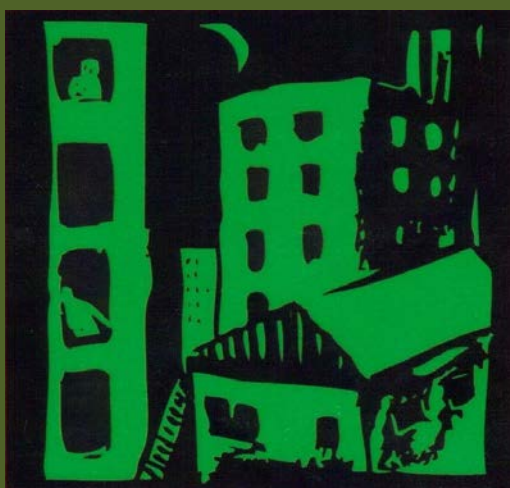


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# The Zimbabwe Human Rights Commission: Prospects and challenges for the protection of human rights

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## 1 INTRODUCTION

Many international human rights instruments require States to introduce domestic measures in their territories to ensure the protection and promotion of human rights.<sup>1</sup> This may be mainly attributed to the fact that States are generally held accountable or regarded as being responsible when international human rights obligations are not observed or given effect to.<sup>2</sup> To achieve effective domestic protection of human rights it is important that the

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<sup>1</sup>Steiner HJ, Alston P & Goodman R *International human rights in context: law, politics, morals; text and materials* (Oxford: OUP 2007) at 1123. See also Shaw M *International law* (Cambridge: Cambridge University Press 2008) at 268.

<sup>2</sup>Evans M *International law* (Oxford: Oxford University Press 2010) at 290.

introduction of pro-human rights laws is accompanied by a network of complementary norms and mechanisms to co-ordinate or supervise the implementation of such laws.<sup>3</sup> In order to ensure the domestic protection of human rights, the Constitution of Zimbabwe establishes the Zimbabwe Human Rights Commission (ZHRC).<sup>4</sup> In accordance with the Principles Relating to the Status of National Institutions (The Paris Principles)<sup>5</sup>, the Constitution mandates the ZHRC with a primary role of promoting and protecting human rights at all levels of society.<sup>6</sup> The aim of this article is to look at the prospects of and challenges to the ZHRC in its quest to promote and protect human rights.

## 2 INDEPENDENT HUMAN RIGHTS INSTITUTIONS AND INTERNATIONAL LAW

According to Reif, independent National Human Rights Institutions (NHRIs) which have emerged out of the human rights movement play a great role in the protection and promotion of human rights.<sup>7</sup> The importance of NHRIs has been widely recognised by the United Nations human rights bodies since 1946.<sup>8</sup> In 1992 the United Nations Commission on Human Rights adopted the Guiding Principles Relating to the Status of National Institutions (Paris Principles) and these Principles were also adopted by the General Assembly in 1993.<sup>9</sup> The Paris Principles provide significant guidance and direction on the establishment of NHRIs in general, and also provide standards and principles that NHRIs must follow in order to function effectively.

The Paris Principles provide benchmarks against which proposed, new and existing NHRIs can be assessed and “accredited” by the International Coordinating Committee’s Sub-Committee on Accreditation (ICC SCA).<sup>10</sup> The International Coordinating Committee (ICC) of NHRIs was established with the aim of co-ordinating the activities of NHRIs at international level, and to develop joint programmes of action for NHRIs around the world.<sup>11</sup> It was also established to support the creation and strengthening of NHRIs and to liaise with international human rights organisations,

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<sup>3</sup>Reif LC “Building democratic institutions: the role of national human rights institutions in good governance and human rights protection” (2000) 13 *Harvard Human Rights Journal* 1 at 2.

<sup>4</sup>S 242 of the Constitution of Zimbabwe.

<sup>5</sup>Adopted by General Assembly Resolution 48/134 of 20 December 1993.

<sup>6</sup>S 243 of the Constitution of Zimbabwe.

<sup>7</sup>Reif (2000) at 2.

<sup>8</sup>United Nations Centre for Human Rights *National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* Professional Training Series No 4 at 4-6 UN Doc HR/P/PT/4, UN Sales No E.95.XIV.2 (1995).

<sup>9</sup>GA Res 134, UN GAOR, 48th Sess, UN Doc A/RES/48/134 (1993).

<sup>10</sup>OHCHR *National human rights institutions; history, principles, roles, and responsibilities* (New York: United Nations 2010) at 31.

<sup>11</sup>See United Nations Centre for Human Rights (1995) at para 66.

such as, the Office of the High Commissioner for Human Rights (OHCHR).<sup>12</sup> In 1998, the ICC developed rules of procedures and created a process for accrediting institutions. The ICC SCA was given the mandate to review and analyse accreditation applications and to make recommendations to the ICC Members on the compliance with the Paris Principles by NHRIs.

