be exercised their socio-economic rights mandates unhindered, subject only to other limitations imposed by either the constitution or by the enabling legislation. Apart from these examples, the express mandate of most NHRCs on socio-economic rights in Africa is not quite clear, even when the enabling law attempts to be so by obliging the NHRCs to monitor states’ compliance with their international human rights obligations as part of their human rights mandates.

### **3.4.3. Implicit competence over socio-economic rights**

Doubts may exist over the competence of NHRCs to promote and protect socio-economic rights in states where these rights are either not expressly recognized under the Constitution as fundamental rights or where the power to promote and protect this category of rights is not clearly conferred by the enabling legislation. However, the point has been emphasized that even where there is no explicit mandate, NHRCs can still have inherent powers to advance the implementation of socio-economic rights.<sup>580</sup> A number of arguments support this position. The human rights mandate of NHRCs is usually couched in generic terms. Thus, it would be exceptional to find NHRCs with a legal mandate that expressly excludes socio-economic rights. Consequently, a general presumption strongly exists that every NHRC with a mandate over ‘human rights’ at least, has an implicit

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<sup>576</sup> The Indian Human Rights Commission’s mandate covers human rights under both the Constitution of India and human rights embodied in the International Covenants and enforceable by courts in India. See Sections 12 of the Indian Human Rights Commission Act.

<sup>577</sup> See Constitution of Argentina 1994 section 41.

<sup>578</sup> Section 184(3) of the South African Constitution of 1996.

<sup>579</sup> Section 8(1)(i) of the Uganda Human Rights Commission Act of 1997.

<sup>580</sup> Commonwealth Best Practice Book 23.

power to also promote and protect socio-economic rights as much as it would with civil and political rights, except if otherwise expressly restricted by law.<sup>581</sup>

The same position also holds where human rights are defined in the national legal regime in terms of international human rights standards, or where the NHRCs have responsibilities to monitor states compliance with the ICESCR or the African Charter. In these cases it is argued that the fact that socio-economic rights are not recognized as legal rights in the domestic legal regime is immaterial insofar as the state is a party to the ICESCR or the African Charter, which establishes the legal basis for the NHRCs to act on these rights domestically. As Hatchard argues, basing the mandate of NHRCs on international instruments provides ‘a convenient point of reference by which the degree of domestic implementation of human rights’ can be realistically assessed.<sup>582</sup> Thus, having assumed an international mandate to advance the implementation of human rights holistically, it would be inappropriate for NHRCs to exclude themselves from promoting and protecting socio-economic rights on the grounds that such a mandate is not specifically expressed or conferred. NHRCs that are not sure of the scope of their mandate clearly have the option to interpret them. However, in doing so, they are expected to interpret their mandates creatively and extensively and to include socio-economic rights as falling within their mandates to promote and protect human rights generally.<sup>583</sup> As the Commonwealth Secretariat has advised, an NHRI should use all available means to respond to socio-economic rights irrespective of the lack of an express statutory or constitutional recognition of these rights as justiciable.<sup>584</sup>

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<sup>581</sup> Guideline 25 of the Maastricht guidelines on violations of economic, social and cultural rights (1998) 14/12/98.E/C.12/1998/25.

<sup>582</sup> J Hatchard ‘The inter-relationship between Commonwealth human rights commissions and other national human rights institutions (2011) available at <http://www.britishcouncil.org/governance-report061003.doc> 15.

<sup>583</sup> In the Philippines, the national constitution restricted the mandate of the national human rights commission to ‘investigate on its own or on complaint by any party, all forms of human rights violation involving civil and political rights.’ The Philippines national human rights commission transcended this constitutional restriction by issuing resolution CHR No. A95-069, where it differentiated between investigations necessary for the purpose of prosecution civil and political rights and investigations necessary for monitoring socio-economic rights and asserted its right to deal with socio-economic rights complaints.

<sup>584</sup> Commonwealth Best Practice Book 23.



Furthermore, NHRCs perform functions relating to socio-economic rights, albeit implicitly, in the course of exercising their legal powers. As Tigerstrom argues, where NHRCs are conferred with powers to receive complaints or initiate investigations against government departments or agencies with responsibilities for providing socio-economic goods and services, their competence on socio-economic rights is inherently provided.<sup>585</sup> The same conclusion could also be reached where NHRCs are given powers to receive and treat individual complaints without restrictions on the nature, subject matter or object of the complaints, as it is more than likely that they would be confronted with complaints that may relate to the violation of the socio-economic rights of individuals, groups or communities, which they have to deal with.<sup>586</sup>

Finally, being an integral part of the body of human rights, it is impossible to completely isolate NHRCs from promoting and protecting socio-economic rights without negating the indivisibility, interrelatedness and interdependency of all human rights.<sup>587</sup> As articulated in the UN Handbook on socio-economic rights, ‘even though a national human rights institution’s mandate may refer only to civil and political rights, it will have jurisdiction to deal with many issues of economic, social and cultural rights through the rights to life, equality and non-discrimination.’<sup>588</sup>

This view is predicated on the doctrine of implied powers and functions, which enables organizations with legal personality to exercise powers and perform functions that are necessary for the fulfilment of the organization’s purpose or objectives, even if not expressly granted.<sup>589</sup> As Rama-Montaldo has expressed, the powers of every international organizations also include those tasks not clearly expressed but which are incidental to the realization of its objectives.<sup>590</sup> In the case of NHRCs, implied functions are akin to implied powers, which are inextricably tied to their expressed mandate to promote and

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<sup>585</sup> Tigerstrom (n 2 above) 143.

<sup>586</sup> Tigerstrom (n 2 above) 143.

<sup>587</sup> S Aurora ‘Promoting and protecting the economic, social and cultural rights of women: The NHRI mandate.’ (2007) at 5 available at <http://www.equitas.org/>.

<sup>588</sup> The OHCHR Handbook on socio-economic rights (n 5 above) 34.

<sup>589</sup> CF Amerasinghe *Principles of the institutional law of international organizations* (2005) 102.

<sup>590</sup> M Rama-Montaldo ‘International legal personality and implied powers of international organizations’ (1970) 44 *British Year Book International Law* 111-112.

protect all categories of human rights. Thus, there is no legitimate basis to justify the complete exclusion of socio-economic rights from the competency of NHRCs.

In conclusion, therefore, given the fact that African states are party to the various international and regional treaties on socio-economic rights, NHRCs in Africa cannot legitimately be excluded from having jurisdiction or acting on socio-economic rights either expressly or by necessary implication. Although NHRCs may find it difficult to enforce socio-economic rights not clearly expressed or recognized by the national Constitution, this does not constitute a limit on their powers to advance the implementation of these rights, as the duty to do so is inextricably linked to the natural and legitimate purpose for which they are established to accomplish in the first place.

### **3.5. The comparative advantages of NHRCs in advancing socio-economic rights implementation**

Apart from NHRCs, other relevant bodies and agencies, such as the judiciary (courts), PHRCs, and the anti-corruption agencies also bear some responsibility to ensure the domestic implementation of socio-economic rights. Furthermore, NGOs, including civil society, generally demonstrate empathy for victims of human rights abuse, which feeds their personal interest and responsibility to promote and protect human rights at the national level. However, even as these bodies are all critical for enhancing the domestic realization of human rights, it is argued that NHRIs have certain peculiar features and advantages that make them more suitable than other public bodies and non-state actors for advancing the domestic implementation of socio-economic rights.<sup>591</sup>

#### **3.5.1 NHRCs and domestic courts**

NHRCs and the judiciary have shared responsibility and sometimes overlapping jurisdiction for protecting human rights. However, NHRCs and domestic courts are both institutionally similar and different in several ways. Both are public bodies created by statute or the constitution, financed from public sources and saddled with responsibility to serve the interest of the public generally. Although an integral part of the state's

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<sup>591</sup> C Elmendorf 'Advisory counterparts to constitutional courts' *Duke Law Journal* (2007) 953 955

governance structure, the judiciary enjoys higher institutional status and powers than NHRCs.<sup>592</sup> Furthermore, both bodies are interrelated with respect to their common duty or shared responsibility to protect human rights and build a culture of respect for human rights among public officials, corporate entities, and ordinary citizens.<sup>593</sup> Also, both bodies are necessary complements to each other in the task of protecting human rights generally. For instance, NHRCs can use the judicial platform in several ways to advance their mandates. They can act as *amicus curia* before courts in serious human rights cases or in cases where the courts are considering legislation that may impact on human rights. They may exercise the competence to initiate and prosecute human rights violation cases in courts for and on behalf of victims. Conversely, the courts have the competence to refer matters to NHRCs for amicable settlement where this is considered more viable, or order NHRCs to monitor compliance with their judgments.<sup>594</sup>

However, although they both have jurisdiction over the protection of human rights, NHRCs have a much wider scope and social space to manoeuvre as against the judiciary in this regard. For instance, the jurisdiction of the judiciary is limited mostly to protective tasks as against NHRCs that perform both promotional and protective responsibilities. Also, courts apply adjudication and coercion as primary means of protecting human rights, NHRCs do not primarily adjudicate. They are known and appreciated mostly for their conciliatory and less legalistic approaches to the discharge of their functions. This methodology applies even to NHRCs with quasi-judicial competences.

Thus, in spite of their prominence, powers and influence, the argument still remains strong that courts are not very effective venues for advancing the practical realization of socio-economic rights. This disadvantage stems from the reality that attaches to the difficulty of adjudicating socio-economic rights before courts and the meagre results or impact the courts have in jurisdictions where these rights are adjudicated. Generally, the

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<sup>592</sup> The judiciary is acknowledged universally as the third arm of government with constitutional powers to interpret and enforce the Constitution and resolve disputes peacefully.

<sup>593</sup> M Ebadolahi 'Using structural interdicts and the South African human rights commission to achieve judicial enforcement of economic and social rights in South Africa' (2008) 83 *New York University Law Review* 156.

<sup>594</sup> Ebadolahi (n 227 above) 158.

reactionary disposition of courts is a hindrance to the timely resolution of socio-economic rights complaints,<sup>595</sup> as opposed to the proactive nature and disposition of NHRCs.<sup>596</sup> The pregnant teenager who is thrown out of school on account of her pregnancy may have to go through tedious, costly and prolonged litigation to have her right to education restored, if at all. However, this is not so with NHRCs that can intervene on behalf of the victim even by hearing about the violation from the news media. Thus, the courts are almost always insensitive and even inactive in relation to socio-economic rights' violations unless and until a victim approaches them and follows the process through to trigger their jurisdiction.

Also, courts are known for the personalization of justice by limiting issues and remedies to the specific facts and interest of the victim. Although victorious public interest litigation impacts on a wider social spectrum and beneficiaries, this is still relatively minimal. What is common is that if three pupils are unlawfully expelled from or denied admission to school, the benefit of a positive judicial order for reinstatement or admission often is available only to the one that had the means, time and courage to approach the court. As Rajagopal notes, this approach is practically incapable of addressing systemic and continuous violation of socio-economic rights.<sup>597</sup> In contrast, NHRCs also handle and deal with individual complaints but in doing so have nothing to prevent them from going beyond the immediate interest of the victim to investigate other underlying causes and the extent of the impact on the social environment before awarding remediation that may assuage both the complainant and all others who may be similarly situated as is the immediate victim.

Furthermore, as O'Brien notes, the argument is common that the court process is notoriously characterized by 'relative formality, expense, delay, complexity and rule-dominated qualities.'<sup>598</sup> Arguably, victims of socio-economic rights are mostly people from the lowest rung of society, marginalized, poor, vulnerable, and without capacity. It

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<sup>595</sup> S Fredman *Human rights transformed: positive rights and positive duties* (2008) 169.

<sup>596</sup> Fredman (n 225 above).

<sup>597</sup> B Rajogopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective' (2007) 8 *Human Rights Review* 1-50.

<sup>598</sup> NO Brien 'Ombudsmen and social rights adjudication' (2009) *Public Law* 23.

is difficult for these people to comprehend, follow the judicial process and have a good day in court without the assistance of a legal practitioner, whose services they cannot, in most cases, afford. Invariably, this is why almost all the celebrated socio-economic rights cases have been litigated on behalf of victims by NGOs, and not directly by the victims.<sup>599</sup> Thus, in reality courts are not attractive avenues for the poor to access socio-economic justice as the several hurdles in the way of litigants constitute serious disincentives and impediment to advancing the implementation of socio-economic rights.<sup>600</sup> In contrast NHRCs and their processes are generally acknowledged to be ‘relatively informal, free of cost to both parties at the point of delivery, relatively quick, unfettered by complex rules of evidence or process, and normative in their application of principle rather than in the imposition of rules.’<sup>601</sup> This makes NHRCs very friendly, affordable and accessible avenues by the poor and vulnerable sections of the society for achieving expeditious resolution of socio-economic rights complaints.

Finally, adversarial adjudication is almost the only approach or means available to the courts to advance the implementation of socio-economic rights where they have jurisdiction. But this is not so with NHRCs which have and apply several strategies and approaches to advance socio-economic rights. Thus, with a singular and often predictable outcome, the extent to which the courts can advance the implementation of socio-economic rights is quite limited because they lack the capacity, competence or experience to engage other non-formal means to facilitate socio-economic rights implementation. However, this is not the case with NHRCs which have different methods to choose from in considering what is most appropriate for a particular situation, including litigation or friendly settlement. Although the recommendations of NHRCs are generally not binding unlike court orders, the political cost of ignoring them could be great, especially when joined to pressures from other social platforms, like civil society. As Thipanyane argues, in most cases, the non-binding recommendations of NHRCs are willingly accepted and

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<sup>599</sup> *Minister of Health v. Treatment Action Campaign & Others* (No. 2)(2002) (5) SA 721 (CC).

<sup>600</sup> S Gloppen and FE Kanyongolo ‘Courts and the poor in Malawi: economic marginalization, vulnerability and the law’ (2007) 5 *International Journal on Constitutional Law* 258.

<sup>601</sup> Brien (n 232 above) .

complied without by the parties having been part of the dialogic process that resulted in the decision or recommendation.<sup>602</sup>

### 3.5.2. NHRCs and parliamentary human rights committees

NHRCs and parliamentary human rights committees (PHRCs) are related as public institutions with different roles and capacities. While NHRCs are state bodies with specific legally assigned roles on human rights, PHRCs are routine committees created by Parliament to facilitate its law-making and oversight functions and, therefore, exist solely at the pleasure of Parliament. In this regard PHRCs or other relevant parliamentary portfolio committees, such as the portfolio committees on education, health, housing, and water are relevant to advancing the domestic implementation of socio-economic rights. Thus, in this context and to this end, Parliament may directly or indirectly be obliged to advance the implementation of socio-economic rights through the PHRCs or other relevant portfolio committees.

Both bodies share some common interest and responsibility to advance the implementation of socio-economic rights and can complement each other to some extent in this regard. For instance, both should be interested in ensuring the domestication of all relevant socio-economic rights treaties, the amendment of existing constitutions to reflect justiciable socio-economic rights and the allocation of adequate funds for the execution of social policies to enhance peoples' wellbeing generally.<sup>603</sup> Furthermore, while NHRCs may well be obliged to monitor legislative activities on socio-economic rights, or be requested by PHRCs to deliver inputs to proposed bills to ensure that they advance the socio-economic wellbeing of the people, Parliament for its part, may be required to enhance the effective of NHRCs by strengthening their independence and appropriating adequate funds for them to execute their mandates on socio-economic rights. Thus, like the courts, both institutions can complement each other through their respective duties to promote and protect socio-economic rights.

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<sup>602</sup> T Thipanyane 'Challenges facing National Human Rights Institutions: a South African perspective' in EA Ankuma (ed) *Strengthening national human rights commissions in Africa* (2009) *Africa Legal Aid* 14.

<sup>603</sup> J Salzberg and DY Young 'The parliamentary role in implementing international human rights: a U.S. example (1977) 12 *Texas International Law Journal* 251 253.

However, ensuring the practical implementation of socio-economic rights is a multi-dimensional activity and goes beyond the ordinary passing of framework laws or the domestication of relevant international treaties on socio-economic rights. Apart from monitoring state compliance through legislative oversight, it is outside the jurisdiction of PHRCs to embark on such other mechanical but important activities as socio-economic rights education and training, awareness creation within the society and targeted stakeholders, taking legal actions against government departments to protect socio-economic rights and collaborating on a regular basis with civil society to promote and protect socio-economic rights.<sup>604</sup> These are all necessary activities for enhancing the implementation of socio-economic rights, which only NHRCs can easily perform or carry out more effectively than PHRCs.<sup>605</sup>

Therefore, unlike NHRCs the PHRCs neither can devote specific, targeted and continuous attention nor develop specific action plans and expertise for advancing the implementation of these rights.<sup>606</sup> Furthermore, the legislature carries out oversight functions in fulfilment of its responsibility to implement these rights. This makes the legislature in general, and PHRCs in particular, one of the important state institutions NHRCs have to target with activities to ensure that they play their role effectively to secure the implementation of socio-economic rights. Arguably, advancing the implementation of socio-economic rights is not an integral function of the PHRCs per se. Consequently, what they can do and achieve in this regard, even when they get involved, is quite limited when compared to NHRCs.

### **3.5.3. NHRCs and other relevant state agencies**

Apart from the fundamental organs of the state, there are state agencies with functions that result in advancing the implementation of socio-economic rights. The most relevant in this regard are the national institutions with legal responsibility to prevent and redress

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<sup>604</sup> Nowak (n 8 above) 13-14

<sup>605</sup> Hiebert JL Hiebert 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4 *International Journal on Constitutional Law* 1 5-8.

<sup>606</sup> P Burnell 'Financial indiscipline in Zambia's third republic: The role of parliamentary scrutiny' (2001) 7 *Journal of Legislative Studies* 34-6.

maladministration and abuse of office or power (the ombudsman) corruption (the anti-corruption agencies), discrimination (the anti-discrimination commissions) or gender or employment inequality (the gender equality or equal opportunity commissions). While the ombudsman and the anti-corruption agencies are commonly found in states across the globe,<sup>607</sup> the anti-discrimination and equality commissions are created mostly by states with an entrenched history and practice of social, cultural, and economic discrimination and deprivation against minority tribes and disadvantaged groups, including women, children, people with disabilities, and the migrant population.<sup>608</sup>

Like other state bodies, these institutions share common functional characteristics with NHRCs.<sup>609</sup> For instance, they are equally created by law, either under a national constitution or by ordinary legislation as independent state institutions with some form human rights promotion and protection mandate, although circumscribed to some specific thematic social issues or areas. Thus, they are functionally as important as NHRCs in the context and focus of this study. As Tigerstrom argues, ‘individuals may be deprived of their sole source of income, unable to work, denied health care, or evicted from their homes; such deprivations, when they are the result of unfairness or unlawfulness on the part of government officials, are both instances of maladministration within the scope of the ombudsman’s mandate and, potentially, violations of the state’s obligation to respect economic, social, or cultural rights contrary to the norms and legal obligations of international human rights law.’<sup>610</sup> A similar link also exists between the role of anti-corruption agencies and advancing the implementation of socio-economic rights.

However these institutions are statutorily limited from the outset in all ramifications, including their mandates, powers, resources and capabilities, as against NHRCs. Thus, even as they have no direct mandate on socio-economic rights, they are also limited in other necessary factors to be functionally relevant across a broad social spectrum. Under this circumstance, these related state institutions are merely relevant as complementary

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<sup>607</sup> LC Rief *The ombudsman, good governance and the international human rights system* (2004) 9

<sup>608</sup> Australia, Canada, New Zealand, and South Africa.

<sup>609</sup> S Cardenas (n 91 above) 9.

<sup>610</sup> Tigerstrom (n 2 above) 143.



institutions to NHRCs in relation to advancing socio-economic rights' implementation at the national level.

#### 3.5.4. NHRCs and NGOs

Tugl defines NGOs as 'self-governing, private, non-profit organizations that are geared toward improving the quality of life of disadvantaged people.'<sup>611</sup> Time and again, NGOs, including Community-based Organizations (CBOs), have demonstrated their relevance as 'the key actors in the realization of human rights.'<sup>612</sup> Undoubtedly, NGOs have been integral to human rights implementation at the national level by stimulating attention on human rights violations.

They utilize opportunities for engaging states in the processes of preparing state or alternative reports and seeking redress for victims of socio-economic rights before treaty bodies.<sup>613</sup> At the national level NGOs use traditional tools, such as advocacy, investigation, monitoring, reporting, and litigation<sup>614</sup> to advance the implementation of all categories of human rights.<sup>615</sup> In some countries, such as South Africa, civil society easily deploys radicalized methods, ranging from political engagement to mass mobilization and resistance, to protest against lack of, or poor, socio-economic service delivery or to challenge the state's 'neo-liberal' policies that undermine peoples' wellbeing.<sup>616</sup>

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<sup>611</sup> PV Tugl, 'NGOs and human rights: Sources of justice and democracy' (1999) 52 *Journal of International Affairs* 1.

<sup>612</sup> 'The MDGs through socio-economic rights: Constitutional making and implementation handbook United Nations Millennium Campaign' (2009) 32.

<sup>613</sup> S Michael, 'The role of NGOs in human security' (2002) *The Hauser Centre for Non-profits Organizations and the Kennedy School of Government Harvard University working papers No 12* 4-6.

<sup>614</sup> M Mutua, 'Human rights international NGOs' in CE Welch (ed) *NGOs and human rights: promise and performance* 154.

<sup>615</sup> MH Posner and C Whittome, 'The status of human rights NGOs' (1994) 26 *Columbia Human Rights Law Review* 269 272. For instance, the Centre for Human Rights, University of Pretoria has since its inception been involved extensively in human rights, including socio-economic rights, education, research and training. Other organizations in this category include the Child Law Centre of the University of Pretoria; the Centre for Aids Studies, University of Pretoria; Community Law Centre of University of Cape Town; the Legal Resource Centre, Cape Town.

<sup>616</sup> K Stokke and S Oldfield 'Social movements, socio-economic rights and substantial democratization in South Africa' in J Harris, K Stokke and O Tornquist (eds) *Politicizing democracy: the new politics of democratization in developing countries* (2004)43.

Thus, NHRCs and human rights NGOs perform similar roles in the field of human rights.<sup>617</sup> Both are involved in mainstreaming human rights at the national level through a host of activities, including advocacy, education, litigation, and providing capacity building on human rights for public servants, judges, law enforcement agencies, as well as members of the public.<sup>618</sup> NGOs are therefore strong partners with NHRCs for advancing the realization of socio-economic rights as their relative functions are such that they can carry out together or support in their execution.<sup>619</sup>

However, NHRCs and NGOs are different in several respects, particularly with respect to their legal basis, functions and powers.<sup>620</sup> NHRCs are creations of law, while NGOs are not: they are strictly private entities. As state agencies NHRCs have greater access to human capacity, expertise, tools and resources, which enable them to gather information, commission broad research, hold public enquiries, and conduct investigations into socio-economic rights violations, most of which either are outside what NGOs can do or are activities they cannot carry out due to limited capacity and resources.<sup>621</sup> This alone gives NHRCs greater advantage than NGOs in relation to advancing the implementation of socio-economic rights. Arguably, most local NGOs lack any legal foundation, state institutional support and access to a tangible level of material and human resources to execute their mandates.

Also, as state institutions, NHRCs can readily develop synergy and maintain institutional links with public and private entities, intergovernmental agencies and academic institutions involved in specific areas of socio-economic rights for the purpose of advancing the realization of these rights. By not having any legally defined relationship

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<sup>617</sup> Human Rights NGOs are those, which primary focus is to promote and protect international human rights.

<sup>618</sup> GE Edwards 'Assessing the effectiveness of human rights non-governmental organizations (NGOs) from the birth of the United Nations to the 21<sup>st</sup> century: attributes of highly successful human rights NGOs' (2010) 18 *Michigan State Journal of International Law* 165 170.

<sup>619</sup> For instance, the activities of SERAP in Nigeria and several other NGOs across Africa have shown that NGOs can play very influential roles in advancing the realization of socio-economic rights in Africa.

<sup>620</sup> M Qafisheh 'Defining the role of national human rights with regard to the United Nations' (2006) 36 *Legal Report Series* 21.

<sup>621</sup> Edwards (n 261 above) 179.

with the state and other public bodies, local NGOs struggle to build up their reputation to become recognized nationally and even globally as serious entities worth doing business with in their self-imposed task of advancing human rights implementation.

Furthermore, proposals, opinions, decisions, conclusions, and recommendations from NHRCs have the stamp of legitimacy, institutional weight and influence as a state body as against those from NGOs, which lack any legal weight and effect behind them. Thus, while NHRCs can effectively leverage their legal status and institutional capacity to obtain responses from the state with respect to their proposals, findings and recommendations on the state of socio-economic rights implementation, NGOs have little or no influence to throw behind theirs. This is an important advantage, the lack of which makes NGOs less effective as NHRCs in advancing the implementation of socio-economic rights.

Also, the roles and services of NGOs in advancing human rights are totally voluntary and thus not compelling, while those of NHRCs are statutory and, are at least, inherently compelling. These factors both impel and enable NHRCs to have clear strategies, including action plans and resources, to execute their mandates on socio-economic rights, as against NGOs that must depend on philanthropy and self-motivation to carry out their self-imposed goals and activities. Arguably, as state institutions with statutory mandates, public interest, in and expectations, both within and outside the state, about the functions and performances of NHRCs are high. This factor could motivate and make NHRCs more serious in the execution of their mandates than NGOs, that are accountable to nobody but, perhaps, themselves alone.

Thus, being statutorily accountable to the people, NHRCs have deeper interest in the success of their mandates to advance the implementation of socio-economic rights than NGOs, from which the public ordinarily expects nothing and which bears no consequences if they fail to perform. Also, apart from having privileged access to public authorities at the national and international levels, NHRCs are uniquely positioned by virtue of their special status to work cooperatively with civil society to build bridges,

shape values and attitudes, and build a culture of respect for human rights through the use of multiple channels of communication and dissemination of human rights values and human dignity. Against this backdrop there is no gainsaying that NHRCs are better suited, equipped and functional to advance the implementation of socio-economic rights than NGOs.

In conclusion, it is argued that by virtue of their special status, functions and competences, NHRCs have inherent advantages over other related bodies for advancing the implementation of socio-economic rights. However, it is relevant to state that NHRCs are not substitutes for the other public bodies and NGOs for advancing socio-economic rights' implementation. Rather, they are complementary institutions and need to establish and maintain mutually beneficial cooperative relationships with every other relevant public institution and civil society to enhance their performance, effectiveness and impact.

### **3.6. Conclusion**

NHRCs are globally recognized and acknowledged as state bodies established for the purpose of promoting and protecting human rights at the national level. As in other parts of the world, these bodies have proliferated in Commonwealth Africa in different shapes and forms. Having come into existence, NHRCs have critical roles to play in advancing the implementation of human rights at the national level. However, there seems to be a dominant norm that NHRCs can be effective if they are established and run in conformity to the Paris Principles. The survey clearly shows some African NHRCs are Paris Principles compliant. This means that they are in a relatively strong position to advance the promotion and protection of human rights generally, including socio-economic rights, at the national level.

However, though NHRCs have the express and implied mandate to advance socio-economic rights, the question is whether they can do so more, or as effectively as other equally relevant state institutions, like the judiciary, PHRCs, the anti-corruption agencies and NGOs. It is the contention of this chapter that NHRCs have comparative advantage

over these institutions on the issue of advancing the implementation of socio-economic rights at the national level. Undoubtedly, these institutions all have a common interest and an abiding legal or moral duty to advance the implementation of socio-economic rights. However, the judiciary carries out a protective function, while advancing human rights implementation entails both promotional and protective responsibility. This and other factors associated with the judicial process make the courts less suitable and effective avenues for advancing the implementation of socio-economic rights. This means that NHRCs can play different roles and, correspondingly, achieve greater results than the judiciary in advancing socio-economic rights implementation.

Similarly, as an agency PHRCs are to advance the law-making and oversight responsibility of the legislature, which also touches on advancing human rights implementation. This is a narrow duty with limited effect relative to the functions and activities of NHRCs. Besides, PHRCs, as against NHRCs, have very limited capacity and responsibility if at all, to mainstream socio-economic rights. Hence it is also not a very active institutional framework for advancing the implementation of socio-economic rights compared with NHRCs. A lack of institutional responsibility and competence also limits the ability of anti-corruption and other related state agencies to advance the implementation of socio-economic rights as against NHRCs. Finally, NGOs have obvious weaknesses as against NHRCs that limit their capacity to advance socio-economic rights implementation.

These factors give NHRCs an edge over other related state agencies when it comes to advancing the implementation of socio-economic rights at the national level. Thus, it is submitted that NHRCs are more relevant institutions for advancing the implementation of socio-economic rights as against other state institutions and NGOs, which is their primary responsibility in relation to the other institutions which have no specific legal duty to promote and protect human rights.<sup>622</sup>

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<sup>622</sup> A Corkery 'National human rights institutions as monitors of economic, social and cultural rights' *Centre for economic and social rights* (2007) 4

It is against this background that the succeeding three chapters comprehensively consider the role and measures adopted by the NHRCs of Nigeria, South Africa and Uganda to advance the practical implementation of socio-economic rights. The essence is to use the outcome to determine whether or not NHRIs have a role in advancing socio-economic rights implementation and, if so, the extent to which, they have succeed with their strategies to advance the effective implementation of these rights. Specifically, chapter four, which is the first of the case studies, elaborates the role of, measures taken, and the effectiveness of the NNHRC in advancing domestic implementation of socio-economic rights in Nigeria in line with the objectives of the study.

## CHAPTER FOUR

### THE ROLE OF, MEASURES TAKEN BY, AND THE EFFECTIVENESS OF THE NIGERIAN NATIONAL HUMAN RIGHTS COMMISSION IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS

#### 4.1. Introduction

This chapter considers the role, efforts and effectiveness of the Nigerian National Human Rights Commission ('NNHRC') in advancing the implementation of socio-economic rights. Accordingly, the chapter begins by evaluating the institutional structure of the Commission, from the constitutive legislation, the composition, tenure and appointment of members, to its independence, powers, autonomy, administrative structure and relationship with civil society against the requirements of the Paris Principles. The essence is to determine whether or not the NNHRC has the requisite institutional frameworks to operate as an effective human rights institution.

The second part of the chapter examines the mandate of the NNHRC in relation to socio-economic rights. The purpose is to establish the express or inherent jurisdictional justification for the NNHRC's promotional and protective activities on socio-economic rights. Consequently, the potency of the existing legal and policy entry points, under which the NNHRC is advancing national implementation of these rights, is exhaustively considered. The chapter also considers the present socio-economic realities in Nigeria against the backdrop of available resources.

The third part of the chapter considers the practical work of the NNHRC, especially the strategies it employs to advance the implementation of socio-economic rights. Strategies considered include the adoption of thematic areas of focus, monitoring and investigating processes, the reception and resolution of socio-economic rights complaints and the education and advocacy activities. These strategies are evaluated in relation to their effectiveness in advancing the practical realization of socio-economic rights in Nigeria.

The fourth and final part of the chapter considers the specific and general challenges limiting the NNHRC's ability effectively to promote and protect socio-economic rights in the country. Finally, the chapter concludes with a summary and a brief introduction to the next chapter.

## **4.2. The establishment and institutional structure of the NNHRC**

### **4.2.1. The historical origin of the NNHRC**

The the NNHRC was hastily decreed into existence by the most brutal military regimes in the country's history, led by General Sanni Abacha, who ruled Nigeria between 1994 and 1998. General Abacha seized power from an Interim National Government handpicked and installed by General Ibrahim Babangida, who was forced out of power by the political crisis that followed his arbitrary annulment of the 12 June 1993 presidential election, presumably won by the late Chief Bashorun Abiola.<sup>1</sup>

Upon seizing power, Abacha dismantled all existing democratic structures. Initially, he promised to respect human rights by appointing leading opposition figures and pro-democracy activists into his cabinet and organized a national conference, ostensibly, to placate the pro-democracy and human rights community. However, his romance with democratic pretensions and human rights idealism was short-lived.<sup>2</sup> Before long, he introduced draconian laws and let loose a reign of terror and repression on the political opposition<sup>3</sup> and arrested and kept Chief Abiola in jail on treason charges for insisting on reclaiming his annulled presidential mandate.<sup>4</sup>

As the opposition to his draconian rule intensified, General Abacha invented a phantom *coup* under which pretext he implicated and arrested prominent opposition leaders and pro-democracy activists, including former President Olusegun Obasanjo, senior military officers, journalists and pro-democracy activists. These people were implicated in the

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<sup>1</sup> O Abegurin (2003) *Nigeria foreign policy under military rule 1966-1999* 149.

<sup>2</sup> Abegurin (n 1 above) 140.

<sup>3</sup> Constitutional Rights Project Annual Report: *Human Rights' Practices in Nigeria* (July 1997 – September 1998).

<sup>4</sup> C Obiagwu and CA Odinkalu 'Combating legacies of colonialism and militarism' in AA An-Na'im (ed) *Human rights under African Constitutions: Realizing the promise for ourselves* (2003) 211.



coup, tried by a special military tribunal and given death sentences which were only commuted to long prison terms following local and international protests.<sup>5</sup> With each passing day the regime became more and more notorious for its brutality, ruthlessness and oppressiveness, as extra-judicial killings, political assassinations and unlawful imprisonment became rampant.<sup>6</sup>

Furthermore, as the rage against the regime's brutal violation of human rights became internationalized, General Abacha created and deployed a special military taskforce which unleashed violence and gross human rights abuses against in the country in a bid to quell raging agitation for regional autonomy and resource control, particularly in the Niger Delta area.<sup>7</sup> To this end, he arrested and ensured the judicial murder of nine minority leaders of the Ogoni people, including the playwright Ken Saro-Wiwa despite pleas for clemency from the international community, including President Nelson Mandela.<sup>8</sup> The increasingly repressive character of the regime led to the suspension of Nigerian from the Commonwealth of Nations while the regime itself became internationally isolated.<sup>9</sup>

Apparently jolted by its pariah status in the comity of nations, the regime decided to seek ways to restore some respectability to its battered image as well as to relieve pressure from the local and international human rights community.<sup>10</sup> One such scheme was to decree the establishment of the NNHRC in 1995,<sup>11</sup> two days after the execution of Ken

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<sup>5</sup> Abegurin (n 1 above) 152.

<sup>6</sup> CO Adebayo (2000) *Running for dear life: My work in exile at 5*; United States Department Nigeria Country Report on Human Rights Practices for 1997 available at [www.refworld.org/docid/3ae6aa/820.html](http://www.refworld.org/docid/3ae6aa/820.html) (accessed on 5 January 2014).

<sup>7</sup> 'Evil cankerworm of Abacha's era' *Newswatch* Lagos 8 January 2001 18.

<sup>8</sup> 'Nigerian foaming with blood' *The Economist* London 18-24 November 1995 17-18; 'Nigeria: 'Permanent transition, current violations of human rights' *Human Rights Watch* available at [www.hrw.org/reports;1996/09/01/permanent-transition](http://www.hrw.org/reports;1996/09/01/permanent-transition) (1996).

<sup>9</sup> S Onyegbula 'The human rights situation in Nigeria since the democratic dispensation' (2001) 1 available at [unpanl.un.org/intra.doc/groups/public/document](http://unpanl.un.org/intra.doc/groups/public/document) (accessed 13 October 2013).

<sup>10</sup> S Onyegbula 'The human rights situation in Nigeria since the democratic dispensation' (2001) 1 available at [unpanl.un.org/intra.doc/groups/public/document](http://unpanl.un.org/intra.doc/groups/public/document) (accessed 13 October 2013).

<sup>11</sup> The National Human Rights Commission Decree 22 of 1995 promulgated by the late General Sanni Abacha military junta.

Saro-Wiwa and eight of his kinsmen and the trenchant condemnation that trailed the statutory murder of these minority rights activists.<sup>12</sup>

However, for critics, Abacha did not create the NNHRC with any credible desire or intention to respect and protect human rights but as subterfuge to deflect international criticisms of the regime's notorious human rights violation record.<sup>13</sup> Arguably, this perception dogged the NNHRC's legitimacy in the initial years of its existence,<sup>14</sup> although the local human rights community cautiously embraced and worked with it throughout the life of the Abacha regime.<sup>15</sup>

Following the country's return to democracy in 1999,<sup>16</sup> the decree establishing the NNHRC was retained as an existing Act of the National Assembly.<sup>17</sup> For this reason, the NNHRC is presently deemed to have been established by the National Assembly. However, the new democratic dispensation inherited a NNHRC that lacked the fundamental structures of an ideal NHRC. This fact was evident in the weaknesses associated with the Commission's architecture, which among others, lacked institutional and operational independence and autonomy.<sup>18</sup> Indeed, the NNHRC's independence and autonomy was frequently assaulted and compromised, so much so that the ICC in April 2008 downgraded it from category A to category B status.<sup>19</sup> The prostrate condition of the NNHRC led to agitation and the eventual amendment of the enabling Act by the National Assembly in 2010 to strengthen its institutional architecture, although the practical effect of the new provisions is still to be seen.<sup>20</sup>

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<sup>12</sup> 'Mandela Attacks Abacha Nigerian' *Times New York* 3 December 1995.

<sup>13</sup> A Obey *The National Human Rights Commission: The Experience of Nigeria*, at 5 available at [www.scu.edu.tw/hr/research/imgs.Ayo.pdf](http://www.scu.edu.tw/hr/research/imgs.Ayo.pdf) (accessed on 20 May 2011).

<sup>14</sup> C Obiagwu and CA Odinkalu (n 4 above) 211.

<sup>15</sup> S Cardenas *Chains of justice. The global rise of state institutions for human rights* (2014) 113; Obe (n 12 above) 10.

<sup>16</sup> The country returned to democratic rule on the 29 May 1999 following the voluntary relinquishing of power by the military and the restoration of multi-party democracy.

<sup>17</sup> Section 319 of the 1999 Constitution preserves the decrees promulgated by the military regimes as Acts of the National Assembly.

<sup>18</sup> Section 17 of the National Human Rights Commission Act of 1995.

<sup>19</sup> A Ojukwu 'Strengthening national human rights institutions, the Paris Principles and the ICC accreditation system: The experience of the national human rights Commission of Nigeria.' Being a paper presented at the 26<sup>th</sup> session of the ICC in Switzerland 20-22 March 2007 5.

<sup>20</sup> The National Human Rights Commission (Amendment) Act 2010.

#### 4.2.2. The legal status of the NNHRC

As indicated in the brief introduction, the NNHRC is a product of an organic law<sup>21</sup> which, comprehensively provided for the composition, qualification, tenure and the appointment of members of the Commission, in addition to setting out its functions, powers,<sup>22</sup> staffing,<sup>23</sup> and finances.<sup>24</sup> However, being a product of a legislative enactment and not the Constitution, the NNHRC currently functions as a legal body in contrast to NHRCs of Ghana, Kenya, South Africa and Uganda that are constitutional bodies.

Although legal status of the NNHRC is not a serious hindrance to its operations, arguably, it still could be seen to be sitting on a weak legal superstructure as against the SAHRC.<sup>25</sup> As Makubuya correctly argues, NHRIs remain constantly vulnerable to threats relating to their continued existence or independence, especially where they are very vocal and active against the state.<sup>26</sup> Thus, it is safer to have them securely established by the constitution. Thus, although, at present, there is no threat to the existence of the NNHRC, the goal to have it secured within the Nigerian Constitution is highly desirable given its relevance to the realization of a culture of human rights and democracy in the country.<sup>27</sup> This is even more desirable, when it is noted that fourteen other bodies, some of which are arguably not as important as the NNHRC such as the National Police Commission, currently enjoy such high profile constitutional status under the 1999 Constitution of Nigeria.<sup>28</sup>

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<sup>21</sup> Section 1 of the National Human Rights Commission Act of 1995.

<sup>22</sup> Sections 5-6 of the National Human Rights Commission Act of 1995.

<sup>23</sup> Sections 7-11 of the National Human Rights Commission Act of 1995.

<sup>24</sup> Sections 12-16 of the National Human Rights Commission Act of 1995.

<sup>25</sup> T Pelgram 'National human rights institutions in Latin America: politics and institutionalization law' in R Goodman and T Pelgam (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 212.

<sup>26</sup> AN Makubuya 'National human rights institutions under fire: The Uganda human rights commission on the brink' 10 *East African Journal of Peace and Human Rights* (2004) 78-96.

<sup>27</sup> The Commission is said to have made proposal to this effect to the National Assembly for the amendment of the Constitution to reflect it as a constitutional body.

<sup>28</sup> Section 153 of Nigerian Constitution of 1999.

### 4.2.3. The composition of the NNHRC

The NNHRC is required to be composed of 16 members, constituted as follows: the chairperson,<sup>29</sup> one representative each from the Federal Ministries of Justice, Foreign Affairs and Internal Affairs;<sup>30</sup> three representatives of registered human rights NGOs in Nigeria;<sup>31</sup> two legal practitioners;<sup>32</sup> three representatives of the print and electronic media;<sup>33</sup> one representative of organized labour;<sup>34</sup> two women;<sup>35</sup> and the Executive Secretary of the Commission.<sup>36</sup> The number and quality of the composition is statute specific and thus leaves little room for executive manipulation. For instance, a minimum of two women will always be part of the Governing Council even if the other positions, which are not gender-specific, are allotted to men, either by omission or deliberately.

However, while the composition is relatively diverse, there seem to be no direct representation for the ordinary members of society.<sup>37</sup> Although Okafor argues that these category of persons, the ‘voices of suffering’ are adequately represented by the presence of women, the human rights NGOs, the media and the labour movement,<sup>38</sup> this assumption does not resonate with their status. The position is that commissioners are expected to serve in their individual capacity and not as representatives of the particular social platform from which their appointment originates.<sup>39</sup> This situation notwithstanding, the representation of human rights NGOs and other social groups is relevant to the NNHRC for other reasons, such as enhancing its public legitimacy, capacity and effectiveness.<sup>40</sup> A similar argument applies to the government’s representatives who are there to articulate the government’s position on human rights

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<sup>29</sup> Section 2(2)(a) of the National Human Rights Commission Act of 1995.

<sup>30</sup> Section 2(2)(b) of the National Human Rights Commission Act of 1995.

<sup>31</sup> Section 2(2)(c) of the National Human Rights Commission Act of 1995.

<sup>32</sup> Section 2(2)(d) of the National Human Rights Commission Act of 1995.

<sup>33</sup> Section 2(2)(e) of the National Human Rights Commission Act of 1995.

<sup>34</sup> Section 2(2)(f) of the National Human Rights Commission Act of 1995.

<sup>35</sup> Section 2(2)(g) of the National Human Rights Commission Act of 1995.

<sup>36</sup> Section 2(2)(h) of the National Human Rights Commission Act of 1995

<sup>37</sup> K Yigen ‘Guarantees of independence of national human rights institutions: Appointment and dismissal procedures of leading members’ in B Lindsnaes and L Lindholt (eds) *National human rights institutions: articles and working papers* (2001) 65.

<sup>38</sup> OC Okafor and SC Agbakwa ‘On legalism, popular agency and “voices of suffering”: The Nigerian National Human Rights Commission in context’ (2002) 24 *Human Rights Quarterly* 662 714.

<sup>39</sup> Ojukwu (n 19 above) 5.

<sup>40</sup> Obe (n 12 above) 5.

issues and, apparently, to serve as a direct communication link between the government and the NNHRC itself. By and large, it is my view that the issue of specific representation for disadvantaged segments of society is not an essential factor as long as the commissioners are committed to the successful implementation of the mandate of the NNHRC irrespective of sociological, professional, religious, or ethnic background.

Furthermore, it is observed that out of the 16 members the legal profession alone has no less than four statutory members, with two occupying the most important offices, that is, the Chairman of the Governing Council and the Executive Secretary of the NNHRC.<sup>41</sup> This factor may not breach the Paris Principles, but it somewhat defeats the essence of having an NHRC with a diverse multidisciplinary disposition. The result is that law and legalism, with its drawbacks, may play a dominant role in the decisions and operations of the NNHRC.

However, for Angwe, there is nothing patently wrong with having more lawyers than other professional or social groups in the NNHRC.<sup>42</sup> According to him, no other profession understands the essence of human rights and the mandate of the NNHRC better than members of the legal profession. Hence, they should be the dominant voices and participants in its management and operations.<sup>43</sup> Although Angwe may be correct but his view fails to take into consideration the multi-disciplinary nature of human rights. As Ayewoh argues, human rights is an issue that affects all social groups, thus the composition of the NNHRC ought to reflect as many social disciplines as possible, instead of the current lopsided membership that favours a single profession or social group.<sup>44</sup> In my view this argument is correct as the present composition clearly deprives the NNHRC of additional knowledge, experience and skills from people of other professional and social backgrounds which would enable it to function more effectively

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<sup>41</sup> Sections 2(2)(a to g) of the National Human Rights Commission Act of 1995.

<sup>42</sup> Interview with Professor Ben Angwe, Executive Secretary, NNHRC, Nigerian, Abuja 20 February 2014.

<sup>43</sup> Angwe (n 42 above).

<sup>44</sup> Interview with Olufemi Ayewor Special Assistant to the Honourable Minister of State Education, Nigeria, Abuja 3 February 2014.

and create a broader degree of impact.<sup>45</sup> However, what is more important is for the commissioners to remain faithful to their oath of office and commit themselves to pursuing the primary task of promoting and protecting the human rights of Nigerians without fear or favour.

#### **4.2.4. The qualification of members of the NNHRC**

The provision for specific qualification requirements for members of the Governing Council is another noticeable and relatively distinguishing feature of the NNHRC. By the enabling law the chairperson of the NNHRC must either be a retired jurist or legal practitioner with not less than twenty years post-qualification knowledge and experience in human rights.<sup>46</sup> Similarly, the position of the Executive Secretary of the NNHRC, which is an administrative position, is exclusive to legal practitioners with not less than twenty years post-qualification experience and knowledge of human rights issues.<sup>47</sup> Furthermore, while the representatives of government must not be below the rank of director in the public service, or a deputy comptroller of prisons,<sup>48</sup> the legal practitioners nominated by the Nigerian Bar Association to the NNHRC must also have not less than ten years post-qualification knowledge and experience of human rights.<sup>49</sup> However, no specific academic or professional qualification and experience is prescribed for the members outside the legal profession, although they all may be expected to have sufficient experience in human rights issues, irrespective of their educational or professional background.<sup>50</sup>

As a social entity the quality of the NNHRC's membership is central to its independence, performance and outcomes. Thus, empowering the NNHRC with well-educated, knowledgeable and experienced persons in human rights and public administration has obvious advantages. Certainly, a NNHRC headed by persons from the highest echelons of the country's judiciary will command public respect and confidence because of their

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<sup>45</sup> JA Mertus *Human rights matters* (2009) 27.

<sup>46</sup> Section 2(2)(a) of the National Human Rights Commission Act of 1995.

<sup>47</sup> Section 7(1)(a) of the National Human Rights Commission Act of 1995.

<sup>48</sup> Section 2(2)(a)(b) and (c) of the National Human Rights Commission Act of 1995.

<sup>49</sup> Section 2(2)(d) of the National Human Rights Commission Act of 1995.

<sup>50</sup> Section 2(2)(g) of the National Human Rights Commission Act of 1995.

very high social status, vast knowledge and experience in law and human rights issues. Also, a lawyer who has been in active legal practice for 20 or more years will confer similar levels of public confidence and integrity on the NNHRC.

However, for Raheem, a single and professionally exclusive legal qualification requirement for membership of the NNHRC is ‘a total restriction which may not augur well for the realization of the goals of the Commission.’<sup>51</sup> While Raheem’s worry may be justified, given the dominant presence of the legal profession in the membership; this trend is not unique to the NNHRC as the headship of the Ghanaian, Indian and Ugandan NNHRCs<sup>52</sup> is also permanently restricted to serving or retired judges.

Although in a normal situation, Raheem’s concern is somewhat justified as the issue goes to the effectiveness of the NNHRC. In Nigeria, justices of the Court of Appeal and the Supreme Court retire at the age of 70.<sup>53</sup> Consequently, to appoint a person, who is already 70 or more years old at the point of entry leaves a question mark regarding his or her physical and mental strength to effectively lead the NNHRC. Thus, while there is great wisdom in age, this requirement may turn out to be an albatross rather than an advantage for the singular reason that at such an advanced age the person may no longer have adequate physical and mental strength to function effectively.<sup>54</sup> In the circumstance there is a need to expunge the overly restrictive requirement on the appointment of retired justices to the headship of the NNHRC to prevent, in the words of Raheem, turning the ‘Commission into a victim of its own legal formalism.’<sup>55</sup>

Besides the educational, professional qualifications and cognate experience in human rights, members of the NNHRC must also be persons of proven integrity.<sup>56</sup> Naturally,

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<sup>51</sup> SK Raheem ‘The effectiveness of Nigerian national human rights Commission in human rights protection’ unpublished PhD thesis, International Islamic University Malaysia, 2011 163.

<sup>52</sup> Section 3 of the Commission for Human Rights and Administrative Justice Act of 1995; section 3(2)(a) of the Indian National Human Rights Commission Act of 1993; section 51(3) of the Constitution of Uganda 1995.

<sup>53</sup> Section 291(1) of the 1999 Constitution of Nigeria.

<sup>54</sup> In India the chairman of the Commission must retire at 70 on account of advanced age. See section 3(2)(a) of the Indian National Human Rights Commission Act of 1993.

<sup>55</sup> Raheem (n 51 above) 164.

<sup>56</sup> Section 2(3)(a) of the National Human Rights Commission Act of 1995.

persons of questionable character are unfit to occupy any public office. This is even more the case where the NNHRC's public legitimacy is partly dependent on the personal integrity of the members. Although the phrase 'proven integrity' is subjective, it is nevertheless salutary as a legal ground to prevent the appointment of persons with questionable characters into the membership of the NNHRC.<sup>57</sup>

With these provisions it is assumed that the Governing Council of the NNHRC, at all times, is composed of men and women of high educational standards, proven integrity and a profound knowledge of human rights issues. Although this is good for ensuring the effectiveness of the NNHRC, it is not a guarantee for its practical effectiveness. Other factors, especially the priority and the commitment of the members are also very important, in addition to academic qualification and knowledge of human rights. The present Governing Council is headed by Dr. Chidi Odinkalu, a human rights scholar and activist while its Executive Secretary is a professor of law. Generally, public expectations from the present management on the performance of the NNHRC are reasonably high. However, whether this optimism may translate into real results in terms of advancing the practical realization of socio-economic rights in Nigeria is still to be seen.

#### **4.2.5. Appointment of members of the NNHRC**

The Chairman and members of the NNHRC are appointed by the President of the country subject to the confirmation of the Senate.<sup>58</sup> The Executive Secretary of the NNHRC is also appointed by the President subject to confirmation by the Senate.<sup>59</sup> The Senate is the upper arm of the National Assembly and is constitutionally responsible for confirming Presidential nominees to federal government agencies and bodies.<sup>60</sup> Practically, it is within the exclusive prerogative of the President to select his preferred nominees and submit the list to the Senate for confirmation. The Senate then screens and confirms the nominees in terms of their qualification, knowledge, experience and character.

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<sup>57</sup> Recently, the President of Nigeria was forced to withdraw his nominee to the Independent Corrupt Practices and Related Offences Commission, Mr. ThankGod Elechi, on account of petitions received from the public that questioned his personal character and suitability to hold the particular office.

<sup>58</sup> Section 2(3)(a) of the National Human Rights Commission Act of 1995.

<sup>59</sup> Section 7(1)(c) of the National Human Rights Commission Act of 1995.

<sup>60</sup> Section 47 of the 1999 Constitution of Nigeria.



The present Governing Council is the first to have gone through this appointment process, which became operational following the amendment of the enabling law. Thus, under the new legal dispensation, the appointment of the members of the NNHRC is no longer an exclusively executive activity. The legislature also plays a crucial role in the process, which is an improvement over the former process where the President alone appointed the members solely on the recommendation of the Attorney-General of the federation, who is also a member of the President's cabinet.<sup>61</sup>

However, behind the façade of the involvement of the two arms of government in the appointment of members to the NNHRC lie some serious concerns about the credibility of the process. Basically, a process that allows the President solely to nominate members of the NNHRC for appointment,<sup>62</sup> including the representatives from NGOs, organized labour, and the media, without recourse to or consultation with their constituents or any other body, is not transparent, open and participatory.<sup>63</sup>

In faulting the present process, Alabo Ozubide argues that the system encourages the twin evils of political patronage and blind allegiance, noting that the likes of Bukari Bello<sup>64</sup> and Kehinde Ajoni<sup>65</sup> had their fingers burnt for violating the unwritten bond of loyalty

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<sup>61</sup> Section 2(3)(b) of the National Human Rights Commission Act of 1995.

<sup>62</sup> The only exception is the two legal practitioners that the Nigerian Bar Association is allowed to recommend under Section 2(2)(d) of the National Human Rights Commission Act of 1995.

<sup>63</sup> It is relevant to recall the incident where the President appointed one Kunle Fadele into the Commission by virtue of his purported membership of the Civil Liberties Organization (CLO), but his appointment was denounced by the CLO because it was done without its knowledge or input. See Obey (n 12 above) 10.

<sup>64</sup> Bukari Bello, was prematurely removed as Executive Secretary of the Commission via a letter from the Attorney-General of the Federation and Minister of Justice for daring to criticize the bid by President Olusegun Obasanjo to influence an amendment of the 1999 Constitution to enable him continue in office for a third term. See Human Right Watch 'Nigeria: Do not fire chief without cause: Assault on the independence of national human rights Commission' (2006) available at [www.hrw.org/sites/all/themes/hrw/images/nav.png](http://www.hrw.org/sites/all/themes/hrw/images/nav.png) (accessed on 20 May 2013); FIDH, Dismissal of the Executive Secretary of the National Human Rights Commission, June 2006 available at [www.fidh.org/Dismissal-of-the-Executive-director-of-the-Commission](http://www.fidh.org/Dismissal-of-the-Executive-director-of-the-Commission) (accessed 30 March 2013).

<sup>65</sup> Kehinde Ajoni, who succeeded Bukhari Bello, as Executive Secretary was also suddenly dismissed in 2008 for criticizing the abuse of human rights by the Federal Government. See JA Dada 'Impediments to human rights protection in Nigeria' (2012) 18 *Annual Survey of International and Comparative Law* at 87; See also Soyinka A 'On the death row' Tell Magazine (Nigeria) April 20, 2009 20-22.

they subscribed to when they accepted an unsolicited appointment from a generous benefactor.<sup>66</sup> Felix Muoka, the Director of the Socio-economic Rights Action Centre (SERAC), agrees with Ozubide's assertion and further argues that the NNHRC has consistently failed to act against the Federal Government in the face of massive violations of human rights simply because the members do not want to be seen to be opposing the very government that appointed them.<sup>67</sup>

However, Lambert Oparah, an Assistant Director with the NNHRC, strongly disagrees with Ozubide and Muoka's contentions, noting that members of the NNHRC have in the past proven to be quite independent from the Executive despite being appointed solely by the Executive.<sup>68</sup> Although Oparah's assertion is anchored by the high level of courage and effectiveness displayed by some past heads,<sup>69</sup> it is disingenuous to conclude that the present process of appointing members of the NNHRC is flawless simply because the beneficiaries have demonstrated rare courage and independence. The issue is about securing the independence of the NNHRC by ensuring that none of the members owes his or her appointment to the goodwill or sympathy of the Executive arm of government. The fact that the National Assembly is the ultimate appointing authority is inadequate; as Murray has convincingly argued in relation to the SAHRC, that it is naïve to assume that the appointment process of this nature could ever be free from political manipulation.<sup>70</sup>

Thus, while the appointment process of the membership of the NNHRC substantially conforms to the prescriptions of the Paris Principles, the dominant observation cannot be ignored that the present appointment process leaves room for the President to exercise his or her discretion in favour of political loyalists and acolytes thereby compromising the independence of the NNHRC.<sup>71</sup> Thus, there is a need to amend this aspect of the law to

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<sup>66</sup> Interview with Alabo Ozubide a senior state prosecutor Bayelsa State, Nigeria, Yenagoa, 20 April 2013.

<sup>67</sup> Interview with Felix Muoka, a legal practitioner and Executive Director, Social and Economic Rights Action Centre (SERAC), Nigeria, Lagos, 14 June 2013.

<sup>68</sup> Interview with Mr. Lambert Oparah, Assistant Director NNHRC and Special Assistant to the Honourable Minister of State, Education, Nigeria, Abuja, 5 May 2013.

<sup>69</sup> Okafor and Agbakwa (n 38 above) 712.

<sup>70</sup> R Murray 'National human rights institutions. Criteria and factors for assessing their effectiveness' (2007) 25 *Netherlands Quarterly of Human Rights* 189 197

<sup>71</sup> Raheem (n 51 above) 165.

ensure an appointment process that ensures the participation of credible and independent social forces, as in Ghana<sup>72</sup> or Tanzania,<sup>73</sup> and substantially insulate the members from Executive influence and safeguard the independence of the NNHRC.

#### **4.2.6. The tenure of members of the NNHRC**

The position with regard to the tenure of members of the NNHRC by the enabling Act is positive. Once appointed, members, except the Executive Secretary, are entitled to remain in office for a definite term of four years, which is renewable upon expiration for another, final, term of four years.<sup>74</sup> The Executive Secretary is entitled to an extended tenure of five years.<sup>75</sup> The security of tenure, at least to some extent, is further strengthened by the President's lack of power to remove any member of the NNHRC without the approval of a simple majority of the Senate.<sup>76</sup>

Even more interesting is the additional requirement that the removal of a member of the NNHRC must be based on any of these grounds: if they are found to be of unsound mind;<sup>77</sup> or become bankrupt or makes a compromise with their creditors;<sup>78</sup> or are convicted of a felony or any offence involving dishonesty;<sup>79</sup> or found guilty of serious misconduct in relation to their duties.<sup>80</sup> These are all factual and verifiable grounds that require credible evidence to establish, thus outlawing the termination of the membership of the NNHRC without proven allegations.

This is a positive improvement on the previous provision that allows the President to dismiss any member at his discretion 'if he satisfied that it is not in the interest of the public that the member should remain in office.'<sup>81</sup> Under the present provisions of the

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<sup>72</sup> Commission for Human Rights and Good Governance (Appointment, Procedure for Commissioners) Regulations 2001.

<sup>73</sup> Section 129(4) of the 1995 Constitution of Ghana; Section 6 (2) (Regulation for Appointment) Tanzania Commission for Human Rights and Good Governance.

<sup>74</sup> Section 3(1) of the National Human Rights Commission Act of 1995.

<sup>75</sup> Section 7(2) of the National Human Rights Commission Act of 1995.

<sup>76</sup> Section 5(1) of the National Human Rights Commission Act of 1995.

<sup>77</sup> Section 5(1)(a) of the National Human Rights Commission Act of 1995.

<sup>78</sup> Section 5(1)(b) of the National Human Rights Commission Act of 1995.

<sup>79</sup> Section 5(1)(c) of the National Human Rights Commission Act of 1995.

<sup>80</sup> Section 5(1)(d) of the National Human Rights Commission Act of 1995.

<sup>81</sup> Section 4(2) of the National Human Rights Commission Act of 1995.

law, the NNHRC may never experience the ugly scenario where its former Executive Secretaries and the entire Governing Board were arbitrarily sacked by the President, since any unlawful dismissal can now effectively be challenged in a court of law to secure reinstatement. Thus, once appointed, members of the NNHRC are secured under the law to carry out their roles and responsibilities free from any fear or pressure associated with tenure insecurity, thereby enhancing both the individual and corporate independence of the commissioners and the NNHRC as a whole.

#### **4.2.7. The administrative structure of the NNHRC**

There are two levels to the NHRC's governance structure: the Governing Council, which is headed by a chairperson, and Management, which is headed by the Executive Secretary. With the exception of the Executive Secretary, all other members serve the NNHRC in a part-time capacity. Although the specific functions of the Governing Council are not stipulated by law, it is the most important policy-making organ saddled with the responsibility of executing the mandate of the NNHRC.<sup>82</sup> Thus, in addition to policy-making, the Governing Council is also responsible for approving the recruitment, discipline, promotion as well as fixing the remuneration and service conditions of the staff of the NNHRC.<sup>83</sup> Members of the Governing Council also head the different thematic areas of focus of the NNHRC. On his or her part the Executive Secretary ensures the implementation of the decisions of the Governing Council in addition to carrying out the day-to-day administration of the NNHRC on behalf of the Governing Council. The Commission meets at periodic intervals to consider issues tabled by the Executive Secretary for action.<sup>84</sup>

The management of the NNHRC is principally responsible for policy implementation as approved by the Governing Council.<sup>85</sup> Presently, the NNHRC is divided into six departments headed by directors, and six units headed by unit heads.<sup>86</sup> The departments are administration, legal services, investigation and protection, public affairs and

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<sup>82</sup> Section 2(1) of the National Human Rights Commission Act of 1995.

<sup>83</sup> Section 8 of the National Human Rights Commission Act of 1995.

<sup>84</sup> The NNHRC Annual Report 2011 8.

<sup>85</sup> The NNHRC Annual Report 2011 8.

<sup>86</sup> The NNHRC Annual Report 2011 8.

communication, research, statistics and documentation, strategy and external programmes, and finance and accounts. The units are planning and anti-corruption, human rights education, finance, audit and budget.<sup>87</sup> Each of the departments and units has a specific schedule of duties relevant to the NNHRC's mandate and, together, they constitute the engine room responsible for policy coordination and carrying out the day-to-day activities of the NNHRC.<sup>88</sup>

The administrative structure of the NNHRC is not different from that of NHRCs in general, but it is important to observe that the Governing Board operates on a part-time basis. Accordingly to Opara, it meets only once in a quarter to consider reports and issues tabled by the Executive Secretary. In reality, the running of the NNHRC is done by the Executive Secretary, who merely reports to the Board at irregular meetings. It is argued, this is a disadvantage to effectiveness as it keeps all other members away most of the time. Besides, as part-time members, their interest in the NNHRC and its activities would be limited since they have to give more time and attention to their other, perhaps more profitable, ventures. For instance, one wonders how much time and attention Odinkalu gives to the affairs of the NNHRC when he is also the Executive Director of Open Society Initiatives for Africa. Thus, there is a need to give full-time responsibilities to members of the NNHRC instead of the present situation in which the Board is almost entirely part-time.

#### **4.2.8. The independence and operational autonomy of the NNHRC**

The institutional and operational independence and autonomy of the NNHRC are legally guaranteed. The NNHRC is now empowered to exercise its powers and execute its mandate without being subject to the direction and control of any other authority or person.<sup>89</sup> This provision legally insulates it from taking or receiving instructions from any public officer or private entity irrespective of the status or personality. This means that the NNHRC is solely responsible for all its actions, decisions and activities. In addition,

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<sup>87</sup> The NNHRC Annual Report 2011 9.

<sup>88</sup> The NNHRC Annual Report 2011 8.

<sup>89</sup> Section (6)(3) of the National Human Rights Commission (Amendment) Act of 2010.

the NNHRC is not limited in its operational powers. Thus, it can ‘do such other things as incidental, necessary, conducive or expedient for the performance of its functions.’<sup>90</sup>

Furthermore, its independence is strengthened by the immunity from civil and criminal prosecution granted to its members for actions done or left undone insofar as they act or acted in good faith and in their official capacities.<sup>91</sup> Still further, the NNHRC is empowered to appoint the employees it requires,<sup>92</sup> determine their conditions of service, including salaries, pensions and gratuities, as well as discipline and promote deserving staff.<sup>93</sup> Finally, it is accountable to Nigerians in general as it is required to publish and submit annual reports not only to the President but also to the National Assembly, the Judiciary, as well as to all the sub-states and local governments.<sup>94</sup>

Evidently, the NNHRC initially lacked institutional independence and autonomy even though it was established as a distinct legal personality with perpetual succession and powers to sue and be sued in its corporate name.<sup>95</sup> Until 2011, the NNHRC operated almost completely under the imperative authority of the Attorney-General and Minister of Justice, who not only could give general directives to it with regard to the exercise of its function, but also could approve virtually everything it had to do.<sup>96</sup> For instance, it could not determine remuneration for its staff,<sup>97</sup> borrow or invests its funds,<sup>98</sup> or acquire landed property without the prior consent of the Attorney-General of the Federation and Minister of Justice.<sup>99</sup> Similarly, it was obliged to submit its budgetary requests<sup>100</sup> and annual reports to the federal government through the Attorney-General of the Federation and Minister of Justice.<sup>101</sup>

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<sup>90</sup> Section 6(1)(g) of the National Human Rights Commission Act of 1995.

<sup>91</sup> Section 15 of the National Human Rights Commission Act of 1995.

<sup>92</sup> Section 8 of the National Human Rights Commission Act of 1995.

<sup>93</sup> Section 9 of the National Human Rights Commission Act of 1995.

<sup>94</sup> Section 6(e) of the National Human Rights Commission Act of 1995.

<sup>95</sup> Section 1 of the National Human Rights Commission Act of 1995.

<sup>96</sup> Section 17 of the National Human Rights Commission Act of 1995.

<sup>97</sup> Section 10 of the National Human Rights Commission Act of 1995.

<sup>98</sup> Section 14(1) and (2) of the National Human Rights Commission Act of 1995.

<sup>99</sup> Section 14(4) of the National Human Rights Commission Act of 1995.

<sup>100</sup> Section 15 of the National Human Rights Commission Act of 1995.

<sup>101</sup> Section 16 of the National Human Rights Commission Act of 1995.

However, what was effectively reckoned as a dependency status of the NNHRC has changed. As Pelgram has argued, a national human rights institution is independent and operationally autonomous if it is not subject to any imperative mandate; does not receive instructions from any authority; carries out its function with autonomy; has autonomy over recruitment; has powers to define its internal structures and develops its strategic plan.<sup>102</sup> The current legal status and powers of the NNHRC clearly mirror these essential ingredients of institutional independence and autonomy. One of the positive outcomes of the new legal status of the NNHRC is the review and elevation of the Commission's accreditation status from 'B' to 'A' category by the ICC.<sup>103</sup> However, it is one thing to be independent in law and another to be able to exercise it in practice. So far, the NNHRC has all that is required under the Paris Principles to be practically independent and operationally autonomous in words, conduct and actions.

#### **4.2.9. The financial autonomy of the NNHRC**

The enabling Act provides for three sources of funding for the NNHRC. These are sums that may be provided by the Federal Government,<sup>104</sup> fees it may charge for services rendered,<sup>105</sup> and all other sums it can raise from gifts, testamentary depositions, endowments and contributions from philanthropic persons and organizations.<sup>106</sup> A fourth source of funding for the NNHRC is the establishment of a human rights fund.<sup>107</sup> Among these sources, the regular allocation it receives from the Federal Government remains the most viable and stable source of funding. The NNHRC does not undertake business ventures that will enable it to charge or receive service fees. Thus, the second source of funding is not feasible in practice. Even the funds it receives from overseas donor agencies are mostly project specific and, reportedly, insignificant.<sup>108</sup>

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<sup>102</sup> T Pelgram 'National Human Rights Institutions in Latin America: Politics and institutionalization law' in R Goodman and T Pelgam (eds) *Human rights, state compliance and social change: assessing national human rights institutions* (2012) 215.

