

**International Principles and Methods Employed by National Human Rights  
Institutions (NHRIs) as a Means of Promoting and Protecting Human Rights, a  
Case Study of the Malawi Human Rights Commission (MHRC)**

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## **DEDICATION**

To Lincoln, for being such a great source of inspiration. A wonderful and calm baby during mummy's studies.

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**ABBREVIATIONS**

AFP	Asia Pacific Forum of National Human Rights Institutions
AHRC	Australian Human Rights Commission
CBO	Community Based Organisation
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEDEP	Centre for the Development of People
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CHRR	Centre for Human Rights Rehabilitation
CSO	Civil Service Organisation
ECOSOC	UN Economic and Social Council
ENNHRI	European Network of National Human Rights Institutions
GA	General Assembly
HRC Act	Human Rights Commission Act
HRD	Human Rights Defender
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ICC-SCA	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights -Sub Committee on Accreditation
ICESCR	International Covenant on Economic Social and Cultural Rights
IHCHR	Iraq High Commission for Human Rights
MalawiLII	Malawi Legal Information Institute
MHRC	Malawi Human Rights Commission
NANHRI	Network of African of National Human Rights Institutions
NGO	Non-Governmental Organisation
NHRCK	National Human Rights Commission of the Republic of Korea
NHRI	National Human Rights Institution
OHCHR	Office of the United Nations High Commissioner for Human Rights
PIL	Public Interest Litigation
R2P	Responsibility to Protect
SAHRC	South African Human Rights Commission
SP	Strategic Plan
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UN	United Nations
UNDP	United Nations Development Program

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## CHAPTER ONE

### INTRODUCTION

#### 1.1. Contextual Background

The promotion and protection of human rights is no longer considered a matter within states' domestic jurisdictions. Rather, there is a growing international concern for the status of human rights, even for people in other states. This global concern has gone as far as promulgation of the controversial responsibility to protect (r2p) doctrine, whereby neglect and abuse of human rights by a state, of its nationals entitles other states to intervene, in order to protect those rights.<sup>1</sup> On the domestic level, the obligation to protect, respect and fulfil human rights which states have, both inherently and as a result of ratifying human rights instruments, entails taking well calculated steps and creating mechanisms for the promotion and protection of those rights.<sup>2</sup> Among the recommended mechanisms are National Human Rights Institutions (NHRIs).

NHRI's have been established in different states throughout the world. As opposed to international evaluators, NHRIs are preferred to monitor government's implementation of human rights standards due to the fact that they can easily understand local challenges and specific national situations.<sup>3</sup> Some of the other important roles that NHRIs play were highlighted in the Vienna Declaration and Programme of Action by the World Conference on Human Rights.<sup>4</sup> These include; 'playing an advisory role to competent authorities; taking a role in remedying human rights violations; and, carrying out human rights public awareness campaigns.'<sup>5</sup>

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<sup>1</sup> TW Bennett & J Strug *Introduction to International Law* (2013) 344.

<sup>2</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) *Professional Training Series No.4: National Human Rights Institutions: History, Principles, Roles and Responsibilities* (2010) 13.

<sup>3</sup> Commonwealth Secretariat *National Human Rights Institutions Best Practice Guide* (2001) 3.

<sup>4</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, (1993) Vienna 14-25, UN DOC. A/CONF.157/23.

<sup>5</sup> *Ibid*, Paragraph 36.

Another important principle that came out from the World Conference is the fact that whilst guidelines exist as to the requisites of a NHRI, each State retains the right to choose the framework most suited to its needs.<sup>6</sup> Hence it is not unusual to have different forms, names and structures for NHRIs. Further, NHRIs differ in terms of the functions which they perform, mode of establishment and appointment of members.<sup>7</sup> Despite these differences, coordination among NHRIs is encouraged.<sup>8</sup>

When NHRIs are established in individual states, it is very important to ensure that they are effective in discharging their mandate. As a core minimum, ‘Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights,’<sup>9</sup> popularly known as the Paris Principles, will act as a guide as to minimum requirements for setting up a new NHRIs, but also as a benchmarks for measuring different aspects of NHRIs.<sup>10</sup> As will be seen in later sections, some NHRIs do not conform to the Paris Principles. This study will therefore focus only on those NHRIs which are established in accordance with the Paris Principles,<sup>11</sup> which principles will be one of the tools used to assess a NHRI’s legitimacy and credibility.<sup>12</sup> It has been said that the Paris Principles ‘are a crude instrument in assessing the effectiveness of NHRIs.’<sup>13</sup> What this argument means is that there is more that must be considered when assessing the effectiveness of a NHRI. Hence other standards, developed by NHRIs’ regional networks, reputable organisations, institutions and agencies as well as best practices from other NHRIs will augment the Paris Principles in assessing the effectiveness of NHRIs.

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<sup>6</sup> Ibid.

<sup>7</sup> FL Seidensticker and A Wuerth ‘National Human Rights Institutions – Models, Programs, Challenges, Solutions- A study for the Ministry of Foreign Affairs of the People’s Republic of Viet Nam.’ (2010) 8, available at

[http://www.undp.org/content/dam/vietnam/docs/Publications/28236\\_NHRI\\_study\\_Final.pdf](http://www.undp.org/content/dam/vietnam/docs/Publications/28236_NHRI_study_Final.pdf) , accessed on 18 January 2016.

<sup>8</sup> S Livingstone and R Murray *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission, with Comparisons from South Africa* (2005) 2.

<sup>9</sup> General Assembly Resolution 48/134, 20 December 1993.

<sup>10</sup> Ibid.

<sup>11</sup> Seidensticker and Wuerth op cit (n7) 8.

<sup>12</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) ‘A brief history of NHRIs’ para 3, available at <http://nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx> , accessed on 9 December 2015.

<sup>13</sup> Livingstone and Murray op cit (n8) 4.

In realising the important role that NHRIs play in the justice system, and in keeping up with international standards, the republic of Malawi established a NHRI named the Malawi Human Rights Commission (MHRC). It was created under chapter XI of the 1994 Constitution of the Republic of Malawi and it became fully functional in 1999 after the enactment of the Human Rights Commission Act.<sup>14</sup> The Constitution and the Human Rights Commission Act grant the MHRC mandate to protect and promote human rights in the broadest sense possible, and to investigate human rights violations.<sup>15</sup>

Once a NHRI is established, and after it has carried out its basic functions for some time, there is need for an ongoing need for stock taking, capacity building and, corrective actions.<sup>16</sup> In that regard, MHRC undertook an assessment exercise to find out what is working and what is not. Some challenges were noted and recorded in a 2006 Situation Analysis Report.<sup>17</sup> Among some of the notable challenges include; inadequate investigative skills in members of staff, lack of direct enforcement powers, inaccessibility of the MHRC to rural communities, lack of resources, lack of a systematic approach in the Commission's work and inordinate emphasis on civil and political rights.<sup>18</sup> Corrective measures have been taken for some of those challenges, yet some remain unresolved. This study assesses the current principles and methods the MHRC has used or uses to promote and protect human rights in Malawi and the effectiveness of such principles and methods. The aim of such an assessment is to find out whether the MHRC adheres to international principles in its operations and to consider whether it could advance human rights better by improving its working methods.

## 1.2. Research Questions

This thesis will answer the following questions:

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<sup>14</sup> Chapter 3:08 of the Laws of Malawi.

<sup>15</sup> Section 129 of the Constitution of the Republic of Malawi and Section 12 of the Human Rights Commission Act.

<sup>16</sup> OHCHR op cit (n2) 160.

<sup>17</sup> See Malawi Human Rights Commission *Situation Analysis Report* (2006) at para 1.1.6.

<sup>18</sup> N Patel *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: the Malawi Human Rights Commission and the Office of the Ombudsman* (2009) 37.

1. What principles and methods should NHRIs use to promote and protect human rights?
2. What principles and methods has the MHRC used to promote and protect human rights?
3. How effective are the methods used by the MHRC and what have been the challenges?
4. How best can the MHRC improve in its operational methods in order to effectively promote and protect human rights?

### **1.3. Research Methodology**

This study is primarily based on desk research. In assessing international methods and principles for promoting and protecting human rights, the main sources of information to be consulted include human rights instruments and other soft law adopted by various organs of the UN. General Observations developed by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC); as well as source books on NHRIs mainly from the office of the United Nations High Commissioner for Human Rights; the Commonwealth Secretariat; and Amnesty International will be consulted.

Best practices of how other NHRI apply the international principles and methods of promoting and protecting human rights will be sought from; national legislation from different states; cases; academic books; journal articles; reports from different NHRIs, NGOs and other bodies; and from selected reputable internet sources.

When focusing on the MHRC, in addition to the above sources, the main source of information will be the Constitution of the Republic of Malawi, the Human Rights Commission Act and other selected pieces of legislation. In addition, MHRC's Annual Reports, as well as MHRC's 2011-2015 Strategic Plan will be consulted. These will provide MHRC's mandate, working methods, goals, targets, activities, budgets and challenges, among other information.

The author is also a serving member of the MHRC, since 2013. She works as a Principal Civil and Political Rights Officer (PCPRO). As such, she will draw on her own experiences.

#### **1.4. Limitations of the Study**

The evaluation of MHRC will be restricted from 2011 to 2015 due to time and space constraints. Further, this period will present the most current picture of the operations of the MHRC. Having said that, there will be instances where reference is made to events pre 2011 just to illustrate or emphasise a point.

Another limitation is that MHRC's 2015 Annual Report was not yet published at the time of writing this thesis hence discussion on activities undertaken by MHRC in 2015 will be very limited.

Further, there are several types and forms of NHRIs in existence. However this thesis will only focus on those NHRIs that adhere to the Paris Principles, as the internationally endorsed minimum standards for a NHRI.

Lastly, some challenges are anticipated in terms of getting hold of some NHRI's reports, including the MHRC's reports, due to an inefficient data storage system.

#### **1.5. Chapter Synopsis**

This first chapter has presented a general overview of the thesis, including an introduction and problem statement of the study to the effect that without an assessment of principles and methods adopted by a NHRI for the promotion and protection of human rights, some aspects may be falling short of international standards hence limit a NHRI's effectiveness. The chapter has also presented the aims and objectives of the study as well as the significance, which is to contribute to the effectiveness of the MHRC by recommending the retention of good and effective standards and methods of operation and the adjustment of unworkable methods, falling short of international standards. Other issues covered in the chapter include research methodology and study limitations.

Chapter two will define basic concepts including defining what NHRIS are. It will further trace the evolution of NHRIS and the current forms in which NHRIs exist. Lastly, the chapter will present an overview of the international as well as regional networks; and governing bodies for NHRIs and the important contributions that these bodies and networks make to the effectiveness of NHRIs.

Chapter three will analyse the specific international principles and methods for the promotion and protection of human rights. The Paris Principles will be the starting point which will be augmented by other standards, including General Observations issued by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) as well as literature from other authoritative bodies and organisations. The chapter will also present best practices of how other NHRIs have applied the principles and standards and also how other NHRIs have fallen short of the standards.

Chapter four will contain a general discussion of the MHRC. Its history, mandate, methods and practices for promoting and protecting human rights. These will be compared against the standards and principles discussed in chapter three. Shortfalls will be noted and strengths pointed out. Lastly, chapter five will conclude by presenting a summarised discussion of what the study is all about, including key findings and challenges. The final section of the chapter will contain recommendations, aimed at addressing some of the challenges.

## CHAPTER TWO

### WHAT ARE NATIONAL HUMAN RIGHTS INSTITUTIONS

#### 2.1. Introduction

This chapter builds on the previous chapter by defining and explaining some of the core concepts. Notably, it defines what NHRIs are and gives a brief history of their evolution. It then takes us to the present by discussing the different forms which NHRIs take. Lastly, the chapter concludes by presenting an overview of NHRIs' international and regional networks and the extent to which these networks have contributed to the effectiveness of NHRIs.

#### 2.2. Defining NHRIs and Tracing their Evolution

There is no one universally agreed definition for a NHRI. However, the UN defines it as 'a State funded body with a constitutional and / or legislative mandate to protect and promote human rights.'<sup>19</sup> Although NHRIs are created and funded by government, they are meant to be independent.

At the international level, the call for the creation of NHRIs in individual states can be traced to 1946, when the UN Economic and Social Council (ECOSOC) called upon member states to consider establishing human rights committees or information groups, which would advance the work of the UN Human Rights Commission in their respective countries.<sup>20</sup> Such calls were repeated by the ECOSOC and by the General Assembly in subsequent years.<sup>21</sup> During the 1960s and the 1970s several human rights instruments had been adopted by the UN, notably, the bill of rights, comprised of the Universal Declaration of Human Rights (UDHR),<sup>22</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>23</sup> in 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>24</sup> in 1966. Other instruments adopted during this period include the International Convention on the Elimination of all Forms of Racial

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<sup>19</sup>OHCHR op cit (n2) 13.

<sup>20</sup> ECOSOC Resolution 2/9, 21 June 1946.

<sup>21</sup> See ECOSOC Resolution 772B (XXX) 25 July 1960 and GA Resolution 36/440, 1981.

<sup>22</sup> GA Resolution 217A (III), 10 December 1948.

<sup>23</sup> GA Resolution 2200 (XXI), 16 December 1966, entry into force: 23 May 1976.

<sup>24</sup> GA Resolution 2200A (XXI), 16 December 1966, entry into force: 3 January 1976.

Discrimination (CERD)<sup>25</sup> in 1965 and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>26</sup> in 1979. The need to implement these instruments at the domestic level contributed further to the calls for the creation of NHRI in member states.<sup>27</sup>

Between 1946 and 1991 there had been several developments pertaining to NHRIs. Notably, the 1978 Seminar on National and Local Institutions for the Promotion and Protection of Human Rights which was organised by the Commission on Human Rights. At this seminar, guidelines for the structure and functions of NHRIs were outlined.<sup>28</sup> Some of the outlined functions included to act as a source of human rights information for the general public; to undertake public awareness campaigns for human rights; to make recommendations and advice government on human rights issues and; to review judicial, legislative, and administrative decisions for conformity with human rights standards.<sup>29</sup> The seminar did not suggest any particular structure for NHRIs. However, it made the following recommendations; NHRI's composition should represent all sections of society;<sup>30</sup> NHRIs must have structures to facilitate easy access by the general public; finally, NHRIs must have regional branches.<sup>31</sup> These guidelines were eventually endorsed by the UN General Assembly. These guidelines are very important and as will be seen in subsequent discussions; they form the basis of the widely accepted responsibilities and composition of NHRIs, which this study will keep on making reference to.

The UN kept on making calls for the establishment of NHRIs throughout the 1970s and 80s.<sup>32</sup> The main emphasis was the encouragement for setting up NHRIs in respective

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<sup>25</sup> GA Resolution 2106 A (XX), 21 December 1965, entry into force: 4 January 1969.

<sup>26</sup> GA Resolution 34/180, 18 December 1979, entry into force: 3 September 1981.

<sup>27</sup> B Lindsnaes and L Lindholt 'National Human Rights Institutions: Standard Setting and Achievements' in H Stokke and A Tostensen (eds) *Human Rights in Development Yearbook Global Perspectives and Local Issues* (1998) 5.

<sup>28</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Fact Sheet No.19: National Institutions for the Promotion and Protection of Human Rights,' available at <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf> , accessed on 10 December 2015.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> See A/RES/34/49, 23 November 1979; A/RES/36/134, 14 December 1981; and, A/38/416, 1983.

states and also stressing the role of the UN to provide financial and technical assistance and also to facilitate the exchange of information and experiences among NHRIs.<sup>33</sup>

A seminal development in the history of NHRIs was the International Workshop on National Institutions for the Promotion and Protection of Human Rights, convened by the UN Commission on Human Rights from 7 to 9 October 1991.<sup>34</sup> Participants included members of national and regional institutions, NGOs and Intergovernmental Organisations for the promotion and protection of human rights. Also present were State representatives, as well as representatives from the UN and its specialised agencies.<sup>35</sup> The objectives of the workshop were to review and share information on existing NHRIs.<sup>36</sup> A significant output of the workshop are the guiding principles which were developed to act as minimum benchmarks for the establishment, functioning and composition of NHRIs. These guidelines are called ‘Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights,’<sup>37</sup> popularly known as the Paris Principles, in reference to the place where they were developed. These principles were later adopted by UN Commission on Human Rights in 1992,<sup>38</sup> and later on endorsed by the UN GA in 1993.<sup>39</sup> Despite the fact that the Paris Principles are not legally binding, the global consensus and the subsequent endorsement by the Vienna World Conference on Human Rights in 1993, has raised their status.<sup>40</sup>

The Paris Principles focus on four main areas: competence and responsibilities; composition and other guarantees of independence; methods of operations; and principles applicable to commissions with a quasi-judicial mandate. The Paris Principles are the core minimum. They do not prescribe how a NHRI should operate nor do they prescribe the structure which it should take. This acknowledges the diversity among

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<sup>33</sup> Lindsnaes and Lindholt op cit (n27)7.

<sup>34</sup> OHCHR op cit (n2) 7.

<sup>35</sup> OHCHR op cit (n 28) 9.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> United Nations Commission on Human Rights, Resolution 1992/54, 3 March 1992.

<sup>39</sup> General Assembly resolution 48/134 op cit (n 9).