The importance of independent NHRIs is also emphasised by the Vienna Declaration and Programme of Action which was adopted at the end of the Vienna World Conference on Human Rights.<sup>13</sup> The Vienna Programme of Action recognises the importance of the role played by NHRIs in the promotion and protection of human rights, disseminating human rights information and providing education about human rights.<sup>14</sup> NHRIs supplement the role of other democratic institutions in ensuring that issues of human rights remain the central focus of political discourse in every society.<sup>15</sup> Over the years the United Nations has made concerted efforts to encourage States to focus on the domestic enforcement of human rights, and also by providing assistance in strengthening NHRIs.<sup>16</sup>

In Africa, donor support in the 1990s resulted in the establishment of several NHRIs to serve as independent bodies for the protection and promotion of human rights.<sup>17</sup> The African Charter on Human and Peoples' Rights (ACHPR) provides for the creation of NHRIs by governments in Africa. Article 26 of the ACHPR states:

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

As a result of the emergence of the NHRIs, the African Commission on Human and Peoples' Rights (African Commission) also recognises the importance of NHRIs as institutions that are required to assist the African Commission in the promotion of human rights at country level.<sup>18</sup> NHRIs affiliated to the African Commission have a role to play in the implementation of the ACHPR at the national level.<sup>19</sup> They (NHRIs) are entitled to attend and participate in the African Commission's public sessions and are

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<sup>12</sup>Pohjolainen AE *The evolution of national human rights institutions: the role of the United Nations* (Denmark: Danish Institute for Human Rights 2006) at 24.

<sup>13</sup>Vienna Declaration and Programme of Action, adopted June 25 1993. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (accessed 21 August 2013).

<sup>14</sup>See para 36 of the Vienna Declaration and Programme of Action 1993. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (accessed 21 August 2013).

<sup>15</sup>Kumar R "National human rights institutions: good governance perspectives on institutionalisation of human rights" (2003) 19:2 *AM U INT' L Rev* 260 at 278.

<sup>16</sup>See Reif (2000) at 4.

<sup>17</sup>Viljoen F *International human rights law in Africa* 2<sup>nd</sup> ed (Oxford: Oxford University Press 2012) at 389.

<sup>18</sup>ACHPR "National Human Rights Institutions". Available at <http://www.achpr.org/network/nhri/> (accessed 21 August 2013).

<sup>19</sup>See Art 45 of the ACHPR.

required to submit reports on their activities to the African Commission every two years.<sup>20</sup>

### 3 THE CONSTITUTION OF ZIMBABWE AND THE HUMAN RIGHTS COMMISSION

The Constitution of Zimbabwe establishes a number of institutions to help ensure the protection of the rights enshrined therein.<sup>21</sup> These institutions, similarly to the South African model,<sup>22</sup> are charged with supporting and entrenching human rights and democracy, promoting constitutionalism, protecting the sovereignty and interests of the people, securing and ensuring the observance of democratic values by the State and all institutions and agencies of government, and ensuring that all injustices are remedied.<sup>23</sup> The Constitution of Zimbabwe guarantees these institutions legal and operational independence and states that they are accountable to Parliament, are independent, and must perform their functions without fear, favour or prejudice.<sup>24</sup> Although the other independent institutions<sup>25</sup> mentioned in the Constitution also play a role in the protection and promotion of human rights, this article focuses on the ZHRC which has the primary role of promoting and protecting human rights in Zimbabwe.

The Lancaster House Constitution provided for a Human Rights Commission<sup>26</sup>, but the ZHRC was only established in 2009, after 29 years of democracy. The ZHRC began to function in March 2010 when the President appointed the Chairman and other members of the Commission<sup>27</sup>, and became fully operational in 2012 after the passing of the enabling legislation.<sup>28</sup>

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<sup>20</sup>ACHRP “National Human Rights Institutions” Available at <http://www.achpr.org/network/nhri/> (accessed 21 August 2013).

<sup>21</sup>According to s 232 of the Constitution of Zimbabwe, these institutions include: the Zimbabwe Electoral Commission, ZHRC, Zimbabwe Gender Commission, Zimbabwe Media Commission and National Peace and Reconciliation Commission.

<sup>22</sup>S 181 of the Constitution of South Africa establishes a number of institutions, also known as the Chap 9 institutions, which are independent organs with a general mandate of strengthening constitutional democracy in South Africa. These institutions are independent, subject only to the Constitution, accountable to Parliament, and must report on their activities and the performance of their functions to the House of Assembly at least once a year.

<sup>23</sup>S 233 of the Constitution of Zimbabwe.