<sup>103</sup> E Okubanji 'Nigeria reclaims "A" status at ICC' *Daily Times Newspapers* 19 January 2012 available at <http://www.dailytimes.com.ng/article/nigeria-reclaims-status-icc>.

<sup>104</sup> Section 12(2)(a) of the National Human Rights Commission Act of 1995.

<sup>105</sup> Section 12(2)(b) of the National Human Rights Commission Act of 1995.

<sup>106</sup> Section 12(2)(c) of the National Human Rights Commission Act of 1995.

<sup>107</sup> Section 15 of the National Human Rights Commission Act of 1995.

<sup>108</sup> The NNHRC Annual Reports did not even state whether the Commission received any form of external funding from international donor agencies.

Furthermore, the much vaunted Human Rights Commission Fund, to which the federal, sub-states and local governments, as well as corporate bodies, are required to make contributions, is yet to be established.<sup>109</sup> Indeed, the feasibility of this fund is doubtful because it has the trappings of an unlawful taxation or levy and, more than likely, will be resisted by the potential contributors. Thus, the NNHRC relies and will continue to rely mostly on financial allocations, which has always been insufficient, from the Federal Government to fund all of its activities.<sup>110</sup> For instance, in 2011 the Commission's capital budget was fixed by the envelope system to R16, 180, 868.00 (about 120,000.00 United States Dollars) only. Even then only R14, 851, 1555.00 (less than 100, 000.00 USD) was released to the NNHRC. This has been a recurrent trend right from its inception.. In fact, in 2004, the NNHRC had no allocation for capital expenditures.<sup>111</sup> Until the recent amendment to the principal Act the NNHRC lacked financial autonomy as funds meant for it were accessed through the Federal Ministry of Justice.<sup>112</sup> However, this has changed with the charging of its recurrent expenditure to the consolidated revenue fund of the Federal Government.<sup>113</sup> As a result, the NNHRC is among the few public bodies that receives approved annual budgetary allocations directly from the federation account.<sup>114</sup> This is a positive development in the sense that it now has a legally guaranteed right to direct funding for all its administrative and operational expenses.

However, it is one thing to have a right to direct funding; it is another and, perhaps, even more crucial to enjoy the necessary adequate funding in practice. This is the crux of the matter as far as the financial autonomy of the NNHRC is an issue. The envelope system of budgeting, which limits the NNHRC's capital budget to an amount that is predetermined and fixed by the Minister of Finance, is still in practice.<sup>115</sup> This means that the NNHRC will have to situate its capital budget, irrespective of the scope of its actual

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<sup>109</sup> Section 15 of the National Human Rights Commission Act of 1995.

<sup>110</sup> The NNHRC Annual Report 2011 66.

<sup>111</sup> N Mbelle 'The national human rights commission of Nigeria: valuable but struggling to enhance relevance; in M Paarlevliet, et al (eds) *National human rights institutions in Africa: defenders of human rights, managers of conflict, builders of peace* (2005) 41.

<sup>112</sup> Section 14(1)(c) 5 of the National Human Rights Commission Act of 1995.

<sup>113</sup> Section 10 of the National Human Rights Commission Act of 1995.

<sup>114</sup> Others include the National Assembly and the Judiciary.

<sup>115</sup> The NNHRC Report 2011 66.



needs, within whatever sum offered to it by the Ministry of Finance. Furthermore, the NNHRC may never get what it needs and eventually requests but only what is finally approved and appropriated by the National Assembly, which, most often, has been less than what it requires. This means that it has to effectively lobby the National Assembly to be able to have its budgetary estimates either approved as submitted or even improved upon. The conclusion, therefore, is that the financial autonomy granted the NNHRC remains illusory unless and until it is matched with adequate funding, with serious implications for its practical effectiveness in relation to achieving the demands of its mandate.

#### **4.2.10. The relationship of the NNHRC with NGOs**

Striking effective relationships with civil society groups is one area the NNHRC is considered to be doing appreciably well. Obe,<sup>116</sup> Okafor and Agbakwa,<sup>117</sup> and Mbelle<sup>118</sup> are unanimous in their respective views that the NNHRC cultivates a mutually reinforcing relationship with civil society groups and inter-governmental agencies to promote and protect human rights in the country. Some of NGOs with which it has reportedly partnered include the Civil Liberties Organization (CLO), the Constitutional Rights Project (CRP), the Centre for Democracy and Development (CDD), the Criminal Defense Group (CDP), and the National Association for Persons with Disabilities (JONAPWD). Others partnerships outside the NGO community include the Joint Action Committee of Federal Medical Centre, the Justice, Penal Reforms International, the Nigerian Prison Service, the National Judicial Institute (NJI), the Judiciary, and the Danish Institute for Human Rights (DIHR).<sup>119</sup>

Evidently, the NNHRC has executed several human rights promotion and protection activities in collaboration with local and international NGOs. This is the basis for the positive assessment it gets about its relationship with civil society groups. For instance, its complaint process is regularly used by NGOs such as the CLO, the CRP, and Convict

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<sup>116</sup> Obe (n 12 above) 12-13.

<sup>117</sup> Okafor and Agbakwa (n 38 above) 708.

<sup>118</sup> Mbelle (n 112 above) 41.

<sup>119</sup> NNHRC Annual Report 2011 51-55.

Rights to protect the rights of their clients.<sup>120</sup> It carried out a project on juvenile justice with Penal Reforms International, the CRP and the Nigerian Prisons Service.<sup>121</sup> It organized capacity building workshops for judges in collaboration with the CLO, the Judiciary, the NJI and the DIHR.<sup>122</sup> It carried out a legal audit of prisons with the Criminal Defence Group, which provided legal assistance to 300 awaiting trial inmates,<sup>123</sup> organized stakeholders on the documentation of sexual violence with Gender Action Team,<sup>124</sup> carried out an audit exercise on Kano State police formations with CLEEN Foundation,<sup>125</sup> organized seminar on the Freedom of Information Act with the Swedish Embassy and marked the international day for persons with disabilities in collaboration with the International Republican Institute and the Joint National Association of persons with Disabilities.<sup>126</sup>

However, critics hold the view that the NNHRC is selective in the type of NGOs it works with and, especially, has not been quite accessible to NGOs working in the area of socio-economic rights.<sup>127</sup> According to Muoka the NNHRC has refused to partner with the SERAC because of its critical stand on the state's neglect of socio-economic rights. In his words, 'the Commission has never worked with my NGO or any other NGO that is committed to the realization of socio-economic rights.'<sup>128</sup> However, Opara strongly denies Muoka's claims. He states that although NGOs working in the area of socio-economic rights are few, the NNHRC has never and will never shut its doors against SERAC or any other NGO, emphasizing that it is always willing to partner with all credible NGOs to advance human rights implementation in the country.<sup>129</sup>

However, Opara's assertion is difficult to believe as there is little or no proven record of collaboration between the NNHRC and socio-economic rights NGOs in its annual

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<sup>120</sup> NNHRC Annual Report 2010 45.  
<sup>121</sup> Obe (n 12 above) 12-13.  
<sup>122</sup> Obe (n 12 above) 12-13.  
<sup>123</sup> NNHRC Annual Report 2011 51.  
<sup>124</sup> NNHRC Annual Report 2011 55.  
<sup>125</sup> NNHRC Annual Report 2011 55.  
<sup>126</sup> NNHRC Annual Report 2011 55.  
<sup>127</sup> Muoka (n 67 above).  
<sup>128</sup> Muoka (n 67 above).  
<sup>129</sup> Oparah (n (68 above).

reports. Arguably, this is an indication that points to a lack of effective collaboration between the NNHRC and NGOs working on socio-economic rights in the country: a gap the NNHRC needs to close to enhance its activities for achieving the implementation of this category of rights.

### 4.3. The challenge of implementing socio-economic rights in Nigeria

Nigeria is endowed with enormous natural and human resources. It is the largest oil producer in Africa, the 11<sup>th</sup> largest in the world, and the 8<sup>th</sup> largest exporter of crude oil with proven oil reserves estimated at 37.2 billion barrels ( $5.91 \times 10^9 \text{ m}^3$ ).<sup>130</sup> For decades, Nigeria has been a net exporter of over two million barrels of crude oil per day.<sup>131</sup> According to a report commissioned by the Presidency, Nigeria earned about \$292.3 billion in the last six years.<sup>132</sup> Nigeria's economy in the last decade grew, and continues to grow, by 7.5% on the average.<sup>133</sup> Presently, Nigeria claims to be, and has declared itself, the largest economy in Africa, with a rebased annual Gross Domestic Product of \$510 billion.<sup>134</sup>

Despite the huge export earnings and regular reports of economic progress, these gains have not translated into improving the standards of living and wellbeing for the majority of the population. According to Nigeria's National Bureau of Statistics, over 112 million Nigerians, representing about 60 per cent of the entire population, live below the poverty line as at 2010. Since then, recent reports from the African Development Bank<sup>135</sup> and the

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<sup>130</sup> Oil reserves in Nigeria Wikipedia available at

<sup>131</sup> CIA World Factbook available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (accessed 10 April 2014).

<sup>132</sup> Sada, Idris and Co 'Nigeria Extractive Industries Transparency Initiative: Financial audit: An independent report assessing and reconciling financial flows within Nigeria's oil and gas industry – 2009 to 2011 18 December 2012 .

<sup>133</sup> *World Bank estimates available at* [data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG](http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG) .

<sup>134</sup> Voice of America 'Nigeria declares self-Africa's largest economy' available at <http://www.voanews.com/content/nigeria-declares-itself-africas-biggest-economy/1887490.html> (accessed 12 April 2014).

<sup>135</sup> African Development Bank: Federal Republic of Nigeria country strategy report 2013-2017'Orwa department 2013 available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Nigeria%20-%202013-2017%20-%20Country%20Strategy%20Paper.pdf> (accessed 11 April 2014).

World Bank<sup>136</sup> show that the poverty rate has rather increased to about 63% despite the strong performance by the economy.

According to the ADB, social deprivation is glaringly huge in Nigeria, while income distribution is highly skewed with a Gini coefficient of 43.70 on a GNI per capita of USD1.180, leading to worsening income gap and inequality between the poor and rich.<sup>137</sup> Also, with a HDI ranking of 153 out of 186 countries, Nigeria's social indicators are lower than the average for Africa.<sup>138</sup> For instance, 47% of Nigerians reportedly have no access to safe drinking water<sup>139</sup> and 69% have no access to basic sanitation.<sup>140</sup> With 10.5 million children, Nigeria has more children out of school than any other country in the world.<sup>141</sup> According to Nigeria's Minister of Education, illiteracy figures increased from 25 million in 1998 to 35 million in 2013, making Nigeria one of the countries with the highest levels of adult illiteracy.<sup>142</sup> In the health sector, Nigeria reportedly has the highest child and maternal mortality rates in the world, next only to India, with an estimated 608 deaths per 100,000 deliveries.<sup>143</sup>

Arguably, Nigeria's endemic poverty and high degree of socio-economic deprivation are not as a result of a relative lack of resources but are more a reflection of the poor quality of governance and the state's failure to efficiently utilize the available resources to fund appropriate social policies resulting in too few socio-economic benefits to the poor. For instance, while budgetary allocations for the provision of social services, like water, keep declining from 112 billion naira in 2010 to 62 billion in 2011 and to 35 billion in 2012 respectively, funding for defence keeps increasing from 348 billion naira in 2011 to 921 billion in 2012 respectively. As noted in the 2013 HDI report, 'a society can spend its

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<sup>136</sup> World Bank 'Nigeria economic report' 2013 8.

<sup>137</sup> African Development Bank (n 137 above).

<sup>138</sup> UNDP Human Development Report 2013 available at

<sup>139</sup> '47% Nigerians can't access clean water-Survey; Daily Independent'<http://dailyindependentnig.com/2013/03/47-nigerians-cant-access-clean-water-survey/>.

<sup>140</sup> WaterAid 'Bridging the divide: Using aid flows to tackle inequality in water and sanitation access' Briefing paper 2014 available at <http://www.wateraid.org/~media/Files/Bridgingthedivide.pdf>.

<sup>141</sup> UNESCO Education for All (EFA) Global Monitoring report 2013-2014 available at

<sup>142</sup> A Akinbode Vanguard Newspapers '35 million Nigerian adults are illiterate – Minister' 11 September 2013.

<sup>143</sup> Amnesty International World Report 2010 142.

income on education or on weapons of war. Individuals can spend their income on essential foods or on narcotics. For both societies and individuals, what is decisive is not the process of wealth maximisation, but how they choose to convert income into human development.’<sup>144</sup> Nigeria shows that high economic growth does not and cannot automatically translate into meaningful human development. As UNDP correctly argues, for economic growth to achieve meaningful human development the state must plough its huge riches into human development through effective pro-poor social policies and investments in education, healthcare, social housing and job creation as a matter of deliberate and targeted commitment.<sup>145</sup>

Consequently, the world remains perplexed by the Nigerian paradox of endemic poverty and sharp inequality in the midst of enormous state resources; the effect is already taking a toll on the country’s social fabric and cohesiveness with increasing socio-political tensions, inter and intra ethnic conflicts and flash points of violence. Therefore, there is an urgent for stakeholders to hold the Nigeria state accountable to its obligations to implement socio-economic rights and to end the circle of poverty and socio-economic deprivation in the lives of ordinary. A concerted effort is required from all stakeholders. However, the role and responsibility of the NNHRC in driving the state to comply with its socio-economic rights obligations is important in view of its statutory status and direct responsibility to so do.

#### **4.4. The socio-economic rights mandate and powers of the NNHRC**

Among the 16 statutory functions, the most far-reaching mandates the NNHRC to deal with all human rights guaranteed by the Constitution, the UN Charter, the UDHR and all other international and regional human rights treaties to which Nigeria is a party.<sup>146</sup> Arguably, this is a wide mandate on human rights, which also is inherent in the power of the NNHRC to monitor and investigate ‘all alleged cases of human rights violations in the country’<sup>147</sup> and to provide redress and remedies to all victims of human rights

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<sup>144</sup> UNDP Human development report 2013 64.

<sup>145</sup> UNDP Human development report 201364.

<sup>146</sup> Section 5(a) National Human Rights Commission Act of 1995.

<sup>147</sup> Section 5(b) National Human Rights Commission Act of 1995.

violations without discrimination.<sup>148</sup> These provisions give the NNHRC several pathways to advance the progressive realization of socio-economic rights in Nigeria; even more so when the term ‘human rights’ is not defined so not allowing any person to infer a possible limitation on its mandate. Thus, the entry points for the NNHRC to advance the progressive realization of on socio-economic rights are as follows:

#### 4.4.1. The constitutional framework

Nigeria’s current Constitution does not expressly guarantee justiciable socio-economic rights. Indeed, none of the previous Constitutions did.<sup>149</sup> However, the idea of socio-economic rights crept into the country’s constitutional framework for the first time in 1979 as non-justiciable Fundamental Objectives and Directive Principles of State Policy.<sup>150</sup> In denying constitutional recognition to substantive socio-economic rights, the 1979 Constitution Drafting Committee (CDC) held the view that the country lacked the facilities to support the grant of such rights as constitutional entitlements.<sup>151</sup> The current 1999 Constitution also failed categorically to provide for judicially actionable socio-economic rights. Instead, the fundamental objectives and directive principles of state policy were lifted directly from the defunct 1979 Constitution and planted in the new Constitution, under which sections 16, 17, 18 and 20 are identified as central to socio-economic rights implementation in Nigeria.<sup>152</sup>

Section 16 obliges the state to direct its policy towards ensuring ‘that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pension and unemployment, sick benefits and welfare of the disabled are provided for the citizens.’<sup>153</sup> Section 17 obliges the state to direct its policy towards ensuring that all citizens have the opportunity to secure adequate means of livelihood and

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<sup>148</sup> Section 5(c) Nigerian Human Rights Commission Act of 1995.

<sup>149</sup> The first was the 1960 independence constitution; followed by the Republican Constitution of 1963; then the 1979 Constitution, and the current 1999 Constitution.

<sup>150</sup> Chapter two of the 1979 Constitution of Nigeria.

<sup>151</sup> E Osita *Human rights in Africa: some selected problems* (1984) 32.

<sup>152</sup> DCJ Dekas ‘Judicial reform of the legal framework for human rights litigation in Nigeria: Novelities and perplexities’ in DCJ Dekas (ed) *Judicial reform and transformation in Nigeria* 334-335; SAOlumade ‘Human rights and quality education in Nigerian primary schools’ (2012) *Academic Research International* 459-462.

<sup>153</sup> Sec 16 (2)(d) of the 1999 Constitution of Nigeria.

suitable employment;<sup>154</sup> to provide adequate, just and humane conditions and facilities for work and leisure;<sup>155</sup> to safeguard the health, safety and welfare of all persons in employment;<sup>156</sup> to provide adequate medical and health facilities for all persons;<sup>157</sup> to ensure equal pay for equal work without discrimination on account of sex or other ground;<sup>158</sup> to prevent children, young persons and the age against any exploitation whatsoever and against moral and material neglect;<sup>159</sup> to provide social assistance for the needy in disserving cases;<sup>160</sup> and to encourage the promotion of family life.<sup>161</sup>

Section 18 provides the right to education and directs the state to ensure the provision of equal and adequate educational opportunities at all levels,<sup>162</sup> including the eradication of illiteracy through the provision of free, compulsory and universal primary education,<sup>163</sup> as well as, free secondary,<sup>164</sup> university<sup>165</sup> and adult literacy programmes,<sup>166</sup> as and when practicable to so do. Finally, section 20 directs the state to protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country.<sup>167</sup>

Thus, chapter two of the 1999 Nigerian Constitution is not a catalogue of socio-economic rights,<sup>168</sup> but the provisions constitute the nearest expression of socio-economic rights within the Nigerian constitutional framework. They proclaim socio-economic responsibilities on all organs and authorities of the state to implement.<sup>169</sup> The Supreme Court of Nigeria emphasizes that ‘while they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of state

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<sup>154</sup> Section 17(3)(a) of the 1999 Constitution of Nigeria.

<sup>155</sup> Section 17(3)(b) of the 1999 Constitution of Nigeria.

<sup>156</sup> Section 17(3)(c) of the 1999 Constitution of Nigeria.

<sup>157</sup> Section 17(3)(d) of the 1999 Constitution of Nigeria.

<sup>158</sup> Section 17(3)(e) of the 1999 Constitution of Nigeria.

<sup>159</sup> Section 17(3)(f) of the 1999 Constitution of Nigeria.

<sup>160</sup> Section 17(3)(g) of the 1999 Constitution of Nigeria.

<sup>161</sup> Section 17(3)(h) of the 1999 Constitution of Nigeria.

<sup>162</sup> Section 18(1) of the 1999 Constitution of Nigeria.

<sup>163</sup> Section 18(3)(a) of the 1999 Constitution of Nigeria.

<sup>164</sup> Section 18(3)(b) of the 1999 Constitution of Nigeria.

<sup>165</sup> Section 18(3)(c) of the 1999 Constitution of Nigeria.

<sup>166</sup> Section 18(d)(d) of the 1999 Constitution of Nigeria.

<sup>167</sup> Section 20 of the 1999 Constitution of Nigeria.

<sup>168</sup> ST Ebobrah ‘The future of economic, social and cultural rights litigation in Nigeria’ (2007) 1 *College of Advance Legal Studies Review of Nigerian Law and Practice* 108 113.

<sup>169</sup> Section 13 of the 1999 Constitution of Nigeria.

organs if they acted in clear disregard of them.’<sup>170</sup> Their importance is further underscored by the state’s constitutional obligation to establish appropriate authorities to promote and enforce their observance.’<sup>171</sup> Although no such authority has been established so far, the failure to do so is, in effect, a breach of constitutional duty. As Minkler emphasizes, the fundamental objectives and directive principles of state policy ‘reflect social norms and generate expectations to which policy-makers can be held accountable.’<sup>172</sup>

Thus, as a human rights promotion and protection agency, the NNHRC bears responsibility to prod the Nigerian government to uphold, apply and implement the fundamental objectives and directive principles of state policy through advocacy and other means, since doing so invariably means improving the socio-economic wellbeing of ordinary Nigerians. Therefore, it is conceded that chapter two of the 1999 Constitution constitutes a persuasive source for socio-economic rights; it is a veritable provision for the NNHRC and other social actors to demand socio-economic accountability from the state on the basis of the constitutionally imposed duty to do so.

#### **4.4.2. International and regional human rights treaties framework**

As a member of the UN, Nigeria is bound by the UN Charter and the UDHR. Nigeria is a party to the ICESCR. Nigeria acceded to this important treaty on 29 July 1993. Besides the ICESCR, Nigeria is a party to several other international human rights instruments that embody socio-economic rights, including the CEDAW, the CRC, the CERD, the African Charter and its Protocols on women and children rights and the ECOWAS Protocol.

That Nigeria bears international legal obligations to implement these treaties is no longer in doubt. This position has since been affirmed by the African Commission in the complaint between *Social and Economic Rights Action Centre (SERAC) and Another v.*

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<sup>170</sup> *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 27 NWLN 1.

<sup>171</sup> Item 60(a) of the Exclusive Legislative List of the 1999 Constitution of Nigeria.

<sup>172</sup> L. Minkler ‘Economic rights and political decision making’ (2009) 32 *Human Rights Quarterly* 368 381.



*Nigeria*.<sup>173</sup> Furthermore, in *Registered Trustees of the SERAP v Nigeria*,<sup>174</sup> the ECOWAS Court dismissed Nigeria's objection that it cannot be held to account for its international socio-economic obligations because these rights are not justiciable under the country's constitution.<sup>175</sup> The ECOWAS Court concluded, since the plaintiff's claim pertains to a violation of the right to quality education and other related socio-economic rights guaranteed by the African Charter, Nigeria, as a party to the Revised ECOWAS Treaty, is bound under article 4(g) of the treaty to recognize, promote, protect, and fulfil these rights.

The significance of these decisions lies in the fact that socio-economic rights violation complaints can be litigated and the outcome possibly enforced against Nigeria under the provisions of the ICESCR, African Charter, and other international human rights treaties by the African Commission and the ECOWAS Court. The latter may be preferred venue because of proximity and the added advantage that the court requires no exhaustion of local remedies to access its jurisdiction.<sup>176</sup> This situation is more likely since attempts to litigated socio-economic rights in domestic courts have not been successful and the issue whether these rights are domestically justiciable or not has not been considered and settled by Nigeria's Supreme Court. While the decision of the Federal High Court in *Odafe v Attorney-General of the Federation*<sup>177</sup> that the Federal Government bore a mandatory obligation to provide medical care to four HIV positive prisoners under article 16(2) of the African Charter is quite instructive and welcome, it is a decision of an inferior court and, thus, lacks any serious weight to ground any definite legal opinion.

However the justiciability or otherwise of socio-economic rights does not affect the mandate of the NNHRC to promote and protect socio-economic rights through any of the jurisdictions, whether international or national. With this mandate, the various international and regional treaties the country has ratified form the legal basis for the NNHRC to draw inspiration from to actively promote and protect socio-economic rights.

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<sup>173</sup> *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* (2001) AHLR60.

<sup>174</sup> ECW/CCJ/APP/0808; (2009) AHLR 331.

<sup>175</sup> *Registered Trustees of the SERAP v Nigeria* ECW/CCJ/APP/0808; AHLR 334 para 14.

<sup>176</sup> F Viljoen *International human rights law in Africa* (2012)490.

<sup>177</sup> *Odafe v Attorney-General of the Federation* (2004) AHRLR 205.

Thus, the status of socio-economic rights within the national legal framework is not a serious impediment to its responsibility to monitor Nigeria's compliance with its international and regional treaty obligations and advance the progressive realization of these rights.

#### **4.4.3. The national legislation and policy framework**

The NNHRC's expressed mandate is apparently tied to human rights that are recognized by the Constitution or by international and regional treaties. This situation may admit arguments that the Commission does not have any legal responsibility to promote and protect human rights created by national legislation or Executive policy initiatives. However, such a position is untenable as the Commission's inherent powers over human rights constituted under national laws is located in the expressed functions of the Commission to promote and protect legislation and Executive policies on human rights.

For instance, part of the NNHRC's express mandate is to assist all tiers of government, that is, the federal, sub-state and local governments, to formulate appropriate human rights policies,<sup>178</sup> as well as examine any existing legislation, administrative provisions and proposed bills or bye-laws to ascertain their compliance or consistency with human rights norms.<sup>179</sup> Furthermore, the NNHRC is obliged to monitor and investigate 'all alleged cases of human rights violations in the country.'<sup>180</sup> These provisions clearly empower the NNHRC to monitor and investigate human rights violations under international treaties, the constitution, and the national-cum-policy frameworks.

Arguably, national legislation and policy initiatives, including positive administrative actions and budgetary allocations, remain some of the most viable means for ensuring the practical realization of socio-economic rights. Therefore, the NNHRC cannot be indifferent to the relevance of national legislation and policy in advancing the realization of socio-economic rights as this is implicit in its role as an agency for the promotion and protection of human rights. Presently, the African Charter on Human and Peoples' Rights

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<sup>178</sup> Section 5(d) Nigerian Human Rights Commission Act of 1995.

<sup>179</sup> Section 5(k) Nigerian Human Rights Commission Act of 1995.

<sup>180</sup> Section 5(b) National Human Rights Commission Act of 1995.

(Application and Enforcement) Act 1983, which domesticates the African Charter, is considered the most important domestic legislation on socio-economic rights, having been held by the Supreme Court to be binding on all organs of government.<sup>181</sup> Consequently, it is submitted that the African Charter domestication legislation reflects the existence of substantive socio-economic rights in Nigeria, on which platform the NNHRC can stand to advance their implementation.

Other relevant national legislation that relate to socio-economic rights are the Universal Basic Education Act 2004, and the Child Rights Act 2003. The Basic Education Act makes basic education universal, free and compulsory. Thus every Nigerian child, irrespective of his sociological background or geographical location, is legally entitled to primary and junior secondary education free of cost to parents.<sup>182</sup> The Nigerian state is under a legal duty to make qualitative basic education sufficiently available for the benefit of all Nigerian children in public primary and secondary schools. Parents are also under a negative legal duty not to deny their children the opportunity to enjoy the right to basic education by withholding them from attending public schools.<sup>183</sup> Under the Constitution federal laws are binding on all states of the federation.<sup>184</sup> Thus, being an Act of the National Assembly, the provisions of the Universal Basic Education are binding and legally enforceable by domestic courts in all the 36 states of the federation. Therefore, the Universal Basic Education Act constitutes an important legal instrument the NNHRC can utilize to advance the practical realization of the right to basic education in Nigeria.

The Child Rights Act 2003 essentially domesticates the principles of the CRC in Nigeria. Indeed, it is a very comprehensive piece of legislation that not only asserts the autonomy and dignity of the Nigerian child as a human being but also emphasizes the best interest of the child as the primary consideration in administrative, adjudicative, legislative and

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<sup>181</sup> *Abacha v Fawehinmi* (1996) 9 NWLR Part 475 710.

<sup>182</sup> Section 1 of the Universal Basic Education Act 2004.

Section 2 of the Universal Basic Education Act 2004 makes it a criminal offence for any parent to prevent his or child from attending basic education schools.

<sup>184</sup> Section 4(1)(2)(5) of the 1999 Constitution of Nigeria.

other measures relating to children.<sup>185</sup> It also guarantees a full range of human rights, including the socio-economic rights, to free, compulsory universal basic education, the right to health services, as well as the related right to freedom from discrimination, the right to leisure, recreation and cultural activities. The failure of the state to implement the Child Rights Act amounts to a violation of these rights. Thus, this is another important piece of national legislation that provides the normative platform for advancing the realization of the socio-economic rights of children by the NNHRC.

As indicated above, the NNHRC's mandate extends to playing an advisory role on government policies. Here, the poverty eradication and socio-economic development policies of government are most relevant. Presently, the federal government is implementing several poverty eradication policies, ranging from the MDGs to the National Economic Empowerment and Development Strategy (NEEDS) to the National Poverty Eradication Programme (NAPEP). The NEEDS strategy, which was replicated at the state and local government levels, aims at directing the states macroeconomic policies towards socio-economic growth and development; the NAPEP, which components include the Youth Empowerment Scheme, Rural Infrastructure Development Scheme and the Social Welfare Scheme and the National Resources Development and Conservation Scheme are targeted at integrating the poor into the country's economic development process.<sup>186</sup>

Specifically, the Youth Empowerment Scheme programme aims to provide youth with skills, employment and wealth generation opportunities. The Rural Infrastructure Development Scheme programme, on its part, is targeted at meeting rural infrastructure needs in the areas of transportation, energy, water and communication. Similarly, the Social Welfare Scheme and the National Resources Development and Conservation Scheme is aimed at providing social benefits, such as quality primary education and primary healthcare, and improving the capacity of rural farmers. The SRDS scheme was meant to stimulate sustainable development in agriculture, solid mineral and water

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<sup>185</sup> AI Emily 'Legal frameworks for the child rights in Nigeria' (2010) 3 *Journal of Public and Constitutional Practice* 11.

<sup>186</sup> An Ighodalo 'Poverty and sustainable socio-economic development in African: The Nigerian experience' (2012) 8 *European Scientific Journal* 58.

resources. Besides these programmes, poverty eradication is one of the areas of focus of the ‘transformation’ agenda of the present administration.<sup>187</sup> Accordingly, apart from funding the existing programmes, the state is introducing poverty reduction strategies and funding them through dedicated sources, such as the constituency projects, the subsidy reinvestment and empowerment programme and the MDGs projects for basic social services in rural communities funded from the gains of the debt relief fund.

By and large, PREPs are important for the realization of socio-economic rights. Thus securing their effective implementation is in consonance with responsibilities of NHRIs. This much is acknowledged in the national action plan for the promotion and implementation of human rights, which specifically lists PREPs as part of the strategies for advancing the implementation of socio-economic rights in the country.<sup>188</sup> Therefore, the role of the NNHRC in the promotion and protection of socio-economic rights is intrinsically linked to securing the proper implementation of PREPs through the promotion of development, good governance, judicious application of resources and the eradication of corruption.

It is relevant to conclude on the basis of the above discussions that the NNHRC arguably has a very wide mandate to promote and protect human all human rights, including socio-economic rights. Indeed, according to Ojukwu, the promotion and protection of socio-economic rights is not just a responsibility of the NNHRC; it is a primary responsibility.<sup>189</sup> This, of course, is the correct interpretation of the mandate of the NNHRC.

Furthermore, the NNHRC has adequate powers to drive and enforce its mandate. It now has powers to summon or compel the attendance of witnesses, the production of documents, arrest and search of premises where necessary<sup>190</sup> and the power to legally enforce its awards and recommendations against any person or authority through the

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<sup>187</sup> Ighodalo (n 188 above) 58-59.

<sup>188</sup> National action plan for the promotion and protection of human rights in Nigeria (2009-2013) 54-76.

<sup>189</sup> Interview with Anthony Ojukwu Director of Legal Department, NNHRC, Nigeria, Abuja 20 May 2013.

<sup>190</sup> Section 7(2)(a) – (e) of the Nigerian Human Rights Commission (Amendment) Act of 2010.

courts. As Opara has observed, the NNHRC has now been appropriately strengthened with the authority and powers it requires to perform its statutory responsibilities as a rights protection agency, including the power not only to bark but also to bite against any person or corporate entity that violates the human rights of Nigerians.<sup>191</sup> The NNHRC can determine and award damages or compensation in relation to any violation of human rights where it considers it necessary.<sup>192</sup> Indeed, with such powers the NNHRC has few problems monitoring socio-economic rights implementation, as well as investigating, resolving complaints and, where necessary, getting its remedies judicially enforced, except that it will depend on the cooperation of the courts to successfully enforce its recommendations.<sup>193</sup>

Thus, it is submitted that the NNHRC is well mandated and adequately empowered to promote and protect socio-economic rights in Nigeria. Accordingly, if the NNHRC is seen to be more active in the promotion and protection of civil and political rights as against socio-economic rights, that is not because of a lack of express or insufficient mandate and powers.

#### **4.5. The strategies, effectiveness and impact of the NNHRC in advancing socio-economic rights**

Although the NNHRC has no specific or targeted strategies for promoting and protecting socio-economic rights, some of its general approaches directly or indirectly, have impacted on these rights. Five such strategies and the extent of their effectiveness in advancing the implementation of socio-economic rights are considered below.

##### **4.5.1. Adopting socio-economic rights as thematic areas of focus**

In December 2006, the NNHRC, in collaboration with other stakeholders, completed the first Nigerian Action Plan for Human Rights in Nigeria (the national action plan on human rights) which incorporated specific socio-economic rights, such as the right to employment, housing and shelter, health, food, water, and education for promotion and

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<sup>191</sup> L Opara 'The new national human rights Commission' (2012) 13 *Human Rights Newsletter* 18 19.

<sup>192</sup> Section 7(1)(e) of the Nigerian Human Rights Commission (Amendment) Act of 2010.

<sup>193</sup> Section 6(2) of the Nigerian National Human Rights Commission (Amendment) Act of 2010.

protection.<sup>194</sup> The current national action plan on human rights addresses the challenges of implementation of these rights as well as the strategies, including the roles expected of government at all levels and other stakeholders to drive the implementation of these rights.<sup>195</sup>

Besides, the national action plan on human rights, the NNHRC has adopted socio-economic rights amongst its thematic areas of focus.<sup>196</sup> Like the action plan on human rights, the list includes the rights to education, health, food and shelter. Non-substantive but related issues and rights, like women and gender matters, children and disability rights, as well as corruption and good governance, are also included in the thematic areas. There are desk officers assigned to each of these rights with responsibility to relate and deal with issues relating to their promotion and protection.

The national action plan on human rights and the identification of socio-economic rights with the thematic areas of focus is important for at least two reasons. First, it publicizes these rights and the responsibilities of the different stakeholders toward ensuring their implementation. Second, it places socio-economic rights on the national agenda, thereby legitimizing both the concept and the responsibility of the state to ensure their implementation, which in turn raises legitimate interests and expectations of compliance from the general public and the international human rights community.

For instance, its focus on legislative reforms and children's rights facilitated the enactment of the Child Rights Act by the National Assembly. Furthermore, it carried out advocacy activities and visits to the Attorneys-General of the various states of the Federation to adopt the Act. Presently, twenty out of the thirty-six states have enacted their own child rights laws to promote and protect the welfare and wellbeing of children. Similar its attention and efforts on disability issues has resulted in the enactment of the national Disability Act awaiting Presidential assent. These outcomes and others, minimal

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<sup>194</sup> National action plan for the promotion and protection of human rights in Nigeria (2006) 40-47.

<sup>195</sup> The most recent one is National action plan for the promotion and protection of human rights in Nigeria (2009 - 2013).

<sup>196</sup> The Nigerian National Human Rights Commission Annual Report 2011 18.

as they are, vindicate the interest and involvement of the NNHRC in promoting and protecting socio-economic rights. However, while the strategy is relevant for creating awareness around these rights, it is not an effective strategy unless the NNHRC goes beyond mere statement of intention to actively engagement with the state on the latter's legal obligation to ensure the practical realization of these rights.

#### **4.5.2. Monitoring socio-economic rights violations**

The NNHRC has no special obligation to monitor socio-economic rights. Thus, it monitors the implementation of socio-economic rights within its general duty on human rights. Thus, routine human rights monitoring activities are carried out by its staff as part of the strategy to respond to particular human rights violation issues or incidents. The general human rights monitoring activity is carried out by a multi-stakeholder special committee, which includes some NGOs,<sup>197</sup> and culminates in the publication of the 'report on the state of human rights situations monitored in Nigeria.'<sup>198</sup>

However, there are no publicly known objective criteria used by the NNHRC to carry out this monitoring exercise. What the special committee has repeatedly done is to gather and collate relevant information and data on alleged cases of human rights violations across the country through personal observation of incidents or visits to places where human rights violations have allegedly taken place or were likely to occur and use the result of the fact-finding as the barometer to evaluate the level of observance of human rights in the country.<sup>199</sup> At the end of the monitoring exercise, the findings are collated, evaluated and published with recommendations as the official report of the NNHRC on the state of human rights in Nigeria. So far, it has produced four 'state of human rights reports' from

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<sup>197</sup> The Report on the state of human rights in Nigeria (2009 – 2010) vii-viii. A section from staff of the Commission, six NGOs, namely, the Civil Liberties Organization (CLO), the Human Rights Monitors, the Social Justice Advocacy Initiative (SJAJ), the Human Rights Social Development and Environmental Foundation (HURDET), CLEEN Foundation, and Amnesty International were involved in monitoring the 2009 – 2010 exercise.

<sup>198</sup> See the Report on the state of human rights situations monitored in Nigeria by the national human rights Commission in collaboration with the network of human rights monitors' (2009 – 2010), hereinafter called 'the report on the state of human rights in Nigeria.' By Section 9(c) of the National Human Rights Commission (Amendment) Act of 2010 the production of the 'the report on the state of human rights in Nigeria is now a statutory responsibility.

<sup>199</sup> Interview with Harry Obe Head of Monitoring Department, NNHRC Nigeria, Abuja 28 May 2013



its monitoring activity from 2006 to 2010,<sup>200</sup> which featured the rights to education, health, food and shelter, as socio-economic rights that were monitored. Interestingly, these rights were monitored and reported within the context of Nigeria's obligation to implement them under the international, regional and national legal and policy framework.<sup>201</sup> In addition the NNHRC also monitors women and gender matters,<sup>202</sup> children rights,<sup>203</sup> as well as the related issues of good governance and corruption in both the public and private affairs of the country.<sup>204</sup>

Although the monitoring and reporting on socio-economic rights by the NNHRC is not elaborate enough to make any meaningful impact, it can be considered to be somewhat relevant. First, it enables the NNHRC to document violations of socio-economic rights within the limited scope of the exercise. Secondly, it enables the NNHRC to gauge the level of implementation of these rights in the surveyed communities. Thus, the state of human rights reports of the NNHRC constitutes vital reference materials and sources of information on the status of implementation of socio-economic rights in the country. According to the NNHRC, scholars, students and researchers, civil society groups and even members of the public have found these reports to be useful.<sup>205</sup>

No doubt the contents of the reports have the potency to create public awareness around these rights. Furthermore, public concern and even outrage over some of its awful findings, in the past, have influenced the state's positive response on the recommendations. For instance, the NNHRC through this exercise exposed the dehumanizing living conditions of prisoners and other detainees in the nation's prisons which succeeded in compelling the Federal Government to rehabilitate and improve the habitation and socio-economic conditions of inmates in the nation's prisons and other detention facilities.<sup>206</sup>

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<sup>200</sup> The latest is one that covered the period 2009-2010.

<sup>201</sup> Chapters 9 - 11 of the report on the state of human rights in Nigeria 2009-2010.

<sup>202</sup> Chapter 13 of the report on the state of human rights in Nigeria 2009-2010.

<sup>203</sup> Chapter 14 of the report on the state of human rights in Nigeria 2009-2010.

<sup>204</sup> Chapter 17 of the report on the state of human rights in Nigeria 2009-2010.

<sup>205</sup> The report on the state of human rights in Nigeria 2009-2010 xi.

<sup>206</sup> Mbelle (n 112 above) 50.

However, a socio-economic rights monitoring exercise would be more effective if it is systematic and based on clear strategic goals.<sup>207</sup> Therefore the random approach adopted by the NNHRC is incapable of achieving any meaningful outcome, especially in a country as huge as Nigeria, where the three levels of government (the federal, state and local governments) all bear direct responsibility to implement socio-economic rights relative to the resources allocated to them from the federation account. Furthermore, the NNHRC lacks both technical and financial resources to carry out a credible and comprehensive monitoring of socio-economic rights in the country. Certainly, an 18-member standing or special committee is incapable of effectively monitoring socio-economic rights in Nigeria in 36 states, a federal capital territory and 774 local government areas and produce a credible report.

Thus, without necessarily disapproving of its efforts, it is argued that it is difficult for the NNHRC to produce qualitative reference facts with which to hold the Nigerian state accountable for socio-economic rights violations.<sup>208</sup> Furthermore, the funding of the exercise is donor dependent,<sup>209</sup> hence the last exercise was in 2010 and there is no indication when the next exercise is to take place. Against this backdrop it is submitted that the NNHRC is not effectively involved in the practical monitoring of socio-economic rights implementation in Nigeria. Certainly, the present approach is too simplistic to make any serious impact. Thus, the NNHRC needs to adopt a more purposeful methodology for systematic monitoring and reporting on socio-economic rights in Nigeria.

#### **4.5.3. Receiving and treating socio-economic rights violation complaints**

The NNHRC receives and handles human rights violation complaints in the exercise of its human rights protection mandate. The complaint process is relatively simple. Any person can file a complaint with the NNHRC in any of its offices, either personally or on

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<sup>207</sup> PT Ambudde 'Building the record of human rights violation in Africa - the functions of monitoring, investigation and advocacy' in D Barnhizer (ed) *Effective strategies for protection human rights: prevention, trade and education* (2001) 11 13.

<sup>208</sup> See p 70 of the report on the state of human rights in Nigeria (2009-2010) where a study conducted since 2003 by Action Aid London is used to buttress arguments on low primary school enrolment

<sup>209</sup> Such as MacArthur Foundation and UNDP.

his or her behalf, stating particulars of the respondent, the right violated and the relief sought.<sup>210</sup> Zonal offices are empowered to handle complaints, but they are obliged to submit reports to the head office on the outcome.<sup>211</sup> The complaint can be in writing, via e-mails, by letters or even by telephone.<sup>212</sup>

However, the NNHRC may reject any complaint if the content falls outside its jurisdiction, is superfluous, speculative, grounded on hearsay or rumour, or written or expressed in abusive, insulting or disparaging words or when the subject matter of the complaint is under litigation or under the consideration of any other statutory body, or where the complainant is unidentified.<sup>213</sup> Any complaint that is considered admissible is usually investigated and resolved through mediation, reconciliation or litigation.<sup>214</sup> Indeed, most of the complaints are resolved through mediation as the NNHRC is not known to have any interest in litigating complaints as a viable strategy to advance any aspect of its mandate.<sup>215</sup>

It is worthy to note that some of complaints that stream into the NNHRC for consideration involve the violation of socio-economic rights. Indeed, the Director of legal department asserts that the NNHRC handles more socio-economic complaints than complaints about civil and political rights.<sup>216</sup> Okafor also seems to hold a similar view about the relevance of the complaint system.<sup>217</sup> However, a closer look at the complaint record of the NNHRC shows that complaints on socio-economic rights are few if not completely lacking. For instance, the available statistical record of complaints between 1996 and 2012 shows most of the 30,104 complaints are on issues that relate to degrading treatment by law enforcement agencies, unlawful arrest and detention by law enforcement agencies, extra-judicial killings, delay in hearing of appeals, lack of fair

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<sup>210</sup> NNHRC Annual Report 2011 34.

<sup>211</sup> Ojukwu (n191 above).

<sup>212</sup> NNHRC Annual Report 2011 34.

<sup>213</sup> NNHRC Annual Report 2011 34.

<sup>214</sup> The Attorney-General and Minister of Justice is the one with prosecutorial powers under Section 274 of the 1999 Constitution of Nigeria.

<sup>215</sup> Okafor and Agbakwa (n 38 above) 132.

<sup>216</sup> Ojukwu (n 191 above).

<sup>217</sup> Okafor and Agbakwa (n 38 above) 139.

hearing, domestic violence against women, child abuse and abandonment, communal clashes, appeals for prerogative of mercy and threats to life.<sup>218</sup> Only a few, such as issues as unlawful termination of employment, non-payment of benefits and entitlements, and child abuse and abandonment, relate somehow to socio-economic issues although they do not come within the brackets of core socio-economic rights in the context of this study.

It is conceded that the denial of employment benefits or unlawful termination of employment touches on the socio-economic well-being of the victim. However, these issues are contractual in nature and the state's obligation to protect them is fulfilled by the provision of related labour and employment law and the means for securing remedies for breach under the relevant statutes or the common law.<sup>219</sup> Besides, there are other agencies with primary jurisdiction over such matters, including the departments of labour, social welfare, and the Public Complaints' Commission. That the NNHRC's platform is readily used to resolve them is significant. Even then, it is still erroneous in my view to credit the NNHRC as being more involved in the resolution of socio-economic rights, when complaints on violation of the rights to education, health, water, and housing hardly come before it.

However, it does appear that the trend is changing as complaints of unlawful eviction or demolitions of shelters and children's socio-economic rights issues are now being presented before the NNHRC to handle. For instance, presently it is handling complaints involving about 198 complainants whose houses were forcefully demolished in the Ijora and Makoko suburbs of Lagos metropolis by the Lagos State Government without any resettlement plan or payment of adequate compensation. Indeed, it recently announced its readiness to conduct a national inquiry into the demolition of slum houses, a practice which is becoming very frequent in different parts of the country in response to public outcry. Also, most of the complaints on child abandonment revolve around parental neglect of the survival and educational rights of their children. Further, between January and June 2013 the NNHRC reportedly handled about 74 such cases, including four on the

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<sup>218</sup> NNHRC Annual Report 2011 47-48.

<sup>219</sup> Nigerian Labour Act of 2004; RK Salman 'A critical analysis of rights of employer and employee under contract of employment' in AA Borokiri (ed) *Confluence reading in law* (2008) 237.

right to education, four on the right to food, and a single complaint on unlawful discrimination on health grounds.<sup>220</sup> Thus, the degree is relatively low but the fact of its involvement in the resolution of socio-economic complaints is correct. However, these claims could not be evidentially verified because the NNHRC refused the researcher access to the complaints files.<sup>221</sup>

These efforts notwithstanding, human rights activists like Muoka, hold the view that the NNHRC's complaint mechanism is ineffective in addressing socio-economic rights.<sup>222</sup> Muoka alleges that the NNHRC has failed to respond to a class complaint SERAP filed over a year ago on behalf of 198 complainants whose houses were illegally demolished by the Lagos state government. He further refers to the low number of socio-economic rights complaints it handles as indicative of peoples' lack of interest and confidence in its ability to successfully handle complaints on these rights.<sup>223</sup> When confronted with Muoka's assertions, Ojukwu denies abandoning the said complaint from SERAP and stated that investigations are still on-going.<sup>224</sup> He acknowledged the delay in concluding the matter but averred that this was due to lack of cooperation from the respondent (the Lagos state government) which refuses to respond to the queries already issued in respect of the complaint. Ojukwu further explains that, on average, it takes between two weeks and one month to resolve complaints if there is effective cooperation from the parties; hence, the allegation regarding the dilatory nature of its complaint process is not correct.<sup>225</sup>

As an NHRI, the NNHRC has a responsibility to act expeditiously on complaints. Muoka's view may be prejudiced, but to allow a complaint to linger for more than a year without resolution clearly negates its essence as an expeditious and cost effective arbiter.

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<sup>220</sup> See National human rights Commission disaggregation of complaints on thematic areas 2013 for headquarters (on file with the researcher).

<sup>221</sup> The Commission pleaded confidentiality between it and the complainants and failed to disclose factual information about the socio-economic rights complains, including the names and access to the parties.

<sup>222</sup> Muoka (n 67 above).

<sup>223</sup> Muoka (n 67 above).

<sup>224</sup> Ojukwu (n 191 above).

<sup>225</sup> Ojukwu (n 191 above).

Furthermore, it may be correct to attribute the low number of socio-economic rights complaints to a lack of awareness of these rights and access to the complaint mechanism by victims. Thus, in my view, the complaint process of the NNHRC is not necessarily ineffective, but it will continue to be associated with few socio-economic rights complaints due mainly to the lack of awareness of these rights and the utility of the complaint process by ordinary Nigerians. Therefore, the NNHRC needs to do more to create public awareness among ordinary Nigerians of socio-economic rights and the redress mechanisms, including the Commission's processes, available to victims to redress the violation of their socio-economic rights.<sup>226</sup>

#### **4.5.4. Resolving community benefit disputes with oil companies in the Niger Delta**

With its rich endowments of oil and gas resources, the Niger Delta region contributes over 80 per cent of the country's foreign exchange and 70 per cent of government revenue.<sup>227</sup> However, the sad reality is that after over 50 years of oil and gas exploitation, the Niger Delta is still characterized by abysmal poverty and under-development. Generally, denial of access to basic human needs, like adequate drinking water, housing, healthcare, quality education, and employment opportunities, is widespread in a region whose resources are creating wealth and funding major development projects in other parts of the country.<sup>228</sup>

Not unexpectedly, agitation by the indigenous population against deprivation of the socio-economic benefits of oil and gas production, until recently, has turned the Niger Delta area into a flashpoint of recurrent conflicts over inequitable resource allocations to the area between communities and the oil producing multinational companies.<sup>229</sup> These conflicts often manifest themselves in human rights violations on a scale that attracted the

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<sup>226</sup> AJ Mertus 'Evaluating NHRIs: considering structure, mandate and impact' in R Goodman and T Pogram (eds) (2012) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) 74-87.

<sup>227</sup> UNDP Niger Delta Human Development Report 2006 9.

<sup>228</sup> O Igbuzo 'Review of the Niger Delta human development report.' A review presented at a conference on development in the Niger Delta: From agenda to action in Port Harcourt 20-22 August 2006 at para 4.

Presently, the Niger Delta area is relatively peaceful following the successful implementation of an amnesty programme by the Federal Government and the provision of development projects

Commission to list the Niger Delta as one of its thematic areas of focus. Consequently, apart from appointing a Special Rapporteur to carry out fact-finding missions on a regular basis, the Commission also adopted engagement and mediation as relevant strategies to resolve human rights violation complaints between corporate bodies and communities in the Niger Delta.<sup>230</sup>

As expected, some of the complaints from this area relate to the alleged violation of socio-economic rights caused by the environmentally harmful activities and a lack of corporate social responsibility by the multinational oil companies involved in the exploitation of the vast oil and gas resources in the area.<sup>231</sup> The engagement or dialogic approach to the resolution of complaints usually involves initiating a series of meetings between the multinational oil companies and the complainants with the NNHRC as the facilitator/mediator. This approach, in some cases, has proved to be successful not only in resolving the conflict but also leading to the provision of socio-economic rights-related benefits to the communities, such as the payment of compensation, to provision of potable water and, the construction of roads, hospitals and school buildings by the multinational oil companies.<sup>232</sup>

For instance, in one such petition from the Ekerekana community in Okrika Local Government Area of Rivers State, the community alleged that effluent discharged into the community's creeks and environment by the Nigerian National Petroleum Refinery Company polluted the environment, corroded the roofs of their houses, destroyed aquatic life in their creeks and caused serious health hazards, such as malaria, stomach upsets and skin infections in the community.<sup>233</sup> Upon the receipt of the petition, the NNHRC first visited and interacted with the community and the company to ascertain the veracity of

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<sup>230</sup> J Aga 'The role played by the national human rights Commission in enhancing access of individuals, groups and communities to effective remedies from oil corporations and other multinationals when violation occurs at 3. Available at [www.seerac.org/Publications/Aga%20paper.doc](http://www.seerac.org/Publications/Aga%20paper.doc) (accessed 13 April 2013).

<sup>231</sup> Interview with Ohochukwu Sam-Wobo, Rumeume community leader, Nigeria, Port Harcourt 15 April 2013.

<sup>232</sup> Aga (n 233 above) 1-2.

<sup>233</sup> Aga (n 233 above) 5.

the petition. Thereafter, it initiated meetings between the community representatives and the management of the company.

After four meetings, the NNHRC successfully brokered an amicable settlement, in which the company agreed to take practical steps to remediate the pollution, provide development projects for the community, consider members of the community for small contracts and refer the request for the employment of locals to its head office for consideration.<sup>234</sup> Thus, in addition to successfully brokering a satisfactory agreement between the parties with a potential for advancing socio-economic rights, the NNHRC further resolved to monitor compliance with agreement by the company.<sup>235</sup>

The approach testifies to the effectiveness of resolving disputes through dialogue and a participatory process. In this specific instance, the NNHRC operated within the ‘protect, respect and remedy’ framework to resolve the dispute between communities and business;<sup>236</sup> it also maximized the process to advance the provision of social benefits, including the payment of compensation and the provision of social infrastructure to victims of corporate human rights violations.<sup>237</sup> Furthermore, this conciliatory approach promotes a peaceful and enduring relationship between communities and business wherein the interest of the community not to be harmed by business operations is secured.

Thus, the approach of the NNHRC in resolving corporate human rights violation grievances in the Niger Delta area can be seen as effective for advancing the progressive realization of socio-economic rights.<sup>238</sup> However, the NNHRC’s involvement in the resolution of socio-economic disputes between communities and corporate bodies in the

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<sup>234</sup> Aga (n 233 above) 5.

<sup>235</sup> Aga (n 233 above) 9.

<sup>236</sup> Kemp D and Gotzmann N (2009) *Community complaints and grievance mechanism and the Australian mineral industry* 9.

<sup>237</sup> SK Kaggwa ‘Access to remedy for corporate human rights abuses’ available 5. Available at [www.humanrights.business.org/](http://www.humanrights.business.org/)(accessed 12 March 2013).

<sup>238</sup> The Commission has carried out similar visitations and actions in the following communities: Ayama community in Abua/ Odual/Abua local government area, Obunuku 1 and II Communities in Oyigbo local government area, and the Ogbodo community in Ikwere local government area of Rivers State.



Niger Delta area appears to be ad hoc. Besides, this was done only in one of the nine Niger Delta states.<sup>239</sup> Hence it is considered too remote from the scene where such disputes are rampant. In the circumstance the NNHRC's achievements in advancing socio-economic rights in the Niger Delta area are ephemeral and not continuous.

#### **4.5.5. Socio-economic rights education and advocacy**

The NNHRC carries out human rights education and advocacy through its human rights education unit. Over the years it has organized awareness campaigns, open forums, town hall meetings, media interactions, as well as training workshops, conferences, and seminars with or for different stakeholders, including civil servants, law enforcement agencies, civil society groups, students and teachers.<sup>240</sup> It has continued to mark human rights days, make press releases, and publish the human rights newsletter and the NNHRC's monthly bulletin. Similarly, it employs the medium of television, radio programmes and jingles<sup>241</sup> to promote the social awareness of human rights in the country.<sup>242</sup>

Socio-economic rights education has featured as part of the human rights promotional activities of the NNHRC. For instance, the national action plan on the implementation of human rights, as well as the report on the state of human rights in Nigeria, contains information on socio-economic rights. It also organized public lectures on human rights and national security, business and human rights, as well as, access to food as a fundamental right, facilitated the introduction and teaching of human rights in the basic education schools and established human rights clubs in some secondary and tertiary institutions.<sup>243</sup>

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<sup>239</sup> The Niger Delta is a geographical area in the south of the country constituted by nine oil producing states of the country, namely Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States.

<sup>240</sup> The Nigerian National Human Rights Annual Report 2011 21.

<sup>241</sup> The Commission runs a 30 minute quarterly human rights programme on KISS FM, (99.9) Abuja, titled 'berekete'; it also relays jingles on the radio broadcast networks.

<sup>242</sup> I Nwakama 'Activities of the Nigerian national human rights Commission on human rights education' at 1. Available at

[www.ohchr.org/Documents/.../education/.../NigerianNHRI%20MAY2012](http://www.ohchr.org/Documents/.../education/.../NigerianNHRI%20MAY2012) (accessed 20 April 2013).

<sup>243</sup> Harry (n 211 above). So far several human rights clubs have been established in schools in dozen states, including Nassarawa and Adamawa states.

Equally worthy of mention are the monthly human rights forums and village square meetings, which are held outside the NNHRC's headquarters to reach, interact, enlighten and discuss human rights issues relevant to the local environment with community members, including local government officials, traditional and religious leaders and the less privileged.<sup>244</sup>

Thus, the NNHRC engages in the socialization of socio-economic rights but to a minimal degree. Evidently, it has no targeted strategy for socio-economic rights education and advocacy. For instance, there is not a specific publication dedicated to the promotion of socio-economic rights. None of its annual reports from inception to date discloses any information about its efforts on socio-economic rights, which shows the apparent lack of serious concern for socio-economic rights in its work plan or activities.

According to Cohen, 'real change only happens when mass mobilization and other forms of outside pressure are exerted on the institutions that need to change.'<sup>245</sup> Apart from its failure to create public awareness of socio-economic rights,<sup>246</sup> the NNHRC is unable to take advocacy of these rights to the halls and sanctuaries of the country's key decision-makers, let alone placing demand for systemic changes in legislation, public policy and resource allocation for the progressive realization of socio-economic rights.

Arguably, the NNHRC's human rights education and advocacy mechanism is ineffective for failing to create the necessary awareness and empower the ordinary victims with the right knowledge and capacity to demand or enforce their lawful claims against the state. Certainly, infrequent town hall meetings or public forums and single public lectures on socio-economic rights are incapable of creating the kind of public awareness that can

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<sup>244</sup> Mbelle (n 112 above) 43.

<sup>245</sup> D Cohen, 'Reflections on advocacy' in D Cohen, R dela Vega and G Watson (eds) *Advocacy for social justice* (2001) 19.

<sup>246</sup> How else can we explain the situation where the Commission's regional office in Port Harcourt, which covers six sub-states in the federation received and handled only 9 complaints on the right to education, 8 complaints on the right to health, 3 complaints on the right to food, and 17 complaints on the right to shelter in 10 years, that is, between 2004 and 2013. See statistics on disaggregation of complaints based on thematic area in the south-south geopolitical region obtained from the Commission (on file with researcher).

influence changes in the political, economic, and social institutions of a country where the socio-legal system does not recognize the right of the ordinary people to basic needs. Thus, the NNHRC must go beyond such infrequent and isolated education activities to adopt and implement a targeted, regular and massive awareness campaign and education on socio-economic rights in all parts of the country to make the necessary impact. Otherwise, its stated objective to entrench a culture of respect for human rights and the use of rights-based approach in public governance to enhance the implementation of socio-economic rights will remain illusory and elusive.

#### **4.5.6. The international engagements of the NNHRC on human rights**

As acknowledged by the NNHRC, the execution of its mandate extends to participating in international activities for the promotion and protection of human rights at the national level. Such roles include providing information to the treaty bodies on the state of human rights in the country;<sup>247</sup> educating and disseminating relevant information on relevant materials and procedures for accessing the international and regional human rights protective mechanisms by victims of human rights violation; submitting and prosecuting communications before international and regional human rights adjudicatory mechanisms;<sup>248</sup> drafting and submitting state periodic reports<sup>249</sup> or independent shadow reports on the state of human rights to international and regional treaty bodies;<sup>250</sup> lobbying international bodies to take specific actions against states' violation of human rights; advise states on the ratification of international human rights treaties; and assisting states to ensure that domestic laws comply with international human rights obligations.<sup>251</sup>

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<sup>247</sup> Murray (n 60 above) 11.

<sup>248</sup> *Commission Nationale Des Droits de l'Homme et des Libertés v Chad* Communication 135/94 (2000).

<sup>249</sup> UN Committee on CRC General Comment 2 on the role of independent in the promotion and protection of the rights of the child, HR1/GEN/1/Rev.7 para 21: states are required to consult with NHRIs during the preparation of periodic reports for the Committee on the Rights of the Child. Recommendation xviii of the Committee on the Elimination of Racial Discrimination on its part requires NHRIs to be participants in the drafting of state periodic reports.

<sup>250</sup> Human Rights Council Resolution 5/1 of 18<sup>th</sup> June 2007 para 15.

<sup>251</sup> Paragraph 3(a) of the Copenhagen Declaration enjoins NHRIs to work to ensure states' ratification of international human rights treaties; the removal of reservations contrary to the object and purpose of the treaty as well as ensuring consistency between domestic laws, programmes and policies and international human rights standards.

Over the years the NNHRC has managed to carry out some of these responsibilities. According to the current Executive Secretary, apart from participating in the drafting and submission of Nigeria's second periodic report to the CESCRC, it regularly attends sessions of the HRC and the African Commission. Furthermore, it has unsuccessfully lobbied for the domestication of the ICESCRC and the constitutionalization of substantive socio-economic rights.

However, beyond these promotional activities, the NNHRC is not engaged in taking human rights protective actions against the state at any supranational platform, such as the African Commission or even the ECOWAS Court of Justice, which is located in Abuja, the capital city. According to Ojukwu, the NNHRC does not have an extraterritorial mandate to enforce human rights outside national mechanisms.<sup>252</sup> Thus, such actions as filing complaints or litigating socio-economic rights before international and regional treaty bodies cannot even be contemplated, let alone practically carried out. He further asserts that while it continues to impress on the state the need to comply with its international human rights obligations, including complying with existing decisions of the African Commission and the ECOWAS Court of Justice, it is not part of the responsibility of the NNHRC to take steps to enforce such decisions.<sup>253</sup> Ojukwu's explanation clearly shows how difficult it is for the NNHRC to influence the state to comply with its international human rights obligations generally. With such an approach, it is submitted that the NNHRC will continue to make no serious impact in relation to its international engagements on human rights.<sup>254</sup>

#### **4.5.7. The role of other related state agencies**

There are four national agencies or institutions, whose functions are relevant to advancing the realization of socio-economic rights in Nigeria. These are the Public Complaints Commission (PCC), the Code of Conduct Bureau (CCB), the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt and other Related Practices Commission (ICPC). While the PCC and the CCB are established by the

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<sup>252</sup> Ojukwu (n 191 above).

<sup>253</sup> Ojukwu (n 191 above).

<sup>254</sup> Ojukwu n 191 above).

Constitution,<sup>255</sup> the EFCC and the ICPC are statutory bodies established by the Economic and Financial Crimes Commission Act 2004 (the EFCC Act), and the Independent Corrupt Practices and other Related Offences Commission (the ICPC) Act of 2004 respectively.

The PCC functions as Nigeria's ombudsman. It is mandated to investigate and resolve complaints from any person against the federal, sub-state, and local governments, as well as public corporations and private sector organizations, on any alleged act of administrative injustice or maladministration against any Nigerian or any person resident in Nigeria.<sup>256</sup> Ordinarily, the effective performance of these functions should result in outcomes that curb corruption in the public and private sectors, and enhance administrative efficiency, leading to efficient and equitable delivery of services government departments and the protection of the rule of law and human rights. Unlike the NNHRC, the PCC has offices in all the 36 sub-states of the federation, thus it is more accessible.

The CCB is a constitutional body charge with responsibility to monitor and enforce the code of conduct for all public officers, including the President, the Vice President, state governors, members of the national assembly and senior public officials at all levels of government.<sup>257</sup> Principally, its work is to receive, retain, investigate and verify the declaration of assets from all public officers and, where there is a breach, to prosecute the person before the Code of Conduct Tribunal.<sup>258</sup> Thus, the effect of its functions is to curb corruption practices, including theft and the diversion public resources to personal use, among public officers while in office.

Both the EFCC and the ICPC are established as anti-corruption agencies. Both bear a primary responsibility to investigate, arrest, and prosecute any person alleged to have committed financial or economic crimes or to be involved in corrupt and related

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<sup>255</sup> Section 153 of the 1999 Constitution of Nigeria.

<sup>256</sup> Section 5(2)(a)-(e) of the Public Complaints Commission Act 1975.

<sup>257</sup> 3<sup>rd</sup> Schedule, part 1 to the 1999 Constitution of Nigeria sections 3-5.

<sup>258</sup> 15 Schedule, part 1 to the 1999 Constitution of Nigeria.

practices, including stealing or mismanagement of public funds.<sup>259</sup> Basically, the ICPC deals with corruption or corrupt practices in the public sector and private persons who aid, facilitate, or perpetuate corruption and corrupt practices.<sup>260</sup> It also reviews government systems susceptible to corruption and educates the public on the effects of corruption.<sup>261</sup> It has regional offices and acts on petitions received from members of the public. For its part, the EFCC has an extensive mandate to prevent, investigate, prosecute, and penalize economic and financial crimes.<sup>262</sup> Thus, its mandate deals with criminal issues relating to fraud and other economic crimes in the public and private sectors, including the banking industry. Basically, it bears the responsibility to enforce the anti-money laundry statutes, the legislation of failed banks and financial malpractices in banks, and the statute on banks and financial institutions, as well as the law on miscellaneous offences and terrorism crimes.<sup>263</sup>

All these agencies are functional. For instance, the EFCC, in particular, has successfully prosecuted and secured the conviction of some high profile Nigerians, including sub-state governors and bank chief executives for stealing huge sums of public funds.<sup>264</sup> It has also managed to recover a reasonable amount of stolen public funds and property. Similarly, the ICPC has successfully prosecuted and secured some convictions, but it is not as active and as visible as the EFCC. The CCB is also functional. Generally, Nigerians see these anti-corruption agencies as weak, ineffective, even compromised in combating corruption and corrupt practices in Nigeria.<sup>265</sup> Instead, the rate of corruption continuous on the

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<sup>259</sup> L Raimi; I Suara, and AO Fadipe 'Role of Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices and other Related Offences Commission (ICPC) at ensuring accountability and corporate governance in Nigeria (2013) 3*Journal of Business Administration and Education* 105-122.

<sup>260</sup> Section 6 of the ICPC Act of 2000.

<sup>261</sup> Section 6(10)(e)and(f) of the ICPC Act of 2000.

<sup>262</sup> Section 6(b) of the EFCC Act of 2004.

<sup>263</sup>Raimi et al (n 260 above) 111-112.

<sup>264</sup> Some of the high profile public office holders it has successfully prosecuted and convicted for stealing public funds with impunity include two former sub-state governors, Alamiyeseigha Diepreye of Bayelsa state, and Lucky Igbenedion of Edo state. Several bank CEOs are also facing trial while one, Cecilia Ibru was convicted for fraudulent diversion of depositors' funds to personal use.

<sup>265</sup> S Ocheni and BC Nwankwo 'The effectiveness of anti-corruption agencies in enhancing Good governance and sustainable developmental growth in Africa: The Nigeria paradox under Obasanjo administration 2003-2007' (2012) 8 *Canadian Social Science* 16-21; Raimi et al (n 259 above) 114-115.

upswing: Nigeria comfortably occupying the 144 out of the 177 at a points score of 25 out of a possible 100 in the 2013 world corruption perception index.<sup>266</sup> The quality of life of ordinary Nigerians keeps deteriorating.<sup>267</sup> This is largely because so much money is lost to corruption and less money is available or invested to provide social services like health, education, and social security that benefit the poor and disadvantaged population.

