

**ENFORCEMENT POWERS OF NATIONAL HUMAN RIGHTS
INSTITUTIONS: A CASE STUDY OF GHANA, SOUTH AFRICA AND
UGANDA**

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Rights and Democratisation in Africa) of the Centre for Human Rights,
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DECLARATION

I, POLO EVODIA CHABANE, do hereby declare that this research is my original work and that it is the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Where someone else's work was used (whether from a printed source, the internet or any other source) due acknowledgement was given and reference was made according to the requirements of the Faculty of Law. I did not make use of another student's work and submit it as my own.

Signed

Date

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed

Prof Kofi Quashigah

University of Ghana

Date

DEDICATION

In memory of my father, Jacob Chabane, who would have shared my achievements. Gone but not forgotten.

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LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AU	African Union
CHARJ	Commission on Human Rights and Administrative Justice of Ghana
ESCR	Economic, social and cultural rights
ECOSOC	United Nations Economic and Social Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
NHRI	National Human Rights Institution
NGO	Non Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
SAHRC	South African Human Rights Commission
Ug. Shs.	Ugandan Shillings
UHRC	Uganda Human Rights Commission
UN	United Nations
UPDF	Uganda People's Defense Forces

PREFACE

Accordingly, I take the view that never has the role of national human rights institutions been more important than now; with their potential to act as keepers of the human rights flame, just as King Arthur's court represented one of the final illuminations of Rome's civilising influence prior to its dousing in the murky waters of the Dark Ages. In the absence of a clear future role for the United Nations, national human rights institutions would assume even greater importance as the de facto repositories of human rights knowledge and expertise, linked across national boundaries by a shared core of originating principles and ideals.

Dr Sev Ozdowski OAM, Australian Human Rights Commissioner, Session 9: Human Rights Institutions in the Asia/Pacific Region, September 1-5, 2003

This quotation is true more than ever today. We need effective and efficient National Human Rights Institutions (NHRIs) in Africa which can promote and protect the human rights of their respective citizens and keep the torch of human rights burning. Some of the best performing NHRIs are vested with judicially binding powers of a court to enforce their decisions whereas some do not possess such. It is not peculiar for a national institution to have authority to grant legally binding decisions. However, where such does not exist, the commission can transfer complaints to courts for final determination. This poses a problem at times because it is not in every case that the court will be in agreement with the findings of the national institutions.

The purpose of this study is to analyse the effectiveness of the Uganda Human Rights Commission (UHRC), which possesses judicial powers vis-à-vis the Commission on Human Rights and Administrative Justice of Ghana (CHRAJ) and the South African Human Rights Commission (SAHRC) which do not possess such powers. The difference notwithstanding, all the three have been rated as the best national institutions in Africa. Due to time and space constraints, one will focus specifically with the mandates of the three commissions and in particular, on the different or distinct mandates assigned to them, namely, that of CHRAJ to deal with corruption, that of SAHRC to deal with economic, cultural and social rights and UHRC of dealing with torture matters and generally of constituting a tribunal. This study was motivated by the fact that Lesotho will be setting up a national institution in 2008 and one would like to draw lessons from these institutions and pick up elements that could best suit Lesotho. One's starting premise will therefore be to study these institutions and come up with a conclusion of which is the best – the one that possesses judicial powers or those without?

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Chapter 1

Introduction to the study

1. Background to the study

'National Human Rights Institutions (NHRIs) can be generally described as permanent and independent bodies, which governments have established for specific purpose of promoting and protecting human rights.'¹ NHRIs stand between government and civil society and they complement rather than displace the work of other bodies.² It is therefore important to appreciate that national institutions are not courts nor are they substitutes for courts so there should be avoidance of conflicts of jurisdiction. It is true that national institutions may be more accessible than courts because they may be less expensive, faster and less formal. They play an important role in the promotion of human rights although this will depend on the powers allocated to them.³

NHRIs have been measured by a set of Paris principles (The principles) relating to the status and functioning of national human rights institutions for the protection and promotion of human rights. These spell out the responsibilities of NHRIs,⁴ as amongst others, effective investigation of individual complaints of human rights concerns.⁵

Although documentation on what constitutes an effective NHRI seems to have consistently stressed the need for states to establish NHRIs, there is little attention to the criteria by which they could be judged once they have been set up.⁶ Thus this study will analyse and or compare the effectiveness of the Uganda Human Rights Commission (UHRC), which deals with torture issues and vested with judicial powers, the Commission on Human Rights and Administrative Justice of Ghana (CHRAJ) which does not possess judicial powers but deals with corruption issues⁷ and South African Human Rights Commission (SAHRC) which also does not possess such powers but has been explicitly

¹ AE Pohjola 'The evolution of national human rights institutions – The role of the United Nations' (2006) 6.

² A Smith 'The unique position of national human rights institutions: A mixed blessing?' (2006) 28.4 *Human Rights Quarterly* 904

³ As above, 913.

⁴ National institutions for the promotion and protection of human rights, Fact Sheet No 19.

⁵ <http://www.amnesty.org> (accessed 3 May 2007).

⁶ <http://www.hrw.org/reports/2001/africa/overview/factors.html> (accessed 3 May 2007).

⁷ Sec 7(1)(a) of Commission on Human Rights and Administrative Justice Act 456 of 1993.

mandated to deal with economic, social and cultural rights (ESCR).⁸ It is worth mentioning that UHRC does deal with ESCR but on a very limited scale.

The commissions will be assessed on their specific distinct mandates. These commissions have been chosen because they are often viewed as among the best NHRIs in Africa;⁹ they are perceived as having a reasonable degree of independence and are promising in challenging government abuses and protecting citizen's rights. The three commissions have mandates different from each other and the research will take into account the different mandates and try to find out whether at the end of the day the commission that possesses judicial powers is more effective or otherwise.

The Kingdom of Lesotho will be establishing a NHRI in 2008.¹⁰ From the experiences of the three commissions selected for discussion, one will be able to do an a-la-carte of the best practices that Lesotho could adopt in order to have an effective commission.

The objectives of this study are therefore to:

- a) Examine the consequences of not having a NHRI with judicial powers vis-à-vis that which possesses such powers
- b) Assess the different mandates of the three NHRIs taking into account their special features, that of, corruption, ESCR and torture and also that one is a tribunal
- c) Examine the nature and extent of problems encountered by the NHRIs in discharging their mandates
- d) Assess the tenability of the argument that there must be separation of roles of the NHRIs and the judiciary.

1.2 Research questions

The Paris principles do not make it obligatory or do not take it as a given that national institutions possess the power to hear and consider complaints, but set out suggestions for how they should deal with them if they have such a mandate.¹¹ The principles also require that the national commissions be given 'as broad a mandate as possible,'¹² and this may include dealing with cases of corruption and

⁸ Sec 184(1)(3) of South African Constitution Act 108 of 1996.

⁹ n 6 above.

¹⁰ End of mission report submitted to government by consultant, John Dwyer, 9 July 2007.

¹¹ Paris Principles para D.

¹² As above, para A2.

ESCR. Clearly it includes the requirement that they have both promotional and protective powers.¹³ This study will deal with the following pertinent question: Which is the best option when establishing a commission, that which has judicial powers or not? In trying to answer the above question, the paper will address the following three sub-questions:

- (a) What makes the three commissions the best or unique, taking into account that UHRC deals with torture and also sits as a tribunal while CHRAJ deals with corruption and SAHRC deals with ESCR?
- (b) What problems are encountered in the implementation of their various mandates?
- (c) To what degree can we hold the argument that the best option is to separate the roles of the commissions with that of the courts?

1.3 Methodology

This research will combine information obtained from library sources and internet. Interviews with officials of CHRAJ will be carried out. One will analyse the cases of the NHRIs to determine their effectiveness. Further, one will also consider decisions of courts which rule on the jurisdiction of the commissions. The reports and in particular, annual reports of the commissions will also be examined.

1.4 Limitations

Interviews with officials of CHRAJ will be held but the same will not be possible with the UHRC and SAHRC due to one's present location. Secondary information will therefore be relied on. The number of mandates assigned to the various commissions makes it impossible to deal with all the mandates to evaluate implementation, taking into account that they deal with a wide range of issues, for instance, child maintenance, property and land disputes. Therefore, the study will concentrate only on implementation of the corruption mandate under CHRAJ, mandate to deal with ESCR under SAHRC and the unique feature of UHRC to sit as a tribunal as well as dealing with torture.

¹³ As above, para A1.

1.5 Literature review

Hatchard¹⁴ examined the powers of NHRIs and the importance of maintaining their independence and Ghana, Uganda and South Africa commissions are taken into consideration.

International Council on Human Rights Policy¹⁵ discussed the types of national institutions, the roles of NHRIs and eventually recommended revisiting of the Paris principles. It suggested the possibility of taking ESCR on board.

Sonia Cardenas¹⁶ discussed the complex impact of national institutions especially in agenda setting, rule creation, accountability and socialization. She argued that NHRIs are being created to satisfy international pressure (global proliferation) and they are a result of state adaptation, therefore, failing to protect human rights.

Anne Smith¹⁷ discussed the independence and accountability of NHRIs and their unique relationship with government, civil society and the non-governmental organisations. She concluded that this relationship does present problems.

Raj Kumar¹⁸ stated that NHRIs have come to play an important part in the promotion and protection of human rights and argues that focus has been made, in particular, to civil and political rights and ESCR have been ignored. He concluded by stating that NHRIs should focus on ESCR as ignoring them encroaches on other developmental issues, such as, poverty, corruption and globalization.

James Matshekga¹⁹ discussed the importance of independence of the UHRC and SAHRC, in particular, their independence in composition, financially, establishment, appointment and dismissal

¹⁴ J Hatchard 'A new breed of institutions: The development of human rights commissions in Commonwealth Africa with particular reference to Uganda Human Rights Commission' (1999) 32 *Comparative and International Law Journal of South Africa*.

¹⁵ Performance and legitimacy: National human rights institutions International Council on Human Rights Policy (2000).

¹⁶ S Cardenas Working paper 'Adaptive states: The proliferation of national human rights institutions' (2001) (available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Cardenas.pdf>) (accessed 13 August 2007).

¹⁷ Smith (n 2 above).

¹⁸ R Kumar 'National human rights institutions and economic, social and cultural rights: Toward the institutionalization and developmentalization of human rights' (2006) 28.3 *Human Rights Quarterly*.

¹⁹ J Matshekga 'Toothless bulldogs: The human rights commissions of Uganda and South Africa: A comparative study of their independence' (2000) 2 *African Human Rights Journal*.

procedures. He criticized the transparency of some of these procedures and recommended review in some instances.

The Danish Centre for Human Rights²⁰ carried out a study on the effectiveness, independence, jurisdiction and quasi judicial competences of NHRIs. A comparative perspective of the NHRIs in Africa, Asia, Europe and Latin America was considered.

Amnesty International²¹ has also discussed the issue of how NHRIs should be effective taking into account their mandates, activities, selection of commissioners and funding. It has mentioned the importance of maintaining independence and transparency at all times.

The dissertation of Ambani Osogo²² was also examined. He looked at the place of NHRIs in government and stated that NHRIs should not compete with the legislature, executive and the judiciary. He pointed out that they should still be given democratic space to promote and protect human rights.