<sup>24</sup>S 235 of the Constitution of Zimbabwe.

<sup>25</sup>These institutions include: the Zimbabwe Gender Commission, Zimbabwe Media Commission and Zimbabwe Electoral Commission.

<sup>26</sup>S 100R of the Lancaster House Constitution.

<sup>27</sup>ZHRC “Bill watch: the Zimbabwe Human Rights Commission”. Available at <http://www.swradioafrica.com/pages/billwatch120410.htm> (accessed 21 August 2013).

<sup>28</sup>Zimbabwe Human Rights Commission Act 2 of 2012.

#### 4 FUNCTIONS OF THE ZIMBABWE HUMAN RIGHTS COMMISSION

The functions of the ZHRC are dealt with under s243 of the Constitution of Zimbabwe.<sup>29</sup> It provides that the ZHRC has a general mandate of promoting awareness and respect for human rights and the realisation of such rights. Arguably (as will be demonstrated below), the fact that the Constitution has established a fully operational Human Rights Commission with enabling legislation, will not automatically guarantee the effective protection and promotion of human rights. This contention is supported by Reif who notes:

National human rights institutions may be established by a government with the best of intentions, such as when a state is making the transition to democratic government, or consolidating its democratic structure, or when established democracies wish to fine tune their institutions. However, national human rights institutions can be established by governments that are not democratic or by governments who want to give the appearance that they are taking steps to improve the human rights and administrative justice situation in their countries, while the reality is that there is little material change after the institution starts operations.<sup>30</sup>

Thus, the success of the ZHRC in effectively protecting and promoting human rights goes deeper than its mere establishment. It should be noted that for the ZHRC to effectively discharge its functions, there are a number of factors, such as, legal, political, financial and social issues, that need to be addressed in order to ensure that the institution complies with the requirements set out under the Paris Principles. These key factors are discussed below.

#### 5 INDEPENDENCE

Independence is key to ensuring that the ZHRC functions effectively. Independence is the attribute that underpins a national institution's legitimacy and credibility and contributes to its effective discharge of its functions.<sup>31</sup> The independence and impartiality of any NHRI have been frequently cited as prerequisites for their effective operation.<sup>32</sup> The United Nations has also maintained that NHRIs must operate in such a manner that their independence is beyond reproach.<sup>33</sup> On the subject of the independence of NHRIs, the Paris Principles stipulate:

(1)The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of: (a) Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;

<sup>29</sup>S 243 of the Constitution of Zimbabwe.

<sup>30</sup>See Reif (2000) at 23.

<sup>31</sup>See United Nations Centre for Human Rights (1995) at 37.

<sup>32</sup>See United Nations Centre for Human Rights (1995) at 10.

<sup>33</sup>See United Nations Centre for Human Rights (1995) at 10.

(b) Trends in philosophical or religious thought; (c) Universities and qualified experts; (d) Parliament; (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity). (2) The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence. (3) In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.<sup>34</sup>

Matshekga opines that the effectiveness of NHRIs primarily depends on their capacity to act independently of government, and on the institutions' demonstrated ability to act independently of all other activities, governmental or not, that may impinge on their work.<sup>35</sup> Importantly, Matshekga also notes that the issue of independence is a relative concept. He explains that NHRIs derive their powers from enabling legislation, are required to report to Parliament, and lack full financial autonomy which inhibits complete independence.<sup>36</sup> Although the reporting obligations and the financial dependence are aimed at ensuring accountability, it is vital that restrictions on independence should be minimal.

The United Nations Centre for Human Rights have put into place criteria for determining the independence of any NHRI. The criteria deals with questions such as the following: (a) Does the institution enjoy legal and operational independence? (b) Does the institution have clearly defined appointment and dismissal procedures? (c) Does it control its own finances? (d) Is it composed of individuals capable of acting independently?<sup>37</sup> This criterion seeks to protect the independence of any NHRI. Governments must therefore respect these criteria in order to ensure and protect the independence of NHRIs. This applies to the ZHRC, too in order to ensure that it functions effectively. The discussion below focuses on crucial aspects of the independence of any NHRI and makes an analysis of the compliance by the ZHRC with the aspects of independence.

## 5.1 Independence through Legal and Operational Independence

The OHCHR has noted that the constitutional provision or law that establishes an institution should give it distinct legal personality.<sup>38</sup> Such personality will allow the institution to make decisions independently and act independently.<sup>39</sup> In order to enhance the operational independence of institutions, it is important that they must

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<sup>34</sup>S B(1) of the Paris Principles.

<sup>35</sup>Motshekga J "Toothless bulldogs? the human rights commissions of Uganda and South Africa: a comparative study of their independence" (2002) 2 *African Human Rights Law Journal* 68 at 71.