<sup>40</sup> Commonwealth Secretariat *Comparative Study on Mandates of National Human Rights Institutions in the Commonwealth* (2007) 22.

states, both in terms of economies, pressing human rights issues, legal and political values as well as levels of democracy.<sup>41</sup>

### 2.3. Forms of NHRIS

Currently, 106 NHRIs exist in different parts of the world,<sup>42</sup> and they take different forms and perform various, and at time, different functions. There are six models of NHRIs in the world viz; ‘Human rights commissions; Human rights ombudsman institutions; Hybrid institutions; Consultative and advisory bodies; Institutes and Centres and; Multiple institutions.’<sup>43</sup> According to a 2009 survey by the office of the United Nations High Commissioner for Human Rights, the majority of NHRIs took the form of human rights commissions, comprising 58% of all the models, followed by ombudsman institutions, comprising 30%.<sup>44</sup> The name which an institution goes by should not mislead one to reach a conclusion whether an institution is or is not a NHRI. Only by a careful analysis of the enabling law, including its mandate can such a determination be rightly made.<sup>45</sup>

Human Rights Commissions or the Commonwealth model, as they are popularly known,<sup>46</sup> are the most common form of NHRIs.<sup>47</sup> They are characterised by a broad mandate, with both human rights promotional and protective functions, and covering jurisdiction over both the public and private sectors.<sup>48</sup> Examples of specific promotional functions include human rights education and training,<sup>49</sup> whilst protection functions

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<sup>41</sup> Ibid.

<sup>42</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) ‘Chart of the Status of National Institutions,’ (2014) available at <http://nhri.ohchr.org/EN/AboutUs/ICC/ACCreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf>, accessed on 11 December 2015.

<sup>43</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) ‘Roles and Types of NHRIs,’ available at <http://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx>, accessed on 11 December 2015.

<sup>44</sup> OHCHR op cit (n2) 15.

<sup>45</sup> Ibid.

<sup>46</sup> This is because they originated from, and are very popular among Commonwealth countries. The first countries to establish Human Rights Commissions were United Kingdom in 1976, followed by Canada and New Zealand, both in 1977. See AE Pohjolainen *The Evolution of National Human Rights Institutions - The Role of the United Nations* (2006) 16.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 16-17.

<sup>49</sup> Ibid 17.

include investigating instances of human rights violations, handling individual complaints and intervening in court cases involving serious, systematic or pervasive allegations of human rights violations.<sup>50</sup> Other functions include provision of advisory services to government as well as monitoring government's compliance with international human rights obligations.<sup>51</sup> Despite being characterised by a broad mandate, other human rights commissions have a specific focus. For example, equality and discrimination.<sup>52</sup> The composition of most human rights commissions is pluralistic, representing as wider section of society as possible.<sup>53</sup> They 'clearly conform to the model set out in the Paris Principles.'<sup>54</sup>

The second model of NHRIs is known as Ombudsmen. Also known as 'protector of citizens, mediator, defender of people, or parliamentary commissioner.'<sup>55</sup> They are characterised by a very narrow mandate, usually focusing on providing legal protection to individuals. Consequently, complaints handling is a core component of this model of NHRI.<sup>56</sup> Other Ombudsmen institutions focus on how government officials discharge their duties. In that regard, the office of the Ombudsman is empowered to investigate instances of failure to perform duties by governmental officials.<sup>57</sup> Since Ombudsmen are usually managed by a single person, there is no pluralist representation of society,<sup>58</sup> which is one of the factors putting them at odds with the Paris Principles, as will be discussed in due course.

Hybrid or Human Rights Ombudsmen are the third model for NHRIs. They combine some features of human rights commissions and typical ombudsmen institutions.<sup>59</sup> However, unlike a typical ombudsman institution, human rights ombudsmen go beyond the monitoring and investigating of maladministration by public officers. Their mandate

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<sup>50</sup> Seidensticker and Wuerth op cit (n7) 8.

<sup>51</sup> Pohjola op cit (n 46) 17.

<sup>52</sup> OHCHR op cit (n2) 16.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> JB Marie 'National Systems for the Protection of Human Rights' in J Symonides *Human Rights: International Protection, Monitoring, Enforcement* (ed) (2003) 265.

<sup>56</sup> Seidensticker and Wuerth op cit (n7) 8.

<sup>57</sup> Section 245 of the Constitution of the Kingdom of Thailand.

<sup>58</sup> Pohjola op cit (n 46) 18.

<sup>59</sup> Ibid.

includes promoting and protection of human rights albeit limited to the public sector.<sup>60</sup> Hence they can undertake human rights education and training, just as human rights commissions do. Human rights ombudsmen are not an ideal NHRI. For instance, addressing several issues like human rights, corruption and maladministration runs the risk of paying less attention to human rights issues.<sup>61</sup> However, they are times when they are the only practical model, given a country's financial and human resource, as well as small geographical size and population.<sup>62</sup> Human right ombudsmen are known to save on infrastructure costs and to provide the convenience of addressing several issues under one roof.<sup>63</sup>

The fourth type of NHRIs are called Consultative and Advisory Committees, also referred to as the "French Model," due to the fact that they are based on the National Consultative Commission of Human Rights of France.<sup>64</sup> They are very common in Francophone Africa.<sup>65</sup> Their main focus is on playing an advisory role to government; providing human rights education, undertaking human rights research and advocacy.<sup>66</sup> Advisory Committees also seeks to achieve a pluralist representation of society. The committees are larger in number thereby contributing to a larger representation of society.<sup>67</sup>

The fifth model of NHRIs are Institutes and Centres. They usually focus on undertaking academic research.<sup>68</sup> Hence, the provision of human rights education and advice is a primary function.<sup>69</sup> Human rights institutes also comment and input into legislative bills.<sup>70</sup> They do not adjudicate individual complaints, nor do they investigate human

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<sup>60</sup> Ibid.

<sup>61</sup> OHCHR op cit (n2) 18.

<sup>62</sup> OHCHR Regional Office for South-East Asia 'Technical Note on the National Human Rights Commission of Thailand in the Draft 2015 Constitution' (2015) 4, available at <http://bangkok.ohchr.org/files/OHCHR%20on%20NHRI%20150327.pdf>, accessed on 8 December 2015.

<sup>63</sup> OHCHR op cit (n2) 18.

<sup>64</sup> Pohjolainen op cit (n 46) 17.

<sup>65</sup> Ibid.

<sup>66</sup> Seidensticker and Wuerth op cit (n7)8.

<sup>67</sup> Pohjolainen op cit (n 46) 18.

<sup>68</sup> B Rudolf 'The German Institute for Human Rights' (2011) 113 (387) *Nova Acta Leopoldina NF* 19-24 at 19.

<sup>69</sup> Pohjolainen op cit (n 46) 19

<sup>70</sup> Ibid.

rights violations.<sup>71</sup> In terms of composition, the governing body for human rights institutes is meant to be representative of the society at large.<sup>72</sup> Human rights institutes have been established in several countries and some of them are accredited as being fully compliant to the Paris Principles. Accredited human rights institutes include the Danish Centre for human rights, the German Institute for Human Rights and the Norwegian Centre for Human Rights,<sup>73</sup> recently, the Netherlands Institute for Human Rights, which was accredited in 2014.<sup>74</sup>

The sixth and last model for NHRIs is called multiple institutions. Several states have established several thematic NHRIs with a mandate to promote and protect specific human rights; for example, children's rights.<sup>75</sup> Where these multiple national institutions exist it is encouraged that they coordinate with each other to avoid duplication of activities. Coordination is also needed to make it possible to share information and refer relevant cases to the institution with the relevant competence.<sup>76</sup> It is further encouraged that multiple institutions be consolidated to form one national NHRI. Otherwise only one of them will be accredited as a NHRI, unless there are compelling reasons for accrediting several.<sup>77</sup> The only five thematic NHRIs that are accredited as NHRIs are found in countries where there are no national human rights commissions or ombudsman in existence.<sup>78</sup> Similarly, in states where there are human rights commissions as well as ombudsperson institutions,<sup>79</sup> the latter is at a disadvantage as only one is usually accredited.

The common thing with all the above models is that they are independent bodies, tasked with promoting and protecting human rights. However this thesis focuses on NHRIs

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> *ibid* 29.

<sup>74</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) *op cit* (n 42) 6.

<sup>75</sup> See UN Committee on the Rights of the Child calls for the creation of thematic NHRIs focusing on children's rights in General Comment No 2 *National Human Rights Institutions in the Promotion and Protection of the Rights of the Child* para 1.CRC /GC/2002/2 adopted 15 November 2002.

<sup>76</sup> OHCHR *op cit* (n2) 19.

<sup>77</sup> LC Reif 'Boundaries of NHRI Definition' in R Goodman and T Pegram (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2012) 58.

<sup>78</sup> Ibid.

<sup>79</sup> As is the case in 'Greece, Norway, Tanzania and Malawi. *Ibid*

modelled on the Paris Principles, hence most examples in this dissertation will be based on human rights commissions for the fact that they present the clearest example of a NHRI envisaged in the Paris Principles.

#### **2.4. International and Regional Governing Bodies and Networks**

Another significant development in the study of NHRIs is the establishment of an International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) in 1993, which is registered as a legal entity in Switzerland.<sup>80</sup> This is an international association for NHRIs from all over the world. It provides leadership and guidance in the promotion and protection of human rights.<sup>81</sup> Among some of the ways in which the ICC does that is through assisting in setting up NHRIs in countries where none exist; guiding and facilitating the interaction between NHRIs and the UN Human Rights Council, and also between NHRIs and Treaty Bodies; organising periodic meetings and conferences through which NHRIs can share information and best practices; undertaking capacity building; and; assisting NHRIs facing different threats.<sup>82</sup>

The ICC also promotes adherence to the Paris Principles.<sup>83</sup> Through a Sub Committee on Accreditation (SCA) the ICC accredits NHRIs in accordance to the NHRI's level of compliance to the Paris Principles. As of 2014, 71 NHRIs had 'A status,' meaning they were fully compliant with the Paris Principles, 25 had 'B status,' meaning they were not fully compliant with the principles and ten NHRIs had 'C status', meaning they were not compliant with the principles, hence no status before the ICC and other UN forums.<sup>84</sup> This accreditation is done periodically, once in every five years. Hence, if an NHRI falls short of the Paris Principles, it is downgraded. A recent example of a NHRI which was downgraded from A to B status is the National Human Rights Commission of Thailand in November 2015. Some of the reasons for the downgrading include the

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<sup>80</sup> ICC 'A brief history of the ICC' available at <http://nhri.ohchr.org/EN/AboutUs/Pages/History.aspx> , accessed 11 December 2015.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> ICC op cit (n 42).

lack of transparency in the selection and appointment processes for commissioners and the lack of functional immunity to allow members to effectively discharge their duties.<sup>85</sup>

The indirect pressure that this periodic review exerts on NHRIs and governments is enormous. It actually contributes positively to the promotion and protection of human rights. In general, the ICC will make some recommendations to NHRIs for improvement in certain aspects, before downgrading them. Most NHRIs will implement the recommendations, and this contributes to the effectiveness of the NHRIs hence, to an improvement in the promotion and protection of human rights.

There are also benefits and privileges of being adjudged fully compliant with the Paris Principles. In addition to being recognised internationally, NHRIs with A status can participate fully in the meetings and conferences of the ICC, with voting rights, and they can hold office in organs of the ICC. They can also participate in UN Human Rights Council's sessions and make contributions on any agenda item.<sup>86</sup> In addition, they have a right to separate seating from government and NGOs; and they can organise side events on matters of relevance to the Human Rights Council.<sup>87</sup> This is in contrast to those NHRIs with 'B' status whose participation in ICC and Human Rights Council meetings is limited to that of observers, which means that they cannot vote or make any contributions on agenda items. Worse still, NHRIs with 'C Status' have no privileges whatsoever with both the ICC and the Human Rights Council. They can only attend ICC meetings upon invitation.<sup>88</sup>

The ICC-SCA has also played an important role of interpreting and expounding on the Paris Principles, which have at times been criticized as 'vague and unworkable.'<sup>89</sup> The ICC -SCA, pursuant to the SCA Rules of Procedure<sup>90</sup> has developed some General

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<sup>85</sup> ICC Sub-Committee on Accreditation (ICC-SCA) 'Report and Recommendations of the Session of the Sub-Committee on Accreditation' 27-31 October 2014, paragraph 3.10.1.

<sup>86</sup> ICC 'ICC Sub-Committee on Accreditation (ICC-SCA),' available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx> , accessed on 11 December 2015.

<sup>87</sup> European Union Agency for Fundamental Rights *Handbook on the Establishment and Accreditation of NHRIs in the EU* (2012) 36.

<sup>88</sup> ICC op cit (n 86).

<sup>89</sup> J Mertus 'Evaluating NHRIs: Considering Structure, Mandate, and Impact' in Goodman and Pogram (eds) op cit (n 77) 79.

<sup>90</sup> Sections 6.2 - 6.3

Observations, to be used as interpretive tools for the Paris Principles. These are very useful and will be referred to quite extensively in subsequent sections of this thesis.

At the regional level, there are four regional NHRIs' forums. The Asia Pacific Forum of National Human Rights Institutions (APF) was established in 1996. Its secretariat is based in Australia. It is the earliest and most developed of the five regional networks.<sup>91</sup> It is composed of 22 NHRIs.<sup>92</sup> For the African region, there is the Network of African NHRIs (NANHRI) established in 2007 and based in Nairobi, Kenya. It is composed of 44 members. There are sub-regional forums for NHRIs in West Africa, as well as East Africa.<sup>93</sup> For the Americas and Caribbean region,<sup>93</sup> there is the Network of National Institutions for the Promotion and Protection of Human Rights in the Americas, formed in the year 2000.<sup>94</sup> Lastly, for Europe, the European Network of National Human Rights Institutions (ENNHRI) was established in 2013 and has its secretariat in Brussels, Belgium. It is comprised of 34 NHRIs in the region.<sup>95</sup>

The importance of NHRIs coordination at the international and regional levels cannot be overemphasised. The main purpose of forming networks is to enable members to share information.<sup>96</sup> Hence coordination enables the NHRIs to learn from each other and also to adopt each other's best practices and improve performance in promoting and protecting human rights. By discussing and considering different alternatives, possibilities which were not even conceived by any of the NHRIs are discovered,<sup>97</sup> Further, coordination and networking allows NHRIs to learn of peers' achievements which in turn pushes and urges a NHRI to meet agreed standards.<sup>98</sup> The form of peer review which pushes NHRIs to meet agreed standards is deemed constructive and objective since it happens on the international level where peers have no political or

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<sup>91</sup> Asia Pacific Forum of National Human Rights Institutions (APF) *A Manual on National Human Rights Institutions* (2015) 273.

<sup>92</sup> Asia Pacific Forum (APF) 'About the Asia Pacific forum' available at <http://www.asiapacificforum.net/about/> accessed on 12 December 2015.

<sup>93</sup> Commonwealth Secretariat op cit (n40) 48.

<sup>94</sup> Ibid 33.

<sup>95</sup> European Network of National Human Rights Institutions (ENNHRI) 'about ENNHRI,' available at <http://www.ennhri.org/about.html> , accessed on 12 December 2015.

<sup>96</sup> G De Beco *Non-judicial Mechanisms for the Implementation of Human Rights in European States* (2010) 141.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid 142.

other interests that may be present at the domestic level. These international peers are also in a better position to offer constructive feedback as some of them are aware of the problems that are there on the ground when discharging their mandate.<sup>99</sup> Coordinating and networking can also contribute to saving of resources, where instead of carrying out research on certain areas of common interest, common standards may be readily available from other NHRIs. Coordination and networking can contribute to support, be it financial, material or expertise, which most NHRIs lack. As explained earlier on, the ICC provides capacity building.<sup>100</sup>

Another importance of networking and coordination among NHRIs is the fact that it might actually increase individual governmental support to a NHRI on the basis that a government may consider the exclusion of its NHRI from networks, as embarrassing and as affecting its reputation.<sup>101</sup> Finally, networks offer some protection to NHRIs due to the collective reaction to any threats, be it from the government or any other sources.<sup>102</sup> For example, in 2008, the Presidential Transition Committee in the Republic of Korea announced to incorporate the National Human Rights Commission of the Republic of Korea (NHRCK) under the office of the president. ‘The international community, including the ICC and the OHCHR, successfully supported the NHRCK in opposing this proposal.’<sup>103</sup>

## 2.5. Conclusion

This chapter has defined NHRIs and presented the historical development of the recognition of NHRIs at the international level. At first being seen as a mechanism to advance the work of the UN Human Rights Commission, and to help governments meet human rights obligations under different human rights instruments, eventually being mandated to perform general human rights protective and promotional functions. At the centre of the historical developments, the seminal Workshop on National Institutions for the Promotion and Protection of Human Rights was highlighted as it adopted the ‘Paris Principles Relating to the Status and Functioning of National Institutions for the

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<sup>99</sup> European Union Agency for Fundamental Rights op cit (n 87) 44.

<sup>100</sup> De Beco op cit (n 96) 143.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Seidensticker and Wuerth op cit (n7) 13.

Protection and Promotion of Human Rights (Paris Principles). Following their endorsement by the UNGA, these have been accepted as the core minimum principles establishing NHRIs and for assessing different aspects of a NHRI.

The following models of NHRIs were discussed; Human rights commissions; Human rights ombudsman institutions; Hybrid institutions; Consultative and advisory bodies; Institutes and Centres and; Multiple institutions. Human rights commissions being the most common form and clearly conforming to the Paris Principles. States retain the discretion to choose from any of these models.

Finally, the chapter discussed international as well as regional networks which a NHRI is encouraged to belong to, for the benefits that the networks offer. At the international level the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) is the Association for all NHRIs around the world. Whilst at the regional level there is the Asia Pacific Forum of National Human Rights Institutions (AFP); Network of African NHRIs (NANHRI); Network of National Institutions for the Promotion and Protection of Human Rights in the Americas; and the European Network of National Human Rights Institutions (ENNHRI). These networks perform the following roles; promoting adherence to the Paris Principles , providing leadership and guidance in the promotion and protection of human rights, assisting in setting up NHRIs in countries where none exist and guiding and facilitating the interaction between NHRIs and the UN Human Rights Council, and also between NHRIs and Treaty Bodies. In addition, the networks assist in organising periodic meetings and conferences through which NHRIs can share information and best practices; undertake capacity building; and; assist NHRIs facing different threats. These roles contribute to the effectiveness of the NHRIs

## CHAPTER 3

### INTERNATIONAL PRINCIPLES AND METHODS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND THEIR IMPLEMENTATION BY NHRIS

#### 3.1. Introduction

This chapter builds on the previous two chapters by going into the specific international standards and methods for the promotion and protection of human rights. The Paris Principles briefly introduced in the previous chapter will be the starting point and they will be augmented by other standards, including General Observations issued by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) as well as best practice guides from other authoritative bodies and organisations. The chapter will also present best practices of how other NHRIs have applied the principles and standards and how others have fallen short of the standards. The aim is to draw lessons, some of which will form the basis for comparison with, and recommendations for the improvement of the Malawi Human Rights Commission in subsequent chapters.