In light of the above, none of the literature gives the topic an in-depth treatment on whether NHRIs that have judicial powers are more effective than those which do not have such powers, As far as one can ascertain, no attention has been given to this effect.

1.6 Chapters

Chapter 1 - Introduction

Chapter 2 - Historical background of NHRIs

Chapter 3 - Mandates of the three commissions

Chapter 4 – Challenges facing the commissions

Chapter 5 - Conclusion and recommendations

²⁰ B Lindsnaes, L Lindholt & K Yigen (eds) *National human rights institutions: Articles and working papers* Danish Centre for Human Rights (2001).

²¹ n 5 above.

²² Unpublished: AJ Osogo 'Oval slides in triangular spaces? Anchoring national human rights institutions in 'tripartite' Commonwealth Africa' unpublished LLM dissertation, University of Pretoria, 2006 38.

Chapter 2

Historical background of national human rights institutions

2.1 Introduction

This chapter will outline the historical establishment of NHRIs, their purpose and the efforts that have been made by various bodies and regions to bring them on board in the promotion and protection of human rights.

2.2 Historical background

The historical establishment of national human rights institutions dates as far back as 1946 when the United Nations Economic and Social Council (ECOSOC) adopted a resolution to this effect²³ but the matter was not fully explored. The matter was debated over the years and was placed on the annual sessions of the General Assembly²⁴ thus resulting in a series of resolutions.²⁵ In 1978, the Commission on Human Rights organized a seminar on national and local institutions for the promotion and protection of human rights and a series of guidelines were adopted that basically stipulated the mandates of NHRIs.²⁶ In 1991, the United Nations (UN) held the UN international workshop on national institutions for the promotion and protection of human rights which resulted in a set of recommendations and principles 'Principles relating to the status of national institutions' (popularly known as the Paris principles), which were later adopted by the Human Rights Commission in 1992 and by the General Assembly in 1993.²⁷

All human rights institutions have a primary duty to protect and promote human rights in their respective countries.²⁸ They do this with other local Non-Governmental Organizations (NGO) in their countries, but it must be noted that they are not local NGOs. They may work together with the local

²³ ECOSOC resolution 2/9 of 21 June 1946.

²⁴ n 20 above, 12.

²⁵ A/RES/33/46 of 14 December 1978, A/RES/34/49 OF 23 November 1979, A/RES/36/134 of 14 December 1981, United Nations General Assembly resolution 41/128 of 4 December 1986.

²⁶ n 4 above, 3.

²⁷ LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 4.

²⁸ Smith (n 2 above) 904.

NGOs in promoting human rights, but unlike NGOs, they are born either through an evolved democratic consensus or because of international pressure.²⁹

Today, their role is no longer limited to promotion of human rights at the domestic level. They cooperate closely with international human rights NGOs and other human rights bodies and contribute a great deal in making the phenomenon of human rights a reality but they cannot be seen to replace these bodies. The international community has recognised that human rights are best promoted, respected and fulfilled at the domestic level and that is why NHRIs were created.³⁰

2.3 Efforts undertaken at the national level to establish national institutions

The phenomenon of NHRI in Africa is fairly new.³¹ The African Charter on Human and Peoples' Rights (African Charter) which was adopted in 1981 and came into effect in 1986, stipulates that states parties shall be encouraged to establish NHRIs and the African Commission on Human and Peoples' Rights (African Commission) shall encourage states to establish NHRIs that deal with human rights.³²

Since the African Commission's session in Mauritius in 1996, the issue of establishment of national institutions has always been on the agenda of the Commission and the Commission adopted a plan of action for 1996 to 2001 whereby it pledged its intention to encourage establishment of such institutions.³³ At the first conference of NHRIs held in Cameroon from 5 to 7 February 1996, a call was made for creation of NHRIs and that they will be given the necessary support from the African Commission.³⁴ At the second conference of NHRIs held in Durban, Republic of South Africa, from 1 to 3 July 1998, the issue of establishing effective NHRIs was reiterated. At the 24th Session of the Commission held in 1998, a resolution on granting observer status to NHRIs was adopted.³⁵

In 1999, at the first Organization of African Union (OAU) ministerial conference on human rights held in Mauritius, the African Commission submitted documentation on the formation of national institutions in Africa.³⁶ This meeting concluded that the primary responsibility of establishment of a

²⁹ Kumar (n 18 above) 760.

³⁰ As above, 761.

³¹ Report on the 1st African Union conference 7.

³² Arts 26 & 45 of the African Charter.

³³ Mauritius plan of action 1998 paras 64-68.

³⁴ Yaounde declaration 1996, para 17.

³⁵ ACHPR.Res.31(XXIV) 98.

³⁶ I had the opportunity to attend this session.

NHRI lies with the state and they were also responsible in providing adequate funding to such institutions.

The efforts done by the African Commission in establishing NHRIs in Africa are commendable. However, a lot still remains to be done because the Commission does not have any follow-up mechanism to ensure that these institutions are indeed independent and well funded. There is no advocacy to encourage governments to establish such bodies, it merely depends on the political will of each government. NHRIs in Africa still face a lot of challenges because they have to win the confidence of the citizens.

2.4 Efforts undertaken at the international level to establish national institutions

Since the 1940s, the issue of establishment of national institutions has been on the agenda of the UN as already mentioned. After the adoption of the Paris principles, the 1993 Vienna world conference on human rights adopted the Vienna declaration and programme of action and it stipulated that national institutions play an important role in promoting and protecting human rights, disseminating human rights information and providing human rights education. The declaration³⁷ declared that

The world conference on human rights reaffirms the important and constructive role played national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights. The world conference on human rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each state to choose the framework which is best suited to its particular needs at the national level.

The UN has strived to strengthen national institutions wherever they exist in order to promote and protect human rights at the national level. It has provided financial and technical assistance to states that would like to establish the institutions.³⁸

2.5 The Paris Principles

First and foremost, it should be borne in mind that the principles are mere recommendations and are not legally binding. However, the principles have today been used as a yardstick and 'bible' which

³⁷ Vienna declaration and programme of action 1993 para 36.

³⁸ Lesotho will be establishing the institution in 2008 and since 2003, the UN through some of its specialized agencies, has been providing technical and financial assistance.

paves way for existing and new institutions on fulfilling their mandates and effectiveness.³⁹ Every NHRI should be 'Paris compliant'. The main objective of the principles is to guarantee the independence of the institutions in their mandates. The central mission of the national institutions is to give advise to government, parliament and other relevant stakeholders on issues of promotion and protection of human rights.⁴⁰

The principles focus on three areas: i) the competence and responsibilities of national institutions, ii) composition and guarantees on independence and pluralism, iii) methods of operation and finally, additional principles concerning the status of commissions with quasi-judicial competence.⁴¹ The United Nations High Commission for Human Rights, has in addition, laid down factors that apply generally to all national institutions and these are: independence, adequate powers, accountability, accessibility, co-operation operational, efficiency and defined jurisdiction.⁴²

It is worth mentioning that in recent times, the principles have been criticized as being inadequate. The principles do not make it obligatory for NHRIs to deal with individual complaints and today this element is at the centre of all effective NHRIs. It has been argued⁴³ that it was not proper for the principles not to specify the investigative feature as a core function of national institutions, rather than leaving it to governments to make a discretion on whether or not to grant them such powers.

When the principles were formulated, the intention was basically to provide governments with an idea or benchmark that they should use to set up national institutions but today for any NHRI to be formed, they must be in compliant with the principles and it has become the 'maximum programme that is met hardly by any national institution in the world.'⁴⁴ This shows the ambition of their drafters.

There are those who have recommended for the revision of the principles but others think that their review would open a Pandora's box and it would be dangerous to open the doors of negotiation.⁴⁵ One does not see why this would cause a problem because so far we owe it to them that there are effective

³⁹ n 4 above, 1.

⁴⁰ <http://www.nhri.net/pdf/RestAfrNhri.pdf> (accessed 15 August 2007).

⁴¹ Principles relating to the status of national institutions as per UN Commission on Human Rights resolution 1992/54 of 3 March 1992 and General Assembly resolution 48/134 of 20 December 1993.

⁴² Reif (n 27 above) 23.

⁴³ M Parlevliet Working paper 'National human rights institutions and peace agreements: Establishing national institutions in divided societies' (2006). Available at http://www.ichrp.org/im_coverprojet/114_cover.jpg (accessed 20 August 2007).

⁴⁴ As above.

⁴⁵ Pohjolainen (n 1above) 9.

and efficient NHRIs today. Whereas one agrees that there are certain shortcomings as enunciated above, there are also positive aspects, for example, the fact that their drafters gave them a broad mandate as possible has made them to deal with issues such as poverty, corruption, HIV/AIDS which were not important in the 1990s when they were adopted.

Despite the criticisms they are still a starting and vital reference point for discussion of an effective national institution⁴⁶ and NHRIs can go beyond them where they prove to be inadequate.⁴⁷

2.6 Types of national institutions

NHRIs are made up of quasi-governmental or statutory institutions and this covers a wide spectrum of institutions that deal with human rights issues, for example, ombudsman, human rights commissions, office of the public protector, procurators and defence for human rights.⁴⁸ These do not, however, include a human rights office in the Ministries of Foreign Affairs or Justice.

An interesting question would be that do national institutions that do not deal with human rights issues alone and which also covers issues of maladministration also fall within this definition? For example, the CHRAJ is composed of the human rights commission, ombudsman and the anti corruption directorate. It accepts complaints even when such complaints do not deal specifically with a human rights issue. This will be considered later.

2.7 Characteristics of national institutions

We will not deal with every activity or mandate of the institutions because although we would like to see active and effective institutions worldwide, there is no formula that can be used to measure the full potential of an institution.⁴⁹ One will concentrate on the elements that are likely to constitute a transparent and effective national institution and which are crucial for this study.

2.7.1 Independence

Independence of national institutions encompasses the notion that they should be established by law and derive their powers from a legislation or constitution.⁵⁰ The principles have stipulated that the

⁴⁶ n 15 above, 2.

⁴⁷ n 31 above, 21.

⁴⁸ n 15 above, 2.

⁴⁹ n 6 above.

⁵⁰ Smith (n 2 above) 913.

institutions should be created legislatively or constitutionally in order for them to be fully autonomous. The legislature is the main source of where they draw their inspiration. The independence and impartiality of national institutions are often cited as the cornerstone for their effective operation.⁵¹ It has been observed that the more active or promising national institutions in Africa are the ones that have been created as such.⁵² Their effectiveness depends solely on their capability to act as independently as possible from government and other departments.⁵³ When asked about the importance of independence, Ghanaian Commissioner Emile Short⁵⁴ said

Independence...even the perception of independence is important. You need to be seen to be independent. Most African governments have not yet grasped the concept of independence. There is a perception that you should be grateful to the government of the day.