<sup>36</sup>See Motshekga (2002) at 71.

<sup>37</sup>See United Nations Centre for Human Rights (1995) at 10-12.

<sup>38</sup>See OHCHR (2010) at 41.

<sup>39</sup>See OHCHR (2010) at 41.

have the ability to conduct their day-to-day affairs independently of any outside influences. The new Constitution of Zimbabwe establishes the ZHRC as an independent institution and forbids any individual from interfering with its functioning.<sup>40</sup> The Constitution compels the ZHRC to be independent in the performance of its duties and not to be subject to the direction or control of anyone.<sup>41</sup> The Constitution further states that the ZHRC must act in accordance with the Constitution and must exercise its functions without fear, favour or prejudice.<sup>42</sup> In order to secure the operational independence of the ZHRC, the Constitution mandates the State and all other institutions and agencies of government at every level, through legislative and other measures to assist the ZHRC and to protect its independence, impartiality, integrity and effectiveness.<sup>43</sup> The constitutional protection of the independence of the ZHRC seeks to ensure that it conducts its duties effectively and without any interference. The protection of such independence will greatly enhance the capability of the ZHRC to effectively protect and promote human rights.

In order to enhance the operational independence of the ZHRC, the Constitution mandates members of the ZHRC to be non-political. The Constitution stipulates:

(1) Members of the independent Commissions must not, in the exercise of their functions- (a) act in a partisan manner; (b) further the interests of any political party or cause; (c) prejudice the lawful interests of any political party or cause; or (d) violate the fundamental rights or freedoms of any person.<sup>44</sup>

The Constitution further states “that persons who are members of a political party or organisation on their appointment to an independent Commission (in this case the ZHRC) must relinquish that membership without delay and in any event within thirty days of their appointment”.<sup>45</sup> The Constitution also states that “if a member of an independent Commission (ZHRC) who becomes a member of a political party or having been a member of a political party or organisation on his or her appointment to the commission, but fails to relinquish that membership within thirty days of the appointment, ceases immediately to be a member of the ZHRC”.<sup>46</sup>

The protection of the legal and operational independence of the ZHRC is aimed at permitting it to exercise independent decision making power and to perform its functions without interference or obstruction from any branch of government or any public or private entity. Since the ZHRC is a newly-formed independent entity it is crucial that the provisions in the Constitution are adhered to. This is to ensure that the ZHRC discharges its constitutional mandate independently and without any external

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<sup>40</sup>See s 242 of the Constitution of Zimbabwe. See also s 235(1)(a) of the Constitution of Zimbabwe.

<sup>41</sup>S 235(1)(a) of the Constitution of Zimbabwe.

<sup>42</sup>Ss 235(1)(b) and (c) of the Constitution of Zimbabwe. It should be noted that in accordance with the Constitution, the ZHRC is however accountable to Parliament and this does not necessarily have any effect on its independence.

<sup>43</sup>S 235(2) of the Constitution of Zimbabwe.

<sup>44</sup>S 236(1) of the Constitution of Zimbabwe.

<sup>45</sup>S 236(2) of the Constitution of Zimbabwe.

<sup>46</sup>Ss 236(3)(a) and (b) of the Constitution of Zimbabwe.

interference. If this independence is maintained, there is no doubt that it will bode well for the future prospects of the ZHRC and enhance its constitutional obligations to effectively carry out its constitutional mandate.

## 5.2 Independence through Appointments

The method by which members of a NHRI are appointed is important in ensuring the independence of the institution. This is affirmed by the United Nations Centre for Human Rights which notes that the method by which members of national institutions are appointed is critical in ensuring independence.<sup>47</sup> As a result, it is important that consideration should be given to entrusting the task to a representative body such as Parliament.<sup>48</sup> The United Nations Centre for Human Rights also notes that the founding legislation of any NHRI must specify matters relating to the method of appointment, including the voting and other procedures to be followed.<sup>49</sup> In line with the requirements of the Paris Principles<sup>50</sup>, the ICC SCA has noted the critical importance of selection and appointment in maintaining the independence of any NHRI. It has stated that the appointment and selection process must be transparent, broad consultations must be undertaken, vacancies have to be advertised widely, and that there is a need for maximising the number of potential candidates from a wide range of societal groups.<sup>51</sup> The ICC SCA has further noted that the appointment process is fundamental in ensuring the independence and effectiveness of, and public confidence in, the national institution.<sup>52</sup> The selection process must be characterised by openness and transparency and should be under the control of a credible and independent body and involve open and fair consultation with the wider NGOs and civil society.<sup>53</sup>

### 5.2.1 Constitution of Zimbabwe and Appointments

In seeking to maintain and secure the independence of the ZHRC, it is important that the appointment of members of the ZHRC must be done in conformity with the Paris Principles and the ICC SCA General Observations. This will ensure impartiality in the appointment process and enhance the independence of the ZHRC. The Constitution of Zimbabwe sets out the criteria for the appointment of members of the ZHRC and the prerequisites for appointment such as nationality<sup>54</sup>, and the qualifications of members

<sup>47</sup>See United Nations Centre for Human Rights (1995) at 10.