The PCC is functional but severely incapacitated even if it remains relevant to advancing the practical enjoyment of socio-economic rights given its array of functions and relative accessibility. For instance, it is obliged to promote social justice, redress injustices arising from administrative and bureaucratic errors, omissions, or abuse by public officers across all levels of government and private entities.<sup>268</sup> It is obliged to improve public administration by pointing out weaknesses in laws, policies, regulations, and procedures of standard behaviour by public officers.<sup>269</sup> However, it is severally incapacitated, including gross under-funding, lack of cooperation from state agencies, and its recommendations are hardly acted on by the state.<sup>270</sup>

However, apart from the PCC, there seems to be no inter-institutional collaboration between the NNHRC and these other state agencies. This is so even as the NNHRC has no specific mandate to deal with corruption and maladministration by public officers. Each of these institutions pursues its mandate independently of the others. However, the fact that the outcomes of their official functions are relevant to advancing the practical realization of socio-economic rights is not in doubt, if they are truly effective. However, this is not the case and the burden on the NNHRC to advance the implementation of these rights is not lightened in any way by their presence as related state agencies for promoting good governance and thereby advancing the implementation of socio-economic rights to enhance the well-being of ordinary Nigerians.

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<sup>266</sup> 'Corruption Perception Index 2013 *Transparency International* available at <http://www.transparency.org/country/#NGA>.

<sup>267</sup> African Development Bank report 2013-2017 (n 135 above).

<sup>268</sup> Section 5(2)(a)-(e) of the Public Complaints Commission Act 1975.

<sup>269</sup> Section 5(3)(d) of the Public Complaints Commission Act of 1975.

<sup>270</sup> Ocheni and Nwankwo (n 266 above) 16-18.

#### **4.6. Factors limiting the effectiveness of the NNHRC in advancing socio-economic rights**

The Commission has a legal mandate to promote and protect socio-economic rights, but its ability to actually and effectively execute this mandate is somewhat problematic due to structural and operational limitations. Some of the basic challenges identified in the course of the study are discussed below:

##### **4.6.1. Inadequate legal recognition for socio-economic rights**

Like every other NHRI, the mandate of the NNHRC is expressed in terms of legally recognized human rights. As a country that practices constitutional supremacy with judicial review, the Nigerian Constitution offers the strongest legal platform for the protection and enforcement of all categories of human rights. However, this is not the experience with socio-economic rights at the moment. Minkler argues, correctly in my view, that constitutionalization of socio-economic rights as directive principles is problematic because it gives too much discretion to policy-makers to ignore them since no legal obligation to fulfil these rights is clearly imposed.<sup>271</sup>

As Cardenas argues, the effectiveness of a NHRC is determined by its ability to exercise both its promotional and protective mandate.<sup>272</sup> Though promotional activities are fundamental, protective activities challenge the state and, consequently, produce more direct effect on state behaviour.<sup>273</sup> Arguably, the current constitutional provisions on socio-economic rights and, in particular, their non-justiciable status effectively limit the capacity of the NNHRC to exercise its protective mandate over these rights. For instance, it cannot litigate against a department of government in an attempt to advance implementation in matters concerning socio-economic rights.

Although litigation of socio-economic rights is possible under the international contentious processes, this also is not viable. In addition to the problems of exhausting

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<sup>271</sup> Minkler (n 174 above) 382.

<sup>272</sup> S Cadenas National human rights institutions and state compliance' in R Goodman and T Pelgram (eds) *Human rights, state compliance, and social change: assessing national human rights institutions* (2012) 1 41.

<sup>273</sup> Cardenas (n 274 above) 41.



local remedies, the NNHRC must be prepared possibly to strain its relationship with the government to breaking point if it attempts to proceed against the state in either the African Commission or the ECOWAS Court to enforce the implementation of these rights. Thus Ojukwu may be correct in his assertion that the NNHRC cannot ignore the constitution which precludes socio-economic rights adjudication ‘merely for the sake of proving it is a human rights institution.’<sup>274</sup> Therefore, the best it can do in the circumstance is to indirectly litigate socio-economic rights, if it so desires, through proxies using the international adjudicatory platforms.

Similarly, the NNHRC has powers to monitor and investigate socio-economic rights violations as part of its protective mandate but has no corresponding power to gather relevant information, data and evidence unhindered. For instance, previously, it has no subpoena powers and thus could not compel the production of evidence or the appearance of witnesses before it.<sup>275</sup> How then can it effectively have monitored or investigated socio-economic rights violation complaints? Even now that it has the powers to subpoena appearances and the release of evidence, the extent to which it can use these powers to secure compliance from government departments and high profile public officers with respect to inquiries on socio-economic rights is unclear.<sup>276</sup> This restriction on the protective mandate of the NNHRC extends equally to its power to make and enforce recommendations against the state. Thus, the way it effectively can exercise these new powers to advance human rights implementation remains speculative than a reality.

Although the protective mandate of the NNHRC over socio-economic rights is not completely excluded but the practical reality is that exercising it will be complicated, costly, and even difficult to satisfy, especially if it is to proceed against the state and its agencies. Little wonder in the face of the systemic violation of these rights by the state,

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<sup>274</sup> Ojukwu (n 191 above).

<sup>275</sup> Mbele (n 112 above) 58.

<sup>276</sup> There is nowhere in the Commission’s enabling that obliges the state to supply the Commission with information regarding its implementation of socio-economic rights.

the NNHRC has not litigated a single matter against the state or any high profile government official since its inception.<sup>277</sup>

Yet, state agents can be coerced to comply with international norms provided the cost of norm violations, which includes punishment in its various forms, is adequately high.<sup>278</sup> With the present status of socio-economic rights under the Constitution, it is difficult for the NNHRC to compel the state to respond to its socio-economic rights obligations with threats or likely punishments, thereby creating a wedge between the promise of the its socio-economic rights mandate and its capacity to exercise it effectively. This is a reflection of the extent to which the state is prepared to allow the NNHRC to function, which remains a challenge to be overcome only by amending the Constitution to guarantee socio-economic rights as substantive human rights legally enforceable against the state and non-state actors within the national legal framework. This will enable the NNHRC to effectively exercise both its promotive and protective mandates.

#### **4.6.2. The challenge of inaccessibility**

The head office of the NNHRC is located in the capital city of Abuja. It is accommodated in a modern, spacious and comfortable building owned by the Commission and accessible by public transportation.<sup>279</sup> As the head office, it enjoys the privilege of being better furnished, equipped, and staffed than other offices. However, by its location, the Abuja office is quite remote and accessible only at a heavy transportation cost to people from most other parts of the country.<sup>280</sup> Thus, its services can easily be accessed only by the residents of Abuja city.

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<sup>277</sup> The Commission recently announced an intention to conduct a national public enquiry on the massive demolition of shelter across the country. If it successfully carries out this intention, then it will be the first time the Commission would have carried out a public inquiry on an issue that borders on the protection of socio-economic rights in the country. Consequently, there are heightened expectations on how the Commission is going to carry out the exercise, particularly in the area of securing the cooperation of the state and enforcement of its recommendations.

<sup>278</sup> S Cardenas 'Emerging global actors: The United Nations and national human rights institutions' (2003) 9 *Global Governance* 23 31.

<sup>279</sup> The head office is located at No. 19 Aguiyi-Ironsi Street, Maitama Garki, Abuja, Nigeria.

<sup>280</sup> Nigeria has 36 states and the Federal Capital Territory – Abuja. Abuja is in the centre of the country.

In addition to the head office, the Commission has six regional offices serving the six geo-political zones of the country,<sup>281</sup> and ten other state offices.<sup>282</sup> According to Ajoni, the regional offices have helped the Commission to reach rural communities,<sup>283</sup> but this statement is far from the reality. On the average, each regional office covers six autonomous sub-states of the federation;<sup>284</sup> a jurisdiction that is clearly too expansive for the NNHRC to make any meaningful impact, even within the state that the regional office is physically located. The fact that regional offices are headed by middle-level staff has not helped matters as civil society groups prefer to interact with the head office in spite of the distance and cost in time and money, because regional officers lack adequate authority and influence to take decisions or handle their matters effectively.<sup>285</sup>

Furthermore, the NNHRC presently has a total of only 21 offices, that is, seven zonal and 14 state offices nationwide,<sup>286</sup> in a country with the territorial size of 923,768 square metres with 36 sub-states and 774 local government areas.<sup>287</sup> This implies that the NNHRC cannot be accessed physically in 22 out of 36 sub-states, as well as in none of the 774 local government headquarters. This situation is disappointing when compared with the Public Complaints Commission which has offices in every state of the

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<sup>281</sup> Located as follows: South West zone (Lagos); South East zone (Enugu); South South zone (Port Harcourt); North East zone (Maiduguri); North Central zone (Jos); and North West zone Kano. It also has a metropolitan office in Mararaba (Nassarawa State).

<sup>282</sup> Nigerian National Human Rights Commission 13 *human rights newsletter* July – September (2012) 13.

<sup>283</sup> FK Ajoni 'My experience in driving the mandate of the national human rights Commission of Nigerian and the challenges of NHRIs in African sub-region' Being a conference paper presented for Commonwealth national human rights institutions, 26-28 February 2007 2.

<sup>284</sup> For instance, the Lagos zonal office is located on 3rd Floor, old National Assembly complex building, Tafawa Balewa Square, Lagos state, serves the south- west states of Ekiti, Lagos, Ogun, Ondo, Osun and Oyo states; the South-Eastern zonal office, which is located at No. 3 Ezeagu Street, New Haven, Enugu state serves the south-eastern states of Abia, Anambra, Ebonyi, Enugu and Imo states; the south-south regional office located at No. 203 Bonny Street, Port Harcourt serves the south-south states of Akwa-Ibom, Bayelsa, Cross Rivers, Delta, Edo and Rivers State; the North-Eastern zonal office located at No. 4, Bama Road, Maiduguri, Borno State, serves the states of Adamawa, Bauchi, Borno, Gombe and Taraba States; the North Central zonal office which is located at Plot 12677, Lamingo Liberty Dam Road, Jos Plateau State, serves the states of Benue, Kogi, Kwara, Nassarawa, Niger and Plateau; while the North-Western Zonal office is located at Plot 313 Aminu Kano Teaching Hospital Road, Kano serves the states of Kaduna, Kano, Katsina, Kebbi, Jigiwa, Sokoto, Yobe and Zamfara.

<sup>285</sup> Mbelle (n 112 above) 43.

<sup>286</sup> NNHRC Annual Report 2012 18.

<sup>287</sup> See National planning Commission annual performance of the Nigerian economy 2011 available at <http://www.npc.gov.ng/vault/ECONOMY.pdf> (accessed 23 June 2013).

federation.<sup>288</sup> As well, there is glaring absence of alternative means of accessing the commission's existing offices, such as effective internet, telephone and email facilities, as these services are presently ineffective and limited to urban areas.

As a federal body, the jurisdiction of the NNHRC covers the entire country. This requires it to implement its mandate and make its services available to the people in all parts of the country.<sup>289</sup> However, the sheer geographical size of the country constitutes a major challenge to the accessibility of the NNHRC and its ability to make meaningful impact across the entire country. Although it is seriously concerned and has expressed its frustration,<sup>290</sup> the reality is that after 18 years in existence the NNHRC remains physically located in a few urban cities and, thus, physically inaccessible to the overwhelming majority of the population, especially the poor, vulnerable and marginalized, who live in the rural areas and who are most in need of its intervention and assistance to promote and protect their socio-economic rights. The fact is that the NNHRC has a functional website through which it can be accessed via the internet is a good start. However, internet services are available mostly in urban towns and cities. Thus, even the online services on offer are not available to those who live in the rural areas. The result, as lamentably expressed by its current Executive Secretary, is the unfortunate fact that the services of the NNHRC are presently available to only an insignificant percentage of Nigerians.<sup>291</sup>

As Ebobrah has notes, it is difficult to imagine how the NNHRC can effectively monitor, promote and protect socio-economic rights in a huge country like Nigeria.<sup>292</sup> Although the Executive Secretary to the Commission tacitly concurs, he nevertheless opines that the NNHRC can meet these challenges if it is adequately funded, resourced and

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<sup>288</sup> SO Akpekpe and ESI Ejere (200) *Public perceptions of the Public Complaints Commission (Nigerian System): A survey of residents of Benin City Nigeria* 19. Available at <http://dspace.unijos.edu.ng/bitstream/10485/548/1> (accessed 20 July 2013).

<sup>289</sup> NNHRC Annual Report (2012) 97.

<sup>290</sup> NNHRC Commission Annual Report 2011 66 -67; NNHRC Commission Annual Report (2012) 96

<sup>291</sup> NHRC *Human Rights News Letter* (2013) 13.

<sup>292</sup> Interview with Solomon Ebobrah, Lecturer and Head of Department, Faculty of Law, Niger Delta University, Bayelsa State, Nigeria, Amassoma 14 February 2014.

motivated.<sup>293</sup> He also holds the view it would be a positive step if the sub-states decide to create their own state human rights commissions to complement the NNHRC.<sup>294</sup> It is argued that the Executive Secretary is correct on both counts. Despite the size of the country, a well-resourced and funded NHRC could still do well. Furthermore, as a country with several, and geographically dispersed, sub-states, a single NHRI naturally have a problem of effective accessibility. Thus, the idea of the sub-states creating separate independent institutional mechanisms to complement the NNHRC as is the case in India<sup>295</sup> deserves a positive consideration.

#### **4.6.3. The challenge of under-funding**

The effect of under-funding, which has been a recurrent phenomenon since its inception, is evident in several aspects of the operations of the NNHRC. For instance, although it has been in existence for eighteen years, is able to establish its presence only in thirteen out of the thirty-six states of the federation due to lack of funds to build, buy or rent office accommodation. The regional offices in the six geo-political zones of the country are very poorly furnished, equipped and under-resourced. A visit to the Port Harcourt regional office revealed poor conditions: the air-conditioners are non-functional; the windows have no blinds; the available chairs and tables were old and dilapidated; there is only one operational vehicle, which frequently breaks down; no office stationery; and no money to pay for the radio and television human rights awareness programmes. Arguably, the incapacitating effect of inadequate resource allocation to the NNHRC is quite visible in its inability to become widely accessible by opening and funding new and existing offices, its inability to procure or maintain an adequate number of vehicles for its operations, its inability to recruit, train and retain competent and dedicated staff, as well as, its inability to effectively execute or impact appreciably on virtually all aspects of its omnibus mandate, including the promotion and protection of socio-economic rights.

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<sup>293</sup> Angwe (n 42 above).

<sup>294</sup> Angwe (n 42 above).

<sup>295</sup> V Sripati 'India's National Human Rights Commission: A Shackled Commission?' (2000) 18 *Buffalo International Law Journal* 22; State human rights commissions are being established in every state in India to complement the NHRC. See [news.oneindia.in/.../statehuman-rights-commissions-set-up-in-19-statesgovt.Html](http://news.oneindia.in/.../statehuman-rights-commissions-set-up-in-19-statesgovt.Html).

Although inadequacy of funding is a common factor among NHRIs in Africa and a general challenge,<sup>296</sup> the centrality of adequate resources to the effectiveness of the NNHRC cannot be discounted given the multiple roles and activities it is obliged to undertake to advance the promotion and protection of all categories of human rights in the country. According to the current Executive Secretary, funding is the number one problem with the NNHRC because the resources received from the Government are grossly inadequate to meet its funding obligations.<sup>297</sup> Consequently, this lack of funds is affecting its ability to implement its expanded mandate to the letter.<sup>298</sup> Invariably, the tensions and constraints of limited resources has forced the NNHRC to focus attention on particular rights to the neglect of others, or spread the available resources rather too thinly to make any significant impact across all strands of its mandate.<sup>299</sup> In the present case, civil and political rights evidently are getting more attention than socio-economic rights from the NNHRC and the challenge of inadequate resources is without doubt a major contributory factor to this bias.

Thus, the need for the provision of adequate funds to the Commission cannot be over-emphasized. There is no NHRC in the world that can effectively deliver on an unfunded mandate and the NNHRC is no exception.

#### **4.6.4. The challenge of inadequate institutional capacity**

Promoting and protecting socio-economic rights is a serious and demanding responsibility, particularly in a country such as Nigeria where violation of these rights is endemic. Apart from the fact that the staff strength must be adequate; the staff must also be persons with the required technical knowledge and competence to administer the various components of the responsibility to promote and protect these rights, especially,

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<sup>296</sup> OHCHR *Survey on national human rights institutions: report on the findings, recommendations of a questionnaire addressed to NHRIs worldwide* (2009) 52.

<sup>297</sup> Angwe (n 42 above).

<sup>298</sup> NNHRC Annual Report 2012 96-97.

<sup>299</sup> J Hatchard 'The Inter-relationship between Commonwealth human rights commissions and other national human rights institutions' (2011) 15, available at <http://www.britishcouncil.org/governance-report061003.doc>.

monitoring state compliance, education, research, and awareness raising, investigation, handling and enforcing complaints, as well as undertaking strategic litigation.

However, while the NNHRC is not necessarily under-staffed, most of the staff are based in Abuja, the headquarters, with the consequence that the regional offices are practically under-staffed. For instance, the Port Harcourt regional office has a total complement of 20 staff, which is grossly inadequate to service the six different states that the office covers.<sup>300</sup> What is even more striking is the distribution of staff where a greater number are without technical competences. For instance, out of the 20 afore-mentioned staff in the Port Harcourt regional office, only two are investigation officers, 8 are legal officers, while the remaining 12 are all administrative officers.<sup>301</sup>

According to Ojukwu, the problem of staff inadequacy is so acute that the NNHRC is sometimes confronted with a situation where a single person is assigned to handle over 50 human rights violation complaints.<sup>302</sup> This situation was corroborated by the Executive Secretary who stated that inadequate staff capacity in virtually every critical department is stalling the Commission's efforts at ensuring the full execution of its mandate across the country.<sup>303</sup> For instance, inadequate human capacity has played a role in limiting its ability to collect and process data, develop necessary benchmarks and indicators to evaluate policy impacts and progress, as well as to undertake strategic monitoring and litigation to advance the progressive realization of socio-economic rights. Limited funding is also limiting the capacity of the NNHRC to attend to and address complaints from victims of human rights violations.<sup>304</sup>

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<sup>300</sup> NNHRC Annual Report (2011) 67: The Commission listed manpower needs and capacity building as one of its major challenges.

<sup>301</sup> Interview with FA, staff of the Port Harcourt zonal office, NNHRC, Nigeria, Port Harcourt 9 June 2013.

<sup>302</sup> Ojukwu (n 191 above).

<sup>303</sup> Angwe (n 42 above).

<sup>304</sup> Interview with Munanyo Goodluck, a waterfront (shanty) resident whose hut was arbitrarily destroyed by agents of the Rivers State Government, Nigeria, Port Harcourt, 6 January 2014; Interview with James Okomadu and Baralate Kienka, traders whose kiosks were destroyed by agents of the Rivers State Government, Nigerian, Port Harcourt 15 January 2014; Interview with Promise Amadi, whose sick child was refused admission and treatment by a private hospital on account of non-payment of fees in Nigeria, Port Harcourt, 29 February 2014.

#### **4.6.5. The challenge of inadequate commitment to socio-economic rights**

While a NHRI cannot be isolated from its domestic legal and socio-political environment, the commitment of the NNHRC through its commissioners towards fulfilling its human rights mandate in its entirety is equally important, if not more important than other factors. The NNHRC remains a valuable platform for advancing the progressive realization of socio-economic rights in Nigeria. However, this is an enormous responsibility in view of the widespread poverty and deprivation of socio-economic rights in the country. Therefore, it requires utmost commitment and determination on the part of the Commission to effectively discharge this aspect of its mandate. For now, some people interviewed are of the view that the NNHRC's level of involvement in socio-economic rights promotion and protection is arguably below average.

Muoka, for instance, argues that 18 years after its creation, the NNHRC is yet to establish itself in the public domain as a reference point for assessing the implementation of socio-economic rights in Nigeria, noting that the state is encouraged to violate socio-economic rights with impunity partly because of its poor attitude, negligence and failure to effectively promote and protect these rights.<sup>305</sup> Muoka's low opinion about the level of commitment of the NNHRC to socio-economic rights was corroborated by Nduneli, who states that he knew the NNHRC as always in the news for regular visitations to prisons, paying courtesy calls on senior public officers and the training of law enforcement officers; it has never been visible for embarking on activities that are seriously promotional or protective of socio-economic rights in the country.<sup>306</sup>

Although some of its senior officers, including Ojukwu, strongly disagree with such a perception, the fact that the NNHRC lacks a strategic action plan with clear socio-economic rights goals and targeted deliverables is evident in its sporadic approach and the scant activities it has managed to carry out over the years in relation to these rights. The scant regard for socio-economic rights in its scheme of activity is evident in its annual report, a key human rights informational material, but which contains no reportage

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<sup>305</sup> Muoka (n 67 above).

<sup>306</sup> Interview with Anthony Nduneli, lawyer and human rights activist, Nigeria, Abuja 3 June 2013.



on what it has done or is doing to advance the implementation of socio-economic, apparently because of its lack of interest in and virtual inactivity with regards to these rights.

Furthermore, despite the widespread violation of socio-economic rights in the country, the NNHRC has largely been reactive in its attitude to the protection of these rights. According to the Executive Secretary, the NNHRC will act to enforce these rights only when it receives ‘a complaint in this direction.’<sup>307</sup> Thus, whatever activity it has done in relation to socio-economic rights was done either in the course of its routine business or in response to initiatives from other people. Arguably, there has been no noticeable interest and attention from the NNHRC to advance the realization of socio-economic rights.

#### **4.6.6. The challenge of the federal political and governance system**

Nigeria is a federal state with 36 sub-states and 774 local government areas. Correspondingly, there are three levels of government, the federal (national) the state (sub-states) and local government councils.<sup>308</sup> Together, they are responsible for the governance of the country at the different levels. Accordingly, national resources are shared proportionally accordingly to their levels of responsibilities to provide basic socio-economic development and welfare goods and services for the people. The Federal government has the lion’s share of about 51 per cent.<sup>309</sup> It is under this political and governance structure that the NNHRC is required to advance the implementation of human rights generally, including socio-economic rights.

Although the federal government bears the ultimate legal responsibility, in practice all three tiers of government are required to implement socio-economic rights with the resources at their disposal. The implication is that the NNHRC should be able to hold all the three governance structures accountable for their socio-economic responsibilities.

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<sup>307</sup> B Angwe ‘We are ready to enforce chapter two of the Constitution’ *The Nation Newspapers* 28 May 2013 32.

<sup>308</sup> Sections 2(2)(3) and 7(1) of the 1999 Constitution of Nigeria.

<sup>309</sup> Sections 80(1) and 162 of the 1999 Constitution of Nigeria.

However, this goal appears very difficult for the NNHRC to accomplish so far because, short of denying its role and relevance, most of the states have refused to cooperate with it.

Angwe gives two reasons why the Nigeria's governance structure is the major stumbling block to the execution of its mandate on socio-economic rights. First, all three tiers of government do not accept any legal responsibility, domestic or international, for socio-economic rights.<sup>310</sup> Thus, there exists a wide gulf between the international narratives of these rights and the way they are perceived by the state and its governance structure. Hence, it has been difficult for the NNHRC to achieve any appreciable levels of 'buy in' into its mandate and activities on socio-economic rights from the national, sub-state and local governments. Second is the political autonomy of the sub-states to control and utilize their resources as they wish without accountability to the national government. Thus, being a federal body, sub-states treat the NNHRC with scepticism and quite suspiciously interpret its activities on human rights and socio-economic accountability as political witch-hunting, particularly in states controlled by opposition parties.<sup>311</sup> Angwe is largely correct in his view as efforts by federal agencies to demand accountability in terms of the funds they receive from the federation accounts is often resisted by the sub-states. A case in point is the judicial injunction granted by a state High Court in Rivers State preventing the EFCC from investigating a state Governor on charges relating to corruption and mismanagement of the public funds. Arguably, the NNHRC faces similar resistance and lack of cooperation from the sub-states.

As Mertus argues 'domestic human rights bodies are only as good as the local political and economic contexts permit them to be.'<sup>312</sup> Arguably, NHRIs require a congenial political environment that is receptive of human rights to operate and be effective. Above all, they need the active cooperation of the state to be effective. In a state like Nigeria the NNHRC needs maximum cooperation from all the multiple levels of governance to be active and effective in all parts of the country, including the rural areas. However, the

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<sup>310</sup> Angwe (n 42 above).

<sup>311</sup> Opara (n 68 above).

<sup>312</sup> Mertus (n 228 above) 2.

practical reality is that the NNHRC is denied the cooperation it needs from state and its governance structures. For instance, a majority of the sub-states have refused to provide simple operational offices in their areas despite repeated demands by the Commission.<sup>313</sup> In most instances sub-state governments have ignored requests to respond to complaints on socio-economic rights violation levelled against them by members of the public.<sup>314</sup> A case in point was the refusal of the Lagos State Government to respond to queries from the NNHRC on the massive demolition and eviction of ordinary people from their houses in the Barga suburbs of the state.<sup>315</sup> Yet, there is little it can do to force the sub-state government to comply with its simple request for information in the face of the gross violation of the housing rights of poor ordinary people by a sub-state state government.

Furthermore, while the NNHRC can question the implementation of socio-economic rights by state governments, it lacks the powers and the motivation to monitor the allocation and utilization of resources by sub-state governments to provide socio-economic goods and services for the people. It also lacks the capacity and integrity to influence federal and state legislatures on the need to prioritize socio-economic rights in their budgetary provisions. Odo, while summarizing the tension between the NNHRC and the sub-state governments, argues that the NNHRC exists in the Nigerian political and social space as one of the numerous government agencies or parastatals and so is debased and treated scornfully by state officials, including members of the National Assembly.<sup>316</sup> Thus, there is nothing or little the NNHRC can do to advance the implementation of socio-economic rights where it is not clearly welcome, even if that has not been openly expressed, and where the governance political structure neither recognizes nor accepts responsibility for socio-economic rights.

#### **4.7. Conclusion**

This chapter has considered the role and efforts of the NNHRC in advancing the implementation of socio-economic rights in Nigeria. It demonstrates that the NNHRC's

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<sup>313</sup> Angwe (n 42 above).

<sup>314</sup> Ojukwu (n 185 above).

<sup>315</sup> Muoka (n 67 above).

<sup>316</sup> Interview with Godwin Odo, Programme Officer, MacArthur Foundation, Nigeria, Abuja 20 December 2013.

institutional characteristics meet the prescriptions of the Paris Principles for effective NHRIs. The NNHRC also has a wide mandate that covers all categories of human rights. Thus, in principle, the NNHRC is adequately established, structured, mandated and empowered to promote and protect all categories of rights, including socio-economic rights even if it is not expressly stated in the enabling legislation.

However, the NNHRC has carried out its functions without reflecting on their impact in advancing socio-economic rights. Consequently, it acknowledges its responsibility over socio-economic rights but neither sees nor takes this responsibility as deserving any special attention or measures in its scheme of activities. Thus, it advances socio-economic rights within the framework of its routine mandate on human rights, but to the extent that is possible within the limitations presented by the national Constitution that fails to give judicially enforceable status to socio-economic rights, as it does with civil and political rights.

The chapter also demonstrated that the NNHRC lacks the courage to engage with the state about its obligations to implement socio-economic rights. Since there is no effective remedy at the national level for socio-economic rights violations, the regional mechanisms of the African Commission and the ECOWAS Court are the alternative platforms for securing the enforcement of these rights. This is especially the case as the Commission's functional mandate on socio-economic rights is rooted in the regional and international human rights treaties the country has ratified and not on the national constitution. However, this option, also is not without serious limitations for the NNHRC and not viable in practical terms. The chapter further explains that the Commission employs certain strategies to directly or indirectly advance the realization of socio-economic rights.

The most pronounced among these strategies are monitoring state compliance with socio-economic rights, the complaint process and socio-economic rights education. However, the NNHRC was adjudged not to have effectively utilized any of these strategies to impact appreciably on socio-economic rights implementation by the state. For instance,

even in the area of human rights education, it is doing very little to create the necessary awareness about socio-economic rights, the obligations they entail, and the mechanisms for state accountability. Yet awareness of these rights is the first step towards demanding, ensuring and securing their effective protection.

Furthermore, the chapter attributes the seeming lack of serious activities on socio-economic rights implementation to certain identifiable challenges, ranging from the inchoate status of socio-economic rights under the constitution to inadequate funding and lack of technical capacity. Others include the inaccessibility of the NNHRC to the disadvantaged majority population who live in the rural areas and coupled with its failure to prioritize socio-economic rights in its action plans. The presumption is that the NNHRC may be more effective in advancing the implementation of socio-economic rights if it stops treating these rights as subsidiary components of its general mandate and is more proactive towards them even in the face of the structural limitations.

The next chapter considers the role and effectiveness of the South African Human Rights Commission in advancing the implementation of socio-economic rights in that country.

## CHAPTER FIVE

### **THE ROLE OF, MEASURES TAKEN BY, AND THE EFFECTIVENESS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS**

#### **5.1. Introduction**

This chapter evaluates the role, measures adopted and relative effectiveness of the South African Human Rights Commission (SAHRC) to advance the implementation of socio-economic rights in South Africa.

Like chapter four, this chapter is divided into three parts. The first part addresses the structural characteristics of the SAHRC against the Paris Principles. This is done to establish the extent to which the structural edifice of the SAHRC conforms to the generally accepted requirements of the Paris Principles for effective NHRIs. The historical origin of the SAHRC, legal foundation and composition, including the qualification, appointment and tenure of its members are evaluated in this part. The section also considers the independence, administrative structure, and accessibility of the SAHRC to the public, as well as its relationships with NGOs in the light of their relevance and how they have affected its work in facilitating the implementation of socio-economic rights in South Africa.

The second part of the chapter discusses the nature and legal status of relevant international and national legal instruments on socio-economic rights and the extent to which they constitute relevant normative frameworks for the SAHRC to execute its mandate on advancing state implementation of socio-economic rights. The chapter also considers the nature and relevance of the SAHRC's general and special mandate on socio-economic rights, how it has been applied to advance these rights, as well as the challenges in the execution of this mandate.

The third part of chapter reviews the various measures that the SAHRC has taken over the years to advance the implementation of socio-economic rights in South Africa. In

addition to identifying the relevant strategies, the chapter also evaluates how these strategies have been applied in practice and the extent to which they can be considered relevant or effective in advancing the progressive realization of socio-economic rights. Finally, the chapter deliberates upon the challenges limiting the SAHRC in effectively discharging its mandate on socio-economic rights and concludes with a summary and an insight into what is considered in the next chapter.

## **5.2. The establishment and institutional structure of the SAHRC**

### **5.2.1. The historical origin of the SAHRC**

The origin of the SAHRC is situated in the country's historical experience under colonialism and apartheid. The apartheid system of governance, which was established in 1948 by the Afrikaner-dominated National Party, crystallized into a political and social philosophy and policy, that not only classified South Africans into separate social, economic and political racial groups, but also denied fundamental rights and freedoms to all non-white South Africans, often in a very brutal form.<sup>1</sup> According to Christiansen, as apartheid evolved and expanded throughout the 1960s and 1970s, its laws and definitions of race harshly 'circumscribed people's rights, opportunities, and relationships with each other and the state.'<sup>2</sup>

Thus, apart from political and social exclusion, non-whites in general, and black Africans in particular, suffered socio-economic inequality, inequity, injustice and oppression in their own country whereas entrenched white rights and privileges created living standards comparable to those of western European countries.<sup>3</sup> While apartheid lasted, the government never contemplated nor established a human right institution in the country. Non-whites, particularly the majority black population, were considered not to have human rights or dignity to be promoted and protected by the state. Consequently, what became paramount at the twilight of the struggle against apartheid was not just to achieve political independence, but also to restore human rights, dignity and social justice to all

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<sup>1</sup> P Andrews and S Ellmann *The post-apartheid constitutions: perspective on South Africa's basic law* (2001) 408-09; S Terreblanche *A history of inequality in South Africa 1652 – 2002* (2002) 371.

<sup>2</sup> EC Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 323.

<sup>3</sup> Terreblanche (note 1 above) 25.

South Africans, and the black majority population in particular, after generations of systemic and systematic violation, abuse and exploitation by the apartheid white minority regime.<sup>4</sup>

Therefore, when President FW de Klerk offered to end the political conflict through a negotiated settlement by introducing a democratic order following the release of Nelson Mandela from prison, the reality he faced was how to dismantle a repulsive, oppressive and dehumanizing social, political and economic system. As Mureinik notes, the democratic transition in South Africa had the purpose of replacing absolutism with a democratic culture of justification, ‘a culture in which every exercise of power is expected to be justified.’<sup>5</sup> Also, for Terreblanche, the essence of the transition was that ‘it opened, for the first time ever, a window of opportunity for restoring social justice, for blacks after centuries of social oppression, political domination and economic exploitation.’<sup>6</sup>

Finally, and as the majority of South Africans had struggled for the African National Congress (ANC), the National Party (NP), and other political parties engaged in the peaceful negotiations settled for a new South Africa under the rule of law, with equality and respect for human rights as the corner stone and fundamental principles of the new Constitution. A composite set of human rights, embracing both civil and political rights and socio-economic rights, was first provided and protected by the Interim Constitution of 1993, and later enshrined in the constitutional Bill of Rights of the Final Constitution of 1996. This, as Musuva argues, was to achieve the transformation of South Africa from a culture that was oppressive, secretive, and profoundly disrespectful of basic human rights into a human rights-based culture in which the human rights and dignity of all is both respected and celebrated.<sup>7</sup>

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<sup>4</sup> Terreblanche (n 1 above) 25.

<sup>5</sup> E Mureinik ‘A bridge to where? Introducing the interim constitution’ (1994) 10 *South African Journal on Human Rights* 31 32.

<sup>6</sup> Terreblanche (n 1 above) 25.

<sup>7</sup> C Musuva ‘Promoting the effectiveness of democracy protection institutions in Southern Africa South Africa’s public protector and human rights commission’ *Electoral institute for sustainable democracy in Africa report* (2009) ix.



In addition to entrenching fundamental human rights and freedoms, the crafters of the 1996 Constitution also considered it compelling to nurture and consolidate the newly won democracy, human rights and freedoms. Thus, the South African Human Rights Commission together with eight other institutions was established in Chapter nine of the 1996 Constitution to support and strengthen the new democracy and social accountability in South Africa.<sup>8</sup>

Thus, unlike the NNHRC the SAHRC was not established by an executive, but through a negotiated settlement and agreement among the different political parties during the country's non-violent political transition from a race-based and authoritarian political system in which human rights were grossly violated to a non-racial constitutional democracy founded on the rule of law, equality and respect for the fundamental human rights, freedoms and dignity of all South Africans.<sup>9</sup> Furthermore, the SAHRC was set up as part of a structured institutional framework to support and strengthen constitutional democracy in conjunction with the other Chapter 9 institutions. Since its inauguration in 1996 by President Nelson Mandela, the SAHRC has remained active in executing its robust constitutional mandate to promote and protect the fundamental rights and freedoms of all South Africans as provided and protected by the Bill of Rights under the 1996 Constitution of South Africa.

### **5.2.2. The legal status of the SAHRC**

As stated above, the SAHRC was first created in the Interim Constitution of 1993,<sup>10</sup> and later retained in the 1996 Final Constitution of South Africa.<sup>11</sup> As well as the Constitution, the SAHRC is also recognized in three other statutes: the Human Rights Commission Act of 1994, which enumerates its powers, functions, composition and mode of appointing its commissioners; the Promotion of Access to Information Act 2 of 2000,

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<sup>8</sup> Sections 181 – 194 of the Constitution of South Africa 1996; the other Chapter 9 institutions are the Public Protector; the Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and the Broadcasting Authority.

<sup>9</sup> M Parlevliet 'National human rights institutions and peace agreements: establishing national institutions in divided societies' *Review meeting: role of human rights in peace agreement*. International Council on Human Rights Policy Belfast 7-8 March 2005 5-7.

<sup>10</sup> Sections 115 - 118 of the Interim Constitution of the Republic of South Africa Act of 1993.

<sup>11</sup> Section 181 of the Constitution of South Africa 1996.

which empowers the SAHRC to monitor and enforce the implementation of the legal right of access of South Africans to records held by public bodies;<sup>12</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, which empowers the SAHRC to monitor the implementation of the right to equality.<sup>13</sup>

Therefore, like the Ghanaian and Ugandan National Human Rights Commissions, the SAHRC is a constitutional body, but not of the same status with the three organs of government.<sup>14</sup> However, it has a stronger legal foundation than other similar bodies created by statutes, such as the NNHRC, in terms of the Paris Principles.<sup>15</sup> Thus, the SAHRC exists as a permanent state institution to which South Africans look for the promotion and protection of human rights as guaranteed by the Constitution and other legal instruments, including international treaties and national legislation.

### **5.2.3. The composition and qualification of members of the SAHRC**

The composition of the SAHRC is not very clearly expressed. Section 3(1) of the Human Rights Commission Act 1996 merely obliges the President to appoint not less than five persons as full-time Commissioners. However, the same section gives the President the discretion to appoint additional members either on a full-time or part-time basis. Thus, while the SAHRC must at all times have five persons as full-time members; there is no statutory limit with regard to its composition. Therefore, unlike some other NHRCs,<sup>16</sup> the composition of the SAHRC is left to the discretion of the President. For instance, the first set of Commissioners of the SAHRC numbered 11, but they were reduced to six during its second term. Presently, it is composed of six Commissioners, four of which are full-

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<sup>12</sup> Section 85 of the Promotion of Access to Information Act of 2000.

<sup>13</sup> Section 20(10); 15(2) and 28(2) of Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>14</sup> C Murray 'The human rights commission et al: what is the role of South Africa's Chapter 9 institutions?' (2006) *Potchefstroom Electronic Law Journal* 1 5.

<sup>15</sup> Section 20 of Schedule 6 to the 1996 Constitution of South Africa.

<sup>16</sup> For instance, Section 2(2) and 2(3) of the Mauritius National Human Rights Commission Act 1998 fixes a membership of four for the Commission, while Section 5 of the Republic of Benin's Commission for Human Rights prescribes a 45 member Commission.

time,<sup>17</sup> although it had justifiably argued for a larger membership in view of its wide mandate.<sup>18</sup>

Also, the enabling legislation does not speak in clear terms on the issue of diversified social composition. Although the Constitution stipulates that the SAHRC's membership should reflect the race and gender composition of the country,<sup>19</sup> this does not meet the socially cosmopolitan representation envisaged by the Paris Principles. The point being made here is, apart from gender balance, that the composition ought to include civil society groups and other relevant social entities involved in the promotion and protection of human rights.<sup>20</sup>

However, the President can ensure a sociologically diversified composition for the SAHRC if he or she so desires although this is not exactly the case with the present composition, except gender balance.<sup>21</sup> Furthermore, even if members are appointed from different social, academic or professional backgrounds they are required not only to function in their individual capacity but also to act impartially and faithfully towards all South Africans irrespective of ethnic, race, gender, occupation, profession or social backgrounds.<sup>22</sup> This provision presupposes that membership of a particular social group may be relevant, but is not a necessary factor for appointment into the membership of the SAHRC.

Basically, the Constitution stipulates two criteria for the appointment of Commissioners into the SAHRC: the person must be a South African citizen,<sup>23</sup> who must also be a fit and proper person to hold such an office.<sup>24</sup> The first criterion is obvious. Non-South Africans cannot be members of the SAHRC except as employees. The second criterion is an

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<sup>17</sup> SAHRC Annual Report 2013 vi.

<sup>18</sup> SAHRC: *A critical reflection on an institutional journey 2002 – 2009* (2009) 31.

<sup>19</sup> Section 193(2) of the 1996 Constitution of South Africa.

<sup>20</sup> G De Beco 'National human rights institutions in Europe' (2007) 7 *Human Rights Law Review* 331 337.

<sup>21</sup> The present composition has three women and three men in the Commission; one of the men is a person living with disability.

<sup>22</sup> Section 4(1) of the Human Rights Act of 1994.

<sup>23</sup> Section 193(1)(a) of the 1996 Constitution of South Africa.

<sup>24</sup> Section 193(1)(b) of the 1996 Constitution of South Africa.

omnibus condition. Arguably, it is not limited to the character of the candidate but covers all other necessary factors for determining the suitability of the prospective appointee, including cognate knowledge, experience or expertise in the field of human rights.

However, with three out of six members, legal practitioners are disproportionately favoured in the composition despite the fact that its membership is, in theory, open to all qualified persons irrespective of educational, professional, or career background. As Mechlem observes, the composition of international human rights treaty bodies, such as the HRC, has generally been dominated by lawyers.<sup>25</sup> This, he rationalizes, is because, apart from the specific mention of lawyers in some of the treaties, law and legal methods of interpretation have an important role to play in the work of such bodies.<sup>26</sup> Arguably, this reasoning also applies to NHRCs with quasi-judicial functions as the SAHRC. However, as Mechlem further argues, NHRCs, similar to treaty bodies, have unique and diverse functions which include the evaluation of laws, policies, and administrative practices of states that require the application of relevant expertise broader than legal knowledge.<sup>27</sup> Accordingly, they are likely to benefit more with regard to the effective understanding and execution of their mandates from an interdisciplinary composition of lawyers, economists, and political and social scientists and other relevant disciplines. Thus, it is submitted that the present composition of the SAHRC in which lawyers constitute half of the members is clearly lopsided and denies it the possibility of having a multi-disciplinary approach in the execution of its mandate. Since the enabling legislation positively allows for flexibility in its membership composition it is far more appropriate to have a SAHRC that is inclusively diversified in its composition at all times. This is not the case presently.

#### **5.2.4. The appointment and tenure of members of the SAHRC**

The appointment of members of the SAHRC is a joint responsibility of the Executive and the Parliament. However, unlike the NNHRC where the President nominates candidates

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<sup>25</sup> K Mechlem 'Treaty bodies and the interpretation of human rights' (2009) *Vanderbilt Journal of Transnational Law* 905 917-918.

<sup>26</sup> Mechlem (n 25 above) 918.

<sup>27</sup> Mechlem (n 25 above) 918.

for the National Assembly to confirm; here the National Assembly nominates suitable persons to the President for appointment,<sup>28</sup> after they have been screened by an all-party parliamentary ad hoc committee<sup>29</sup> and approved by a simple majority of members of the National Assembly.<sup>30</sup> Thus, the appointment process is participatory, but only to the extent that opposition parties can make inputs during the consideration of candidates at the level of the all-party parliamentary ad hoc committee.

On the face of it, the role of the President in the appointment process appears to be very insignificant. The President simply waits for the National Assembly to transmit the names of the recommended nominees to him or her to appoint with no power to reject their nomination.<sup>31</sup> However, behind the façade is a potentially different reality. In South Africa, the President of the country is also the leader or head of the ruling party, the ANC, which also dominates the National Assembly at the moment. Thus, it would be difficult to isolate the President's interest or preference from the selection process, even if it is not clearly expressed. As Murray observes, the extent to which opposition parties can influence the outcome is quite limited in the situation in which the ANC controls more than the required votes for endorsing any candidate in spite of any objections from the minority parties.<sup>32</sup> Furthermore, although the National Assembly is required to involve civil society in the recommendation process, this also is not mandatory.<sup>33</sup> Even if civil society is consulted there is little they can do to influence the outcome of the process since their participation is merely advisory.

Thus, it is argued that the existing appointment process can be manipulated by the President and the dominant political party in Parliament. This possibility is what drives Zille, the leader of the main opposition Democratic Alliance (DA) party in South Africa, to consider the SAHRC as fast becoming 'a dumping ground for ANC cadres' and her calling for the law to be amended to insulate the appointment process from political

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<sup>28</sup> Section 193(4)(a) of the 1996 Constitution of South Africa.

<sup>29</sup> Section 193(5)(a) of the 1996 Constitution of South Africa.

<sup>30</sup> Section 193(5)(b) of the 1996 Constitution of South Africa.

<sup>31</sup> Section 193(4) of the 1996 Constitution of South Africa.

<sup>32</sup> Murray (n 14 above) 133.

<sup>33</sup> Section 193(6) of the 1996 Constitution of South Africa.

interference.<sup>34</sup> Although the SAHRC vehemently denies being a ‘political hit squad’ of the ANC,<sup>35</sup> it is difficult to totally dissociate it from perceptions linking it to having some sympathy for the ANC led government when three out of the six members, including the chairperson, are ANC members.<sup>36</sup> Thus, Zille’s outrage against the appointment process is not without justification, as the practice of deploying ANC cadres to the SAHRC effectually undermines its legitimacy in the eyes of members of the public, despite its internal policy of committing members to exercise political neutrality.<sup>37</sup>

Therefore, there is the need to make the selection process as transparent, open and inclusively participatory as possible in line with the Paris Principles. Indeed, years ago, the parliamentary ad hoc committee on Chapter 9 institutions considered the existing procedure inappropriate and recommended a review of the process.<sup>38</sup> This, as Sarkin proposes, should include ensuring that vacancies are widely advertised for qualified and interested candidates to apply.<sup>39</sup> This process should be followed by the formation of a broadly inclusive independent selection committee to properly screen the applicants, conduct interviews and recommend the nominees for appointment.<sup>40</sup>

In support of Sarkin’s views, Matshekga further proposes the need to allow members of the public to lodge objections before Parliament against unacceptable nominations.<sup>41</sup> Unfortunately, nothing has so far been done to reflect the necessary changes recommended by the parliamentary ad hoc committee. By refusing to effect the changes to make the appointment process of members to the SAHRC more transparent, open and

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<sup>34</sup> HZille ‘SAHRC a dumping ground for ANC cadres’ available at <http://www.politicsweb.co/za> (assessed 10 October 2013).

<sup>35</sup> *SAHRC slams Zille IOL News on 7<sup>th</sup> October 2010* available at <http://www.iol.co.za/news/south-africa/western-cape/sahrc-slams-zille-1.684341>.

<sup>36</sup> Brief background of Commissioners as disclosed on the Commission’s website [www.sahrc.org.za](http://www.sahrc.org.za)

<sup>37</sup> *SAHRC: A critical reflection on an institutional journey 2002 – 2009* (2009) 31.

<sup>38</sup> Parliamentary Ad Hoc Committee on Chapter 9 Institutions: *The Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa* (2009) at 22-23, hereinafter referred to as ‘the Ad-hoc Parliamentary Committee Report on Chapter 9 institutions.’

<sup>39</sup> J Sarkin ‘Reviewing and reformulating appointment processes to constitutional (chapter nine) structures’ (1999)15 *South African Journal on Human Rights* 587 611.

<sup>40</sup> Sarkin (n 39 above) 611.

<sup>41</sup> J Matshekga ‘Toot less bulldogs? The human rights commissions of Uganda and South Africa: a comparative study of their independence’ (2002) *African Human Rights Law Journal* 68 82.

socially participatory, the South African Parliament still leaves the mischief in the appointment process not cured with the attendant problems to its legitimacy.

The enabling law is quite positive with regard to the tenure of Commissioners. Once appointed to office, Commissioners cannot be removed before the end of their tenure, unless on the grounds of misconduct, incapacity or incompetence.<sup>42</sup> For any removal from office on any of the aforesaid grounds to be effective, there has to be clear factual findings to that effect by a Committee of the National Assembly,<sup>43</sup> which is followed by a formal resolution adopting the findings by a simple majority of members of the National Assembly.<sup>44</sup> Thus, even where a Commissioner is indicted by any statutory body or authority, the purported indictment is still subject to further consideration or review by the National Assembly.

This effectively means that the removal of any of the Commissioners from office cannot easily be effected by arbitrary means as it is subject to due process requirements.<sup>45</sup> The fact that the President can only place a lawfully indicted Commissioner on suspension until the conclusion of the removal process is indicative of the strength of legal protection that surrounds the tenure of Commissioners of the SAHRC.<sup>46</sup> However, when the process is duly complied with and completed by the National Assembly, the President is bound to comply with the resolution by removing the affected Commissioner.<sup>47</sup>

Therefore, it is clear that members of the SAHRC have security of tenure in conformity with the requirements of the Paris Principles. However, there are still a few contentious issues with respect to the tenure of Commissioners. For instance, while no Commissioner is entitled to no longer than seven years tenure,<sup>48</sup> the actual number of years is discretionary to the President. Thus, the failure of the enabling law to provide definite

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<sup>42</sup> Section 194(1)(a) of the 1996 Constitution of South Africa.

<sup>43</sup> Section 194(1)(b) of the 1996 Constitution of South Africa.

<sup>44</sup> Section 194(1)(c) of the 1996 Constitution of South Africa.

<sup>45</sup> J Klaaren 'South African Human Rights Commission' in S Woolman, M Bishop and J Brickhill (eds) *Constitutional Law of South Africa* (2012) 24c-18.

<sup>46</sup> Section 194(3)(a) of the Constitution of South Africa 1996.

<sup>47</sup> Section 194(3)(b) of the Constitution of South Africa 1996.

<sup>48</sup> Section 3(1) of the Human Rights Commission Act of 1994.

tenure for Commissioners is unhealthy and open to abuse by the President. Furthermore, there is no reasonable justification for requiring an ordinary majority vote of the National Assembly for the adoption of the resolution for the removal of members of the SAHRC instead of the two thirds majority vote prescribed for other Chapter 9 institutions.<sup>49</sup>

### **5.2.5. The independence and operational autonomy of the SAHRC**

The Constitution of South Africa 1996 clearly states that the SAHRC is ‘independent and subject only to the Constitution and the law.’<sup>50</sup> The Constitution further charges all other organs of the state to assist and protect, respect and preserve its independence, impartiality, dignity and effectiveness ‘through legislative and other measures.’<sup>51</sup> The Human Rights Commission Act of 1994 also obliges the SAHRC and its staff to serve independently and perform their duties ‘in good faith and subject only to the Constitution and the law.’<sup>52</sup> Both the Constitution and the Human Rights Commission Act further restrain every organ of the state or employee of any organ of the state or any other person from interfering, hindering, or obstructing the SAHRC, its staff or agents in the exercise or performance of their powers and duties and functions.<sup>53</sup> Furthermore, it has unconditional standing to protect its independence and autonomy of action by judicial action,<sup>54</sup> as well as its members are protected from civil and criminal liability for acts or omissions done in the course of their official lawful responsibilities for and on behalf of the SAHRC.<sup>55</sup>

The legal implications of these provisions are profound for its independence and operational autonomy. The SAHRC and its staff are not subservient to any other state organ, institution or authority, but only to the Constitution and the law, in the exercise of their powers and the performance of their functions. It has absolute powers and control over the scope, content and execution of its administrative procedures, policies,

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<sup>49</sup> Section 194(2)(a) of the 1996 Constitution of South Africa.

<sup>50</sup> Section 181(2) of the 1996 Constitution of South Africa.

<sup>51</sup> Section 181(3) of the 1996 Constitution of South Africa.

<sup>52</sup> Section 4(1) of the Human Rights Commission Act of 1994.

<sup>53</sup> Section 181(4) of the 1996 Constitution of South Africa; Section 4(2) of the Human Rights Commission Act of 1994.

<sup>54</sup> Section 7(1)(e) of the Human Rights Commission Act of 1994.

<sup>55</sup> Section 17(3) of the Human Rights Commission Act of 1994.



programmes, action plans and other activities. This much is underscored by the judgment of the Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa*,<sup>56</sup> to the effect that both the executive and Parliament cannot routinely interfere in the day-to-day running of the constitutional bodies. Thus, without doubt, the SAHRC has adequate legal guarantees of institutional and operational autonomy as prescribed by the Paris Principles.

However, as the Constitutional Court held in *Van Rooyen and Others v S and Others*,<sup>57</sup> the standard measure for determining institutional independence is whether in the perception of a reasonable and informed bystander the institution actually enjoys the essential conditions of independence. Arguably, the SAHRC has been performing its constitutional responsibilities without any noticeable interference from the state. At least to some extent, it has in the past been critical of the state and even managed to proceed against some highly placed state officials to protect its authority and independence.<sup>58</sup>

However, as Hannah Dawson notes, it is difficult totally to ascribe a sense of objectivity to the SAHRC, if the appointment and possible reappointment of the members is dependent on their continued loyalty to the President and the ruling ANC, which hand-picked them in the first place.<sup>59</sup> Thebiso also holds the view, despite the constitutional prescriptions to the contrary, that the SAHRC in practical terms, more or less is a government body and not a state body, as it lacks the capacity to function effectively without the government's support.<sup>60</sup> Thus, it could easily be disposed to act against some state departments or officers but is inherently limited from being critical of the government as an entity in the face of the obvious deprivation of socio-economic rights to the poor and increasing inequality.<sup>61</sup>

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<sup>56</sup> (1999) (3) SA 191 (CC) 1999 (5) BCLR 489 (CC).

<sup>57</sup> 2002 (8) BCLR 810 (CC).

<sup>58</sup> Musuva (n 7 above) 9 – 10.

<sup>59</sup> Interview with Hannah Dawson, Senior Researcher, Studies in Poverty and Inequality Institute (SPII), South Africa, Johannesburg, 3 October 2013.

<sup>60</sup> Interview with Mandla Thebiso, an opinion leader, South Africa, Pretoria, 14 September 2013.

<sup>61</sup> Thebiso (60 above).

While Thebiso's expression of doubts about the independence or lack thereof of the SAHRC is not out of place, such opinions are nevertheless borne out of subjective considerations. As Elroy asserts, although formal legal guarantees of independence are important because political interference reduces its powers and injures its legitimacy, the SAHRC is as independent as the mind-set and conviction of its Commissioners.<sup>62</sup> Arguably, despite some negative perceptions, the general view seems to be that the SAHRC exhibits substantial independence and carries out its functions without clearly noticeable control or interference from the state, which conforms to the requirements of the Paris Principles. However, this does not mean that the tendency to genuflect to political expediency is completely ruled out given the obvious dominance of active ANC leaders in composition of the SAHRC.

#### **5.2.6. The financial autonomy of the SAHRC**

Like every other NHRI, the SAHRC needs financial autonomy to effectively carry out its operations and services. However, it is yet to realize this necessity as several factors impede it from being financially independent. For instance, the SAHRC has no direct access to funding from the national consolidated revenue funds as is the case of the NNHRC.<sup>63</sup> Instead, its annual budget is located within the general financial vote of the Department of Justice and Constitutional Development.<sup>64</sup> Although the Department of Justice and Constitutional Development merely serves as a conduit through which the SAHRC accesses state funds, this practice prevents it from directly defending its own budget proposal before Parliament.

Arguably, a practice whereby the SAHRC is compelled to pursue its budgetary interest with Parliament through a proxy source is detrimental to its quest for financial independence. There is no way a proxy source can effectively present, defend and convince the Parliament about facts and figures behind its budgetary proposal that is predicated on its needs.<sup>65</sup> Little wonder, this practice was strongly decried by the

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<sup>62</sup> Interview with Paulus Elroy, National Advocacy Manager, Black Sash, South Africa, Cape Town 3 October 2013 (interview on file with the researcher).

<sup>63</sup> Section 10 of the National Human Rights Commission Act of 1995.

<sup>64</sup> Matsheka (n 41 above) 60.

<sup>65</sup> SAHRC: Strategic Business Plan (2010 – 2014) 11.

Parliamentary ad hoc Committee on Chapter 9 institutions as undermining the independence and operational efficiency of the SAHRC.<sup>66</sup>

However, actual financial allocation to the SAHRC from the state reportedly increased by an average of 12% between 2007 and 2013.<sup>67</sup> For instance, it received R56.281, R69.603, R72.755, R73.474, R89.066, and R100.736, in 2007/2008, 2008/2009, 2009/2010, 2010/2011, 2011/2012, and 2012/2013 financial years respectively.<sup>68</sup> The SAHRC also received funds from international donor agencies during the period under review, except in 2013.<sup>69</sup> Besides, it is independent in the application of released funds subject only to public accountability requirements.<sup>70</sup> While this is positive element, the SAHRC continuously complains about funding inadequacy even as it is perceived as a relatively well-funded NHRC in Africa.<sup>71</sup>

Although the complaint is understandable, it is also a fact that the SAHRC competes with other state agencies for a fair allocation from the limited financial resources of the state. However, the need to match the demands of its mandate with adequate allocation of funds to enable it discharge its functions more effectively, as recommended by the Parliamentary ad hoc Committee on Chapter 9 institutions, cannot be over-emphasised.<sup>72</sup> As Elroy argues, South Africa needs a NHRC that is far more resourced and funded than it is currently.<sup>73</sup>

### **5.2.7. The administrative structure and accessibility of the SAHRC**

Administratively, the SAHRC is composed of two sections: the Commission and the Secretariat. The Commission is made up of the Commissioners. Collectively the

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<sup>66</sup> The Report of the Parliamentary Ad hoc Committee on Chapter 9 institutions (n 34 above at 19-20)

<sup>67</sup> SAHRC Annual Report 2012 56.

<sup>68</sup> SAHRC Annual Report 2013 77.

<sup>69</sup> SAHRC Annual Report 2013 77.

<sup>70</sup> T Thipanyane 'Challenges facing national human rights institutions: A South African perspective' in EA Ankuma (ed) *Strengthening national human rights commissions in Africa* (2009) 24.

<sup>71</sup> SAHRC Annual Report 2013 77.

<sup>72</sup> The Parliamentary ad hoc committee on Chapter 9 Institutions: 'The Review of Chapter 9 and associated institutions: A report to the National Assembly of the Parliament of South Africa' (2009)' hereinafter referred to as (the parliamentary ad hoc committee report on Chapter 9 institutions) 19-20.

<sup>73</sup> Elroy (n 62 above).

Commissioners are responsible for driving the practical realization of the Commission's mandate by providing leadership in terms of policy making and setting priorities for the Secretariat to execute.<sup>74</sup> Furthermore, each Commissioner superintends responsibilities for a province, at least, and a specific thematic area of human rights.<sup>75</sup>

Generally, the Commissioners provide oversight of the operations of the SAHRC, including the complaint and appeal process; facilitate human rights interventions at national and provincial levels; engage with human rights stakeholders on behalf of the SAHRC; represent the SAHRC in national and provincial parliaments; spearhead partnerships with relevant international and national stakeholders, including civil society in Africa and other regional NHRIs, and the African Commission on Human and Peoples' Rights; and ensure the implementation of the recommendations of the SAHRC.<sup>76</sup> Presently, four out of the six members are full-time Commissioners. This factor is good for the SAHRC since they will be available on a daily basis to supervise and attend to their job responsibilities, unlike members of the NNHRC who operate on part-time basis.

The Secretariat, which is headed by the Chief Executive Officer, is responsible for the day-to-day administration and, in particular, for ensuring the effective implementation of the policies, programmes and priorities of the SAHRC.<sup>77</sup> For effective administration the Secretariat functions through different departments each charged with specific programme and headed by directors.<sup>78</sup> The departments are: legal services, human rights advocacy, strategic support and governance, research, monitoring and reporting and the administration departments.<sup>79</sup>

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<sup>74</sup> SAHRC Annual Report 2013 8; SAHRC Annual Report 2012 25.

<sup>75</sup> SAHRC Annual Report 2012 25; SAHRC Annual Report 2013 8.

<sup>76</sup> SAHRC Annual Report 2012 25; SAHRC Annual Report 2013 13.

<sup>77</sup> SAHRC Annual Report 2013 14; SAHRC Strategic Business Plan (2010 – 2014) 12.

<sup>78</sup> SAHRC Annual Report 2012 27.

<sup>79</sup> SAHRC Annual Report 2013 13-14.

The legal department provides general legal services through investigation of complaints of human rights violations, legal advice and assistance, as well as seeking redress through litigation in courts for victims of human rights violations.<sup>80</sup> The human rights advocacy unit promotes education and awareness,<sup>81</sup> while the strategic support and governance unit coordinates the strategic planning, performance monitoring, evaluation, reporting, and communications and media relations needs of the SAHRC.<sup>82</sup> Further, the research department conducts research and the promotion of access to information. The research unit plans, conducts and manages research on the promotion and protection of human rights,<sup>83</sup> whereas the promotion of access to information unit undertakes monitoring and promoting compliance with and protecting the right of access to information in South Africa.<sup>84</sup> Similarly the administration department consists of three business units: finance, corporate services and internal audit. The finance unit manages the SAHRC's budget in addition to monitoring and facilitating the management of organizational risks.<sup>85</sup> The corporate unit accommodates the functions of administration, supply chain management and human resources,<sup>86</sup> while the internal audit unit assess the adequacy and reliability of internal controls and governance processes.<sup>87</sup>

The SAHRC claims to have put in place a good governance structure with the delegation of authority and a charter governing working relationship between Commissioners and the secretariat in line with its new performance management system that places emphasis on greater team work and collaboration among programmes.<sup>88</sup> With the new governance structure has clearly delineated lines of authority and responsibility between the Commissioners and the management team; it can only function more effectively by avoiding the rivalries that in the past almost paralyzed its stability and cohesiveness.<sup>89</sup> However, only time will tell how effective the new governance system will be.

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<sup>80</sup> SAHRC Annual Report 2013 13.

<sup>81</sup> SAHRC Annual Report 2013 13.

<sup>82</sup> SAHRC Annual Report 2013 13.

<sup>83</sup> SAHRC Annual Report 2013 14.

<sup>84</sup> SAHRC Annual Report 2013 14.

<sup>85</sup> SAHRC Annual Report 2013 77.

<sup>86</sup> SAHRC Annual Report 2013 77.

<sup>87</sup> SAHRC Annual Report 2013 77.

<sup>88</sup> SAHRC Annual Report 2013 10.

<sup>89</sup> The parliamentary ad hoc committee report on Chapter 9 institutions (n 72 above) 182.

In terms of accessibility, the SAHRC has its head office in Johannesburg and, which is located close to the Constitutional Court. It also has a provincial office in each of the country's nine provinces.<sup>90</sup> As well as the physical offices, it further has a functional website and internet platform through which its services can be accessed.

However, the SAHRC is more or less an urban-based institution. It is visible more in the media than being physically present across the length and breadth of South Africa. For instance, giving the large geographical size and population of South Africa, which currently stands at about fifty-one million,<sup>91</sup> having just one regional office in each of the provinces is a serious limitation to its physical accessibility. As Elroy has argues, it appears that public knowledge about the SAHRC and its mandate is stronger in the media and by the people that reside within or around where its officers are located.<sup>92</sup> For instance, eight out of eleven persons randomly interviewed within the vicinity of the Johannesburg head office of the SAHRC turned out not knowing about its presence in the area or what its functions are.

Thus, over 16 years of existence, the SAHRC remains a limited urban-based institution; its services are largely inaccessible to an overwhelming majority of the people who live in the rural and semi-urban communities. Therefore, there is need for the SAHRC to decentralize its presence, in particular, to areas where ignorance is pervasive and the alternative accessory platforms to its services, such as the internet are either less developed or almost completely unavailable.

### **5.2.8. The relationship of the SAHRC with NGOs**

The SAHRC does not have any regulatory framework for partnering with NGOs or civil society groups for the purpose of advancing its mandate. However, the need for a collaborative relationship between it and civil society is not lost as it has over the years

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<sup>90</sup> The regional offices are: Eastern Cape province, East London; Free State province, Bloemfontein; Gauteng province Houglaston; Kwazulu-Natal province, Durban; Limpopo province, Nelspriut; Mpumalanga province, Upingon; Northern Cape, Rustenburg; and Western Cape, Cape town

<sup>91</sup> Statistics South Africa available at <http://beta2.statssa.gov.za/>.

<sup>92</sup> Elroy (n 62 above).

built effective relationships with NGOs.<sup>93</sup> Thus, the SAHRC, in its initial years, included NGOs in some of its standing Committees established under section five of the enabling law. However, it effectively disbanded this collaboration after a few years in operation to take full responsibility for all its decisions.<sup>94</sup> Although not confirmed by the study, the section five Committees reportedly were reinstated in 2013.<sup>95</sup>

Accordingly, the SAHRC has over the years worked with some of the functional NGOs to promote and protect human rights, including socio-economic rights NGOs in South Africa. For instance, the it organized poverty hearings with the South African National NGO Coalition (SANGOCO-NET), which produced the first comprehensive report on poverty and human rights in South Africa.<sup>96</sup> Also, it has a standing partnership relationship and has worked with the Centre for Human Rights at the University of Pretoria, the Community Law Centre at the University of Western Cape, the Foundation for Human Rights, and the Socio-Economic Rights Institute of South Africa (SERI), and the Studies in Poverty and Inequality Institute (SPII) in the areas of research and monitoring socio-economic rights implementation in South Africa, and the Studies in Poverty<sup>97</sup>

Other NGOs the SAHRC has collaborated with include the Legal Resource Centre to provide free legal services and improve access to justice;<sup>98</sup> the South African History Archive (SAHA), for research on the Protection of Access to information Act,<sup>99</sup> the Open Democratic Advice Centre (ODAC), for research and conferment of the openness awards

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<sup>93</sup> SAHRC written responses to research questionnaire submitted to the Commission by the researcher 1 (hereinafter referred to as 'SAHRC: written responses'); Musuva (n 7 above) 36.

<sup>94</sup> Human Sciences Research Council (HSRC): 'Assessment of the relationship between Chapter 9 institutions and civil society': A final report prepared for the Foundation for Human Rights by the Democracy and Governance Research Programme of the Human Sciences Research Council ((2007) 20.

<sup>95</sup> Interview with Kate Tissington, Senior Researcher, Socio-Economic Rights Institute of South Africa (SERI), South Africa, Johannesburg 7 October 2013.

<sup>96</sup> Interview with Jacob Molapisi, Executive Director SANGOCO-NET on 7 October 2013 (interview on file with the researcher).

<sup>97</sup> Tissington (n 95 above); Elroy (n 62 above).

<sup>98</sup> Musuva (n 7 above) 36.

<sup>99</sup> SAHRC Annual Report 2003/2004 84.

to individuals and government departments for promoting access to information;<sup>100</sup> the Aids Legal Network (ALN) for HIV/AIDS education and awareness;<sup>101</sup> Women's Legal Centre, in relation to litigating women's right of inheritance at the Constitutional Court;<sup>102</sup> the Lawyers for Human Rights Centre;<sup>103</sup> the National Development Council and the Centre for the Study of violence (CSV), the Black Sash, and the African Institute of Corporate Citizenship (AICC),<sup>104</sup> on promoting the right to education, access to health care services, and business and human rights.<sup>105</sup>

However, despite having successful partnerships with NGOs, the SAHRC's relationship with NGOs is still perceived to be uninspiring. According to Molapisi, this is a weak point that has made NGOs not to be actively interested in its activities; a situation, he claims, has curtailed its visibility and effectiveness generally, and in the rural areas in particular.<sup>106</sup> This view aligns with the report of the Human Sciences Research Council (HSRC), which in a 2007 evaluation found that although the SAHRC had a structured relationship with NGOs this was not based on a clearly articulated corporate policy framework.<sup>107</sup> This weak linkage between the SAHRC and NGOs, it appears, has not changed as the Commission continues to relate to civil society, but more on an ad hoc basis if and when a need arises. According to Saal, while it has and will continue to work with NGOs, there is need to be circumspect since the agendas, strategies and ideological motivations for NGOs may be markedly different from those of the SAHRC.<sup>108</sup> Thus, it is preferable, she argues, for the SAHRC to remain open to a working partnership with all credible NGOs on a case by case basis and as justified by the prevailing interest in the subject matter for collaboration.<sup>109</sup>

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<sup>100</sup> SAHRC Annual Report 2003/2004 84.