They should also be independent financially. However, this is one of shortcomings of most institutions because most of them world-wide still depend largely on partial or full government sponsoring and at times the government gives a low budget for the activities of the institution. Nonetheless, independence is still the most important tool for an effective institution and is a ruler or yardstick against which a national institution's effectiveness can be measured and they must guard jealously against it. Many national institutions have comprehensive and ambitious mandates, they cannot perform their mandates because of lack of resources and capacity and therefore face the challenge of credibility.⁵⁵

2.7.2 Composition

Independence also includes the composition, appointment and dismissal procedures of the commissioners. The appointment of commissioners has to be as transparent as possible and such appointments should not take place secretly. The civil society should also be co-opted into the process so that they are able to appreciate that the institution will also serve their interests.⁵⁶ The commissioners should be drawn from a variety of disciplines and should not only include former government officials but also members of the civil society and non-governmental organizations.⁵⁷ This

⁵¹ n 6 above.

⁵² As above.

⁵³ Smith (n 2 above) 914.

⁵⁴ n 6 above.

⁵⁵ <http://www.nhri/net/pdf/Final> (accessed 22 August 2007).

⁵⁶ The first draft of the legislation of establishing the NHRI of Lesotho caters for this and it is hoped that this will be considered when appointments are made.

⁵⁷ n 5 above.

characteristic of pluralism has been debated today because there has been emergence of national institutions that are those similar to those in the principles but are single bodies such as the ombudsmen. The drafters of the principles have been criticized⁵⁸ that they did not foresee the emergence of such institutions and therefore did not cater for them.

They should also be people of integrity, good reputation and knowledgeable in issues of human rights. It has been argued⁵⁹ that commissioners should not *per se* have human rights background as long as they satisfy other criteria, because Commissioner Short of Ghana did not have human rights experience, but was able to create one of the most credible commissions. It is however doubtful whether these procedures do indeed take place but more often than not, they do take place in those institutions that are deemed to be effective and transparent and these are very few in number, but it works to create and strengthen national institutions and to ensure that they conform with the Paris principles.⁶⁰

2.7.3 Activities

National institutions are responsible for, amongst others, to address human rights violations especially individual complaints and they should have their concerns at heart,⁶¹ to ensure that the rights of the citizens are upheld at all times. They have quasi-judicial powers when they have the authority to hear and settle individual complaints. This can further be done through investigating the complaint itself and making recommendations on how the matter can be settled. Whether or not they should possess judicial powers or not is still a subject of debate of this study. They must have power to monitor compliance with their recommendations and this must be consistent practice.⁶² It must play an advisory role to government, it must be a 'watchdog' to ensure that government honours its obligations under the various international human rights instruments and under domestic human rights law in general. It must also ensure that where the perpetrator of the wrong is a non-state actor, adequate mechanisms are put in place which will address the human rights violation.⁶³ It must also inculcate a culture of human rights education and raise human rights awareness at all levels.

⁵⁸ Reif (n 27 above) 24.

⁵⁹ Smith (n 2 above) 927.

⁶⁰ <http://www.nhri.net/2007/Annex-E-ICC-Volume-iv.pdf> (accessed 21 August 2007).

⁶¹ n 5 above.

⁶² <http://www.ohchr.org/english> (accessed 21 August 2007).

⁶³ n 5 above.

2.8 Conclusion

This chapter stipulated the origins of national institutions and analysed some of the elements that may amount to what constitutes an effective and efficient national institution. The Paris principles which constitute the back-bone of principles that national institutions should adhere to were also examined. Having ascertained what is meant by NHRI, the next chapter will examine the specific mandate of CHRAJ in dealing with corruption, SAHRC and in particular in dealing with ESCR and UHRC in dealing with torture and also sitting as a tribunal.

Chapter 3

Mandates of the three Commissions

3.1 Introduction

The mandates of the CHRAJ, UHRC and SAHRC will be examined and in particular, their distinct mandates in dealing with corruption and ESCR. The mandate of the UHRC in dealing with torture issues and the special feature of UHRC constituting a tribunal will also be considered. Many national institutions which handle complaints normally do not have the judicial powers of a court to enforce their decisions.

3.2 Mandate of the Commission on Human Rights and Administrative Justice

The CHRAJ was created by the Constitution of Ghana⁶⁴ as an independent institution and is answerable neither to the Executive nor the Judiciary but only to the Legislature because it has to present annual reports to parliament.⁶⁵ It was established by an Act of parliament the following year.⁶⁶ It started to operate in 1994.

The Commission possesses broad powers and these include the ability to investigate complaints regarding violation of human rights, injustice, corruption and abuse of power, to mention but a few. It has powers to investigate actions of private individuals or institutions where such acts may constitute violation of fundamental rights. It has the mandate to educate the public on human rights education. The Commission enacted its regulations⁶⁷ which lay down the mechanism of filing a complaint. The regulations are broad and stipulate that CHRAJ is mandated to investigate complaints of violations of fundamental human rights by both the public and private spheres. CHRAJ represents the model of a national institution that has a multiple mandate, namely operating as a human rights institution, Ombudsman and an anti-corruption unit.

⁶⁴ Art 216.

⁶⁵ EK Quashigah 'The Ghana Commission on Human Rights and Administrative Justice' in B Lindsnaes, L Lindholt & K Yigen (eds) *National human rights institutions: Articles and working papers* (2001) 200.

⁶⁶ CHRAJ Act 456 of 1993.

⁶⁷ CHRAJ (complaint procedure) regulations 1994.

3.2.1 Investigative role

In conducting its investigations, the Commission has the power to issue subpoenas for the attendance of witnesses or production of any evidence, cause attendance of any person to court who is in contemptuous of such subpoena and question any person in respect of their investigations.⁶⁸

The commissioner shall not investigate a matter pending before a court or judicial tribunal, matter involving relations between the government and any other government or international organization or a matter relating to exercise of prerogative of mercy.⁶⁹

3.2.2 Enforcement role

The respondent is given a period of three months in order to implement the decision of the Commission. If the respondent does not honour the decision, the Commission may take up the matter to court for enforcement.⁷⁰ However, some respondents have ignored this provision because the Commission hardly enforces it.⁷¹ The respondent is called time and again to the Commission in order to have the case settled amicably,⁷² and this is in compliance with its regulations.⁷³ One has a problem with this mechanism because there is no clear time frame on how long this procedure should be followed before a case can be taken to the enforcement unit for action. This issue will be dealt with in the next chapters.

3.2.3 Corruption mandate

In relation to the corruption mandate, in particular, the Constitution⁷⁴ empowers the Commission to investigate complaints of corruption and abuse of power. Further it is to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and inform accordingly the Attorney General and the Auditor General on the results of such investigations.⁷⁵ This means therefore that to remedy the situation where corruption exists, the Commission may take

⁶⁸ Sec 8(1) of Act.

⁶⁹ Sec 8(2) of Act.

⁷⁰ Sec 18(2) of Act.

⁷¹ Interview with Isaac Annan, head of the enforcement unit, CHRAJ, 27 August 2007.

⁷² I witnessed this procedure while on attachment in the children and women's section of CHRAJ.

⁷³ Sec 4(1) of regulations.

⁷⁴ Art 218(a).

⁷⁵ Art 218(e) of Constitution.

effective and appropriate means such as bringing the matter to court. The Commission is also mandated by the Constitution⁷⁶ to investigate allegations of code of conduct for public officers, namely, that a public officer should not put him or herself in a situation where his or her personal interests conflicts with his functions in the office,⁷⁷ a person will not be appointed as Chairperson of a governing body if he holds a position in that particular authority,⁷⁸ declaration of assets to the Auditor General by public officers,⁷⁹ and if the officer contravenes any of the requirements, the Commission can investigate the case. The President of Ghana can also be investigated by the commission.

3.2.4 Cases on corruption

In order to carry out its mandate under corruption, the Commission investigated a case relating to media allegations of corruption and conflict of interest against the President of the Republic of Ghana, His Excellency John Agyekum Kufuor⁸⁰ between 2005 and 2006. The allegations were that the President had acquired a building near his private residence in an area known as West airport at the cost of \$3 000 0000 00 (three million dollars), which building was being constructed as a hotel. The allegations stated that the hotel was registered in the name of the President's son who served as a front for the President. The allegations further stated that the owner, one Mr Anthony Saoud was coerced into selling the property and the President used national security agents to do this. The findings revealed that the evidence available to the Commission does not support the allegations of corruption against the President and therefore the President was not found in breach of any constitutional provisions relating to conflict of interest.

In *CHRAJ v Dr. Richard Anane*⁸¹ the Commission wrote to Dr Anane (Minister for road transport and member of parliament for Bantama West constituency) and indicated that there were media allegations that he was involved in acts of corruption. On the day of the hearing, counsel for respondent made objections to the jurisdiction of the Commission in acting on allegations from newspapers; in response, the Commission stated that CHRAJ does not need a formal complaint from an identifiable person to start and proceed with an investigation and that the Commission is not precluded from investigating on its own motion and has since its inception done so.

⁷⁶ Ch 24.

⁷⁷ Art 284.

⁷⁸ Art 285.

⁷⁹ Art 286(1)(2).

⁸⁰ File No. 5232/2005.

⁸¹ File No. 5117/2005.

The Commission found out that there had been a conflict of interest as he began an intimate relationship after he opened negotiations with one Alexandra O'Brien who was representing the company. The Commission made recommendations, amongst others, that the President of the Republic of Ghana should relieve the respondent of his post as minister for abusing his power and bringing his office into disrepute because he misconducted himself by committing perjury when he appeared before parliament. As a result, the respondent was forced to resign his post. In the High Court, it was held that the proceedings of CHRAJ should be removed from the registry of the commission and be quashed. It is also worth mentioning that this case has caused controversy with respect to the jurisdiction of the Commission and is presently before the Supreme Court. The ruling will be made on 14 November 2007. Mr Annan⁸² had this to say

The challenge is whether CHRAJ can on its own volition take up complaints without a formal complaint lodged with it. It should be possible for CHRAJ to do so in the interest of safeguarding the national purse and acting in the best interest of the public. CHRAJ should be proactive on issues relating to suspected corruption.

In *CHRAJ v Appiah Ampofo*⁸³ the editor-in-chief of the Crusading Guide reported to the Commission that the respondent (ex-national insurance commissioner) had received \$96 500 from one Edward Grant Whytock, a broker working as a consultant to the Aviation division of Nicholson Leslie Limited which is part of the Aon Group that respondent brought to replace Ghana Airways insurance brokers. The respondent admitted that he received the mentioned money as a gift and the commission found that this was bribery so that he could expedite the transfer of Ghanair's reinsurance business from the former to the latter. It was found that the respondent was culpable for corruption and as a public officer put himself in a position which conflicted with his office, thus contravening article 284 of the Constitution.

The CHRAJ recommended that the respondent should pay back the remaining \$11 243 12 on his account into government chest. Other recommendations were that he should be banned from holding any public office or membership of any insurance institution and that criminal prosecution be instituted against him by the Attorney General. Further, that all future national insurance commissioners should be registered insurance practitioners subject to the recommendation of appropriate regulatory bodies. When concluding, Mr Short said the implementation of these recommendations will go a long way in

⁸² n 71 above, 26 October 2007.

⁸³ Annual Report CHRAJ (2002), 46.

giving real meaning to the government's policy of zero tolerance to corruption. The respondent took the CHRAJ to court in 2003 contending that the Commission was not duly constituted and lacked jurisdiction to adjudicate matters affecting him. The Supreme Court rendered an unanimous judgment in favor of the Commission stating that CHRAJ complaint procedure regulations is not unconstitutional.