The Paris Principles cover the following main aspects of a NHRI: competence and responsibilities; composition, guarantees of independence and pluralism; methods of operation; and principles applicable to NHRIs with a quasi-judicial mandate. This chapter will cover those broad areas.

#### 3.2. Enabling Instrument

According to the Paris Principles, a NHRI's mandate should be specifically set out in its constitutive instrument.<sup>104</sup> Following this principle, the constitutive instruments will be discussed first, before going into the discussion for mandate. There are generally three types of constitutive instruments that have been used by states to create NHRIs; Constitutions, Acts of parliament and Executive Instruments.<sup>105</sup> Although it has been said that there is no evidence to prove that NHRIs established by means of an executive decree are less independent, as compared to those established by the constitution or by

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<sup>104</sup> Paris Principles section A.2.

<sup>105</sup> Lindsnaes and Lindholt op cit (n 27) 11.

legislation,<sup>106</sup> the Sub Committee on Accreditation (ICC-SCA) recently took a position against the creation of NHRIs by means of executive instruments. The reason is that executive instruments can be cancelled at any time, without being subjected to legislative scrutiny, hence the independence and permanency of the NHRI is not guaranteed.<sup>107</sup> Despite those sentiments, executive decrees may at times be the only viable means of establishing an NHRI. Particularly where the legislative arm of government does not seem keen to exercise its powers to create an NHRI through the law. This was the case in Kazakhstan.<sup>108</sup>

The second mode of creating NHRIs is through constitutional provisions. Countries emerging from an era characterised by massive human rights violations usually establish their NHRIs by means of the Constitution.<sup>109</sup> Such a step is seen as part of the democratisation process, or as way of merely creating an impression that they are taking progressive steps to address human rights situations.<sup>110</sup> Examples of such countries include Philippines and Thailand, whose NHRIs are created by, and entrenched into their respective Constitutions.<sup>111</sup> Similarly, immediately after emerging from the apartheid regime, the South African Human Rights Commission (SAHRC) was created through a constitutional mandate.<sup>112</sup>

The third, and last, means of establishing NHRIs is through an Act of Parliament or by other law. This is the most popular means of creating NHRIs. Apart from ensuring the long existence and independence of the NHRI, creation of a NHRI by means of law is a means of enabling the NHRI to defend its legal mandate and power, in case they are challenged.<sup>113</sup> The legal instrument creating a NHRI also confers popular legitimacy to

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<sup>106</sup> Ibid 12.

<sup>107</sup> International Coordinating Committee's Sub-Committee on Accreditation (ICC SCA) 'General Observations,' adopted May 2013. Para 6.6. Para 1.1.

<sup>108</sup> Lindsnaes and Lindholt op cit (n 27) 12.

<sup>109</sup> Ibid 11.

<sup>110</sup> 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* 1 at 23.

<sup>111</sup> A Corkery 'National Human Rights Institutions' in United Nations Development Program (UNDP) *Accelerating Achievement of MDGs by Ways and Means of Economic and Social Rights* (2012) 137.

<sup>112</sup> OC Okafor 'National Human Rights Institutions in Anglophone Africa: Legalism, Popular Agency, and the "Voices of Suffering"' in Goodman and Pegram (eds) op cit (n 77) 127.

<sup>113</sup> International Council on Human Rights Policy (ICHRP) and United Nations Office of the High Commissioner for Human Rights *Assessing the Effectiveness of National Human Rights Institutions* (2005) 13.

the NHRI.<sup>114</sup> Suffice to say that creating NHRIs through a constitutional mandate is the most viable option for creating a NHRI due to the fact that the procedures for amending constitutions in most regimes are very strict, as compared to the procedures for amending other Acts of Parliament.<sup>115</sup>

### **3.3. Mandate and Responsibilities**

According to the Paris Principles, it is crucial that a NHRI is given as broad a mandate as possible to allow it to effectively promote and protect human rights.<sup>116</sup> Because human rights are interdependent, interrelated and indivisible, it is important that the mandate of a NHRI be broad so as to cover all categories of human rights.<sup>117</sup> There is usually a tendency for NHRIs to ignore the promotion and protection of economic social and cultural rights (ESCR). This can be attributed to the ‘historical bias in favour of civil and political rights,’ and the acute shortage of resources in some countries.<sup>118</sup> However, there is evidence that where efforts to promote ESCR are intensified there is a corresponding rise in ESCR complaints before a NHRI. This was noted in the Ugandan Human Rights Commission (UHRC).<sup>119</sup>

The following section will cover recommended specific responsibilities under a NHRI’s broad mandate.

#### **3.3.1. Ensuring the Ratification and Implementation of Human Rights Instruments**

A NHRI must ensure that states ratify and implement human rights instruments,<sup>120</sup> and that domestic laws, regulations and other practices are in line with international human rights standards.<sup>121</sup> A NHRI must also ensure that states comply with treaty obligations by, among other means, submitting periodic reports to treaty monitoring bodies and other regional forums.<sup>122</sup> Among the crucial treaty obligations which a NHRI must monitor compliance with are those dealing with migrant workers and refugees.<sup>123</sup> In that

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<sup>114</sup> Ibid.

<sup>115</sup> Lindsnaes and Lindholt op cit (n 27) 11.

<sup>116</sup> Paris Principles, Section A.2.

<sup>117</sup> Commonwealth Secretariat op cit (n40) 18.

<sup>118</sup> Okafor op cit (n112) 145.

<sup>119</sup> Ibid, 146.

<sup>120</sup> Paris Principles, sections A. 3 (c).

<sup>121</sup> Ibid, sections A.3 (b).

<sup>122</sup> Ibid, sections A. 3 (d).

<sup>123</sup> Commonwealth Secretariat op cit (n3) 35.

respect, a NHRI should have powers to inspect places of detention including refugee and immigration camps. Other places of detention include ‘prisons and correctional institutions.’<sup>124</sup>

### **3.3.2. International Cooperation and Interaction with International and Regional Human Rights Systems**

A NHRI has the responsibility to maintain cooperation and interaction with international and regional human rights systems.<sup>125</sup> Some of the ways in which a NHRI can achieve this is through submission of shadow reports to Treaty Body Committees and to the UN Human Rights Council’s Universal Periodic Review and other Special Mechanisms. After submission of reports, a NHRI must monitor a State’s implementation of the recommendations and concluding observations made therefrom.<sup>126</sup> Another way of interacting with the international human rights system is by facilitating, and where necessary, assisting in ‘country visits carried out by UN human rights experts,’<sup>127</sup> as well as experts from the regional human rights systems.

### **3.3.3. Assisting with Research and Formulation of Human Rights Programmes; and Public Awareness Campaigns.**

NHRIs are further supposed to take on the responsibility of assisting research and formulation of human rights programmes for teaching purposes;<sup>128</sup> as well as embarking on human rights public awareness campaigns.<sup>129</sup> There are several ways through which a NHRI can execute this mandate, including conducting research, incorporating human rights in school curricula, developing tool kits, conducting training and carrying out public sensitization campaigns.<sup>130</sup> In order to reach out to as many people as possible, including grassroots, NHRIs with limited resources and capacity should be able to coordinate and utilise the services of Community Based Organisations (CBOs), Civil Service Organisations (CSOs) and other groups with presence on the ground, and the

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<sup>124</sup> Ibid 20.

<sup>125</sup> Paris Principles, sections A.3 (e).

<sup>126</sup> General Observations, op cit (n 107) para 1.4

<sup>127</sup> Ibid.

<sup>128</sup> Paris Principles, sections A.3 (f).

<sup>129</sup> Ibid, sections A.3 (g).

<sup>130</sup> Commonwealth Human Rights Initiative ‘Civil Society and National Human Rights Institutions’ (2011) 13(4) *International Journal of Not-for-Profit Law* 5 at 42.

NHRI should provide support in the form of resources and/or expertise to these partners.<sup>131</sup>

These core responsibilities are undertaken by most of NHRIs. However other NHRIs add on to the list, under the Paris Principle that mandates a NHRI ‘to consider any situation of violation of human rights which it decides to take up.’<sup>132</sup>

### **3.4. Complaints Handling**

This is one of the main distinguishing factor in the protective mandate of NHRIs. Whilst some NHRIs have the mandate to deal with individual petitions and complaints from the general public, other NHRIs do not have this function.<sup>133</sup> This difference is recognised in the Paris Principles and is dealt with in the last section entitled ‘Additional principles concerning the status of commissions with quasi-judicial competence.’ NHRIs with complaints handling mandate must be able to carry out investigations. This is justified on the need to have an independent body to be able to investigate and ably handle complaints against institutions that normally carry out investigation functions, like the police.<sup>134</sup> Further, a complaints handling NHRI must have the power to call for relevant documentation from both public and private actors; power to summon witnesses; and to inspect premises, including places of detention.<sup>135</sup>

The complaints-handling mandate is vital and can be an effective means of promoting and protecting human rights. The remedies which a NHRIs can offer when undertaking complaints handling differ. However the Paris Principles recommend several options including; advising the petitioner of his or her rights and possible remedies; referring the matter to other relevant authorities; drawing the attention of authorities responsible for the complained violations and making recommendations on how they can remedy the situation.<sup>136</sup> Some NHRIs can recommend compensation by the respondent to the

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<sup>131</sup> Ibid.

<sup>132</sup> Paris Principle, section A.3 (a) (ii).

<sup>133</sup> Lindsnaes and Lindholt op cit (n 27) 18.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Paris Principles, Section D.

victim.<sup>137</sup> However, it is important to keep in mind that the guiding principle in complaints handling is the need to achieve an amicable settlement.<sup>138</sup>

It is good practice for a NHRI to strike a balance between the need to address individual complaints and systematic human rights violations.<sup>139</sup> Complaints received by a NHRI must be analysed to identify common human rights issues. An example of a good practice can be mirrored from the Lithuanian Children's Rights Ombudsman whereby after analyzing individual complaints, 'three complaints on the same issue constitutes a problem,' which triggers systematic monitoring of the problem.<sup>140</sup>

The quasi-judicial nature of the complaints-handling process allows the complainants to access a remedy for human rights violations whilst avoiding the challenges associated with formal judicial processes. Unlike the formal judicial process, the quasi-judicial complaints-handling process is very flexible and informal, 'less time consuming, non-confrontational and less costly, making it user friendly and accessible to most vulnerable members of the society'.<sup>141</sup>

Although complaints-handling NHRIs usually have such a broad mandate, most encounter challenges when it comes to enforcing their decisions. This is due to the fact that decisions of most NHRIs are recommendatory, with no binding force.<sup>142</sup> A few NHRIs have been given some extra powers that mitigates against this lack of enforceability of decisions. For example, other NHRIs have some powers akin to a court exercising civil jurisdiction. The Indian Human Rights Commission falls into that category.<sup>143</sup> When handling complaints laid before it, the Indian Human Rights Commissions has power 'to summon the attendance of witnesses and examine them on oath; to summon the production of documents including public records; receive evidence on affidavits; and power to enter premises and seize documents.'<sup>144</sup> The

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<sup>137</sup> For example 'Australia, Canada, Ghana, India, New Zealand, Nigeria, Philippines, South Africa and Uganda'- Lindsnaes and Lindholt op cit n (n 27) 19.

<sup>138</sup> Paris Principles, Section D (a).

<sup>139</sup> Commonwealth Secretariat op cit (n3) 20.

<sup>140</sup> R Carver 'NHRIs in Central and Eastern Europe: The Ombudsman as Agent of International Law' in Goodman and Pegram (eds) op cit (n 77) 204.

<sup>141</sup> Lindsnaes and Lindholt op cit (n 27) 18.

<sup>142</sup> Ibid.

<sup>143</sup> Sec 13 of the Indian Protection of Human Rights Act, 1993.

<sup>144</sup> Ibid.

Ugandan Human Rights Commission (UHRC) has similar powers. In addition, it can commit people to prison for contempt of its decisions and orders;<sup>145</sup> it can order the release of detained persons and; can provide any other suitable legal remedies.<sup>146</sup>

Since most NHRIs do not have powers akin to a civil court, to get around the challenge of implementation of decisions, they often refer some complaints to courts in order to get binding decisions.<sup>147</sup> Although most NHRIs' decisions and recommendations lack binding force, the idea of being publicly named and shamed, for refusing or failing to comply with recommendations of a NHRI sometimes provides the necessary pressure for people to comply with the recommendations.<sup>148</sup> Collaboration with CSOs can also exert the needed pressure to have a NHRI's recommendations and decisions implemented. A good example can be taken from the Australian Human Rights Commission (AHRC) where, in order to compel government to address inequalities in healthcare services for Aboriginals, the AHRC facilitated the 'Close the Gap Coalition,' consisting of the AHRC and over 40 NGOS. This coalition successfully managed to compel government to take remedial steps to address the problem.<sup>149</sup>

As already said, some complaints are handled by way of litigation. The main disadvantage of this mandate is that there is a high likelihood for the NHRI to be overwhelmed with litigating individual cases, at the expense of other equally important functions. Litigating individual cases also has the potential to drain resources from promotional activities.<sup>150</sup> In order to alleviate these challenges, some NHRIs limit litigation to specific types of cases.<sup>151</sup> The other alternative to mitigate the challenges of litigating individual cases is to undertake strategic litigation. This is where there is widespread and pervasive human rights violations for a section of the society and where

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<sup>145</sup> Ibid.

<sup>146</sup> Constitution of the Republic of Uganda (2005), art 53(2).

<sup>147</sup> Ibid.

<sup>148</sup> Learning Alliance on Human Rights 'Module two: Promoting and Guaranteeing Human Rights' (2009) 5, available at [http://ella.practicalaction.org/wp-content/uploads/files/140314\\_GOV\\_ProHumRig\\_LEA5\\_Module2.pdf](http://ella.practicalaction.org/wp-content/uploads/files/140314_GOV_ProHumRig_LEA5_Module2.pdf), accessed on 14 January 2015.

<sup>149</sup> Commonwealth Human Rights Initiative op cit (n 130) 31-32.

<sup>150</sup> Joint Committee on Human Rights 'Any of Our Business? Government Response to the Committee's First Report of Session 2009-10' (2010) para 64.

<sup>151</sup> See section 7(2) of the UK Disability Rights Commission Act 1999.

a single case is brought before the court in order to address those concerns.<sup>152</sup> Strategic litigation, including public interest litigation can be successful and set an important precedent.<sup>153</sup> On the other hand, the case may fail nevertheless result in change by raising awareness of the issues, leading to public pressure and also debate of the issues on public forums.<sup>154</sup>

### **3.5. Methods of Operation**

In order for a NHRI to discharge the above functions, the following methods of operation have been recommended:

#### **3.5.1. Consideration of Any Question Falling Within a NHRI's Mandate**

A NHRI must be able to consider any question that falls within its mandate. In this regard, matters can be referred to the NHRI by any one, be it the aggrieved party, third parties or government. The NHRI must also be able to act on its own initiative.<sup>155</sup> If a NHRI is to consider any question falling within its mandate freely, then it becomes important that they should not be composed of either government or political party representatives. Where such representatives are present, then they should be restricted to playing an advisory role. Otherwise they may hinder or interfere with a NHRI's independence, including objective 'assessment of human rights situations and determination of priorities.'<sup>156</sup> Lastly, a NHRI must hear any person, obtain any information,<sup>157</sup> and must be able to address public opinion.<sup>158</sup>

#### **3.5.2. Regular Meetings**

A NHRI's governing body must convene regularly. Considering the pluralist composition of a NHRI and the fact that not all members of a NHRI work full time, this becomes a challenge. This is where the ICC recommendations that members of a NHRI must work full time with a NHRI becomes important.<sup>159</sup> It is very easy for full time

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<sup>152</sup> B Schokman, D Creasey and P Mohen *Short Guide – Strategic Litigation and Its Role in Promoting and Protecting Human Rights* (2012) 3.

<sup>153</sup> A Cockery op cit (n111)146.

<sup>154</sup> Ibid.

<sup>155</sup> Paris Principles, section C (a).

<sup>156</sup> Ibid section B.1(e); General Observations Op Cit (n 107) para 1.9

<sup>157</sup> Paris Principles, section C (b).

<sup>158</sup> Ibid, section C (c).

<sup>159</sup> General Observations op cit (n107) para 2.2.

members to attend emergency meetings for situations that demand immediate attention and response. However it is important to acknowledge the fact that it may be difficult, if not impractical to find competent and well qualified members who are available and willing to take a career break in order to serve a NHRI.<sup>160</sup> Further, more full time members of a NHRI may limit the number of commissioners hence affecting the need to ensure pluralist representation of society, which will be discussed later on.<sup>161</sup>

### **3.5.3. Establishment of Working Groups and Local Branches**

Thirdly, a NHRI must establish working groups and local or regional branches.<sup>162</sup> Regional offices are especially important where most vulnerable members of society are ‘located in remote parts of the country.’<sup>163</sup> The South African Human Rights Commission, for example, has maintained its presence in remote areas. It has nine provincial offices which have suitable cars to reach the rural areas. On average there are eight interventions per month in the rural areas.<sup>164</sup> Apart from establishing provincial offices, SAHRC establishes professional relationships with traditional leaders, who have such great influence at the grass root level. Further, it produces materials in all ‘11 official languages of South Africa,’ It also utilizes community radios to disseminate human rights information.<sup>165</sup> Another notable good practice for reaching remote areas is adopted by the Ugandan Human Rights Commission whereby it sets up district human rights committees, which are utilized for reaching rural communities.<sup>166</sup>

### **3.5.4. Consultation with Stakeholders**

It is recommended for a NHRI to maintain constant consultation with other local and international stakeholders in the human rights sector.<sup>167</sup> Through ‘sharing research studies, statistics, data, training programs, information on activities and other best practices,’ a NHRI is able to develop: better understanding of human rights issues throughout the state, implementation strategies, gaps in policies, as well as duplication

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<sup>160</sup> Livingstone and Murray op cit (n8) 22.