<sup>101</sup> SAHRC Annual Report 1998/1999 37.

<sup>102</sup> SAHRC Annual Report 2003/2004 29.

<sup>103</sup> SAHRC Annual Report 2004/2005 26.

<sup>104</sup> SAHRC Annual Report 2004/2005 26.

<sup>105</sup> SAHRC Annual Report 2004/2005 69.

<sup>106</sup> Molapisi (n 96 above).

<sup>107</sup> HSRC 'Assessment of the relationship between Chapter 9 institutions and civil society' *Final report* (2007) 31 (hereafter called 'the HSRC Chapter 9 institutions and civil society relationship report').

<sup>108</sup> Interview with Querida Saal, researcher, SAHRC, South Africa, Johannesburg 12 September 2013.

<sup>109</sup> Saal (n 108 above).



### 5.2.9. The powers of the SAHRC

The SAHRC has all the powers that are customary for standard NHRIs. For instance, it has a wide jurisdiction over all state organs, including the legislature, the executive, the judiciary, as well as all natural, private or juristic persons.<sup>110</sup> Thus, it can exercise its authority over all state organs, institutions and departments, and all persons whether public officials, private persons or corporate entities.

Besides the extensive personal jurisdiction, the Human Rights Commission Act grants the SAHRC powers to conduct or cause to be conducted any investigation on the alleged violation of any human rights, including socio-economic rights;<sup>111</sup> to invite or summon any person in relation to any investigation to appear before it and provide either oral and documentary evidence relevant to the investigation;<sup>112</sup> to enter, search any premises, make inquiries, examine any document found, make copies or seize any material connected to the investigation it is conducting;<sup>113</sup> to bring proceedings in a competent court or tribunal;<sup>114</sup> and to provide remedies for victims of human rights violations.<sup>115</sup>

Furthermore, all organs of state are legally obliged to cooperate and give the SAHRC the assistance that it may reasonably require for the effective exercise of its powers and performance of its duties and functions.<sup>116</sup> Thus, the SAHRC can issue and serve subpoenas on witnesses to appear before it to answer questions or produce sections or documents relevant to the investigation.<sup>117</sup> Any person it invites is a competent and compellable witness, who is legally obliged to answer any question, although evidence so obtained from the witness is inadmissible against the person in a court of law, except where the person has criminally perjured.<sup>118</sup> A person who refuses to cooperate with or assist, or fails to honour its invitation, or declines to answer questions, or wilfully

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<sup>110</sup> Section 8 of the 1996 Constitution of South Africa.

<sup>111</sup> Section 9(1)(a) of the Human Rights Commission Act of 1994.

<sup>112</sup> Section 9(1)(c) of the Human Rights Commission Act of 1994.

<sup>113</sup> Section 7 of the National Human Rights Commission Act of 1994.

<sup>114</sup> Section 7(1)(e) of the Human Rights Commission Act of 1994.

<sup>115</sup> Section 10(3) of the Human Rights Commission Act of 1994.

<sup>116</sup> Section 184(2)(b) of the 1996 Constitution of South Africa.

<sup>117</sup> Section 9(1)(a) of the Human Rights Act of 1994.

<sup>118</sup> Section 9(3)(1) of the Human Rights Act of 1994.

disrupts or undermines the investigation process, or does anything which is improperly intended to influence it in respect of its work commits an offence and could be prosecuted.<sup>119</sup>

Evidently, the SAHRC is appropriately empowered in line with the Paris Principles to effectively carry out its functions. However, conspicuously lacking is the power to enforce its decisions and recommendations which is critical to advancing the realization of socio-economic rights.

### **5.3. The challenge of implementing socio-economic rights in South Africa**

South Africa remains an upper-middle-income economy, which until recently, was the largest in the African continent. Even now with a GDP of 4847.3 USD South Africa remains one of the richest countries in Africa in terms of per capita income.<sup>120</sup> As Langa notes, when apartheid ended in 1994 the new democratic edifice was erected on a constitutional foundation that ‘aspires to create a fair, equal and developed society.’<sup>121</sup> Thus, the Constitution obliges the state to remedy the socio-economic injustices of the past by addressing the endemic poverty, inequality and socio-economic deprivation that diminished the quality of life for the majority of the citizens.<sup>122</sup> As Rosa notes, the need to achieve substantial equality and social justice is the basis for the specific provisions protecting the rights to healthcare, food, water, social security, education, housing, land and the environment in South Africa’s constitutional Bill of Rights.<sup>123</sup>

However, despite its relative wealth and 20 years since the demise of apartheid, mass poverty and inequality in South Africa continue to be major challenges in various ways. While some progress has been made in the last two decades to address mass poverty and

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<sup>119</sup> Section 18 of the Human Rights Act 1994.

<sup>120</sup> Trading Economics at available <http://www.tradingeconomics.com/south-africa/gdp-per-capita>.

<sup>121</sup> PN Langa ‘The role of the constitution in the struggle against poverty’ in S Liebenberg and G Quinot (eds) *Law and poverty: perspectives from South Africa and beyond* (2010) 7.

<sup>122</sup> The preamble to the 1996 Constitution of South Africa.

<sup>123</sup> S Rosa ‘Transformative constitutionalism in a democratic developmental state’ in S Liebenberg and G Quinot (eds) *Law and poverty: perspectives from South Africa and beyond* (2010) 102-103.

inequality with various affirmative policies and programmes,<sup>124</sup> growing evidence suggests that a reasonable proportion of the South African population still lack access to quality education, healthcare, nutrition, water, sanitation and housing across all racial groups.<sup>125</sup> For instance, with a HDI value of 0.629 South Africa is ranked 121 out of 187 countries in the 2013 human development report, which is below the average of 0.64 in the medium human development group.<sup>126</sup> The country's performance in other indicators is equally below average. For instance, it occupies a position of 90 out of 148 countries in the gender inequality index (GII), and the lived experience of ordinary people is either one of absolute or relative poverty or of continued vulnerability to becoming poor. For instance, 13% of the population reportedly live in absolute multidimensional poverty; a further 22% are vulnerable to multidimensional deprivations, with an average intensity of deprivations of 42.3%.<sup>127</sup> Furthermore, with a with a Gini coefficient of expenditure of 0.62, income inequality in South Africa ranks as one of, if not the most, unequal countries in the world.<sup>128</sup>

Although the pervasive inability of the state to satisfy the socio-economic needs of ordinary people is attributable to several factors, one of which, as Rosa argues, is the failure of the state to transform itself into 'an egalitarian one where all enjoy the aims, values and rights upheld in the Constitution of the Republic of South Africa 1996.'<sup>129</sup> This, it is argued, is a central factor responsible for the growing inequality and degradation of the quality of life of most South Africans. Arguably, South Africa is not just a resource rich country; it has the most modernized economy with a reasonable industrial base on the continent and a relatively smaller population. Yet, like Nigeria, the level of poverty and socio-economic deprivation is visibly huge.

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<sup>124</sup> JG Hoogeveen and B Ozler 'Not separate, not equal: poverty and inequality in post-apartheid South Africa' (2005) 2-3.

<sup>125</sup> Statistics South Africa 'The South African MPI: Creating a multidimensional poverty index using census data' (2014) 55.

<sup>126</sup> 'Human Development Report 2013: The rise of the South: human progress in a diverse world' *Explanatory note on 2013 HDR composite indices* South Africa 2-3.

<sup>127</sup> UNDP Human Development Report (n 126 above) 5.

<sup>128</sup> 'South Africa's Gini is the highest in the world' *Rawson Property Group available at [www.rawson.co.za/.../south-africas-gini-coefficient-is-the-highest-in-the-world-id-874](http://www.rawson.co.za/.../south-africas-gini-coefficient-is-the-highest-in-the-world-id-874)*.

<sup>129</sup> Rosa (n 123 above) 100.

Therefore, as one of the institutional players constitutionally obliged to address issues bordering on the material conditions and deficiencies that inhibit the realistic enjoyment of socio-economic rights, the SAHRC is central to achieving the constitutional aspirations of building and sustaining an equal, fair and progressive society with an improved quality of life for all South Africans, by holding the state accountable to its constitutional obligations to effectively implement socio-economic rights.

#### **5.4. The socio-economic rights mandate of the SAHRC**

##### **5.4.1. The general mandate as relevant to socio-economic rights**

The SAHRC has a general mandate to promote and protect socio-economic rights. This mandate is derived from the combination of the three general functions of the Commission under the Constitution of South Africa 1996. These are: to promote respect for human rights and a culture of human rights;<sup>130</sup> to promote the protection, development and attainment of human rights;<sup>131</sup> and to monitor and assess the observance of human rights in the Republic.<sup>132</sup> Although the Human Rights Commission Act 1994 mostly reinstates its constitutional mandate, it also lists some additional functions that enable the SAHRC to promote all categories of human rights, including socio-economic rights.<sup>133</sup> The fact is that the general mandate of the SAHRC over socio-economic rights has never been in doubt as human rights are defined by the Constitution and the Human Rights Commission Act<sup>134</sup> in terms of the constitutional Bill of Rights, which unequivocally guarantees these rights for all South Africans.

Like most other countries, South Africa is a party to a number of international and regional treaties not only guaranteeing socio-economic rights, but also obligating state implementation of these rights. As well, there are national legislation and policies embodying socio-economic rights, which compel state implementation for the purpose of enjoying socio-economic rights. Therefore, apart from the Constitution of South Africa 1996, socio-economic rights or their ideals are also derivable in South Africa from

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<sup>130</sup> Section 184(1)(a) of the 1996 Constitution of South Africa.

<sup>131</sup> Section 184(1)(b) of the 1996 Constitution of South Africa.

<sup>132</sup> Section 184(1)(c) of the 1996 Constitution of South Africa.

<sup>133</sup> Section 7(1)(a) – (d) of the Human Rights Commission Act of 1994.

<sup>134</sup> Section 1 of the Human Rights Commission Act of 1994.

various other sources, including relevant international treaties, national legislation, and social policies and programmes. These sources feed into the general mandate of the SAHRC for advancing the promotion and protection of socio-economic rights in South Africa. Thus, the extent to which they constitute, support and strengthen the general mandate of the SAHRC for driving socio-economic rights implementation is considered below.

#### **5.4.2. The Constitution of South Africa 1996**

Arguably, the Constitution of South Africa 1996 is a leading constitutional document on socio-economic rights in the world<sup>135</sup> and, thus, the most fundamental source of these rights in South Africa. The socio-economic rights it expressly guarantees include: labour rights,<sup>136</sup> the right to a healthy environment;<sup>137</sup> the right of access to adequate housing and prohibition of arbitrary eviction or demolition of homes;<sup>138</sup> the right of access to health care services, including reproductive health care, sufficient food, water, social security and social assistance;<sup>139</sup> and the right to education.<sup>140</sup> Vulnerable groups, such as children and detainees, also have guarantees of socio-economic rights. For children, the rights to shelter, basic nutrition, social services and health care are provided for;<sup>141</sup> detainees have the rights to adequate nutrition, accommodation, medical care and reading materials are guaranteed for them.<sup>142</sup> Apart from the express provision of substantive socio-economic rights, the Constitution also guarantees the equal enjoyment of these rights and further obligates the state and all its organs to respect, protect, promote and fulfil these rights.<sup>143</sup>

In Africa, the Constitution of South Africa 1996 has no parallel in the constitutionalization of socio-economic rights. As Liebenberg observes, notions of fundamental objectives and directive principles are completely absent in the framing of

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<sup>135</sup> EC Christiansen (n 2 above) 378.

<sup>136</sup> Section 23 of the Constitution of South Africa 1996.

<sup>137</sup> Section 24 of the Constitution of South Africa 1996.

<sup>138</sup> Section 26 of the Constitution of South Africa 1996.

<sup>139</sup> Section 27 of the Constitution of South Africa 1996.

<sup>140</sup> Section 29 of the Constitution of South Africa 1996.

<sup>141</sup> Section 28(1)(c) of the Constitution of South Africa 1996.

<sup>142</sup> Section 35(2)(e) of the Constitution of South Africa 1996.

<sup>143</sup> Section 7(2) of the Constitution of South Africa 1996.

these rights under the South African Constitution.<sup>144</sup> Brand posits that socio-economic rights are not provided for on a level inferior to civil and political rights, but ‘interspersed between the other rights, on an equal level, emphasizing the interdependence and indivisibility of the different generations of rights.’<sup>145</sup> Besides the positive obligations the Constitution imposes on the state to respect, protect, promote and fulfil these rights,<sup>146</sup> these rights are also enforceable against the state by judicial and non-judicial means as interpreted severally and reaffirmed by the Constitutional Court starting with the *Re: Certification* case.<sup>147</sup>

*In Government of the Republic of South Africa v Grootboom & others (Grootboom case)*,<sup>148</sup> Ms Irene Grootboom, 510 children and 389 other adults, claimed their right to the provision of adequate housing pending when they would have permanent accommodation under sections 26 and 28 of the Constitution. The Constitutional Court agreed with the plaintiffs and held that the government’s housing programmes, which failed to address the housing needs of most vulnerable people who were living in intolerable conditions, violated the constitutional right to access to housing. In *Minister of Health v Treatment Action Campaign & Others (No. 2) (TAC case)*,<sup>149</sup> the Treatment Action Campaign (TAC) challenged the government’s policy and programme that limited the distribution of drugs for the prevention of mother-to-child transmission of MTCT HIV to few health centres as violating the state’s constitutional obligation to fulfil the right of access to health care services for pregnant women and their children as guaranteed under section 27(2) of the Bill of Rights. The Constitutional Court agreed with TAC and ordered the state to ‘implement within its available resources a comprehensive and coordinated programme’ to address HIV issues. The Court further decided that the state must devise reasonable, effective and progressive measures for the

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<sup>144</sup> S Liebenberg S Liebenberg ‘Violations of socio-economic rights: the role of the South African human rights commission’ in P Andrews and S Ellmann (eds) *Post-apartheid constitution’s perspectives on South Africa’s basic law* (2001)408-9.

<sup>145</sup> D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in D Brand and C Heyns (eds) *Socio-economic rights in the South Africa* (2005) 157.

<sup>146</sup> Section 7(2) of the Constitution of South Africa 1996.

<sup>147</sup> Case no. CCT 37/96 (1996).

<sup>148</sup> (2000) ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

<sup>149</sup> (CCT8/02) (2002) ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR.

prevention of MTCT, including counselling and testing pregnant women for HIV, removing the barriers preventing drugs from being distributed widely and permit and facilitate the availability and use of medication. In contrast, in *Sobramoney v Minister of Health Kwazulu-Natal*,<sup>150</sup> the plaintiff challenged the policy of a public hospital excluding a terminally ill patient from receiving an emergency life-sustaining dialysis treatment under section 27 of the Constitution of South Africa 1996. While affirming the justiciability of socio-economic rights, the Constitutional Court however, held that the reasonable medical decisions of doctors and administrators faced with limited financial resources cannot be reversed in spite of a constitutional guarantee of the right of access to healthcare or to emergency medical treatment.

Thus, the reasonability of the measure or action taken by the state is the central question. In *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg (Occupiers of 51 Olivia Road case)*,<sup>151</sup> the Constitutional Court stated that a decision, action, or measure taken on behalf of beneficiaries could be unreasonable if the beneficiaries were not taken into confidence through meaningful engagement prior to the decision, action or measure. Here, the plaintiffs sought to halt an otherwise legal government eviction of people residing in unsafe buildings in Johannesburg. The Constitutional Court, in granting the plaintiff's plea against eviction, held that the obligation on the state to provide a comprehensive social programme includes initiating a meaningful process of engagement with the affected community, which it describes as a two-way process for resolving socio-economic rights disputes. This case, as Christiansen has observed, is of great practical value to the extent that it further limits the government's capacity to evict legal and illegal home occupants until the exhaustion of good faith negotiation between the parties which would result in positively securing the interest of the complainants is reached.<sup>152</sup>

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<sup>150</sup> (1997) (1) SA 763 (CC); 1997(12) BCLR 1696 (CC).

<sup>151</sup> Case no 24/07 (2008) ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

<sup>152</sup> Christiansen (n 2 above) 383.

Similarly, in the well-known case of *Beja and Others v Premier of the Western Cape and Other (Beja's case)*,<sup>153</sup> the residents of Makhaza settlement approached the Western Cape High Court for a declaration that the open toilets provided by the city of Cape Town were a violation of their constitutional right to dignity and also for an order compelling the city to enclose all 1316 open toilets. In finding for the plaintiffs, the Constitutional Court held that the city's decision to install unenclosed toilets without prior meaningful engagement was unreasonable, unfair, and unlawful for violating the privacy and dignity rights of the people under the Constitution.<sup>154</sup>

Furthermore, in *Head of Department, Department of Education Free State Province v Welkom High School and Another (Welkom High School case)*,<sup>155</sup> the Constitutional Court, after directing the respondents to review their pregnancy policies, ordered the parties to enter into meaningful engagement to give effect to the remedy granted.

The issue of meaningful engagement, as van der Burg has correctly points out, is closely connected to the accessory rights of ordinary people to the enjoyment of socio-economic rights. He asserts that 'without proper consultation and the understanding of the needs of communities, effective fulfilment of socioeconomic rights will fail.'<sup>156</sup> Furthermore, Brian sees meaningful engagement as an 'important tool for norm development and enforcing socio-economic rights outside of courts' decisions.<sup>157</sup> Muller,<sup>158</sup> as well as Chenwe and Tissington<sup>159</sup> express the positive view that the process not only increases understanding among disputants but also offers a more reliable, acceptable and enduring

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<sup>153</sup> *Beja and Others v Premier of the Western Cape and Others* (2011) 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC).

<sup>154</sup> *Beja's case* (n 153 above) para 143.

<sup>155</sup> Unreported Case no CCT 103/12 (2013) ZACC 25.

<sup>156</sup> A van der Burg 'Application of international law in South African case law and the importance of ratification of the ICESCR' (2012) 13 *Economic and Social Rights Review* 9.  
R Brian 'Extending the shadow of the law: using hybrid mechanisms to develop constitutional norms in socio-economic rights' (2009) 3 *Utah Law Review* 797 842; R Brian 'Engagement's possibilities and limits as a socioeconomic rights remedy' (2010) 9 *Washington University Global Studies Law Review* 399 401-424.

<sup>158</sup> G Muller 'Conceptualizing 'meaningful engagement' as a deliberative democratic partnership' in S Liebenberg and G Quinot (eds) *Law and poverty: perspectives from South Africa and beyond* (2012) 300 308.

<sup>159</sup> L Chenwe and K Tissington *Engaging meaningfully with government on socio-economic rights: a focus on the right to housing* (2010) 10.



socialization of socio-economic rights in South Africa. Arguably, these views are correct considering the negotiated outcome of the *Occupiers of 51 Olivia Road* case, where the parties mutually agreed to a settlement that stopped the City not only from evicting the occupants but also obliged it to take positive measures to improve the habitation of the affected buildings with the provision of sanitation services, water and functioning toilets, in addition to refurbishing several other buildings in the inner-city as security against eviction.<sup>160</sup>

Thus, the issue has since been settled in accord with the jurisprudence of the Constitutional Court that although socio-economic rights obligations are substantially dependent on the availability of resources, the state cannot hide under the resource burden to neglect their implementation; it must initiate, adopt and implement reasonable and comprehensive measures to advance the progressive realization of these rights. These measures include broad policy-based programmes that give particular attention to the most vulnerable, including entering into dialogue with those most affected and incorporating their concerns and priorities before the implementation of any social policy, decision or action. Furthermore, the South African Constitution, as Brand and Heyns have noted, goes beyond the recognition of socio-economic rights as substantive human rights to make them enforceable not only by the courts but also by the SAHRC.<sup>161</sup> Therefore, given the specific mandate of the SAHRC, the Constitution and the affirmative jurisprudence of the Constitutional Court on deliberative resolution of disputes constitute primary and fundamental legal sources for the SAHRC to effectively advance the implementation of socio-economic rights in South Africa.<sup>162</sup>

#### **5.4.3. International and regional treaties on socio-economic rights**

South Africa is a party to a number of international and regional human rights treaties that guarantee social economic rights. These treaties include: the CEDAW, the CERD, the CRC, the CMW and the African Charter. South Africa is also a party to the

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<sup>160</sup> Settlement agreement between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg (2007) paras 2-6 (copy on file with the researcher).

<sup>161</sup> Brand and Heyns (n 144) 166.

<sup>162</sup> Muller (n 158 above) 308.

Convention and Protocol Relating to the Status of Refugees, the African Union (AU) Convention Governing Specific Aspects of Refugee Problems in Africa.<sup>163</sup> However, it has signed the ICESCR but failed to ratify it despite cabinet's approval in 2013.<sup>164</sup> It has also not ratified the OP-ICESCR.

Under the Constitution of South Africa 1996, international and regional treaties are legally effective within the domestic legal framework only after domestication.<sup>165</sup> However, South Africa is yet to domesticate any of the international treaties relating to socio-economic rights, thereby rendering international and regional treaties nominally relevant as sources for advancing the implementation of socio-economic rights within the domestic legal framework.<sup>166</sup>

While the comprehensive constitutionalization of socio-economic rights might make recourse to external legal sources for these rights less significant, scholars strongly disapprove of the refusal of South Africa to ratify the ICESCR and the OP-ICESCR. According to Chenwe and Hardowar, the ICESCR and the OP-ICESCR are the most important international treaties on socio-economic rights the ultimate aim of which is to enhance the implementation of socio-economic rights.<sup>167</sup> Thus, the failure to ratify these treaties effectively denies ordinary South Africans the opportunity to proceed with the quest for socio-economic justice at the international level when disappointed by the domestic legal and institutional frameworks, adding that the Bill of Rights is not a substitute for the ICESCR since there are remarkable differences between the two legal instruments regarding the normative prescriptions and the state obligations they impose.<sup>168</sup> Van der Burg argues along similar lines, noting apart from serving as an additional platform for putting international pressure on the country to ensure implement

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<sup>163</sup> Brand and Heyns (n 144 above) 154.

<sup>164</sup> See statement on cabinet meeting 10 October 2013 available at <http://www.gcis.gov.za/content/newsroom/media-releases/cabstatements/11Ict2012> (accessed 13 April 2014).

<sup>165</sup> Section 231(2) of the 1996 Constitution of South Africa.

<sup>166</sup> Tissington (n 95 above).

<sup>167</sup> L Chenwe and R Hardowar 'Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol' (2010) 11 *Economic and Social Review* 3.

<sup>168</sup> Chenwe and Hardowar (n 167 above) 4.

socio-economic rights, that the ratification of these treaties has the potential to influence domestic changes in legislation and policies to conform to the established international standards, as well as effectively enhancing South Africa's burgeoning jurisprudence on the domestic implementation of socio-economic rights.<sup>169</sup>

One cannot agree more with the arguments supporting the need for South Africa to ratify the ICESCR and the OP-ICESCR because doing so will give greater impetus to the demand for the implementation of socio-economic rights as affirmatively expressed by both the spirit and the letter of the Constitution by ordinary people and stakeholders alike, including the SAHRC and NGOs. As it stands now, these fundamental legal instruments remain weak as sources for advancing the implementation of socio-economic rights in South Africa, although their influence cannot also be ignored. Putting pressure on the state to ratify the ICESCR and OP-ICESCR is one of the tasks the SAHRC has to accomplish as part of its strategy to facilitate the practical implementation and enjoyment of socio-economic rights in South Africa.

#### **5.4.4. National laws, policies and programmes**

Since South Africa's transition from apartheid to constitutional democracy, it has adopted various laws and policies that relate directly to the implementation of socio-economic rights. Most of these laws and policies were adopted by the state in furtherance of the constitutional obligation to implement socio-economic rights. For instance, the following laws and policies exist in the areas of housing rights: the Development Facilitation Act 67 of 1995, the Housing Act 107 of 1997, which gave legislative effect to the White Paper on Housing; the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998, the Rental Housing Act 50 of 1999, the Home Loan and Mortgage Disclosure Act of 2000, the National Housing Code 2000, the White Paper on Housing and comprehensive plan for the development of sustainable Human Settlements (2004); the Housing Development Agency Act 23 of 2008, and the Social Housing Act 16 of 2008. These laws, policies and plans were enacted and adopted for the purpose of actualizing

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<sup>169</sup> Van der Burg (n 156 above) 10.

the state's constitutional obligation under section 26 of the Constitution to ensure access to adequate housing for all South Africans.<sup>170</sup>

Similarly, the following domestic laws and policies exist to translate the right to have access to health care services into reality in the lives of ordinary South Africans: the National Drugs Policy for South Africa 1996; the Medical Schemes Act 131 of 1998; the White Paper for the Transformation of the Health System of South Africa 1997; the Primary Health Care Package for South Africa 2000; the Patients Charter 2000; and the National Health Act 2003. The National Health Care Act 2003, in particular, presents great optimism for the provision of health care services, including free medical services for pregnant and lactating women and for children below the age of six years.<sup>171</sup> As Tissington notes, these laws and policies are significant for advancing South Africa's implementation of the right to have access to health care services.<sup>172</sup>

The right to education is another area which has seen progressive national laws and policies since 1994. Some of these laws and policies include: the South African Schools Act 84 of 1996, the National Education Policy Act 27 of 1996; the Admission Policy for Ordinary Schools Act 1996, the Exemption of Parents from the payment of Schools Fees Regulation 1998, and the National Policy for HIV/AIDs for Learners and Educators in Public Schools of 1999. The South African Schools Act 1996 was adopted to give effect to the constitutional right to education by guaranteeing compulsory basic education for all learners from ages 7 to 15, or the 9<sup>th</sup> grade.<sup>173</sup>

It also obliges provincial education departments to provide sufficient space in public schools for all learners in their respective provinces. The National Education Policy Act 1996 delineates the different roles the national, provincial governments and school governing bodies are required to play with regard to funding, norms and standards for

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<sup>170</sup> K Tissington 'A review of housing policy and development in South Africa since 1994.' A paper prepared for the Studies in Poverty and Inequality (2010) 81. Available at <http://www.sprii.org.za/agentfiles/434/file/Research> (accessed 2 September 2013).

<sup>171</sup> Section 4 of the National Health Act 2003.

<sup>172</sup> M Pieterse 'Legislative and executive translation of the right to access to health care services' (2010) 14 *Law, Democracy and Development* 10.

<sup>173</sup> Section 3(1) of the South African Schools Act of 1996.

education planning, provision, governance and measurement and evaluation. The Admission Policy for Ordinary Schools Act prohibits the exclusion of any learner from school activities on account of non-payment of schools fees. The National Policy on HIV/AIDS provides guidelines prohibiting discrimination of learners living with or affected by HIV/AIDS.

Furthermore, the following legislation and policies exist on the right to water: the Water Services Act 1997; the National Water Act 1998 which sets out a comprehensive agenda for promoting equitable access to water and the efficient, sustainable and beneficial use of water in the public interest and eliminating inequities in the provision and distribution of water;<sup>174</sup> the National Free Basic Water Policy 2000, which targets the water needs of the most impoverished population by requiring municipalities to provide 6000 litres of water per person per month or 25 litres per day of free water for poor households; the Free Basic Water Implementation Strategy 2003; and the Strategic Framework for Water Services 2003.

Apart from the specific legislation and policies on socio-economic rights, poverty eradication and reduction of inequality has been part of government goals since 1994. Accordingly, apart from being a party to the MDGs and other international commitments on poverty eradication, the state has various policy initiatives on poverty eradication. These include the Reconstruction and Development Programme (RDP) 1994; which was the official economic policy of the ANC that aimed at achieving even distribution of resources in the Country. The RDP was replaced by the Growth, Employment and Reconstruction (GEAR) 1996; which introduced Black Economic Enforcement and Affirmation Action (BEE) and was also intended to achieve economic growth that will trickle down to the poor.

Furthermore, the state introduced the Integrated and Sustainable Rural Development Programme (ISRDP) 2001; the Accelerated and Shared Growth Comprehensive Rural Development Programme (2010); and the most recent National Development Plan (NDP)

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<sup>174</sup> Section 2 of the National Water Act of 1998.

2011. Generally, the NDP is anchored in a vision to eliminate poverty and reduce inequality by 2030 through job creation; expanding infrastructure; transitioning to a low-carbon economy; transforming urban and rural spaces; improving education and training; providing quality health care; building a capable state; fighting corruption and enhancing accountability.

Evidently, the issue in South Africa is not about lack of necessary legislation and policies on socio-economic rights; it is more about translating the existing legislation and policies into practical reality. Thus, while the laws create legally enforceable rights and obligations on socio-economic rights, the policies embody the realization of socio-economic rights if effectively implemented.<sup>175</sup> Therefore, they constitute veritable sources on socio-economic rights over which the SAHRC can carry out oversight and monitor their implementation by the state.

#### **5.4.5. The specific mandate of the SAHRC on socio-economic rights**

Section 184(3) of the 1996 Constitution of South Africa provides:

Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

As the 1994 historic transition ushered in a new beginning for a South Africa, the country was confronted with serious human rights challenges, including extensive economic and social inequalities, grinding mass poverty, especially among the formerly oppressed black population and a high crime rate.<sup>176</sup> As Liebenberg notes, the systematic violation of the socio-economic rights was an integral part of the legacy of apartheid which manifested in millions of South Africans living in deplorable conditions of poverty, lack of adequate

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<sup>175</sup> SA Whiteng and A Salmons 'Parliament's role in overcoming structural poverty in South Africa' A conference paper presented Johannesburg on *overcoming poverty in South Africa: towards inclusive growth and development* on 20-22 August 2010 5.

<sup>176</sup> Terreblanche (n 1 above) 30.

sanitation, water, decent housing, quality education, health care, decent employment and social security.<sup>177</sup>

Thus, socio-economic rights were entrenched in the 1996 Constitution of South Africa because of the need and their potential for achieving restorative justice by improving the lives of vast majority of South Africans. The crucial question the Constitution further addresses is how to ensure the implementation of these rights and achieve the basic constitutional objective behind the Bill of Rights. Therefore, section 184(3) of the Constitution is one of the clearest expressions of a constitutional intention to nudge the practical realization of socio-economic rights through the instrumentality of the SAHRC.

The nature and justification for special mandate of the SAHRC on socio-economic rights attracted considerable interest and attention among human rights scholars in the early years of its existence. Heyns (1999);<sup>178</sup> Liebenberg (2001);<sup>179</sup> Newman (2003);<sup>180</sup> Klaaren (2005);<sup>181</sup> Hosten (2006);<sup>182</sup> and Murray (2008)<sup>183</sup> are among several commentators justifying the special mandate as one of great importance and viable enough as a mechanism for facilitating the progressive realization of socio-economic rights in South Africa for the disadvantaged.

There is no doubt about the significance of the section 184(3) functions of the SAHRC, which are unparalleled in the history of NHRIs in the world. Heyns sees this section as the domestication of the international reporting procedure as provided under the ICESCR, which essentially imposes a duty of justification on the part of state organs and a system

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<sup>177</sup> S Liebenberg 'The protection of economic and social rights in domestic legal systems' in Eide, A et al (eds) *Economic, social and cultural rights* (2001) 53 83.

<sup>178</sup> C Heyns 'Taking socio-economic rights seriously: The "reporting procedure" and the role of the South African human Rights commission in terms of the new constitution' (1999) 30 *De Jure* 195 197.

<sup>179</sup> S Liebenberg (n 143 above) 405.

<sup>180</sup> DG Newman 'Institutional monitoring of social and economic rights: A South African case study and a new research agenda' (2003) 19 *South African Journal on Human Rights* 189 199.

<sup>181</sup> J Klaaren 'A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights' (2005) 27 *Human Rights Quarterly* 539 543.

<sup>182</sup> D Horsten 'The role played by the SAHRC's economic and social rights reports in good governance in South Africa' (2006) 2 *Potchefstroom Electronic Report* 3.

<sup>183</sup> Murray (n 14 above) 15-17.

of monitoring on the part of the SAHRC.<sup>184</sup> He notes that as the domestic equivalent of the reporting procedure, state organs are constitutionally obliged to report to the SAHRC upon request on what they have done or are doing to implement socio-economic rights.<sup>185</sup>

Heyns is correct in his analysis. It has emerged that the constitutional section 183(4) mandate is more demanding on the Commission than the international reporting procedure is on the CESCR. Thus, unlike the CESCR that waits for states to submit their periodic reports on socio-economic rights, in the case of section 183(4) of the Constitution, the Commission is required to commit significant amount of time, attention, and resources to comprehensively monitor the implementation of socio-economic rights, at least once in every year. Furthermore, the special mandate is additional to the Commission's general function to routinely monitor and report on the implementation of socio-economic rights.

The SAHRC plays an active role by requesting and ensuring that the relevant information is provided by the relevant state departments. It evaluates and processes the available information into the section 184(3) report, which it submits to Parliament. As Liebenberg notes, evaluating the supplied information enables the SAHRC to identify structural patterns of violation of socio-economic rights and bring them to the attention of the state for action thereby promoting socio-economic rights accountability among the responsible organs of the state.<sup>186</sup>

Therefore, the special socio-economic rights monitoring function is not simply about complying with a constitutional obligation, it is about ensuring the practical implementation of socio-economic rights for the benefit of all South Africans, particularly the poor and the vulnerable, by determining the extent to which state organs have implemented these rights; determining the reasonability of the measures which state departments and agencies have adopted to ensure that these rights are realized; and

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<sup>184</sup> Heyns (n 178 above) 207.

<sup>185</sup> N Ntlama 'Monitoring the implementation of socio-economic rights in South Africa: some lessons from the international community' (2004) 8 *Law, Democracy and Development* 214.

<sup>186</sup> Liebenberg (n 175 above) 83.



making relevant recommendations for the development and realization of these rights.<sup>187</sup> Thus, the relevance and effectiveness of the section 184(3) mandate of the SAHRC lie in its ability to use it to making socio-economic rights a reality in the daily lives of disadvantaged groups.<sup>188</sup>

For Newman the section 184(3) special mandate confers an enormous responsibility on the SAHRC which is not easy effectively to accomplish.<sup>189</sup> Apart from the burden of carrying out the exercise every year across all three levels of government, which entails enormous financial and human capacity, the SAHRC must receive adequate cooperation from the state and the relevant line departments for it to effectively execute this mandate.<sup>190</sup> Arguably, the SAHRC has not overcome these challenges which have evidently impaired its ability and impact so far. However, in spite of the noticeable challenges, most people interviewed by the study consider the the section 184(3) mandate of the SAHRC as very relevant and wish that it is creatively applied to advance the implementation of socio-economic rights in South Africa.

## **5.5. The strategies, effectiveness and impact of the SAHRC in advancing socio-economic rights implementation**

The SAHRC executes its mandate to advance the implementation of socio-economic rights through a number of identifiable strategies which this section evaluates in terms of its constitutional and statutory responsibility to advance the effective implementation of these rights.

### **5.5.1. Monitoring socio-economic rights implementation by state departments**

The SAHRC continues to specifically monitor the implementation of socio-economic rights in South Africa as a way to advance their implementation. Although it routinely monitors the observance of human rights under its general human rights mandate,

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<sup>187</sup> SAHRC 8<sup>th</sup> section 184(3) Economic and Social Rights Reports 2012 13-14.

<sup>188</sup> D Brand and S Liebenberg 'The second economic, social and cultural rights reports' (2000) 2 *Economic and Social Rights Review* 2 16.

<sup>189</sup> Newman (n 180 above) 195.

<sup>190</sup> SAHRC 8<sup>th</sup> section 184(3) Report on Economic and Social Rights 2011 16.

attention here is greater on its dedicated constitutional mandate to yearly monitor the state's implementation of socio-economic rights.

Thus, pursuant to this special mandate, the SAHRC collects relevant information by administering customized protocols or questionnaires on relevant state departments at all levels of governance responsible for the delivery of public services in the areas of housing, health care, food, water, social security, education and the environment.<sup>191</sup> However, in 2009 it abandoned the administration of questionnaires and, instead, conducted public hearings.<sup>192</sup> It reportedly reverted to the former in the 2011 exercise.<sup>193</sup> The protocols, which were adapted from the international reporting instruments on human rights, usually request the departments to provide information on the measures they have taken in terms of legislation, policies, administrative actions, projects, and programmes to further the actualization of these rights; the actual outcome or progress made from these measures and the challenges of implementation.<sup>194</sup>

The SAHRC then evaluates the information it has received from the departments against the established human rights standards to determine the extent to which these rights are being implemented.<sup>195</sup> According to Saal, the SAHRC also uses relevant information from independent sources, such as findings from fieldworks, research works and conclusions from public consultations, to evaluate the information supplied by the departments.<sup>196</sup>

Generally, the evaluation considers such issues as the existence or lack of necessary framework laws, policies and programmes on these rights, the reasonableness or otherwise of these laws, policies and programmes if available and budgetary allocations

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<sup>191</sup> These include Agriculture, Basic Education, Environmental Affairs and Tourism, Housing, Minerals Energy, Local and Provincial Government, Water Affairs and Forestry, Rural Development and Land Affairs, Health and Social Development: SAHRC Report on Economic and Social Rights 2006-2009 6; Section 184(3) of the 1996 Constitution of South Africa..

<sup>192</sup> SAHRC Report on Economic and Social Rights 2006-2009 7.

<sup>193</sup> SAHRC Report on Economic and Social Rights 2012 14.

<sup>194</sup> SAHRC Report on Economic and Social Rights 2006-2009 5.

<sup>195</sup> SAHRC Report on Economic and Social Rights 2006-2009 7.

<sup>196</sup> Saal (n 108 above).

to departments for social funding and effective utilization of such allocations by the various departments to implement these rights. It then makes specific findings on each of the socio-economic rights in respect of what the responsible departments have done or are not doing to implement these rights. Finally, it compiles the findings and recommendations in a composite report, tagged the ‘Social and Economic Rights Report’ which it presents to the National Assembly and also circulates to the general public.<sup>197</sup>

From 1996 to date, the SAHRC has carried out eight socio-economic rights monitoring exercises and correspondingly produced and submitted eight Economic and Social Rights Reports to the South African Parliament.<sup>198</sup> As mentioned above, the entire exercise is equivalent to carrying out a performance audit on state departments responsible for socio-economic rights implementation. Thus the methodology, content and outcome of the exercise and the reports have been fairly similar.

In the 2006-2009 combined report, as with previous reports, the SAHRC acknowledged the availability of the necessary legislative and policy framework on socio-economic rights implementation and reiterated the recognition of some noticeable progress the state has recorded in the implementation of these rights, particularly the right of access to education, the right to social security and assistance and the right to water and sanitation when benchmarked against the MDGs indicators and targets. For instance, it argued that primary school enrolment was about 98 per cent, municipalities are delivering clean water at no financial costs to poor households, social security and assistance were increasingly being accessed by the registered indigents, health care services were relatively available and accessible to everybody including the poor, and South Africa was satisfying its immediate food needs.<sup>199</sup>

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<sup>197</sup> Report on Economic and Social Rights 2006-2009 2.

<sup>198</sup> The first exercise covered the period 1994 to 1998 and the report was published in 1998. The second exercise covered the period 1998-1999 but the report was published in 2000. The third exercise covered the period 1999 to 2000 and the report was released in 2001. The fourth exercise covered the period 2000 to 2001 and the report was released in 2002. The fifth exercise covered the period 2002 to 2003 and the report was published in 2004. The sixth exercise covered the period 2004 to 2006 and the report was released in 2007, and the seventh exercise covered the period 2006 to 2009 and the report was released in 2010. The eighth exercise covered the period 2011 and the report was published in 2012.

<sup>199</sup> SAHRC Economic and Social Rights Report 2006-2009 166.

However, on the negative side, the report identified four basic impediments to the expeditious realization of socio-economic rights in South Africa. These were the government's misunderstanding of its constitutional obligation to progressively realize rights; inadequate public participation processes and access to information which resulted in lack of understanding of the right-based approach to service delivery; social exclusion of the poor and vulnerable groups; and weak capacity of government departments to deliver on their intended outputs.<sup>200</sup> Consequently, these impediments have resulted in making access to education physically and economically challenging to children from poor and vulnerable backgrounds.<sup>201</sup> Similarly, health care services remain substantially inaccessible, inadequate and expensive, especially for the poor, with high child and maternal mortality rates, an increase in mental health and new HIV infections, shortages in anti-retroviral and other essential medication, emergency transport and long waiting time at clinics.<sup>202</sup>

The SAHRC made similar findings on the right of access to housing, the right to food, the right to social security and assistance, and the right to water. For instance, it argued that lack of awareness of the indigent policy and status has kept children from poor households from benefitting from the existing schemes on social security and access to free water delivery.<sup>203</sup> In concluding, it noted that 'while programmes are put in place to bring services to the people, the most vulnerable are denied their most basic rights, such as the right to food, tenure security and adequate shelter.'<sup>204</sup>

The 2006-2009 combined report also evaluated the state's budgetary allocations to social funding during the period and considered the trend to be retrogressive. It identified inadequate financial allocations; under-spending of allocated funds by departments, inefficient funds utilization, and dislocated state priorities on quality services as some of

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<sup>200</sup> SAHRC Economic and Social Rights Report 2006-2009 167.

<sup>201</sup> SAHRC Economic and Social Rights Report 2006-2009 168.

<sup>202</sup> SAHRC Economic and Social Rights Report 2006-2009 106.

<sup>203</sup> SAHRC Economic and Social Rights Report 2006-2009 106.

<sup>204</sup> SAHRC Economic and Social Rights Report 2006-2009 106.

the issues that the state needed to address within the budgetary framework.<sup>205</sup> It attributed the disconnection between strategic planning and policy implementation as the major factor for the inability of government departments to deliver on their intended outputs.<sup>206</sup>

As in 2006-2009 and previous reports, similar themes, arguments, findings and conclusions dominated the content of the 8<sup>th</sup> Economic and Social Rights Report (2012). A general introduction of the state's legal obligation to implement socio-economic rights is followed by a laborious analysis of existing legislation, policies, and the problems, which in its view, are responsible for the gap between policy and implementation of each of the rights under review. The final segment provides general remedial recommendations directed at the respective departments to implement.<sup>207</sup> The SAHRC claimed that its latest Economic and Social Rights Report 'represents an extension of the findings and recommendations'<sup>208</sup> of the 2006-2009 exercise but it merely reproduced the same recommendations in the new report. In other words, the state apparently did nothing to address the previous recommendations hence they have to be reproduced as new recommendations in the new report.

As Murray notes, the socio-economic rights monitoring process and the accompanying report epitomize the contribution of the SAHRC to ensuring governmental accountability 'through influence rather than enforcement.'<sup>209</sup> She further views the outcome of the monitoring process as 'legitimate and authoritative accounts' of government records or activities, which are relevant to citizens and Parliament for scrutinizing government's performance.<sup>210</sup> Murray is substantially correct, but it is difficult to identify the extent to which the SAHRC has been able to influence state accountability with its report when it lacks the powers to enforce its recommendations, if they are not willingly complied with.

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<sup>205</sup> SAHRC Economic and Social Rights Report 2006-2009 171-174.

<sup>206</sup> SAHRC Economic and Social Rights Report 2006-2009 106.

<sup>207</sup> SAHRC Economic and Social Rights Report 2012 1-60.

<sup>208</sup> SAHRC Economic and Social Rights Report 2012 16-17.

<sup>209</sup> Murray (n 14 above) 133.

<sup>210</sup> Murray (n 14 above) 132.

The Parliamentary ad hoc Committee on Chapter 9 Institutions also held the view that the Economic and Social Rights Reports are useful for drawing governments' attention to identified deficiencies in laws, policies and programmes for securing the implementation of these rights.<sup>211</sup> Khoza posits that the reviews or comments from civil society groups and opposition parties on the findings may result in the 'naming and shaming' of badly performing state departments and officials.<sup>212</sup> Newman notes that both the process and the reports are useful mechanisms for advancing public knowledge and awareness of these rights and the legal obligations they entail.<sup>213</sup>

According to the SAHRC, section 184(3) entails two duties: to find out the policies, legislation, administrative and budgetary measures the state has or is using to realize socio-economic rights and to recommend interventions for ensuring the progressive realization of these rights.<sup>214</sup> Thus, section 184(3) is relevant essentially as an expository process with a potential for impacting positively on socio-economic rights implementation. However, the effectiveness of the mechanism is dependent on a number of factors. As Tissington notes, since the findings and recommendations must be deduced from information submitted by government departments, the credibility of both the information received and the evaluation process is important.<sup>215</sup> According to her, this problem is largely solved if both processes are allowed to be critically participatory and inclusive of credible NGOs.<sup>216</sup> More importantly, the SAHRC needs the cooperation of the government departments and the commitment of the state to implement the relevant recommendations. However, she argues that these factors are hardly visible in the way and manner the SAHRC has carried out the monitoring of socio-economic rights implementation so far, hence its perceived ineffectiveness.<sup>217</sup>

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<sup>211</sup> The parliamentary ad hoc committee report on Chapter 9 institutions (n 38 above) 180.

<sup>212</sup> S Khoza 'Do socio-economic rights require different monitoring and advocacy strategies from other rights? A review of selected sections in the Human Rights Quarterly' (2005) 6 *Economic and Social Rights Review* 16.

<sup>213</sup> Newman (n 180 above) 199.

<sup>214</sup> SAHRC written responses (n 93 above) 2.

<sup>215</sup> Tissington (n 95 above).

<sup>216</sup> Tissington (n 95 above).

<sup>217</sup> Tissington (n 95 above)

Tissington's argument is not exactly new as Klaaren had also viewed the entire socio-economic rights monitoring process as one that had settled into a consistent pattern that neither the SAHRC nor its closest NGO and academic partners appear to be comfortable with.<sup>218</sup> What is new perhaps is the fact that the initial excitement and heightened expectation that heralded the introduction of the mechanism has degenerated to such an extent that all stakeholders, including even the SAHRC appears to be losing interest in its utility.

For instance, while the first five monitoring exercises were done annually as required by the Constitution, the sixth and seventh exercises were carried out after three intervening years respectively. This alone is inconsistent with the constitutional requirement that the exercise be carried out annually. Only recently, the SAHRC acknowledged that its 'original strategy of developing an economic and social rights report every three years does not do justice to its critical monitoring mandate.'<sup>219</sup>

Furthermore, 17 years later, the SAHRC is still experimenting on the appropriate methodology to apply: hence it moved from the use of protocols to holding public hearings and has come back to the use of protocols to gather relevant information from government departments.<sup>220</sup> The credibility question continues to taint the outcome following its much criticized practice of insulating the responses from the government departments to critical scrutiny by civil society and other relevant stakeholders.<sup>221</sup>

For Elroy the fact that it is the SAHRC alone that drives and determines everything about the exercise, including prioritizing the 'needs' of people without involving civil society from planning to execution, leaves much to be desired about its approach to the execution of the mandate and the credibility of the outcome.<sup>222</sup> Even Kollapen, its former Chairperson, conceded to this view and further asserted that 'no reporting process can

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<sup>218</sup> Klaaren, (n 181 above) 550.

<sup>219</sup> SAHRC written responses (n 93 above) 2.

<sup>220</sup> SAHRC Economic and Social Rights Report 2012 15.

<sup>221</sup> Newman (n 180 above) 198.

<sup>222</sup> Elroy (n 62 above).

have credibility without the participation of society's other reporting stakeholders.'<sup>223</sup> Thus, although there is no total exclusion of civil society involvement in the socio-economic rights monitoring process, it has always been at a minimal level in spite of the fact that the most critical issue, as Brand notes, is about having a credible report that can influence the course of things. This position is impossible under the continuous marginalization of civil society to the fringes in the socio-economic rights monitoring process and exercise.<sup>224</sup>

Most seriously, the SAHRC continues to grapple with poor responses to its protocols by government departments. According to it, in 2004, four out of nine government departments, namely, Correctional services, Health, Agriculture, and Housing, failed to make submissions.<sup>225</sup> Again, in 2009, four out of the nine provinces, namely, Eastern Cape, Northern Cape, KwaZulu-Natal, and the Free State, failed to make submissions to the public hearings.<sup>226</sup> Yet again, in 2011, it recorded the worst snub from the responsible departments: of 9 departments, only 3 namely, Housing, Social Security and Environment, responded to the protocols.<sup>227</sup> Thus the 8<sup>th</sup> SAHRC socio-economic rights monitoring exercise evaluated only these three rights, as there were no entries in the report on the right to education, the right of access to health, the right to food, the right to access to water and the right to access to land.<sup>228</sup>

According to Kateke it is unfortunate for the SAHRC to allow the process to degenerate to the level where over 60 per cent of the relevant line departments could wilfully neglect to co-operate with it in the performance of its constitutional function; a situation that clearly shows the diminishing relevance of the section 184(3) procedure.<sup>229</sup> For Tissington, the unwillingness, inability or refusal to invoke its powers to compel

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<sup>223</sup> J Kollapen 'Not only the business of the state but also a business of all: state reporting in South Africa and popular participation' (2011) 15 *Law and Development* 414 522.

<sup>224</sup> Brand, D 'South African human rights commission' (1998) 2 *Economic and Social Rights Review* 11; Ntlama (n 185 above) 216.

<sup>225</sup> SAHRC Economic and Social Rights Report 2012 15.

<sup>226</sup> SAHRC Economic and Social Rights Report 2012 15.

<sup>227</sup> SAHRC Economic and Social Rights Report (2012) 15.

<sup>228</sup> SAHRC Economic and Social Rights Report (2012) 1.

<sup>229</sup> Interview with Violet Kateke, Paralegal SECTION 27, South Africa, Johannesburg 3 October 2013.



departments to comply with its request for information is indicative of a fast diminishing interest on the part of the SAHRC in the utility of the of the socio-economic rights monitoring mechanism.<sup>230</sup>

Another discernible challenge is on the attitude of the SAHRC towards its own findings and recommendations. It seems to be content with mechanically abstracting reports and transmitting them to Parliament without using the findings to advance the realization of these rights. For instance, in the 7<sup>th</sup> SAHRC Economic and Social Rights Report (2006-2009), the SAHRC identified the lack of government's conceptual misunderstanding of its socio-economic rights obligations, the lack of awareness of these rights and the lack of adherence to the rights-based approach to service delivery as major impediments to the realization of socio-economic rights in South Africa. Arguably, these are issues that clearly fall within its primary mandate to address through effective education and training. Yet, it prefers to pass the buck to the departments instead of accepting responsibility for its obvious failures. As Molapisi notes, 'this Commission keeps turning out reports upon reports without telling us what it has achieved regarding the implementation of these rights with the previous reports and recommendations.'<sup>231</sup>

Therefore, it is argued that while the relevance of the section 183(4) mechanism for monitoring and reporting the implementation of socio-economic rights is not in doubt, its practical effectiveness is incapacitated by a combination of factors, including the 'laid-back' approach of the SAHRC to its administration; the alienation of civil society and other stakeholders from the process; the limited capacity of the SAHRC to influence compliance with the process; and the failure of Parliament to consider the reports and enforce compliance with the relevant recommendations. The cumulative effect of these factors is that the section 183(4) mechanisms has largely been reduced to a mechanical process relevant only for collating and processing information furnished by willing departments of government into a report, which is subsequently is sent to Parliament in compliance with the constitutional requirement, and nothing more. This is more so, when

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<sup>230</sup> Tissington (n 95 above).

<sup>231</sup> Molapisi (n 96 above).

nothing else, including follow-up actions, ever happens in response to after the report is published and submitted to Parliament. As Dawson notes, the failure of Parliament to debate the report and invite relevant state departments to respond to allegations of maladministration and lack of service delivery clearly undermines the SAHRC's influence on public accountability through the section 183(4) mechanism.<sup>232</sup>

Interestingly, having identified the shortcomings with its present approach to the monitoring of and reporting on the implementation of socio-economic rights, the SAHRC indicated its willingness to address the inadequacies by producing two reports annually from 2013: a Social and Economic Rights Report under section 184(3) of the Constitution, and Strategic Focus Area Report, which will report the real lived experience of the most vulnerable population and the various gatekeepers to the realization of socio-economic rights. It also declared to be more 'pro-active in terms of its recommendations and securing appropriate redress where human rights have been violated.'<sup>233</sup> However, the extent to which this new approach will be effective is unclear, given its pessimistic view about the state's lack of 'political will to create the social conditions for the realization of socio-economic rights'<sup>234</sup> as well as its persistent failure to effectively respond to social pressures for the progressive realization of these rights.<sup>235</sup>

### **5.5.2. Receiving, investigating and settling socio-economic rights violation complaints**

The SAHRC receives, investigates and resolves socio-economic rights violation complaints. It carries out this function under the Constitution of South Africa 1996, and the Human Rights Commission Act 1994. While the Constitution generally empowers it to investigate and to report on the observance of human rights,<sup>236</sup> the Human Rights Commission Act directly empowers it to either conduct or cause to be conducted any necessary investigation on human rights violations.<sup>237</sup> This function enables the SAHRC

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<sup>232</sup> Dawson (n 59 above).

<sup>233</sup> SAHRC written responses (n 93 above) 3.

<sup>234</sup> SAHRC written responses (n 93 above) 7.

<sup>235</sup> SAHRC written responses (n 93 above) 9.

<sup>236</sup> Section 182(4) of the South African Constitution 1996.

<sup>237</sup> Section 9 of the Human Rights Commission Act of 1994; the preamble of the Act also states that the Commission can 'investigate any alleged violation of human rights.'

to receive, investigate and resolve complaints from individuals or groups alleging the violations of socio-economic rights against any person or authority, including state departments, non-state actors, and corporate persons.<sup>238</sup>

The SAHRC investigates human rights violations either upon the receipt of a complaint to that effect or on its own accord.<sup>239</sup> Although complaints are required to be in writing, complaints made either orally or by the telephone are also accepted, particularly if the urgency of the matter makes it inadvisable to insist on a written complaint.<sup>240</sup> It has no jurisdiction to investigate complaints that border on acts or omissions that occurred before April 1994 or are based on hearsay, rumour or reports disseminated through the media. It will also not consider a complaint if it is written in abusive, insulting, rude or disparaging language. It may decline jurisdiction with respect to complaints already subject to adjudication before a court of law, tribunal, any statutory body, any internal dispute resolution mechanisms, or settled between the parties; or if there is a judgment on the issue in the complaint or finding of a court of law, tribunal, statutory body or other body.<sup>241</sup>

Furthermore, the SAHRC may reject a complaint if it is from an anonymous source, or considered to be frivolous, misconceived, unwarranted, incomprehensible and manifestly incompatible with fundamental rights or does not comply with the provisions of the Act or the procedures or is statute barred, that is lodged after the expiration of three years from when the alleged violation of human rights took place.<sup>242</sup>

Complaints received by it are first screened by the responsible officer to whom it is assigned to determine whether the subject matter falls within its jurisdiction<sup>243</sup> and

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<sup>238</sup> By virtue of its general mandate over the al bill of rights as well as over all state entities, both natural and juristic persons under Section 8 of the 1996 Constitution of South Africa.

<sup>239</sup> Section 3 of the SAHRC Complaint Handling Procedures 2012 Gazette 55 dated 27/1/2012, hereinafter referred to as 'the Complaint Handling Procedure.' See also sections 6 and 7 of the Complaint Handling Procedure. A complaint can be lodged personally or on behalf of another person, group or class of persons, association, organization or organ of state.

<sup>240</sup> Section 9(1) of the Complaint Handling Procedures 2012.

<sup>241</sup> Section 4 of the Complaints Handling procedure 2012.

<sup>242</sup> Section 4 of the Complaints Handling Procedure 2012.

<sup>243</sup> Section 4 of the Complaint Handling Procedures 2012.

whether a prima facie violation of human rights can be established.<sup>244</sup> Although the conditions for excluding a complaint from its jurisdiction appear to be many, the most fundamental condition for admissibility is that the subject matter of the complaint must disclose or be related to the violation of a human right as guaranteed by the Bill of Rights or constituted under international human rights treaties or national legislation.

The ultimate objective of the complaint procedure is to ensure that alleged human rights violations are amicably resolved within a reasonable time frame. To this end the SAHRC readily applies negotiation, conciliation, and mediation to resolve complaints brought before it.<sup>245</sup> Where the parties arrive at a settlement through mediation, conciliation or negotiation efforts, or where its recommendations are accepted, the terms of the settlement reached is reduced into writing and endorsed by the parties to indicate acceptance. The parties are expected to accept and respect the settlement agreement as binding and to comply willingly.<sup>246</sup> The SAHRC asserts that its findings and settlements are almost always accepted, although they may not be applied.<sup>247</sup> However, it could, where necessary, submit the outcome of such settlement to other relevant bodies.<sup>248</sup>

Over the years the SAHRC has applied the complaint process to successfully resolve socio-economic rights violation complaints. Indeed, it even claims that complaints over the violation of the rights to housing, health care, food, water and social security are among the top ten most frequent complaints in its records.<sup>249</sup> Although not adequately disaggregated in its records, the SAHRC reportedly dealt with numerous socio-economic rights violation issues, such as unlawful expulsion from school;<sup>250</sup> unlawful suspension of

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<sup>244</sup> Section 12(7) of the Complaint Handling Procedures 2012.

<sup>245</sup> Section 15 of the Complaint Handling Procedures 2012.

<sup>246</sup> Thipanyane (n 70 above) 19-20.

<sup>247</sup> Musuva (n 7 above) 25.

<sup>248</sup> Section 15 of the South African Human Rights Commission Act of 1994.

<sup>249</sup> CV Maclain 'The SA human rights commission and socio-economic rights: facing the challenges' (2002) 3 *Economic and Social Rights Review* 3-9; C Musuva (n 7 above) 24. For instance, out of the 647 complaints the Commission treated between 2006 and 2007, twenty six were on the right to education, thirty were on healthcare, food, water and social security, while twenty eight, nine and fifty-five were on housing, environment and equality respectively.

<sup>250</sup> *Mpeta, V Cambridge High School* EC/2010/0319 (unreported) See SAHRC Annual Report 2011 28.

school feeding;<sup>251</sup> unlawful suspension of school transport;<sup>252</sup> expulsion from school on account of pregnancy;<sup>253</sup> refusal to readmit a learner who failed matric examinations;<sup>254</sup> discrimination in school for communicating in local language;<sup>255</sup> lack of access to conducive school building;<sup>256</sup> ill-treatment in school for being an albino;<sup>257</sup> poor living conditions of disabled learners in special schools;<sup>258</sup> the right of disabled fishermen to have access to reserve fishing grounds to carry out fishing activities;<sup>259</sup> environmental degradation and health hazard;<sup>260</sup> demolition of a tuck-shop belonging to a foreign national;<sup>261</sup> keeping mental health patients in prisons instead of appropriate institutions as provided by the Mental Health Act;<sup>262</sup> denial of health services by a clinic for refusing forced HIV testing;<sup>263</sup> unlawful evictions;<sup>264</sup> denial of access to housing;<sup>265</sup> and denial of access to water.<sup>266</sup>

According to the SAHRC, it successfully mediated or negotiated mutually accepted settlements in all these complaints and restored the complainants to the enjoyment of socio-economic rights they were unlawfully denied. For instance, an unlawfully evicted widow was restored to her common home,<sup>267</sup> water services were restored to a community,<sup>268</sup> and learners expelled from school on account of pregnancy were re-admitted, all on account of the successful intervention of the SAHRC through the complaint procedure.<sup>269</sup> Furthermore, both Kateke and Tissington confirm that it

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251 *SAHRC v Department of Education* (unreported) See SAHRC Annual Report 2011 28.  
 252 SAHRC Department of Education: SAHRC Annual Report 2011 28.  
 253 SAHRC Annual Report 2011 28.  
 254 *Tshweu v Bergsig Academy* NW/2011/002; SAHRC Annual Report 2011 28.  
 255 *Nxasana Roosevelt High School*; SAHRC Annual Report 2011 28.  
 256 *School Governing Body, Lumko Senior Secondary School v Department of Education* EC/2010/0416.  
 257 *Betela F v Crewe Primary School* EC/2010/0436  
 258 SAHRC Annual Report 2011 28.  
 259 *Neville Beiling v Buffalo City Municipality* EC/2010/0297.  
 260 *Bapong community v Madibeng Municipality* NW/2010/0191.  
 261 *Luka Village demolitions v Royal Bafokeng Administration* NW/2010/0198.  
 262 *Lombard v Department of Health*: SAHRC Annual Report 2011 32.  
 263 *North West Klipgat clinic matter*: SAHRC Annual Report 2011 28.  
 264 *Boshoek farm community v Royal Bafokeng Administration* NW/2011/0004.  
 265 *Deeyone De Koker Kheis Municipality*; SAHRC Annual report 2011 32.  
 266 *Esteenskuil Boereverengiging v Northern Cape*; SAHRC Annual Report 2011 28.  
 267 *Frangeline Dikgale v Limpopo*; SAHRC Annual Report 2011 28.  
 268 *Esteenskuil Boereverengiging v Northern Cape*; SAHRC Annual Report 2011 28.  
 269 *Tshweu v Bergsig Academy* NW/2011/002; SAHRC Annual Report 2011 28.

successfully handled various complaints on socio-economic rights violations which were referred to it on behalf of the victims by NGOs, including SECTION 27 and SERI.<sup>270</sup>

Arguably, the assertion that it offers a platform through the complaint procedure for the poor and marginalized to seek effective redress for socio-economic rights violations is correct. Apart from resolving and restoring appropriate remedies to individuals, the process has been useful in redressing systemic violations by restoring municipal services, like water and electricity, to communities. However, according to Kofiprah, the complaint procedure of the SAHRC is as reactive as the court process. Citing the open toilet saga at Khayelitsha and Rammolutsi to buttress his point, he argues that a proactive NHRC would have seen and acted on its own to end the dehumanization instead of waiting for a formal complaint, which came after the people had lived and endured the humiliation for over three years.<sup>271</sup>

Thus, Molapisi also is not satisfied with the complaint process of the SAHRC. According to him, it is more receptive to complaints from NGOs than individuals, who are often left unattended to and frustrated by its attitude. He argues further that in a country where lack of service delivery protests are quite common the SAHRC ought to be overwhelmed with socio-economic rights violation complaints, but this is not the case because it is largely inaccessible, unknown to the majority of the people who live in the rural areas and without powers to grant or enforce effective remedies.<sup>272</sup>

The SAHRC did not offer any direct response to questions about the level of effectiveness of its complaint process. However, it sees itself as ‘an agency trusted by the society to review and adjudicate human rights complaints’ with public legitimacy that is equal to that enjoyed by a court of law.<sup>273</sup> Whether its own opinion about the level of public trust and legitimacy in the complaint process is correct or not, the fact is that the complaint process of the SAHRC allows for a deliberative resolution of disputes, hence it

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<sup>270</sup> Kateke (n 229 above).

<sup>271</sup> Interview with Daniel Kofiprah, Operations Manager, SANGOCO-NET, South Africa, Johannesburg, 3 October 2013.

<sup>272</sup> Molapisi (n 96 above).

<sup>273</sup> SAHRC written responses (n 93 above) 8.

is considered as a preferable alternative to litigation in the resolution of socio-economic rights violation complaints, even if it is presently not being used as much as it should.

### **5.5.3. Conducting public inquiries/hearings on socio-economic rights**

The SAHRC employs public hearing as an active strategy to promote and protect human rights in the country. It uses public hearing to investigate and evaluate systematic patterns of human rights violation perpetrated either by the state or by corporate entities.<sup>274</sup> The SAHRC derives jurisdiction to institute a public inquiry over human rights violations from the Human Rights Commission Act, which empowers it to source for, and collect from any person, including individuals, public officials, private organizations and institutions to make documentary and or oral submissions and testimony to a public inquiry.<sup>275</sup> Such testimony may be given either under oath or by affirmation. The enabling Act further empowers it to subpoena any person who is in possession or custody of any information, material or document considered relevant to an inquiry to appear before it and give testimony or produce any relevant material or document.<sup>276</sup> At the end of the public sittings, it evaluates the submissions and processes them into a report detailing its findings and recommendations, which it subsequently submits to Parliament and also presents to the public.<sup>277</sup>

Furthermore, the SAHRC can initiate a public inquiry either through its own action or on a written request by individuals or groups.<sup>278</sup> However, being a special procedure, it may not concede to an individual's request for a public hearing unless the complaint cannot otherwise be resolved by mediation or conciliation,<sup>279</sup> or if the hearing will offer an appropriate solution to the parties.<sup>280</sup> A private complaint may be subjected to public hearing if the subject-matter is in public interest,<sup>281</sup> or where the complaint cannot be

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<sup>274</sup> SAHRC's investigations into the human rights effects of the resettlement process undertaken by Anglo Platinum's Potgietersrust Platinum Limited ("PPL") Mine near Mokopane, Limpopo.

<sup>275</sup> Section 9 Human Rights Commission Act of 1994.

<sup>276</sup> Section 9 Human Rights Commission Act of 1994.

<sup>277</sup> Section 15 of the Human Rights Commission Act of 1994.

<sup>278</sup> Section 20(1) of Complaints handling procedures 2012.

<sup>279</sup> Section 20(1)(a) of the Complain Handling Procedures 2012.

<sup>280</sup> Section 20(1)(b) of the Complain Handling Procedures 2012.

<sup>281</sup> Section 20(1)(c) of the Complain Handling Procedures 2012.

fairly resolved on the basis of documentary evidence or written statements,<sup>282</sup> or if the complainant can supply reasonable grounds for the complaint to be heard in public.<sup>283</sup>

From 1996 to date, the SAHRC has conducted several public inquiries on alleged human rights violations, some of which directly relate to socio-economic rights. These include: the public hearing on the conditions of farming communities (2003); the public hearing on the right to basic education (2006); the public inquiry on the right to access health care services (2007); the public hearing on housing, evictions and possessions (2007); the public hearing on school-based violence (2008); and the public hearing on water and sanitation (2012).

The public hearing on the conditions of farming communities investigated alleged systematic human rights violations, including tenancy conditions, safety and security, socio-economic rights, and the factors responsible for these violations, in the farming communities in South Africa.<sup>284</sup> Similarly, the public hearing on the right to basic education investigated all aspects relating to the implementation of the right to basic education as guaranteed by the Constitution. According to the SAHRC, the purpose of the inquiry was to create a framework concerning the right to basic education and to explore the meaning, content and context in which the right is experienced in South Africa.<sup>285</sup>

The public hearing on school-based violence investigated the nature, extent and impact of school-based violence on the enjoyment of the right to basic education and other human rights in South Africa. The public inquiry on housing, evictions and possessions was at the instance of complaints from the Ennerdale, Lawlay and Kathorus communities of Gauteng province. Basically, it investigated the progress the state has made in implementing the right of access to adequate housing and identified the fundamental

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<sup>282</sup> Section 20(1)(d) of the Complain Handling Procedures 2012.