3.2.5 Other activities

In addition, the department carries out sensitization workshops to alert the nation on zero tolerance to corruption. The department finalized the guidelines on conflict of interest to assist public officials identify, manage and resolve conflicts of interest. It also organized a conference on corruption on the theme 'The role of national human rights institutions and the ombudsman in the fight against corruption' which took place in Accra from 14-16 November 2005.

The Commission also enacted the Whistle Blowers Act which provides the manner in which individuals may disclose information that relates to unlawful, corrupt or other illegal conducts.⁸⁴ The Act imposes two main responsibilities on CHRAJ, namely, investigation of disclosures and protection of victimized whistleblowers. The Act gives the Commission the power to make binding orders when it is exercising its power of protection for whistleblowers who have been victimized. An order of the Commission under this section shall be of the same effect as a judgment or order of the High Court and is enforceable in the same manner as a judgment or order of the High Court.⁸⁵

From analyzing the above cases, one can safely state that CHRAJ has been able to get involved into these high profile investigations and cases because of its independence and transparency and has so far, perceived corruption as a human rights issue.

3.3 Mandate of the South African Human Rights Commission

The SAHRC derives its mandate from the Constitution⁸⁶ which has created a number of national institutions that protect and promote the rights of citizens. The constitutional provisions are further supplemented by the provisions of the Human Rights Commission Act 54 of 1994. The Commission was inaugurated on 2 October 1995.

⁸⁴ Annual Report CHRAJ (2005) 45.

⁸⁵ Sec 14(5).

⁸⁶ Sec 184.

3.3.1 Investigative role

The Commission has been given the mandate to investigate violations of human rights under the Act.⁸⁷ The Commission may require any person to appear before it to produce evidence of either documents or articles that are related to that particular investigation. If such a person refuses to appear before the Commission, the Commission may consult the Attorney General who has jurisdiction to issue an order to this effect.

3.3.2 Enforcement role

The Commission is empowered to receive any recommendations or requests from any source for enhancing its performance in the promotion and protection of human rights. The Commission may bring proceedings to court in its own name or on behalf of a certain class of persons.⁸⁸ The Commission may also approach the President in relation to any matter that affects their performance or functions.⁸⁹

3.3.3 Mandate of dealing with economic, social and cultural rights

The Commission has been vested with this unique feature of dealing with ESCR and the Constitution stipulates that the Commission shall report on progress made in the fields of housing, health, food, water, social security, education and the environment. The Commission therefore draws its inspiration from the Constitution as it specifically spells out ESCR.⁹⁰ However, it is worth pointing out that for most of these rights there is a limitation⁹¹ because some of the rights can be attained if there is availability of resources on the part of the State. Notwithstanding, South African Constitution is still one of the best constitutions in Africa; this is unlike other constitutions in Africa that make ESCR state principles.⁹² Commissioner Leon Wessels said 'The drafters of the Constitution charged us with something very special and that is monitoring the progressive realization of socio-economic right.'⁹³

⁸⁷ Sec 9.

⁸⁸ Sec 7(1)(e) of Act.

⁸⁹ Sec 6 of Act.

⁹⁰ Ch 2.

⁹¹ Sec 36.

⁹² Ch 3 of Lesotho Constitution states that ESCR will depend on state policies and principles, therefore they are not justiciable.

⁹³ J Klaaren 'A second look at the South African Human Rights Commission, access to information and the promotion of socio economic rights' (2005) 27.2 *Human Rights Quarterly* 556.

Each year, the Commission prepares an annual report to parliament on the measures that it has undertaken in realizing the rights in the constitution on health care, food, housing, water social security, education and the environment. The Commission sends out questionnaires (protocols) to other state departments in order to get information from their respective desks.⁹⁴ They are required to address measures that have been undertaken to address ESCR of the vulnerable groups such as people living in rural areas and informal settlements, homeless persons, female headed households, women, persons with disabilities, elderly people, persons with HIV/AIDS, children and formerly disadvantaged groups.⁹⁵ The protocols cover policy, legislative and budgetary measures, outcomes, national action plans and monitoring systems. This information forms the bulk of the report.

It is through the report that government can analyze whether the departments are protecting the ESCR of the nation efficiently. The Commission also handles complaints from both public and private persons on any violation of ESCR, they organize training workshops in order to educate the nation on their rights⁹⁶ and carry out researches to monitor the rights. In their research on ESCR, the Office of the High Commissioner for Human Rights (OHCHR)⁹⁷ said

A national human rights institution, as an official human rights organization, is well equipped to undertake this monitoring. ...The results of the monitoring can provide crucial information and analysis to support the other functions of the national human rights institution, particularly systemic investigations, advisory statements or recommendations, and educational activities promoting economic, social and cultural and other rights. Monitoring economic, social and cultural rights is a promotional activity in itself.

3.3.4 Monitoring Economic, Social and Cultural Rights

The Commission has been instrumental in ensuring that ESCR are enjoyed by most citizens. The Commission⁹⁸ said

⁹⁴ Paper by L Mokate 'Monitoring economic and social rights in South Africa: The role of the SAHRC' (2001).

⁹⁵ Annual Report SAHRC (1998/1999) 2.

⁹⁶ Seminar on the impact of the exercise of the right to strike on the rights to education and access to health care services held on 16 August 2007 and conference on fighting poverty from the grassroots held on 16 – 18 October 2007 (accessed <http://www.sahrc.org.za> 2 October 2007).

⁹⁷ Economic, social and cultural rights handbook for national human rights institutions, Professional training series No. 12, Office of the High Commissioner for Human Rights 57.

⁹⁸ Annual Report SAHRC (2000/2002) 17.

The Commission has reiterated in previous reports that its mandate is to assess whether legislative, policy and programmatic measures adopted by organs of state are reasonable, that the programmes and projects are comprehensive and cater for vulnerable groups and ensure that the responsibilities of the three spheres of government have been clearly spelt out.

It has been involved in a number of cases. In *Grootboom v Oostenberg Municipality & Others*.⁹⁹ in which the plaintiff was part of a group, which included adults and children living in horrendous conditions in an informal settlement in Wallacedene. They were evicted from the farm land that they had wrongly occupied. The High Court found that the children, and through them, their parents were entitled to shelter as stipulated in the Constitution¹⁰⁰ and the Court ordered that the municipality should provide them with tents, water supply and proper sanitation. The government appealed against the decision.

The Court held that the government had to act positively in realizing the rights in the Bill of Rights and that the rights in the Constitution are inter-related because in upholding ESCR of the people, they will in turn be able to enjoy other rights. The Commission acted as amicus in this case¹⁰¹ and the Court specifically mandated it to monitor the government's compliance with the judgment under its general investigative and monitoring powers. The Commission is still concerned that despite the judgment, not much progress has taken place and it is continuing to monitor the situation.¹⁰²

The situation in 2006 had improved slightly because the national department had introduced social housing bill which enables poor people to access rental housing at reasonable cost. The housing assistance in emergency circumstances bill which provides temporary relief to people who find themselves in emergency situations and this is done through providing shelter, land and municipal services infrastructure was also introduced.¹⁰³

In the *Minister of Health v Treatment Action Campaign & others*¹⁰⁴ the crux of the matter was whether government was entitled to refuse to make nevirapine available to pregnant women who have HIV and who do not give birth in a public hospital. It was further contested that there must be clear time frames for the implementation of the programme of mother-to-child-transmission of HIV. The Court held that South African government had an obligation to provide anti-retroviral drugs to HIV positive pregnant

⁹⁹ *Grootboom v Oostenberg Municipality & Others* 3 BCLR 277(C).

¹⁰⁰ Sec 28(1)(c).

¹⁰¹ Preface to Annual Report SAHRC (2003/2006).

¹⁰² Annual Report SAHRC (2002/2003) 57.

¹⁰³ n 101 above, 20.

¹⁰⁴ *Minister of Health v Treatment Action Campaign & Others* CCT/8/02.

women. The Commission continues to play an active part in ensuring that the judgment is being complied with and also by monitoring the situation of health care services.¹⁰⁵

In addition to the above measures, the Commission also subpoenaed Mr Semenya (member of the executive council) for local government and housing in the Limpopo province and Mr Pasha of the Lepelle Nkumpi municipality to appear before to answer allegations of violations of the human rights of 237 evicted families whom they had evicted in May 2004 to another section. Upon investigation, the Commission found that there were only 17 tents with holes and more than three families were accommodated in one tent. The municipality did not cater for those with disabilities, the sick and the elderly. The Commission alleged that the government had violated its obligations with regard to health, adequate housing and education.

3.3.5 Other activities

The mandate also, includes amongst others, to promote, protect and monitor human rights and inculcate a culture of human rights. The Commission has powers to investigate and report on the observance of human rights, take appropriate steps to redress violations of human rights, carry out research and public education.

From the above, it is clear that SAHRC has, to a large extent, been able to monitor ESCR thus aligning itself with General Comment 10,¹⁰⁶ which addressed the issue that full attention should also be given to ESCR in all the activities of NHRIs.

3.4 Mandate of the Uganda Human Rights Commission

The Commission was established by the Constitution¹⁰⁷ in 1995 and was seen as a ray of hope for the people of Uganda as a watchdog that will take government to task in violations of human rights because since independence Uganda has had a poor record of human rights.¹⁰⁸ This was on recommendation of the Commission of Inquiry into the Violations of Human Rights in Uganda (CIVHU).¹⁰⁹ The Commission has been mandated, amongst others, to deal with visiting prisons and

¹⁰⁵ A Hassim, M Heywood & B Jonathan, Submission to South African Human Rights Commission of Enquiry into access to health care services, 17 April 2007.

¹⁰⁶ Adopted by the Committee on ESCR in December 1998.

¹⁰⁷ Art 51(2).

¹⁰⁸ n 20 above, 189.

¹⁰⁹ Matshekga (n 19 above) 69.

places of detention to ensure that they keep up to suitable human rights standards, conduct human rights education and research, recommend to Parliament on the measures to be taken to compensate victims and their families and educate the public on how to defend the Constitution.

Further, the Commission has to prepare periodic publications on its findings and submit an annual report to parliament on the measures it has undertaken to promote and protect the rights of the citizens.

3.4.1 Investigative role

The Commission can investigate any matter on its own initiative or a person can lodge a complaint on violation of any human right.¹¹⁰ The Commission may summon any person to attend before it and produce any document or evidence as it deems fit and question any person under investigation.

When investigations are complete, the matter is referred to the legal and tribunal section and if they are not convinced with the findings, the file is sent back for further investigations. If they are satisfied with the outcome, they will decide whether the matter should be settled through mediation or it should be deliberated upon by the tribunal.¹¹¹

The Commission shall, however, not investigate any matter that is already before the courts of law, any matter dealing with diplomatic relations between states and any matter relating to prerogative of mercy.¹¹²

3.4.2 Enforcement role

The Commission has the power of a court.¹¹³ Where it is of the opinion that there has been a violation of human rights, it can order the release of a person from detention, payment of sufficient compensation and any other remedy. Further, the Commission can review a case of a person who has been detained.¹¹⁴ Where the person is not satisfied with the decision of the Commission, they can appeal to the High Court. The Commission may also find a person in contempt for non-compliance with its orders. It is worth mentioning that the Commission is not a court of law but merely possesses the powers of the courts.