<sup>161</sup> Ibid.

<sup>162</sup> Paris Principles, section C (e).

<sup>163</sup> ICC Sub-Committee on Accreditation ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)’ 16-20 March 2015 para 2.1.4.

<sup>164</sup> Okafor op cit (n112) 140.

<sup>165</sup> Ibid 142.

<sup>166</sup> Ibid 145.

<sup>167</sup> Paris Principles, section C (f) and (g).

in policies.<sup>168</sup> Consultation and good relationships with other stakeholders may also benefit a NHRI by enabling it to utilise relevant expertise which some of these stakeholders may possess.<sup>169</sup> Lastly, good relationship with the media is an effective tool to help disseminate human rights education and other public awareness campaigns.<sup>170</sup>

### **3.6. Composition and Other Guarantees of Independence**

The Paris Principles also recommend some minimum requirements when it comes to composition of a NHRI. These recommendations are meant to help in safeguarding a NHRI's independence and prevent interference in its functions, especially in terms of assessing human rights situation in the country, and in determining its priorities.<sup>171</sup>

#### **3.6.1. Pluralist Representation of Society**

The first important factor to consider when it comes to composition of an NHRI is the need for diversity.<sup>172</sup> The Paris Principles recommend that there must be representation of all the stakeholders that are involved in the promotion and protection of human rights. Listed stakeholders include; NGOs, trade unions, social and professional organisations;<sup>173</sup> religious leaders; academicians; parliament; and; government departments.<sup>174</sup> The Paris Principles are nevertheless clear that where a NHRI comprises of representatives from government, such representatives must only participate in an advisory capacity.<sup>175</sup>

The inclusion of 'parliament' in the Paris Principles, as one of the stakeholders that must be represented within an NHRI's governing body has been a cause for concern and controversy in some instances. For example, when reviewing the Slovakian National Centre of Human Rights, the Sub Committee on Accreditation (SCA) noted that one member of the governing body was a member of parliament from the ruling party. The

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<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> General Observations op cit (n 107) 31.

<sup>172</sup> Paris Principles, section B.1.

<sup>173</sup> According to the Paris Principles these include associations of different professionals, like lawyers, doctors, journalists and scientists. Section B.1 (a).

<sup>174</sup> Ibid, section B.1.

<sup>175</sup> Ibid.

SCA commented that this had the potential of compromising the independence of the NHRI.<sup>176</sup> The SCA then stressed the importance of excluding members of parliament within the membership of an NHRI's governing body.<sup>177</sup> This position has generally been incorporated within SCA's General Observation whereby members of the ruling party, or coalition, should not, as a general principle, be represented in the governing body of an NHRI.<sup>178</sup> Where they are represented, then they should only do so in an advisory capacity.<sup>178</sup> Further, their participation should be restricted only to those functions that are directly relevant to the mandate and function of the NHRI.<sup>179</sup>

In line with representing all the forces that are responsible for promoting and protection of human rights in a society, it is very important that composition of a NHRI should reflect diversity in sex.<sup>180</sup> In particular, it has been said that meaningful participation of women in an NHRI is very key to 'ensuring the understanding of, and access for, a substantial portion of the society.'<sup>181</sup> Composition of a NHRI should also reflect diversity in a society's ethnic origin and language.<sup>182</sup> Diversity in language is especially important in multilingual societies, where accessibility of the NHRI dictates that the NHRI must be able to communicate in all languages.<sup>183</sup>

Other authors add 'Political affiliation' to the list.<sup>184</sup> Meaning that composition of a NHRI's governing body should manifest diversity in political affiliation. On the other hand, others are of the view that members of a NHRI must not be affiliated to any political party.<sup>185</sup> Caution must be taken with having politically affiliated members of a NHRI. In Thailand, some staff members were displaying their political affiliation in the performance of their official duties.<sup>186</sup> During review of the status of the Commission,

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<sup>176</sup> ICC Sub-Committee on Accreditation 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)' 17-21 March 2014, Para 2.2.4.

<sup>177</sup> Ibid.

<sup>178</sup> General Observations op cit (n107) para 1.9.

<sup>179</sup> Ibid.

<sup>180</sup> Lindsnaes and Lindholt op cit (n 27) 15; General Observations op cit (n107) para 1.7.

<sup>181</sup> General Observations op cit (n107) para 1.7.

<sup>182</sup> Lindsnaes and Lindholt op cit (n27) 15.

<sup>183</sup> General Observations op cit (n107) 27.

<sup>184</sup> Lindsnaes and Lindholt op cit (n27) 15.

<sup>185</sup> See Art. 10 of the Korean National Human Rights Commission Act, (2001) which provides that commissioners of the National Human Rights Commission of the Republic of Korea shall neither be members of the National Assembly, parliament nor political parties.

<sup>186</sup> ICC-SCA op cit (n 176) Para 3.4.4.

the SCA noted that such behaviour undermines the independence and erodes public confidence in the NHRI. Again in times of political unrest especially, political affiliation of staff members may deter victims from reporting human rights violations to the NHRI. This is due to the victims' perception that some 'staff members of the NHRI are politically affiliated with the alleged violators.'<sup>187</sup>

As a way of achieving a pluralist representation of society, some NHRIs in some countries, notably 'Australia, India and New Zealand' appoint commissioners to represent specific vulnerable groups, such as children and minority groups.<sup>188</sup>

Whilst the Paris Principles concentrate on pluralist composition of a NHRI, personal attributes of members of NHRI are equally important. Otherwise if quality of members is ignored, the NHRI risks employing people who are ill suited for the role.<sup>189</sup> Members and staff of a NHRI are always dealing with sensitive issues and at times outside the expertise of some members. Some human rights issues may also clash with members' personal beliefs. Hence professional skills, including knowledge of human rights becomes very relevant.<sup>190</sup>

### **3.6.2. Clear Guidelines for Appointment and Dismissal of Members of a NHRI.**

According to the Paris Principles, another aspect to consider when it comes to composition of a NHRI is the need to develop clear appointment guidelines for members of a NHRI. There must be pre-determined and objective assessment criteria in the appointment process, such guidelines must be effected by an official Act, be it legislation, regulation or administrative guidelines with binding force.<sup>191</sup> It is also important that the official act must clearly specify the duration of the mandate.<sup>192</sup> Longer non-renewable terms of office are preferred to renewable short terms. Normally, five years is recommended as a reasonable period.<sup>193</sup> Longer, non-renewable terms are justified on the basis that members are able to freely execute their duties

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<sup>187</sup> Ibid.

<sup>188</sup> General Observations op cit (n107) para 1.8.

<sup>189</sup> Livingstone and Murray op cit (n8) 21.

<sup>190</sup> ICHRP and OHCHR op cit (n 113) 15.

<sup>191</sup> General Observations op cit (n77) 30.

<sup>192</sup> Paris principles, section B.3

<sup>193</sup> ICHRP and OHCHR op cit (n 113) 12.

without being cautious of displeasing appointing authorities thereby risking non-renewal of contracts.<sup>194</sup>

Other factors to consider in order to ensure a merit-based and transparent appointment process include; consulting and encouraging participation by CSOs and NGOs.<sup>195</sup> This is justified on the need to create a good working relationship and also to tap from CSOs' and NGOs' expertise.<sup>196</sup> It is also highly recommendable to appoint individuals in their personal capacity, as opposed to appointing them in a capacity representative of individual organisations.<sup>197</sup> In 2006, in contravention of all the above principles, commissioners for the Human Rights Commission of Sri Lanka were directly appointed by the President of Sri Lanka. Consequently, the legitimacy and independence of the Commission was greatly compromised, to the extent that CSOs distanced themselves from the NHRI. This eventually led to the downgrading of the NHRI to "B" status.<sup>198</sup>

In addition to specifying duration of the mandate, grounds for dismissal and who can effect a dismissal of members of a NHRI are issues which must be spelt out right at the outset.<sup>199</sup> Hence where the tenure of members of the governing body of a NHRI was subject to recall by the appointing authority without clear, pre-determined grounds for such recall, the SCA found that to be against the 'Paris Principle requirement for a stable mandate.'<sup>200</sup>

Lastly, it is good practice to create functional immunities for members of a NHRI in order to protect them from legal liability, when lawfully discharging their duties.<sup>201</sup> Such immunity can be lifted where necessary. For example, where a member of a NHRI is involved in allegations of corruption or other breaches of the law. However, the decision to lift the immunity should be made by a properly constituted body as opposed

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<sup>194</sup> Ibid.

<sup>195</sup> General Observations op cit (n107) 30.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid, Para 1.8.

<sup>198</sup> Commonwealth Human Rights Initiative op cit (n130) 29.

<sup>199</sup> Ibid.

<sup>200</sup> In reference to the Slovakian National Centre for Human Rights, ICC- SCA 'March 2014 Report' op cit (n 176) para 2.2.6.

<sup>201</sup> General Observations op cit (n107) para 2.3.

to an individual.<sup>202</sup> It is also good practice to have pre-determined grounds upon which immunity can be lifted.<sup>203</sup>

### **3.6.3. Adequate Funding**

The last component to consider when looking at factors to guarantee independence of a NHRI is the need to ensure adequate funding. There are two components to adequate funding; preventing political authorities from discussing a NHRI's priorities; and ensuring that a NHRI has enough funds to enable it discharge its functions effectively whilst maintaining professionalism.<sup>204</sup> Funding a NHRI through parliament, as opposed to through a government ministry is the preferred mode of funding. For example, the Commission on Human Rights and Administrative Justice in Ghana explained that funding the Commission through the Ministry of Finance and Planning usually resulted in a long and cumbersome vetting process, which eventually led to a trimming of the budget. This threatened the effectiveness and independence of the NHRI.<sup>205</sup>

A NHRI should be adequately funded to enable it maintain its staff.<sup>206</sup> At a minimum, NHRIs salaries and benefits must not be any less favorable when compared to salaries and benefits for other employees performing similar tasks in other State institutions.<sup>207</sup>

Adequate funds also allows a NHRI to possess infrastructure and maintain its independence of the government.<sup>208</sup> At a minimum, infrastructure must include premises that are easily accessible to the public at large, including to persons living with disabilities.<sup>209</sup> It is also recommended that NHRI offices be housed along public transport route.<sup>210</sup> NHRIs funds must also be enough to enable it to establish and operate regional offices,<sup>211</sup> as well as enable it possess proper 'functioning communications systems including telephone and internet.'<sup>212</sup> The communications

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<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Lindsnaes and Lindholt op cit (n27) 16.

<sup>205</sup> Ibid.

<sup>206</sup> Paris Principles, section B.2.

<sup>207</sup> General Observations op cit (n107) para 1.10.

<sup>208</sup> Paris principles section B.2

<sup>209</sup> General Observations op cit (n107) para 1.10.

<sup>210</sup> ICHRP and OHCHR op cit (n113) 16.

<sup>211</sup> Ibid.

<sup>212</sup> General Observations op cit (n 107) para 1.10.

systems must be user friendly, even to people with different disabilities, including visual or aural disabilities. In that respect NHRIs must have interpreters and other people who can communicate using sign language.<sup>213</sup>

The primary responsibility to fund a NHRI lies with the State. However it is not unusual for NHRIs to receive financial assistance from donors. Where circumstances make it impossible for states to adequately fund their NHRIs the SCA recommends that the international community and other donors can continue funding those NHRIs, until such time when the State will be able to provide adequate support.<sup>214</sup> However, donor funding should not form the main source of funds for a NHRI.<sup>215</sup> Further, the NHRI is not expected to seek approval from the State in order to receive donor support.<sup>216</sup> This was one of the issues that led to the downgrading of the Iraq High Commission for Human Rights (HCHR) from A to B status. It was observed that whilst the NHRI was not adequately funded by the state, its ability to accept donor funding was subject to approval by the council of representatives.<sup>217</sup> This had the potential to compromise the independence of the NHRI.

Inadequacy of funding is a common challenge that most NHRIs face. At times budget limitations is used as a means by the State to express its disapproval of a NHRI's work.<sup>218</sup> The ability of the NHRI to seek other sources of financial support, and the willingness of the international community and other donors to assist are therefore important points that cannot be overemphasized. However over-reliance on donor funding can compromise a NHRI's independence and objectivity. Compromise of independence can take many forms, including donors pressurizing the NHRI to 'realign its goals and outputs,' in line with donors' preferences.<sup>219</sup>

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<sup>213</sup> ICHRP and OHCHR op cit (n113) 16.

<sup>214</sup> General Observations op cit (n 107) para 1.10

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> SCA-ICC 'March 2015 Report' op cit (n176) para 2.1.4.

<sup>218</sup> S Makhija & S Raha *A review of the working of the Karnataka State Human Rights Commission and the Karnataka State Commission for Women* (2011) para 1.5.8.

<sup>219</sup> Ibid.

### 3.7. Reports

The above mentioned principles, mandate, and methods of operation should constitute the contents of reports which a NHRI is supposed to submit to government and other competent bodies, including parliament.<sup>220</sup> It is good practice that a NHRI's enabling instrument makes it mandatory for NHRI's reports to be scrutinised by the legislature.<sup>221</sup> Apart from highlighting the activities undertaken, the reports serve other important purposes, including highlighting human rights issues and developments, monitoring implementation of its recommendations by government, and serving as a mechanism for public accountability.<sup>222</sup> In this regard, a NHRI's reports must be available to and easily accessible by the public.<sup>223</sup> This necessitates the publishing of the reports in vernacular languages.

After making recommendations to government and other bodies, it is very important for NHRIs to follow up and monitor implementation. As an example of a best practice, Annual reports of the Ugandan Human Rights Commission include a section on implementation of decisions and recommendations. The section lists all the recommendations which have been complied with, those which have been partially complied with and those which have not been implemented.<sup>224</sup>

### 3.8. Conclusion

This chapter has given a general overview of the recommended international standards and principles relating to a NHRIs mandate, methods of operations, composition and other factors to guarantee a NHRI's independence. Best practices from some NHRIs in implementing the principles have been given where necessary, as well as examples of shortcomings in some NHRIs. In particular, the chapter discussed in detail the substantive provisions of the Paris Principles, as the core minimum, but also General

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<sup>220</sup> Paris Principles, Sections A.3 (a) and A.3 (iii).

<sup>221</sup> General Observations op cit (n107) para 1.11.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> KC Esom 'The Role of National Human Rights Institutions in Promoting International Law in Domestic Legal Systems: Case Study of the Uganda Human Rights Commission' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 217.

Observations from the ICC, as interpretative guides for the Paris Principles. Other principles, guidelines and best practices from other sources were also consulted.

Specifically, this chapter discussed the following aspects of a NHRI; firstly in terms of enabling instruments, constitutions are the recommended mode of creating NHRIs due to their status as supreme law and rigid amendment processes. Acts of Parliament are the second best mode, whilst Executive Decrees are discouraged as they can be cancelled anytime.

In terms of mandate, the chapter discussed the following, as the recommended core minimum: - a broad mandate, ensuring that states ratify human rights instruments and implement them, maintaining cooperation and interacting with the international human rights system, assisting in research and in formulation of human rights programs as well as undertaking human rights public awareness campaigns.

For NHRIs with a quasi-judicial mandate the chapter emphasised the importance of such mandate in as far as it is flexible, less time consuming, non-confrontational and less costly, making it user friendly. In terms of minimum requirements, the chapter discussed the need for such NHRIs to have broad powers to enable them; carry out investigations; call for relevant documents from all sectors of society; to summon witnesses and; to inspect premises. The chapter also recommended the following remedies which NHRIs with quasi-judicial powers can provide to complaints; legal advice, referral of the complaint to other relevant institutions; drawing attention of institutions responsible for violations and recommending how they can remedy the violations.

The following methods of operation of a NHRI were discussed; consideration of any questions falling within a NHRI's mandate, having regular meetings, establishment of working groups and local branches so as to widen accessibility, consultation with stakeholders which allows a NHRI to develop better understanding of human rights issues throughout the State and allows the NHRI to utilise expertise from some of the stakeholders.

In terms of composition of a NHRI, the following minimum requirements were discussed; need to ensure pluralist representation of society. In fulfilling this

requirement a caution was made, that where a NHRI includes government and political party representatives, then their participation must be restricted to advisory capacity. Other factors to guarantee independence in the composition of a NHRI which were discussed include the need to ensure a merit based and transparent appointment processes, clear guidelines for appointment and dismissal of members, involvement of the public in the appointment processes; appointment of individuals in personal capacities; professional skills; longer terms of service for members; and, the need to have functional immunities and clear grounds for lifting the immunities.

Funding of a NHRI as a means of guaranteeing independence of a NHRI was another issue which was discussed in the chapter. It was recommended that government should adequately fund NHRIs, and the preferable mode of funding being through parliament, as opposed to through a government Ministry. Where government is unable to adequately fund a NHRI then it is permissible for the donor community to come to aid of the NHRI. However, the NHRI should not be required to seek government's approval before it can receive donor aid. Lastly, donor funds should not compromise a NHRIs independence.

Lastly, the chapter discussed the need for a NHRI to produce periodical reports for its activities. It was recommended that the reports be accessible to the public. It was also recommended that it should be mandatory for a NHRI's reports to be scrutinised by the legislature and to include a section in the reports where implementation and non-implementation of its decisions is detailed out.