<sup>48</sup>See United Nations Centre for Human Rights (1995) at 10.

<sup>49</sup>See United Nations Centre for Human Rights (1995) at 10.

<sup>50</sup>See s B(1) of the Paris Principles.

<sup>51</sup>ICC SCA "General observations adopted in May 2013" (Geneva: ICC SCA 2013) at 29. Available at

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf> (accessed 23 September 2014).

<sup>52</sup>See ICC SCA (2013) at 29.

<sup>53</sup>See ICC SCA (2013) at 30.

<sup>54</sup>See s 2(1) (a) of the First Schedule of the Zimbabwe Human Rights Commission Act 2 of 2002.



of the ZHRC.<sup>55</sup> The Constitution recognises the importance of any member of the ZHRC having extensive knowledge of human rights issues and international law. The Constitution of Zimbabwe stipulates that members of the ZHRC must be chosen for their integrity and their knowledge and understanding of, and experience in, the promotion of human rights.<sup>56</sup> This provision is in accordance with the ICC SCA recommendations that advocate for the assessment of applicants on the basis of pre-determined, objective and publicly available criteria that promote transparency, pluralism and public confidence in the process.<sup>57</sup>

### 5.2.2 *Appointment of the Chairperson of the ZHRC*

In order to ensure that individuals of integrity are appointed to the ZHRC, it is crucial that impartiality is observed in the appointment process. However, the appointment process in Zimbabwe, particularly with regards to the appointment of the Chairperson of the ZHRC raises questions about its impartiality. In appointing the Chairperson of the ZHRC, the President is not bound by the advice of the Judicial Service Commission (JSC) and the Committee on Standing Rules and Orders.<sup>58</sup> Section 242(3) of the Constitution states:

If the appointment of a chairperson to the Zimbabwe Human Rights Commission is not consistent with a recommendation of the JSC, the President must cause the Committee on Standing Rules and Orders to be informed as soon as practicable.

The Constitution is, however, silent both on why the Committee on Standing Rules and Orders must be informed in such instance and the appropriate action that the Committee has to take if such a decision is made. It seems, thus that the President is given greater powers<sup>59</sup> in the appointment of the Chairperson of the ZHRC. The silence regarding what ought to happen if the President omits to follow the recommendations of the JSC leaves scope for partiality. Concrete provisions are thus required to negate this. There is a likelihood that such powers might be used to appoint individuals that may be partisan and who will support the ideologies of the ruling party and interfere with the independence and functioning of the Commission.

The independence of the ZHRC is arguably also less protected due to the lack of non-governmental organization (NGO) and civil society input in the appointment of the

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<sup>55</sup>S 242(2) of the Constitution of Zimbabwe states: "The Chairperson of the Zimbabwe Human Rights Commission must be a person who has been qualified for at least seven years to practise as a legal practitioner in Zimbabwe."

<sup>56</sup>S 242(4) of the Constitution of Zimbabwe.

<sup>57</sup>See ICC SCA (2013) at 30.

<sup>58</sup>S 242(1)(a) of the Constitution of Zimbabwe.

<sup>59</sup>It should be noted that this problem is not only unique to Zimbabwe as the same has been said about the appointment process in Uganda. Section 51(2) of the Constitution of Uganda stipulates that commissioners of the Ugandan Human Rights Commission (UHRC) are appointed by the President with the approval of Parliament. Motshekga (2002), at 78, notes that although this procedure might over the years have worked well in practice, it is however flawed as it gives the President (executive) too much influence in the appointment process. This problem is further compounded by the lack of consultation with civil society.

Chairperson of the ZHRC. Contrary to the general observation of the ICC SCA, the Constitution does not cater for extensive consultation with members of NGOs and civil society in the appointment of the Chairperson of the ZHRC, and thus leaves the President with greater powers of appointment. Such a clause can therefore be used to intrude on the independence of the ZHRC. Perhaps the procedure adopted in Namibia where appointment of the Ombudsman (has a human rights mandate) is made by the President on the recommendation of the JSC could have been adopted.<sup>60</sup> In South Africa, the President is bound by the recommendations of the National Assembly in the appointment of the Chairperson and Deputy Chairperson of the South African Human Rights Commission (SAHRC). Such a procedure could also have been adopted in Zimbabwe.<sup>61</sup> Arguably this would ensure accountability and checks and balances on the powers of the President, and would assist in ensuring that the independence of the ZHRC is protected. It would also make for a democratic process and thus bolster the integrity of the office.