¹¹⁰ Sec 8(1)(a) of Uganda Human Rights Act 4 of 1997.

¹¹¹ Report of Saba Zarghami who was on internship at UHRC.

¹¹² Art 53(4) of Constitution.

¹¹³ Art 53(1) of Constitution.

¹¹⁴ Art 48 of Constitution.

3.4.3 Cases involving torture

Torture forms one of the major complaints registered by the Commission. In 2003, 50 complaints were handled by the Commission's tribunals.¹¹⁵ In 2005, the Commission registered 256 cases of torture and this represented about 21.1 per cent of the complaints registered and there were 44 cases on torture, thus representing 3.6 per cent of the complaints registered.¹¹⁶ The Commission, through its tribunals has given compensation and awards to victims. In *Idris Kasekende v Attorney General*¹¹⁷ while returning from prayers from the Katwe mosque, he was arrested without reason and while resisting the arrest, he was shot in the ribs. He was later detained and during interrogation, he was tortured and remains with big scars on his abdomen. The tribunal held that such acts constitute torture and were deliberate acts of severe physical and mental pain. The tribunal awarded him Ug. Shs (Ugandan shillings) 25 000 000 as damages for torture. Unfortunately, the government has not yet paid this amount.

In *Aber Aziza Juma & Talib Abdu Juma v Attorney General*¹¹⁸ the complainants were arrested from their home and taken to a military camp where they were blindfolded and stepped on by the soldiers. They were later transferred to another military camp where they were severely tortured on the allegations that they were rebels. The Commission found that the state was liable for the actions of its servants and an order was made of Ug. Shs. 33 578 000. However, the government did not comply with the award.

In *S.Chepkwuri v Attorney General*¹¹⁹ the complainant was tortured by the military police. The state was held liable and a damage of Ug. Shs. 9 000 000 was awarded. In this case too, the government did not comply with the order.

In *Gidudu Stephen v Attorney General*¹²⁰ the complainant was detained by the military for three months and tortured. He was awarded Ug. Shs. 59 000 000 and the government has since appealed the award given to the complainant.

In all the above cases, government has not been able to make payments because it states that the amounts were not budgeted for.¹²¹ From the analysis of the cases above, it is evident that there is a

¹¹⁵ Annual Report UHRC (2003) 6.

¹¹⁶ Annual Report UHRC (2005) 52.

¹¹⁷ *Idris Kasekende and Attorney General* UHRC No.172/1998.

¹¹⁸ *Alber Aziza Juma & Talibu Abdu Juma v Attorney General* UHRC No.G/577/1999.

¹¹⁹ *S. Chepkwurui v Attorney General* UHRC No.S/42/02.

¹²⁰ *Gidudu Stephen v Attorney General* UHRC No.210/99.

problem of enforcement of the decisions of the Commission though it has judicial powers but this will be dealt with in the coming chapters.

3.4.4 Other activities

In order to carry out its mandate against torture, the Commission has been engaged in advocacy work in order to inculcate in the security personnel that at no point in time can torture be justified. It has also been campaigning for the law on prohibition of torture and that the country should ratify the international instruments relating to torture.

3.5 Conclusion

The chapter dealt with the mandates of CHRAJ and in particular the mandate of dealing with corruption. SAHRC mandate of dealing with ESCR was also considered. UHRC mandate of dealing with torture issues was also stipulated and special attention was paid to cases that have been handled by the tribunal. A number of cases dealt with by the three Commissions were analyzed. It was seen that governments do not always respect the pronouncements of the Commissions. The next chapter will deal with the problems faced by these Commissions in dealing with the specified mandates.

¹²¹ n 116 above, 112.

Chapter 4

Challenges facing the Commissions

4.1 Introduction

This chapter will analyze the problems and challenges encountered by the CHRAJ, SAHRC and the UHRC in the discharge of their respective mandates. It deals with the causes and the efforts undertaken to address these problems.

4.2 Problems encountered by CHRAJ

4.2.1 Deficiencies in the law

Both the Constitution and the Act are silent on the kinds of remedies that the Commission is empowered to grant to successful complainants. However, it is worth noting that the Constitution¹²² states that the commissioner may bring an action before any court in Ghana and may seek any remedy, which is available from that court, in order to enable him to perform his functions under the Constitution.

The Commission is empowered to go to court to have their decisions enforced and this has posed quite a number of challenges because in some cases, the courts have questioned the jurisdiction of the Commission. In the ongoing and controversial case of *The Republic v CHRAJ Ex Parte, Dr Richard Anane*¹²³ Justice Baffoe Bonnie had this to say on the jurisdiction of the commission

I will first like to comment on the status of the Commission. Without sounding any disrespectful I am sure the Commission is aware or ought to be aware that it is an inferior tribunal or inferior investigating authority whose jurisdiction is limited to that expressly given to it under the constitution or the statute that created it. No matter the content or value of their investigation and no matter the quality of their personnel. And like any other inferior tribunals or bodies the Commission has no inherent power, jurisdiction or investigative powers beyond that expressly given by the Constitution...It should not behave like an octopus stretching its eight tentacles here and there to grasp jurisdiction not constitutionally meant for it. Its powers are limited by law as spelt out in Act 456 and C1 7 and the Commission is in duty bound to respect those limits.

¹²² Art 229.

¹²³ *The Republic v CHRAJ Ex- Parte, Dr. Richard Anane* Suit No. AP 45/07.

It is worth mentioning that CHRAJ has since appealed to the Supreme Court against the ruling of the High Court. The Acting Commissioner, Ms Anna Bossman, said they have appealed in order to have clarity from the court on interpretation of some sections of the Constitution relating to the mandate of the Commission and its work.¹²⁴ Counsel for the respondent, amongst others, wanted interpretation of the words corruption, complaint and abuse of power as given by the Constitution.¹²⁵

The case of *CHRAJ v Attorney General*¹²⁶ also challenged the jurisdiction of the Commission and when dismissing the case, Charles Hayfron-Benjamin JSC said:

In the instant case, the plaintiff Commission on Human Rights and Administrative Justice had no judicial power in the performance of its functions under the Commission on Human Rights and Administrative Justice ACT, 1993 (Act 456). Even though for purposes of effective exercise of its investigative functions, the commission had certain powers akin to those of the regular courts and tribunals, in exercising those powers, the plaintiff commission did not thereby constitute a court or tribunal properly so-called. It had no power to review decisions of other courts or tribunals; nor did it possess any supervisory powers over such courts or tribunals.

Similarly in *Attorney General v CHRAJ*¹²⁷ the plaintiff alleged that the conduct of the defendant in seeking to implement its decisions in respect of matters that were pending before the Ombudsman on or before 7 January 1993 under article 229 of the 1992 Constitution, was inconsistent with the letter and spirit of the Constitution. The case was dismissed on the ground that the enforcement powers of the defendant are granted by article 229 of the Constitution. The Court further stated that it is a serious misconception by the plaintiff to make a submission that the conduct of the defendant which is aimed at enforcing or implementing its decisions in a court of law is in contravention of the Constitution.

The law is silent on the fact that the anti-corruption department could prosecute public officers against whom adverse findings of corruption had been made in the Auditor General's report submitted annually to the public accounts committee of parliament. Recommendations are forwarded to the Attorney General's department.¹²⁸

¹²⁴ <http://www.allAfrica.com> (accessed 22 September 2007).

¹²⁵ Art 218(a), 218(e) & 287.

¹²⁶ *CHRAG (No 1) v Attorney General* (No 1) Supreme Court of Ghana.

¹²⁷ *Attorney General* (No 2) v *CHRAG* (No 2) Supreme Court of Ghana.

¹²⁸ n 82 above.

To address such problems, Commissioner Short called that the CHRAJ enabling Act be amended to enable its decisions to be registered as judgments of the High Court from which there could be a judicial review or appeal to the Court of Appeal.¹²⁹ This would partly address the uncertainty surrounding the roles of the Commission and the Court in the enforcement of the Commission's decisions. This was also reiterated by the present acting chair of the Commission.¹³⁰

4.3 South African Human Rights Institutions

4.3.1. Limitation of mandate

SAHRC has a huge challenge in promoting ESCR as entrenched in the Constitution. However, there are times when SAHRC is criticized as not executing its mandate well whereas all it is doing is to perform a constitutional duty and not a political function.¹³¹ This basically means that the nation sometimes has high expectations of the commission whereas there are instances that are beyond its control. It will depend on whether the government has allocated adequate resources in order to realize the rights. This was confirmed by Chakalson P in *Soobramoney v Minister of Health*¹³² when he said

What is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demand on them that they have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

4.3.2 Lack of precedent

SAHRC is so far the most effective in dealing with ESCR. However, the problem is that there are few precedents in which the Commission can follow to attain its goals,¹³³ it has to find its own way of dealing with issues. Some scholars have suggested that guidance can be obtained from studying the strengths and weaknesses of international reporting systems and in particular International Covenant

¹²⁹ CHRAJ news, 10th anniversary edition.

¹³⁰ Paper presented at the Commonwealth conference of national human rights institutions, 26-28 February 2007, London.

¹³¹ n 98 above.

¹³² *Soobramoney v Minister of Health* CCT 32/97.

¹³³ S Liebenberg & K Pillay 'Social rights in South Africa' <http://www.chr.org.za> (accessed 16 October 2007).

on Economic, Social and Cultural Rights 1966.¹³⁴ From these they can develop a dynamic tool for realising the rights.

4.3.3 Reporting

At times, the different departments which have to report on the implementation of ESCR in their divisions ignore the questionnaires and do not fill them in timeously. This leads to the Commission having to subpoena such departments in order to account for their failure to comply with the request of the Commission and to submit the reports. There has also been poor engagement of the parliament as a body that the Commission has to report to annually. The parliament does not take into consideration the recommendations of the Commission and relevant action is not taken to remedy the concerns.¹³⁵

It is worth mentioning that the Commission has been criticized for focusing heavily on reporting by the departments and not providing an assessment of the measures.¹³⁶ The Commission has a challenge on how to mainstream the reporting process and properly assess the realization of ESCR as implemented by various state departments. There is also a problem of the reporting process because, of amongst others, lack of fully appreciating the rights as enshrined in the constitution and constitutional obligations by government, lack of information, poor record keeping which leads to incorrect information and ultimately late submission of the protocols by government departments.¹³⁷

The Commission has also been criticized as moving towards progressive realization of the rights rather than the monitoring aspect. The Commission has concentrated on statistical data rather than legislative and policy measures.¹³⁸ One agrees with this criticism because the reports are flowing with too much data. Monitoring goes beyond statistical collection. The OHCHR¹³⁹ said

Monitoring is the process of systematically tracking and assessing state performance against clear benchmarks and targets. It requires, first and foremost, data collection and analysis, involving not only official statistics, but possibly also field observation and investigations or even fact-finding delegations. It needs to draw on diverse sources of information, including studies and standards, both

¹³⁴ Klaaren (n 93 above) 545.

¹³⁵ n 94 above.

¹³⁶ Annual Report SAHRC (1999/2000) 9.

¹³⁷ As above.

¹³⁸ Klaaren (n 93 above) 548.