## CHAPTER 4

### THE MALAWI HUMAN RIGHTS COMMISSION

#### 4.1 Introduction

The Malawian Human Rights Commission (MHRC) is a NHRI created under Chapter XI of the 1994 Constitution of the Republic of Malawi. The fact that MHRC is fully compliant with the Paris principles, and hence credited with the A status by the ICC-SCA is not a complete indication of its effectiveness. When it comes to effectiveness, compliance with the Paris principles is only a starting point. Effectiveness will assess the extent to which the NHRI is truly ‘independent, accessible, accountable as it exercises its mandate’ on the ground.<sup>225</sup> This chapter therefore discusses MHRC’s mandate, methods of operation, composition and other guarantees of independence. Furthermore, it investigates the extent to which the legal framework of the MHRC and its methods comply with the international principles expounded in chapters two and three and how effectively they have been used in practice.

#### 4.2 Contextual Background

Since attaining independence from Great Britain in 1964, the Republic of Malawi had been under the dictatorial leadership of Dr Hastings Kamuzu Banda, lasting for up to 30 years. With unlimited powers entrenched in the 1964 and 1966 Constitutions, Dr Banda, it has been said, ruled the country ‘as he would a private Estate’.<sup>226</sup> The Constitution at that time did not contain a bill of rights. All that was contained therein pertaining to human rights was a general recognition of certain limited rights, including the right to property,<sup>227</sup> equality regardless of colour, race or creed<sup>228</sup> and; a general recognition of the personal liberties enshrined in the Universal Declaration of Human Rights and the Law of Nations.<sup>229</sup> However, these rights were watered down by a claw back clause which provided that the human rights commitments were subject to the state’s right to

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<sup>225</sup> DM Chirwa and RE Kapindu ‘Accountable Governance and the Role of National Human Rights Institutions: The Experience of the Malawi Human Rights Commission’ in DM Chirwa and L Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012) 144.

<sup>226</sup> H Meinhardt and N Patel *Malawi’s Process of Democratic Transition: an Analysis of Political Developments between 1990 and 2003* (2003) 3.

<sup>227</sup> Republic of Malawi, 1966 Constitution, section 2(1) (IV).

<sup>228</sup> Ibid, section 2(1) (v).

<sup>229</sup> Ibid, section 2(1) (iii).

pass any law that was ‘reasonably required in the interest of defence, public safety, public order or national economy.’<sup>230</sup> Dr Banda’s regime was characterised by wanton disregard for human rights and the rule of law. Violations took many forms, including enforced disappearances of party and government critics; torture; executions; detentions without trials; and a high level censorship of information,<sup>231</sup> just to mention a few.

The decade of the 1990s was a period of important transformation in the political history of Malawi. In 1993, through a referendum, the people of Malawi voted for a change of system of government from one party to multi-party democracy. As a way of consolidating and strengthening the democracy, several important matters had to be addressed, such as law reform, strengthening of civil society and redesigning of state governance structures.<sup>232</sup> A notable and significant development was the adoption in 1994 of a Constitution that entrenched a progressive and comprehensive bill of human rights and also created democratic institutions.<sup>233</sup> The following state governance institutions were created; Office of the Ombudsman, the MHRC, the Law Commission and the National Compensation Fund.

Since then, Malawi has undergone significant political and social transformation. It has been said that the MHRC generally operates in a stable political environment with improved legal and regulatory framework on human rights and in which many CSOs operate relatively freely. This is important since the political, social and economic context within which a NHRI operates are crucial to its effectiveness. The NHRI must be a part of a generally democratic society, comprised of other key institutions.<sup>234</sup> The importance of MHRC in the Malawian society cannot be overemphasised. The following sections will focus on MHRC’s current composition, mandate and methods of operation and the role that it has played and continue to play in Malawi.

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<sup>230</sup> Ibid, section 2(2).

<sup>231</sup> Meinhardt and Patel op cit (n 225) 4-5.

<sup>232</sup> LC Reif op cit (n110) 2.

<sup>233</sup> Ibid, 11-12.

<sup>234</sup> Livingstone and Murray op cit (n 8) 15.

### 4.3 Constitutive and Enabling Instruments

The MHRC as created under Chapter XI of the 1994 Constitution of the Republic of Malawi became fully functional in 1999 after passing an enabling Act in 1998, the Human Rights Commission Act (HRC Act).<sup>235</sup> By virtue of being created by the Constitution and governed by an Act of Parliament, the permanency and independence of the MHRC is guaranteed. Any changes, in terms of competence, mandate and composition can only be effected by means of legislative amendment to the Constitution and/or the HRC Act. Such amendments have to be supported by at least two thirds of the total number of Members of Parliament.<sup>236</sup>

The MHRC draws five year strategic plans to guide its operations. At the time of writing this thesis, the 2011-2015 strategic plan had just expired and the MHRC was in the process of drawing a 2016-2020 plan. Consequently the thesis will draw on the 2011-2015 strategic plan, hereinafter referred to as the ‘SP’. The SP set out MHRC’s plans and framework to guide MHRC’s operations; and set targets and goals to be achieved by 2015. The main theme that runs throughout the SP is the need to develop activities that would increase human rights knowledge and accompanying responsibilities among the populace.<sup>237</sup> The SP also aimed at enhancing cooperation with stakeholders and improvement of service delivery by MHRC.<sup>238</sup>

Some of the targets that the SP sought to achieve by 2015 include 80% of the population to be aware of their rights and responsibilities, 80% of the population to be aware of the role and mandate of the MHRC, 60% of the population to be able to demand their rights, 70% of service providers to apply rights based approaches to service delivery, 80% of cases laid before MHRC to be resolved, 80% of policies, bills, legislation and judicial decisions to be assessed, 100% office equipment to be available and office accommodation to have improved.<sup>239</sup> Meeting these targets required a significant amount of resources and efficiency. Whether they were realistic or not will

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<sup>235</sup> Chapter 3:08 of the Laws of Malawi.

<sup>236</sup> Section 197 of the Constitution of the Republic of Malawi.

<sup>237</sup> Malawi Human Rights Commission *Strategic Plan 2011-2015* (2010) 7.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid* 9.

be discussed in due course. Nevertheless, the SP captures the necessary elements for effective promotion and protection of human rights as discussed in chapter three.

However, it must be mentioned that the SP and the targets set therein were developed without conducting a proper baseline study to enable the MHRC to determine key human rights issues in the country it ought to have focussed on or paid more attention to. The reason for skipping the baseline study was lack of funding.<sup>240</sup> Having said this, the targets set in the SP are relevant and crucial to the realisation of human rights. However, considering that a SP is periodic, subsequent SPs need to be formulated after a baseline study in order for them to be informed. This will ensure the most effective use of resources and powers of the MHRC.<sup>241</sup>

#### 4.4 Mandate and Competence

Section 129 of the Constitution provides as follows: ‘There shall be a Human Rights Commission the primary functions of which shall be the protection and investigation of violations of the rights accorded by this Constitution or any other law.’ Whilst section 12 of the HRC Act provides as follows: ‘The Commission shall be competent in every respect to protect and promote human rights in Malawi in the broadest sense possible and to investigate violations of human rights on its own motion or upon complaints received from any person, class of persons or body.’ This a very broad mandate and perfectly in line with the Paris Principles whereby a NHRI must have a broad mandate entrenched in a Constitutional or legislative text.<sup>242</sup> The broad mandate has proved to being a very important attribute of the MHRC and a very effective means of promoting and protecting human rights. For instance, the High Court of Malawi has held that the MHRC has power to intervene in human rights cases, as *amicus curiae*, within the context and ambit of its broad constitutional and statutory mandate.<sup>243</sup> Similarly, the High Court has allowed the MHRC to institute legal proceedings in its own name.<sup>244</sup>

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<sup>240</sup> Ibid 2.

<sup>241</sup> Livingstone and Murray op cit (n8) 23.

<sup>242</sup> Paris Principles, section A.2.

<sup>243</sup> *Registered Trustees of Public Affairs Committee vs. Attorney General, Malawi Human Rights Commission –Amicus Curiae*, Civil Cause No. 1861 of 2003.

<sup>244</sup> *Malawi Human Rights Commission vs. Attorney General* Miscellaneous Civil Cause No. 1119 of 2000, Lilongwe District Registry, unreported.

Apart from the open ended mandate to promote, protect and investigate human rights violation, the HRC Act gives the MHRC specific responsibilities. Commendably, the mandate covers all the responsibilities enumerated in the Paris Principles as discussed in Chapter three. The following are some of MHRC's specific duties, functions and responsibilities.

#### **4.4.1 Protection of Vulnerable Groups**

The MHRC is mandated to promote the rights of vulnerable groups particularly children, illiterate persons, persons with disabilities and the elderly.<sup>245</sup> As part of executing this mandate, the MHRC reorganised its structure in 2011. Previously there were five departments; Administration and Finance; Investigations; Research; Legal Services; and Education.<sup>246</sup> The current structure, effective August 2011, is organised according to directorates focusing on the following thematic areas: Children's rights; Gender Equality and Women's rights; Economic, Social and Cultural rights; Disabled and Elderly rights and; Civil and Political rights. This is a very unique organisational structure. As was discussed in chapter two, some NHRIs will either focus on a particular category of vulnerable people (thematic NHRIs),<sup>247</sup> or they will just designate specific commissioners to represent particular vulnerable groups.<sup>248</sup> MHRC's approach has been effective in addressing rights of vulnerable groups.

More recently, the MHRC's mandate to protect women's rights was bolstered by the enactment of the Gender Equality Act, 2013. To the extent that this Act particularises the obligations of the state in relation to the women's rights enshrined in the Constitution, and designates to the MHRC the duty to oversee the enforcement of this Act.<sup>249</sup> This makes it easier for the Commission to monitor the implementation of, and protect, women's rights.

It is also commendable to note that the MHRC has not restricted itself to the protection of the vulnerable groups listed in the HRC Act. Instead, it has extended the protection to other vulnerable groups including prisoners and remandees. Through a periodic exercise

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<sup>245</sup> HRC Act, section 13(c).

<sup>246</sup> MHRC op cit (n 237) 21.

<sup>247</sup> Supra (n 75).

<sup>248</sup> Supra (n 188).

<sup>249</sup> Sections 8 to 10 of the Act.

of monitoring places of detention, including police cells and prisons the MHRC monitors the extent to which the situation in these places complies with Constitutional, legislative, as well as United Nations Minimum Standards for the Treatment of Prisoners, and other international human rights standards.<sup>250</sup> MHRC then makes recommendations to relevant stakeholders to bring the conditions in the prisons and cells in line with the human rights standards.<sup>251</sup>

In *Kafantayeni v. Attorney General*,<sup>252</sup> the Constitutional Court annulled the mandatory death penalty in 2007 and ordered the office of the Director of the Public Prosecutions (DPP) to bring before the High Court all prisoners who had been sentenced to the mandatory death penalty, for resentencing. By 2014, the DPP had done nothing. The MHRC initiated and coordinated a project to have the prisoners re-sentenced, which project is still in progress.<sup>253</sup>

However, the extent to which MHRC has tended to protect the rights of the LGBTI community leaves a lot to be desired. There have been several instances where the rights of LGBTI have been violated. Malawi still has anti-sodomy laws in its statute books.<sup>254</sup> The Marriage, Divorce and Family Relations Act which was passed in April 2015,<sup>255</sup> does not recognise same sex marriages and defines ‘sex’ as the ‘sex of a person at birth,’ thereby excluding intersexuals.<sup>256</sup> Between 2011 and 2014, 21 men have been convicted of homosexuality acts,<sup>257</sup> whilst 76 other homosexuality-related violations were reported in 2013 alone.<sup>258</sup> The MHRC has neither spoken against these incidents nor pushed for the repeal of the applicable laws. This silence has occurred

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<sup>250</sup> MHRC 2011 Annual Report (2012) 22.

<sup>251</sup> Ibid; MHRC 2013 Annual Report (2014) 59; MHRC 2012 Annual Report (2013) 9-10, and MHRC 2014 Annual Report (2015) 48.

<sup>252</sup> Constitutional Case No. 12 of 2005 [2007] MWHC 1.

<sup>253</sup> MHRC 2014 Annual Report (2015) 34.

<sup>254</sup> Sections 137A, 153, 154 and 156 of Malawi’s Penal Code, Cap 7:01 of the Laws of Malawi.

<sup>255</sup> No. 3 of 2015.

<sup>256</sup> Joint Committee on Human Rights op cit (n 150) para 2.3.2 and 4.1.4.

<sup>257</sup> International Gay and Human Rights Commission ‘UN Human Rights Committee Identifies Human Rights Violations against Persons Based on Sexual Orientation in Malawi’ 10 July, 2014, available at <http://iglhrc.org/content/un-human-rights-committee-identifies-human-rights-violations-against-persons-based-sexual>, accessed on 16 February 2016.

<sup>258</sup> Centre for the Development of People (CEDEP) ‘Report on Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity in Malawi’ (2014) 1, available at [http://irantiorg.co.za/content/Africa\\_by\\_country/Malawi/2014\\_CEDEP\\_Human\\_Rights\\_violations\\_report.pdf](http://irantiorg.co.za/content/Africa_by_country/Malawi/2014_CEDEP_Human_Rights_violations_report.pdf), accessed on 26 January 2015.

despite the fact that it submitted for the amendment and repeal of certain laws in the Penal Code categorised as offences against morality and which falls in the same category as the anti-sodomy laws.<sup>259</sup>

In 2013, the High Court of Malawi decided to exercise its inherent jurisdiction to review the constitutionality of the anti-sodomy laws in line with anti-discrimination constitutional provisions. The court further made calls to interested parties to join the case as *amicus-curiae*. Some of the interested parties specifically invited by the court were the Malawi Law Society, CSOs (both local and international), and MHRC.<sup>260</sup> Unfortunately, MHRC declined the invitation.<sup>261</sup>

In recent developments, following the arrest of two men on allegations of practicing homosexuality, and a moratorium on anti sodomy laws by the Minister of Justice and Constitutional Affairs, the MHRC issued a press statement which commendably, reaffirmed the right to equality and non-discrimination for all; condemned compulsory medical tests which the men underwent whilst in police custody; and condemned hate speech. However, MHRC condemned the moratorium as offending the rule of law as it was issued by the executive arm of government to suspend laws duly passed by the legislature.<sup>262</sup> This condemnation of the moratorium comes at a background where there have been calls from international human rights forums including from the UN Human Rights Council to enforce a moratorium on the anti-homosexuality laws and to eventually decriminalise homosexuality.<sup>263</sup>

The MHRC's stand as evidenced in the press statement is to engage in consultation with stakeholders and to try and change mind sets towards tolerance for LGBTI community.

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<sup>259</sup> See Chapter XV of the Penal Code.

<sup>260</sup> Open Society Initiative for Southern Africa (OSISA) 'Malawi High Court to Review Sodomy Laws' 4 November, 2013, available at <http://www.osisa.org/lgbti/malawi/malawi-high-court-review-sodomy-laws>, accessed on 16 February 2016.

<sup>261</sup> Centre for Human Rights and Rehabilitation (CHRR) *Annual Report: Covering events between 1 January and 31<sup>st</sup> December 2014* (2014) 56.

<sup>262</sup> MHRC 'MHRC's Position on the Recent Developments Relating to the Issue of Sexual Orientation and Human Rights,' 12 January 2016, available at <https://mzindanewline.wordpress.com/2016/01/12/malawi-human-rights-commission-position-on-the-recent-developments-relating-to-the-issue-of-sexual-orientation-and-human-rights/>, accessed on 13 February 2016.

<sup>263</sup> Human Rights Council 'Draft report of the Human Rights Council on its sixteenth session' (2011) Paragraphs 17- 29 A/HRC/16/L.4.

Otherwise the MHRC is cautious that abrupt decriminalisation of homosexuality can lead to homophobia and stigma against the LGBTI community.<sup>264</sup> The disappointing reality is that the MHRC is aware of how resistant the Malawian society has been towards the issue of LGBTI, yet MHRC has not taken any meaningful steps to facilitate the change of mind-set which it seems to favour. As a NHRI, mindful of the environment within which it operates, the MHRC should not have been in the forefront attacking the moratorium, if anything it should have been pushing for repeal of the laws whilst the moratorium is in force.

MHRC has also done very little in the protection of refugees as a vulnerable group, despite reports of poor and substandard living conditions at the refugee camp in Dzaleka, Dowa district.<sup>265</sup>

#### **4.4.2 Provision of Human Rights Education, Training and Information to the Public**

The second responsibility bestowed upon the MHRC is to promote human rights through raising awareness, provision of human rights education and information to the general public.<sup>266</sup> According to the SP, human rights awareness was to be achieved by employing the following means; undertaking public sensitisation campaigns through open air meetings; conducting training workshops targeting important duty bearers in both public and private sectors; running TV and radio Programmes; disseminating publications including those in vernacular languages; holding press conferences,<sup>267</sup> creating a functional website; and improving its library services.<sup>268</sup> The SP sought to strengthen and utilise the regional office in the Southern Region as well as establish another regional office in the Northern Region as a means of reaching out to as many people as possible. Another means of maximising service delivery and reaching out to grassroots, outlined in the SP is maintaining and strengthening collaboration with

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<sup>264</sup> MHRC op cit (n 262).

<sup>265</sup> Face of Malawi 'Dzaleka Refugee Camp: the last refuge of Malawi,' available at <http://www.faceofmalawi.com/2014/08/dzaleka-refugee-camp-the-last-refugee-of-malawi/> accessed on 24 February 2016.

<sup>266</sup> Section 13(a) and (b) of the HRC Act.

<sup>267</sup> MHRC op cit (n 237) 10.

<sup>268</sup> Ibid, 11.