It should be noted that in the past the media have reported on alleged “questionable appointments.” Accusations of political allegiances have been made against a former Chairperson of the ZHRC, Jacob Mudenda, whose appointment caused controversy as there were allegations that constitutional procedures were not followed in his appointment.<sup>62</sup> His credibility was also called into question as he was a former Governor of Matabeleland North during the *Gukurahundi*<sup>63</sup> massacres. His political allegiance to the ruling party saw him being elected as a Zimbabwe African National Union-Patriotic Front (ZANU-PF) Member of Parliament in the 2013 elections and subsequently as the Speaker of Parliament whilst holding the office of the Chairperson of the ZHRC.<sup>64</sup> Such close ties with the ruling party and subsequent appointment to Parliament whilst still holding office at the ZHRC raise serious questions about the degree of independence of the ZHRC whilst he was in charge. These are crucial issues

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<sup>60</sup>See Art 90(1) of the Constitution of Namibia.

<sup>61</sup>See s 6(1) of the South African Human Rights Commission Act 40 of 2013. S 193(5) of the Constitution of South Africa states: “The National Assembly must recommend persons- (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and (b) approved by the Assembly by a resolution adopted with a supporting vote- (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or (ii) of a majority of members of the Assembly, if the recommendations concerns the appointment of a member of a Commission.” S 193(6) states: “The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).”

<sup>62</sup>Mushava E “Mugabe, Tsvangirai misfire” *Newsday* 20 February 2013. Available at

<http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> (accessed 22 August 2013). The Movement for Democratic Change led by Welshman Ncube, alleged that they were not consulted, nor was the Committee on Standing Rules and Orders consulted, in the appointment of the former Chairperson of the ZHRC. The appointment was, as a result, in violation of s237 of the Constitution of Zimbabwe.

<sup>63</sup>The *Gukurahundi* massacres took place at the height of the state of emergency and the Matabeleland civil war (*Gukurahundi*) in Zimbabwe. The *Gukurahundi* massacres resulted in thousands of individuals being killed, raped and tortured for dissident activities.

<sup>64</sup>Mushava E “Mugabe, Tsvangirai misfire” *Newsday* 20 February 2013. Available at

<http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> (accessed 22 August 2013).

that need to be addressed in order to ensure that non-political individuals who will seek to protect and preserve the independence of the Commission are appointed.

Reif is of the view that the personal character of the person(s) appointed to head a Human Rights Commission is an important contributory factor in ensuring that the institution is able to discharge its duties effectively.<sup>65</sup> The existence of close political links with any political party poses a great risk for the politicisation of any independent commission, thus raising questions about its independence. It is important that individuals with an established history of independence from government should be appointed to head human rights institutions.<sup>66</sup> Therefore, any future appointments to the ZHRC must ensure that individuals with credible credentials, who are fit and proper and non-partisan are appointed to head the Commission. To ensure that non-partisan individuals are appointed, it is crucial that checks and balances need to be put into place to ensure that appointments made by the President are in accordance with provisions of the Constitution relating to an independent human rights institution. This will ensure that the independence of the institution is established and that individuals are able to carry out their duties in a non-partisan manner.

### 5.2.3 *Appointment of Other Members of the ZHRC*

The Constitution sets out a different criterion for the appointment of other members of the ZHRC. It states that eight other members of the ZHRC are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders.<sup>67</sup> In line with the Paris Principles and the ICC SCA General Observations, the Constitution of Zimbabwe has put in place a selection process that seeks to ensure impartiality in the appointment of other members of the ZHRC. Section 237(1) of the Constitution states:

(1) For the purpose of nominating persons for any appointment to any independent Commission, the Committee on Standing Rules and Orders must- (a) advertise the position; (b) invite the public to make nominations; (c) conduct public interviews of prospective candidates; (d) prepare a list of the appropriate number of nominees for appointment; and (e) submit the list to the President.

The Constitution of Zimbabwe in regard to the appointment of other members of the ZHRC provides for broad consultation and participation, screening, selection, and an appointment process that seeks to promote transparency, pluralism and public confidence in the ZHRC. In line with the ICC SCA General Observations the advertising of vacancies maximises the potential number of candidates and hence promotes pluralism in the appointment process.<sup>68</sup> The involvement of the public in the nomination process seeks to ensure that individuals of integrity and who are competent are appointed to

<sup>65</sup>See Reif (2000) at 24. It should also be noted that allegations of corruption and close links with the ruling party have also been levelled against Mr Jacob Mudenda.

<sup>66</sup>See Reif (2000) at 27.