<sup>283</sup> Section 20(1)(e) of the Complain Handling Procedures 2012.

<sup>284</sup> SAHRC Report on the conditions of farming communities 2003.

<sup>285</sup> SAHRC 'Report of the public hearing on the right to basic education' 2006 4.



issues the state needs to address to advance the practical realization of this right.<sup>286</sup> Similarly, the public hearing on the right to water and sanitation evaluated the extent to which water and sanitation services are available and accessible throughout the country and recommended solutions to identified challenges impeding the adequate provision of water and sanitation by municipalities to poor households.<sup>287</sup>

Like the complaint procedure, the relevance of advancing the implementation of socio-economic rights through public inquiries cannot be over-emphasized. First of all, the process provides an independent, legitimate and effective platform for the SAHRC to address systemic violations of socio-economic rights by the state or corporate entities. As McClain notes, without such inquiries the poor and marginalized by virtue of their disadvantaged status may never get the opportunity to bring to public notice the socio-economic deprivation that characterizes their daily existence with the hope that the relevant authorities may be touched to positively address their plight.<sup>288</sup> Thus, public inquiry provides ample opportunity for ordinary people, civil society and other relevant stakeholders and role-players to discuss, dialogue and proffer ways of tackling prevailing tendencies or patterns of socio-economic rights violations.

Second, these hearings also serve as official platforms for making state departments account for their responsibility to implement socio-economic rights. According to Liebenberg, the dialogue that takes place among rights holders, duty-bearers and all other stakeholders during the public hearings engenders public participation and accountability in South Africa.<sup>289</sup> Roach also emphasises the point that a public inquiry has the potential to 'create pressure on individuals and organizations to account for their acts or omissions, even if they are not legally obliged to do so.'<sup>290</sup>

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<sup>286</sup> SAHRC 'Report of the public hearing on housing, evictions and possessions' 2008 5.

<sup>287</sup> SAHRC written responses (n 93 above) 8.

<sup>288</sup> MacClain (n 249 above) 4-5.

<sup>289</sup> S Liebenberg 'The South African human rights commission releases its fourth annual economic and social rights report' (2003) 4 *ESR Review* 15 – 16.

<sup>290</sup> K Roach, 'Canadian public inquiries and accountability' in CP Stenning (ed) *Accountability for criminal justice: selected essays* (1995) 268 269.

Third, these hearings provide the SAHRC with a strong platform and relevant information to evaluate the extent to which socio-economic rights are being implemented.<sup>291</sup> For instance, at the end of the public inquiry on the right to access to water and sanitation, the SAHRC was able to establish that about 70 per cent of households in South Africa have access to adequate water and sanitation services; 2.5 million ordinary people use unventilated pit latrine; 110,000 people use bucket toilets; while over 700,000 households had no toilets at all.<sup>292</sup> These factual statistics are relevant for future planning and development interventions by the state and other stakeholders to eliminate the gap or shortfall in implementation and enjoyment of these rights. Thus, the findings and recommendations are relevant and specifically directed towards addressing the identified violations. The fact that the state may not readily accept the findings or implement the recommendations does not diminish the value of the process and its outcome, in which the impact on public consciousness may remain long after the enquiry has ended.<sup>293</sup> Arguably, the public hearings of the SAHRC on the implementation of socio-economic rights have served some purpose. People are informed or better informed about the socio-economic right under inquiry, the extent to which it is being implemented or violated, the factors responsible for the violation or non-implementation and the way forward to ensure implementation. Being a forum of public accountability, public hearing is highly informative and promotional of human rights. Thus, it has been a useful and effective strategy for the SAHRC to investigate and address issues of systemic violation of socio-economic rights.

However, like most other its strategies the reports and recommendations from these inquiries are never considered in Parliament or by the government. There is also no evidence that the outcome of these inquiries has led to a change of attitude by public officers in terms of service delivery or a better enjoyment of socio-economic rights by ordinary people, although this conclusion may require a comprehensive survey and appropriate linkages to justify. However, as Salter notes, ‘even if its recommendations are ignored, the process of holding a public inquiry opens the possibility for dialogue

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<sup>291</sup> SAHRC ‘Report on the public hearing on housing, evictions and dispossessions’ 2008.

<sup>292</sup> SAHRC ‘Findings and Recommendations on access to water and sanitation’ 2011.

<sup>293</sup> S Cardenas *Chains of justice: the global rise of state institutions for human rights* (2014) 330-333.

about issues of public importance, and prepares the way for attitudinal change and policy development'.<sup>294</sup> The frequency with which the SAHRC applies public hearings shows how relevant they are to it as a strategy for investigating and seeking to enlist the state's attention to address systematic violation of socio-economic rights in South Africa.<sup>295</sup>

#### 5.5.4. Judicial enforcement of socio-economic rights

One of the noticeable functions of the SAHRC is to 'to take steps to secure appropriate redress where human rights have been violated.'<sup>296</sup> Litigating socio-economic rights is one of the ways the SAHRC uses to accomplish this aspect of its mandate. It litigates socio-economic rights based on its duty under the Human Rights Commission Act 1994 to institute actions in a competent court or tribunal either in its own name or on behalf of persons or groups of persons in discharge of its human rights mandate.<sup>297</sup> Thus, where it becomes necessary, the SAHRC is involved in litigating socio-economic rights, either as a party or as *amicus curia*, to advance the implementation of socio-economic rights. It may also be made to work with the court to supervise the implementation of the latter's decision on socio-economic rights.

For instance, through litigation, the SAHRC, in conjunction with the Women Legal Centre, succeeded in striking down provisions in the Black Administration Act and Intestate Succession Act that discriminated against the in-testate rights of female spouses, common law wives, girl children, children born out of wedlock and young sons to inherit customarily.<sup>298</sup> Also, through litigation, it obtained a positive order against the Ministry of Justice and the Department of Public Works to ensure that courts in South Africa are easily accessible and user-friendly to people living with disabilities;<sup>299</sup> It reportedly maintained a class action on behalf of people with disabilities, which successfully

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<sup>294</sup> L Salter 'The two contradictions in public inquiries' in AP Pross; I.M. Christie, and J Yogis (eds), *Commissions of Inquiry* (1990) 173.

<sup>295</sup> The UN Hand book on socio-economic rights 55, which asserts that public inquiry is an effective way of conducting wide-ranging investigations into systemic violations of socio-economic rights and noted that some NHRIs have adopted the process in their jurisdictions.

<sup>296</sup> Section 184(3) of the 1996 Constitution of South Africa.

<sup>297</sup> Section 7(1)(e) of the Human Rights Commission Act of 1994.

<sup>298</sup> *Bhe and others v Magistrate, Khayelitsha and others; Shibiv Sithole and others; SAHRC and Another v the President of the Republic of South Africa* (2005) (1) BCLR 1 (CC).

<sup>299</sup> Unreported but see SAHRC Annual Report 2004/2005 25.

stopped a private airline from charging discriminatory extra fares from wheelchair bound passengers.<sup>300</sup> Furthermore, in two other cases, it obtained court orders to suspend a teacher for sexually abusing a pupil pending investigations into the allegation<sup>301</sup> and prevented the forceful eviction of the complainants from the occupation of their houses.<sup>302</sup>

The SAHRC also engages the judicial system as amicus curia. For instance, in the *Grootboom* case<sup>303</sup> it jointly participated with the Community Law Centre (UWC) as amicus curia before the Constitutional Court. Also, in the *Welkom High School* case,<sup>304</sup> it participated in the court's proceedings as an amicus curia and persuaded the Court with its arguments to compel the school to reverse its school fees exemption policy and to withdraw cases filed against parents for non-payment of school fees. *ChristianRoberts and Others v Minister of Social Development and Others*<sup>305</sup> is another matter in which the SAHRC, with the court's leave, intervened as amicus curia to challenge the constitutionality of imposing different ages, 60 and 65 years for women and men respectively, in the eligibility criteria for accessing social pension grants from the state.

However, the SAHRC curiously declined to act as amicus curia in in the *TAC* case.<sup>306</sup> Here TAC sued the government for an order to compel the government to provide ARV therapy to pregnant HIV-positive women across South Africa. In order to strengthen its case, TAC requested the SAHRC to partner with it and participate in the matter as amicus curia since the matter borders on advancing the implementation of the human rights of South Africans. After seeking and obtaining permission to intervene as amicus curia, it later backtracked before the start of proceedings by instructing its lawyers to withdraw from the matter on the excuse that it had nothing new or additional to contribute to the

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<sup>300</sup> Unreported but see SAHRC Annual Report 2004/2005 25.

<sup>301</sup> *Harker v Klipapruit High School and Department of Education* (Unreported) but see SAHRC Annual Report 2006/2007 41.

<sup>302</sup> *Haga Haga* Unreported but see SAHRC Annual Report 2006/2007 41.

<sup>303</sup> (2000) ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

<sup>304</sup> CCT8/02 (2002) ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR.

<sup>305</sup> Unreported Case no CCT 103/12 (2013) ZACC 25.

<sup>306</sup> (CCT8/02) (2002) ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR.

arguments already canvassed by the parties.<sup>307</sup> TAC went on to win the case but the SAHRC was accused of capitulating to political pressure to withdraw from the matter, particularly when it emerged that the withdrawal was sequel to an internal review among the Commissioners with a narrow majority voting against its continuing involvement in the matter.<sup>308</sup>

Although the SAHRC denied being pressurized, the decision was unpopular and trailed by criticisms.<sup>309</sup> However, since then it has on to intervene in socio-economic cases as *amicus curia*, although on its own volition and in cases not involving NGOs as the initiators. The indication is that, as a public body, it should not be seen to be lending its reputation to NGOs to advance their causes even if the subject matter affects the rights of the public.

Arguably, litigation is one of the legitimate steps it could take on its own to protect and advance the implementation of socio-economic rights, yet, the SAHRC apparently utilizes this option very sparingly, except at the Equality Court.<sup>310</sup> This procedure is justified by several factors. For instance, it has its own methods for executing its mandate which it should utilize instead of abandoning them for a rival or complementary, but costly, platform. Thus, there must be a compelling justification for the SAHRC to utilize the courts for the execution of its mandate in order for it not to be perceived as a litigious enforcer instead of a promoter and facilitator of human rights implementation.

Furthermore, its preference for mediation and negotiation over litigation is justified on two grounds:<sup>311</sup> First, it simply does not have the money to engage in the enforcement of socio-economic rights through large scale litigation.<sup>312</sup> Second, it is committed to the

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<sup>307</sup> 'HRC 'Has nothing new to add'' (Mail and Guardian 23 November 2001) available at <http://www.aegis.org/news/dmg/2001/MG011109.html>.

<sup>308</sup> M Heywood 'Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 299 - 300.

<sup>309</sup> HSRC Report (n 107 above) 38.

<sup>310</sup> For instance, the Commission reportedly litigated 17 matters before the Equality Magistrate's and the High Courts between 2011 and 2012: SAHRC Annual Report 2012 29.

<sup>311</sup> SAHRC written responses (n 93 above) 8.

<sup>312</sup> SAHRC written responses (n 93 above) 8.

principle of cooperative governance which enhances the resolution of disputes through constructive engagement rather than adversarial litigation.<sup>313</sup> Therefore, while it is not totally averse to litigation which remains a viable instrument, it prefers and will continue to intervene as an impartial arbiter rather than participate or descend into the arena of dispute more often as an adverse party.<sup>314</sup>

This minimalist approach of the SAHRC to litigating socio-economic rights clearly agrees with Klaaren's view that litigating socio-economic rights by any NHRC is a misconceived idea that makes it legalistic instead of being pragmatic in the execution of its mandate.<sup>315</sup> However, while the SAHRC may try to avoid outright litigation for all the reasons it has advanced, the fact is that there are occasions where it has no other choice but to approach the courts in aid of its functions and to realize its objectives.

Therefore, the activities of the SAHRC in litigating socio-economic rights, either as a party or as an *amicus curiae*, before the respective courts in South Africa are relevant for enhancing not only the promotion and protection of these rights but also the development of legal jurisprudence on socio-economic rights generally, in a way that goes, as Chenwe observes, to profit the broader interest of society rather than the specific interest of litigants.<sup>316</sup>

Furthermore, the complementary relationship of the SAHRC with the courts has proven to be relevant for advancing the implementation of socio-economic rights. For instance, in the *Grootboom* case<sup>317</sup> the Constitutional Court directed to supervise the practical implementation of its decision against the state to protect the rights of the petitioners and their children from forceful eviction from their makeshift dwellings built on state land. Although this case seems to be the only case as yet whereby the SAHRC has been empowered to act under a judicial authority to address a socio-economic rights violation,

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<sup>313</sup> SAHRC written responses (n 93 above) 8.

<sup>314</sup> SAHRC written responses (n 93 above) 8.

<sup>315</sup> Klaaren (n 181 above) 551.

<sup>316</sup> L Chenwe 'Litigating socio-economic rights through *amicus curia*' (2009) 10 *Economic and Social Rights Review* 7 8.

<sup>317</sup> (2001) SA 46 (CC); 11 BCLR 1169 (CC).

it nevertheless demonstrates recognition of its usefulness as a partner to the courts in advancing the implementation of socio-economic rights.<sup>318</sup> Indeed, for Ebadolahi this form of active and positive collaboration and combination of forces could prove to be one of the most effective ways of advancing the practical realization of socio-economic rights.<sup>319</sup> This, it is submitted, is true even as the SAHRC was adjudged and criticized for unsatisfactory performance of the responsibility assigned to it by the court in the *Grootboom* case.<sup>320</sup>

#### **5.5.5. Socio-economic rights education and advocacy**

Both the Constitution of South Africa 1996<sup>321</sup> and the Human Rights Commission Act 1994<sup>322</sup> oblige the SAHRC to engage in human rights education for the purpose of attaining a culture of respect for human rights in the country. This objective is also captured in the strategic policy thrust of the SAHRC in terms of human rights education: to facilitate the development of a sustainable human rights culture in South Africa through public education, training and advocacy.<sup>323</sup>

From its inception, the SAHRC is known to have prioritized human rights education in its operational plans.<sup>324</sup> Thus, it has developed and implemented various strategies, activities and programmes to promote human rights education and awareness among South Africans. These include holding human rights education workshops, conferences and seminars with stakeholders; organizing press conferences and other media events through the print and electronic media; and organizing and participating in human rights outreach activities with community leaders.

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<sup>318</sup> V Jaichand 'The implementation and enforcement of economic and social rights in South Africa' A paper delivered at Irish Human Rights Commission Conference on economic, social and cultural rights: Models of enforcement 9-10 December 2006 4.

<sup>319</sup> M Ebadolahi 'Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa' (2008) 83 *New York University Law Review* 156 158.

<sup>320</sup> K Pillay 'Implementing Grootboom' (2003) 3 *Economic and Social Rights Review* 15.

<sup>321</sup> Section 184(1)(a) of the 1996 Constitution of South Africa.

<sup>322</sup> Section 184(1)(b) of the 1996 Constitution of South Africa.

<sup>323</sup> SAHRC Business Strategic Plan 2012-2012 17.

<sup>324</sup> S Cardinas 'Constructing rights? Human rights education and the state' (2005) 26 *International Political Science Review* 363 371 – 374.

The further promotes human rights awareness by celebrating national, African and World Human Rights Days with educational programmes and events. Furthermore, it also has a rich array of human rights publications, including handbooks, training manuals, pamphlets, brochures, posters, leaflets, newsletters, calendars and info-packs.<sup>325</sup> For instance, the it has a training manual titled: *Building a culture of human rights*, which outlines the Bill of Rights in question and answer format with samples of everyday illustrations. In addition, its website is also well-developed with a rich depository of on-line human rights publications, including all the Commission's annual reports, economic and social rights reports and other special reports from public hearings or research works.<sup>326</sup> Additionally, it also has a well-equipped library and resource centre at its head office in Johannesburg that members of the public can freely use.<sup>327</sup>

Practically, the SAHRC tries to reach all parts of the country and the different segments of society, including rural inhabitants with its human rights education programmes by spreading the organization of these programmes to national, provincial and community levels. Thus it has organized human rights education programmes for parliamentarians, high state officials, community leaders, men, women, the youth, the aged, people living with disabilities, and people living with HIV and AIDS in urban and rural communities. Since it promotes all categories of human rights in line within its mandate and the national action plan for human rights, there seems to be no programmes specifically targeted towards socio-economic rights education.<sup>328</sup>

However, it has been active in promoting the rights of the vulnerable and disadvantaged people, such as children, older persons, and people living with disabilities, as well as people living with HIV and AIDS and non-nationals. It has also institutionalized human rights education in the school system with curriculum and teachers' manual and by collaborating with provincial educational departments to implement human rights

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<sup>325</sup> The Commission has a training manual titled: *Building a culture of human rights*, which outlines the bill of rights in questions and answers format with samples of everyday illustrations. The manual answers such as 'what are the human rights protected in the bill of rights? Can the bill of rights be limited?

<sup>326</sup> [www.sahrc.co.za](http://www.sahrc.co.za).

<sup>327</sup> SAHRC Annual Report 2012 36.

<sup>328</sup> SAHRC written responses (n 93 above) 4.



education across schools in the country.<sup>329</sup> Furthermore, it regularly produces and distributes educational publications and materials, including posters, reports, and manuals specific to the promotion of socio-economic rights.<sup>330</sup>

Equally worthy of note are its community human rights education outreach programmes. Under these programmes the SAHRC focuses on poverty-stricken communities in rural areas and educate, train and empower them on their socio-economic rights through focus group discussions, dialogues, site visits and walkabouts.<sup>331</sup> Community members, including local government officers, traditional leaders, community and faith-based organizations, and trade union branch offices are educated on general human rights education, including socio-economic rights, access to information, gender matters and HIV and AIDS.<sup>332</sup>

These outreach programmes enable community members, who are at the receiving end of social inequality and marginalization, to be informed about their socio-economic rights and empowered to speak out about violations and know where and how to enforce these rights against the state. The fact that the SAHRC has a functional human rights education programme is not in doubt. Indeed the Parliamentary ad hoc committee on Chapter 9 Institutions expressed satisfaction with its human rights education programmes and noted that ordinary South Africans are better informed about their fundamental rights to socio-economic goods and services, partly due to its activities.<sup>333</sup>

Arguably, this view may not be entirely correct or at least contrary to its own assessment that there is still much ignorance about socio-economic rights and the state's obligation to implement them throughout the government system in South Africa.<sup>334</sup>

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<sup>329</sup> Cardinas (n 324 above) 371.

<sup>330</sup> SAHRC written responses (n 93 above) 4.

<sup>331</sup> SAHRC Annual Report 2004/2005 37.

<sup>332</sup> SAHRC Annual Report 2004/2005 38.

<sup>333</sup> The parliamentary ad hoc Committee report on Chapter 9 institutions (n 72 above) 177.

<sup>334</sup> SAHRC socio-economic report 2006-2009 19.

As Elroy notes, human rights education should be measured not by the quantity of activities the SAHRC has undertaken, but by its quality and impact.<sup>335</sup> Generally, South Africans exhibit an appreciable degree of rights consciousness as expressed in robust social debates in the media, intellectual and political circles, and often more forcefully expressed in the regular street protests among ordinary people over a lack of or poor service delivery. However, Thabo is of the view that greater credit should be given to the labour confederations, academic institutions, civil society groups and the human rights intellectuals and activists than to the educational activities of SAHRC in this regard.<sup>336</sup> Baka substantially agrees with Thabo's assertion. According to him, the SAHRC remains an urban entity eighteen years after its establishment, with no reasonable physical visibility even in the urban areas.<sup>337</sup> When ordinary people do not even know about its existence, then it is difficult to assert that they may have been reached or empowered by its educational activities, he emphasised.<sup>338</sup>

Thus, although human rights education remains one of the major activities of the SAHRC, its impact has been quite limited. Certainly, the SAHRC needs to do more than it is presently doing to effectively create and realize the social awareness of socio-economic rights across all parts of South Africa.

#### **5.5.6. The SAHRC's engagement with Parliament on socio-economic rights**

With a mandate to consider, pass, amend or reject any legislation,<sup>339</sup> to approve the national budget and maintain oversight over executive policy implementation,<sup>340</sup> to ratify international treaties,<sup>341</sup> to receive petitions, representations or submissions from interested any interested persons; and to assist the SAHRC, the South African Parliament's role is crucial in the implementation of socio-economic rights.<sup>342</sup>

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<sup>335</sup> Elroy (n 62 above).

<sup>336</sup> Interview with Mandla Thabo, youth leader, South Africa Mamelodi Pretoria 4 October 2013

<sup>337</sup> Thabo, as above.

<sup>338</sup> Interview with Samuel Baka, Programmes Director, SANGOCO-NET 7 October 2013 (interview on file with the researcher).

<sup>339</sup> Section 55(1)(a) of the 1996 Constitution of South Africa.

<sup>340</sup> Section 55(2)(b)(i) and (ii) of the 1996 Constitution of South Africa.

<sup>341</sup> Section 231(2) of the 1996 Constitution of South Africa.

<sup>342</sup> Section 4(3) of the Human Rights Commission Act of 1994.

The SAHR Commission engages Parliament on human rights implementation through its parliamentary liaison and legislation monitoring programme, the object of which is to ‘make an impact on the promotion and protection of human rights.’<sup>343</sup> Under the rubric of parliamentary engagement, it monitors the law-making process and makes inputs into proposed legislation to ensure practical compliance or compatibility with international human rights standards. Accordingly, the SAHRC reportedly made relevant inputs into the following parliamentary bills relevant to the implementation of socio-economic rights in South Africa: the Basic Education Amendment Bill,<sup>344</sup> the Older Persons Bill; the Disability Bill, the Choice on Termination of Pregnancy Bill, and the Children Amendment Bill.<sup>345</sup> These bills, which have since been enacted into law, are important for ensuring that the vulnerable and disadvantaged segments of society have equal access to socio-economic rights.<sup>346</sup> It also recently made submissions to Parliament on the Legal Practice Bill, to provide access to justice to vulnerable persons; the Employment Services bill and the need for the domestication of the CRPD.<sup>347</sup>

As well as making contributions to parliamentary Bills, the SAHRC engages Parliament through workshops, seminars and conferences at national, provincial and municipal levels. Over time it has provided training to parliamentarians on the Bill of Rights and their individual and collective obligation to promote, respect, protect and fulfil the fundamental rights guaranteed therein. It regularly attends parliamentary portfolio committee briefings relevant to its mandates.<sup>348</sup> Arguably, the workshops and meetings are useful for enhancing parliamentary knowledge and capacity for human rights law-making, the performance of oversight duties and for achieving a positive attitudinal change among parliamentarians toward human rights protection.

Although the parliamentary monitoring activities of the Commission with direct reference to socio-economic rights may be few but the significance of such engagements for the

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<sup>343</sup> SAHRC Annual Report 2010/2011 43.

<sup>344</sup> SAHRC Annual Report 2010/2011 43.

<sup>345</sup> SAHRC Annual Report 2010/2011 44.

<sup>346</sup> Klaaren (n 181 above) 413.

<sup>347</sup> SAHRC Annual Report 2013 34.

<sup>348</sup> SAHRC Annual Reports 2010/2011 44.

entrenchment of human rights standards into legislative-policy making in South Africa is note-worthy. However, the ability of the SAHRC to influence parliament to accept and facilitate the implementation of its recommendations remains a challenge despite its seemingly regular engagement and interface with the relevant parliamentary portfolio committees.<sup>349</sup>

#### **5.5.7. Monitoring compliance with international socio-economic rights treaty obligations**

Although this duty is not expressly provided, the SAHRC has creatively interpreted its mandate to accommodate the role of monitoring South Africa's compliance with its international human rights treaty obligations. As a party to the international and regional treaties on socio-economic rights South Africa is bound to comply with the obligation to implement these instruments, including the reporting obligation and the duty to domesticate or harmonize these treaties with national legislation. Acting under the rubric of monitoring state compliance with its international human rights treaty obligations, the SAHRC continues to advise the state to ratify the ICESCR and its Optional Protocol, as well as the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).<sup>350</sup> It regularly publicises the state's status of compliance with its international reporting obligations and advises the state on the need effectively to discharge this responsibility under the various international human rights treaties.<sup>351</sup>

Furthermore, when South Africa was peer-reviewed for the second time under the UPR mechanism in 2011, the SAHRC made written submissions wherein it expressed concern with the failure of the state to comply with its reporting obligations as well as to ratify the ICESCR and its Optional Protocol, despite persistent requests to do so from it and civil society.<sup>352</sup> Other socio-economic rights issues it raised in its submissions to the UPR include concern over the increasing rate of poverty and inequality in the country,<sup>353</sup> the

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<sup>349</sup> SAHRC Business plan 2011-2014 16.

<sup>350</sup> SAHRC Annual Report 2013 17-19.

<sup>351</sup> SAHRC Annual Report 2013 17-19.

<sup>352</sup> SAHRC written submission to UPR 2011 1.

<sup>353</sup> SAHRC written submission to UPR 2011 2.

lack and poor delivery of basic services in the rural areas,<sup>354</sup> the high maternal mortality rates,<sup>355</sup> the challenge of accessing treatment for HIV/AIDS infections,<sup>356</sup> and the increasing difficulties among children from poor households, as well as children with disabilities, to access basic education.<sup>357</sup>

As the SAHRC itself has noted, the state's compliance with its treaty obligations on socio-economic rights is important for the practical realization of these rights. However, since its approach to achieving compliance with this obligation is essentially promotional, it is only effective in bringing these issues to the attention of the state and the public through the reports, whereas the state keeps on ignoring its concern and recommendations.

The negative attitude towards the inputs of the SAHRC in this regard is evident in the state's refusal to commit itself to any of the recommendations of the UPR, despite participating in the review exercise. This attitude is in spite of the public appreciation of its role in monitoring the state's compliance with its international human rights treaty obligations.<sup>358</sup> Thus, as Tissington notes, the SAHRC may have to look for other more creative ways to achieving its desire to compel state compliance with its international treaty obligations on the implementation of socio-economic rights.<sup>359</sup> Otherwise, advancing South Africa's compliance with its international human rights treaty obligations will continue to have little or no effect beyond purely promotional measures, such as reproducing the status of compliance with these obligations and its inputs in annual reports.<sup>360</sup>

#### **5.5.8. The promotion and protection of the right to equality**

The systemic and structural inequalities in South Africa are partly the consequence of the historical injustice and social legacy of apartheid. In order to bring these to an end, the Constitution erects the achievement of substantive equality as one of its founding

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<sup>354</sup> SAHRC written submission to UPR 2011 2.

<sup>355</sup> SAHRC written submission to UPR 2011 3.

<sup>356</sup> SAHRC written submission to UPR 2011 3.

<sup>357</sup> SAHRC written submission to UPR 2011 4.

<sup>358</sup> The parliamentary ad hoc committee report on Chapter 9 institutions (n 38 above) 178.

<sup>359</sup> Tissington (n 95 above).

<sup>360</sup> Thipanyaye (n 70 above) 22.

values.<sup>361</sup> The Constitution, not only guarantees the rule of law, but also guarantees everyone the equal protection of the law,<sup>362</sup> as well as the freedom from discrimination.<sup>363</sup> It further commits the state to overcome inequality by adopting reasonable legislation to ensure access to socio-economic rights.<sup>364</sup>

Accordingly, the South Africa Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act ('the PEPUDA') of 2000 to advance equality in all facets of South Africa's society. Emerging from a background where material disadvantages and social deprivation was institutionalized on the basis of race, gender, class and other forms of discrimination, the fundamental objective of the PEPUDA is to realize the constitutional aspirations of a democratic nation that is guided by respect for diversity, and the normative principles of equality, fairness and social solidarity, justice, human dignity and freedom.<sup>365</sup>

Consequently, the PEPUDA prohibits unfair discrimination in social, economic and political life on any of the prohibited grounds, including race, gender, sex, marital status, pregnancy, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>366</sup> The Act defines equality in its substantive form as including 'the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.'<sup>367</sup> It also defines 'discrimination' to mean 'any positive act or omission which imposes burdens, obligations or disadvantage on a person, or withholds benefits, opportunities or advantages from a person, whether directly or indirectly on the basis of one or more of the prohibited grounds of discrimination'.<sup>368</sup>

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<sup>361</sup> KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 154; *National coalition for gay and lesbian equality v Minister of home affairs* 1999 (3) SA 186J-187A (C).

<sup>362</sup> Section 9(1) of the 1996 Constitution of South Africa.

<sup>363</sup> Section 9(3) of the 1996 Constitution of South Africa.

<sup>364</sup> Section 9(2)-(5) of the 1996 Constitution of South Africa.

<sup>365</sup> Section 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>366</sup> Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>367</sup> Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>368</sup> Sections 7-9 Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

Apart from addressing the fundamental issues of race, gender and disability, the Act also addresses the inequities of the social system, which is linked to structural inequities, such as income or wealth distribution, poverty, gender discrimination and deprivation.<sup>369</sup> Also, it specifically protects people with disabilities from unfair discrimination including denial of equal enjoyment of opportunities or failing to take steps to reasonably accommodate their needs.<sup>370</sup> Furthermore, it provides remedial measures for the violation of the right to equality and gives the Equality Courts and the SAHRC institutional responsibility to promote and enforce its provisions.<sup>371</sup>

One of the fundamental targets of achieving the right to equality is to reduce material poverty and improve the wellbeing of ordinary people, particularly in ensuring the enjoyment of the socio-economic rights provided for under the Constitution. This target partly entails removing all barriers to the equal enjoyment of these rights, such as repealing discriminatory laws or ensuring that existing laws, regulations, policies and programmes conform to the principle of fairness and non-discrimination.<sup>372</sup> Furthermore, public officers responsible for the provision of services must ensure equality and avoid the discriminatory provision of services.<sup>373</sup>

The SAHRC has been advanced the realization of the right to equality in three ways: it monitors, promotes and enforces compliance with the PEPUDA by the state, individuals and corporate agencies. Accordingly, it monitors the implementation of the PEDUDA through engagement with the legislature. For instance, it was involved in promoting and monitoring the changes to the Civil Union Act 2006, the Older Persons Act, and the Criminal Law (Sexual Offences) and Related Matters Act of 2006, leading to the inclusion of more disability-sensitive provisions.<sup>374</sup> It also drafted and submitted the first equality report to parliament, which highlighted the state of inequality in the country, particularly, the issues of racism, gender equality, disability and Lesbian, Gay, Bisexual,

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<sup>369</sup> R Kruger 'Equality Courts' (2011) 7*Equality Rights Review* 27.

<sup>370</sup> Section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>371</sup> Sections 16 and 25(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>372</sup> Section 25 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>373</sup> Section 26 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

<sup>374</sup> SAHRC annual Report 2012 30.

Transgender and Intersex (LGBT) rights.<sup>375</sup> Furthermore, the SAHRC promotes the right to equality through its involvement in the national anti-racism and anti-discrimination forums,<sup>376</sup> raising general awareness about the PEPUDA through workshops<sup>377</sup> and assisting individuals and communities on how to access their rights in terms of the Act.<sup>378</sup>

Finally, it enforces the provisions of PEDUDA through mediation and litigations at the regular and equality courts. For instance, its litigation activities successfully led to the striking down of the discriminatory provisions of the Black Administration Act and the Intestate Succession Act, and the restoration of intestacy rights to spouses, common wives, girl children, children born out of wedlock, and young sons of an intestate deceased.<sup>379</sup> Evidently, the SAHRC through litigation in the Equality Courts succeeded in making the state ensure that courts in South Africa are accessible and user-friendly to people with disabilities,<sup>380</sup> ending discriminatory fees charged by a transport company on wheelchair bound passengers,<sup>381</sup> getting the right to education restored to girls expelled on pregnancy grounds,<sup>382</sup> and getting the state to change its policy of the age for men to get retirement benefits lowered from 65 to 60.<sup>383</sup> Furthermore, through its complaint and monitoring activities it succeeded in restoring an expelled widow to her common home,<sup>384</sup> getting local municipalities to replace open toilets with closed ones,<sup>385</sup> and restoring the right to health to women denied access to a community clinic unless they conceded to forced HIV testing.<sup>386</sup>

Also, the SAHRC's activities in advancing the right to equality also contribute to the implementation of socio-economic rights. Through its efforts the rights of ordinary South

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<sup>375</sup> SAHRC Annual Report 2013 36.

<sup>376</sup> SAHRC Annual Report 2005-2006 14.

<sup>377</sup> SAHRC Annual Report 2004 25.

<sup>378</sup> SAHRC Annual Report 2006/2007 12.

<sup>379</sup> *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC).

<sup>380</sup> SAHRC Annual Report 2005/2006 25-26.

<sup>381</sup> SAHRC Annual Report 2005/2006 25-26.

<sup>382</sup> SAHRC Annual Report 2005/2006 25.

<sup>383</sup> *Christian Roberts and Others v Minister of Social Development and Others Unreported* case no 3283/5/2010.

<sup>384</sup> *Frangeline Dikgale v Limpopo*: SAHRC Annual Report 2011 37.

<sup>385</sup> *Beja and Others v Premier of the Western Cape and Others* 21332/10.

<sup>386</sup> SAHRC Annual Report 2012 30.



Africans, especially the vulnerable populations, including children, women and people living with disabilities, are being enhanced through changes to legislation, policies and even attitudes. It is also clear that it employs all available platforms, including litigation to advance the right to equality in South Africa. Therefore, although the battle to end inequality is a long way off, the fact cannot be doubted that the SAHRC has been active and measurably effective in advancing the implementation of the right to equality, which is also affecting the implementation of socio-economic rights positively.

#### **5.5.9. The role of other relevant state agencies**

As noted above, Chapter 9 of the 1996 Constitution creates national institutions to strengthen democracy, advance state accountability and contribute to transformation. Arguably, among the existing independent Chapter 9 state institutions, the functions of the Public Protector and the Commission for Gender Equality (CGE) are most closely relevant in terms of supporting or complementing the SAHRC in advancing the implementation of socio-economic rights.

Basically, the Public Protector functions as South Africa's ombudsman. Thus, its primary mandate in terms of the Constitution is to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action.<sup>387</sup> It has an additional mandate in terms of the Public Protector Act 1994 to investigate allegations of maladministration in connection with the affairs of government at any level; abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function; and improper or unlawful enrichment or receipt of any improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function.<sup>388</sup> Furthermore, the Executive Members' Ethics Act 1998 also confers it with additional responsibility to investigate any

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<sup>387</sup> Section 182 of the 1996 Constitution of South Africa.

<sup>388</sup> Section 6(4)(a)-(c) of the Public Protector Act of 1994.

alleged breach of the Executive Ethics Code by cabinet members, including the President.<sup>389</sup>

On its part, the CGE is mandated in terms of the Constitution to promote respect for gender equality and the protection, development and attainment of gender equality in South Africa.<sup>390</sup> Furthermore, the Commission on Gender Equality Act of 1996 specifically requires the CGE to monitor and evaluate the practices of state organs at any level, as well as other public and private bodies, authorities, businesses, enterprises, and institutions in order to promote gender equality and make any recommendations to the relevant legislature in response to its monitoring activities.<sup>391</sup> Besides, the CGE is also legally obliged to prepare and carry out information and educational programmes to foster public understanding of gender equality, to review laws and policies, including parliamentary statutes; personal and family law or custom; indigenous law, customs or practices; and any other existing law or draft legislation likely to affect gender equality and the status of women, and to make recommendations to the appropriate legislature for necessary amendments to the law and the adoption of new legislation.<sup>392</sup> Furthermore, the CGE is empowered to investigate any gender-related issues of its own accord or on receipt of a complaint and resolve the dispute or to rectify the act or omission complained of, through mediation, conciliation or negotiation.<sup>393</sup> Finally, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 also empowers the CGE to institute legal proceedings in an equality court to protect the right to equality on behalf of any aggrieved person or group of persons.<sup>394</sup>

Like the SAHRC, these institutions are required to intermediate between the people and the government to advance state accountability and contribute to improving the socio-economic wellbeing of the people. Thus, they have similar objectives and play roles that effectively supplement one another. As Murray notes, these institutions are all ‘expected

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<sup>389</sup> Sections 3(1) and 4(1)(a) of the Executive Members’ Ethics Act of 1998.

<sup>390</sup> Section 187(1) of the 1996 Constitution of South Africa.

<sup>391</sup> Section 11(1)(a) and (b) of the Commission on Gender Equality Act of 1996.

<sup>392</sup> Section 11(1)(c) of the Commission on Gender Equality Act of 1996.

<sup>393</sup> Section 11(1)(d) of the Commission on Gender Equality Act of 1996.

<sup>394</sup> Section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

to build support around human rights norms and build up networks of citizens committed to the basic values of the Constitution. In so doing they will strengthen the ability of the new democratic order to protect the values spelt out in section 1 of the Constitution.’<sup>395</sup> Accordingly, they are required to maintain close liaison with each other in order to foster common policies and practices and to promote cooperation where appropriate.<sup>396</sup>

As is the case of the SAHRC, the effectiveness of these institutions in discharging their respective mandates is critical to the qualitative and quantitative implementation of the aspects of socio-economic rights they are directly or indirectly obliged to advance. While these institutions are functional in executing their mandates, their effectiveness is grossly hampered by the continuous challenges of inadequate capacity, lack of financial resources and inadequate cooperation and support from the state. For instance, the Public Protector was recently constrained to complain about inadequate funding and how the Presidency’s un-cooperative attitude nearly frustrated the investigation into the misuse and abuse of public funds by the state in the application of 240 million rand to upgrade security in the President’s privately owned residence in his home town of Nkandla.<sup>397</sup> The SAHRC have been collaborating with both agencies in relevant areas to advance their mutual responsibility of facilitating the implementation of policies which promote, protect and defend the socio-economic and equality rights of the weakest segment of society although its effectiveness has been limited.

## **5.6. Challenges of the SAHRC in advancing socio-economic rights implementation**

The SAHRC faces the following noticeable challenges that undermine its ability to effectively advance socio-economic rights:

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<sup>395</sup> Murray (n 14 above) 135.

<sup>396</sup> Parliamentary ad hoc report on Chapter 9 institutions (n 72 above) 149.

<sup>397</sup> ‘Secure in comfort: Report on the investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of public works at and in respect of the private residence of President Jacob Zuma at Nkandla in KwaZulu-Natal province 2013/14’ 2014 *The Public Protector* 92 para 3.2.17 available at [http://www.publicprotector.org/library%5Cinvestigation\\_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf](http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf).

### 5.6.1. The challenge of a wide mandate

Basically, the SAHRC's mandate as derived from the Constitution empowers it with jurisdiction over human rights. Arguably, while this conforms to the requirements of the Paris Principles, it is also seen as an impediment to its work. For instance, the Community Law Centre, University of Western Cape sees the SAHRC's mandate as 'too broad, covering anything and everything that has to do with human rights,' with associated constraints on its capacity to deliver.<sup>398</sup>

According to Tissington, the basis for such an observation is obvious. The mandate of the SAHRC covers all categories of rights and it must attempt to promote and protect all since all rights are important, indivisible and interdependent. However, clearly, it is impossible for it to implement all aspects of the composite mandate simultaneously and record any meaningful impact. This makes it to prioritize its activities which necessitate shifting attention or focus from one area of rights to the other from time to time in the scheme of things. The result is that all aspects of socio-economic rights are not getting equal and continuous attention from the SAHRC's strategic plan of action from year to year, which consequentially, limits its ability to advance a holistic implementation of these rights.<sup>399</sup>

However, the Commission views the broadness of its mandate as inevitable since it is defined by the Bill of Rights and the country's socio-economic historical experience, nevertheless, it concedes that it poses a number of challenges, including 'coming to terms with the broadness of the mandate, finding the balance between being reactive and proactive, discharging the mandate with limited resources, and finding a niche in relation to other Chapter 9 institutions.'<sup>400</sup> Therefore, meeting the demands of the wide mandate, according to the SAHRC, requires it to prioritize and think strategically.

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<sup>398</sup> S Khoza 'The South African human rights commission and its monitoring of socio-economic rights through compiling periodic reports: a submission on the parliamentary ad hoc committee on review of state institutions supporting constitutional democracy' (2007) 63.

<sup>399</sup> Tissington (n 95 above).

<sup>400</sup> SAHRC: The critical reflection on an institutional journey 2002-2009 (2009) 18.

As Tissington has observed, this is where the problem lies in relation to advancing the implementation of socio-economic rights as the SAHRC has been constrained thereby to give selective or sporadic attention to these rights in its operations. For instance, it has decided to prioritize the right to food as its strategic area of focus in the 2013-14 operational years. The implication is that other socio-economic rights will receive little or no attention in its promotional activities during the period. As Thabo argues, mainstream socio-economic rights in all their ramifications in South Africa should be an everyday activity for the SAHRC.<sup>401</sup> However, it is unable to do so because of the need to satisfy other human rights imperatives in its composite mandate and this need is limiting its impact in advancing the implementation of socio-economic rights.<sup>402</sup>

### **5.6.2. The challenge of inadequate funding and institutional incapacity**

Structural limitations in the areas of inadequate financial resources and human capacity are major factors that limit NHRIs from effectively executing their functions across Africa. The SAHRC is no exception.<sup>403</sup> Tissington holds the view that the SAHRC is severely limited by financial and human capacity constraints to effectively advance socio-economic rights.<sup>404</sup> For Molapisi, the need for the SAHRC to spread available human and financial resources to satisfy the demands of its mandate can only result in minimum levels of activities and effectiveness if at all, on socio-economic rights implementation.<sup>405</sup>

Although it is noted as being one of the best-resourced on the continent, expressions about the inadequacy of available funds and their impact on the effective operations of the SAHRC are common. For instance, it disclosed that budgetary constraints adversely impacted on its activities and achievements in several ways, such as preventing it from embarking on staff development, the recruitment and filling of vacant positions,<sup>406</sup> and carrying out effective human rights education and training across the country due to the

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<sup>401</sup> Thabo (n 60 above).  
<sup>402</sup> Thabo (n 60 above).  
<sup>403</sup> Thipanyane (n 70 above) 25-26.  
<sup>404</sup> Tissington (n 95 above).  
<sup>405</sup> Molapisi (n 96 above).  
<sup>406</sup> SAHRC Annual Report 2011 11.

vastness of the country and the area it has to cover.<sup>407</sup> In its 2013 annual report, the the SAHRC clearly states that budgetary constraints have hindered its ability to appoint secretariat staff for its new organizational structure, thoroughly investigate matters in rural areas and districts, effectively reach a wider audience with its outreach programmes, harness technology to increase organizational capacity and performance, and improve accessibility to people with disabilities.<sup>408</sup> In emphatic terms the SAHRC laments that, financially, ‘it simply does not have a large enough budget to do the kind of work that is expected of it in terms of its broad mandate.’<sup>409</sup>

Similarly, Newman notes, there is no possibility for the SAHRC’s budget to allow it to monitor socio-economic rights ‘as completely as desirable while also carrying out its other constitutional and statutory mandates.’<sup>410</sup> Thus it is easy to agree with the position that its performance in terms of achieving the mandate objectives is partly limited by serious lack of institutional capacity resulting from budgetary constraints.<sup>411</sup>

### **5.6.3. The challenge of ineffective powers and social influence**

As a body with responsibility to enforce human rights, the SAHRC is constitutionally empowered to ‘take steps to secure appropriate redress where human rights have been violated.’<sup>412</sup> Practically, apart from bringing proceedings before a court of tribunal, the SAHRC acts or makes recommendations to relevant departments, including the President and Parliament, to redress human rights violations.<sup>413</sup>

However, unlike the NNHRC, the decisions or recommendations of the SAHRC are not binding and legally unenforceable. This feature is typical of most NHRCs and, reportedly, preferred by the SAHRC, but it arguably constitutes a challenge to the practical realization of its mandate to advance the implementation of socio-economic

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<sup>407</sup> SAHRC written responses (n 93 above) 4.

<sup>408</sup> SAHRC Annual Report 2013 10.

<sup>409</sup> SAHRC written responses (n 93 above).

<sup>410</sup> Newman (n 180 above) 269.

<sup>411</sup> SAHRC Annual Report 2013 10.

<sup>412</sup> Section 184(2) of the 1996 Constitution of South Africa.

<sup>413</sup> Section 8 of the Human Rights Commission Act of 1994.

rights. Even more so, is the fact that the state is not naturally predisposed to comply with its international and constitutional obligations to implement these rights.<sup>414</sup>

As Newman argues, the South African Constitution may lose its transformative value and essence among the ordinary people facing conditions of poverty if socio-economic rights do not get entrenched in governmental priorities.<sup>415</sup> Although moral sanctions, persuasions and the threat of litigation remain essential for the SAHRC to secure compliance with its decisions and recommendations on socio-economic rights implementation, these soft enforcement mechanisms have been grossly ineffective. Tissington notes that government departments have largely refused to cooperate with and even ignore the findings and recommendations of the SAHRC because they know that it is powerless and they bear no sanctions for such actions.<sup>416</sup>

Although Thipanyane has argued that the challenge in respect of non-binding decisions by NHRIs is to ensure that these recommendations are taken seriously by the state and non-state entities that violate human rights, this is not the experience of the SAHRC.<sup>417</sup> Even so, the SAHRC prefers to remain without legally binding powers to implement its recommendations. However, it accepts that the country will continue to make little progress in the realization of socio-economic rights if the state and its organs continue to neglect its reports and recommendations on these rights.<sup>418</sup> This view points to the conclusion that the SAHRC may be more effective in advancing socio-economic rights if its decisions, recommendations, and directives have some compellable influence backed by effective sanctions. For instance, it is argued that the SAHRC would be more effective in preventing arbitrary evictions against the poor if it has powers to issue temporary preservative orders on housing evictions or demolitions pending the resolution of disputes without the need to go through the courts. Thus, lack of effective powers of enforcement perpetuates disregard for the findings and recommendations of the SAHRC

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<sup>414</sup> SAHRC written responses (n 93 above) 5.

<sup>415</sup> Newman (n 180 above) 199.

<sup>416</sup> Tissington (n 95 above).

<sup>417</sup> Thipanyane (n 70 above) 19.

<sup>418</sup> 8<sup>th</sup> section 184(3) Economic and Social Rights Report 2012 13.

by the state and its departments, which contributes to limiting its level of effectiveness in advancing socio-economic rights implementation in South Africa.

## **5.7. Conclusion**

As a Chapter 9 institution, the SAHRC was established to support and strengthen democracy with a broad mandate to advance the implementation of human rights generally. The chapter evaluates the SAHRC in terms of its role and activities in advancing the implementation of socio-economic rights in South Africa.

The chapter first considered the institutional characteristics of the SAHRC and on the basis of findings reached the conclusion that the SAHRC's establishment, mandate, powers, level of independence and other relevant features substantially comply with the basic requirements of the Paris Principles. Thus, the SAHRC has the relevant institutional features to be operationally effective.

The chapter also considered the domestic governance and legal framework, which is also crucial for the effectiveness of the SAHRC and concluded that the domestic political and legal framework is conducive for it to effectively execute its mandate. Basically, apart from the fact that South Africa is a functional democracy, the legal framework expressly guarantees socio-economic rights and obligates the state to ensure their progressive implementations with relevant legislation, policy and administrative measures. Consequently, apart from the constitutional guarantee of socio-economic rights, the state has also put in place legislation and a number of policies relevant to achieving the practical enjoyment of all categories of socio-economic rights in the country. Here, too, the SAHRC is considered as having the right political and legal environment to execute its mandate. Consequently, the problem, which is also the reason for its existence, is how to, for the benefit of all South Africans, achieve the implementation of socio-economic rights, as guaranteed by the Constitution and other relevant international treaties the state has subscribed to.



Although the SAHRC has a general mandate on human rights, it is known to have given considerable attention to the promotion and protection of socio-economic rights. Since its establishment in 1995 it has advanced state's implementation of these rights through various mechanisms. While the study considers the strategies of the SAHRC to be relevant, it emerges that they vary in their levels of impact or effectiveness. For instance, human rights education and the promotion of state compliance with its international obligations were discovered to be less practically impacting as against the complaint process, socio-economic rights monitoring, public hearings and even litigation.

Furthermore, it emerges that the SAHRC's reach, effectiveness and impact are limited or hindered by a number of structural challenges, including its largely reactive approach and attitude towards the exercise of its socio-economic rights mandate, also contributed to its less than impressive performance. For instance, the section 184(3) special mandate of the SAHRC on socio-economic rights is fast losing its vitality and potential because of its failure to enforce strict compliance from state departments and municipalities.

Arguably, the extensive provision of socio-economic rights in the constitutional and statutory framework in the country makes recourse to the international human rights platform less attractive for the SAHRC to advance the implementation of these rights. However, this does not justify its Commission's limited engagement with the state through these platforms to advance the implementation of socio-economic rights.

The study further discloses that while the SAHRC is relatively active in executing its mandate on socio-economic rights, its efforts are limited, either directly or indirectly, by structural challenges such as the wideness of the mandate, inadequate human and material capacity, and lack of effective remedial powers. Thus, public confidence in the ability of the SAHRC to redress socio-economic wrongs or influence state compliance with its obligation to implement these rights is fast eroding, particularly among the poor and marginalized people who are the ones most in need of its aid to assist them to ensure the full realization of these rights. Consequently, instead of carrying on as if everything is normal, the SAHRC needs to re-examine its strategies and approaches toward the

promotion and protection of socio-economic rights in South Africa through a comprehensive impact study.

The next chapter evaluates the Uganda Human Rights Commission and its work in advancing the implementation of socio-economic rights in that country in line with the scope of the study.

## CHAPTER SIX

### **THE ROLE OF, MEASURES TAKEN BY, AND THE EFFECTIVENESS OF THE UGANDAN HUMAN RIGHTS COMMISSION IN ADVANCING DOMESTIC IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS**

#### **6.1. Introduction**

This is the last of the three country studies on the responsibility of and measures taken by NHRIs for advancing the realization of socio-economic rights in Africa. The focus of this chapter is on the Ugandan Human Rights Commission ('the UHRC') which has been established as a constitutional body to promote and protect the fundamental human rights of all Ugandans.

The first segment of the chapter considers the UHRC's existence in addition to its characteristic architecture set against the Paris Principles to determine whether it has the requisite institutional structure to function as an effective NHRI. Thus, the origin, legal status, membership, appointment, and tenure of members of the UHRC are critically evaluated in relevant sub-sections to establish the extent to which there has been compliance with the Paris Principles. Other relevant prescriptions scrutinized are its independence, operational and financial autonomy, as well as its administrative structure, and relationship with NGOs and other related stakeholders.

The next section examines the prevailing socio-economic conditions in Uganda in relation to the failure of, and the need for, the state to implement socio-economic rights as a logical way of improving the living conditions of the people. The section that follows considers the UHRC's socio-economic rights mandate as expressed or derivable from the existing legal and policy frameworks. Thus, the various sources of socio-economic rights in Uganda are examined in relevant sub-sections to establish how and the extent to which they feed and strengthen the UHRC's socio-economic rights mandate. Thereafter, the chapter examines the practical strategies the UHRC utilizes to advance the progressive realization of socio-economic rights in Uganda, including how it carries out these activities and the outcomes in furtherance of the mandate to promote and protect these

rights. The final segment of the chapter then looks at the challenges the UHRC contends with while discharging its responsibility to advance the implementation of socio-economic rights in Uganda. The chapter concludes with a brief summary.

## **6.2. The establishment and institutional structure of the UHRC**

### **6.2.1. The historical origin of the UHRC**

Uganda was a British Protectorate between 1894 and 1962.<sup>1</sup> It gained independence from Britain on 9 October 1962. Between 1962 and 1986, when the present government came to power, Uganda experienced civil strife, political instability and gross human rights abuses under successive governments.<sup>2</sup> In 1966, the government of Milton Obote disbanded the independence Constitution, imposed a state of emergency in parts of the country and enacted the Public Order and Security Act 1967. This Act gave discretionary powers to Obote to detain or restrict the freedom of any person indefinitely without due process in the name of preserving peace and good order in Uganda. This power was reportedly used and abused by the Obote's government to harass, repress and brutalize perceived opponents until his government was overthrown by Idi Amin Dada in 1971.<sup>3</sup>

For eight years (1971 – 1979), Amin presided over what has been described as ‘the most dictatorial, murderous and rapacious regime’ in Uganda post-independence history.<sup>4</sup> Incidents of summary executions, arrests, harassment, torture, and imprisonment of the civilian population were widespread. He terrorized and expelled about 80,000 Asians from Uganda and expropriated their property.<sup>5</sup> Indeed, an estimated 300,000 Ugandans are reported to either have disappeared, or been summarily executed by the regime and its

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<sup>1</sup> GW Kanyeihamba *Constitutional and political history of Uganda: From 1894 to the present* (2002) 1.

<sup>2</sup> FM Ssekandi and C Gitta ‘Protection of fundamental rights in Uganda Constitution’ (1994) 26 *Columbia Human Rights Law Review* 191.

<sup>3</sup> Ssekandi and Gitta (n 2 above).

<sup>4</sup> EK Makubuya ‘The right to restitution, compensation and rehabilitation for victims of gross violation of human rights and fundamental freedoms in Uganda’ *A presentation at a seminar on The right to restitution, compensation and rehabilitation for victims of gross violation of human rights and fundamental freedoms* Maastricht 11 – 15 March 1992 86.

<sup>5</sup> AN Makubuya ‘National human rights institutions under fire: The Uganda human rights commission on the brink’ 10 *East African Journal of Peace and Human Rights* (2004) 78 87.

agents.<sup>6</sup> According to Kanyeihamba, official terrorism, murders and torture and blatant violation of human rights became the normal activities of the government, the national economy plummeted and Amin added more pain by authorizing his soldiers and officers to feed and enrich themselves with their guns.<sup>7</sup> Consequently, people were also killed, tortured, dismembered or made to disappear for allegedly committing economic crimes, such as corruption, hoarding, smuggling, overcharging or the diversion of essential goods.<sup>8</sup>

In 1979, Amin's government was toppled by the Uganda National Liberation Army (UNLF), but the circle of violence and human rights violations continued.<sup>9</sup> There was looting and destruction in Kampala, including the harassment and killing of those considered sympathetic to Amin's regime.<sup>10</sup> President Obote, who was restored to power, also used the UNLF to harass, repress and maltreat Ugandans. In 1985, the UNLF overthrew the Obote regime and subjected Ugandans to another six gruelling months of gross human rights violations.<sup>11</sup> In January 1986, the national resistance army overran Kampala, expelled the UNLF and established a new government under President Yoweri Museveni.<sup>12</sup>

Museveni took over a country that was ranked as one of the least developed in the world,<sup>13</sup> badly misruled and mismanaged by successive dictatorships that committed a litany of gross human rights violations against the people of Uganda. Two years after coming to power President Museveni initiated moves to restore constitutional order by establishing the Uganda Constitutional Commission (UCC) and empowered it to produce

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<sup>6</sup> International Commission of Jurists Report on Uganda (1978); The human rights centre Uganda *human rights defenders in action: An overview of the working environment for human rights defenders in Uganda* 5. Available at <http://protectionline.org/files/2013/05/human-rig> (accesses 20 August 2013); EK Makubuya (n 4 above) 88.

<sup>7</sup> Kanyeihamba (n 1 above) 162.

<sup>8</sup> Kanyeihamba (n 1 above) 162.

<sup>9</sup> International Commission of Jurists Report on Uganda (1978); The human rights centre Uganda *human rights defenders in action: an overview of the working environment for human rights defenders in Uganda* 5. Available at <http://protectionline.org/files/2013/05/human-rig> (accesses 20 August 2013); EK Makubuya (n 4 above) 88.

<sup>10</sup> Makubuya (n 4 above) 88.

<sup>11</sup> Makubuya (n 4 above) 88.

<sup>12</sup> Makubuya (n 4 above) 89.

<sup>13</sup> 'Human Development Report 2011 *United Nations Development Programme* 19.

a new national Constitution.<sup>14</sup> He also established the Commission of Inquiry on Violations of Human Rights (CIVHU) to investigate and collate all aspects of human rights violations, breaches of the rule of law and excessive abuses of power in Uganda between 1962 and 1986.<sup>15</sup> The CIVHU, as a way of preventing the reoccurrence of the horrendous violations of human rights that occurred during the period, recommended to the UCC the creation of a permanent body with responsibility to promote and protect human rights and freedoms in the country. It was the first time the idea of establishing a NHRI for Uganda was raised as part of human rights discussions.<sup>16</sup>

In 1994, the UCC, which received and reviewed public views on what should constitute the content of the new Constitution of Uganda, adopted the CIVHU's recommendation for the establishment of the UHRC, on the basis that an 'overwhelming number of submissions from all levels of society' endorsed the creation of a specialized national institution to effectively ensure the primacy of human rights in Uganda.<sup>17</sup> The UCC then proposed the creation of the UHRC as part of the draft Constitution. This proposition was accepted by the Constituent Assembly and was entrenched in the 1995 Constitution of Uganda.

Thus, the UHRC was created during the country's transition from absolute dictatorship to some kind of constitutional rule. The constitutional reforms and democratization process taking place during the period created the opportunity for it to be established with the hope that it would serve to bring to an end the cycle of human rights violations that

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<sup>14</sup> Ssekandi and Gitta (n 2 above).

<sup>15</sup> J Matshekga 'Tootless bulldogs? The human rights commissions of Uganda and South Africa: a comparative study of their independence' (2002) *African Human Rights Law Journal* 68 80; AN Makubuya (n 5 above) 83; S Mattiar 'The Uganda human rights commission: beyond protection and promotion of human rights' in M Paarlevliet et al (eds) (n 929 above at 41); M Sekaggya 'The protection role of Uganda Human Rights Commission' in BG Ramcharam (ed) *The protection role of national human rights institutions* (2005) 165.

<sup>16</sup> J Hatchard 'A new breed of institution: The development of human rights commissions in Commonwealth Africa with particular reference to the Uganda human rights commission' (1999) 32 *Comparative and International Law Journal of South Africa* 28 at 30-31.

<sup>17</sup> 'Report of the commission of inquiry into human rights violations in Uganda: findings, conclusions, and recommendations' October 1994 (1996) 3 *East African Journal of Peace and Human Rights* 140-170.

characterized Uganda's turbulent history.<sup>18</sup> The Commission started functioning with the appointment of the first set of Commissioners in November 1996. However, in 2004, to the consternation of the human rights community, the Government sponsored a proposal before Parliament to merge the Commission with the Inspectorate of Government (IG). Fortunately, the proposal, which was strongly opposed by human rights organizations within and outside the country, failed to receive the necessary parliamentary approval.<sup>19</sup> Since then the UHRC has remained in existence to date.

### **6.2.2. The legal status of the UHRC**

The UHRC is established under section 51 of the Constitution of the Republic of Uganda 1995. This establishment makes the UHRC a constitutional body, and among the few NHRIs in Africa that is established, secured and empowered under both constitutional and statutory provisions. Apart from its establishment, both the Constitution and the Uganda Human Rights Commission Act 1997<sup>20</sup> further enumerate its mandate, functions, and powers. Thus, the creation and legal status of the UHRC in this respect adequately complies with the requirements of the Paris Principles as it is assured of stable and continuing existence. The fact that the government failed in its active attempt to abolish the UHRC in 2004 clearly strengthens the view that the continuous existence, independence and stability of a NHRI are better secured when they are entrenched in the Constitution.<sup>21</sup>

### **6.2.3. The composition and qualification of members of the UHRC**

The Constitution requires the UHRC to be composed of a Chairperson and not less than three other persons.<sup>22</sup> The Chairperson must be a judge of the High Court or a person with an equivalent qualification.<sup>23</sup> The qualification of the other members is not stated. However, both the Chairperson and the other members must be persons of high moral character and proven integrity.<sup>24</sup>

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<sup>18</sup> 6<sup>th</sup> Annual Report of UHRC xiii.

<sup>19</sup> Makubuya (n 5 above) 78.

<sup>20</sup> Hereinafter referred to as 'the UHRC Act of 1997'

<sup>21</sup> Makubuya (n 5 above) 78.

<sup>22</sup> Section 51(2) of the Constitution of Uganda 1995.

<sup>23</sup> Section 51(3) of the Constitution of Uganda 1995.

<sup>24</sup> Section 51(4) of the Constitution of Uganda 1995.

It is clear that the UHRC is meant to be a small-member institution similar to that of Ghana, although having the flexibility to have more than four members, if and when necessary. However, it thus far, has in fact, always been composed of eight members.<sup>25</sup> The issue of having an inclusive representation in the UHRC is not clearly expressed in the UHRC Act of 1997. This aspect, it appears, is left for the discretion of the President when appointing the members. Presently, the UHRC is composed of two female and six male Commissioners as of March 30 2014.<sup>26</sup> The Commissioners do not reflect or represent any particular social constituency: although the Chairperson and two others are lawyers, the rest of the Commissioners are from different social and professional backgrounds.<sup>27</sup>

Furthermore, the need for broad social diversity in the composition of the UHRC is downplayed by the responsibility of the Commissioners, irrespective of their social backgrounds, to do justice to all Ugandans in accordance with the Constitution and the laws of the country ‘without fear or favour, affection or ill will.’<sup>28</sup> Every Commissioner’s responsibility is to all Ugandans and not to the particular social constituency from which he or she was appointed.

Also, apart from the Chairperson, both the Constitution and the framework legislation are silent on the qualification requirements for membership of the UHRC. This position is similar to that in South Africa, but different from that in Nigeria where the attainment of some high educational or professional qualification is a precondition for appointment.<sup>29</sup> However, knowledge of human rights issues is a necessary factor for consideration in the appointment of members of NHRIs. This consideration also applies to the UHRC, as is evident in the profile of all the Commissioners.<sup>30</sup> Although reserving the position of the Commission’s Chairperson to a judge of the High Court clearly limits and narrows the

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<sup>25</sup> 15<sup>th</sup> UHRC Annual Report 2012 v.

<sup>26</sup> 15<sup>th</sup> UHRC Annual Report 2012 v.

<sup>27</sup> VA Adome is from an NGO background; J Etima is a retired Commissioner-general of prisons; KW Irumba was a senior public servant; while S Basaliza was from the Uganda Peoples Defence Force

<sup>28</sup> Section 3 of the UHRC Act of 1997.

<sup>29</sup> Sections 2(2)(a) and 7(1)(a) of the Nigerian Human Rights Commission Act of 1997.

<sup>30</sup> The Commissioners profile is on the Commission’s website [www.uhrc.ug](http://www.uhrc.ug).



choice of the headship of the UHRC to the legal profession, this requirement may be justified by the nature of its functions, and its quasi-judicial status, which entails the interpretation of legal instruments.

Furthermore, it is imperative for the Commissioners to be men and women of good character in order to secure the institution's public image and integrity.<sup>31</sup> Equally justified is the exclusion of public officers, such as members of Parliament, local government councils, executive members of any political party or organization from concurrently becoming members of the UHRC to avoid a conflict of interest or shifty loyalty.<sup>32</sup> By and large the composition and qualifications for membership of the UHRC substantially conform to the Paris Principles, although with a limited opportunity for achieving social diversity in the composition.

#### **6.2.4. The appointment and tenure of members of the UHRC**

The President appoints the appointment of all members of the UHRC with the approval of Parliament.<sup>33</sup> Practically, the President's submits his nominees to the Parliamentary Appointments Committee, which reserves the right to accept or reject any one or all of the nominees. Thus, like the NNHRC, the appointment process is not exclusively controlled by the Executive: both the Executive and the Parliamentary arms of government play distinct but reinforcing roles. The Executive nominates and Parliament screens and confirms the nominees before the person becomes a member of the UHRC.

Critics, like Hatchard hold the view that this provision gives the President too much influence in the appointment process, which negates the prescriptions of the Paris Principles that require an open, transparent and broadly participatory process.<sup>34</sup> Topp feels that only a very strong and independent-minded Parliament could reject the President's nominees, which is unlikely under the prevailing power equation that exists

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<sup>31</sup> Hatchard (n 16 above) 31.

<sup>32</sup> Section 6 of the UHRC Act 1997.

<sup>33</sup> Section 51(2) of the Constitution of Uganda 1995.

<sup>34</sup> Hatchard (n 16 above) 32.

between the President and Parliament in Uganda.<sup>35</sup> The point being made is that with the complete exclusion of independent social forces from the appointment process, every member owes and holds his or her appointment to the pleasure of the President, a situation that may be perceived to undermine the credibility of the process and its outcome.<sup>36</sup>

However, although the negative perceptions about the integrity of the appointment process are valid, the fears about the possible outcome appear to be largely speculative. According to Ssekindi,<sup>37</sup> Parliament is a distinct and independent body under the Constitution, even if the ruling party holds an overwhelming majority. She further argues that the parliamentary screening is an open process that offers members of the public, including NGOs, the opportunity to object to the confirmation of any nominee they consider unsuitable to become a member of the UHRC.<sup>38</sup> Ssekindi's assertions may be correct: at least on one occasion the Parliament of Uganda rejected the President's nominee to the UHRC.<sup>39</sup> Also, it is relevant to note that once appointed Commissioners are under oath to be loyal to the Constitution and the laws of the country, and not to the appointing authority.

Namusobyia however, insists that the appointment process is defective as it is not completely insulated from the influence of the President and the ruling party.<sup>40</sup> Therefore, she insists on an amendment to the Constitution to provide for the active participation of civil society and other relevant stakeholders in the appointment process.<sup>41</sup> The recommendation of Namusobyia is desirable, but it should be noted that the current

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<sup>35</sup> M Topp 'Human rights protection by the state in Uganda' in B Lindholt and K Yigen (eds) *National human rights institutions: actions and working papers, input to the discussions on the establishment and development of the functions of national human rights institutions* (2001) 171 180.

<sup>36</sup> Matshekga (n 15 above) 79.

<sup>37</sup> Interview with Ruth Ssekindi, Director of Complaints, Investigations and Legal services UHRC, Uganda, Kampala, 13 September 2013.

<sup>38</sup> Section 3 of the UHRC Act of 1997.

<sup>39</sup> Out of the first set of seven commissioner nominees from the President, Parliament reportedly rejected one, who was replaced, on account of insufficient known on human rights. See Hatchard (n 16 above) 33.

<sup>40</sup> Interview with Salima Namusobyia, the Executive Director, Institute for Socio-Economic Rights (ISER) Uganda, Kampala, 13 September 2013.

<sup>41</sup> Namusobyia (n 40 above).

process of appointment of members to the UHRC is not different from that which prevails in other countries, such as Nigeria and Ghana.