CBOs, CSOs and the Media.<sup>269</sup> These methods conform to the international standards and are normally employed by most NHRIs as outlined in the previous chapter.<sup>270</sup>

MHRC has developed some innovations in discharging this mandate. Notably, it has engaged traditional leaders on some human rights violations, hoping to influence them and use them as agents of change in their areas. For example, it has engaged traditional leaders in Mangochi district, well known for child marriages. MHRC educated the traditional leaders on the negative impact of child marriages and advocated for them to take a leading role in combating child marriages.<sup>271</sup> Considering the level of influence which these leaders command in their communities, these are commendable efforts. Another innovation is the sponsoring of a football match commentary on the radio in 2014. The commentary attracted thousands of listeners and the MHRC utilised commercial break to disseminate human rights messages.<sup>272</sup>

It is commendable that MHRC has a library which is open to the general public. In 2012 the Office of the United Nations High Commissioner for Human Rights donated some materials to help with implementation of plans to have the MHRC's library operate as a resource and documentation centre.<sup>273</sup> This library serves an important purpose to the public and people can access daily newspapers, draft bills and it also serves as a collection point for Fuko newspaper for several CBOs. This newspaper highlights development and human rights issues.<sup>274</sup> However the Library does not contain updated resource materials, it has very limited space and is poor at record keeping. For instance, during the research for this thesis, several internal Annual reports and publications could not be found in the library.

The MHRC has strived to cover all the essential areas when it comes to discharging the mandate of disseminating human rights education and training. However there are some shortfalls noted in the discharge of this mandate. Firstly the lack of coordination amongst the directorates. Each directorate is independent and is meant to be self-reliant

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<sup>269</sup> Ibid, 10.

<sup>270</sup> Supra (n130-131).

<sup>271</sup> MHRC op cit (n 253) 52.

<sup>272</sup> Ibid, 93.

<sup>273</sup> MHRC 2012 *Annual Report* (2013) 63.

<sup>274</sup> MHRC op cit (n 253) 93.

in conducting its activities, including provision of human rights education, training and spreading awareness. The period under review showed that the directorate of child rights conducted more sensitization campaigns and trainings whilst the civil and political rights directorate had less of the trainings. This means that the population is getting sensitized more on child rights. There is need for a proper balance.

Secondly, the lack of coordination can also be observed in the implementation of sensitisation campaigns. Whilst some districts received more than one sensitisation campaign, there were none in other districts. For instance, in 2012 MHRC carried out sensitisation campaigns in Blantyre, Mangochi and Ntchisi districts. The main focus of the sensitisation campaigns was on Gender Based Violence. However other rights, including child rights were also covered.<sup>275</sup> In the same year the Child Rights Directorate also embarked on sensitisation campaigns on child rights in the same districts.<sup>276</sup> This was so despite the fact that in that year, and for the whole period under review, there had not been any sensitisation campaign for any of the human rights in other districts such as Phalombe, Chiradzulu and Likoma districts. This needs to be looked into, particularly because the high illiteracy rates in the country<sup>277</sup> makes sensitisation campaigns and trainings an effective mode of disseminating human rights information to the public, as compared to press statements, press releases, library services and publications, which are usually utilised by literate, the elite and people in urban areas, who are in minority.<sup>278</sup>

#### **4.4.3 Harmonizing Bills, Legislation, Court Judgments and Administrative Provisions with International Human Rights Standards.**

The MHRC is also mandated to ensure that effects of bills, legislation, court judgments, as well as administrative provisions conform to fundamental human rights principles.<sup>279</sup> Notable bills and laws advocated for change during the period under review include an amendment to section 46 of the Penal Code which gave discretion to the Minister to

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<sup>275</sup> MHRC op cit (n 273), 30.

<sup>276</sup> Ibid, 33.

<sup>277</sup> UN data 'Malawi Country Profile,' available at <http://data.un.org/CountryProfile.aspx?crName=malawi#Social> accessed on 17 February 2016.

<sup>278</sup> Ibid.

<sup>279</sup> HRC Act sections 13(c) and 14(b).

prohibit the publication or importation of any publication which he reasonably believed to be contrary to public interest.<sup>280</sup> MHRC also made some recommendations for the amendment of the HRC Act. Specific recommendations will be dealt with in later sections.

Other commendable efforts by the MHRC in discharging this mandate include lobbying for the enactment of the Trafficking in Persons Bill,<sup>281</sup> and the revision of the Adoption of Children Act.<sup>282</sup> MHRC also made input into the Public Officers (Declaration of Assets, Liabilities and Business Interests) Bill, 2013, highlighting that the subject matter is a human rights issue and that it was premised on the need to ensure ‘accountability, transparency and financial probity of public officers’.<sup>283</sup> Lastly, MHRC carried out a research in 2012 to determine Malawi’s compliance with international and regional human rights instruments. Following the research, it was established that Malawi had done well in other areas, however there was need for better coordinated actions in order to fulfil the international obligations.<sup>284</sup>

The challenges noted in this area are poor implementation of MHRC recommendations. Some of the laws recommended for repeal or amendment are still on the statute books. Notable examples are the Penal Code provisions criminalising abortion,<sup>285</sup> and those creating the offence of sedition,<sup>286</sup> which MHRC recommended for repeal as far as 2010.<sup>287</sup> To date the recommended amendments to the HRC Act are still not implemented, prompting the ICC- SCA to defer considerations for MHRC’S reaccreditation to 2015,<sup>288</sup> then again to 2016, giving chance for implementation of the proposed amendments.<sup>289</sup>

Other challenges noted in this area include the unbalanced focus by the MHRC on lobbying for the enactment of new laws; and making submissions on bills. However,

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<sup>280</sup> MHRC op cit (n 250) 13.

<sup>281</sup> Ibid 55; and MHRC op cit (n 253) 56.

<sup>282</sup> Chapter 26:01 of the Laws of Malawi.

<sup>283</sup> MHRC *2013 Annual Report* (2014) 34-35.

<sup>284</sup> MHRC op cit (n 273) 19 -20.

<sup>285</sup> Sections 149-151 of the Penal Code, Chapter 7:01 of the Laws of Malawi.

<sup>286</sup> Ibid, sections 50 -52.

<sup>287</sup> MHRC *2010 Annual Report* (2011) 31.

<sup>288</sup> ICC-SCA op cit (n 85) 20-21.

<sup>289</sup> ICC-SCA op cit (n 163) 39.

when it comes to advocating for amendment or repeal of laws, the MHRC seems to wait until a particular law or provision is a subject of public controversy, for example, where one is arrested, charged and /or convicted using the provisions. In other words, MHRC seems to be reactive as opposed to being pro-active. Some laws were inherited from the colonial government and remain in Malawi's statute books. As mentioned earlier, the SP had set to review 80% of laws, cases and policies by 2015. Without deliberate and concerted efforts to review all the laws, it is difficult to imagine how the MHRC could have met the target. There is also a limited focus on the review of policies and cases. The MHRC reviewed only two cases during the period under review and both cases had come to the attention of the MHRC via the media.<sup>290</sup> This needs to be improved as the number of reviewed cases is obviously small.

#### **4.4.4 Promoting Ratification of Human Rights Instruments by the State.**

The HRC Act also mandates the MHRC to promote ratification of human rights instruments by the state.<sup>291</sup> During the period under review, the MHRC has only had to advocate for the ratification of the Optional Protocol to the Convention on the Rights of the child, which Malawi is yet to ratify.<sup>292</sup> According to the OHCHR, the following instruments are yet to be ratified by Malawi,<sup>293</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;<sup>294</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;<sup>295</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;<sup>296</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>297</sup> Optional Protocol to the Convention on the Rights of the Child on a communications

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<sup>290</sup> *Rep v Mr X*, Criminal Case Number 264 of 2014 in MHRC op cit (n 252) 45; and *In the matter of Paulo Sangwa vs. Bulugama Makunganya and Others* in MHRC op cit (n 282) 60.

<sup>291</sup> HRC Act, Section 14 (e).

<sup>292</sup> MHRC op cit (n 253) 57.

<sup>293</sup> OHCHR 'Country Profile for Malawi-Status for Ratification,' available at <http://indicators.ohchr.org/>, accessed on 11 March 2016.

<sup>294</sup> GA Resolution 44/128, 15 December 1989, entry into force: 11 July 1991.

<sup>295</sup> GA Resolution 63/117, 10 December 2009, entry into force: 5 March 2009.

<sup>296</sup> GA Resolution 55/4, 10 December 1999, entry into force: 20 December 2000.

<sup>297</sup> GA Resolution 57/199, 18 December 2002, entry into force: 22 June 2006.

procedure;<sup>298</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;<sup>299</sup> International Convention for the Protection of all Persons from Enforced Disappearance;<sup>300</sup> and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.<sup>301</sup> Another important instrument relevant for the protection of rights of children is the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption,<sup>302</sup> which Malawi has not ratified. The MHRC needs to make sure that it advocates for the ratification of these human rights instruments as they are very important in terms of standard setting.

Another notable challenge in this area is domestication of the instruments so that they can be enforced, Malawi being a dualist state. MHRC should therefore go the extra mile and advocate for the domestication of the ratified treaties so that they have direct enforcement in the Courts of Malawi.

#### **4.4.5 Contributing to State Party Reports**

The MHRC is also mandated ‘to contribute to reports which the State is required to submit pursuant to treaty obligations.’<sup>303</sup> As stated in the previous chapter, this is one way of interaction and achieving cooperation with the international and regional human rights systems.<sup>304</sup> Commendably, the MHRC has been instrumental in facilitating the compilation of State Party Reports by the government of Malawi to relevant treaty bodies. In 2013, it compiled a list of all human rights instruments which Malawi had ratified and the status of the State Party Reports under each instrument.<sup>305</sup> Out of 14 instruments with reporting obligations under the AU and UN Human rights systems, Malawi had only reported once for the ICCPR, once for the CEDAW and twice for the

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<sup>298</sup> GA Resolution 66/138, 19 December 2011, entry into force: 14 April 2014.

<sup>299</sup> GA Resolution 45/158, 18 December 1990, entry into force: 1 July 2003.

<sup>300</sup> GA Resolution 61/448, 20 December 2006, entry into force: 23 December 2010.

<sup>301</sup> GA Resolution 61/106, 13 December 2006, entry into force: 3 May 2008.

<sup>302</sup> Adopted by the Hague Conference on Private International Law 29 May 1993, entry into force: 1 May 1995.

<sup>303</sup> HRC Act, Section 14(g).

<sup>304</sup> *Supra* (n 126).

<sup>305</sup> MHRC op cit (n 283) 25.

CRC.<sup>306</sup> In that regard MHRC engaged the Ministry of Justice and Constitutional Affairs for the outstanding reports.

Other efforts undertaken by the MHRC include submitting an alternative report to the UN Human Rights Committee on implementation of the ICCPR, after government failed to discharge its reporting obligations under the instrument.<sup>307</sup> Further, MHRC facilitated the creation of a working group on the State Party report to the Committee on the Convention against Torture, which Malawi had never submitted as at 2013,<sup>308</sup> presentation of shadow reports on the status of human rights in Malawi to the African Commission on Human and Peoples' Rights,<sup>309</sup> and to the United Nations Human Rights Committee.<sup>310</sup> Lastly, MHRC provides technical support to NGOs intending to submit shadow reports to treaty bodies.<sup>311</sup>

It is also commendable that MHRC actively monitors the implementation of recommendations under the Universal Periodic Review (UPR).<sup>312</sup> It convenes meetings with stakeholders to inform them of the UPR process, of the recommendations and of the roles they can play in implementing the recommendations.<sup>313</sup> Furthermore, MHRC compiled a mid-term progress report of the implementation of the recommendations made during the 2010 UPR. This report was submitted to the Human Rights Council in 2013.<sup>314</sup>

In the few times that the government of Malawi has submitted its State Reports to Treaty Bodies, it has actively engaged the MHRC. The MHRC is usually included in the taskforces responsible for the compilation of State reports. Notably, MHRC was part of the taskforce for the preparation of an initial and second party reports to the Committee on Rights of people with Disabilities where by the MHRC played the role of

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<sup>306</sup> Ibid, 26-28

<sup>307</sup> MHRC op cit (n 240) 22.

<sup>308</sup> MHRC op cit (n 283) 32.

<sup>309</sup> Ibid 33.

<sup>310</sup> MHRC op cit (n 253) 37.

<sup>311</sup> Ibid.

<sup>312</sup> The Human Rights Council undertakes a periodic review of human rights records of states once after every four years. See OHCHR 'Universal Periodic Review,' available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> , accessed on 28 November 2015.

<sup>313</sup> MHRC op cit (n 273) 21; MHRC op cit (n 283) 29.

<sup>314</sup> MHRC op cit (n 283) 29.

providing information on the progress and challenges faced in the implementation of the Convention. MHRC was also responsible for reviewing the draft report.<sup>315</sup> An important development during this exercise was the observation made by other stakeholders in the taskforce to the effect that the final report was not a true reflection of the reality on the ground. Consequently, CSOs decided to draft a shadow report and MHRC facilitated the drafting process.<sup>316</sup>

#### **4.4.6 Cooperation with Stakeholders**

Another responsibility assigned to the MHRC is to cooperate with international, regional as well as national organisations and agencies involved in the promotion and protection of human rights.<sup>317</sup> MHRC realises the importance of cooperation with other stakeholders and it effectively utilises these networks to improve its service delivery. MHRC utilises CSOs, CBOs and NGOs which have high visibility on the ground in order to reach out to more people, including grassroots. There are times when CBOs with potential of being effective partners for MHRC lack capacity, MHRC enhances their capacity by providing training and drawing work plans with the CBOs. Ultimately, MHRC monitors the implementation of the work plans.<sup>318</sup>

MHRC also utilises expertise of some of its partners to promote and protect human rights, including legal expertise of the Malawi Law Society,<sup>319</sup> and influence of Traditional leaders,<sup>320</sup> just to mention a few. Other stakeholders which MHRC works hand in hand with include the Anti-Corruption Bureau, Malawi Police service, Government Ministries and the Judiciary.<sup>321</sup>

Strategic Output three of the SP sought to enhance cooperation with stakeholders. This output sought to be achieved by among other means, establishment of regional committees and thematic committees, comprised of members of different CSOs. This process was meant to be finalised by 2013.<sup>322</sup> Unfortunately as at 2016, only one

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<sup>315</sup> MHRC op cit (n 253) 65.

<sup>316</sup> Ibid, 66-67.

<sup>317</sup> HRC Act, sec 14(h).

<sup>318</sup> MHRC op cit (n 273) 48; MHRC op cit (n 283) 37.

<sup>319</sup> MHRC op cit (n 253) 39.

<sup>320</sup> Ibid, 87.

<sup>321</sup> MHRC op cit (n 250) 7.

<sup>322</sup> MHRC op cit (n 237) 14.

thematic committee was created by the Gender and Women Rights Directorate, with funding from UN Women.<sup>323</sup> No regional committees were created.

On the international and regional levels, MHRC also cooperates very well. MHRC is an ‘A’ status NHRI thereby enjoying all benefits of being a full member of the ICC,<sup>324</sup> it belongs to the Network of African NHRIs<sup>325</sup> as well as to the Commonwealth Forum of National Human Rights Institutions.<sup>326</sup> The MHRC is also involved with the African Commission on Human and People’s rights (ACHPR) among other means, by presentation of shadow reports on the status of human rights in Malawi as stated above.<sup>327</sup> MHRC has benefited from its membership of these network. Once and again MHRC members attend meetings and workshops organised by these networks, these present an opportunity to learn best practices, learn of new innovations in the promotion and protection of human rights as well as get training in specific human rights issues. For example, a training workshop on the Role of NHRIs in Business and Human Rights organised by the ICC.<sup>328</sup>

Another benefit of cooperating with other stakeholders are financial and human resources which MHRC receives from partners and stakeholders. Most of the programs of MHRC are funded by international development partners. For instance, in 2014 MHRC drew a joint annual work plan with UN agencies for the year 2015. This was to collaborate technical and financial support.<sup>329</sup> Recent partnership include North-western University based in America, which provides MHRC with human resource, like interns and resource persons with expertise on particular issues.<sup>330</sup>

#### **4.4.7 Consideration of Any Human Rights Issues It Deems Necessary**

Lastly, MHRC is mandated to consider, deliberate upon and make recommendations regarding any human rights issues in the country.<sup>331</sup> This is a very broad mandate. Some

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<sup>323</sup> MHRC op cit (n 253) 73.

<sup>324</sup> MHRC op cit (n 287) 37.

<sup>325</sup> MHRC op cit (n 250) 62.

<sup>326</sup> Ibid.

<sup>327</sup> Supra (n 309).

<sup>328</sup> MHRC op cit (n 283) 74.

<sup>329</sup> MHRC op cit (n 253) 107.

<sup>330</sup> Ibid, 16.

<sup>331</sup> HRC Act, section 13(d).

of the methods which MHRC uses to discharge this mandate include holding public enquires on the status of human rights in general,<sup>332</sup> and also on thematic areas, including gender based violence.<sup>333</sup> It undertakes surveys on different human rights issues, for example survey on the situation of children living and working on the streets,<sup>334</sup> and mapping exercise to establish the total number of Child Care Institutions and monitoring their compliance with international and national human rights standards.<sup>335</sup> MHRC also monitors different human rights issues and situations including children in prisons,<sup>336</sup> education facilities,<sup>337</sup> government programs, extractive industries, and places of detention including mental health hospitals. MHRC also monitors National Assembly proceedings and elections.<sup>338</sup>

#### **4.5 Complaints Handling**

Complaints handling falls under the section of the Paris Principles that deals with quasi-judicial competence. MHRC is mandated to hear and consider complaints brought by individuals, groups of people or by third parties, on behalf of victims.<sup>339</sup> Upon receipt of complaints, there are several options open to MHRC; it may conduct investigations or provide advice of the rights of the complainant, or, it may refer the matter to other institutions or, it may decide to hear the complaint with the aim of reaching an amicable settlement (alternative dispute resolution) or, it may decide to institute legal proceedings.<sup>340</sup> These remedies are also recommended under the Paris Principles, as discussed in the previous chapter.<sup>341</sup>

During the period under review, complaints handling was one of the core activities undertaken by the MHRC. Initially the data on complaints handling used to be categorised in terms of gender, and type of rights involved. However from 2013, the

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<sup>332</sup> MHRC op cit (n 273) 23.

<sup>333</sup> Ibid, 29.

<sup>334</sup> Ibid, 46.