¹³⁹ n 97 above, 57.

domestic and international, relating to violations or progressive change in the status of economic, social and cultural rights. Monitoring these rights requires looking at qualitative and quantitative measures or indicators to assess what movement there has been from key benchmarks established at the start of the monitoring period and whether targets set at that time have been met.

To address some of these problems, the Commission continually revises the protocols and has solicited opinions from different departments and the civil society organizations on how best it can improve its mandate. It has also held workshops for government officials and the relevant stakeholders and is willing to address all the challenges. One is of the opinion that in implementing its mandate, the Commission has to bear in mind the wide gap that exists between the rich and the poor and try to recommend for a means of balancing that.

4.4 Uganda Human Rights Commission

4.4.1 Inadequate legislation

Torture is a serious problem in Uganda and the Commission has since recommended an enabling law on torture in an attempt to remedy the situation. However, no law on torture has been enacted and no efforts of drafting the law had been made by the government.¹⁴⁰

4.4.2 Non-payment of awards

Despite the tribunals awarding compensation to victims of violation of human rights, the government has not been able to honour such awards. In 2004, the government had paid Ug. Shs. 93 280 425 out of the Ug. Shs. 784 000 000 as compensation representing only 11.9% of compliance with the awards.¹⁴¹ In 2005 alone, the awards had accumulated to Ug. Shs. 306 228 000 of which Ug. Shs. 275 278 000 (89%) is against the government. The argument of the government was that the money was not budgeted for. The Commission's¹⁴² view in this matter was that

The Commission is convinced that there has been no significant progress in this direction...Furthermore, the Commission's position is that continued delay in compensating victims of human rights violations is a further violation of their rights and defeats the whole purpose of such awards. We continue to appeal to

¹⁴⁰ n 116 above, 114.

¹⁴¹ As above, 112.

¹⁴² As above.

government, to expedite payment of these awards, and priority should be given to compensating the victims of human rights violations when money for compensation is available.

As a result of non-payment of compensation, there have been recommendations from other members of the Commission that complainants should accept lesser compensation,¹⁴³ thus affecting the credibility of the Commission. The complainant and the government both have the right to appeal and the office of the Attorney General usually appeals against decisions of the Commission without even proceeding subsequently.¹⁴⁴

The Commission was of the opinion that to remedy the situation there should be an establishment of a victims compensation fund and decentralizing liability to ministries that may be concerned, for example, ministries of defense and internal affairs because most of the perpetrators are the army and police personnel. They do not advise that the burden should be put solely on the office of the Attorney General. Whereas this argument holds water, I doubt whether it will solve the problem because they will still be dealing with a government department which will also be prioritizing its budget.

It is clear that a majority of cases are against officers of government thus having to sue the Attorney General because of the rule of vicarious liability.¹⁴⁵ The Commission identified the biggest challenge in this regard as not being possible to directly penalize the perpetrators of torture individually for their deeds. This, it said, would have acted as a deterrent. To remedy the situation, it advocated for amendment of Government Proceedings Act, Cap.77 to ensure that it is the relevant Ministry from where the perpetrator belongs that will be held personally responsible.¹⁴⁶ Whereas the officer will be held liable and disciplinary action taken, I am not too optimistic whether this will entirely solve the issue of costs but maybe there will be improvement

It is worth mentioning that the Commission has no problem regarding torture committed by individuals, the problematic area is when it is committed by agents of the state. In the case of Shaban Gita,¹⁴⁷ the respondent was ordered to pay complainant Ug. Shs. of the cost of eight million.

4.4.3 Protection of perpetrators

¹⁴³ <http://www.redress.org> (accessed 20 October 2007).

¹⁴⁴ As above.

¹⁴⁵ n 112 above, 56.

¹⁴⁶ As above, 112.

¹⁴⁷ Annual Report UHRC (1998), 19.

The problem that the Commission also faces is that of receiving reports frequently of security agents who continue to violate the individual's rights and the reluctance of the prison and police officials to ensure that officers who commit such crimes are prosecuted or disciplined. For example, Michael Sebagala was arrested and imprisoned. While in prison, he was forced to work in a garden and was severely beaten and tortured by a prison warder, Paul Bisaso. He later died as a result of the beatings. His death was confirmed by the officer in charge and the Commission later discovered that no action had been taken against the perpetrator instead he was transferred to another unit.¹⁴⁸

The Commission discouraged impunity of security forces in torture and recommended that vigorous steps be taken against the perpetrators and they should be convicted. When this was put before Uganda Peoples Defense Forces (UPDF), they argued that this was already being taken care of by a Compensation Committee which was also responsible for deduction from salaries and disciplinary action was taken against those who committed such acts.¹⁴⁹ This was an internal arrangement and the Commission was not briefed on it earlier. The UHRC has been dismissed by UPDF at times that they will deal with the officer in their own way. This poses problems because some of the perpetrators were acting within superior powers so they will have to be covered by their superiors. Different blocking tactics are used, for example, transferring the officer to another department.

Torture in prisons was still a problem. Ronald Twinomugisha was detained in Nyabuhikye Local Government prison and he was beaten severely and subjected to torture. However, the officer in charge, Sergeant Perez, denied ignorance of Ronald's condition.¹⁵⁰

4.4.4 Abolition of the Commission

Uganda has had a poor human rights record and in 2003, the cabinet came up with a decision that the Commission should be abolished due to lack of funds and that its functions should be transferred to the Inspectorate of government stating that this would reduce costs of two operating institutions with similar mandates. This was a very disappointing step towards one of the best NHRIs. The Commission¹⁵¹ was of the view that

¹⁴⁸ n 116 above, 53.

¹⁴⁹ As above, 116.

¹⁵⁰ Annual Report UHRC (2000-2001) 10.

¹⁵¹ n 115 above, 164.

Human rights institutions are now part and parcel of the human rights movement worldwide. This is the rights movement worldwide. This is the reason every nation is coming up with a permanent human rights institution, which has become a must for every nation, just as the judiciary and the Ombudsman is a necessity in every country. Consequently the arguments of costs to government may never in itself be good enough to settle the fate of the UHRC.

It is doubtful whether the government's sole reason of abolishing the Commission was the issue of costs and one would like to make the assumption that the government felt threatened by the Commission's independence and the ability to expose even the most sensitive issues and challenge the government on violations of torture. The Commission managed to convince government otherwise in this matter.

4.4.5 Problem in investigating torture

There has been serious hindrance to the Commission's work with regard to this issue. In the study on torture in Uganda¹⁵² it was stated that

The UHRC has identified a series of obstacles in its investigatory work, namely the difficulty in locating witnesses or victims, lack of cooperation from government institutions in particular denial of access to military detention facilities, ignorance of the population on the powers of the Commission, lack of co-operation from eye witnesses, insecurity in conflict related areas and lack of logistics.

UHRC has not dealt with cases by the Lord's Resistance Army (LRA) although such cases fall within its mandate. It does also not have a policy of recommending for prosecutions.¹⁵³

The UHRC also has a problem of capacity and resource, shortage of staff and lack of resources and at times cases concerning torture violations take five years to complete. This results in serious backlog of cases.¹⁵⁴

However, the Commission witnessed that there had been progress in that torture had significantly declined and this was a result of advocacy that had been carried out.¹⁵⁵

¹⁵² n 143 above.

¹⁵³ As above.

¹⁵⁴ As above.

¹⁵⁵ n 116 above, 53.

4.5 Conclusion

This chapter dealt with the problems encountered by the Commissions and some of the efforts that they have undertaken to address some of the problems. The next chapter will give a summary of the study and come up with recommendations. It will also draw lessons learnt that could be applicable to Lesotho.

Chapter 5

Conclusion and Recommendations

5.1 Introduction

The question whether it is advisable to establish a NHRI which possesses judicial powers or not has been the centre of this study. In this chapter, conclusions drawn from the previous chapters will be made and general and specific recommendations will be tabled. Lesotho will be establishing a NHRI in 2008 and a menu will be drawn on which elements that best suit Lesotho would be suggested.

5.2 Summary

A comparison of the best three NHRIs in Africa was undertaken. This work was a study of whether a NHRI which possesses judicial powers is more effective or otherwise in respect of enforcement of its decisions in the implementation of their distinct mandates. The emergence of NHRIs was considered and it was seen that the time is now ripe for the amendment of the Paris principles to cater for new developments and trends of NHRIs. The argument on whether their amendment would open a pandora's box was also considered and one is of the opinion that this would not be the case.

A case study was made of CHRAJ, UHRC and SAHRC and an analysis of their mandates was made, in particular, their distinct mandates on corruption, ESCR and dealing with torture issues and also that of UHRC of sitting as a tribunal were considered. Although the three have been rated as the best in Africa, they have problems that at times hinder their efficiencies, some of which are beyond their control. Nonetheless, 'they can play a key role in promoting and protecting human rights. They are able to do so by the unique position they occupy between government, civil society and nongovernmental organizations.'¹⁵⁶ This means that they need all the support from the governments that established them in order to perform their mandates efficiently.

¹⁵⁶ Smith (n 2 above) 1.

5.3 General recommendations

5.3.1 Separation of roles by NHRIs and courts

Regarding the tenability of the argument on separation of roles of NHRIs and the courts, the view taken here is that there must indeed be separation of roles. Matters should first be dealt with by the NHRIs where they exist, before they are brought to the courts. One however, does not agree with the study by Amnesty International¹⁵⁷ that the results of investigations by NHRIs should be communicated to the courts for them to take appropriate action. One is of the opinion that national institutions should still make recommendations because if this was not allowed then we would be diluting the mandates of these institutions. A person can appeal against such if they are not satisfied. One also does not think that it was the aim of the drafters of the principles to create tension between NHRIs and the judiciary.

One agrees with the study that national institutions should have the mandate of dealing with a case even if it is before courts especially if the violation pertains to human rights. One is aware that this in a way may, to a certain extent, results in duplication of duties but cases drag for a long time within the legal system so where do we place the interests of the victims of crime or complainants in such a situation?

5.3.2 Commitment from governments

NHRIs are products of governments and they are increasing because even governments that have the worst human rights record have established them. Although the international community might have influenced their establishment, government is responsible for their maintenance. They should be allocated adequate funds in order to carry out their mandates efficiently. Governments should therefore show the political will and commitment to promote human rights at both the national and international level. The commissioners should be able to execute their mandate without fear or favour. Governments should work towards influencing the African Union (AU) in establishing the post of the Commissioner for Human Rights within the AU for if there is such a portfolio, the Commissioner could be able to push for the advancement of NHRIs in Africa and address more efficiently the problems that NHRIs in Africa face.

¹⁵⁷ n 5 above.

5.3.3 Amendment of the Paris Principles

NHRIs owe their gratitude to the principles that have served a good purpose in making most national institutions to be effective and efficient. However, the time is now ripe for them to be revised and maybe amended. From the study, it was seen that there are those who are of the opinion that amending the principles would open a Pandora's box to which one totally disagrees.