Furthermore, members of the UHRC enjoy security of tenure. Once appointed they are to remain in office as fulltime Commissioners for six years, which is renewable for further terms.<sup>42</sup> Relative to Nigeria and South Africa, six years is a reasonably long tenure with the advantage that it allows Commissioners to focus undisturbed on the execution of the Commission's mandate. Furthermore, while members of the UHRC can be removed from office before the expiration of their tenure, the dismissal process is similar to that of judges of the High Court of Uganda.<sup>43</sup>

A Commissioner can be removed from office only when he or she is totally incapacitated from performing his or her functions by reason of infirmity of body or mind, or involvement in acts of misbehaviour, misconduct, or incompetence.<sup>44</sup> In all instances, the recommendation for removal must be made to the President by the Judicial Service Commission or by the Parliament or by an independent tribunal set up by the President for that purpose.<sup>45</sup> These processes are administrative and subject to judicial review. Besides, any advice of the tribunal against the removal is final and the President is bound to accept it.<sup>46</sup> Thus, members of the UHRC practically enjoy security of tenure which enhances its independence in accordance with the Paris Principles.<sup>47</sup>

#### **6.2.5. The independence and operational autonomy of the UHRC**

The UHRC is established as an independent body. The national Constitution expressly provides that the UHRC 'shall be independent and shall not, in the performance of its duties, be subject to the direction or control of any person or authority.'<sup>48</sup> Thus, in exercising its powers or carrying out its mandate and operations, the UHRC is regulated only by the Constitution, the UHRC Act 1997, its Strategic Action Plans, Operational

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<sup>42</sup> Section 51(4) of the Constitution of Uganda of 1995.

<sup>43</sup> Section 56 of the Constitution of Uganda of 1995.

<sup>44</sup> Section 144(2) of the Constitution of Uganda of 1995.

<sup>45</sup> Section 144(3)-(5) of the Constitution of Uganda 1995.

<sup>46</sup> Section 144(6) of the Constitution of Uganda of 1995.

<sup>47</sup> Hatchard (n 16 above) 34; Matshekga (n 15 above) 79.

<sup>48</sup> Section 54 of the Constitution of Uganda 1997.

Guidelines, and Rules of Procedures.<sup>49</sup> Therefore, no other authority, including the President, can lawfully dictate orders or directives to it in the performance of its functions, and, if given, it is not legally bound to take or follow such orders or directives, having subscribed solemnly to always uphold the Constitution and the laws of the country.<sup>50</sup>

In addition to the express grant of institutional autonomy, the UHRC has all other legal and material elements that safeguard and enhance its institutional autonomy. Thus, since the Commissioners have a stable tenure in office, are immune from civil proceedings for acts done in good faith in the performance of their official responsibilities<sup>51</sup> and enjoying the same public status and service conditions as judges of a high court of justice, there can be no justification for the Commissioners to compromise their individual autonomy of action or the corporate independence of the UHRC.

Furthermore, with the power to recruit and remunerate its staff, although in consultation with the Public Service Commission,<sup>52</sup> the UHRC can engage its own staff with the requisite competences to effectively and efficiently execute its mandate. Finally, it appears that the Commission's first line of accountability is to the people through Parliament, and not to the Executive.<sup>53</sup> Thus, the UHRC is required to submit its reports to Parliament for consideration and merely transmit copies to the President.<sup>54</sup>

The UHRC has, over the years, exhibited a substantial degree of operational independence and autonomy. Arguably, it is noted for its ability to criticize the government over issues of human rights violations which in Matshekga's view, is an unequivocal assertion of institutional independence.<sup>55</sup> Thus, there have not been any

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<sup>49</sup> Sekaggya (n 15 above) 165.

<sup>50</sup> Section 3 of the UHRC Act 1995; members are required to take and subscribe to the oath specified in part 1 of the second schedule to the Act.

<sup>51</sup> Section 14 of the UHRC Act 1997.

<sup>52</sup> Section 57 of the Constitution of Uganda 1995; Section 11(1)(2) and (3) of the UHRC Act 1997.

<sup>53</sup> Section 52(2) of the Constitution of Uganda 1995.

<sup>54</sup> Section 8(6) of the UHRC Act 1997.

<sup>55</sup> Matshekga (n 15 above) 74.

credible reasons to perceive the UHRC as acting under the influence or control of any other person or authority.<sup>56</sup>

However, Nkuubi views the UHRC as highly subdued when it comes to criticizing the state over the lack of reasonable progress in the implementation of socio-economic rights.<sup>57</sup> He argues further that bodies like the UHRC, which depend almost entirely on the state for funding for the execution of their mandates, are all subject to the twists, turns and bottlenecks of the public governance system. Thus, he argues that there is no possibility the UHRC can exercise absolute or unlimited autonomy irrespective of express constitutional guarantees of independence.<sup>58</sup>

It is argued that Nkuubi's assertion is correct and perhaps applies to all NHRIs, as it is difficult for these bodies to be completely autonomous in their operations. For instance, the fact that the UHRC needs to consult with, and perhaps secure approval from, the Public Service Commission and the Ministry of Finance before recruiting staff and fixing their remuneration is a limitation to its powers to recruit, retain and reward competent staff. However, it is correct to say that the UHRC has adequate legal guarantees of independence and autonomy to be effective in the discharge of its mandate in line with the prescriptions of the Paris Principles.

#### **6.2.6. The financial autonomy of the UHRC**

The Constitution and the UHRC Act both provide for the financial autonomy of the UHRC. Both instruments guarantee the charging of the administrative expenses of the UHRC to the consolidated revenue fund.<sup>59</sup> This means the UHRC has no problems with funds to meet its administrative expenses, including payment of staff salaries, allowances and pensions.<sup>60</sup> Furthermore, it can also accept grants and donations from external

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<sup>56</sup> Matshekga (n 15 above) 73.

<sup>57</sup> Interview with James Nkuubi, Programme Officer Human Rights Network Uganda (HURINET-U), Kampala, Uganda 13 September 2013

<sup>58</sup> Nkuubi (n 57 above).

<sup>59</sup> Section 55 of the Constitution of Uganda 1995; Section 13(2) of the UHRC Act 1997.

<sup>60</sup> Section 55 of the Constitution of Uganda 1995.

sources, such as the country's development partners, with the approval of the Minister of Finance.<sup>61</sup>

Budgetary allocation from the government, which currently stands at 75 per cent of its total expenditure, remains the most reliable source of funding for the UHRC. However, its approved capital expenditure is not as legally assured, as releases are subject to the discretion of the government. Thus, although the UHRC has the autonomy to spend what the government releases, it has no powers to decide or influence the quantum of funds it actually needs to fund its activities despite the legal obligation of Parliament to provide adequate resources and facilities to enable it to perform its functions effectively.<sup>62</sup> For instance, even as government funding has progressively increased annually to about 125 per cent, the UHRC, still reportedly, had a budget deficit of about 15.2 billion Uganda shillings between 2008 and 2012.<sup>63</sup> This shortfall worked against its interest by preventing it from opening additional offices and implementing an already approved enhanced staff welfare package.<sup>64</sup>

Furthermore, while the 75 per cent funding from the state seems impressive, the fact is that the bulk of government funds is spent mostly on meeting administrative services, payment of staff salaries and other costs, acquisition of goods and services, communication expenses, utilities, maintenance and procurement of equipment.<sup>65</sup> This makes the UHRC almost entirely dependent on external funds from overseas development partners to execute its core mandate activities, including human rights education, investigating and handling complaints, holding circuit tribunal hearings, staff capacity building and monitoring of human rights.<sup>66</sup>

As Musiga observes, dependency on external funding is in itself a limitation to the autonomy of action of the UHRC since funding is usually tied to specific aspects of its

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<sup>61</sup> Section 13(3) of the UHRC Act 1997.

<sup>62</sup> Section 13(1) of the UHRC Act 1997.

<sup>63</sup> 15<sup>th</sup> UHRC Annual Report 2012 77.

<sup>64</sup> 14<sup>th</sup> UHRC Annual Report 2011 52.

<sup>65</sup> 15<sup>th</sup> UHRC Annual Report 2012 77.

<sup>66</sup> 15<sup>th</sup> UHRC Annual Report 2011 77.

mandate, which it cannot deviate from. Also, the work-plan for the project and the cost implications are vetted and approved by the fund providers before the UHRC can proceed with execution.<sup>67</sup> In corroboration Kubuye, the Commission's director of research, education, and documentation, asserts, that although strings are not attached by the donor agencies to the funds they donate, the UHRC is often forced to scale down its work-plan because of funding limits set by the partners.<sup>68</sup> As well funds from external sources are said to be declining in recent years, which no doubt will affect the operations of the UHRC negatively unless the state steps up its own funding to fill the gap.<sup>69</sup>

Thus, as a self-accounting body, the UHRC has substantial autonomy over the utilization of available funds but is limited in terms of getting adequate funds to cater for all its planned activities in every given year without depending on external sources of funding.<sup>70</sup> Therefore, although the UHRC is not poorly funded, the level of funding from the state is inadequate for its effective operations as prescribed by the Paris Principles.

#### **6.2.7. The administrative structure and accessibility of the UHRC**

The UHRC operates a centralized administrative structure, with the head office in Kampala. The Chairperson and the other Commissioners are at the apex of the administrative structure. As its head,<sup>71</sup> the Chairperson is responsible for giving policy and administrative direction to the UHRC.<sup>72</sup> The Chairperson also monitors and supervises the Secretary.<sup>73</sup> Commissioners assist the Chairperson to direct the affairs of the Commission. Collectively, the Commissioners provide policy decisions and guidelines for the Secretary to implement.

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<sup>67</sup> Interview with Martha Mugisa, Programme Officer, Strategic Programmes, Center for Health Human Rights and Development (CEHURD), Kampala Uganda 12 September 2013.

<sup>68</sup> Interview with Dorah Kubuye, Director of Education and Research and Training of the UHRC on 16 September 2013.

<sup>69</sup> 6<sup>th</sup> UHRC Annual Report 2004 49.

<sup>70</sup> Section 55(a) of the Constitution of Uganda 1995.

<sup>71</sup> Section 6(a) of the UHRC Act 1997.

<sup>72</sup> Section 6(b) of the UHRC Act 1997.

<sup>73</sup> Section 6(c) of the UHRC Act 1997.

The Secretary is the chief accounting officer and administrative head of the UHRC.<sup>74</sup> Thus, he or she is responsible for its day-to-day administration, including the implementation of its policies, decisions, and guidelines and supervising the subordinate staff.<sup>75</sup> He or she is also responsible for organizing the meetings by preparing the business of such meetings, recording and keeping the minutes of all decisions and proceedings at its meetings.<sup>76</sup>

Below the Secretary is the technical management team, who are directors and heads of directorates, units and regional offices.<sup>77</sup> The management team assists the Secretary in the administration of the UHRC's activities, including programmes and projects. Presently, the UHRC has five directorates, namely: monitoring and inspection; complaints, investigation and legal services; research, education and documentation; finance and administration; and regional services.<sup>78</sup> The units are a health unit, a planning unit, a public affairs unit, a vulnerable persons unit, a systems unit, a human resource unit, a human rights unit and a registry.<sup>79</sup>

Furthermore, although the Commission is required to 'establish offices at district and other administrative levels as it considers fit for the better performance of its functions,'<sup>80</sup> it presently operates at two levels only: the headquarters and regional offices. There is a head office, which is located in Kampala, the country's capital city, and nine regional offices, namely: Arua regional office, Central regional office, Forte Porte regional office, Gulu regional office, Jinja regional office, Mbarara regional office, Moroto regional office and Soroto regional office.<sup>81</sup> It is yet to have offices in any of the country's 134 districts.<sup>82</sup>

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<sup>74</sup> Section 13(4) of the UHRC Act 1997.

<sup>75</sup> Section 10(2)(a) of the UHRC Act 1997.

<sup>76</sup> Section 10(2)(b) of the UHRC Act 1997.

<sup>77</sup> 15th UHRC Annual Report 2012 vi.

<sup>78</sup> 15th UHRC Annual Report 2012 74.

<sup>79</sup> 15th UHRC Annual Report 2012 74.

<sup>80</sup> Section 9 of the UHRC Act of 1997.

<sup>81</sup> 15th UHRC Annual Report 2012 vi.

<sup>82</sup> 15th UHRC Annual Report 2012 74.



Arguably, although the regional offices, to some extent, have brought the UHRC's services closer to some, it remains largely an urban-based institution and physically inaccessible to the majority of the people who live in the rural parts of Uganda. Thus, the need for the UHRC to decentralize its access further to all parts of the country, including the rural areas, to make its services available to the grassroots and to create a better impact across the country's landscape, is critical to its effectiveness.

#### **6.2.8. The relationship of the UHRC with NGOs**

The UHRC appreciates the importance and relevance of civil society groups and other key social actors in the promotion and protection of human rights. Accordingly, it carries out some of its activities through partnerships and alliances with civil society groups and other stakeholders, including security agencies, local council leaders, school, religious, district and community leaders, and international human rights bodies.<sup>83</sup> Between 2011 and 2012 alone, the UHRC reportedly participated in over 50 human rights sensitization activities organized by NGOs and other stakeholders.<sup>84</sup>

The UHRC has jointly held various human rights promotional activities with numerous human rights NGOs, including socio-economic rights NGOs and CBOs in Uganda. Some of the NGOs and CBOs it regularly partners with include: the Human Rights Network (HURINET-U); Human Rights Concern (HURICO); the Foundation for Human Rights Initiative (FHRI); and the Human Rights Centre Uganda. Others are: the National Community of Women Living with HIV/AIDS (NACWOLA); the Network for Empowerment of Marginalized Children and Youth (NEMACY Uganda); the Arua Male Community living with HIV/AIDS; Uganda Children's Rights NGO Network; and the Federation of International Female Lawyers (FIDA).<sup>85</sup> The UHRC also works with human rights stakeholders outside the NGO community, such as the local Office of the High Commissioner for Human Rights (OHCHR); the International Refugee Rights

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<sup>83</sup> 15th UHRC Annual Report 2012 71.

<sup>84</sup> 14<sup>th</sup> UHRC Annual Report 2011 41; 15<sup>th</sup> UHRC Annual Report 2012 71.

<sup>85</sup> 14<sup>th</sup> UHRC Annual Report 2011 48; 15<sup>th</sup> UHRC Annual Report 2012 71.

Initiative (IRI); and the Centre for Transitional Justice, and the UNESCO office in Uganda.<sup>86</sup>

The fact that it regularly works with NGOs to advance all aspects of its mandate was confirmed by the Institute of Socio-economic Rights (ISER) and HURINET-U. According to Namusobya, ISER and other NGOs work with the UHRC when they are consulted and brought on-board, especially in the area of human rights education and capacity building for local people.<sup>87</sup> Nkuubi of HURINET-U agrees with Namusobya, but added that involvement of NGOs in its activities is quite minimal.<sup>88</sup> However, Ssekindi, while asserting that the UHRC regularly partners with several NGOs and CBOs in the execution of its mandate, further stated that it is practically impossible for the UHRC to work with all the NGOs in Uganda at the same time as the decision is based on need, relevance and the credibility of the NGO.<sup>89</sup>

It is clear that there are several human rights NGOs and related stakeholder organizations in Uganda, some of which are committed to advancing the realization of socio-economic rights. Thus, the issue is not about lack of credible NGOs but the extent to which the UHRC is willing to collaborate with the existing NGOs and leverage their peculiar competences to advance the implementation of socio-economic rights. With regard to this aspect, it seems that the UHRC needs to do more to engage the socio-economic rights NGOs given their relevance to the actualization of its mandate. Presently, the UHRC appears to be maintaining some distance from some of the most active NGOs on socio-economic rights, such as the Centre for Health Human Rights and Development (CEHURD) and ISER.<sup>90</sup>

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<sup>86</sup> 15<sup>th</sup> UHRC Annual Report 2012 71.

<sup>87</sup> Namusobya (n 40 above).

<sup>88</sup> Nkuubi (n 57 above).

<sup>89</sup> Ssekindi (n 37 above).

<sup>90</sup> Musiga (n 67 above).

### 6.3. The Ugandan state and the challenge of implementing socio-economic rights

Located in East Africa, Uganda occupies an area of 240,038 square kilometres with the population currently estimated to be about 34 million people.<sup>91</sup> Until recently, Uganda experienced continuous political instability which saw its economy nose-dive to crisis levels.<sup>92</sup> However, President Museveni, who has been in power since 1991, seems to have restored relative political stability and constitutional order to the country with a decentralized system of government.<sup>93</sup>

Like Nigeria, Uganda experienced positive economic growth in the last decade, averaging 6.5% in real terms, with agriculture, industrial production, and the service sector as the main contributors to the country's economic growth and development.<sup>94</sup> With an estimated GDP of USD 50.4 billion Uganda's economic prospect is high among countries in the East African region.<sup>95</sup> Further economic growth and development prospects have been enhanced with the discovery of commercially viable oil deposits in the country, estimated to be about 100,000 barrels per day for 25 years.<sup>96</sup> This discovery should enable the country to save funds by cutting back on fuel imports and so have more resources to channel into public funding of much needed basic infrastructure development.<sup>97</sup>

The good news is, unlike Nigeria, that the impressive growth in the economy has reportedly contributed to significant reduction in poverty and relatively improved access

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<sup>91</sup> 'Basic statistical abstracts' *Uganda Bureau of Statistics* 2012.

<sup>92</sup> 'Uganda: The economy-historical background' *US Library Congress* available at <http://countrystudies.us/uganda/38.htm>.

<sup>93</sup> Kanyeihamba (n 1 above) 1-3.

<sup>94</sup> 'Uganda national report for the implementation of the programme of action for the LDCs for the decade 2001-2010' 3.

<sup>95</sup> East Africa (EAC) economic review and assessment (2012) *Stratlink International* 50-60 available at [www.stratlinkglobal.com](http://www.stratlinkglobal.com).

<sup>96</sup> Chuhan-Pole et al 'An analysis of issues shaping Africa's economic future' (2013) 8 *Africa pulse World Bank* 29.

<sup>97</sup> P Chuhan-Pole et al (n 96 above).

by ordinary people to socio-economic goods and services.<sup>98</sup> For instance, in 1990, Uganda's HDI was 0.306 but increased to 0.456 by 2012.<sup>99</sup> This is regarded as a substantial improvement when compared to its peers, like the Central African Republic's 0.352.<sup>100</sup> Both countries were almost at the same level in 1990. Furthermore, although still lowly ranked 161 out of 187 countries in the HDI, Uganda nevertheless, is reported to be among the 15 developing countries whose economic growth benefited the poor, with accelerate achievements in health, education and income between 1990 and 2012.<sup>101</sup> For instance, according to the report, poverty fell from 56.4% in 1992 to 24.5% in 2010, enrolment in primary education progressed to 83 per cent, and Uganda's adult literacy rate has reached 73%.<sup>102</sup> Another positive revelation comes from the WHO which states, despite unacceptably high health indicators, that Uganda has made reasonable improvement in healthcare delivery in the past years, especially by reducing the infant mortality from 75 deaths per 1,000 live births in 2006 to 54 deaths per 1,000 live births in 2011.<sup>103</sup>

However, despite this impressive economic growth and improvement in human development trends in health, education nutrition and household income levels, poverty remains endemic in Uganda and the level of per capita income is still very low.<sup>104</sup> As well the beneficial effect of the economic growth is disproportionately distributed: the declining poverty rate is more pronounced in the urban areas than in rural areas where the majority of the poor live.<sup>105</sup> According to the WHO, there has been no improvement in

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<sup>98</sup> 'Human Development Indicators Human Development Report 2013' *United Nations Development Programme* 63; 'Millennium Development Goals Report for Uganda 2013' *Federal Ministry of Finance, and Economic Development* 15.

<sup>99</sup> 'Human Development Indicators Human Development Report 2013' *United Nations Development Programme* 63.

<sup>100</sup> Human Development Indicators Human Development Report 2013' *United Nations Development Programme* 63

<sup>101</sup> Chuhan-Pole et al (n 96 above).

<sup>102</sup> 'Basic statistical abstracts' *Uganda Bureau of Statistics 2012: Millennium Development Goals Report for Uganda 2013' Federal Ministry of Finance, and Economic Development* 2013 18.

<sup>103</sup> 'World Health Organization (WHO) Country cooperation strategy at a glance: Uganda 2009-2014 available at [www.afro.who.int/.../3463-country-cooperation-strategy-at-a-glance-uganda](http://www.afro.who.int/.../3463-country-cooperation-strategy-at-a-glance-uganda). Html.

<sup>104</sup> WHO (n103 above) 1; Millennium Development Goals Report for Uganda 2013' *Federal Ministry of Finance, and Economic Development* 2013 22.

<sup>105</sup> Chuhan-Pole et al (n 96 above).

maternal mortality rate since 2006, which stands at 435 deaths per 100,000 live births.<sup>106</sup> Furthermore, HIV prevalence increased from 6.4% in 2004/05 to 7.3% in 2011; neglected tropical diseases remain a serious challenge in in the country affecting mainly rural poor communities.<sup>107</sup> Furthermore, with the Gini coefficient increasing from 42 to 48, the indication is that inequality is unpleasantly high and the gap between the poor and the rich keeps increasing as the economy continues to grow.<sup>108</sup>

Thus, despite having the trapping of a ‘developmental state’ that apparently understands the imperatives of human development, Uganda’s improving economic growth is rather perpetuating a rising inequality that denies the benefits of the growth to the majority of the poor. As the UNDP argues in its report, ‘development is about changing a society to enhance people’s well-being across generations—enlarging their choices in health, education and income and expanding their freedoms and opportunities for meaningful participation in society.’<sup>109</sup> This change requires the state to inclusively mobilize the people through sound pro-poor policies and significant public sector investments in peoples’ capabilities in order to accelerate socio-economic implementation in Uganda. This is where the challenge for implementing socio-economic rights and the role of the UHRC becomes relevant and important in Uganda.

#### **6.4. The socio-economic rights mandate of the UHRC**

The Constitution of Uganda 1995 and the Uganda Human Rights Commission Act require the UHRC to investigate complaints about any human rights violation;<sup>110</sup> to establish a continuing programme of research, education and information to enhance respect of human rights;<sup>111</sup> and to monitor the government’s compliance with international treaty and convention obligations on human rights.<sup>112</sup> These three specific

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<sup>106</sup> WHO (n 103 above) 1.

<sup>107</sup> WHO (n 103 above) 1.

<sup>108</sup> Chuhan-Pole et al (n 96 above) 29.

<sup>109</sup> Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World’  
*Explanatory note on 2013 HDR composite indices* South Africa2-3

<sup>110</sup> Section 52(1)(a) of the Constitution of Uganda 1995; Section 8(1)(a) of the UHRC Act 1997.

<sup>111</sup> Section 52(1)(c) of the Constitution of Uganda 1995; Section 8(1)(d) of the UHRC Act 1997.

<sup>112</sup> Section 52(1)(h) of the Constitution of Uganda 1995; Section 8(1)(i) of the UHRC Act 1997.

functions together give the UHRC a composite mandate to promote and protect all categories of human rights, including socio-economic rights.

Thus the role and responsibility of the UHRC to advance the implementation of socio-economic rights can be taken as given as neither the Constitution nor the UHRC Act defines or restricts the meaning of ‘human rights’ to a particular sets of rights.<sup>113</sup> However, the extent to which the UHRC can advance the implementation of socio-economic rights depends on their status or availability in the domestic legal framework. Thus, the various sources and status of socio-economic rights in Uganda’s national legal framework is considered below to situate the scope of the UHRC’s mandate and powers to promote and protect these rights.

#### **6.4.1. The Uganda Constitution of 1995**

From independence in 1962 to date, Uganda has experienced four national Constitutions with provisions guaranteeing fundamental human rights.<sup>114</sup> However, only the current Constitution of 1995 expressly incorporates limited socio-economic rights. The three preceding Constitutions were limited to civil and political rights.<sup>115</sup> Although the UCC reportedly proposed the need to ensure that the ‘Bill of Rights gives effect to the basic needs and rights of the people,’<sup>116</sup> during the drafting of the 1995 Constitution, this progressive recommendation was not fully realized. Instead, the Constituent Assembly settled for the provision of two sets of human rights in the Constitution: rights that are judicially enforceable and those rights that ‘cannot all be realized and given effect immediately.’<sup>117</sup> Thus, the former, which falls essentially within the genre of civil and political rights, were guaranteed as fundamental rights and freedoms. A few socio-economic rights were also listed under this category.<sup>118</sup> The latter, which are non-binding

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<sup>113</sup> Hatchard (n 15 above) 58.

<sup>114</sup> The 1962 independence Constitution, the 1966 Constitution, the 1967 Constitution and the current 1995 Constitution.

<sup>115</sup> JC Mubangizi ‘The protection/enforcement of socio-economic rights in Africa: lessons from the South African experience (2007) 15 *African Yearbook of International Law* 87-106; O Oloka ‘Poverty, human rights and the quest for sustainable human rights development in structurally adjusted Uganda (2000) 18 *Netherlands Quarterly of Human Rights* 23 31.

<sup>116</sup> The report of the Uganda constitutional Commission: Analysis and recommendations (1993) 147.

<sup>117</sup> The report of the Uganda constitutional Commission: Analysis and recommendations (1993) 99.

<sup>118</sup> Chapter four of the Uganda Constitution of 1995.

provisions, were set down as National Objectives and Directive Principles of State Policy.<sup>119</sup>

The socio-economic and related rights the Constitution expressly guarantees are the right to property;<sup>120</sup> the right to education;<sup>121</sup> the right to work and to form or join a trade union;<sup>122</sup> and the right to a clean and healthy environment.<sup>123</sup> Accordingly, the implementation of these rights can be advanced by both justiciable and other means. The UHRC actively has done this with respect to the right to basic education under section 34 of the Constitution.<sup>124</sup> However, other very fundamental socio-economic rights, such as the right to health and the right to an adequate standard of living, including, food, shelter and clean water, are conspicuously absent from the constitutionally enumerated substantive rights and freedoms. For this reason academics, like Mubangizi and Oloko-Onyango, assert that socio-economic rights are minimally provided for in the 1995 Constitution of Uganda.<sup>125</sup> Notwithstanding, section 45 of the Constitution of Uganda 1995 further provides that ‘the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms, specifically mentioned in the Constitutional Bill of Rights shall not be regard as excluding others not specifically mentioned.’

Ordinarily, this provision means that the list of fundamental rights and freedoms in the Bill of Rights is not exhaustive.<sup>126</sup> However, whether section 45 can be applied to avail the socio-economic rights not specifically mentioned in the Constitutional Bill of Rights is a contentious issue, which is yet to be interpreted by Uganda’s Constitutional Court. *InCentre for Health Human Rights and Development and others v the Attorney*

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<sup>119</sup> Chapter five of the Uganda Constitution of 1995.

<sup>120</sup> Section 26 of the Uganda Constitution of 1995.

<sup>121</sup> Section 30 of the Uganda Constitution of 1995.

<sup>122</sup> Section 40 of the Uganda Constitution of 1995.

<sup>123</sup> Section 39 of the Uganda Constitution of 1995.

<sup>124</sup> Details are discussed at the segment on the Commission’s strategies for advancing socio-economic rights implementation below 6.5.

<sup>125</sup> J Oloka-Oyango *Rights and democratic governance working paper series: Interrogating NGO struggles for economic, social and cultural rights in contemporary Utake. A perspective from Uganda* (2006) 28.

<sup>126</sup> Kanyehamba (n 1above) 258.

*General*,<sup>127</sup> the petitioners sought a judicial enforcement of the right to health under section 45 of the Constitution as a constitutionally protected right in Uganda, but the Constitutional Court dismissed the entire petition as a political question without interpreting section 45 of the Constitution. According to the Constitutional Court, while it appreciates the concerns of the petitioners regarding the unsatisfactory provision of maternal health goods and services to expectant mothers, it could ‘not find any competent questions set out in the petition that require interpretation of the Constitution.’<sup>128</sup>

What is clear is that, in Uganda, a positive judicial decision on the justiciability of the full range of socio-economic rights is not yet available. This being so, NGOs, such as CEHURD have to turn to relevant mechanisms other than litigation for advancing the realization of socio-economic rights that are not expressly guaranteed by the Constitution. This view also applies to the UHRC, which has to rely more on non-judicial strategies to execute its mandate over the promotion and protection of socio-economic rights.

This study agrees with Musiga’s view that the ruling of the Constitutional Court on the issue exemplifies the failure of the courts in Uganda to appreciate the need to creatively and purposefully interpret the Constitution so as to preserve or incorporate socio-economic rights not otherwise expressly granted and the obligation of the state to implement these rights under the Constitution of Uganda and the relevant international human rights treaties the country has ratified.<sup>129</sup>

It is further argued that the Bill of Rights potentially incorporates socio-economic rights within the context of the indivisibility, interrelatedness, and interdependency of all human rights. Therefore, given the responsibility of all organs and agencies of government and all persons to ‘respect, uphold and promote all the rights and freedoms of the individuals and groups enshrined in the Bill of Rights’<sup>130</sup> the Constitution of Uganda 1995 constitutes a domestic legal framework for the promotion and protection of

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<sup>127</sup> Unreported, Constitutional Petition No. 16 of 2011.

<sup>128</sup> Judgment in Constitutional Petition No. 16 of 2011 28.

<sup>129</sup> Mugisa (n 67 above).

<sup>130</sup> Section 20(2) of the Uganda Constitution of 1995.



socio-economic rights, even if the courts are excluded from participating in the process of holding the state accountable for the implementation of these rights.

#### **6.4.2. The national objectives and directive principles of state policy**

The National Objectives and Directive Principles of State Policy (NODPSP) are tucked away in the preamble to the Constitution of Uganda 1995. The socio-economic objectives require the state to direct its developmental efforts toward securing the maximum social and cultural well-being of the people,<sup>131</sup> and ensure that all Ugandans enjoy rights and opportunities, including access to education, health services, clean and safe water, work, decent shelter, clothing, food, security and pension and retirement benefits.<sup>132</sup> The state is further enjoined to promote free and compulsory basic education,<sup>133</sup> take appropriate measures to afford every citizen equal opportunity to attain the highest educational standards possible,<sup>134</sup> ensure the provision of basic medical services to the population,<sup>135</sup> promote a good water management system at all levels,<sup>136</sup> encourage people to grow and store adequate food,<sup>137</sup> and encourage and promote proper nutrition through mass education and other appropriate means.<sup>138</sup>

These provisions approximate to a panoply of socio-economic rights. However, they are effective, not as human rights, but essentially as guiding principles of governance. The state, citizens and other bodies are all required to use them as guides in applying or interpreting the Constitution or any law, or in taking and implementing relevant decisions and policies for the realization of a just, free and democratic society.<sup>139</sup> Furthermore, the President of Uganda is required, at least once every year, to account to Parliament on

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<sup>131</sup> Section XIV(a) of the Constitution of Uganda 1995.

<sup>132</sup> Section XIV(b) of the Uganda Constitution 1995.

<sup>133</sup> Section XVIII(i) of the Ugandan Constitution 1995.

<sup>134</sup> Section XVIII(ii) of the Ugandan Constitution 1995.

<sup>135</sup> Section XX of the Ugandan Constitution 1995.

<sup>136</sup> Section XXI of the Ugandan Constitution 1995.

<sup>137</sup> Section XXII(a) of the Ugandan Constitution 1995.

<sup>138</sup> Section XXII(c) of the Ugandan Constitution 1995.

<sup>139</sup> Section I(i) of the Ugandan Constitution 1995.

what has been done to ensure their realization,<sup>140</sup> which the current President regularly does through a state of the nation address to Parliament.<sup>141</sup>

Thus, while the NODPSP do not provide any remedy or recourse mechanisms, they have their own legal status as constitutional obligations for driving the practical enjoyment of socio-economic rights.<sup>142</sup> This gives the UHRC the impetus to use them as constitutional standards of accountability and ensure that government decisions, policies, programmes and actions are motivated by the need to implement them. In *Kalyango Mutesarira v Kunsu Kiwanuk & others*,<sup>143</sup> the UHRC affirmed this nexus when it held that failure on the part of a state agency to pay a pension to the petitioner violated the duty of the state to provide reasonable provision for the welfare of the aged under the NODPSP. This case, according to Oloka-Oyango, shows the extent to which the UHrC goes to enforce socio-economic rights, ‘whether or not they are enshrined in the Bill of Rights of the Constitution.’<sup>144</sup>

The UHRC’s purposive application of NODPS as a constitutional basis for advancing state implementation of socio-economic rights also resonates with the views of Ssenyonjo,<sup>145</sup> Namusoby, <sup>146</sup> and Musiga.<sup>147</sup> According to them, the NODPSP have since crystallized into substantive constitutional rights by virtue of section 8A of the Constitution, which obligates the governing of the state on ‘the principles of national interest and common good enshrined in the NODPSP’ and directs Parliament to make laws to give effect to this obligation.<sup>148</sup>

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<sup>140</sup> Section I(ii) of the Ugandan Constitution 1995.

<sup>141</sup> ‘State of the national address’ by His Excellency President Yoweri Kaguta Museveni, Kampala 2013 *State House* available at [www.statehouse.go.ug/media/.../2013/06/07/state-nation-address-2013](http://www.statehouse.go.ug/media/.../2013/06/07/state-nation-address-2013).

<sup>142</sup> FW Juuko and C Kabonesa *Universal primary education (UPE) in contemporary Uganda: right or privilege* (2007) 14.

<sup>143</sup> Unreported, Complaint no. 501 of 2000.

<sup>144</sup> Oloka-Oyango (n 125 above) 28.

<sup>145</sup> M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 190 194.

<sup>146</sup> Namusoby (n 40 above).

<sup>147</sup> Musiga (n 67 above).

<sup>148</sup> Section 8A(1) and (2) of the Constitution of Uganda 1995.

However, section 8A, like section 45 of the Constitution, is yet to be interpreted by the Constitutional Court. Therefore, the import of the section on the constitutional status of the NODPSP is not judicially settled. The fact that the NODPS are tucked away in the preamble of the Constitution clearly limits their relevance to interpretational tools to the substantive provisions of the Constitution. Thus, it is plausible to say that they cannot form the legal basis for claiming the provision of substantive socio-economic rights not expressly guaranteed by the Constitutional Bill of Rights, unless and until Parliament enacts the necessary framework laws in line with section 8A of the Constitution or amends the Constitution to reflect them as substantive rights. However, this requirement does not in any way detract anything from their intrinsic value as a constitutional basis for advancing the state's implementation of socio-economic rights, as the UHRC and other stakeholders are using them presently.

#### **6.4.3. International treaties**

Uganda has ratified the ICESCR, CEDAW, the CRC, the CMW, and the CRPD. It has also ratified the African Charter and the Protocol thereto creating the African Court on Human and Peoples' Rights, the Convention Governing the Specific Aspects of Refugee Problems in Africa, the ACRW Child, as well as the Protocol to the African Charter on the Rights of Women in Africa.<sup>149</sup>

Like Nigeria, Uganda operates a dualist system in which international treaties must be incorporated into domestic law before they can be enforced by the domestic courts:<sup>150</sup> when incorporated, they stand at the same level with Acts of Parliament.<sup>151</sup> However, the Constitution enjoins the state to respect and comply with international laws, treaties, and convention obligations.<sup>152</sup> The NODPSP also require the foreign policy of Uganda to be based on respect for law and treaty obligations.<sup>153</sup>

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<sup>149</sup> B Kabumba 'The application of international law in the Ugandan judicial system: A critical enquiry' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 84.

<sup>150</sup> Section 79 of the Ratification of the Treaties Act 1998; Kabumba (n 139 above) 84-85.

<sup>151</sup> T Mukubwa 'International human rights norms in the domestic arena' (1996) 3 *East African Journal of Peace and Human Rights* 33 35.

<sup>152</sup> Section 286 of the Uganda Constitution 1995.

<sup>153</sup> Section XXVIII of the Uganda Constitution 1995.

As Ssenyonjo argues, the international treaties present a framework for providing appropriate legislation and policies by the state to respect, protect and fulfil socio-economic rights in Uganda.<sup>154</sup> It is submitted this argument is correct. Apart from the ratification of these international treaties, the constitutional directive on the state to comply with international laws, treaties and convention obligations is even more instructive. Apparently, it is on this basis the UHRC is given the power under the Constitution to monitor how the state complies with its international treaty and convention obligations on human rights.<sup>155</sup> Thus, the fact that socio-economic rights constituted in international and regional treaties provide a legal framework for advancing the implementation of socio-economic rights in Uganda is not in doubt. This is why the UHRC in *Kalyango Mutesarira v Kunsu Kiwanuka & others*,<sup>156</sup> arrived at the conclusion, since the state is obliged under the ICESCR to provide social security, that the failure to pay pension entitlements to the claimant violate the obligation to implement the right to social security and ordered that the claimant be paid his pension entitlements, even if there is no specific provision of the right to social security under the Constitution of Uganda 1995.

The UHRC regularly utilizes the ICESCR and the African Charter as necessary normative frameworks and standards for monitoring and evaluating the progressive realization of socio-economic rights in Uganda.<sup>157</sup> Arguably, its approach in this regard clearly demonstrates the relevance of international treaties the state has ratified as a normative basis for advancing the implementation of socio-economic rights, irrespective of their status in Uganda's domestic legal framework.

#### **6.4.4. Domestic legislation and policy framework**

National legislation not only serves to reinforce constitutional provisions on human rights, it also provides the complementary foundation for accessing available legal remedies when human rights are violated. In Uganda, there are several pieces of

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<sup>154</sup> Ssenyonjo (n 145 above) 173.

<sup>155</sup> Section 52(1)(h) of the Uganda Constitution of 1995.

<sup>156</sup> Unreported, Complaint no UHRC/501 of 2000.

<sup>157</sup> 15<sup>th</sup> UHRC Annual Report (2013) 159.

legislation that are relevant to achieving the progressive realization of socio-economic rights. These include: the Children Act 1996, the Education Act 2008, and the University and other Tertiary Institution Act 2001. The Children Act 1996 highlights the primacy of situating the educational needs of the child in the making of decisions affecting children.<sup>158</sup> It also imposes legal duties on parents and guardians to attend to the educational needs of their children, including providing equal opportunities and facilities to disabled children.<sup>159</sup> Thus, the Children Act gives every Ugandan child the right to education and guidance, immunization, adequate diet, clothing, shelter and medical attention.<sup>160</sup>

The Education Act not only reinforces the right to education but also regulates the administration of education in the country, including the registration and licensing of teachers.<sup>161</sup> It empowers the Minister responsible for education to provide educational plans for the promotion and delivery of educational services in Uganda.<sup>162</sup> Furthermore, the University and other Tertiary Institutions Act 2001 regulates the establishment, functions, administration and standards of universities and other tertiary institutions<sup>163</sup> and guarantees equal access to all qualified Ugandan citizens subject only to some affirmative considerations in favour of marginalized groups, such as, gender, disability, and other disadvantaged circumstances.<sup>164</sup>

Other domestic pieces of legislation worth mentioning include the following: the Food and Drug Act of 1993, which deals with issues relating to the quality and safety of food and drugs; the Public Health Act 1964, which promotes public health safety and practices, including sanitation and housing; the Water Act 1995, the object of which is to ensure the provision of a clean, safe and sufficient supply of water for domestic purposes to all Ugandans; and the Decentralization and Local Government Act 1997, which gives

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<sup>158</sup> Section 3 of the Children Act of 1996.

<sup>159</sup> Section 5 of the Children Act of 1996; Section 9 of the Children Act of 1996.

<sup>160</sup> Section 6 and 7(1) of the Children Act of 1996.

<sup>161</sup> Section 29 of the Education Act 2008.

<sup>162</sup> Section 7(4) of the Education Act 2008.

<sup>163</sup> Section 7 of the University and other Tertiary Institutions Act 2001.

<sup>164</sup> Section 28(3) of the University and other Tertiary Institutions Act 2001.

responsibilities to local governments to deliver essential services to the local people in accordance with national policies, guidelines and standards.<sup>165</sup>

Arguably, achieving the practical implementation of these pieces of legislation is important for the practical enjoyment by ordinary people of the socio-economic rights they entail. Thus, they constitute or provide the institutional, procedural and administrative basis for advancing the implementation of socio-economic rights in Uganda. Consequently, they clearly feed into the jurisdiction of the UHRC and provide the legal impetus for it to advance the implementation of socio-economic rights.

Besides national legislation, the national policy framework also constitutes a legitimate basis for UHRC to advance the implementation of socio-economic rights. Uganda has adopted several development policies and programmes. Some of these policies and programmes that are relevant to socio-economic rights are the Poverty Eradication Action Plan (PEAP),<sup>166</sup> the National Health Policies I and II, and the National Health Sector Strategic Plans, and the Universal Primary and Secondary Education Policies and the Expanded School Feeding Programme which are meant to expand access to basic education and improve the cognitive performance of pupils respectively. Other relevant policies and programmes include: the Uganda Food and Nutrition Policy and the National Food and Nutrition Strategy,<sup>167</sup> the National Policy for Internally Displaced Persons which aims to cater for the welfare of IDPs, the National Orphans and other Vulnerable Children Policy, and the National Strategic Programme Plan of Intervention for Orphans and other Vulnerable Children.

According to Nyarogoye, there is no lack of policies for advancing the realization of socio-economic rights in Uganda. However, state social policies and programmes are a bundle of good ideas or intentions until they are actualised. The problem is to ensure that

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<sup>165</sup> RP Milton 'Institutions legislations policies and programmes supporting the right to adequate food in Uganda' *A report prepared for the foodfirst information and action network* (2008) 9-21.

<sup>166</sup> The Uganda National Report (2010) 4.

<sup>167</sup> Available at <http://www.pma.go.ug/nutrition.php>. (accessed 12 August 2013).

these policies and action plans are effectively implemented.<sup>168</sup> This assertion is largely correct as these policies and strategic action plans provide the ground for concretizing appropriate legislation to promote and ensure the realization of the socio-economic rights they entail. Therefore, social institutions must assume public interest responsibility to push for the implementation of relevant government policies and programmes that advance the enjoyment of socio-economic rights, even if there is no legal obligation. Interestingly, the UHRC clearly appreciates the relevance of state policies and programmes as strategic entry points for realizing the implementation of socio-economic rights and is actively engaged not only in the formulation and adoption of some of these policies but also in promoting their effective implementation.

#### **6.4.5. The powers of the UHRC**

The UHRC is conferred with the necessary powers to effectively exercise its expansive mandate. First, like a court of law,<sup>169</sup> the UHRC is conferred with powers to issue summons or other orders to compel the attendance of any person before it<sup>170</sup> or to produce any document or record relevant to any investigation it is conducting.<sup>171</sup> Second, it can question any person on any matter it is investigating, require any person to disclose any information within his or her knowledge relevant to its investigations<sup>172</sup> and commit any person for contempt of its orders.<sup>173</sup> Third, it has powers to give remedies to complainants, such as, to order the release of detained or restricted persons,<sup>174</sup> to grant an order for the payment of compensation<sup>175</sup> or to give any other legal remedy or redress it considers appropriate.<sup>176</sup>

Furthermore, the UHRC can act decisively to protect its powers and authority without going through a court of law and has been doing so since its establishment. In addition,

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<sup>168</sup> Interview with Pricilla Nyaragoye, Acting director of monitoring UHRC Uganda, Kampala 13 September 2013.

<sup>169</sup> Section 53(1) of the Uganda Constitution 1995.

<sup>170</sup> Section 53(1)(a) of the Uganda Constitution 1995.

<sup>171</sup> Section 53(1)(b) of the Uganda Constitution 1995.

<sup>172</sup> Section 53(1)(c) of the Uganda Constitution 1995.

<sup>173</sup> Section 53(1)(d) of the Uganda Constitution 1995.

<sup>174</sup> Section 53(2)(a) of the Uganda Constitution 1995.

<sup>175</sup> Section 53(2)(b) of the Uganda Constitution 1995.

<sup>176</sup> Section 53(2)(c) of the Uganda Constitution 1995.

the power to order the payment of compensation or provide any other legal remedy to victims of human rights violations is relevant to the promotion and protection of socio-economic rights. Evidently, the UHRC has consistently awarded compensation to victims of human rights violation, including those whose socio-economic rights were violated either by the state or by individuals. For example, in *Alifunsi Nyirinkwaya v Attorney General*,<sup>177</sup> the petitioner, who was arrested and detained for seven months underwent some treatment after his release and claimed his hospitalization expenses from the state. The UHRC held that the petitioner was entitled to a refund of his medical expenses and ordered the state to pay the money. Similarly, in *Mpondi Emmanuel v Chairman, Board of Governors Nganwa High School*,<sup>178</sup> the UHRC ordered the respondents to pay damages to the applicant for interfering with his right to education. Furthermore, in *Alice Nabuloli Opolot v Akanga*,<sup>179</sup> the UHRC ordered the respondent to pay the school and examination fees of the applicant. The UHRC granted a similar order in the case between *Rebecca Tibetsigwa v George Lukoda*.<sup>180</sup>

Although the socio-economic rights cases in which the UHRC has exercised its power to award compensation and other remedies are mostly based on the right to education and children's survival or maintenance rights, they demonstrate the fact that it has the power to win effective remedies to victims whose right to education is violated.

Furthermore, the UHRC's personal jurisdiction is unlimited. Thus, it can investigate and resolve socio-economic rights violation complaints or cases against any person, institution or authority, whether private or public. This being so, it has reportedly, exercised jurisdiction over different categories of persons, including government ministers and security officers in order to enforce the implementation of human rights.<sup>181</sup> For instance, in *Allen Atukunda v Hon Col Kahinda Otafiire*,<sup>182</sup> the UHRC considered a petition against a cabinet minister and colonel in the Ugandan national army and ordered

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<sup>177</sup> Unreported, Complaint no. MBA/082/2002.

<sup>178</sup> Unreported, Complaint no. 210 1998.

<sup>179</sup> Unreported, Complaint no. UHRC/J/LOG.2/2002.

<sup>180</sup> Unreported, Complaint no UHRC/J/LOG 41/2003

<sup>181</sup> Makubuya (n 5 above) 85.

<sup>182</sup> Unreported, Complaint No. 776/1998.



him to pay damages and a regular maintenance allowance to the applicant for the upkeep of his children. It is evident that the UHRC has adequate powers, which it uses to drive the implementation of human rights, including socio-economic rights, in the country.

### **6.5. The strategies, effectiveness and impact of the UHRC in advancing socio-economic rights implementation.**

The UHRC, like its Nigerian counterpart, does not have special strategies for advancing the implementation of socio-economic rights. Accordingly, it applies the normal strategies used by NHRIs generally to advance the realization of fundamental human rights. This section considers the actual practices of the UHRC that advances the implementation of socio-economic rights in Uganda.

#### **6.5.1. Receiving and resolving complaints on socio-economic rights**

Receiving, investigating and resolving complaints is an expressed function of the UHRC.<sup>183</sup> According to rules of procedure of the UHRC, persons alleging the violation of their fundamental rights can lodge complaints with it for redress in any of its offices, either personally or on their behalf by any other person, including relatives, friends, legal representatives, organizations, institutions, or concerned persons.<sup>184</sup> In practice, the complaint process is devoid of procedural requirements. Complainants can simply walk into any of its offices to present their stories orally.<sup>185</sup> Complaints can also be lodged with the UHRC through letters, e-mails and fax or by telephone call.<sup>186</sup> Furthermore, the UHRC also operates a mobile complaint handling system, where staff moves from village to village, to sensitize people on their rights and subsequently register complaints that eventually are raised.<sup>187</sup>

Complaints received are subjected to an initial assessment to determine whether or not the it has jurisdiction over the subject matter or if they raise human rights violation

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<sup>183</sup> Section 52(1)(a) of the Constitution of 1995; Section 8(1)(a) of the Ugandan Human Rights Commission Act 1997.

<sup>184</sup> Section 4.1. of the UHRC complaint handling procedures manual 2008.

<sup>185</sup> Section 4.2(a) of the UHRC complaint handling procedures manual 2008.

<sup>186</sup> Section 4.2 of the UHRC complaint handling procedures manual 2008.

<sup>187</sup> 15<sup>th</sup> UHRC Annual Report 2013 2.

issues.<sup>188</sup> Complaints are inadmissible if they are statute barred,<sup>189</sup> or pending before a court or judicial tribunal,<sup>190</sup> or relate to any matter between governments or between government and international bodies,<sup>191</sup> or relate to the prerogative of mercy.<sup>192</sup> The ultimate decision to admit or reject complaints, it seems, lies with the director of complaints, investigations and legal services.<sup>193</sup> After the initial assessment, the complaints that are considered admissible, where necessary, are investigated through collection of relevant evidence and interviewing of witnesses in order to establish the claims in relation to the human rights allegedly violated.<sup>194</sup>

If a case of human rights violation is established, the UHRC proceeds to resolve the matter between the parties through mediation or by hearings as part of the tribunal process. Although the nature of the complaint determines the process to be adopted, it necessarily opts for mediation when the matter is urgent and delay may create injustice for the parties, or there is need to preserve an existing relationship, or if the matter is uncomplicated and easy settle.<sup>195</sup> Thus, family matters, employment or remuneration matters and non-complex land matters are commonly resolved through mediation.<sup>196</sup> The UHRC bears the cost of mediation, including the travel and accommodation expenses of the complainant and witnesses.<sup>197</sup> Though parties may be represented by lawyers, legal technicalities are not allowed.<sup>198</sup>

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<sup>188</sup> Section 4.3 of the UHRC complaint handling procedures manual 2008.

<sup>189</sup> Section 24 of the UHRC Act 1997 prohibits the handling of a matter that is no brought before the Commission after the expiration of five years from the date the violation of human rights allegedly occurred.

<sup>190</sup> Section 53(4)(a) of the Constitution of Uganda 1995.

<sup>191</sup> Section 53(4)(b) of the Constitution of Uganda 1995.

<sup>192</sup> Section 53(4)(c) of the Constitution of Uganda 1995; Section 3.1 – 3.1.4 of the UHRC complaint handling procedures manual 2008.

<sup>193</sup> Letter from the Commission written in response to a protest against the Commission's decision to dismiss CEHURD's complaint dated 8 November 2012 (copy of letter on file with the researcher).

<sup>194</sup> Section 5 of the UHRC complaint handling procedures manual 2008.

<sup>195</sup> Section 7.1 of the UHRC complaint handling procedures manual 2008.

<sup>196</sup> Section 7.1 of the UHRC complaint handling procedures manual 2008.

<sup>197</sup> Section 7.3(iii) of the UHRC complaint handling procedures manual 2008.

<sup>198</sup> Section 7.3(v) of the UHRC complaint handling procedures manual 2008.

At the end of proceedings, whatever settlement is agreed to by the parties is reduced to a memorandum of understanding (MOU), and signed by the parties.<sup>199</sup> The MOU is subsequently converted into a consent judgment, sealed by the presiding Commissioner or the Registrar,<sup>200</sup> and judicially enforceable by either of the parties if the terms are not complied with willingly.<sup>201</sup> The complaint procedure stipulates three months as the period within which to begin and conclude a simple mediation process.<sup>202</sup> However, in practice, a complaint can linger for more than a year due to sundry reasons mostly associated with the attitude of the complainants.<sup>203</sup>

From inception, the UHRC has handled complaints straddling the violation of different categories of human rights, including socio-economic rights. In 2012 it registered complaints on 32 different human rights categories. Those that related to socio-economic rights are the denial of child maintenance, denial of basic education, denial of remuneration and pension, as well as the violation of the right to food, shelter and medical care.<sup>204</sup> Below is a statistical tabulation of socio-economic rights complaints the Commission has handled between 2007 and 2012 as distilled from its annual reports.

Apparently, very few complaints pertaining to the violation of substantive socio-economic rights were lodged before the UHRC, with a declining trend for every succeeding year. For instance, in the five consecutive years under scrutiny, it reportedly handled only six complaints on the right to housing, 23 on the right to health, one on the right to food, and none on the right to water. The right to education and children's welfare rights appear to have fared relatively better.<sup>205</sup> The reason for this is not unconnected with the fact that the UHRC provides effective remedies with respect to these rights. In the case of children's rights the trend shows a high rate of parental failure,

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<sup>199</sup> Section 7.3(vii) of the UHRC complaint handling procedures manual 2008.

<sup>200</sup> Section 7.3(viii) of the UHRC complaint handling procedures manual 2008.

<sup>201</sup> Section 7.4 of the UHRC complaint handling procedures manual 2008.

<sup>202</sup> Section 7.3(ix) of the UHRC complaint handling procedures manual 2008.

<sup>203</sup> Ssekindi (n 37 above).

<sup>204</sup> 15<sup>th</sup> Uganda HRC Annual Report 2013 4-5.

<sup>205</sup> These rights reportedly featured among the top seven complaints the Commission handled between 2007 and 2012.

especially fathers, to discharge their constitutional responsibility to provide for the care, wellbeing and educational development of their children.

Year	Total no. of Human Rights complaints	Categories of socio-economic rights					
		Children	Education	Health	Food	Housing	Water
2007	924	256	74	2	-	3	-
2008	1060		50	3	-	1	-
2009	785	173	49	5	-	1	-
2010	797	797	25	1	1	1	-
2011	1021	224	15	9	-	-	-
2012	706	147	23	3	-	-	-

Generally, it appears that civil and political rights, such as the rights against torture, cruel or inhuman or degrading treatment; the right against deprivation of personal liberty; the right to life; the right to property; and the right to fair trial constitute about 80 per cent of the total number of human rights violation complaints that pass through the UHRC's complaint mechanism. Evidently, like the NNHRC the UHRC readily presides over a complaint system that is increasingly being utilized,<sup>206</sup> but it hardly notices that socio-economic rights complaints are minimal in its dockets.

Ssekindi attributes the trend to the nature of socio-economic rights. According to her, socio-economic rights are group rights and, so, not amenable to the complaint process.<sup>207</sup> For instance, what the UHRC does when it receives a complaint about lack of water in a particular community is to contact the responsible department to ensure that water is restored to the affected community as soon as possible.<sup>208</sup> Such complaints usually are not processed through the complaint mechanism or recorded in any other way because they rarely come before the UHRC. She is also of the view that most Ugandans do not

<sup>206</sup> 15<sup>th</sup> Uganda HRC Annual Report 2013 15.

<sup>207</sup> Ssekindi (n 37 above).

<sup>208</sup> Ssekindi (n 37 above).

appreciate their socio-economic rights; hence, they are unable to seek redress when the rights are violated.<sup>209</sup>

Nkuubi agrees with the fact that most Ugandans are ignorant of their socio-economic rights, but adds that ordinary Ugandans are indifferent to the violation of these rights because they do not believe in the reality that they legally could be entitled to an effective remedy from the UHRC.<sup>210</sup> Namusobya supports the view that a lack of awareness among the masses remains a major reason why socio-economic rights violation complaints are few before the UHRC, although she concedes that NGOs are not helping matters by failing to take such complaints to the UHRC on behalf of ordinary and helpless victims.<sup>211</sup>

However, Musiga is of the view that the UHRC is largely responsible for the low utilization of the complaint process by victims of socio-economic rights violations.<sup>212</sup> According to her, in addition to a lack of awareness of these rights, the complaint process is largely reactive. Therefore, the tendency is for the UHRC to wait for individuals to lodge complaints before it can attend to them.<sup>213</sup> Unfortunately, only a few individuals have so far approached the UHRC with socio-economic rights violation complaints. This does not mean that the socio-economic rights are minimally violated by the state in the country

As well, Musiga alleges that the UHRC has a phobia about socio-economic rights complaints. Thus, instead of handling such complaints it prefers to advise complainants to take such matters to the regular courts.<sup>214</sup> As proof of her allegation she produces a letter from the UHRC in which it rejected a petition filed by CEHURD against the state and the Electricity Regulatory Authority for indiscriminate load-shedding in public health

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<sup>209</sup> Ssekindi (n 37 above).

<sup>210</sup> Nkuubi (n 57 above).

<sup>211</sup> Namusobya (n 40 above).

<sup>212</sup> Musiga (n 67 above).

<sup>213</sup> Musiga (n 67 above).

<sup>214</sup> Musiga (n 67 above).

facilities which resulted in the death of patients on the ground that if it ‘were to take on all cases of alleged violations, it would be overwhelmed.’<sup>215</sup>

Although the rejection of CEHURD’s complaint may be an isolated case nevertheless, it reveals the poor attitude of the UHRC towards socio-economic rights complaints. If the UHRC could strenuously discourage an NGO from lodging socio-economic rights violation complaints with it, then there is the possibility that it has turned away several others, especially poor ordinary victims who may neither have the courage nor opportunity to protest against their rejection. In the light of such an attitude, the rationalization by the UHRC that people are unwilling to utilize the ADR mechanism to resolve their complaints may not be entirely correct.<sup>216</sup>

The UHRC may be failing in its responsibility if Ugandans generally are ignorant of their socio-economic rights and its capacity to redress violation of these rights through the complaint process. Thus, while the complaint mechanism of the UHRC is relevant for advancing the implementation of socio-economic rights, thus far, it has failed to create the necessary socio-economic rights consciousness among the people of Uganda, as well as the usefulness of the complaint process as an expeditious, cost free and effective means to redress their socio-economic rights disputes.

### **6.5.2. The UHRC’s tribunal**

Section 53 of the Constitution of Uganda 1995 makes the UHRC a quasi-judicial equivalent of a court of justice. It exercises this power by sitting as a judicial tribunal and is assisted by a legal counsel from the Attorney-General’s office to adjudicate on human rights violation cases.<sup>217</sup> Arguably, with this power, it is unnecessary for the UHRC to approach the regular courts to litigate human rights matters, except to appear as *amicus curiae* or to seek an interpretation of relevant constitutional provisions. The tribunal process becomes relevant where mediation or conciliation fails to resolve the matter and

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<sup>215</sup> Letter from the Commission written in response to a protest against the Commission’s decision to dismiss CEHURD’s complaint dated 8 November 2012 (copy of letter on file with the researcher)

<sup>216</sup> 14<sup>th</sup> UHRC Annual Report 2011 11.

<sup>217</sup> Section 9 of the UHRC complaint handling procedures manual 2008.

it is in the interest of justice to have the matter adjudicated.<sup>218</sup> Furthermore, circuit hearings presided over by Commissioners are conducted in the regional offices in order to take the tribunal services closer to the people.<sup>219</sup>

As an adjudicatory process, the tribunal is required to comply with due process and the rules of natural justice.<sup>220</sup> Consequently, parties are allowed legal representation at the hearings. Also, the parties and their witnesses testify under oath or affirmation, and present evidence to the tribunal through examination-in-chief, cross-examination, and re-examination, where necessary.<sup>221</sup> At the end of a hearing, legal counsel are allowed to make closing statements before judgment.<sup>222</sup> However, the hearing is less formal than the normal courts and essentially is inquisitorial in approach as the rules of evidence are relaxed substantially in the interest of efficiency and a greater appreciation of the proceedings by the mostly lay parties.<sup>223</sup>

The tribunal gives its judgment in writing after evaluating the facts and evidence of the parties against the background of the relevant law. If the tribunal is satisfied that human rights have been violated, it can give appropriate legal remedies, including the payment of compensation.<sup>224</sup> It can also award costs; grant injunctions to prevent the commission of a wrong; grant an order of restitution; or compel a body to act in a particular way.<sup>225</sup> The tribunal's decisions are binding and as enforceable with the assistance of the state as any other judicial decision.<sup>226</sup> However, a party not satisfied with the decision can appeal to the High Court for a review;<sup>227</sup> no such appeal has so far been recorded against the tribunal's decisions.

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<sup>218</sup> M Sekaggya 'The value of human rights institutions: human rights commission processes' in CM Peter (ed) *The protectors: human rights commissions and accountability in East Africa* (2008) 83.

<sup>219</sup> 14<sup>th</sup> Uganda 2011 12.

<sup>220</sup> Section 9.2.1 of the UHRC complaint handling procedures manual 2008.

<sup>221</sup> Section 9.2.3 of the UHRC complaint handling procedures manual 2008.

<sup>222</sup> Section 9.2.8 of the UHRC complaint handling procedures manual 2008.

<sup>223</sup> Section 9.2.1 of the UHRC complaint handling procedures manual 2008.

<sup>224</sup> Section 53(2) of the Uganda Constitution 1995.

<sup>225</sup> Section 9.3.3 of the UHRC complaint handling procedures manual 2008.

<sup>226</sup> Section 52(3)(b) of the Uganda Constitution 1995.

<sup>227</sup> Section 52(3) of the Uganda Constitution 1995.

As Hatchard observes, the tribunal process creates an alternative, but less formal, speedier and preferable forum for the enforcement of human rights for victims of human rights violations.<sup>228</sup> Thus, it is a useful strategy for advancing the realization of socio-economic rights. In *Mpondi Emmanuel v Chairman, Board of Governors Nganwa High School*,<sup>229</sup> the claimant alleged the violation of his right to education before the tribunal. The claimant, who was a student in the respondents' school, was hospitalized as a result of beatings he received from two teachers for entering the staffroom without knocking at the door or seeking permission from the teachers in the staffroom. When he returned to the school after receiving treatment, he was sent back home for non-payment of school fees. However, his sponsor refused to pay the school fees and insisted that he would do so only when the teachers were punished or there was an indication from the Board that they would take specific disciplinary actions against them. As a result, the complainant was forced to stop schooling. The issue before the tribunal was whether on the facts the respondents' actions violated the complainant's right to education, and the tribunal held that the dismissal of the complainant from school for non-payment of school fees was an action that resulted from an unlawful beating which interfered with his studies, thus violating his right to education. It then awarded damages only as a remedy to the complainant on the ground that the violation was not completely fatal to his right to education.

Also, in *Rebecca Tibetsigwa v George Lukoda*,<sup>230</sup> the complainant had five children with the respondent who allegedly refused to pay the school fees of the children when they got to higher classes. The tribunal, on the facts, found the respondent liable for violating the rights of the children to education and ordered him to pay the school fees without delay.

However, the survey of the cause list shows, like the complaint process, that over 90 per cent of the tribunal's cases relates to civil and political rights, such as the right to life, the right to freedom from torture, inhuman and degrading treatment, the right to property, the right to remuneration, the right to access to children, the right to freedom of expression

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<sup>228</sup> Hatchard (n 15 above) 43.

<sup>229</sup> Unreported, Complaint no. 210 1998.

<sup>230</sup> Unreported, Complaint no UHRC/J/LOG 41/2003.



and assembly, the right to personal liberty and the right to non-discrimination.<sup>231</sup> Of the cases finalised, only the right to education and child maintenance cases could be categorised under the rubric of socio-economic rights. For instance, in 2011 the tribunal reportedly concluded 104 cases, out of which only a single case was on the right to education and five dealt with child maintenance.<sup>232</sup> Similarly, in 2012, out of 96 decided cases, only a single case was on the right to education and six on child maintenance.<sup>233</sup> No case relating to the right to food, the right to adequate healthcare, the right to water, and the right to housing is reported to have been adjudicated by the tribunal so far.

Furthermore, the tribunal process is as reactive as the complaint process and, thus, amenable to the resolution of individual socio-economic rights violation complaints or disputes, such as denial of parental responsibility to pay school fees or to provide for child maintenance. The process is important and, indeed, effective as a redress mechanism but it seems to be quite limited when it comes to enforcing the state's obligations to promote and protect socio-economic rights. For instance, the UHRC has always found the state and its departments to be in violation of socio-economic rights in its annual reports, yet it has not been seen to have held any state department accountable before the tribunal for violating these rights.

According to Namusobya, the tribunal should be able effectively to adjudicate socio-economic rights cases against state departments, issue general comments and assist in developing socio-economic rights jurisprudence in Uganda.<sup>234</sup> However, it is doing none of these things and is more active and competes in the judicial arena with the courts with regard to cases on civil and political rights.<sup>235</sup> Namusobya's assessment of the tribunal process is not wrong. As Cardenas argues, it is a lost cause to expect systemic progress to result from the quasi-judicial tribunals and complaint processes of NHRIs which, like the courts, are individualistic in approach, jurisdictionally restrictive, and generally not

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<sup>231</sup> 15<sup>th</sup> UHRC Annual Report 2013 15.

<sup>232</sup> 14<sup>th</sup> UHRC Annual Report 2012 12.

<sup>233</sup> 15<sup>th</sup> UHRC Annual Report 2013 15.

<sup>234</sup> Namusobya (n 40 above).

<sup>235</sup> Namusobya (n 40 above).

suitable for the resolution of problems that are socially and structurally deep-rooted.<sup>236</sup> Thus, it is submitted, although the tribunal process of the UHRC is relevant for advancing the implementation of human rights, that the degree of its effectiveness is quite limited.

### **6.5.3. General monitoring of socio-economic rights implementation**

Monitoring state compliance with the international treaty obligations in Uganda is one of the primary functions of the UHRC.<sup>237</sup> This responsibility empowers the UHRC to monitor the implementation and progressive realization of socio-economic rights by the state. Since 1997 it has continuously monitored and reported on the extent to which the state has or is implementing socio-economic rights, particularly the right to education, the right to health, the right to housing and the right to an adequate standard of living.<sup>238</sup> It also monitors the implementation of other related rights, such as the rights of children,<sup>239</sup> the rights of persons living with disabilities,<sup>240</sup> and the living conditions of prisoners and other persons detained in prisons and other detention facilities.<sup>241</sup> These rights are monitored against the obligations of the state to implement them, not only under the ICESCR and other relevant international and regional treaties, but also under the Uganda Constitution 1995 and other relevant national laws and policies.<sup>242</sup>

Like the NNHRC, the UHRC monitors socio-economic rights as an integral part of its general human rights promotion and protection mandate. Thus, there is no special process it employs to monitor socio-economic rights. According to Nyarugoye, the monitoring process is simple, but comprehensively participatory.<sup>243</sup> The UHRC deploys its staff to gather relevant information and data not only from state departments but also from other independent sources like NGOs, community leaders, CBOs, and academic institutions, with which to reach informed opinions on the level of implementation of these rights and advise the state accordingly. The information and data gathered are then analysed,

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<sup>236</sup> S Cardenas *Chains of justice: the global rise of state institutions for human rights* (2014) 345-346.

<sup>237</sup> Section 52(1)(h) of the Uganda Constitution 1995; Section 8(1)(i) of the UHRC Act 1997.

<sup>238</sup> 15<sup>th</sup> UHRC Annual Report 2012 at 90 – 114.

<sup>239</sup> 10<sup>th</sup> UHRC Annual Report 2007 71-80.

<sup>240</sup> 12<sup>th</sup> UHRC Annual Report 2009 21.

<sup>241</sup> Section 51(1)(a) of the Constitution of Uganda 1995; Sekaggya (n 15 above) 71).

<sup>242</sup> Sekaggya (n 15 above) 78-79.