<sup>67</sup>S 242(1)(b). See also s 150(2) of the Constitution of Zimbabwe for the composition of the Committee on Standing Rules and Orders.

<sup>68</sup>See ICC SCA (2013) at 30.

serve on the Commission. The above procedure in section 237(1) of the Constitution seeks to ensure that the whole appointment process of other members of the ZHRC is transparent. The inclusion of this transparent appointment process should be applauded as it will go a long way to securing the independence of the institution. However, it is imperative that in practice such appointment process *must be* followed in order to secure the independence of the Commission.<sup>69</sup>

#### 5.2.4 *Independence through Security of Tenure and Removal*

The ICC SCA in its General Observations has recognised the importance of security of tenure of members of an institution's governing body as a means protecting its independence.<sup>70</sup> It has noted that secure terms of office for members is an important guarantee of their independence so that they can develop expertise and be vocal without fear of hindering future prospects. The ICC SCA General Observations also require that the dismissal of a member of NHRIs should follow all substantive and procedural requirements, as prescribed by law, and should not solely be at the discretion of the appointing authorities.<sup>71</sup>

Pursuant to the achievement of independence the Constitution of Zimbabwe envisions that members of the ZHRC are afforded an enabling free environment to discharge their duties without any political hindrance.<sup>72</sup> Members of the Commission are therefore required to exercise their powers without fear of dismissal or non-re-appointment. The Constitution in section 320(1) deals with the conditions of service of members of independent commissions. It states that "except as otherwise provided in this Constitution, every member of a Commission is appointed for a term of five years which is renewable for one additional term only". The Zimbabwe Human Rights Commission Act, in the same manner as in other jurisdictions in Africa,<sup>73</sup> guarantees the security of tenure of members of the ZHRC. This is so that members of the ZHRC are able to exercise their duties without any fear of being removed from office.<sup>74</sup> Commissioners thus have clearly defined terms of office in order to ensure that they discharge their duties without fear or favour.

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<sup>69</sup>It should be noted that despite the existence of such appointment procedures, reports have emerged on how the process has been circumvented by the ruling party in the appointment of members of the ZHRC and other independent Commissions. Accusations have been levelled against the President for ignoring recommendations made by the Committee on Standing Rules and Orders and proceeding to appoint applicants with strong links to the ruling ZANU-PF. For more see Portal for Parliamentary Development "Zimbabwe: President subverts Gender Commission"

<http://www.agora-parl.org/news/zimbabwe-president-subverts-gender-commission> (accessed 11 August 2015).

<sup>70</sup>See ICC SCA (2013) at 40.

<sup>71</sup>See ICC SCA (2013) at 40.

<sup>72</sup>S 235(1)(a) of the Constitution of Zimbabwe. See also s7 of the Zimbabwe Human Rights Commission Act which deals with the independence and impartiality of the Commission and Commissioners.

<sup>73</sup>See for example s10 of the Uganda Human Rights Commission Act 1997.

<sup>74</sup>See s3(1) of the First Schedule of the Zimbabwe Human Rights Commission Act 2 of 2012 which states: "A Commissioner shall hold office for a term of five years and shall be eligible for reappointment for another term of office not exceeding five years."

More importantly, the Constitution protects members of any independent Commission from arbitrary removal from office<sup>75</sup> and members of the ZHRC are granted immunity from prosecution.<sup>76</sup> In line with the ICC SCA General Observations, the Constitution provides that a member of the ZHRC can only be removed from office when they are unable to perform the functions of the office through either physical or mental incapacity; gross incompetence; gross misconduct; or become ineligible for appointment to the Commission.<sup>77</sup> The Zimbabwe Human Rights Commission Act stipulates that a commissioner shall be removed from office by the President if the question of his or her removal from office has been referred to a tribunal<sup>78</sup> and that tribunal has advised the President that he or she ought to be removed from office.<sup>79</sup> The Commissioners enjoy a status similar to that of judges in Zimbabwe and as a result can only be removed in accordance with the removal procedure of a judge.<sup>80</sup>

Although the Constitution and the enabling legislation seek to protect the tenure of commissioners of the ZHRC by means of strict removal provisions, there are concerns about the involvement of the President in the removal process.<sup>81</sup> There is a possibility that independence of the Commission might be compromised in the sense that the President is given too many powers in the removal process. The President is given the powers to solely appoint members of the tribunal to hear the question of the removal of a member of the Commission.<sup>82</sup> Since the President solely constitutes the tribunal there is a chance that political considerations may play a part in the removing of commissioners. Thus, such powers pose a threat to the independence of the ZHRC.