Where NHRIs deal with individual complaints, the principles are silent on how they should go about this mandate.¹⁵⁸ Some NHRIs are barred from dealing with cases before the courts and others have to go through the office of the Attorney General for investigations, that is, they cannot act on their own initiative, so the pertinent question would be is it good to leave the decision of how to handle individual complaints in the hands of government? One's answer is in the negative because governments too want to protect themselves so they will adopt laws that will favour them. Even as one comes to the end of this research, one must confess that what the principles mean by quasi-judicial nature of NHRIs is still not very clear so maybe there is need for further clarification by the principles on this issue.

The principles do not mean that national institutions should possess powers of the court. UHRC possesses such powers and CHRAJ is also advocating for such. One is of the opinion that where specific countries feel that they want an institution that possesses such powers, the principles should give such allowance.

Although most laws of the NHRIs are couched in a manner that stipulates that they can investigate any form of human rights violation, in practice this is not the case. NHRIs can be prevented from investigating into abuses by armed forces and matters that are before the courts. The principles are silent and do not contain any non-derogable standards.

The principles did not deal with a number of significant areas which are crucial to the work of the NHRIs today. They did not make mention of the importance of involving the civil society in the establishment of the institution and in the appointment of commissioners. Mention was not made of the NHRIs dealing with matters of internally displaced persons (IDPs), HIV/AIDS, situations of conflict and the importance of ESCR.

¹⁵⁸ n 15 above, 4.

The principles did not cater for emergence of a new type of national institutions, such as the Ombudsman. This poses problems to commissions that have multi-functions, such as CHRAJ. As a matter of fact, CHRAJ does not fit into the kind of national institutions that were catered for by the principles.¹⁵⁹ It is therefore necessary to amend the principles in this line.

One is of the opinion that the NHRIs based in Africa could make the amendment of the principles an item on the agenda in their upcoming meetings, taking into account that some problems that national institutions have to deal with are peculiar to Africa, for example, human rights of IDPs. One commends African NHRIs for their theme 'The role of national human rights institutions in the protection of refugees, internally displaced and stateless persons' of the sixth conference of African NHRIs held in Kigali, Rwanda from 8-10 October 2007. This is an indication that they are willing to take a new direction in improving the work of NHRIs.

5.3.4 Involvement of the civil society in the appointment of Commissioners

The involvement of the civil society in the appointment of the commissioners is very pertinent because the commission is going to serve the very society and it needs to acquire their confidence. Research has shown in the three Commissions that this is not the case when appointments are made. The President has the final say on who will sit on the commission. This may at times prejudice the work of the commissioners because they may feel that they owe allegiance to the government that has appointed them and this is a violation of the principles.¹⁶⁰

5.4 Specific recommendations

5.4.1 Commission on Human Rights and Administrative Justice of Ghana

5.4.1.1 Appointment and tenure of Commissioners

The Constitution¹⁶¹ and the Commission's enabling Act¹⁶² state that the Commissioners should hold office until they are of the age of 65 in the case of Deputy Commissioners and 70 in the case of the Commissioner. They are both silent on the tenure that the commissioners should serve. This is also a

¹⁵⁹ As above.

¹⁶⁰ Para B.

¹⁶¹ Art 223(2).

¹⁶² Sec 4(1).

violation of the Paris principles.¹⁶³ This poses a problem for one because where an individual stays in the office for too long, they end up misusing their office. Further, it becomes difficult to remove incompetent appointees. One thinks that at least they should be appointed for a period of five or six years with the possibility of renewals. One is of the view that the appointment procedures and tenure in office should be reviewed to also ensure transparency and rotation.

5.4.1.2 Remedies

Both the Constitution and the Act are silent on the kinds of remedies the commission should grant to successful complainants so this leaves the matter in the hands of the presiding officer. To remedy the situation, resort can be made to Article 229 which states that the commissioner may seek any remedy which may be available from the court. This is still not adequate because it still results in making the Commission an inferior body in that it has to consult the court. One would recommend that the Act should be more specific on what kind of remedy should be accorded to complainants.

5.4.1.3 Structure of the Commission

The Commission consists of the Ombudsman, anti-corruption and human rights commission. The Commission has suggested that the multi-functional mandate of the Commission should be reduced as there are instances where their functions overlap and create conflicts.¹⁶⁴ This may be the case and it is true that there are limited resources in Africa and when the divisions are scattered, it is difficult to allocate such resources for efficient running of the institutions. One would like to support this recommendation.

5.4.1.4 Number of Commissioners

The number of Commissioners is three (a Commissioner and two deputy Commissioners). Commissioner Short has advocated on increasing the number of commissioners to at least seven¹⁶⁵ due to the work load that faces the Commission as well as the wide mandate of the Commission. He argued that this would enable the Commission to handle its wide mandate more efficiently. One does not support this suggestion at this point in time, maybe this could be reserved for the future when CHRAJ will possess powers of a court. Whereas one appreciates the nature of the work of the

¹⁶³ Para B(3).

¹⁶⁴ n 129 above, 2.

¹⁶⁵ As above, 7.

Commission, one feels this number is too high and would end up contributing to idleness and incompetence of some Commissioners. Dr Ayeni said ‘Although it looks stressful, I feel more comfortable with a smaller number. Keep the number, widen the directorship level, decentralize at lower levels and allow it to operate.’¹⁶⁶

5.4.1.5 Enforcement of recommendations

The procedure of mediation takes a long time even where parties are cooperative. One is of the opinion that the Commission should adopt guidelines on the procedure of how a matter should be handled, for example, the number of times that a complainant or respondent should be absent before the matter can be taken for enforcement. This will help to avoid a situation where the discretion is left to an individual on when to send a matter to the enforcement department for action.

5.4.1.6 Extension of powers

The Commission has a mandate to make recommendations and enforce them through the court where such are not carried out. There has been a call by the commissioners for the Commission to have the powers of the courts as this would remedy the situation where the courts end up questioning the jurisdiction of the Commission thus a need of amending the Constitution and the enabling Act. Any person who is not satisfied with the Commission's decision could appeal to the court. One is of the opinion that if CHRAJ could possess the powers of a court, it would be more effective than ever. It is already a very reputable institution which has served the public generously over the years. Commissioner Anna Bossman¹⁶⁷ said

The enforcement power is not often invoked. About fifty per cent of the cases handled by the Commission are resolved by conciliation and mediation to the satisfaction of both parties. In the vast majority of the remaining cases, which are decided on merits, the recommendations of the Commission, therefore, serve as a back-up power, which may be invoked, in those relatively few cases where it becomes necessary.

The judiciary was, however, doubtful whether according the Commission with such powers would not cause chaos. ‘But I dare say that if anyone institution like the CHRAJ were to be given the powers as the Commission is seeking to exercise ...surely that will be a recipe for chaos.’¹⁶⁸ One officer at the

¹⁶⁶ As above.

¹⁶⁷ n 130 above.

¹⁶⁸ n 123 above.

Commission said whereas he appreciates the concern that CHRAJ should be given powers of a court, he is in disagreement because CHRAJ has done well so far and all it has to do is to further win the confidence of the nation.¹⁶⁹ Annan¹⁷⁰ agreed by saying

As an administrative tribunal CHRAJ should not be elevated to the status of a court. However, it is important for courts to understand its role as complementary and co-operate with it in respect of enforcement of its decisions or recommendations.

One does appreciate the frustration that they face at times of some of their cases being seriously challenged by the court thus which may ultimately result, at some point, diluting their mandate. One is of the view that possessing powers of a court and initiating cases at their own investigations would help strengthen their mandate. This has been the situation with the UHRC.

5.5 South African Human Rights Commission

5.5.1 Training of officers

After reading some of the annual reports, one gets a feeling that the officers who compile the report may not really appreciate the data, especially due to its complexity. It is recommended that the officers of the Commission should themselves be trained in collection of data and analyzing it. As it has no precedent, it could also rely on external expertise and international and comparative approach.

Continuous education of officers from other governmental departments should be carried out so that they are able to provide relevant and concise information. Training of smaller groups and public awareness should also continue. As already mentioned, it should move away partly from monitoring the capacity of government to formulate and implement policy but rather move to the practical implementation of violations. OHCHR¹⁷¹ had stated that

If monitoring is to be useful as possible, the national human rights institution should move beyond analysis to develop its own conclusions and recommendations. It should express its views on what needs to be done to close any gap between the current status of economic, social and cultural rights and identified national targets. Recommendations might deal with both individual and broader public interest remedies, in order to address immediate violations and the progressive realization of rights.

¹⁶⁹ Interview with Kwame Bosompem, public relations officer CHRAJ 26 October 2007.

¹⁷⁰ n 82 above.

¹⁷¹ n 93 above, 57.

5.5.2 Implementation of international law

The Commission should also move beyond the ICESCR and concentrate on other international instruments such as the International Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.¹⁷² It should also make use of general comments of the Committee on Economic, Social and Cultural Rights as they are important tools for establishing indicators and benchmarks for monitoring.¹⁷³

5.6 Uganda Human Rights Commission

5.6.1 Powers of the Commission

UHRC has the functions of a court and any person who is not satisfied may approach the courts for an appeal and in the case of UHRC it is the government which makes appeals against the decisions of the commission especially in torture cases. The government has failed to pay the complainants who have been awarded compensation and to date the government owes the complainants an amount of approximately 275 278 000.¹⁷⁴ One agrees partly with the Commission's proposal that a victim's compensation fund, funded by the Commission, could attempt to remedy the situation. The worry would be whether it is not going to create the problem of lack of funds because it will have to be done in coordination with the Ministry of Justice which will also have to prioritize its needs as a result of scanty resources. This situation of non-payment is a disappointing situation because the government should budget for such incidents. It must also not be forgotten that the government that does not honor its obligations is the same one that gave the Commission this mandate under the Constitution. The best option is to hold each officer responsible as per ministry.

5.6.2 Non investigation of matter before the court

The Constitution stipulates that the Commission will not investigate any matter that is pending before a court,¹⁷⁵ and this is a vague provision. This exception to the mandates of NHRIs is common and is not peculiar to UHRC. However, one will like to address it from a situation where the Commission deals

¹⁷² As above.

¹⁷³ As above, 60.

¹⁷⁴ Paper presented by the chair of the Commission at the Commonwealth conference of national human rights institutions, 26-27 February 2007, London.

¹⁷⁵ Art 53(4)(a).

with torture issues such as UHCR and which is problematic. If a police officer arrests a person, tortures him and finally the detainee dies of torture, then it means that when the officer is prosecuted, UHRC will not be able to investigate the torture allegations stemming from the officer's conduct during his criminal trial of murder, whether or not the trial takes years to finalize. UHRC cannot investigate the murder case but there is no need to have its hands tied to investigate torture. It is true that two cases proceeding simultaneously could lead to different findings of fact and to different results. The best solution would be for UHRC to wait for finalization of the criminal case before releasing its findings on the torture allegation but it should not be barred from investigating altogether while the matter is being handled by the court. It is recommended that the constitutional provision should be interpreted broadly by the Commission to cater for the above scenario.

5.7 Lessons that Lesotho could adopt

Lesotho would be establishing a NHRI in 2008 and Lesotho has already begun paving the way for its establishment and one would like to draw some best practices that Lesotho could adopt from the research.

5.7.1 Appointment and tenure of Commissioners

One may wish to recommend the route taken by the UHRC and SAHRC in stipulating the tenure of office of the commissioners. Lesotho should avoid a situation where a person stays in office for too long and end up misusing it. The tenure of office of commissioners should be five years and be renewable. The involvement of the civil society in the appointment process should be highly encouraged and the process should be as transparent as possible.