<sup>243</sup> Nyaragoye (n 148 above).

sometimes in consultation with NGOs, in terms of the normative standards for the enjoyment of these rights.<sup>244</sup> Fundamentally, the review exercise enables the UHRC not only to track progress or regression but also to identify patterns of violations and recurrent challenges hindering the effective implementation of these rights.<sup>245</sup> Based on the findings, the UHRC makes recommendations to the state and other relevant stakeholders on the necessary measures to redress the identified challenges.<sup>246</sup>

In 2012 in monitoring the right to health the UHRC visited a total of 329 healthcare facilities, including hospitals and health centres spread across all parts of the country to assess the physical structures and operations of the health system.<sup>247</sup> In its evaluation it listed the following areas as indicative of progressive improvements in Uganda's health system: the adoption of various laws and policies;<sup>248</sup> the construction of new health facilities; the relative accessibility of health facilities, goods and services to all sections of the population, including the elderly and PWDs; the scaling up of immunization services from 37 per cent in 2001 to 52 per cent in 2011; the scaling up of HIV/AIDS services, including voluntary counselling and testing (VCT), from 37 per cent in 2009/10 to 38 per cent in 2011/12 per cent and prevention of mother to child transmission (MTCT) from 32 per cent in 2010/11 to 36 per cent in 2011/12; and a relative increase in access to essential medicine.<sup>249</sup>

However, the report also disclosed the downside of the health system preventing the effective enjoyment of the right to health. Notable among the barriers are inadequate funding, a shortage of skilled medical personnel; drug stock out; a shortage of medical equipment, including ambulances; the high cost of health services, mostly in private health facilities; and a lack of accountability in the health system.<sup>250</sup> The consequences

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<sup>244</sup> Nyaragoye (n 148 above).

<sup>245</sup> 15<sup>th</sup> UHRC Annual Report 2013 90.

<sup>246</sup> 15<sup>th</sup> UHRC Annual Report 2013 90.

<sup>247</sup> 15<sup>th</sup> UHRC Annual Report 2013 160.

<sup>248</sup> Such as the National Drug Policy and Authority Act 1993; the National Medical Stores Act 1993; and the National Environmental Act 1995; the National Health Policy II and the Health Sector Strategy Investment Plan.

<sup>249</sup> 15<sup>th</sup> UHRC Annual Report 2013 161-163.

<sup>250</sup> 15<sup>th</sup> UHRC Annual Report 2013 163-169.

have been poor health service delivery, a high prevalence of neglected tropical diseases and high maternal and child mortality,<sup>251</sup> which signify an inadequate implementation of the right to health. Finally, it recommended increased funding of the health sector, the recruitment of more medical personnel, the strengthening of the accountability system, and the enactment of framework legislation on the right to health to secure the full realization of the right to health in Uganda.<sup>252</sup>

On the right to education, the UHRC noted the introduction of the universal free primary and secondary education policies, a special needs education policy and the higher education financing scheme as some of the notable improvements in the education sector.<sup>253</sup> The result has been the expansion of access and increased school enrolment figures across all levels of the education system. For instance, between 2011 and 2012 the number of primary education schools reportedly increased from 22, 200 to 22, 501<sup>254</sup> and from 1647 to 1919 for secondary schools.<sup>255</sup> The enrolment figures also increased from 8,098,177 to 8,220,920 for primary schools,<sup>256</sup> and 689,541 to 751,567 for secondary schools.<sup>257</sup> It also acknowledged government efforts at improving the quality of education through curriculum reform, the rehabilitation of existing and the construction of new classrooms, the recruitment and training of teachers, the introduction of technical and vocational education, as well as competency-based skilling programmes.<sup>258</sup> By increasing the number of teachers from 169503 to 181,232,<sup>259</sup> the educational system reportedly recorded a pupils' classroom ratio of 56:1,<sup>260</sup> and 1:23 for secondary schools,<sup>261</sup> and a gender parity of 49.07 per cent for boys and 50.2 per cent for girls in 2012.<sup>262</sup>

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251 15<sup>th</sup> UHRC Annual Report 2013 165-166.

252 15<sup>th</sup> UHRC Annual Report 2013 170.

253 15<sup>th</sup> UHRC Annual Report 2013 175-180.

254 15<sup>th</sup> UHRC Annual Report 2013 175.

255 15<sup>th</sup> UHRC Annual Report 2013 178.

256 15<sup>th</sup> UHRC Annual Report 2013 176.

257 15<sup>th</sup> UHRC Annual Report 2013 178.

258 15<sup>th</sup> UHRC Annual Report 2013 178.

259 15<sup>th</sup> UHRC Annual Report 2013 177.

260 15<sup>th</sup> UHRC Annual Report 2013 177.

261 15<sup>th</sup> UHRC Annual Report 2013 180.

262 15<sup>th</sup> UHRC Annual Report 2013 177.

Despite these improvements, the educational system was still reportedly characterized by underfunding, dilapidated classrooms, a poor work or study environment, low enrolment and retention rates and high drop-out rates.<sup>263</sup> Other contributory factors to the low quality of education in Uganda were identified as high levels of absenteeism, poor staffing<sup>264</sup> and high levels of parental poverty. Other factors include systemic corruption, the mass promotion policy and poor monitoring and supervision of schools.<sup>265</sup> The UHRC then advised the state to provide adequate funds to construct more schools and rehabilitate existing ones, procure educational materials, review the curriculum and effectively monitor and supervise the administration of all schools in the country.<sup>266</sup> It also advised parents to meet their educational obligations by providing uniforms, feeding and other incidental costs: education in Uganda is a joint responsibility between government and parents.<sup>267</sup>

Arguably, the UHRC utilizes the monitoring process to play a constructive role in advancing the implementation of socio-economic rights by researching, evaluating, and exposing realistic perceptions about the human rights situation in the country. The reports on the exercise are relevant as repositories of credible information and tools of accountability for assessing the level of implementation of socio-economic rights in Uganda. Through these reports the state and other stakeholders become informed about what the state is doing or not doing, and the existing gaps in legislation and policy failures that have or are preventing the practical realization of these rights.

Some of the NGOs interviewed expressed positive views about the monitoring of socio-economic rights by the UHRC. For instance, Namusobyu views the monitoring of socio-economic rights as a positive exercise provided the state is willing to faithfully implements the recommendations.<sup>268</sup> Although Nkuubi expresses disappointment with the apparent exclusion of NGOs in the monitoring process, he nevertheless concedes that

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<sup>263</sup> 15<sup>th</sup> UHRC Annual Report 2013 182.

<sup>264</sup> 15<sup>th</sup> UHRC Annual Report 2013 185.

<sup>265</sup> 15<sup>th</sup> UHRC Annual Report 2013 186.

<sup>266</sup> 15<sup>th</sup> UHRC Annual Report 2013 187.

<sup>267</sup> 15<sup>th</sup> UHRC Annual Report 2013 187.

<sup>268</sup> Namusobyu (n 40 above).

it is a proactive step in the right direction.<sup>269</sup> Moreover, unlike the situation in Nigeria, the findings and recommendations of the report are usually considered by the parliamentary portfolio committee on human rights. In this regard Ministers in charge of relevant line departments are invited before the parliamentary committee to answer questions and provide explanations to adverse findings and recommendations concerning their departments. Furthermore, according to Kuboye, the outcome of the monitoring exercise enables the UHRC to plan and provide training to build the capacity of relevant departments to implement socio-economic rights.<sup>270</sup>

Thus, the general monitoring of socio-economic rights is relevant as a feedback mechanism and for influencing the state's future policies and actions on socio-economic rights implementation. By exposing the state's level of compliance or violation of these rights to the entire world, the outcome of the monitoring exercise, serves to motivate or exert some kind of social pressure on the state to address the identified gaps and challenges in the implementation of socio-economic rights. As Nsereko notes, the pack of information produced by the exercise can be a basis for attracting development assistance to the state, which possibly can assist the country to progressively meet the supply side of socio-economic rights implementation.<sup>271</sup> Accordingly to him, the UHRC's recommendations constitute a heavy moral burden even if they are ignored by the state.<sup>272</sup> Therefore, it is submitted that the socio-economic rights monitoring strategy is relevant and the UHRC appears to be relatively effective in deploying the strategy to advance the implementation of socio-economic rights in Uganda.

#### **6.5.4. Monitoring specific state policies and programmes on socio-economic rights**

The responsibility to monitor state compliance with international human rights treaty obligations entails the examination of government policies, development plans and programmes to determine whether or not they conduce to the realization of human rights

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<sup>269</sup> Nkuubi (57 above).

<sup>270</sup> Kabuye (68 above).

<sup>271</sup> Interview with Ibrahim Nsereko, Programme Officer, Strategic Litigation CEHURD Uganda, Kampala 12 September 2013.

<sup>272</sup> Nsereko, as above.

and advise as is appropriate. As Omara notes, the power to monitor compliance with human rights standards obliges the UHRC to contribute to government policy-making through requesting policy information from departments, critiquing such information and making recommendations based on human rights standards.<sup>273</sup>

The UHRC has engaged in analysing proposed government policies in terms of their implications for the realization of human rights.<sup>274</sup> This activity enables it to make relevant inputs into policies prior to their adoption and implementation. In evaluating government policies, the UHRC considers the reasonability of the proposed policy in terms of the stated objectives, targeted beneficiaries and proposed mode of implementation, including the timeline, if any, for achieving the intended objectives.<sup>275</sup> After the review, it makes recommendations for changes, or engages with the relevant state department in order to leverage a positive policy outcome that advances human rights implementation or is implemented without violating human rights.<sup>276</sup>

Evidently, some of the existing national policies relating to the progressive realization of socio-economic rights had the critical input of the UHRC. For instance, it reportedly monitored, participated in and contributed to the adoption of Uganda's Poverty Eradication Action Plan (PAEP). During the process, the UHRC worked with UNDP and the Ministry of Finance, Planning and Economic Development to eliminate issues in the draft policy and sectorial papers that contravene human rights.<sup>277</sup> The Commission was able to ensure that the PAEP incorporates human rights concerns, especially the rights of vulnerable people to good governance and to predicate the implementation of the PAEP on a right-based perspective.<sup>278</sup>

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<sup>273</sup> JM Omara 'The role of national human rights institutions in pro-human rights policies: The Uganda experience.' *A presentation at panel of discussion at social forum organized by the UN sub-committee on protection and promotion of human rights* Geneva 21 July 2005 3.

<sup>274</sup> Sekaggya (n 15 above) 173.

<sup>275</sup> 6<sup>th</sup> UHRC Annual Report 2004 46.

<sup>276</sup> 6<sup>th</sup> UHRC Annual Report 2004 46.

<sup>277</sup> 6<sup>th</sup> UHRC Annual Report 2004 46.

<sup>278</sup> C Karusoke 'General principles of economic, social and cultural rights state obligations to promote, protect and fulfil 62.' *A paper presented at an international round table on national institutions implementation economic, social and cultural rights* New Delhi India 29 November (2005) 61.

As well as the PEAP, the UHRC subjected the draft Uganda Food and Nutrition Policy to a critical review through a national stakeholders' dialogue which made the state overhaul the policy and to recognize the provision of food as a human right within the policy framework and to drive its implementation through a right-based approach.<sup>279</sup> In addition, the it participated in the review and conclusion of the Voluntary Guidelines on the implementation of the right to food.<sup>280</sup> Furthermore, some of its policy recommendations for achieving food security in the country, such as having systems of food storage and providing agricultural inputs to communities, are said to have since been adopted by the government.<sup>281</sup>

The health sector is another area the UHRC has been active in policy monitoring and dialogue with the state. Arguably, its consistent reviews, comments and recommendations on the status of the right to health contributed to the state's adoption of the National Health Policy (2010 – 2020), the incorporation of the right to the highest attainable standard of health as a guiding principle of the national health policy, as well as the adoption of the Health Sector Strategic Investment Plan (2010/2011 – 2014/2015).<sup>282</sup> This activity reportedly has resulted in improved government strategic investment in the health sector with a measurable positive impact on the health sector generally, including the fight against the HIV/AIDS pandemic in Uganda.<sup>283</sup>

The adoption and implementation of relevant policies and programmes by the state is important for achieving the progressive realization of socio-economic rights. Thus, the policing of state policies by the UHRC standards enables it to play the role of a watchdog over government policies and programmes to ensure alignment with the state's international and national commitments to implement human rights. Arguably, this strategy makes the UHRC part of the institutional framework for the development, adoption and implementation of relevant polices, programmes, and action plans for

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<sup>279</sup> Omara (n 273 above) 4.

<sup>280</sup> 6<sup>th</sup> UHRC Annual Report 2004 46.

<sup>281</sup> 6<sup>th</sup> UHRC Annual Report 2004 46.

<sup>282</sup> UHRC submission for Uganda's Universal Periodic Review (UPR) 2007-2009 2.

<sup>283</sup> UHRC submission for Uganda's Universal Periodic Review (UPR) 2007-2009 2



advancing the practical realization of socio-economic rights in Uganda.<sup>284</sup> To this extent, and considering what it has reportedly achieved in this light, it is my view that the UHRC has been effective in its engagement with monitoring and advising on state's policies and programmes to secure conformity with socio-economic rights standards. However, while it can successfully influence policy development and adoption, its capacity to influence implementation of existing policies on socio-economic rights is limited. This is obvious from the lack of effective implementation of existing policies on socio-economic rights, in some of which the UHRC assisted in the development and adoption processes.

#### **6.5.5. Monitoring parliamentary bills and legislation on socio-economic rights**

In addition to policies and programmes, the UHRC also monitors parliamentary bills and existing laws to ensure that human rights issues are not side-stepped or overlooked. The UHRC carries out this function in furtherance of its responsibility to monitor state compliance with human rights standards and the obligation to recommend effective measures to promote human rights to Parliament.<sup>285</sup> Generally, this responsibility enables it to review the human rights implications of bills or legislation to ensure conformity or consistency with human rights standards. When it is through with the review, it transmits its observations, comments and recommendations for changes, where necessary, to the appropriate parliamentary portfolio committee for consideration and adoption.<sup>286</sup> Sometimes it works with the parliamentary legal committee to execute this aspect of its mandate.<sup>287</sup> Some of the parliamentary bills relevant to socio-economic rights it reportedly reviewed and made inputs to, include the Constitution Amendment bill, the Uganda Human Rights Commission Act 1997,<sup>288</sup> and the Anti-Corruption bill 2004.<sup>289</sup> In relation to the Constitution Amendment bill, it recommended that the NOFPSP should be incorporated into the substantive provisions on fundamental rights and freedoms under chapter IV of the 1995 Constitution, but this recommendation was rejected.<sup>290</sup>

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<sup>284</sup> Omara (n 273 above) 7.

<sup>285</sup> Section 52(1)(d) of the Uganda Constitution 1995; Section 8(1)(e) of the UHRC Act of 1997.

<sup>286</sup> 4<sup>th</sup> UHRC Annual Report 2000-2001 83.

<sup>287</sup> 4<sup>th</sup> UHRC Annual Report 2000-2001 83.

<sup>288</sup> 4<sup>th</sup> UHRC Annual Report 2000-2001 83.

<sup>289</sup> 11<sup>th</sup> Uganda Human Rights Commission Annual Report 2008 120.

<sup>290</sup> 7<sup>th</sup> UHRC Annual Report 2004.

In addition to monitoring parliamentary measures to ensure conformity with human rights, the UHRC employs this mandate to advocate the enactment of new laws or the amendment or repealing of existing laws it considers negate human rights advancement. Some of the legislation it reportedly advocated has materialized, but others have not. For instance, the following laws: the Refugee Act 2006, the Persons with Disability Act 2006, the Equal Opportunities Commission Act 2007, the Anti-corruption Act 2009, and the National Council for Older Persons Act 2012, have been enacted by Parliament. Furthermore, the state has also acted on proposal of the UHRC to amend the Disability Act 2006 to align with the Convention on the Rights of Persons with Disabilities.<sup>291</sup> However, the state is yet to domesticate the ICESCR, enact framework legislation on the rights to health, the prevention and control of HIV/AIDS, and the right to food and nutrition, despite the consistent call on the state to do so by the UHRC.<sup>292</sup>

As Cardenas argues, parliamentary bills and legislation monitoring are indeed an important strategy for advancing the promotion and protection of human rights.<sup>293</sup> It is evident that the UHRC uses this strategy creatively to transform socio-economic policy objectives into positive legislation.<sup>294</sup> Thus, although the UHRC has not been able to influence the state to enact some vital framework legislation on socio-economic rights, such as the right to health law and its counterpart on food and nutrition, the fact that it is constantly engaging with the state to have these laws enacted and has even succeeded in influencing the enactment of some progressive legislation on socio-economic rights, underscores its commitment to advancing these rights through legislative monitoring and advocacy.<sup>295</sup> It is submitted that the UHRC has been effective in modest terms in applying legislative monitoring to advance the promotion and protection of socio-economic rights in Uganda. However, the ratification of the OP-ICESCR seems not to be on its legislation advocacy and monitoring agenda as yet, as there is nothing to that effect in its existing activity reports. It is argued that while the domestication of the ICESCR is

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<sup>291</sup> 15<sup>th</sup> UHRC Annual Report 2012 203.

<sup>292</sup> 15<sup>th</sup> UHRC Annual Report 2012 203.

<sup>293</sup> Cardenas (n 236 above) 335-338

<sup>294</sup> Omara (n 273 above) 7.

<sup>295</sup> Mattiar (n 15 above 116).

important; it would be better if Uganda also ratifies the OP-ICESCR given its potential for facilitating state implementation of socio-economic rights.

#### **6.5.6. Monitoring budgetary allocation to socio-economic rights**

Investing public expenditure in areas that directly increase the capabilities of the poor, such as agriculture, education, food, health, and rural infrastructure, is seen as very important for advancing the realization of socio-economic rights.<sup>296</sup> This aim can be achieved through the national budget, which embodies the decisions and priorities of the government as to which social areas to direct national resources.<sup>297</sup> Thus, for an NHRI the essence of analysing the national budget is to expose distortions in the distribution and utilization of national resources and influence an outcome that translates socio-economic rights into reality in the life of the people through progressive social budgeting and funds utilization.<sup>298</sup>

In 2011 the UHRC for the first time analysed the country's budgetary allocations to the health, education, and housing sectors against the state's minimum core obligations to fulfil these rights with the available resources.<sup>299</sup> The analysis clearly shows retrogressive patterns of social expenditure by the state on these rights. For instance, budgetary allocations to the health sector reportedly increased from 435.8 billion Ugandan Shillings in the 2009/2010 fiscal year to 569.56 billion Ugandan shillings in 2010/2011,<sup>300</sup> this is merely 9.6 per cent of total government expenditure for 2009/2010, and 8.9 per cent for 2010/2011, and is below the 15 per cent of total government expenditure agreed by African states in the Abuja Declaration.<sup>301</sup> The retrogression is even more visible from the fact that about 83 per cent of the allocation was spent on recurrent expenditure, leaving a paltry 17 per cent for capital expenditure, such as providing infrastructure and

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<sup>296</sup> N Kimenyi 'Economic rights, human development effort, and institutions' in S Hertel and L Minkler (eds) *Economic rights, conceptual measurement and policy issues* (2007) 208.

<sup>297</sup> F Kuteesa, I Magona, et al 'Uganda: decade of budget reform and poverty reduction' (2006) 6 *Organization for Economic Co-operation and Development Journal on Budgeting* 3.

<sup>298</sup> A Norton and D Elson 'What is behind the budget? Politics, rights and accountability in the budget process' *Overseas Development Institute Paper* (2002) viii.

<sup>299</sup> 14<sup>th</sup> UHRC Annual Report 2012 115.

<sup>300</sup> 14<sup>th</sup> UHRC Annual Report 2012 116.

<sup>301</sup> 14<sup>th</sup> UHRC Annual Report 2012 117.

health goods and services, including capacity building in the 2010/2011 fiscal year.<sup>302</sup> These figures mean that not enough money from the national treasury was allocated and spent in funding the health sector in Uganda, which is known to be characterized by myriads of challenges.<sup>303</sup>

The analysis of education showed similar patterns of retrogressive budgeting. For instance, the sum of 1,416.27 billion Ugandan shillings was allocated to the education sector, which was higher than was allocated to the health and housing sectors respectively, in the 2011/2012 fiscal year.<sup>304</sup> This sum is an improvement on the 1,079.7 billion Ugandan shillings and 1,242.66 billion Uganda shillings that were allocated to the education sector in the 2009/2010 and 2010/2011 fiscal years respectively.<sup>305</sup> However, as is the case with the health sector, there was a decline of 17 per cent in 2009/2010; 16.8 per cent in 2010/1011; and 14.5 per cent in 2011/2012, when compared with the total budgetary expenditure of the country.<sup>306</sup> Furthermore, although there were marginal increases in the allocation to universal primary education, the universal secondary education programme and the special needs education programme;<sup>307</sup> the addition was still inadequate to fund an education sector that is severely constrained by inadequate and poor educational infrastructure, poor remuneration for educators, and high staff attrition rate.<sup>308</sup>

The budgetary allocation to housing development is even more disappointing. Of the 19.00 billion Ugandan shillings allocated to the Ministry of Lands, Housing and Urban Development in 2011/2012, the housing directorate was credited with only 2.4 billion Ugandan shillings.<sup>309</sup> 1.9 billion Uganda shillings were allocated for recurrent expenditure and only 0.96 billion was meant for housing development.<sup>310</sup> The sector did

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<sup>302</sup> 14<sup>th</sup> UHRC Annual Report 2012 117.

<sup>303</sup> Nsereko (n 271 above).

<sup>304</sup> 14<sup>th</sup> UHRC Annual Report 2012 118.

<sup>305</sup> 14<sup>th</sup> UHRC Annual Report 2012 119.

<sup>306</sup> 14<sup>th</sup> UHRC Annual Report 2012 118.

<sup>307</sup> 14<sup>th</sup> UHRC Annual Report 2012 120

<sup>308</sup> Basic education teachers were on strike when this research was being put together in September 2013

<sup>309</sup> 14<sup>th</sup> UHRC Annual Report 2012 121.

<sup>310</sup> 14<sup>th</sup> UHRC Annual Report 2012 122.

not fare any better in the 2011/2012 fiscal year when the total allocation barely increased from 3 billion Ugandan shillings to 3.1 billion Uganda shillings. Yet, access to decent and adequate housing remains, in the words of Mbazira, ‘a nightmare to millions of ordinary Ugandans.’<sup>311</sup> The conclusion is that the state’s budgetary allocation to housing development has consistently been inadequate to make any reasonable impact in providing or facilitating the provision of decent houses for ordinary Ugandans.

Although the provision of socio-economic rights is relatively resource dependent, the state is under an international legal obligation to fulfil these rights by effectively and efficiently using a reasonable proportion of the available resources.<sup>312</sup> Thus the UHRC’s budgetary analysis of these rights is relevant to determining the extent to which the state is committed to the progressive realization of socio-economic rights. In this instance, the analysis showed a retrogressive pattern of budgeting towards social spending, which indicates an unwillingness to commit reasonable quantum of resources within the budgetary policy framework to fund the progressively realization of quality education, healthcare and housing for the people of Uganda.

However, the UHRC’s approach to budget monitoring mirrors what Blyberg describes as ‘hindsight’ analysis,<sup>313</sup> which merely identifies the negative impact of the budget on the realization of socio-economic rights without providing any comprehensive concrete data to support the findings. For instance, the analyses were not presented in relation to allocations to other non-productive sectors, such as spending on defense, political appointees and the civil service, so as to establish whether or not the state’s budgetary allocation pattern is unjustifiably skewed against expenditures on social rights which is necessary for the benefit of the poor and disadvantaged segment of the society. At this point the outcome of its budget analyses becomes relevant as a basis for challenging the state on its poor attitude towards social spending and the negative consequences on socio-economic rights implementation. Furthermore, budgetary analysis is not a consistent

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<sup>311</sup> Interview with Geoffrey Mbazira, a civil servant residing at Entebbe Uganda, 14 September 2013.

<sup>312</sup> Section 1 of ICESCR.

<sup>313</sup> A Blyberg ‘The case of the mislaid allocation: economic and social rights and budget work’ (2009) 6 *Sur International Journal on Human Rights* 123 128.

activity in the activity profile of the UHRC; thus, its approach is largely sporadic, piecemeal, and lethargic. The study submits that the UHRC has not effectively applied this strategy to advance state implementation of socio-economic rights in Uganda.

#### **6.5.7. Participating in international human rights platforms**

Apart from the domestic environment, the UHRC also operates at the level of international and regional human rights platforms. Among various other activities the Commission participated in the UN Universal Periodic Review (UPR) exercise and monitors the state's compliance with its international and regional human rights reporting obligations. For the first time in 2011, the Human Rights Council (HRC) peer-reviewed Uganda on its compliance with the international human rights treaties it has subscribed to. During the period the UHRC not only participated in all stages of the exercise but also submitted an alternative report to the HRC in furtherance of its mandate to monitor Uganda's compliance with its international human rights treaty obligations.<sup>314</sup>

The report, among others issues, highlighted the progress and challenges in the state's implementation of human rights, including the right to education, the right to health and the right to adequate food.<sup>315</sup> In the report, the UHRC commended the state for adopting various laws, policies and programmes to advance the realization of socio-economic rights. However, it also expressed concern about the prevailing challenges to the effective realization of these rights in Uganda, such as inadequate funding of the education and health sectors<sup>316</sup> and the absence of framework legislation on the rights to health and food. It also identified inadequate provision of clean water, sanitation, food security and poverty among the disadvantaged as issues of serious concern, and recommended that these issues be addressed with relevant laws, policies and adequate funding.<sup>317</sup>

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<sup>314</sup> SK Kaggwa 'The role of National human rights institutions in the universal periodic review.' *A paper presented at the universal periodic review seminar for parliamentarians* Geneva 12–13 November 2012 4.

<sup>315</sup> The UHRC's submission for Uganda's Universal Periodic Review 2011 2-3.

<sup>316</sup> The UHRC's submission for Uganda's Universal Periodic Review 2011 2.

<sup>317</sup> The UHRC's submission for Uganda's Universal Periodic Review 2011 2-3.

Significantly, during the UPR the UHRC actively participated in the exercise. Obviously, some of the far-reaching recommendations that emanated from the UPR exercise have the effect of advancing socio-economic rights in Uganda if implemented. For instance, the delegates in their review urged the state to domesticate the international treaties on human rights,<sup>318</sup> as well as to develop and implement policies and programmes to enhance the realization of socio-economic rights, including the rights of women, children and PWDs.<sup>319</sup> The state was also encouraged to seek assistance from the international community in terms of technical support and resources to enable it develop action plans and strengthen institutional capacity to ensure effective implementation of relevant policies and action plans for the delivery of socio-economic rights.

Equally worthy of note is the outcome of the UPR exercise. The government of Uganda committed itself to prioritizing human rights promotion and protection and accepted the recommendation to develop and implement a national action plan on human rights, to institute an annual review and reporting on the human rights situation in the country, to establish a cabinet sub-committee to carry out effective policy oversight and guidance on human rights issues and to mainstream human rights issues in all aspects of governance.<sup>320</sup> The participation of the UHRC, according to its present Chairman, was clearly instrumental in the state's voluntary pledges and commitment to implement appropriate policies and programmes with a potential for improving the status and enjoyment of socio-economic rights in Uganda.<sup>321</sup>

Furthermore, the UHRC has publicized the recommendations of the UPR and the state's voluntary pledges and commitments among different role players, including Parliament, government ministries, departments and agencies and the general public through its annual reports.<sup>322</sup> Recently, the state submitted its initial report on the ICESCR to the CESCR, which had been due for the past twenty years, in apparent compliance with its

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<sup>318</sup> 14<sup>th</sup> UHRC Annual Report 2011 125.

<sup>319</sup> 14<sup>th</sup> UHRC Annual Report 2011 126 – 129.

<sup>320</sup> Kaggwa (n 314 above) 4.

<sup>321</sup> Kaggwa (n 314 above) 5.

<sup>322</sup> Kaggwa (n 314 above) 5-6.

voluntary pledges during the UPR exercise.<sup>323</sup> Similarly, the state has reportedly established a multi-stakeholder committee to develop the action plan for the promotion and protection of human rights in Uganda.<sup>324</sup>

Apart from the UPR, the UHRC monitors the level of Uganda's compliance with its reporting obligations under the international and regional treaties on socio-economic rights. This function enables it to interface not only with the international and regional human rights treaty bodies and the state but also to comment on the consistent failure of the state to prepare and submit reports on what it has done to implement these rights. Such activities and comments assist in exerting pressure on the state to comply with its international human rights reporting and other obligations. Also, it enables the UHRC to constantly advise and remind the state to comply with its international reporting obligations under the various treaties it has ratified, such as the ICESCR, the CEDAW, the CERD, CRPD, CRC, and the CMW.<sup>325</sup> However, it is not clear to what extent the UHRC is able to influence the state to comply with the various reporting obligations as Uganda is among African countries that are notoriously in default with reference to this responsibility. Therefore, while the strategy is relevant it has not been strong a measure to influence the state to comply. There is nothing it can do but to keep applying the strategy as a form of soft pressure whether it is respected or not.

#### **6.5.8. Socio-economic rights education and advocacy**

Ignorance or lack of human rights awareness remains a problem in the realization of human rights in every society. According to Nkuubi, the fact is incontestable that in Uganda, where the rate of illiteracy is very high and ignorance is widespread, the need to embark on massive human rights education cannot be over-emphasized if a culture of respect for human rights in the country is to become a reality.<sup>326</sup>

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<sup>323</sup> 15<sup>th</sup> Uganda Human Rights Commission Annual Report 2013 196.

<sup>324</sup> Kubuye ( n 68 above).

<sup>325</sup> 15<sup>th</sup> Uganda Human Rights Commission Annual Report 2013 196

<sup>326</sup> Nkuubi (n 57 above).



The UHRC has human rights education as one of its statutory responsibilities. The Uganda Constitution obliges it to create an on-going programme of research, education and information to enhance respect for human rights,<sup>327</sup> to create and sustain the awareness of the Constitution in the state as the fundamental law of Uganda,<sup>328</sup> to educate and encourage the public to defend the Constitution from violation<sup>329</sup> and to develop implement and supervise programmes intended to instil in the citizens of Uganda awareness of their civic responsibilities and appreciation of their rights and obligations.<sup>330</sup> Thus, four out of the eight specific functions of the UHRC relate to human rights education. This situation clearly underscores the importance the Human Rights Commission Act 1997 attaches to human rights education as a strategy for advancing the internalizing of a culture of human rights in Uganda. Thus, as Sekaggya notes, the UHRC undertakes human rights education as a strategy to make Ugandans understand and appreciate their human rights and civic obligations.<sup>331</sup>

Like every other NHRI, the UHRC implements human rights education through training workshops, seminars, conferences, radio talks, spot messages, television shows, and other grassroots outreach activities, such as *barazas* (informal meetings) and human rights day celebrations.<sup>332</sup> It also disseminates human rights education through research work and publications, including press releases, newspaper advertorial and human rights magazines. Apart from the general public, the UHRC targets specific constituencies with responsibilities for human rights, such as members of the security agencies, the police, prison service, civil servants, as well as community leaders, district officers, health workers, school children and teachers.<sup>333</sup> For instance, it reportedly carries out periodic human rights awareness training for members of the UPDF, UPF, UPS, and the ISO to expose them to human rights education and training relevant to their duties, including

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<sup>327</sup> Section 52(1)(c) of the Uganda Constitution 1995; Section 8(1)(e) of the UHRC Act 1997.

<sup>328</sup> Section 52(1)(e) of the Uganda Constitution 1995; Section 8(1)(f) of the UHRC Act 1997.

<sup>329</sup> Section 52(1)(f) of the Uganda Constitution 1995; Section 8(1)(g) of the UHRC Act 1997.

<sup>330</sup> Section 52(1)(g) of the Uganda Constitution 1995; Section 8(1)(h) of the UHRC Act 1997.

<sup>331</sup> Sekaggya (n 15 above).

<sup>332</sup> 14<sup>th</sup> UHRC Annual Report 2012 36.

<sup>333</sup> 15<sup>th</sup> UHRC Annual Report 2013 55-67.

their human rights responsibilities under the national and international legal framework to respect and protect the values of democracy, constitutionalism and the rule of law.<sup>334</sup>

Furthermore, its community human rights outreach programmes reportedly focus on creating human rights knowledge among community leaders and ordinary people. Thus, religious, community and grassroots leaders are reportedly sensitized on their fundamental human rights and freedoms in addition to their roles and responsibilities to respect and protect the rights of children and women through radio talk shows, spot messages, informal meetings and training.<sup>335</sup> They are also reportedly educated on how to access the UHRC and other available redress mechanisms to seek redress for the violation of their rights.<sup>336</sup> Indeed, in an apparent exercise in self-assessment, Sekaggya holds the view that Ugandans have, through the UHRC, become more knowledgeable of their rights and responsibilities and the existing national and international mechanisms for the protection of human rights.<sup>337</sup> Kubuye also states that human rights education is carried out by the UHRC's regional offices and they, within the constraints of resources, have reached out to countless Ugandans living in hundreds of grassroots communities.<sup>338</sup>

The assertion on the reach and impact of human rights education programmes of the UHRC may be correct, although it is argued that these may be only to a limited extent with respect to socio-economic rights. For instance, the general human rights education and training programmes, including the use of right-based approach to development policy-making and programming, invariably enhance the knowledge of socio-economic rights in the country. So also are its activities in integrating human rights into the education curriculum of schools and the establishing human rights clubs in the school system.<sup>339</sup> Furthermore, its flagship magazine on human rights education, *Your Rights*, and other relevant publications with entries on socio-economic rights, reportedly enjoy a wide circulation among different stakeholders and members of the public, including

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<sup>334</sup> Sekaggya (n 81 above 169).

<sup>335</sup> 15<sup>th</sup> UHRC Annual Report 2013 54-55.

<sup>336</sup> 14<sup>th</sup> UHRC Annual Report 2012 37.

<sup>337</sup> Sekaggya (n 15 above)170.

<sup>338</sup> Kubuye (n 68 above).

<sup>339</sup> 15<sup>th</sup> UHRC Annual Report 2012 62.

parliamentarians, the presidency, government ministries, statutory commissions, security organs and local government officers.<sup>340</sup>

Thus, the approach of the UHRC to human rights education in Uganda is clearly and effectively holistic. However, according to Kubuye, a typical human rights education programme of the UHRC usually focuses on all human rights categories.<sup>341</sup> Thus, it is difficult to disaggregate or analyse the quantum of educational programmes that it dedicates to the promotion of socio-economic rights. Generally, the UHRC presents the increase in the number of complaints it receives as justification for the success of its human rights education programmes.<sup>342</sup> However, this reason refers more to the number of complaints with respect to civil and political rights than to socio-economic rights, which consistently, have recorded very few complaints annually. Besides, it is evident from the annual reports that the human rights education programmes are directed more towards reorienting the state's security institutions, which not only notoriously, were involved in the repression of the past, but still are grossly violating the dignity and liberty rights of civilian Ugandans.<sup>343</sup> Even the grassroots outreach programmes are targeted more at overcoming entrenched cultural practices that undermine the dignity of women and children which, features as the top five of human rights violation complaints that come before it.<sup>344</sup>

Arguably, the human rights education programme of the UHRC is relevant to advancing the implementation of socio-economic rights. However, the problem, as Namusobya argues, is the apparent lack of prioritization of socio-economic rights education.<sup>345</sup> This lack, Namusobya insists, is responsible for the pervasive ignorance of socio-economic rights among a large segment of the population, including lawyers, judges, parliamentarians, government officers, and corporate bodies who have failed to

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<sup>340</sup> 15<sup>th</sup> UHRC Annual Report 2012 45.

<sup>341</sup> Kubuye (n 68 above).

<sup>342</sup> 14<sup>th</sup> UHRC Annual Report 2011 1.

<sup>343</sup> Mattiar (n 15 above) 113.

<sup>344</sup> 14<sup>th</sup> UHRC Annual Report 2011 6.

<sup>345</sup> Namusobya (n 40 above).

appreciate the substance and relevance of these rights.<sup>346</sup> This study agrees with Namusobya's assertions to a reasonable extent. The UHRC's human rights education programmes are relevant to advancing the implementation of socio-economic rights, but the strategy presently, is not well directed and effectively applied towards achieving a culture of respect for socio-economic rights as practically as possible.

#### **6.5.9. Mainstreaming the right-based approach to development**

In 2002, the UHRC hosted the 4<sup>th</sup> conference of African National Institutions for Human Rights, and which the 'Kampala Declaration was adopted'.<sup>347</sup> The Kampala Declaration called on African states to adopt a human rights-based approach to development (HRBAD) with clear emphasis on the eradication of poverty, providing universal basic education, the right to health and the right to an adequate standard of living.<sup>348</sup> The Declaration also called on NHRIs in Africa to advocate and sensitize states, policy-makers, civil society and the public about the advantages of the HRBAD, as well as to monitor compliance.<sup>349</sup>

Since 2003, the UHRC has been active in promoting the HRBAD in Uganda with a view to ensuring that it becomes the guiding principle for national development planning, programming and service delivery at all levels of governance. Accordingly, it has reportedly organized training and sensitization workshops to popularize the tenets of HRBAD, which are participation, empowerment, equality and non-discrimination, accountability in planning, budgeting and programme implementation and service delivery.<sup>350</sup> Those the UHRC is said to have sensitized and trained, include national policy-makers, local government officials, district officials, parliamentarians, lawyers, and civil society organizations, responsible for development planning and programming in the country.<sup>351</sup>

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<sup>346</sup> Namusobya (n 40 above).

<sup>347</sup> Resolution of the 4<sup>th</sup> Conference of the African National Human Rights Institutions held in Kampala Uganda 14 to 16 August 2002 (hereinafter called the 'Kampala Declaration').

<sup>348</sup> Resolution 1(a)(i) of the Kampala Declaration.

<sup>349</sup> Resolution 1(b)(i) and (ii) of the Kampala Declaration.

<sup>350</sup> 6<sup>th</sup> UHRC Annual Report 2004 13.

<sup>351</sup> 12<sup>th</sup> UHRC Annual Report 2009 143.

In 2008, the UHRC produced a handbook titled, *Human Rights Based Approach Guidelines to National Development, Planning/Programming*, to ‘improve planning and programming process and help Uganda achieve national and human development for all.’<sup>352</sup> The guidelines list certain existing policies, such as the Uganda Food and Nutrition Policy 2003, the National Policy for Internally Displaced Persons 2004, the Health Sector Strategic Plan II, the Equal Opportunities Policy 2007, the National Population Policy 1995, the Energy Policy 2002, the National Water Policy, the National Health Policy 1999, as examples of policy instruments that are right-based.<sup>353</sup> Furthermore, the Commission is reported to have influenced the Ministry of Finance, Planning and Economic Development to incorporate the guidelines into the national planning and development processes,<sup>354</sup> as well as to integrate them into the poverty eradication action plans and several social policy instruments of the country.<sup>355</sup>

If these achievements are correct, then the indication would be that the HRBAD concept is gradually is positively becoming widely practiced as a human development paradigm across all levels of public governance in Uganda. As Muntarbhorn notes, the HRBAD remains the most effective way to translate human rights from the realm of abstraction to concrete realities in the life of the people.<sup>356</sup> Thus, mainstreaming the HRBAD by the UHRC is relevant for advancing the implementation of socio-economic rights, but what remains fluid is the extent to which it has been embraced by state organs. Arguably, though this is difficult to assess, the failure of state departments to implement socioeconomic rights clearly does not support any suggestion that the HRBAD is becoming a common practice in Uganda’s public service delivery system at present.

#### **6.5.10. The role of other relevant state agencies**

Uganda has quite a few related state agencies that function to impact on advancing the implementation of the socio-economic rights, the most important of which is the

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<sup>352</sup> UHRC *The human rights based approach guidelines to national development planning/programming* (2008) 3.

<sup>353</sup> UHRC (n 293 above 15-16).

<sup>354</sup> Omara (n 173 above) 5.

<sup>355</sup> 12<sup>th</sup> UHRC Annual Report 2012 14.

<sup>356</sup> V Muntarbhorn *Unity in connectivity? Evolving human rights mechanisms in the ASEAN region* (2013) 173.

Inspectorate of Government (IG).<sup>357</sup> Established under the Constitution, the IG's basic mandate is to eliminate corruption and abuse of office by public officers.<sup>358</sup> Specifically, IG is mandated by the Constitution and the Inspectorate of Government Act 2002,<sup>359</sup> to promote and foster strict adherence to the rule of law and principles of natural justice and administration; eliminate and foster the elimination of corruption, abuse of authority and of public offices; to promote fair, efficient and good governance in public offices; to supervise the enforcement of the leadership code of conduct; to investigate any act, omission, advice, decision/ recommendation by a public officer; taken, made, given or done in exercise of administrative functions; and to stimulate public awareness about the values of constitutionalism through any media and other means it considers appropriate.

The jurisdiction of the IG covers covers all public officers and political leaders, including cabinet members, parliamentarians, judicial officers, central and local government officers, heads of public and private corporations, as well as private persons.<sup>360</sup> The constitution further grants it power to investigate, arrest, and prosecute cases involving corruption or abuse of authority or of public office.<sup>361</sup> The IG is independent in the performance of its functions and not subject to the direction or control of any person or authority but responsible only to the Parliament<sup>362</sup> and is provided with an independent budget.<sup>363</sup>

Thus, the IG is Uganda's ombudsman and foremost anti-corruption agency, whose effectiveness or success is central to improving the socio-economic well-being of ordinary Ugandans. According to the IG, it received 856 corruption complaints as well as arrested and charged 40 public officers to appear in court for corruption in 2013.<sup>364</sup> It also investigated 1874 ombudsman complaints relating to the mismanagement of public

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<sup>357</sup> Others include the office of the Auditor-General and Directorate of Public Prosecutions.

<sup>358</sup> Section 233 of the 1995 Constitution of Uganda.

<sup>359</sup> Section 8(1) of the Inspectorate of Government Act of 2002.

<sup>360</sup> Sections 226 and 227 of the 1995 Constitution of Uganda.

<sup>361</sup> Section 230 of the 1995 Constitution of Uganda.

<sup>362</sup> Section 227 of the 1995 Constitution of Uganda.

<sup>363</sup> Section 229 of the 1999 Constitution of Uganda.

<sup>364</sup> 'Inspector General's report to Parliament January – June 2013' 12.

funds, non-payment or delayed payment of salaries, as well as delayed delivery of social services, employment disputes, unfair dismissals and inheritance disputes.<sup>365</sup>

Despite the efforts of the IG, corruption and abuse of office in diverse ways is reportedly high. For instance, in 2013 the country dropped ten places from the previous year in the Corruption Perception Index with a point's score of 26 out of a possible 100.<sup>366</sup> According to the Observer, besides losing billions of shillings that would have helped to reverse the trend of poverty to grand corruption, abuse of office and maladministration, such as bribery and absenteeism, are persistently high in the education and health sectors, leading to poor delivery of social services in the country.<sup>367</sup> A public opinion survey by Transparency International shows over 67% of Ugandans not only believe that corruption is on the increase but also rated rampant corruption among public servants, the educational system, public utilities and the medical system.<sup>368</sup>

Arguably, the indication is that the IG and other related agencies have not been effective in executing their complementary mandates to advance the implementation of socio-economic rights. This, according to the IG, is as a result of a number of challenges it is facing, including inadequate funding, lack of human and material capacities, as well as resistance to its recommendations, inadequacies in the legal framework, and a negative societal attitude.<sup>369</sup> The implication is that the state needs to strengthen and capacitate the IG to effectively play its complementary role to the UHRC in advancing the implementation of socio-economic rights.

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<sup>365</sup> 'Inspector General's report to Parliament January – June 2013' 12.

<sup>366</sup> 'Corruption Perception Index 2013' *Transparency International* available at <http://www.transparency.org/country/#UGA>.

<sup>367</sup> '10 reasons corruption persists in Uganda' *the Observer* (December 2012) available at [http://www.observer.ug/index.php?option=com\\_content&view=Section&id=22598:10-reasons-corruption-persists-in-uganda](http://www.observer.ug/index.php?option=com_content&view=Section&id=22598:10-reasons-corruption-persists-in-uganda).

<sup>368</sup> D Hardon and F Heinrich *Daily lives and corruption: public opinion in East Africa* (2012) 45-49

<sup>369</sup> 'Inspector General's report to Parliament January – June 2013' xvii.

## **6.6. The challenges of the UHRC in advancing socio-economic rights implementation**

Although the UHRC is functionally involved in advancing the progressive realization of socio-economic rights in Uganda, its efforts are not without challenges. Some of those challenges identified by the study are as follows:

### **6.6.1. The challenge of inadequate domestic legal framework on socio-economic rights**

Although Uganda has ratified virtually all international treaties on socio-economic rights, including the ICESCR and the African Charter, it is yet to domesticate any of these treaties. Furthermore, socio-economic rights, except the right to education and the rights of children, are not substantially provided for in the constitutional Bill of Rights as individual entitlements. Similarly, apart from education, the domestic legal framework lacks substantive legislation on the right to health, the right to housing and the right to an adequate standard of living, including food, nutrition and clean water. Thus, unlike South Africa, a strong domestic legal framework that supports the promotion and protection of socio-economic rights is lacking in Uganda.

Although the lack of domestic recognition of these rights is not a bar to the mandate of the UHRC to promote and protect these rights, it limits the extent to which it can go to execute its mandate. Arguably, without domestication, these rights exist in abstraction within the domestic legal frameworks of the state, particularly given the near total lack of constitutional provision for them as substantive rights. Thus, despite its genuine interest and efforts in advancing the implementation of the right to health, the right to food and nutrition, and the right to water, the UHRC lacks the legal framework to proceed against the state since issues relating to the violation of these rights are political questions for which the state is seen to be beyond legal accountability. Arguably, this may be the reason behind its extremely ‘soft’ approaches of commendation, subtle denunciation and appealing in its reports on the state’s poor attitude towards socio-economic rights implementation. First of all, commend the state profusely for what it has managed to achieve with respect to socio-economic rights, occasionally denounce the state for



neglecting these rights, and then make harmless appeals to the to comply with its obligations to implement these rights.

Obviously, as Galligan and Sandler have argued, when human rights standards originate from outside a national system, they lack strong domestic legitimacy and even weaken the commitment of national institutions to advance their implementation.<sup>370</sup> This situation makes it quite challenging for the UHRC to employ protective strategies to advance the realization of socio-economic rights. As Karusoke, a former Commissioner of the UHRC, notes, the ability of the UHRC to adjudicate the core content of socio-economic rights through the complaints and tribunal processes is hindered by the non-justiciability of most of these rights.<sup>371</sup> Arguably, the need to overcome this challenge is one of the reasons for the persistent request to the state to domesticate the ICESCR and demand the recognition of the national objectives and directive principles of state policy as substantive human rights within the Bill of Rights.<sup>372</sup> Therefore, it is submitted that for as long as socio-economic rights remain largely vague within the domestic legal framework, the UHRC's activities in advancing their implementation will continue to be largely promotional as its capacity to apply protective measures to seek or secure state compliance with its socio-economic rights obligations is limited thereby.

#### **6.6.2. The challenge of a wide mandate**

The UHRC has subject-matter jurisdiction over the promotion and protection of all categories of human rights. It also has both personal and territorial jurisdiction over all persons and authorities throughout the country. This makes it a general-purpose NHRC, with a mandate that is as broad as possible, as required by the Paris Principles. While a broad or 'all-purpose' mandate for NHRCs is generally applauded because it enables them to act on all categories of human rights, the ability of NHRIs to functionally and successfully execute all aspects of such mandates could turn out to be problematic.

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<sup>370</sup> D Gilligan and D Sandler 'Implementing human rights, in S Halliday and P Schmidt (eds) *Human rights brought home: Socio-legal perspectives on human rights in the national context* (2004) 23.

<sup>371</sup> Karusoke (n 278 above) 62.

<sup>372</sup> 6<sup>th</sup> UHRC Annual Report 2003 97.

Arguably, where this is the case the promotion and protection of socio-economic rights, which is only a component, has to compete for attention with civil and political rights. This position results in prioritizing some rights to the exclusion of others in terms of time, resources and commitment. For the UHRC, which is clearly limited in capabilities, it can only experience serious difficulties if it tries to focus on executing all the component parts of its wide mandate at the same time.<sup>373</sup> As Sekaggya correctly notes, ‘the numerous things the Commission needs to do makes it to be ‘spread too thinly, particularly at the regional offices.’<sup>374</sup> Under such circumstance it is no surprise if the UHRC is seen to be paying less attention to socio-economic rights at a particular time. For instance, the UHRC was noted to have given less attention to socio-economic rights in its activities in the early years of its creation.<sup>375</sup> Of course, this was because it had to give priority to other rights. However, in 2004, ten years after its establishment, Onyango echoed the same sentiments that socio-economic rights ‘do not enjoy a place of prominence’ in the reports of the UHRC.<sup>376</sup> A perusal of its most recent annual report shows that even now specific entries on socio-economic rights are very few when compared with civil and political rights.

Kubuye, in response to this question, agrees to some extent with the observation that the UHRC is relatively less actively focus on socio-economic rights. According to her, the Commission started giving serious attention to socio-economic rights only about five years ago.<sup>377</sup> Ssekindi rationalizes that the dynamics of the human rights situation in the country at the time of its establishment dictated the need to prioritize civil and political rights over socio-economic rights, adding that it has nothing to do with an overloaded mandate.<sup>378</sup> Nkuubi also does not see the wide mandate of the UHRC as a limiting factor.

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<sup>373</sup> KC Esom ‘The role of national human rights institutions in promoting international law in domestic law systems: Case study of the Uganda human rights commission’ in M Killander (ed) *International law and domestic human rights litigation* (2010) 205 218.

<sup>374</sup> Sekaggya (n 15 above) 81 175.

<sup>375</sup> A Makubuya ‘Breaking the silence: a review of the mandate report of the Uganda human rights commission’ (1999) 3 *East African Journal of Peace and Human Rights* 217.

<sup>376</sup> Oloka-Oyango (n 1374 above) 26.

<sup>377</sup> Kubuye (68 above).

<sup>378</sup> Ssekindi (n 37 above).

Rather, he submits that it is its failure to prioritize these rights that has limited its ability to advance their effective implementation.<sup>379</sup>

Arguably, Ssekindi and Nkuubi's rationalizations may be correct. However, the fact cannot be ruled out that the need to satisfy the multiple components of its wide mandate makes the UHRC correspondingly divide and makes it invest its time, attention and resources in multiple directions and activities. This diversion naturally limits the extent to which it can address socio-economic rights since it has to take care of other, equally demanding, categories of human rights.<sup>380</sup> Thus, the UHRC must prioritize the promotion and protection of socio-economic rights among its multi-faceted mandate to be more effective in advancing the implementation of these rights.

### **6.6.3. The challenge of inadequate powers to protect socio-economic rights**

A lack of effective powers to protect socio-economic rights is one of the challenges of the UHRC. For instance, it has powers to make recommendations, award compensatory damages and grant other appropriate remedies to victims of socio-economic rights violations. However, its findings and recommendations from monitoring and other exercises are not binding and, thus, can be ignored by state departments and agencies without their suffering any legal consequences. The awards and orders of the UHRC from the complaint process or the tribunal proceedings are binding but it has no powers to ensure compliance unlike the orders of a court of law. Thus, the beneficiaries of such awards, grants or orders are left to the goodwill and discretion of the government to pay.<sup>381</sup>

Furthermore, although line departments and agencies that ignore its recommendations may attract some reproach to themselves when summoned to appear before the Parliamentary Committee on Human Rights, the extent to which the Committee can enforce compliance against the executive arm of government with respect to

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<sup>379</sup> Nkuubi (57 above).

<sup>380</sup> International Council on Human Rights Policy *Performance and legitimacy: National human rights institutions* 2004 76.

<sup>381</sup> 14<sup>th</sup> UHRC Annual Report 2011 13.

recommendations on socio-economic rights is largely limited.<sup>382</sup> As well, some of its most important recommendations for advancing the realization of socio-economic rights, such as domesticating the ICESCR; amending the Constitution to reflect substantive socio-economic rights; enacting framework legislation for the right to health, food and water; appropriating adequate funds in the national budget for the funding of social services; and carrying out effective oversight over socio-economic rights policies and utilization of funds by the state, all fall within the primary responsibility of Parliament. However, Parliament has been unwilling to accept responsibility and there is nothing the UHRC can do to influence or enforce compliance with these vital recommendations. As Reif advises, ignoring the work and recommendations of a NHRI is detrimental to its effectiveness.<sup>383</sup> Thus, the inability of the UHRC to enforce or influence the state to implement its recommendations on socio-economic rights undermines its capacity to effectively protect socio-economic rights and advance their implementation.

#### **6.6.4. The challenge of inadequate funding and capabilities**

The UHRC also faces some structural challenges that indirectly affect its capability to effectively promote and protect socio-economic rights. These relate to its complaint procedure, and the issues of accessibility and adequate funding. Like every other dispute resolution process, the complaint process is complaint driven and reactive. Therefore, it is largely suitable for individual rather than the systemic violation of human rights which is usually associated with socio-economic rights.<sup>384</sup> Thus, in 2012, out of 706 new complaints, only 12 were initiated by the UHRC's and none was on socio-economic rights.<sup>385</sup> This limitation is even acute within its tribunal process, where it is inherently prevented from initiating cases since it cannot preside over its own complaints. This means, like the courts, the Commission does nothing unless and until hapless victims of socio-economic rights violation come before it with their complaints before it can act. Even then the jurisdiction of the tribunal is seriously limited to the right of education, as

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<sup>382</sup> Nsereko (n 271 above).

<sup>383</sup> LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2001) 13 *Harvard Law Review* 1 20.

<sup>384</sup> A Cockery 'National human rights institutions as monitors of economic, social and cultural rights.' *Centre for economic and social rights* (2007) 8.

<sup>385</sup> 15<sup>th</sup> UHRC Annual Report 2013 2.

it is precluded from adjudicating other socio-economic rights not constitutionally recognized as substantive fundamental rights.

Furthermore, the UHRC is over-burdened by a heavy complaint and case workload on civil and political rights that discourages or impairs it from being proactive in the protection of socio-economic rights. For instance, as at December 2012, it had a case back-log of 660 cases before the tribunal,<sup>386</sup> in addition to about 2725 complaints pending resolution.<sup>387</sup> As Kubuye admitted, the UHRC is seriously limited by inadequate capacity effectively to handle the existing complaints in addition to promoting and protecting the human rights of over 30 million Ugandans with a staff strength that is fewer than 200, most of whom are not appropriately skilled.<sup>388</sup>

Furthermore, the Commission's operations are limited by the small number of offices which continues to hinder it from reaching out to people at grassroots level,<sup>389</sup> and the lack of adequate financial resources to timely investigate and resolve complaints,<sup>390</sup> to translate the Constitution of Uganda and other human rights instruments into local languages,<sup>391</sup> and to access remote areas of the country to conduct human rights education.<sup>392</sup> Its inability to influence its own budget outcome is a structural challenge that affects its capability to execute necessary programmes to advance the implementation of socio-economic rights. Therefore, one cannot agree more with Namusobya's assertion, that the UHRC is grossly limited by structural deficiencies effectively to execute its mandate to promote and protect socio-economic rights in Uganda.<sup>393</sup>

## **6.7. Conclusion**

This chapter has considered the role and activities of the UHRC in advancing the implementation of socio-economic rights in Uganda. The chapter considers the

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<sup>386</sup> 15<sup>th</sup> UHRC Annual Report 2013 17.

<sup>387</sup> 15<sup>th</sup> UHRC Annual Report 2013 5-6.

<sup>388</sup> Kubuye (n 68 above).

<sup>389</sup> 14<sup>th</sup> UHRC Annual Report 2012 47.

<sup>390</sup> 15<sup>th</sup> UHRC Annual Report 2011 19.

<sup>391</sup> 15<sup>th</sup> UHRC Annual Report 2012 72.

<sup>392</sup> 14<sup>th</sup> UHRC Annual Report 2011 52.

<sup>393</sup> Namusobya (n 40 above).

characteristics of the UHRC against the requirements of the Paris Principles and concludes that it has most of the features necessary for an effective NHRI. For instance, it has a strong and secure legal foundation that guarantees its independence, well-defined functions and powers and a functional organizational structure to drive its mandate. Also, the UHRC has demonstrated a clear understanding and commitment to its all-embracing mandate, including the need to drive the implementation of socio-economic rights through its activities and in collaboration with civil society and other stakeholders.

Over the years, the UHRC has played a significant role in promoting and protecting socio-economic rights within the context of its mandate and Uganda's social and legal environment. In carrying out its functions, it appears to have been influenced by the philosophical underpinning of the country's Constitution, which seeks to build an egalitarian society with emphasis on meeting the basic needs of ordinary people.

In the 17 years of its existence, the UHRC has managed to carve out a place for itself as a credible state watchdog and a mechanism for social justice not only by speaking to the needs of victims of socio-economic rights violations but also by protecting socio-economic rights with various measures. Consequently, it has been able to educate the state that failure to implement socio-economic rights is not just a violation of state treaty obligations, it is also a wrong against the ordinary people, for which the state must take responsibility and address as practically as possible through the adoption and implementation of social legislation, policies and programmes, including poverty eradication action plans and the use of the right-based approach to development planning and programming. Thus, as well as regularly monitoring state compliance with its international treaty obligations, the UHRC has been active as a cost effective channel for the expeditious ventilation and resolution of socio-economic rights violation grievances raised by ordinary people.

However, the chapter also discloses that the UHRC's workings on socio-economic rights are apparently limited both in scope and impact. The Commission is not confused about its responsibility towards the promotion and protection of all categories of human rights,

however, the consideration of its activities shows that it gives greater attention to civil and political rights rather than socio-economic rights, although the trend appears to be changing, particularly with respect to the monitoring of the state's compliance with its obligations to implement these rights.

Also, it applies the same strategies to promote and protect all categories of human rights. However, some of its major strategies for advancing socio-economic rights implementation, such as the complaint and tribunal procedures, appear to be of limited relevance given the very low rate at which these platforms are used by complainants to resolve such complaints. Its human rights education programmes also are not specifically targeted towards socio-economic rights implementation and are limited in out-reach. Thus Ugandans, generally lack knowledge of these rights, their essence, and what they are meant to accomplish. Since socio-economic rights are largely unavailable in the domestic legal framework, the UHRC needs to focus more on ensuring their availability so that the awareness it is creating about them can become useful as an effective instrument for securing the implementation of these rights.

The chapter also demonstrates that although the UHRC is engaged in advancing the implementation of socio-economic rights, it is largely content with applying domestic pressure, especially in exercising its protective mandate over these rights. These measures are important but they normally are less effective in ensuring compliance unless supported by other, more coercive means, such as judicial action. This makes it imperative for the domestication of the ICESCR and other international and relevant international human rights treaties by the state to give greater legal and moral force to its efforts toward advancing the implementation of these rights.

Finally, the chapter draws a link between the mandate of the UHRC and its capabilities and asserts that its ability to advance socio-economic rights is negatively affected by its mandate which is considered to be too broad. The non-domestication of socio-economic rights, the lack of powers to make and enforce binding recommendations, inadequate resources in terms of expert knowledge and funding, were identified also, as some of the

factors limiting the UHRC from effectively advancing the progressive realization of socio-economic rights.

The next and final chapter presents a summary of the general and specific findings and recommendations of the study in relation to the role and activities of the NNHRC, the SAHRC and the UHRC in advancing the implementation of socio-economic rights.



## CHAPTER SEVEN

### FINDINGS, CONCLUSION AND RECOMMENDATIONS

#### 7.1. Findings

In the light of the totality of the discussions, the study, in relation to the role and effectiveness of NHRCs in advancing state implementation of socio-economic rights in Commonwealth Africa finds as follows:

##### 7.1.1. **The domestic legal status of socio-economic rights does not affect the competence of NHRCs in Commonwealth African countries to advance the implementation of these rights**

The study finds that socio-economic rights have a different status in the domestic legal frameworks of different states. In Nigeria, for instance, socio-economic rights are not clearly available as substantive rights within the domestic legal framework. This unavailability is because the state has neither domesticated the ICESCR nor expressly provided for socio-economic rights in the Constitution as justiciable rights. Although Nigeria has domesticated the African Charter, the enabling law is subordinated to the Constitution, which fails to recognize socio-economic and precludes judicial intervention with respect to the DPSPs. This has rather created a conflict between the socio-economic rights guaranteed under the African Charter as domesticated and the Constitution.

In South Africa, an array of robust socio-economic rights exists within the domestic legal framework as substantive and judicially claimable constitutional rights even though the country has neither ratified the ICESCR nor domesticated the African Charter, which it has ratified. This framework creates ample legal support for South African citizens to hold the state legally accountable for its obligations under the constitution to respect, protect, promote and fulfil socio-economic rights. In Uganda the situation looks like a mixed-bag. The rights to education and provision for children's welfare are expressly guaranteed by the Constitution as fundamental rights and freedoms, but the bulk of socio-economic rights are represented in the Constitution as non-justiciable National Objectives and Directive Principles of State Policy. Uganda, like South Africa, has not domesticated the ICESCR and the African Charter, which it has ratified.

Thus, the general finding is, although socio-economic rights have a constitutionally guaranteed and justiciable legal status in South Africa, that they are deprived of legally enforceable status in Nigeria and only partially or insignificantly available as justiciable rights in Uganda. Yet, the NHRCs from the three countries have mandates to promote and protect socio-economic rights irrespective of their status or the form in which they are constituted or derived within the domestic legal regimes. In particular, the neglected status of socio-economic rights in the domestic legal framework did not prevent the NHRCs of Nigeria and Uganda from advancing the implementation of these rights. Arguably, the status of socio-economic rights in other CommonwealthAfrica mirrors at least one of the situations in the focused countries. Therefore, it is my submission that the fact that socio-economic rights are either not recognised or even unavailable within the domestic legal frameworks does not constitute a bar to the capacity and competence of NHRCs in CommonwealthAfrica to advance their implementation as long as a state is a party to the international treaties guaranteeing these rights or where these rights are expressly or indirectly available under the domestic legal framework as constitutional or legal rights.

**7.1.2. The international normative and institutional frameworks for advancing domestic implementation of socio-economic rights are relatively ineffective in CommonwealthAfrican states**

The study finds that existing international mechanisms for advancing the implementation of socio-economic rights are either ineffective or as yet unavailable in all three countries of the study. For instance, Nigeria and Uganda are irregular in complying with their reporting obligations under the ICESCR and the African Charter, yet both the CESCR and the African Commission are unable to cause these countries to comply with their reporting obligations and prioritize the implementation of socio-economic rights. South Africa is not yet a party to the ICESCR and so bears no reporting obligation. Thus, this mechanism is not available to hold South Africa accountable for its legal obligations to implement socio-economic rights.

Also, because Nigeria, South Africa and Uganda are not yet parties to the Optional Protocol to the ICESCR, the contentious process of the ICESCR is not available to advance the implementation of socio-economic rights in these countries. Furthermore, while the African Court on Human and Peoples' Rights remains inoperative, the African Commission is not only difficult to access but is also perceived as incapable of giving effective remedies. Arguably, the above scenario is also the common experience of other Commonwealth African states. Thus, until the existing international mechanisms become useful in compelling compliance from states, their potency in advancing the domestic implementation of socio-economic rights will remain weak and unlikely to be effective in complementing domestic mechanisms.

### **7.1.3. NHRCs are suitable institutional mechanisms for advancing socio-economic rights implementation in Commonwealth African states**

The implementation of socio-economic rights in Commonwealth Africa can be advanced by relevant bodies, such as the judiciary, PHRCs, and NGOs. However, the study finds that NHRCs are relatively better suited than these other bodies to play this role more effectively. As the study shows, all the afore-mentioned institutional mechanisms are available and active in Nigeria, South Africa and Uganda. However, the extent to which the judiciary, PHRC and NGOs can be effective in advancing the domestic implementation of socio-economic rights was found to be grossly limited due to a number of factors. Unlike NHRCs, advancing the implementation of socio-economic rights is merely tangential to the basic functions of these other agencies. For instance, the judiciary is almost completely restricted by the Constitution from playing any legitimate role over the implementation of socio-economic rights in Nigeria and Uganda. Although the opposite is the case in South Africa, questions of institutional capability, competences and strategies continue to undermine the effective enforcement of socio-economic rights by the courts in that country. Similarly, PHRCs and socio-economic rights NGOs may assume a role in advancing the implementation of socio-economic rights, as they are doing in Nigeria, South Africa and Uganda, but there is no legal obligation for them to play these roles. Furthermore, apart from institutional competences, the nature of socio-economic rights problems in these countries are far more structurally embedded than is

possible for these institutions to take up with the state and make any significant impact with their limited strategies.

However, NHRCs, even with their limitations, have greater public legitimacy and institutional capabilities than the other related institutions to advance the domestic implementation of socio-economic rights. Basically, among other factors, the NHRCs of Nigeria, South Africa and Uganda were considered and seen to be more accessible, convenient, expeditious, less costly, and have more impact than these other state institutions. This is attested to in part by the greater number of complaints they handle annually as against these other institutions. Furthermore, their special status and location between the state and the citizens makes NHRCs of Nigeria, South Africa and Uganda readily available and enabled to intervene on behalf of ordinary people in different ways to hold their respective states accountable for the implementation of socio-economic rights than the other institutional mechanisms. Arguably, NHRCs in other Commonwealth states also enjoy similar status and experiences. Thus, the role, relevance and relative advantage of NHRCs as suitable institutional mechanisms, as against other national institutions, for advancing the domestic implementation of socio-economic rights in Commonwealth Africa cannot be denied.

#### **7.1.4. NHRCs in Commonwealth African states apply relatively common strategies to advance domestic implementation of socio-economic rights**

The study finds that NHRCs not only have but apply diverse strategies to advance the domestic implementation of socio-economic rights. Some of these strategies are provided for under the enabling legislation as their practical functions, others are not. For instance, the NNHRC, the SAHRC and the UHRC all promote socio-economic rights through the following common strategies: human rights education, advocacy, public awareness campaigns, seminars, conferences, workshops, research, and training, as authorized by the establishing laws. In similar vein, the three NHRCs all have statutory powers to receive and settle complaints, monitor, make findings and offer recommendations to the state concerning compliance with international and national socio-economic rights obligations, to hold public inquiries into systemic socio-economic rights violations, and to work with or in the courts to protect socio-economic rights.