<sup>335</sup> MHRC op cit (n 253) 46.

<sup>336</sup> Ibid, 48.

<sup>337</sup> Ibid, 63.

<sup>338</sup> MHRC op cit (n 237) 19.

<sup>339</sup> HRC Act, section 16.

<sup>340</sup> Ibid, section 22.

<sup>341</sup> Supra (n 136).

cases were categorised further into district where the complaint was originating from.<sup>342</sup> Through these categories, MHRC has come across other important issues. For example, throughout the period under review, most of the complaints related to unfair labour practices, and poor access to justice. Unfortunately, there have been no real efforts by MHRC to enquire about the underlying causes and how it can address the issues systematically, as discussed in chapter three.

The high number of complaints alleging violations of ESCRs in some years is encouraging.<sup>343</sup> It is a good indicator that the population is aware of ESCR and that the traditional view, that ESCR are not justiciable, is no longer dominant. The thematic organisational structure might actually be working. An example was given in the previous chapter whereby the Ugandan Human Rights Commission registered higher numbers of complaints after intensifying efforts promoting ESCR.<sup>344</sup>

The MHRC has also made other deductions from other trends from the complaints handling process. For example, a rise in complaints in women's rights violations in 2011 was attributed to good implementation of education, information and training programs by the MHRC. On the other hand, a decrease of complaints in child rights violations was also attributed to good implementation of education, information and training programs.<sup>345</sup> This is confusing and not quite accurate. An increase in complaints may be due to deterioration of human rights standards in the country.<sup>346</sup> This was acknowledged by MHRC in later reports where it admitted that in the absence of an empirical survey, it may be difficult to know the exact reasons for the increase or decrease in complaints.<sup>347</sup> Another challenge noted with complaints handling is that despite registering high number of complaints, the pace at which MHRC resolves these complaints to finality is very slow. For example in 2013, 121 complaints were resolved

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<sup>342</sup> MHRC op cit (n 283) 22.

<sup>343</sup> ESCR registered highest number of complaints in 2011 and 2013. See MHRC op cit (n 250) 8 and MHRC op cit (n 283) 20

<sup>344</sup> Supra (n 119).

<sup>345</sup> MHRC op cit (n 250) 8-9.

<sup>346</sup> ICHRP and OHCHR op cit (n 113) 28.

<sup>347</sup> MHRC op cit (n 253) 30.

out of 560 complaints.<sup>348</sup> The rest are carried over to the other year. Hence MHRC should improve its efficiency.

MHRC's decisions are merely recommendatory, with no binding force. This poses as a challenge. One way to get around the problem is to institute litigation in appropriate cases, so as to get binding decision from the court. What is an appropriate case for litigation is determined on a case by case basis. In addressing the problem of the high number of cases in a context where there are few legal practitioners to take up the cases, the MHRC uses the services of members of the Malawi Law Society who agree to provide their services on a *pro bono* basis.<sup>349</sup> Another way of mitigating against the problem of high number of cases to be litigated, is to be systematic. Strategic litigation, as well as Public Interest Litigation (PIL) is pursued to address pervasive human rights violations affecting a wider section of society.

PIL is an advantage which MHRC enjoys as compared to other litigants. This is due to the fact that the courts in Malawi are very strict in interpreting constitutional provisions on locus standi. As far as matters of human rights are concerned, MHRC is deemed to possess the sufficient *locus standi* as per its constitutional and legislative mandate. In the past MHRC has been instrumental in instituting PIL. Notable cases include; protection of rights of prisoners,<sup>350</sup> protection of children rights,<sup>351</sup> and opposing the imposition of the mandatory death penalty.<sup>352</sup> However, during the period under review there was only one PIL case which MHRC initiated, whereby it was seeking judicial review of the decision of the then State president to distribute maize meant for the public, at political campaigns, thereby benefitting party members and supporters only.<sup>353</sup> The matter was never pursued to finality. MHRC is clearly underutilising its powers to institute PIL, and this must be addressed.

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<sup>348</sup> MHRC op cit (n 283) 23.

<sup>349</sup> MHRC op cit (253) 39.

<sup>350</sup> *Evans Moyo v Attorney General*, Constitutional Case no. 12 of 2007.

<sup>351</sup> *In Re Adoption of David Banda Adoption Cause No 2 of 2006 and In Re Adoption of CJ (a female infant)* Adoption Case No 1 of 2009 (Madonna cases).

<sup>352</sup> *Kafantayeni and others v Attorney General* Supra (n 28).

<sup>353</sup> *In the Matter of the President of the Republic of Malawi and in the Matter of an Application for Judicial Review by the Human Rights Commission* Judicial Review Cause no.29 of 2014.

## 4.6 Methods of Operation

### 4.6.1 Freely Consider All Questions Falling within its Competence

As a starting point, MHRC methods of operation as provided in the HRC Act generally cover all the methods provided by the Paris Principles as discussed in the previous chapter. Specifically, the first method of operation is that MHRC should freely and without hindrance consider any questions falling within its competence. Generally, MHRC has effectively utilised this method of operation. Over the years it has tried to address all human rights issues ranging from civil and political rights, economic, social and cultural rights, as well as environmental rights. MHRC has also not covered in being critical of the government of the day, which has at times led to conflicts with government. An example is the arrest of the then chairperson of the MHRC in 2012 on dubious charges which were later dropped. It was clear that the reason for the arrest was his being critical of some of government's undemocratic and unconstitutional decisions.<sup>354</sup>

A notable weakness in this area is the apparent reluctance by the MHRC to protect minority rights of LGBTI, as has been argued above. Clearly, this is an issue falling within its competence.

### 4.6.2 Power to Hear Any Person and Obtain Any Information and Evidence

Secondly, the MHRC in its operations shall hear any person and obtain any information or evidence necessary to enable it discharge its mandate.<sup>355</sup> MHRC is given additional powers to conduct searches. In that regard it has unhindered authority to visit even places of detentions, with or without notice.<sup>356</sup> MHRC also has powers of entry, search and removal of articles.<sup>357</sup> Any person, including government agents who obstructs or hinders MHRC officials in the performance of their duties is committing a crime and liable to imprisonment of up to five years.<sup>358</sup> Some of these methods have been discussed already, especially inspection of places of detention. However, there is need

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<sup>354</sup> Open Society Initiative for Southern Africa (OSISA) 'Malawi Human Rights Commissioner arrested,' available at <http://www.osisa.org/law/malawi/malawi-human-rights-commissioner-arrested> , accessed on 23 February 2016.

<sup>355</sup> HRC Act, section 15(b).

<sup>356</sup> Ibid, section 15(c) and (d).

<sup>357</sup> Ibid, section 18(b).

<sup>358</sup> Ibid, section 34(2).

for MHRC to educate the public further of its mandate and methods of operations as discussed. There are times whereby some sectors have been non cooperative with the MHRC,<sup>359</sup> and this can be attributable to ignorance of MHRC's powers, among other reasons. Where MHRC informs a respondent of its powers and the party persists in non-cooperating, then MHRC should be able to use its legislative powers, since they were given for that exact reason; to be able to compel cooperation. 'The power to compel co-operation being very essential to fact-finding function of a NHRI.'<sup>360</sup>

### **4.6.3 Other Methods of Operation.**

Other methods of operation provided in the HRC Act include developing work relationships with human rights NGOs and other independent institutions in order to foster common policies and best practices. Work relationships and cooperation is also necessitated by overlapping jurisdictions.<sup>361</sup> This method has already been covered by previous sections. Suffice to emphasise the need to create the thematic committees envisaged in the SP, whose composition is to include representatives from CSOs.

Finally, MHRC is supposed to run its operations at the national, regional, district and other levels in a bid to enhance its outreach to all corners of the public.<sup>362</sup> Some aspects of this method of operation have already been discussed. Suffice to say that MHRC strives to spread its operations throughout Malawi, including utilising partners that it has. However the fact that it only has a national office and one regional office is a huge obstacle to its accessibility and it affects the extent to which it operates as a NHRI. Hence MHRC's long term plans should include establishment of regional offices as well as district offices.

## **4.7 Composition and Other Guarantees of Independence**

### **4.7.1 Composition**

The composition of members of MHRC is defined by the Constitution as well as the HRC Act. The Constitution provides that the MHRC shall be composed of two ex-

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<sup>359</sup> MHRC op cit (n 287) 19,

<sup>360</sup> Commonwealth Secretariat op cit (n 3) 34.

<sup>361</sup> HRC Act, sections 15(e) and (f).

<sup>362</sup> Ibid, section 15(g).

officio members namely, the persons holding the offices of Law Commissioner, and Ombudsman respectively,<sup>363</sup> plus other members to be nominated by reputable organisation which are responsible for the promotion of human rights and which are representative of the Malawian Society.<sup>364</sup> The exact number of appointed commissioners is mentioned in the HRC Act and currently it stands at seven,<sup>365</sup> bringing the total number of commissioners to nine. These commissioners serve for three year terms, renewable.<sup>366</sup> This term is manifestly short and against the recommended five year terms discussed in the previous chapter.<sup>367</sup>

The appointment process for members is also set out in the Constitution as well as in the HRC Act. Firstly, the two ex-officio members make a determination of which organisations satisfy the criteria of being responsible for the promotion of human rights, reputable and representative of the Malawian Society. After that determination MHRC sends out public notices inviting those organisations to nominate two persons who are independent, nonpartisan and of high integrity. No educational qualifications are spelt out. This is against international standards discussed in chapter three whereby personal attributes of members of a NHRI must include professional skills.<sup>368</sup> The ex officio members then chose names of people to be appointed as commissioners and then forward the names to the President for formal appointment.<sup>369</sup> This is one aspect of MHRC that has been criticised as problematic and brings the transparency of the appointment process into question. It is in that regard that MHRC recommended an amendment to the HRC Act to remove these powers from the Ombudsman and the Law commissioner.<sup>370</sup>

The involvement of the public in the selection process, through the nominating CSOs, has been commended for promoting openness and transparency.<sup>371</sup> On the other hand

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<sup>363</sup> Malawi Constitution, section 131(a) and (b).

<sup>364</sup> Ibid, section 131 (d); HRC Act, section 4(1).

<sup>365</sup> Originally it was five appointed commissioners. This was changed in 2005 after MHRC recommended the revision to seven commissioners. This was effected by Presidential Order published in the Gazette.

<sup>366</sup> Section 5(1) of the HRC Act.

<sup>367</sup> Supra (n 193).

<sup>368</sup> Supra (n 190).

<sup>369</sup> HRC Act, section 4(2).

<sup>370</sup> MHRC op cit (n 283) 35.

<sup>371</sup> Commonwealth Secretariat op cit (n 40) 79.

the involvement of CSOs in the nomination process has been criticised for failing to have regard to the need to ensure a pluralist composition, including gender and ethnic balance.<sup>372</sup> This is reflected in MHRC's current composition whereby out of the seven appointed commissioners, only one is a woman,<sup>373</sup> after very few women nominees from the CSOs. This problem can be attributed to the lack of express instructions from the MHRC to the nominating organisations to have due regard to the need to ensure pluralist composition, including gender balance.

The HRC Act is also silent as to whether members should serve on a full time or part time basis. There have been instances where all commissioners have served on part time basis. The first and second cohort of MHRC had this problem.<sup>374</sup> This is against the recommended international standards whereby there must be some members serving on full time, as discussed in the previous chapter.

Also missing from the HRC Act is a provision on functional immunity to enable members and staff to effectively discharge their duties without fear of unnecessary legal actions. It is commendable that one of the proposed amendments to the HRC Act is the need to actually include functional immunity in the HRC Act.<sup>375</sup>

Lastly, the Constitution provides some broad grounds for removal of commissioners from office. These are; incompetence; incapacity; or inability to being impartial in the exercise of their duties.<sup>376</sup> This list leaves out other serious categories on which a dismissal can be effected. For example, misconduct, criminal record and bankruptcy. The HRC Act also does not provide the process for dismissal, including who has the responsibility to effect the dismissal and who would constitute the disciplinary hearing panel. These shortfalls need to be corrected and bring the standards in line with international standards in order to improve the independence and effectiveness of MHRC.

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<sup>372</sup> ICHRP and OHCHR op cit (n 113) 14.

<sup>373</sup> Zodiak Online 'APM Appoints New MHRC Commissioners' (2015), available at <http://www.zodiakmalawi.com/top-stories/apm-appoints-new-mhrc-commissioners> accessed on 22 February 2016.

<sup>374</sup> MHRC op cit (n 287) 78.

<sup>375</sup> MHRC op cit (n 283) 35.

<sup>376</sup> Section 131(3) of the Constitution.

#### 4.7.2 Adequate Funding

Finally, as stated in the previous chapter, adequate funding is one way of guaranteeing a NHRI's independence and also making sure that a NHRI has the necessary resources to enable it discharge its mandate effectively. The MHRC prepares a budget which is approved by parliament.<sup>377</sup> This is the recommended mode of financing a NHRI, explained in chapter three.<sup>378</sup> Unfortunately the MHRC is so underfunded to the extent of greatly affecting its operations and effectiveness. Inadequacy of funds is a contributing factor to the MHRC being understaffed. There are many vacant positions which remain unfilled every year.<sup>379</sup> MHRC also experiences shortages of office space and equipment, including laptops, office furniture, mega phones and digital cameras.<sup>380</sup> This affects the effective implementation of activities.

Inadequacy of funds also affects MHRC's accessibility since it only has a head office in Lilongwe, central Malawi, and a regional office in Blantyre, in southern Malawi. This means there is no regional office in the Northern region. This is so despite the fact that plans to establish the regional office in the Northern region were approved by government in 2013.<sup>381</sup> Despite being located along a public transport route, the MHRC's head office is located in a one story building with no escalators or lifts. Further there are no pathways suitable for persons using wheel chairs. These factors speak volumes about accessibility of the MHRC and they can only be improved once MHRC is adequately funded.

MHRC has several partners who have helped it with financial, material and human resource over the years. However, most of these partners support specific programs and for limited duration.<sup>382</sup> This affects the sustainability of programs. Another negative effect of over-reliance on donors was reported in MHRC's 2006 Annual report to the effect that it had misunderstandings with the UNDP, one of its donors, who had to dictate the mode of delivery of public awareness campaigns against the MHRC's

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<sup>377</sup> MHRC op cit (n 250) 64.

<sup>378</sup> Supra (n 205).

<sup>379</sup> MHRC op cit (n 250) 65; MHRC op cit (n 273) 64; MHRC op cit (n 283) 59; MHRC op cit (n 253) 98.

<sup>380</sup> MHRC op cit (n 283) 89.

<sup>381</sup> MHRC op cit (n 253) 99.

<sup>382</sup> MHRC op cit (n 283) 88.

preferred mode of delivery.<sup>383</sup> Such compromise of independence is against international standards as well as the HRC Act which authorises the MHRC to receive any donations nevertheless cautions against such donations compromising its independence and impartiality.<sup>384</sup>

#### **4.8 Conclusion**

The chapter has laid down the social context in which the MHRC operates, from the historical background to present context. The historical context characterised by non-democratic, autocratic rule and the subsequent migration to democracy being the driving factors for the establishment of the MHRC. Current social economic and political factors were also discussed in as far as they either contribute to or impede the effectiveness of the MHRC.

The chapter commended the creation of the MHRC by constitutional means, and having an Act of Parliament as an enabling instrument, which contribute to MHRC's independence and legitimacy. Further MHRC's SP was also commended for setting up crucial targets relevant to the realisation of human rights, however the need for a baseline survey in subsequent SPs was emphasised so as to help the MHRC determine key human rights issues demanding attention.

In terms of mandate and competence, the chapter discussed the following: MHRC's broad constitutional as well as legislative mandate for the promotion and protection of human rights, protection of vulnerable groups; and provision of human rights education, training and information to the public. In addition, MHRC is mandated to; harmonise bills, legislation, court judgments and administrative provisions with international human rights standards; and to promote ratification of human rights instruments. MHRC has the added responsibility to contribute to state party reports under several human rights instruments; cooperation with stakeholders; and lastly, to consider any human rights issues deemed necessary.

The chapter also discussed MHRC's quasi-judicial mandate which allows it to receive individual complaints from victims, as well as from third parties. The complaints

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<sup>383</sup> MHRC 2006 Annual Report (2007) 13 and 17.

<sup>384</sup> HRC Act, Section 32.

process has informed MHRC of other crucial issues such as pervasiveness of labour related issues, less women having access to MHRC and growing popularity of ESCR.

The chapter then discussed the following methods of operation of the MHRC; freely considering any question that falls within its competence; hearing any person; obtaining any information and evidence; and, power of entry, search and removal of articles. MHRC is also required to develop work relationships with other stakeholders; and to maintain visibility at the national, regional and district levels.

The following challenges and gaps were noted in MHRC's mandate and methods of operations: reluctance to protect rights of the LGBTI community as well as rights of refugees; lack of adequate and updated materials in the library; and limited space and poor record keeping in the library. Lack of coordination among MHRC directorates; slow pace of resolving complaints; poor implementation of decisions and recommendations by government and other parties also posed as challenges. It was also noted that there was limited use of strategic litigation; limited efforts in advocating for amendment and repeal of laws; limited focus on harmonisation of policies and cases with human rights standards and limited efforts in advocating for ratification of human rights instruments. Lastly, it was noted that MHRC was unable to create thematic committees and that it has limited accessibility.

Last but not one, the chapter discussed composition of the MHRC and other guarantees of independence. It bemoaned the short terms of service for members; the role played by the ex-officio members in the selection process; and, the lack of stipulated professional qualifications for members. The limited grounds for dismissal and the lack of a clear dismissal processes, the lack of functional immunities for members and the silence on the need for a minimum number of full time commissioners were also bemoaned.