It is recommended that the Commission should be staffed with personnel that have experience in human rights because they will be able to appreciate human rights issues fully. Whereas, this may be so, there is also need to include officers from other disciplines such as political scientists, universities and sociologists.¹⁷⁶ This is also in line with the Paris principles.¹⁷⁷

¹⁷⁶ n 129 above.

¹⁷⁷ Para B1.

5.7.2 Structure of the Commission

In Lesotho, there exists the office of the Ombudsman and the anti-corruption directorate and these two institutions are separate. It is recommended that they should not be absorbed into the structure of the Commission at any given point in time, to ensure their effective implementation. CHRAJ's mandate covers human rights, ombudsman and anti-corruption and it has been argued that this combination makes CHRAJ the model for the future particularly in smaller and less economically endowed countries.¹⁷⁸ This argument may hold water and it is true that there are limited resources and competing needs in a country but it is recommended that Lesotho's other institutions should still have their autonomy and there should be avoidance of overlapping of functions especially in light of the limited resources.

5.7.3 Powers of the Commission

One is of the view that the Commission should possess powers of the court. Lesotho has a serious problem of back log of cases¹⁷⁹ and there are cases that have taken over ten years to complete. This violates the rights of the victims of crime as 'justice delayed is justice denied.' However, the situation is improving.¹⁸⁰ When the Ombudsman was established, it was not envisaged that it would lift the burden off the courts so much in dealing with maladministration issues but it has done well in executing its mandate. One is of the opinion that if the Commission has powers of the court, it will help to lift the burden that courts face when every citizen looks upon them for protection in the same manner that the Ombudsman did. The decision can be appealed against and once such an appeal is made, the decision can be set aside pending appeal. The UHRC law is silent on this issue but one is of the opinion that it could be applicable in Lesotho. There may be challenges on the way especially with regard to institutional tension of the judiciary and the national institution but these could be dealt with as and when they arise. If Lesotho is to have a body with powers of a court, then the number of commissioners should not be three commissioners as is the case with CHRAJ but it should have at least seven commissioners like the UHRC in order to facilitate efficiency.

¹⁷⁸ n 129 above.

¹⁷⁹ Report of the promotional mission to Lesotho by the African Commission on 3-7 April 2006.

¹⁸⁰ 2005/2006 budget speech.

5.7.4 Mandate

The mandate of the Commission should be in line with the Paris principles. These should include investigating all human rights violations. On this issue, one recommends that the Commission should also be able to initiate investigations at its own accord so that its hands do not remain tied even if human rights violations occur. It should not make referrals to the Attorney General's office like SAHRC. The model of CHRAJ and UHRC could be followed. One may echo the following words of CHRAJ¹⁸¹

It would defeat the purpose and intent of the constitution if the Commission was to sit idly by waiting for complaints while allegations are made in the media and other public forum that constituted notice to the entire world.

The Commission should also be empowered to investigate the following: administrative organs of the state, the armed forces, prisons services, individuals and private enterprises. These are some of the areas covered by UHRC and CHRAJ.

The Commission should also be given the mandate that they should follow cases involving superior officers in order to avoid immunity. It should monitor trials so that trials are not unreasonably long. It should also advocate for legal reform where it sees, in the process of its work, that there may be some shortcomings in the law that would set the perpetrator free thus discourage impunity.¹⁸²

The Commission should carry out public education on human rights and in addition educate the people on the Constitution because that is where they draw their inspiration. This is done by the UHRC. It should visit prisons and jails and make recommendations. One recalls that the Ombudsman carried visits to the prisons and made recommendations which the government is making efforts to implement. In cases where such functions could overlap, the offices should liaise and cooperate closely.

The Constitution of Lesotho¹⁸³ lays down ESCR as non-justiciable rights because their implementation will be determined by state policy. One is aware of the limited resources but the Commission could deal, with amongst, others, HIV/AIDS and other health related matters, poverty issues and education.

¹⁸¹ n 123 above.

¹⁸² n 5 above.

¹⁸³ Ch 3.

One identifies these because one is of the opinion that they would not require high financial resources. The economy is still young so the Commission cannot deal with all ESCR issues like the SAHRC.

5.7.5 Political will

Lesotho's human rights record has been rated as generally good with problems here and there. The fact that the government is already working on this issue is commendable. It is recommended that the government should allocate adequate resources to the Commission especially if it is to possess powers of the court. The situation of UHRC should be avoided where government would end up not paying compensation to victims because of lack of resources.

5.8 Conclusion

By addressing issues that were raised from chapters 2 to 5, the study achieved its objectives as stipulated in its objectives. A case has been made that it is time that NHRIs are advised on moving towards the direction of possessing powers of a court. CHRAJ is already advocating strongly for this change because it is evident that there are hiccups when it does not possess such powers. The model of UHRC which was used revealed that although government does not honor some of the awards, the Commission has been instrumental in the decline of torture and in executing its mandate generally. It is through the Commission tribunal that it was able to expose perpetrators of human rights violations and ordered compensation for victims of torture.¹⁸⁴ Thus we can now safely say that the NHRI which possesses powers of a court still performs more effectively than that which does not possess such powers, regardless of the problems here and there. Whatever their problems, they must be encouraged to strengthen their independence and their protection function.¹⁸⁵ The study revealed that there are some challenges that still face NHRIs in Africa, but one does not see them as formidable challenges; they can be overcome in future if there is political will to address the problems holistically. On the issue of NHRIs being protectors and promoters of human rights, Mary Robinson¹⁸⁶ said

Everything has changed now, you have the full backing of the Secretary-General, all you have to do is to work from the perspective of those who most need their human rights protected and promoted.

¹⁸⁴ n 116 above.

¹⁸⁵ B Rmcharan *The protection role of national human rights institutions* (2005) viii.

¹⁸⁶ M Robinson paper on 'Human rights challenges for the 21 century' 1998, Dag Hammarskjöld Foundation, Sweden.

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BIBLIOGRAPHY

Books

Lindsnaes, B Lindholt L & Yigen, K (eds) (2001) *National human rights institutions: Articles and working papers* Copenhagen: The Danish Centre for Human Rights

Pohjolainen, AE (2006) *The evolution of national human rights institutions: The role of the United Nations* Copenhagen: The Danish Institute for Human Rights

Ramcharan, BG (2005) *The protection role of national human rights institutions* The Netherlands: Martinus Nijhoff Publishers

Journals

Hatchard, J 'A new breed of institutions: The development of human rights commissions in Commonwealth Africa with particular reference to Uganda Human Rights Commission' (1999) 32 *Comparative and International Law Journal of South Africa*.

Klaaren, J 'A second look at the South African Human Rights Commission, access to information and the promotion of socioeconomic rights' (2005) 27.2 *Human Rights Quarterly* 539.

Kumar, CR 'National human rights institutions and economic, social and cultural rights: Toward the institutionalization and developmentarization of human rights' (2006) 28.3 *Human Rights Quarterly* 755.

Matshekga, J 'Toothless bulldogs? The human rights commissions of Uganda and South Africa: A comparative study of their independence' (2002) 2 *African Human Rights Law Journal* 68.

Reif, LC 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 1

Smith, A 'The unique position of national human rights institutions: A mixed blessing?' (2006) 28.4 *Human Rights Quarterly* 904

Municipal decisions

Alber Aziza Juman & Talibu Abdu Juman v Attorney General UHRC No G/577/1999

Attorney General (No 2) Supreme Court of Ghana

CHRAJ (No 1) v Attorney General (No 1) Supreme Court of Ghana

Gidudu Stephen v Attorney General UHRC No 210/99

Grootboom v Oostenberg municipality & Others 3 BCLR 277©

Idris Kasekende v Attorney General UHRC No 172/1998

Minister of Health v Treatment Action Campaign & Others CCT/8/02

S. Chepkwurai v Attorney General UHRC No S/42/02

The Republic v CHRAJ Ex-Parte, Dr Richard Anane Suit No AP 45/07

Websites

<http://www.hrw.org/reports/2001/africa/overview/factors.html> (accessed 3 May 2007)

<http://www.amnesty.org> (accessed 3 May 2007)

<http://www.nhri.net/pdf/RestAfrNhri.pdf> (accessed 5 August 2007)

<http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Cardenas.pdf> (accessed 13 August 2007)

http://www.ichrp.org/im_coverprojet/114_cover.jpg (accessed 20 August 2007)

<http://www.nhri.net/pdf/Final> (accessed 22 August 2007)

<http://www.sahrc.org.za> (accessed 2 October 2007)

<http://www.chr.org.za> (accessed 16 October 2007)

<http://www.allAfrica.com> (accessed 22 September 2007)

Reports

Annual Report CHRAJ 2002

Annual Report CHRAJ 2005

Annual Report SAHRC 1998/1999

Annual Report SAHRC 2000/2002

Annual Report SAHRC 2002/2003

Annual Report SAHRC 2003/2006

Annual Report UHRC 2003

Annual Report UHRC 2005

End of mission report submitted to Lesotho government by John Dwyer

Report on the first African Union conference of national human rights institutions 18-21 October 2004

Report by S Zarghami who was on internship at UHRC

Report by the promotional mission to Lesotho by the African Commission on Human and Peoples' Rights 3-7 April 2007

Other materials

ACHPR.Res.31(XXIV)98

ECOSOC resolution 2/9 of 21 June 1946

CHRAJ newsletter 10th anniversary edition

General Comment 10 adopted by Committee on Economic, Social and Cultural Rights in December 1998

Mauritius plan of action 1996

National institutions for the promotion and protection of human rights, fact sheet no. 19

Paper by L Mokate 'Monitoring economic and social rights in South Africa: The role of the South African Human Rights Commission

Paper presented by Anna Bossman at the Commonwealth conference of national human rights institutions 26-28 February 2007

Paper presented by Margaret Sekaggya at the Commonwealth conference of national human rights institutions 26-28 February 2007

Performance and legitimacy: National human rights institutions international Council on Human Rights (2000)

Submission to South African Human Rights Commission enquiry into access to health care services by A Hassim, M Heywood & B Jonathan

Speech by Mary Robinson 'Human rights challenges in the 21st century' Dag Hammarskjold Foundation, Sweden

Working paper by S Cardenas 'Adaptive States: The proliferation of national human rights institutions' (2001).

Working paper by M Parlevliet 'National human rights institution and peace agreements: Establishing national human rights institutions in divided societies' (2006).

Vienna declaration and programme of action 1993

Yaounde declaration 1996

2005/2006 budget speech of Lesotho

National laws

Commission of Human Rights and Administrative Justice complaints procedure regulations 1994

Commission on Human Rights and Administrative Justice Act 1993

Constitution of the Republic of Ghana

Constitution of the Kingdom of Lesotho

Constitution of the Republic of South Africa

Constitution of the Republic of Uganda

Draft bill of Lesotho Human Rights Commission 2007

Human Rights Commission Act 54 of 1994

Uganda Human Rights Act No 4 of 1997

International legal instruments

African Charter on Human and Peoples' Rights 1981

International Covenant on Economic, Social and Cultural Rights 1966