Although many of these strategies are constant and frequently used, some others, such as interfacing with the international human rights system through the reporting processes and the UPR mechanism or engaging with the complaint processes of international treaties, are irregular or never utilized on account of political expediency. At the domestic level both the NNHRC and the UHRC neglect litigating socio-economic rights in the courts, unlike the SAHRC which, when necessary, uses the domestic courts to advance socio-economic rights implementation. Also, some of the strategies and powers are unique to the respective NHRCs. For instance, the special procedure under section 184(3) of the South African Constitution for monitoring state compliance with socio-economic rights is unique to the SAHRC. Similarly, the quasi-judicial tribunal process for resolving human rights complaints, including applicable socio-economic rights, is unique to the UHRC. Furthermore, among the three NHRCs of the study, the NNHRC has a unique legal status that equates its recommendations as binding and enforceable as decisions of a High Court. Generally, the study finds that while the strategies are all mandate-based, they are, arguably, standard strategies, and thus commonly deployed among NHRCs in Commonwealth Africa to the extent allowed or limited by the enabling legislation.

#### **7.1.5. The NNHRC lacks interest in and, relatively, is ineffective in advancing domestic implementation of socio-economic rights**

The NNHRC presently enjoys an A status with the ICC and the study finds that it has the basic institutional structure to effectively advance the implementation of socio-economic rights. Despite its status and resources, the study finds that the attitude of NNHRC towards advancing the implementation of socio-economic rights in Nigeria is that of ambivalence with no clear action plan towards addressing these rights. Although the NNHRC acknowledges that its mandate incorporates socio-economic rights, it readily hides behind the seeming lack of legal recognition of these rights at the domestic level to do little or nothing tangible to advance their progressive realization. Thus, it allocates or invests relatively too little effort, time and resources to promote and protect socio-economic rights as much as it does with civil and political rights, despite the large-scale violation of these rights by the state against ordinary citizens. For instance, ignorance of socio-economic rights across the entire social and political spectrum is arguably

widespread and the NNHRC has done little to create sufficient awareness of these rights among politicians, law-makers, public servants, judges and members of the public, especially the most deprived poor, marginalized and vulnerable groups. Certainly, holding one or two workshops on socio-economic rights is a clear indication of ineffectiveness in terms of input and outcomes with regards to socio-economic rights education. Even the hitherto existing but largely inactive, desk offices in charge of the rights to education, health and food have been disbanded.

As well, it's monitoring of the state's socio-economic rights implementation is grossly weak and directed at no clear objective or specific purpose. Also, it has a complaint mechanism that is grossly inaccessible to those who need its services most. Arguably, the NNHRC may, occasionally, be seen to be concerned with socio-economic issues, but not with advancing the implementation of socio-economic rights as it lacks a any clear, deliberate, and targeted policy of continuous promotion and protection of socio-economic rights, as well as engagement with the state over its international and national obligations to implement these rights in the NNHRC's action or work plan.

Thus, while the NNHRC remains the most viable institutional platform for advancing state implementation of these rights as a result of the near complete emasculation of the judiciary from playing any serious role in this regard coupled with the high degree of indifference from the executive and legislative arms of the state, it has largely been ineffective in the performance of its activities to advance these rights. Therefore the study concludes that the NNHRC is relatively ineffective and has impacted far less than its potential in advancing socio-economic rights implementation in the country. Furthermore, it is submitted that this attitude is common among NHRCs in Commonwealth Africa. This is evident their statutory reports which hardly speak to or disclose what they are doing to advance socio-economic rights implementation.

#### **7.1.6. The NNHRC faces various challenges that impair its potential for advancing domestic implementation of socio-economic rights**

The thesis finds and attributes the ineffectiveness of the NNHRC in advancing socio-economic rights to both internal and external challenges. The internal challenges include the absence of effective leadership that is willing to initiate and creatively prioritize socio-economic rights in the context of the its fluid socio-economic rights mandate and enormous resource constraints. Arguably, this lack of leadership has been a serious missing link between the NNHRC and its role in advancing the implementation of socio-economic rights, as successive managements since its creation have failed to provide leadership in that direction. Other internal challenges are a lack of adequate human capacity and its failure or inability to forge positive corporative partnerships with other relevant public agencies and non-state actors, especially socio-economic rights NGOs.

Furthermore, the study finds the NNHRC to be physically and economically inaccessible to the poor, a factor that negatively affects its effectiveness and impact in a substantial manner. The facts show locational barriers in terms of physical availability and transport costs hinder access for too many people, especially the poor and people with disabilities. Its few offices are either not available to access or are located in too obscure a position to be accessed without high transport costs. The challenge of inaccessibility equally affects the NNHRC in a reverse form by straining its scarce resources and effectiveness.

The NNHRC's external challenges include inadequate funding from the state, the lack of support from the National Assembly which largely ignores the NNHRC and its activities; the non-justiciability of socio-economic rights which prevents the NNHRC from working with the courts to advance these rights; the state's very lethargic attitude towards its international and national legal obligations to implement these rights; the lack of cooperation from the different tiers of government, especially the 36 sub-states; and the geographical size and population of the country in relation to the its present capabilities. Therefore, the study emphasizes the need for the NNHRC to overcome, or be assisted to overcome, these challenges if it is to be effective and accomplish the expectations of

ordinary Nigerians with respect to the aspect of its mandate concerning the advancement of the progressive realization of socio-economic rights.

**7.1.7. The SAHRC demonstrates appreciable interest in and, relatively, is effective in advancing domestic implementation of socio-economic rights than both the NNHRC and the UHRC**

Like the NNHRC, the SAHRC has an A status with the ICC, which signifies full compliance with the Paris Principles in its institutional structure. Also, like the NNHRC, its members have secure tenures with full-time membership for the majority of the members. Apart from being one of the very few NHRIs in Africa that is established under the Constitution, the Commission has adequate legal guarantees of institutional, administrative and operational independence and autonomy, which are coupled with adequate powers to drive its mandate. Generally, the study finds that the SAHRC operates freely without any noticeable interference from the state and is acknowledged as one of the relatively well-resourced and active NHRCs in Africa.

The study further finds that one basic feature that distinguishes the SAHRC from the other NHRCs under focus is its mandate on socio-economic rights. The SAHRC has the most robust, comprehensive and direct mandate on socio-economic rights among NHRCs in the world. This constitutional mandate grants special competence to the Commission to promote and protect socio-economic rights as a matter of deliberate priority. Thus, unlike the Nigerian and Uganda NNHRCs, there is nothing uncertain about its socio-economic mandate. Furthermore, unlike in Nigeria, the legal status of socio-economic rights is neither disputed nor doubted. The Constitution remains the most fundamental source of legally enforceable socio-economic rights even as the country still needs to ratify both the ICESCR and its Optional Protocol in order to strengthen the status of these rights and give further impetus to the SAHRC and other relevant stakeholders to advance their practical realization.

The study also finds that the SAHRC has been very active in executing its mandate to advance the domestic implementation of socio-economic rights. The Commission has a work-plan that gives attention to the promotion and protection of socio-economic rights.



It engages in socio-economic rights education and advocacy, as well as resolves complaints on socio-economic rights violations using non-judicial mechanisms. It also monitors and advises on the level of progressive implementation of socio-economic rights and, in some instances, has either directly or indirectly approached the courts to litigate socio-economic rights or has served as *amicus curiae* in such litigations. Knowing that ordinary South Africans need to be empowered with the knowledge and capacity to demand these rights, the SAHRC over the years has striven to create awareness of these rights among the people generally, including key state institutions and officials, to understand the nature of these rights, the obligations and standards they entail and the collective or individual responsibility of the state to ensure that these rights are progressively realized in practice for the benefit of all South Africans, especially the marginalized and disadvantaged population. Accordingly, the SAHRC has provided and continues to provide socio-economic rights education and training for public officials on the rights-based approaches to development planning, policy implementation and service delivery, and has striven to empower women, school children, the elderly and disabled people, community and the youth with knowledge, information and capacity to protect and seek redress against the violation of their socio-economic rights.

Apart from education and advocacy, the SAHRC has monitored and continues to monitor socio-economic rights implementation in the country. So far it has produced eight social and economic rights reports, which represents the eight consecutive times it has comprehensively monitored socio-economic rights implementation in the country since its inception. Arguably, the monitoring exercises and the reports serve useful purposes even if the degree of impact is disputed. In particular, the social and economic rights reports provide a comprehensive account of the true state of implementation of these rights as determined from the its process, they go further to bring relevant issues and matters bordering on the lack of or ineffective implementation of and the reasons thereof to the attention of both the state and the public domain, besides offering recommendations for remedial actions in legislation, policy and attitudinal change.

The study further finds that the SAHRC also advances socio-economic rights implementation by receiving and resolving complaints through mediation between the parties. Through this process it reportedly has succeeded in restoring socio-economic goods and services, such as education, healthcare, energy and water to a number of unlawfully deprived individuals and communities. In addition to the complaint procedure, the SAHRC utilizes a public inquiries mechanism to investigate alleged systemic violation of socio-economic rights. Like the monitoring process, the public inquiries of the SAHRC are also useful both as a participatory process and as an outcome in giving voice to the ordinary people to report their situations and expectations on socio-economic rights to the state. So far it has carried out such inquiries on the rights to education, health, food, housing, the conditions of living in farming communities, and the right to water and sanitation. Finally, the study finds that the SAHRC employs litigation, either directly as a contestant or simply as a friend of the court, to advance the implementation of socio-economic rights, although this intervention has been quite minimal. At least on one occasion, it was given the responsibility to supervise the implementation of a judicial order on socio-economic rights.

Notwithstanding the above, the SAHRC visibly has been inactive and ineffective in the several areas. Its recommendations are largely ignored by the state. For instance, its recommendations for the ratification of the ICESCR and its Optional Protocol, and need for the regular submission of reports to the various treaty bodies have not been implemented, yet there seems to be nothing it can do about it. The SAHRC's reluctance to litigate socio-economic rights has limited its role and contributions, if any, to expanding national jurisprudence on these rights. Furthermore, the SAHRC is also lagging in terms of engaging the state in the various international human rights jurisdictions to hold the state accountable for its socio-economic rights obligations. Therefore, the SAHRC has clearly been ineffective in the afore-mentioned areas that are vital to advancing the state's implementation of socio-economic rights.

It is submitted, by the nature of this study, that conclusions on the SAHRC's level of impact can only be subjectively reached due to its limitations and to empirically

disarticulating the relative effectiveness and outcomes of each of the different strategies the SAHRC utilises to advance these rights. Thus, it may be intellectually wrong to make definitive assertions about the impact of the SAHRC in advancing the implementation of socio-economic rights without empirical supporting evidence from specific or targeted research outcomes.

However, on the basis of the findings, the study is of the view that the SAHRC remains an NHRIs in Africa that can be considered to be active and relatively effective in advancing the implementation of socio-economic rights. The SAHRC has been effective in the deployment of necessary strategies to promote and protect socio-economic rights. The level of impact in its different manifestations may not be as satisfactory as generally expected, what cannot be denied is the SAHRC's active and tangible activities in the promotion and protection of socio-economic rights, which are more expressive, comprehensive and result-oriented than any other NHRC in Commonwealth Africa.

The study concludes that a number of reasons account for the relative edge the SAHRC has over other African NHRIs in advancing socio-economic rights implementation. These include the constitutional provision of these rights as substantive legal rights, the competence of the domestic courts to enforce these and the inspiration from the existing jurisprudence, the relatively higher degree of rights-consciousness among the people and the existence of very active civil society groups committed to socio-economic rights activism.

#### **7.1.8. The SAHRC faces challenges that undermine its effort at advancing domestic implementation of socio-economic rights**

The narratives on the Commission's relative effectiveness and impact notwithstanding, the study also finds that the Commission is constrained by a number of challenges from making a much better impact than it is having so far. As is the case with the NNHRC, the challenges are both internal and external. The internal challenges range from inadequate human capacity to funds insufficiency, the Commission's lack of presence in a large part of the country, particularly the rural areas, and an inability to cultivate a structured relationship with civil society. The external challenges include the lack of support from

Parliament for its activities, reports and recommendations. For instance, despite the fact that it lacks powers of its own to enforce its recommendations, parliament does practically nothing with its findings and recommendations. Another crucial challenge is the fact that the Commission operates in a political environment that is not committed to implementing socio-economic rights and improving the wellbeing of ordinary people. Therefore, like the NHRC, the SAHRC also needs to overcome its challenges to enable it do more to advance the progressive realization of socio-economic rights in South Africa.

**7.1.9. The UHRC demonstrates reasonable interest in and, relatively, is more effective than the NNHRC, in advancing domestic implementation of socio-economic rights**

The UHRC also has an A status with the ICC and is equally created by the Constitution. Also, as in South Africa, both the Parliament and the Executive consent to the appointment of members of the Commission who are given a secure tenure in office as full-time members. Again, like South Africa, the Commission is legally independent from executive control and administratively autonomous. Thus, the Commission is in a position to effectively advance the implementation of socio-economic rights in terms of its institutional structure.

The study also finds that the UHRC has a very limited mandate on socio-economic rights under the Constitution of Uganda 1995. This stems from the fact that the Constitution guarantees only the right to education as a substantive socio-economic right. All other related rights are provided for as constitutional aspirations. There is not yet any definitive interpretation of the status of these policy directives. This being the situation, the ICESCR and the African Charter constitute alternative sources for the Commission to drive its mandate on socio-economic rights. They grant the Commission implicit competence to promote and protect the socio-economic rights not expressly provided for in the Constitution and the Commission has creatively extended its mandate to include monitoring the state's implementation of not only the right to education but also other socio-economic rights, such as the right to health, food, water and the welfare of prison inmates or those in detention facilities.

Furthermore, the study finds that UHRC practically promotes and protects socio-economic rights, although the protective aspect of its mandate is severely limited. For instance, it regularly carries out human rights education and training for members of the public, including public servants, judges, prosecutors, police, prison authorities, and members of the armed forces. Other people that have benefited from its education outreach programmes include local clerics, traditional rulers, and civil society groups in order to inculcate a culture of respect for human rights. Also, the UHRC periodically monitors the level of implementation of socio-economic rights, especially the rights to education, health and food and submits its findings to the Parliament with appropriate recommendations. In addition, the UHRC maintains a very good working relationship with Parliament that enables it to vet bills before they are passed. Furthermore, it actively participated in the UPR on Uganda by submitting its own report and made further efforts to follow-up on the implementation of the recommendations and the state's voluntary commitments on socio-economic rights during the UPR process.

The study finds that UHRC operates a quasi-judicial tribunal with a status that is equivalent to a high court of justice. This mandate enables the UHRC to sit like a court of law in justice over human rights disputes, including disputes over the right to education and other related issues on the wellbeing of children. However, because the jurisdiction of the tribunal is quite limited its impact as a platform for advancing socio-economic rights is also limited. As well as the tribunal, the study further finds that the UHRC also operates a complaint handling system where it peacefully and amicably settles socio-economic rights complaints among the people and state agencies.

By all measures, the study considers the UHRC as an NHRC that is active in advancing state implementation of socio-economic rights. Also considered relatively effective are the various strategies it deploys to advance this objective. Especially worthy of note is the strength of energy, commitment and creativity the UHRC brings to bear on the promotion and protection of socio-economic rights even as its mandate is not as legally enabled and supported by the state as is the case with the SAHRC. Thus, in general, the study considers the UHRC, as against the NNHRC, a model or best practice for NHRCs in

Commonwealth Africa where the domestic legal frameworks do not clearly support legal claims and active judicial measures for advancing states' implementation of socio-economic rights.

However, like the SAHRC, the UHRC limits its active strategies to the national jurisdiction only. It has never taken the state to any of the international human rights platforms to attempt to hold the state accountable or its socio-economic rights obligations and, thus, is not effective on this point. Therefore, while the UHRC is active and relatively effective, opinions on its level of impact remains the subject-matter of interpretation based on several dependent factors not empirically considered by this study. It is submitted that the UHRC has visibly impacted on advancing the implementation of socio-economic rights to the extent allowed by its capabilities which, by a random assessment, can arguably be considered by this study to be appreciable.

#### **7.1.10. The UHRC faces various challenges that impair its potential for advancing domestic implementation of socio-economic rights**

The UHRC faces similar challenges as the NNHRC that affect its ability to effectively advance and impact on the implementation of socio-economic rights. For instance, internally the UHRC lacks capacity in terms of adequacy of staff, technical knowhow, technology and incentives to meet the demands of effective promotion and protection of socio-economic rights. The UHRC also fails to have a structured relationship with active NGOs on socio-economic rights because of perceived differences in interest, motivations, and strategies. Furthermore, as is the case with the SAHRC, the membership of the UHRC is dominated by members of the ruling party, which limits the extent to which it can push against or pressurise the government. Among the external challenges are: the violence in the eastern part of the country which limits it from taking its services to those areas, the problems with adequacy of financial resources, accessibility to the vulnerable segments of the society, as well as limitations on its capacity to give effective remedies against the state other than making recommendations that are often ignored. Furthermore, the non-recognition of socio-economic rights as substantive rights at the domestic legal framework, the failure of the state to domesticate the ICESCR and the African Charter, and other relevant international treaties on socio-economic rights, as well as the failure of

the state to ratify the Optional Protocol to the ICESR contribute to limit the effectiveness and impact of the UHRC. Finally, there is also lack of sufficient commitment from the state and other relevant public institutions to the essence and necessity of achieving the practical implementation of socio-economic rights.

**7.1.11. The domestic legal culture and state practice influences states' attitude towards complying with their legal obligations to implement socio-economic rights**

Arguably, a political system that shields the state from socio-economic rights accountability gives impetus to such states to neglect the implementation of these rights. As the findings of the study show the political and legal systems in Nigeria and Uganda have, since independence, neglected to accommodate the legal responsibility of these states to implement socio-economic rights. At independence from Great Britain, both countries were run by constitutions that guaranteed only civil and political rights. Furthermore, human rights in general and socio-economic rights, in particular, experienced the worst forms of neglect during the military interregnums the two countries have experienced in their political history. Even with the restoration of civilian rule the prevailing political systems still shields the state from socio-economic rights accountability. Arguably, the consistent failure of Nigeria and Uganda legally to recognize and prioritize socio-economic rights is not a political or historical coincidence. The dominant issues during the negotiation for independence in the two countries were mainly how to attain self-rule and take control of the country's political, social and economic destiny. People cared little, if at all, about addressing issues of poverty and socio-economic deprivation, even as colonialism and the slave trade were perceived as responsible for the underdevelopment of the African continent generally. The colonial power, Britain, bequeathed to both Nigeria and Uganda its political and legal philosophical traditions that see no justification for according legal status to socio-economic rights and, which continues to influence the political and ideological direction of these countries, despite undergoing political and constitutional reforms.

The above situation contrasts with South Africa where the political and legal systems not only recognize but obligate the implementation of socio-economic rights. Unlike the

situation in Nigerian and Uganda, the internal colonial system and its dehumanizing apartheid policies galvanized the struggle for independence in South Africa beyond the mere attainment of black majority political rule to include dismantling the social and economic inequalities, deprivation and injustices that apartheid erected and perpetuated against South Africans in general, and the black population, in particular. Thus, the struggle against apartheid shaped the transformation vision and mentality of the South African constitutional, legal and political system from the outset and inexorably led to the entrenchment of a robust list of socio-economic rights under the constitutional Bill of Rights as a deliberate state policy to right the wrongs of the past and to improve peoples' general wellbeing. Furthermore, this motivation accounts for the creation of the innovative institutional platforms and specific mandates on socio-economic rights to ensure that these rights do not just remain as constitutional aspirations.

## **7.2. Final conclusion**

The thesis fleshes out a plausible hypothesis that NHRCs are suitable institutional mechanisms for advancing the domestic implementation of socio-economic rights in CommonwealthAfrica and identifies salient factors that enhance their role and effectiveness in this regard. Although scholars generally consider NHRCs as viable gateways for bridging the implementation gap between international human rights norms and domestic practice, the extent to which this can be orchestrated with respect to socio-economic rights is largely uncharted in the literature. This thesis therefore reflects on the role and effectiveness of NHRCs and provides empirical support for the relevance of these institutions as the missing link in the quest for making CommonwealthAfrican states accountable for their legal obligations to implement socio-economic rights at the domestic level.

It emerges from the study that it is unlikely for NHRCs to actively advance the domestic implementation of socio-economic rights simply because they have or are assumed to have an integrated mandate and responsibility on human rights. Although NHRCs are similar in form, they all operate within the dictates of the national legal, economic, political and social context. Thus, where the extant domestic legal and political culture is



not receptive to notions of socio-economic rights and what they entail it is unlikely for NHRCs in such climates to have the leverage to advance the implementation of socio-economic rights domestically since their areas of focus, activities, and attitude in relation to these rights are circumscribed by the prevailing legal culture and state practice. Arguably, this is irrespective of what the enabling law or principles establishing or guiding these institutions might provide. For instance, in spite of the robust mandate and functions of the NNHRC and UHRC, the legal and political authority that established them never intended nor expressed their relevance for advancing the domestic implementation of socio-economic rights.

Therefore, question whether NHRCs can be effectively in advancing socio-economic rights settles on finding answers to questions bordering on the status of these rights in the national constitutional framework and also, whether or not they have an unequivocal mandate to address these rights. Without any doubt, the SAHRC is able to advance the implementation of socio-economic rights more vigorously than the NNHRC and the UHRC because these rights are available in concrete terms as justiciable guarantees within the constitutional framework. This logic also applies to the way the UHRC is able to deal with right to education in Uganda, which is the only substantive socio-economic right the Constitution guarantees as justiciable fundamental human right. Conversely, it is submitted that the lack of explicit constitutional recognition for of socio-economic rights in Nigeria weakens and impairs the role and effectiveness of the NNHRC to advance the domestic implementation of these rights. This is also why the UHRC is largely ineffective in promoting and protecting all other socio-economic rights, except the right to education.

Although NHRCs could act on socio-economic rights even without an explicit legal mandate, the practice among states is to tie their mandates to the human rights expressly recognized by the Constitution as substantive human rights. Where this is so, it implies that socio-economic rights are excluded from the mandates of NHRCs in countries without a legal or constitutional guarantee of socio-economic rights. Obviously, this constitutes a hindrance to their roles and effectiveness in relation to advancing the

implementation of socio-economic rights. For instance, without an explicit mandate parliament is not legally obliged to provide statutory funding for NHRCs to advance socio-economic rights. With limited funds therefore, NHRCs will be forced to prioritize civil and political rights in their activities and exclude socio-economic rights as they will have little motivation to extend their mandates beyond what is clearly spelt out by the enabling law. For instance, with a clear and direct constitutional mandate, the SAHRC is and has relatively been very strong in promoting and protecting socio-economic rights than the NNHRC and the UHRC. Overall, a lack of a clear mandate on socio-economic rights creates a negative situation for NHRCs to do nothing serious about these rights. Arguably, this factor contributes significantly to the relative inactivity and ineffectiveness of the NNHRC and UHRC in advancing the implementation of socio-economic in Nigeria and Uganda respectively. Thus, with the constitutionalization of socio-economic rights and granting of explicit constitutional mandate to the SAHRC, South Africa presents a more positive example of how the prevailing legal culture and state practice can enhance the role and effectiveness of NHRCs in advancing the domestic implementation of socio-economic rights.

Besides these two basic factors, the institutional independence and functional autonomy of NHRCs and the level of supplementary support they get from other accountability institutions, such as the judiciary and parliament are also important. Arguably, the reality of inadequate operational independence and funding can force NHRCs to neglect socio-economic rights as against civil and political rights. For instance, the composition matters a lot in determining the focus and activities of NHRCs. Any membership that does not consider socio-economic rights as important will neglect these rights for civil and political rights. Arguably, this has been the experience with the NNHRC and the UHRC. Also, an appointment process that is dominated by the state cannot produce independent NHRCs capable of exerting their authority and influence in an effective manner. Irrespective of pretensions to the contrary, such members will remain loyal to the socio-political and ideological direction of the government, which in countries like Nigeria and Uganda, are not receptive of socio-economic rights.

Furthermore, NHRCs without adequate funding cannot be functionally independent and operationally effective. First of all, inadequate funds will make NHRCs to prioritize their mandate and invariably focus on those rights they have explicit competence rather than spread their funds too thinly on all categories of human rights. Furthermore, inadequate funding also diminishes the operational efficiency of NHRCs and impairs their ability to deliver effectively on socio-economic rights. For instance, due to limited funding the SAHRC suffers from inadequate number of offices and competent staff, inability to timely investigate and resolve complaints, and to generally function at an optimal level.

Also, NHRCs not supported with an effective judicial system and an active parliament cannot also play its role on socio-economic rights effectively. For instance, where socio-economic rights are justiciable then the courts are indispensable platforms for NHRCs to advance the rights of victims to socio-economic justice and effective remedies through litigation. This situation creates a role for NHRCs to litigate socio-economic rights and a duty for the courts to entertain such cases and provide appropriate remedies. It also creates a role for NHRCs to work towards strengthening the knowledge and capacity of judges, lawyers and litigants to litigate these rights. Thus, apart from making appropriate use of this platform to protect socio-economic rights, the level of cooperation and support they get from the courts is an important element for enhancing the role and effectiveness of NHRCs.

Furthermore, an activist Parliament can enhance the role and effectiveness of NHRCs in advancing socio-economic rights in several ways: it can ensure that NHRCs are given explicit mandate on socio-economic rights; effect constitutional changes to provide for socio-economic rights as justiciable guarantees; ensure adequate budgetary provision for NHRCs; consider and debate the annual and special reports of NHRCs on socio-economic rights, and support NHRCs to enforce their decisions and recommendations through parliamentary oversight on relevant line departments. The lack of adequate cooperation and support from parliament for NHRCs and their activities on socio-economic rights is commonly experienced by the focused NHRCs. Apart from frequent budgetary cuts, the reports submitted to parliament are never considered for any purpose.

Important recommendations requiring parliamentary action, such as domesticating the ICESCR, ratifying the Optional Protocol to the ICESCR, the constitutionalization of socio-economic, and the enactment of framework legislation on socio-economic rights are ignored. Such a laid-back attitude from parliament towards the efforts of NHRCs is unhealthy and only serves to impair the role and effectiveness of NHRCs in relation to advancing the domestic implementation of socio-economic rights.

Finally, the role and effectiveness of NHRCs in advancing the domestic implementation of socio-economic rights arguably goes beyond the focus countries. Arguably, although the scope of the study is limited, its basic theoretical assumptions and conclusions are valid for all other NHRCs across Commonwealth Africa and beyond. It is against this background I venture to make recommendations in relation to Commonwealth Africa as a whole at least, if not beyond the continent as well.

### **7.3. Recommendations**

In the light of the findings, the study recommends as follows:

#### **7.3.1. The need for Commonwealth African states to accord explicit recognition to socio-economic rights in national constitutions as justiciable human rights**

As much as NHRI can promote and protect socio-economic rights irrespective of their status within the domestic legal regime, their ability, effectiveness and impact would be enhanced if these rights are clearly recognized as fundamental human rights within the domestic legal framework. As has emerged from the study, the SAHRC is able to promote and protect all the socio-economic rights expressly recognized by the South African Constitution, but this is not the case with the NNHRC and the UHRC. As a matter of fact, the NNHRC is unsure whether its mandate covers socio-economic rights because of their absence in concrete legal terms in the Nigerian Constitution. The UHRC, for its part, advances the implementation of the right to education and does so much more effectively than the other socio-economic rights. This is because the right to education is expressly guaranteed under the Constitution, whereas other socio-economic rights are not so clearly recognised. Thus, it is deducible from the experience of the NNHRC and the

UHRC that the non-recognition or limited recognition of socio-economic rights as substantive rights within the domestic legal framework has a limiting effect on the mandate, ability and attitude of NHRCs effectively to promote and protect these rights.

As the survey of national constitutions shows this scenario of neglected status or limited recognition of socio-economic rights as justiciable rights is widespread in CommonwealthAfrica. Therefore, the study recommends the need for CommonwealthAfrican states to give proper legal recognition to socio-economic rights as justiciable rights, and not as DPSP, within their domestic legal frameworks in line with the way South Africa has done. This recognition can be accomplished either by domesticating the ICESCR and the Africa Charter without reservations or by amending state constitutions to expressly incorporate and guarantee socio-economic rights as substantive constitutional rights. With constitutional recognition of socio-economic rights in place, NHRCs would have no reason to hesitate over the promotion and protection of these rights and would be more effective in advancing their progressive realization.

### **7.3.2. The need for CommonwealthAfrican states to ratify the Optional Protocol to the ICESCR**

As at 20 April 2014, only 13 African states out of a total of 45 countries have signed the OP-ICESCR. However, Gabon is the only African state, of the 13 countries that has ratified the OP-ICESCR. This means that victims of socio-economic rights violations are denied the opportunity to seek justice, if they so wish, from the newly introduced international complaint procedure of the ICESCR. As well as the denial of an alternative judicial platform for victims, the non-ratification of the OP-ICESCR denies African states the other positive benefits envisaged from the operations of the mechanism, including the possibility of getting technical assistance to advance the implementation of socio-economic rights in areas of need. There is no doubt that the ratification of the OP-ICESCR will further enhance the legal environment for NHRCs and other stakeholders, including NGOs, to hold CommonwealthAfrica states accountable for their international obligations to implement socio-economic rights. Arguably, as an additional platform this would contribute to facilitating the progressive realization of socio-economic rights. Therefore, the study recommends that all CommonwealthAfrican states, including

Nigeria, South Africa and Uganda, should ratify the OP-ICESCR without any further delay, to enhance the domestic implementation of socio-economic rights.

**7.3.3. The need for Commonwealth African states to provide NHRCs with explicit mandate to promote and protect socio-economic rights**

Ordinarily, all NHRCs, the establishment of which conforms to the Paris Principles, should have an integrated mandate or competence to promote and protect socio-economic rights. However, a power not expressly given under an enabling legal instrument will be difficult to exercise or justify, especially if challenged. While NHRI could creatively interpret their mandates to incorporate socio-economic rights, the absence of an express mandate means that a narrow interpretation excluding socio-economic rights is possible. Furthermore, jurisdictional reference to international human instruments a state has ratified may not serve as a very strong basis for NHRCs to assume material jurisdiction over socio-economic rights even in monist states where international treaties not self-executing after being ratified. Such a mandate, even if derivatively justifiable, is hazy and legally weak when these rights have no concrete legal foundation at the domestic level.

As the findings show, this has been the experience of the NNHRC, whose socio-economic rights mandate is derived by reference to the international treaties on socio-economic rights which Nigeria has ratified. The UHRC faces the same challenge over the socio-economic rights not clearly recognized by the country's Constitution as substantive rights. On the contrary, there is nothing equivocal about the socio-economic rights mandate of the SAHRC, even though the country has not ratified the ICESCR. Apparently, several NHRCs in Commonwealth Africa do not have a clearly expressed mandate to promote and protect socio-economic rights. The situation, the study argues, is a setback to the effectiveness of NHRCs to advance the implementation of these rights at the national level. Accordingly, the study recommends that there is a need to give an express legal mandate to the NNHRC, the UHRC and indeed, all existing NHRCs in Commonwealth Africa to enable them to promote and protect socio-economic rights without legal constraints.

#### **7.3.4. The need for NHRCs in Commonwealth African states to prioritize socio-economic rights in their activities**

Arguably, unlike civil and political rights, socio-economic rights are more programmatic to implement because of their nature and frequent dependence on availability of resources. Thus, achieving the implementation of these rights entails entrenching a rights-based approach to development policy planning and implementation, as well as ensuring that relevant government departments, including the legislature, the executive, and the judiciary know, internalize and prioritize socio-economic rights. It also requires empowering individuals and groups with knowledge and capacity to demand these rights and hold the state accountable. In addition, NHRCs have to work with existing related bodies, including law enforcement agencies, to combat corruption and mismanagement of public resources. Furthermore, NHRCs have to work with the legislature and the executive to ensure that economic policies and programmes do not negate the enjoyment of socio-economic rights, as well as the allocation and utilization of adequate budgetary resources for the provision of quality education, healthcare, affordable housing, food and nutrition, water, social security for the aged and safety nets for vulnerable groups. In Africa, where the violation of socio-economic rights is endemic, there is need to prioritize the mainstreaming of these rights with targeted and consistent action plans in order to guarantee better outcomes. As the findings show, a lack of prioritization accounts for the low achievements and impact of the NNHRC in advancing the implementation of socio-economic rights compared to the better achievements and impact of the South African and Uganda NHRCs. Therefore, the study recommends that NHRCs in Africa must prioritize and mainstream socio-economic rights in their action plans and activities in order to fulfil the purpose of their socio-economic rights mandates.

#### **7.3.5. The need for Commonwealth African states to strengthen the institutional capability of NHRCs**

Even if NHRIC have an expressed mandate on socio-economic rights, they must also have the capacity to deal effectively with these rights. Arguably, advancing socio-economic rights implementation requires multi-dimensional knowledge and competences in economic, legal, cultural and social issues. Thus, adequate research and technical competence in various disciplines is regarded as very important for effective performance

of their functions. As the study shows, the challenge of inadequate human and technical capacity is a common challenge among the three NHRCs evaluated. Arguably, this situation is not different from that of all other NHRCs across Commonwealth Africa. Therefore, the study recommends that there is need to enhance the capacity of the NHRCs of Nigeria, South Africa, and Uganda, as well as all other NHRIs across Africa through recruitment and training to enable them effectively to execute their mandates.

### **7.3.6. The need for Commonwealth African states to provide adequate funding for NHRCs**

As generally noted, NHRCs require adequate funds to operate effectively. This is more so with regard to socio-economic rights which require NHRCs to intervene on behalf of poor victims at a considerable cost in money and material resources to them. For instance, in Uganda, the Commission bears the costs of the entire complaint process, including paying for the transportation and upkeep of complainant's witnesses. Besides NHRCs need to have adequate funds to provide salary incentives for staff, pay for office rent and maintenance and fund the execution of their action plans and programmes in all parts of the country. As the study shows, the three NHRCs evaluated all raised concerns about funding inadequacy from the state and the attendant constraints on their operations and effectiveness, even as these Commissions are generally considered to be among the well-funded NHRCs on the African continent. This situation clearly suggests that inadequate funding is a common challenge to almost all NHRIs, which actually limits their ability effectively to execute their mandates on socio-economic rights.

While different funding models for NHRIs operate, what is important is for states to ensure that public funding for these institutions matches the scope and realistic demands of their human rights mandate. Furthermore, NHRCs must find alternative ways to shore up their funding to meet the declining allocations from the state. For instance, the idea of establishing a human rights trust fund with contributions from the public and private sector as envisaged under the NNHRC Act 1995 is worth exploiting. They must also carry out active drive for external funding from multilateral organizations, agencies, foreign governments and reputable charities and foundations provided their independence is not compromised. Therefore, the study recommends that NHRCs in



Commonwealth African states should be adequately funded to enable them to deliver on their mandates on socio-economic rights.

**7.3.7. The need for Commonwealth African states to ensure adequate accessibility to NHRCs**

Inadequate accessibility was also a common challenge that the study identified in all the three NHRCs evaluated. As the study further showed, inadequate accessibility of NHRCs is a double-edged sword. While it limits the ability of the poor in physically accessing their services, it also imposes financial constraints on the institutions, which limits their ability to reach out to ordinary people most in need of their services. This is because the offices of NHRCs across Africa are located mostly in a few urban towns or cities. There is no doubt that accessibility is a serious factor: availability enhances the effectiveness and impact of NHRCs. Therefore, the study recommends the need for the NNHRC, the SAHRC, and the UHRC to expand their physical presence to more communities, especially at a grassroots level, so that their services become clearly accessible in all parts of these countries for greater effectiveness. This recommendation applies equally to all other NHRCs in Commonwealth Africa.

**7.3.8. The need for effective institutional support from the judiciary, parliament and other relevant state organs for NHRCs in Commonwealth African states**

Arguably, NHRIs cannot function effectively without effective support from other state organs, especially the legislature and the executive. Basically, NHRIs rely on the state for virtually all of their relevant needs, from funding to maintaining a convenient environment in which to operate. Furthermore, they need the support of parliament to strengthen their autonomy and powers. They also need the support and cooperation of parliament and the executive to respect their opinions, advice and recommendations. Basically, the duty on state organs to support NHRCs effectively to discharge their functions is either expressly imposed by the enabling statute or inherent. What is usually lacking is the political will on the part of state organs to comply by giving them the support they require to function effectively. Therefore, the study recommends that state

organs must demonstrate effective support and cooperation for NHRCs to enable them effectively to advance the implementation of socio-economic rights.

### **7.3.9. The need to strengthen inter-institutional collaboration between NHRCs and other related state agencies in Commonwealth African states**

Like NHRIs, other related state agencies should be strengthened with adequate funding and capacity to discharge their complementary functions. Obviously, if all existing state institutions are functionally effective, the general objectives for which they are established would be achieved at an accelerated rate. Otherwise the failure of one institution to execute its mandate will negatively affect others, particularly if their functions overlap. Therefore, the study recommends that states should strengthen the productive capacity and effectiveness of other related agencies such as the Ombudsman or Public Complaint Commissions in Nigeria, the Commission for Gender Equality and the Public Protector, in South Africa, the Inspectorate of Government in Uganda, and the general anti-corruption agencies. Similar state agencies in Commonwealth Africa should be strengthened effectively to execute their associated mandates on socio-economic rights.

### **7.3.10. The need for members of the public to effectively utilize NHRCs and the services they offer**

NHRCs are established and funded as necessary institutional platforms for advancing the implementation of human rights. Thus, whereas their services are on offer for the benefit of the public, especially those that exist at the fringes of society, their effectiveness depends on the level of utilization of the services they offer. Thus, the more NHRCs are utilised by NGOs, public interest groups, and other stakeholders to advance socio-economic rights, the more they become active and effective. As the study shows, the lack of effective patronage from the public is partly responsible for the inactivity of the NNHRC with regards to socio-economic rights. Arguably, this situation also applies to most other NHRCs in Africa. Therefore, the study recommends that NHRCs should be pushed to advance the implementation of socio-economic rights with regular and effective utilization of their services by members of the public, especially NGOs on behalf of the poor victims whose socio-economic rights are violated on a daily basis.

### **7.3.11. The need for good governance and the application of the right-based approach to development by Commonwealth African states**

As the findings show, the effectiveness of NHRIs cannot be isolated from the commitment of the political leadership of the state. Studies have shown that it takes a proactive state to initiate and implement people-oriented policies that enhance the well-being of the people across all human welfare indicators in health, education, income and opportunities. Furthermore, state institutions and state policies are inseparable, as the latter often informs the relevance and existence of the former. Thus, every state needs a competent and committed government to articulate and implement social policy priorities through responsive state institutions and structures. Consequently, where the state and its leadership lack a commitment to social policies, the extent to which relevant institutions can drive change is equally be limited. Thus, it is submitted that the lack of proactive and committed governance is part of the reason for the reality of poverty, inequality and socio-economic deprivation that continue to ravage most African countries, including Nigeria, South Africa and Uganda that the study evaluated. Therefore, the study recommends the need for African states to be proactively committed to the implementation of social policies to enhance peoples' general well-being through a right-based approach to development.

### **7.4. An agenda for further research**

The study postulates that NHRCs can effectively advance the domestic implementation of socio-economic rights in Commonwealth African states provided the prevailing legal culture and state practice fulfill four basic factors: the explicit provision of socio-economic rights as justiciable guarantees in the constitutional framework of states; the granting of explicit legal or constitutional mandate on socio-economic rights to NHRCs; the provision of adequate institutional, functional, and financial independence for NHRCs and the capability of the courts and parliament as accountability institutions to support and supplement the efforts of NHRCs. However, arguably, while these theoretical assumptions and conclusions are valid, the premise from which they were synthesized evidently appears to be very narrow. This situation undoubtedly questions the rationality of spreading the validity of these conclusions beyond the focused countries. Therefore,

there is a need to carry out a further research on the role and effectiveness of NHRCs in advancing the domestic implementation of socio-economic rights in more countries in order to validate the claims of the thesis and extend the theoretical assumptions and conclusions to all Commonwealth countries.

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## **List of treaties and other international legal instruments**

### **International treaties**

Charter of the United Nations and statute of the International Court of Justice adopted 26 June 1945 entered into force on 24 October 1945 with 49 state parties. As at the 6 October 2014 there were 193 members (49 original members and 144 admitted members).

International Convention for the Elimination of All Forms of Racial Discrimination 1965 Opened for signature 21 December 1965 660 UNTS 195 (entered into force 4 January 1969). As at 5 October 2014 there were 177 state parties including Nigeria, South Africa and Uganda

International Covenant on Economic, Social and Cultural Rights 1966 opened for signature on 19 December 1966 993 UNTC 3 (entered into force 3 January 1976). As at 5 October 2014 there were 162 state parties, including Nigeria and Uganda. South Africa is yet to ratify this treaty.

International Covenant on Civil and Political Rights 1966 opened for signature on 19 December 1966 999 UNTC 171 (entered into force 23 March 1976). As at 5 October 2014 there were 168 state parties, including Nigeria, South Africa and Uganda.

American Convention on Human Rights 1969 adopted at San Jose, Cost Rica on 22 November 1969 OASTS 36 (entered into force on 18 July 1978).

Vienna Convention on the Law of Treaties 1969 opened for signature on 23 May 1969 1155 UNTS 331 (entered into force on 27 January 1980. As at 5 October 2014 there were 114 state parties, including Nigeria. South Africa and Uganda are yet to accede to this treaty.

Convention on the Elimination of All Forms of Discrimination Against Women opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). As at 5 October 2014 there were 188 state parties, including Nigeria, South Africa and Uganda.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 opened for signature adopted on 10 December 1984 1465 UNTS 85 (entered into force on 26 June 1987). As at 5 October 2014 there were 156 signatories, including Nigeria, South Africa and Uganda.

The African Charter on Human and Peoples' Rights adopted on 27 June 1981, entered into force 21 October 1986. As at 5 October 2014 all African states except South Sudan is yet to ratify this treaty.

The additional protocol to the American convention on human rights in the area of economic, social and cultural rights (the protocol of San Salvador) opened for signature November 17 1988, 28 ILM 156 (entered into force November 16 1999)

Convention on the Rights of the Child opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). As at 5 October 2014 there were 194 state parties including Nigeria, South Africa and Uganda.

The African Charter on the Rights and Welfare of the Child, adopted 11 July 1991, entered into force 29 November 1999. As at 5 October 2014 there were 1 state parties, including Nigeria, South Africa and Uganda.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families Opened for signature 18 December 1990 2220 UNTS 3 Doc A/Res/45/18 (entered into force 1 July 2003). As at 5 October 2014 there were 47 state parties including Nigeria and Uganda. South Africa is yet to ratify this treaty as well.

European Social Charter (revised) 1961 opened for signature 3 May 1996 CETS 166 (entered into force July 1 1999)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted 07 November 2003 and entered into force on 25 November 2005. As at 5 October 2014 there were 28 state parties including Nigeria, South Africa and Uganda.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights adopted 10 June 1998 entered into force 25 January 2004. As at 5 October 2014 there were 24 state parties including Nigeria and South Africa.

Convention on the Rights of Persons with Disabilities opened for signature 30 March 2007 2515 UNTS 3 (entered into force 3 May 2008). As at 5 October 2014 there were 151 state parties including Nigeria, South Africa and Uganda.

Optional Protocol to the International Convention on Economic, Social and Cultural Rights 2008 opened for signature on 24 December 2009 Doc.A/63/435 34 (entered into force on 5 May 2013). As at 5 October 2014 there were 16 state parties with Gabon as the only African country that has ratified this treaty.

Revised Treaty of the Economic Community of West African States (ECOWAS) 24 July 1993, available at <http://www.refworld.org/docod/492182d92.html>

Southern African Development Community Treaty 1992 available at <http://www.sadc.int/documents/publications/sadc-treaty/>

### **General Comments and Recommendations**

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### **Declarations and Resolutions**

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## **National Constitutions and other domestic legal instruments**

### **National Constitutions**

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Constitution of the Republic of Malawi 1994 (Constitution) Act no. 20 of 1994) available at <http://www.malawilii.org/mw/legislation/act/1994/20>

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*Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria* Communication no. 224/98; (2000) AHRLR 227

*Commission Nationale des Droits de l'Homme et des Libertes v Chad* Communication no. 74/92; (2000) AHRLR 66

*Democratic Republic of Congo v Burundi, Rwanda & Uganda* Communication no. 22/99  
(2000) AHRLR 66

*Economic Rights and Accountability Project (SERAP) v Nigeria & Another*  
Communication 155/96 (2001) AHRLR 60

*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union  
Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire* Communication  
nos. 25/89, 47/90, 56/91, 100/93 (Joined) (1995) AHRLR 74

*Malawi African Association and Others v. Mauritania* Communication nos. 54/91, 61/91,  
98/93, 164/97-196/97 and 210/98 (2000), 2000 AHRLR 149

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*Government of the Republic of South Africa v Grootboom & others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)

*Jaftha v Schoeman, Van Rooyen v Stoltz and Others* (CCT74/03) 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC)

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*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173 (CC); 1999 (3) BCLR 280 (CC)

*New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC)

*Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC)

*Re: Certification case* 1996 1997 (2) SA 97; 1997 (1) BCLR 1 (CC)

*Soobramoney v Minister of Health Kwazulu-Natal* (1997) (1) SA 763 (CC); 1997(12) BCLR 1696 (CC)

*Van Rooyen and Others v S and Others* (2002) (5) SA 246; 2002 (8) BCLR 810 (CC)



## **Uganda cases**

*Allen Atukunda v Hon Col Kahinda Otafiire* Unreported complaint no. 776/1998 (unreported)

*Alifunsi Nyirinkwaya v Attorney General (unreported)* complaint no. MBA/082/2002 (unreported)

*Centre for Health Human Rights and Development and others v the Attorney General* Unreported constitutional petition no. 16 of 2011

*Christian Roberts and Others v Minister of Social Development and Others* Unreported Case no. 32838/05 2010

*Kyalimpa Godfrey v Attorney General* Unreported complaint no UHRC/145/2005

*Mpondi Emmanuel v Chairman, Board of Governors Nganwa High School* Unreported complaint no. 210 1998 (unreported)

*Pheobe Kamasindi v Captain David Bashaija* Unreported case no. UHRC/245/2003

*Rebecca Tibetsigwa v George Lukoda* Unreported complaint no UHRC/J/LOG 41/2003

## Appendix A: List of interviewees

### Nigeria

Munanyo, Goodluck, a waterfront (shanty) resident, 6 January 2013, Port Harcourt, Rivers State, Nigeria

James, Okomadu, a local trader, 15 January 2013, Port Harcourt, Rivers State, Nigeria

Sam-Wobo, Ohochukwu, Rumeume community leader, 15 April 2013, Port Harcourt, Rivers State, Nigeria

Ozubide, Alabo, Barrister and Senior state Prosecutor, 20 April 2013, Yenagoa, Bayelsa State, Nigeria

Oparah, Lambert, Assistant Director NNHRC and Special Assistant to the Nigeria's Honourable Minister of State, Education, 5 May 2013, Abuja, Nigeria

Ojukwu, Anthony, Director of Legal Department NNHRC, 20 May 2013, Abuja Nigeria

Obe, Harry, Head of Monitoring Department NNHRC, 28 May 2013, Abuja, Nigeria

Nduneli, Anthony, Legal Practitioner and social rights activist, 3 June 2013, Abuja, Nigeria

Muoka, Felix Legal practitioner and Executive Director SERAC, 14 June 2013, Lagos, Nigeria

Odo, Godwin, Programme Officer, MacArthur Foundation, 20 December 2013, Abuja, Nigeria

Ayewoh, Olufemi, Special Assistant to the Honourable Minister of State Education, 3 February 2014 Abuja, Nigeria

Kienka, Ayebainaemi, a petty fish seller, 13 January 2014, Port Harcourt, Rivers State, Nigeria

Ebobrah Solomon, Lecturer and Head of Department, Faculty of Law, Niger Delta University, 14 February 2014, Yenagoa, Nigeria

Angwe, Ben, Professor of Law and Executive Secretary, NNHRC, 20 February 2014, Abuja, Nigeria

## **South Africa**

Saal, Querida, Researcher SAHRC, 12 September 2013, Johannesburg, South Africa

Baka, Samuel, Programmes Director, SANGOCO-NET, 7 October 2013, Johannesburg, South Africa

Elroy, Paulus, National Advocay Manager, Black Sash, 3 October 2013, Cape Town, South Africa

Dawson,Hannah, Senior Researcher, Studies in Poverty and Inequality Institute, 3 October 2013, Johannesburg, South Africa

Mandla, Thebiso, opinion leader, 14 September 2013, South Africa, Pretoria, South Africa

Kaseke, Violet, Researcher SECTION 27, 3 October 2013, Johannesburg, South Africa

Kofiprah, Daniel, Operations Manager, SANGOCO-NET, 4 October 2013, Johannesburg, South Africa

Thabo, Mandla, student, 4 October 2013, Mamelodi, Pretoria, South Africa

Molapisi, Jacob, Executive Director SANGOCO-NET, 5 October 2013, Johannesburg, South Africa

Tissington, Kate Senior Researcher, SERI, 7 October 2013 Johannesburg, South Africa

## **Uganda**

Nsereko, Ibrahim, Programme Officer, Strategic Litigation CEHURD, 12 September 2013, Kampala, Uganda

Mugisa, Martha, Programme Officer, Strategic Programmes CEHURD, 13 September 2013, Kampala, Uganda

Namusoby, Salima, Executive Director of ISER, 13 September 2013, Kampala, Uganda  
Godfrey Mbazira, civil servant, 14 September 2013, Entebbe, Uganda

Nkuubi,James, Programme Officer HURINET-U, 13 September 2013, Kampala, Uganda

Nyaragoye, Pricilla, Assistant Director Complaints, UHRC, 13 September 2013, Kampala, Uganda

Ssekindi, Ruth, Director of Complaints, Investigations and Legal services, UHRC, 13 September 2013, Kampala, Uganda

## Appendix B: SAHRC response to research questions



### **(1) Strategies taken by the Commission to advance the implementation of socio-economic rights**

What is the extent of civil society involvement in the section 184(3) process? Any insight regarding what happens to the report after submission to Parliament? Does the Commission follow-up on its recommendations with departments and how? In the Commission's opinion is section 184(3) relevant and effective in advancing socio-economic rights?

The Paris Principles identify key criteria for the establishment of an NHRI:

- A legal basis establishing the NHRI, that is, in the Constitution or enabling legislation that guarantees the independence of the NHRI.
- A clearly defined human rights mandate with emphasis on the national implementation of international human rights standards.
- Independence from government, in particular, in decision-making procedures as well as independence from civil society organisations (CSOs).
- Collegiate and representative membership.
- Handling of individual complaints.

Similarly, the UN High Commission for Human Rights (UNHCHR) highlighted six factors that determine the effectiveness of NHRIs, namely, independence, defined jurisdiction and adequate powers, accessibility, operational efficiency and accountability.

Independence from government is crucial to the effectiveness of an NHRI. One factor that guarantees NHRI independence is a constitutional provision (or other enabling legislation) providing for the NHRI's establishment. However, independence is also measured through funding arrangements, the method of appointment of commissioners, and the links to organs of state. The jurisdiction of the institution should, furthermore, be wide enough to empower it to exercise its human rights complaints mechanism, associated investigations, and to accomplish its mandate effectively. The institution must also be accessible to the population as regards its physical location and through public awareness initiatives. Through the creation of strategic partnerships with other NHRIs and CSOs, the activities of the institution can be enhanced and feedback can be given on institutional performance and shortcomings. These partnerships provide a crucial link to grassroots level organisations with privileged access to would-be rights beneficiaries. With respect to operational efficiency, NHRIs require financial and human resources in order to conduct their work without fear, but should also have assessment procedures in place to evaluate the work that they do. Human rights institutions are ultimately

accountable to the public and therefore it is imperative that their dissemination and reporting through annual reports and other special and public reports are as inclusive as possible.

The monitoring system used by the Research Programme of the Commission is premised on finding out the policy, legislative, administrative and budgetary measures introduced by organs of State towards the realization of the rights in the Bill of Rights. However, as a result of various challenges related to the monitoring system, the need to conduct more in depth research in order to meet the objectives of section 184 (3) of the Constitution and the greater South African imperative for constitutional democracy to be strengthened and consolidated, a new monitoring regime was proposed. During the Commission's strategic planning for the 2011/12 financial year, the challenges attached to the economic and social rights methodology were discussed and it was determined that the Commission's original strategy of developing an economic and social rights report every three years does not do justice to its critical monitoring mandate. In addition, it is important for the Commission to have a real understanding of not only the lived experience of the most vulnerable, but also of the various gatekeepers to the realisation of economic and social rights.

Consequently, the following resolutions were adopted:

- There will be two reports produced by the Commission annually - a Section 184 (3) report as well as a Strategic Focus Area report.
- The primary methodology for obtaining information for the purpose of compiling the Section 184 (3) report will be based on the submission of protocols for requesting information to the relevant organs of the state.
- The methodology for collecting information for the Strategic Focus Area report on the other hand, will be based on conducting primary research with regard to the realisation of a particular right(s).

In pursuit of the Commission's mandate and with particular reference to the Strategic Focus Area report, the degree of success in terms of fulfilling its monitoring role is directly dependent on the reliability of the source(s) of information used. Reliance only on information provided by the very state organs which are being monitored raises questions regarding the credibility of the information obtained and therefore also reflects on the ability of the Commission to determine with any level of confidence the extent to which interventions based on the information provided will address real need. To avoid this, the Commission has no choice but to implement its own process of independent assessment and monitoring.

As the aim is to recommend interventions for ensuring the progressive realisation of economic and social rights based on the information provided by this monitoring process, implementation of once-off ad hoc research project(s) as the only means of collecting information will not be adequate. If progressive realisation of rights in South Africa is to be achieved over time, what is needed, in addition to purposive research projects, is continuous assessment and monitoring of the achievement of rights throughout South Africa. Having such a monitoring system in place will enable the Commission to provide

the Parliament of South Africa with a comprehensive picture in terms of the observance of human rights and to be pro-active in terms of its recommendations and securing appropriate redress where human rights have been violated.

## **(2) Resolution of socio-economic rights complaints**

People say the complaint process is reactive, not well-utilized by South Africans and as dilatory as the court processes, and thus not suitable for the resolution of systemic violations of socio-economic rights? Is this perception correct from the Commission's experience? Any statistical data on socio-economic rights violation complaints the Commission has settled against government departments, municipalities and corporate bodies?

Whilst the Commission has been invested in the immediate obligations associated with economic and social rights with regard to the promotion, respect and protection of human rights, the argument is that while this has been effective, it has diverted attention away from issues and standards of resource availability, progressive realization and minimum core obligations. Coupled with the widespread belief that for South Africa its stance on non-ratification of the ICESCR has in-turn played catalyst to the states reluctance in accepting legal accountability in the area of social and economic policy, and as a result hardly engages in human rights discourse and instead opts to engage in dialogue pertaining to developmental challenges without offering any worthwhile solutions.

The SAHRC has worked tirelessly in assessing the observance of human rights in South Africa through monitoring and research. To this end, the SAHRC continues to make countless strides in advancing human rights. The Commission continues to provide a platform for public participation in order to inform advocacy and most importantly to also inform people of the progress of their specific concerns. “Public participation and decision making, which is a cornerstone of participatory democracy and of a rights-based approach, has been predominantly described as pseudo-participation, and without access to information as a basic minimum for meaningful participation, it will remain so.” It follows from this that participatory mechanisms have often favored those with access to resources and information. As such the Commission seeks to afford the marginalized and poor within society an avenue for citizen involvement.

- See attached document for a statistical snapshot of complaints received in the 2012/2013 year.

## **(3) Socio-economic rights education**

Are there special socio-economic rights education programmes being carried out by the Commission? To what extent has the Commission enhanced knowledge of socio-economic rights in South Africa.? Are there specific challenges?

The Advocacy unit conducts initiatives and interventions aimed at raising or enhancing awareness on all human rights and that includes civil and political, as well as socio-

economic rights. This can be either upon specific request from stakeholders or as part of the Commission's Strategic Plan which is developed further into the unit's annual performance plan. For 2012-3, the unit conducted provincial public hearings on water and sanitation across the country, which culminated in a national hearing. This arose out of the systemic violations of the right to dignity as a result of the findings in the Khayelitsha and Rammolutsi complaints. In addition, the unit now plans interventions based on an analysis of the legal complaints/ issues emanating from each provincial office as well as what is in the public domain. For 2013-4 the strategic focus area has been determined as the right to food. In addition, all provinces have already held interventions on the right to education (May-June). Other interventions have been on issues of access to health and HIV/ Aids, impact of mining on communities, rights of arrested, accused and detained persons, issues of law enforcement/ police brutality, freedom of expression in the context of hate speech, housing etc.

The above-mentioned remains a challenge for the Commission due to the vastness of each province and the areas that have to be covered. For the water and sanitation hearings, the Commission focused on the deep rural areas that were hardest hit with the lack of water and adequate sanitation so for example, in Mpumalanga the hearing was in Bushbuckridge, for KZN it was in Mphophomeni, in Limpopo it was Sekhukhune etc.

Recognizing the said limitation, the Commission works with a vast range of strategic partners such as community development workers, NGOs, faith and community based organizations, traditional leaders, community advice offices etc so that the partners spread the message on behalf of the Commission. In addition, the Commission actively partners with the other C9 and C10 entities for example the provincial office accompanies the Public Protector when that office conducts its national governance week outreach programs. Government depts. and municipalities (district and local) also form part of the range of stakeholders that the Commission works closely with during service delivery campaigns as well as national commemorative calendar days.

The unit publishes pamphlets in basic, easy to understand terms and language. Admittedly most of the pamphlets are on civil and political rights and are mainly in English due to the high cost involved in translation and printing. However for 2012, the Commission published and disseminated the water and sanitation pamphlet as well as on the pending Traditional Courts Bill in all 11 languages. For 2013-4 the unit will publish and disseminate the fact sheet on the right to food in all 11 languages

#### **(4) Litigation socio-economic rights**

What is the degree of the Commission's involvement in socio-economic rights litigation, including amicus curiae briefs? (Statistics on some cases, if available) Apart from the Grootboom case, has the Commission been asked to supervise other structural interdicts? Given the Commission's status as an alternative body for enforcing socio-economic rights implementation, is the Commission justified in seeking remedies from the courts through litigating socio-economic socio-economic rights?

In respect of the Commission's relationship with parliament and ESR, the ad hoc committee suggested that the SAHRC should highlight specific aspects of its ESR report by making use of its legal mandate to bring matters to the attention of the National Assembly for discussion and action.

In response to these criticisms, the commission has taken stock and reflected on its achievements, weaknesses and remaining challenges. The criticism received from CSOs, parliament and the academic fraternity has played a large part in informing the SAHRC's next move forward. Much of the criticism it received revolved around the methodology it employed to monitor and assess ESR, its preference for mediation and negotiation over litigation, its relationship with civil society, and its overall contribution to ensuring that peoples' human rights are protected and enforced.

The difficulties that the SAHRC has faced in monitoring and assessing ESR and ensuring that organs of state meet their international and constitutional obligations is fairly typical of the nature of the challenge at hand. In regard to ESR, most national human rights institutions, both in the developed and developing countries, face similar difficulties. Many CSOs such as the Treatment Action Campaign (TAC) and the South African Council of Churches (SACC) have openly criticised the SAHRC for its failure to compel the state to meet its obligations in respect of ESR. For these and other organisations criticism has focused on the commission's reluctance to litigate and its reticence to challenge the state to move expeditiously. These criticisms are not unwarranted – indeed the SAHRC would be the first to recognise that it does not litigate enough. However, certain elements of its approach that have received criticism can be defended on pragmatic, historical and financial grounds. Financially, the SAHRC simply does not have a large enough budget to do the kind of work that is expected of it in terms of its broad mandate. Litigation is an expensive undertaking and thus, practically, the large-scale enforcement of rights cannot be achieved in this way. The SAHRC therefore uses its power to litigate as a matter of last resort. Cooperative governance is another important consideration, and adversarialism through the use of litigation does little to foster a relationship of constructive engagement. These are all legitimate factors that the commission must take into account when confronted with the arduous task of fulfilling its mandate of promoting, protecting, and developing a culture of human rights in South African society

##### **(5) Monitoring of international obligations on human rights**

What has been the outcome of the Commission's monitoring of the state's compliance with its reporting and other treaty obligations on socio-economic rights? To what extent does the Commission apply the international and regional human rights platform to advance socio-economic rights implementation?

It has been argued that neo-liberalism and the negative consequences of globalisation have done more harm than good to the progressive realisation of human rights and that rights are in danger of becoming (or have already become) transactional and commodified. NHRIs, therefore, must step outside the conventional rights paradigm and



become more proactive and robust in fostering the social conditions necessary for the progressive realisation of rights.

The SAHRC is ideally placed to champion such a cause. However, it has relied too heavily on international ‘best practice’ as a guiding principle for developing its structure and functions. International best practice is not necessarily best-suited to local requirements, especially where these are inherently diverse and set against the backdrop of recent political transformation, as in South Africa. In this regard, the SAHRC needs to develop and design domestic monitoring and accountability systems that are suitable to their surroundings. Developing these systems is a daunting but necessary task and collaboration with the many well-placed, grass-roots civil society organisations would represent a very positive step to this process. It would assist in grounding the standards and indicators used for measuring the core minimum requirements for the progressive realisation of human rights.

#### **(6) Monitoring Parliamentary bills and legislation**

Is the Commission regularly consulted for inputs on parliamentary bills, and if so are such inputs accepted? Any statistics on socio-economic rights related bills initiated or supported by the Commission and enacted by Parliament rights?

The Constitution requires that the Commission must report on its activities and the performance of its functions to Parliaments’ National Assembly at least once per year (Section 184(5)). The Commission appears at least annually before the Justice and Constitutional Development Portfolio Committee in the National Assembly and engages on its Strategic Plan and Annual Report. During the past two financial years (2010/11 and 2011/12), the number of engagements has increased to 2 – 3 times per year. This development is welcomed by the Commission.

Section 15(2) of the Human Rights Commission Act is the enabling provision that allows the Commission to table reports in compliance with Rule 302 of the National Assembly. The section reads as follows:

In addition to the report contemplated in section 118 of the Constitution, the Commission shall submit to the President and Parliament Quarterly reports on the findings in respect of functions and investigations of a serious nature which were performed or conducted by it during that quarter: Provided that the Commission may, at any time, submit a report to the President and Parliament if it deems it necessary

The Commission may approach the President or Parliament under Section 6 of the Human Rights Commission Act, which states that the Commission may, at any time, approach either the President or Parliament with regard to any matter relating to the exercising of its powers or the performance of its duties and functions.

## **(7) Challenges**

Does the Commission's wide mandate limit the Commission from advancing socio-economic rights as much as possible?

It might be argued that human rights too have become transactional to the point where it is no longer simply a dialogue about the universal rights but also the commodification of rights. Contextually, economic and social rights are included in our Constitution and are regarded as justiciable. However, the privatisation in health care, water and the market mechanism that is so pervasive for example in land rights translate into rights that are only worth its value on paper. Rights therefore become relegated to abstract concepts to be used in the discourse of the historical period and it is therefore always embedded under such constraints. Consequently, the SAHRC just like most national human rights institutions world-wide inevitably functions in an internal and external environment in which its powers and mandates are subject to a rights discourse that goes beyond the explicit language of rights.

History has shown that democracy is certainly not a sufficient precondition for the fulfilment and enjoyment of human rights. Critically the current neo-liberal democracy in South Africa suggests that it lacks the political will to create the social conditions for human dignity to flourish. This is the problem with which the SAHRC is grappling with. In order to bring about change it has stepped outside the usual rights language and build effective relationships with state and civil society. The motive behind this claim is that such a space would serve to allow the Commission to challenge the status quo and shift the paradigm in South Africa to a point where democracy and development become real to human rights beneficiaries.

Is the not binding character of recommendations, orders and awards a hindrance to the Commission's efforts at advancing the implementation of socio-economic rights?

Given that most NHRIs can put forward only non-binding recommendations, advice and reports, a measure of inventiveness and creative strategy is needed in their human rights promotion and protection. At once, NHRIs need to foster constructive dialogue whilst being critically engaging its stakeholders.

How does the South African Human Rights Commission (SAHRC) rate in terms of these criteria and how does it see itself in relation to the state and CSOs? There is a sharp contrast between the criteria in theory and their practical implementation. Furthermore, the general international discourse in which human rights institutions operate and function affects the way in which they approach the enforcement of human rights at a national level. These are the traps in which many human rights institutions find themselves, and the South Africa Human Rights Commission is no exception. The SAHRC may not have the statutory authority to enforce a recommendation, but it remains an agency trusted by the society to review and adjudicate human rights complaints. Its broad investigatory powers give the Commission a public legitimacy equal to a court of law. As we have alluded it is one of the agencies created to educate the public about the

country's human rights laws, including protection from hate speech and so on. Unfortunately, the public's confidence in the agency has not translated to an increased power to regulate violations. As a consequence, the SAHRC, at times, is deemed to exist in a legal gray area. It has the statutory authority to investigate an incident and to educate the public about the country's human rights laws. But it cannot prosecute any human rights offender, including those individuals or groups who wish harm upon a community and use hate speech as the weapon of choice. It has no legal mechanism in place to force a guilty party to be punished for violating human rights laws.

Evidently while there has been significant policy and legislation created which could enable the state to progressively realize a sound human rights dialogue, there are many policy failures, as well as gaps and weaknesses, in translating policy into action. Yet, the Human Rights Commission Act affirms the independence of the Commission in a similar way to section 181 of the Constitution. It prohibits any organ of state, or any other person, from interfering with, hindering or obstructing the Commission in the exercise of its duties. Still it provides the Commission with adequate powers to carry out its functions and responsibilities through the investigation of complaints mediation, litigation and redress. Section 9 of the Human Rights Commission Act provides the Commission with substantial powers to gather information and these include the power to subpoena witnesses, to enter and search premises and to attach articles of relevance to the investigation.

Are there challenges limiting the Commission's efforts at advancing the implementation of socio-economic rights in South Africa

- a) It emerged from the SAHRC's 7th Economic and Social Rights (ESR) Report (2006-2009) that there were four impediments that hinder access, enjoyment and the fulfilment of ESR. The impediments are as follows:
- b) The conceptual misunderstanding by the government of its constitutional obligation to progressively realise rights.
- c) The inadequate fulfilment of public participation processes and access to information which are key elements of a rights-based approach.
- d) The social exclusion of the poor and vulnerable groups. d) The disjuncture between legislation and strategic planning on one hand and implementation on the other, which is a result of inter alia, the weak capacity of government departments to deliver on their intended outputs.

Although section 7 (2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, it would seem that the understanding of officials in respect of what it means to integrate rights-based approaches is questionable. The impediments serve as indication that the necessary attitude towards progressive realisation of human rights is not readily apparent within government. As was argued in the 7th ESR Report, much progress towards the realisation of rights in South Africa has resulted from litigation. It can be concluded that the government has not been responsive enough to progressive realisation and has adopted a defensive and autocratic approach to pressure from civil society groups.