Lastly, the chapter discussed funding of the MHRC whereby commendably funds are channelled to the MHRC through Parliament. However underfunding posed as a great challenge and was a contributing factor to the limited number of staff members, office space and equipment, and inaccessible premises. Consequently the MHRC heavily relies on donor funds. These factors affect the effectiveness and independence of the MHRC.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Conclusion

NHRIs have been recognised as an important mechanism for the promotion and protection of human rights. After a series of international Workshops<sup>385</sup> and Declarations from the UN GA,<sup>386</sup> international principles were eventually developed to guide in the establishment of NHRIs and to act as minimum benchmarks in assessing different aspects of NHRIs. These principles are called the Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles).<sup>387</sup> They were developed by the International Workshop on National Institutions for the Promotion and Protection of Human Rights and endorsed by the UN GA. In time other standards have been developed to augment the Paris Principles in areas where they seem vague, unworkable or where they manifest a gap. In particular, General Observations issued by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) have significantly played that role. Others principles have been developed by UN agencies and offices, other reputable organisations, NHRIs networks and other academic writings.

In light of the above developments, this study analysed the international principles and methods of promoting and protecting human rights as well as best practises from other NHRIs in implementing the principles. These principles and standards were eventually used to evaluate the MHRC. Specifically, the extent to which the MHRC adheres to the international principles and whether it can improve its working methods by improving some aspects, and aligning them with the international principles and best practices.

In achieving the above stated goals the first task was to define the basic concepts in as far as the study of NHRIs is concerned. This exercise involved defining what NHRIs are

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<sup>385</sup> Notably, the 1978 Seminar on National and Local Institutions for the Promotion and Protection of Human Rights which was organised by the Commission on Human Rights and International Workshop on National Institutions for the Promotion and Protection of Human Rights. *Supra* (n 28 and 34).

<sup>386</sup> See A/RES/34/49, 23 November 1979, A/RES/36/134, 14 December 1981 and A/38/416, 1983.

<sup>387</sup> Paris Principles *op cit* (n 39).

and analysing the underlining ideas and principles behind their establishment. This took us back to 1960's where the first calls for the establishment of NHRIs were made at the international level. It was found that the idea behind these international calls was initially to have a mechanism for advancing the work of the UN Human Rights Commission at the domestic level; to oversee the implementation of international human rights instruments at the domestic level; and later on, to act as a mechanism for the protection and promotion of human rights in general.

Despite the international community promulgating the Paris Principles, states retain the discretion to choose appropriate forms which respective NHRIs should take. States have the liberty to choose from the following forms. Human rights commissions; Human rights ombudsman institutions; Hybrid institutions; Consultative and advisory bodies; Institutes and Centres and; Multiple institutions.<sup>388</sup> Despite the different forms in which NHRIs exist, they are encouraged to belong to international and regional networks so as to improve their effectiveness and independence. Effectiveness is achieved by the encouragement, through the accreditation process and through peer encouragement to adhere to the international principles; sharing of best practices; provision of support; capacity building; as well as collective reaction against interference with NHRIs' independence.

The study then analysed the specific international principles and standards relating to a different aspects of a NHRI. The first aspect to be analysed was NHRIs' mandate. A NHRI is encouraged to guarantee the following core minimum; it must have a broad mandate; it must ensure that states ratify and implement human rights instruments; and, it must maintain cooperation and interaction with international and regional human rights systems. NHRIs are further supposed to take on the responsibility of assisting in research and formulation of human rights programmes for teaching purposes; as well as undertake human rights public awareness campaigns. Lastly, NHRIs have the option to have a further mandate of receiving and dealing with individual petitions and complaints from the general public.<sup>389</sup>

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<sup>388</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) op cit (n 43).

<sup>389</sup> Paris Principles op cit (n 39)

In terms of methods of operations, a NHRI must guarantee the following core minimum; it must be able to consider any question that falls within its mandate, it must convene regularly, it must establish working groups and local or regional branches, and, it must maintain constant consultation with other stakeholders in the human rights sector.<sup>390</sup>

In terms of composition, it is recommended that a NHRI must ensure the following; it must respect diversity and ensure pluralist representation of society; it must develop clear guidelines for appointment and dismissal of members; it must publicise vacancies; and consult and encourage participation by CSOs in the appointment process. Further, it must appoint individuals in their personal capacity as opposed to representing individual CSOs; create functional immunities for members in order to protect them from legal liability; stipulate professional skills for members; and guarantee longer terms of service for members.

The need to fund NHRIs adequately was also discussed as an important factor to consider in order to guarantee a NHRI's independence. A NHRI must be adequately funded in order to allow it: maintain staff, possess infrastructure and communication systems as well as enable it to establish and operate regional offices. It is good practice that a NHRI be funded through parliament, as opposed to through a government ministry. Where circumstances make it impossible for states to adequately fund their NHRIs it is permissible for the NHRI to receive funding from donors. However, the NHRI should not be required to seek government's approval before it can receive donor aid. The NHRIs must also check against donor funds compromising its independence.

Lastly, a NHRI is supposed to submit activity reports to government and other competent bodies, including parliament. Such reports must be available to and easily accessible by the public.

In chapter four the study found a generally satisfactory adherence by MHRC to most of the above stated international principles and standards, hence credited with the A status by the ICC-SCA. In particular, MHRC has a generally broad mandate to promote and

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<sup>390</sup> Ibid.

protect human rights and investigate human rights violations. Its specific mandate includes; to protect the rights of vulnerable groups; to provide human rights education, training and information to the public; harmonise bills, legislation, court judgments and administrative provisions with international human rights standards; contribute to State Party reports; cooperate with stakeholders; and to consider any human rights issues it deems necessary.

MHRC's broad mandate is also coupled with the following enabling methods of operations: to hear and consider complaints brought by individuals, groups of people or by third parties, to freely and without hindrance consider any questions falling within its competence; to hear any person and obtain any information or evidence necessary to enable it discharge its mandate.

In terms of composition, MHRC is governed by nine commissioners; seven appointed and two ex officio. The appointed members are appointed from a list of persons nominated by CSOs, and they serve three year terms, renewable. In terms of funding, government bears the primary responsibility and it funds the MHRC through Parliament. However other donors also fund the MHRC.

Like already said, the MHRC has tried to discharge its mandate competently, as well as effectively utilised its working methods. However there have been some gaps and shortfalls noted in the discharge of its mandate. The following are some of the notable challenges and gaps, as discussed in the study: skipping to undertake a baseline survey in the drawing of its SP; reluctance to protect minority rights of the LGBTI community as well as rights of refugees; lack of adequate and updated resource materials in the library; limited space as well as poor record keeping in the library. A lack of coordination among directorates has also been noted as well as being reactive, as opposed to being proactive in the discharge of some of its mandates, for example in undertaking advocacy for the amendment and repeal of laws. Other notable challenges include limited focus on revision of policies and cases to harmonise them with human rights standards; slow pace of resolving complaints; limited visibility and accessibility; and poor implementation of its recommendations and decisions by government and other parties.

In terms of composition of the MHRC, the following challenges were noted: short terms of service for commissioners; appointment procedures which exhibit a lack of transparency and fall short of the requirement to ensure pluralist representation of society; insufficient grounds and lack of clear processes for dismissal of the commissioners; lack of stipulated minimum professional requirements for commissioners; lack of functional immunities for members and staff in the discharge of their duties; and, lack of express provisions providing for a minimum number of commissioners to serve on a full time basis.

Lastly, MHRC has experienced an acute shortage of funds which had been a major contributing factor to the limited number of staff members, infrastructure and office equipment and has at times compromised its independence.

## **5.2. Recommendations**

In line of the challenges explained in the previous chapter and as summarised above, the following section makes some recommendations as one way of addressing the shortcomings. Most of the recommendations will come from international standards and best practices discussed in previous chapters. Implementation of these recommendations can help bring the MHRC fully in line with international standards and principles, eventually leading to more independence, efficiency and effectiveness of the MHRC.

### **5.2.1. Protection of Vulnerable Groups**

MHRC must be proactive in protecting the rights of all vulnerable people, including LGBTIs. Criminalising sexual acts by people of the same sex perpetuates the stigma and homophobic behaviour against these people, including driving them underground where they cannot access health care services. A study by Human Rights Watch shows that even where there is a moratorium on laws criminalising same sex relations and acts, some negative effects still prevail, including ‘black mail, restricted access to health services, and lack of access to justice.’<sup>391</sup> The MHRC should therefore discharge its mandate and take the lead to push for the repeal of these laws. Since MHRC is of the

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<sup>391</sup> United Kingdom Home Office ‘Country Information and Guidance-Malawi: Sexual Orientation and Gender Identity’ February, 2016 Para 5.2.1, available at <http://www.refworld.org/docid/56b843da4.html>, accessed 16 February 2016.

view that there is need to engage society on the issues of LGBTI, then it should be seen to be taking steps towards that process otherwise it is abrogating its duty.

### **5.2.2. Human Rights Training, Education and Information**

Some shortcomings were identified in the MHRC's library. In terms of poor record keeping, the librarians need to make sure that they have several copies of annual reports as well as special and thematic reports. The library also needs to be updated regularly with recent publications. In terms of accessibility, a leaf can be borrowed from other progressive NHRIs who include a section for people with disabilities in their libraries. For example, the South African Human Rights Commission recently created a section in its library for people with disabilities. The section has devices that can be utilised by people with different types of disabilities.<sup>392</sup> This should be in the long term plans of the MHRC. Lastly, the library space needs to be improved as the current space is very small.

### **5.2.3. Review of Legislation, Cases and Policies.**

The target set in the SP mentioned earlier on, that by 2015 80% of policies, bills, legislation and judicial decisions must be assessed could not have been achieved without being systematic. MHRC should develop a clear strategy for reviewing legislation. This can be reflected in the annual work plans whereby particular legislation will be targeted for a particular year. The legislation to be reviewed should be in line with the SP.<sup>393</sup> Further, MHRC should monitor the extent to which its recommendations and input were taken on board in the final legislative drafts and also in amended laws and policies. This information should be included in its annual reports.

The MHRC also needs to develop a mechanism for reviewing cases, not only publicised cases, but all relevant cases. Bearing in mind a great obstacle in this area whereby there are very few reported cases, the MHRC can consult the Malawi Legal Information

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<sup>392</sup> South African Human Rights Commission 'Media Invitation: SAHRC launches the library section for people with disabilities' 14 March 2014, available at <http://www.sahrc.org.za/home/index.php?ipkArticleID=266> , accessed on 16 February 2016.

<sup>393</sup> Livingstone and Murray op cit (n8) 25.

Institute (MalawiLII) website where some cases are reported. Another way is to use its CBOs and CSOs partners in different districts, to report on any court judgments which may adversely impact on human rights.

#### **5.2.4. Complaints Handling**

In order to avoid being overburdened with complaints at the expense of other activities, it is recommended that MHRC should develop clear guidelines of the types of cases which it will deal with by way of litigation. Otherwise as has been explained in previous chapters it is neither feasible nor desirable for a NHRI to litigate every case laid before it.<sup>394</sup> It is recommended that MHRC should select cases which reflect its SP. In this case information must be made available to the public of the type of cases chosen and the criteria for determining whether or not a particular case falls within the chosen category.<sup>395</sup>

Systematic handling of cases was one of the best practices highlighted in chapter three. It is commendable that MHRC in some instances has taken a cue from the nature of complaints received to address pervasive human rights abuses. However, there is need to intensify such efforts. Otherwise, failure to handle complaints in a systematic way can generate more complaints. In particular, the human rights violations which have topped MHRC's complaints list, that is, labour issues and access to justice, need to be handled systematically. First, the underlying causes for the high numbers must be identified and appropriate means of handling them must be devised.

Another recommendation is the expansion of categories in which the complaints are placed. In addition to gender, type of human rights violated and districts from where complaints are originating from, the complaints can also be categorised in terms of institution complained against. This can assist with the systematic approach whereby the MHRC can take specific action targeting institutions against which high numbers of complaints have been registered. For example, there is high number of complaints against the police.

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<sup>394</sup> Livingstone and Murray op cit (n 8) 23.

<sup>395</sup> Ibid.

Lastly, it is important that MHRC should undertake opinion surveys to ascertain whether or not its complaints handling procedures are satisfactory, including whether or not they are sensitive to complainants' needs. Respondents can also give feedback on whether or not they feel they were given a 'fair opportunity to respond to allegations and to remedy the violation.'<sup>396</sup>

### **5.2.5. Programs in General**

As was discussed in chapter three pertaining to sensitisation campaigns, there was manifestation of a lack of coordination among the directorates. This lack of coordination is not only in terms of sensitisation campaigns, but a general challenge in most activities. There is therefore need for massive coordination among the directorates. The establishment of a Directorate of Planning and Monitoring as recommended in MHRC's 2011 Annual Report could help with the coordination among the directorates.<sup>397</sup>

### **5.2.6. Implementation of Decisions and Recommendations**

One way of exerting pressure on government to implement the recommendations of MHRC is to include a section on implementation of decisions and recommendations in the Annual reports. That section should list all the recommendations which have been complied with, those which have been partially complied with and those which have not been implemented. This is a best practice from the Ugandan Human Rights Commission discussed in chapter three.<sup>398</sup> Being publicly named and shamed, for refusing or failing to comply with recommendations of a NHRI sometimes provides the necessary pressure for compliance with NHRIs recommendations.<sup>399</sup>

Another recommendation to ensure the implementation of MHRC's recommendation and decisions is by forming coalitions with CSOs in order to impress upon government

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<sup>396</sup> ICHRP and OHCHR op cit (n113) 35.

<sup>397</sup> MHRC op cit (n 250) 3.

<sup>398</sup> Esom op cit (n 224) 217.

<sup>399</sup> Learning Alliance on Human Rights op cit (n 148) 5.

to implement recommendations. This was the best practice from the Australian Human Rights Commission discussed in chapter three.<sup>400</sup>

### **5.2.7. Strategic Planning**

It is hereby recommended that future SPs must be carefully drawn, after conducting a baseline survey, resources allowing. SPs must have clear and pre-determined method of assessment and evaluation upon expiry as well as over their life span. There should be an ongoing process of evaluating the benchmarks and targets set therein. It has been said that this helps to focus on the activities.<sup>401</sup>

MHRC should also engage external evaluators who will use their own methodology in evaluating MHRC's effectiveness. External evaluators are known to be objective and impartial in their assessment, they will make some critical comments which are normally avoided by the NHRI itself.<sup>402</sup>

### **5.2.8. Accessibility**

It was discussed in chapter three that generally a NHRI must occupy premises that are easily accessible to the public at large, including to persons living with disabilities. In this regard it is hereby recommended that MHRC should be adequately funded so as to improve its infrastructure and communication systems, including those that are user friendly to people with visual or aural disabilities. This entails having interpreters and those who can communicate using sign language. The current location of MHRC's head office, in a one story building with no escalators, lifts and pathways suitable for handicapped persons, must be rectified so that it is accessible to everyone, including to people with disabilities.

Lastly, MHRC must continue utilising partners, including CBOS and NGOs to reach out to as many people as possible, whilst continuing engaging government for funding for the establishment of a regional office in the northern region, as well as in all the 28 districts. In so doing the accessibility of MHRC can greatly improve.

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<sup>400</sup>Supra (n149).

<sup>401</sup> ICHRP and OHCHR op cit (n113) 42.

<sup>402</sup> Ibid.

### 5.2.9. Composition

Lastly the recommendations for the amendment to the HRC Act to remove voting powers from the Ombudsman and the Law Commissioners and; that there be an independent body to receive nomination and select commissioners is very welcome.<sup>403</sup>

A best practice can be adopted from the Kenyan Human Rights Commission whereby nominations are received by the National Assembly which forwards the names to the President for formal appointment.<sup>404</sup> It must be mentioned that for this amendment to take effect there is need to amend the Constitution which also mandates the Ombudsman and Law Commissioner to receive and review the nominations.<sup>405</sup>

Another best practice can be observed from the same Kenyan Human Rights Commission whereby ‘in the nomination process, the National Assembly and the president must have regard to Kenya’s ethnic, geographical, cultural, political, social, economic diversity and gender equality.’<sup>406</sup> There is therefore need to amend the HRC Act to provide in express terms that in the nomination process due regard must be had to the need to ensure a pluralist representation of society. This will correct problems like the current composition of MHRC whereby there is no gender balance among the appointed members.

The proposed amendment to review terms of office of commissioners from three to five years is commendable and in line with international standards. As was explained in chapter three, it is a way of guaranteeing independence of the members who are free to execute their duties without fear of non-renewal of their short terms.<sup>407</sup> There is need for serious lobbying to ensure that the proposed amendments are implemented.

Another recommendation pertains to qualification of commissioners whereby in addition to the personal attributes of independence, nonpartisan and high integrity, there must be minimum professional qualifications set. In this case a University Degree is recommended. This is justified due to the nature of the job that these commissioners

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<sup>403</sup> Supra (n370).

<sup>404</sup> Kenya National Commission on Human Rights Act, No 2 of 2002, sections 4 and 6.

<sup>405</sup> Section 131 (1) (d), and (2) of the Constitution.

<sup>406</sup> Ibid, section 8.

<sup>407</sup> Supra (n 194).

have to undertake, including dealing with sensitive and complicated human rights issues, representing the MHRC at international forums, holding meetings with high level government officials as well as making complex policy decisions.

This study also recommends that the HRC Act should be amended to extend the grounds upon which members can be dismissed. Some of the recommended grounds include misbehaviour, bankruptcy and conviction of crimes bordering on moral turpitude, among other grounds. The Act must specify the disciplinary procedure leading to the dismissal of the members, including who should constitute the disciplinary hearing panel. This will ensure a clear and transparent process of dismissal, in line with international standards discussed in chapter three.

Lastly, the HRC Act should stipulate a minimum number of members to serve on a full time basis. At least three of the nine commissioners should serve on a full time basis. This will avoid future scenarios whereby all the commissioners were serving on part time basis, as was the case during the first and second cohort of the MHRC. Care has to be exercised so as not to impose a big number for the full time members, since it might be difficult to find competent members willing to take the career break and serve on a full time basis. This was discussed in chapter three.<sup>408</sup>

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<sup>408</sup> *Supra* (n 160).

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