To secure the independence of the ZHRC, there is a need to have checks on the powers of the President in the dismissal and appointment of tribunal members. What is of concern is the exclusion of the Committee on Standing Rules and Orders, which plays a pivotal role in the appointment of commissioners in the removal process of the same

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<sup>75</sup>S 237(2) of the Constitution of Zimbabwe. See also s20 of the Zimbabwe Human Rights Commission Act which deals with the removal of members of the Human Rights Commission.

<sup>76</sup>S 21 of the Zimbabwe Human Rights Commission Act states: "No legal proceedings shall lie against the Commission or any Commissioner or the Executive Secretary or any person acting under the direction of the Commission in respect of anything which is done in good faith and without gross negligence in pursuance of this Act."

<sup>77</sup>S 237(2) of the Constitution of Zimbabwe.

<sup>78</sup>According to s 20(4) of the Zimbabwe Human Rights Commission Act, the tribunal shall consist of a chairperson (a person who is or has been a judge of the Supreme Court or the High Court) and two other members appointed by the President.

<sup>79</sup>S 20(2) of the Zimbabwe Human Rights Commission Act.

<sup>80</sup>S 237(3) of the Constitution of Zimbabwe. See also s187 of the Constitution of Zimbabwe which deals with the removal procedures of judges in Zimbabwe.

<sup>81</sup>For more see Chiduzo L "Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?" (2014) 17(1) *PER/PELJ* 368 at 387 where concerns are expressed about the powers of the President in the removal process of judges.

<sup>82</sup>See s 20(4) of the Zimbabwe Human Rights Commission Act states: "The tribunal referred to in this section shall consist of a chairperson and two other members appointed by the President..."

commissioners.<sup>83</sup> In order to ensure impartiality and secure the independence of the ZHRC, the Constitution could have given the Committee on Standing Rules and Orders the powers to initiate and appoint members of a tribunal that would look at the question of the removal of a commissioner. Similarly to the appointment process, the Committee on Standing Rules and Orders would then communicate the recommendations of the tribunal to the President on whether or not a commissioner ought to be removed from office. Such a process would thus ensure that impartiality is observed and also provide proper checks on the powers of the President.

The procedure adopted in South Africa is a more preferable one; there the National Assembly plays a huge role in the appointment of members of independent commissions<sup>84</sup>, and is also given a central role in the removal process. Thus section 194 of the Constitution of South Africa states:

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on- (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for that person's removal from office; (2) (a) A resolution of the National Assembly concerning the removal from office of (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or (b) a member of a Commission must be adopted with a supporting vote of the majority of the members of the Assembly; (3) The President (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

The section above presents the role that is given to the National Assembly in the appointment and removal of members of independent institutions in South Africa. It is evident that the National Assembly is given a prominent role in the appointment and removal processes, and thus acts as a necessary check on the President in order to ensure and secure the independence of the Chapter 9 institutions. The powers of the President are thus significantly limited and are guided by the recommendations of the National Assembly. The same also applies in Namibia where the Ombudsman can only be removed from office before the expiry of his or her term by the President acting on the recommendations of the JSC.<sup>85</sup>

### 5.2.5 *Independence through Financial/Adequate Resources for the ZHRC*

It is important that a NHRI must have adequate resources, such as, human resources and adequate funding, in order to ensure the operational efficiency of the institution. The Paris Principles stipulate that NHRIs must be adequately funded so as to guarantee their independence. The purpose of such funding and a definition of what it entails are described by The Paris Principles as follows:

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<sup>83</sup>See s 242(1)(b) for the role of the Committee on Standing Rules and Orders in the appointment process of commissioners of the ZHRC.

<sup>84</sup>See s 193(4) of the Constitution of South Africa.

<sup>85</sup>Art 94(1) of the Constitution of Namibia.

The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.<sup>86</sup>

Access to adequate financial resources and the ability to have control over these resources are prerequisites for the effective operation of NHRIs. The ICC SCA notes that since the provision of adequate funding is determined in part by the national financial climate, States have the duty to protect the most vulnerable members of society, who are often the victims of human rights violations, even in times of severe resource constraints.<sup>87</sup> In line with the Paris Principles, the ICC SCA believes that irrespective of any financial constraints, there are certain aspects of the Paris Principles requirements that must be taken into account in any particular context. These requirements are summarised thus as: (a) The need for a national human rights institution to be accessible to the public; (b) need for salaries and benefits awarded to national human rights institutions to be comparable to those of civil servants performing similar tasks in other independent institutions of the State; (c) need to establish communications infrastructure; (d) adequate public funding to perform their mandated activities; (e) external funding should not constitute the institution's core funding as it is the responsibility of the State to ensure that institution's core budget.<sup>88</sup>

Section 322 of the Constitution of Zimbabwe stipulates that Parliament ensure that sufficient funds are appropriated to all independent Commissions to enable them to exercise their functions effectively. Section 17 of the Zimbabwe Human Rights Commission Act deals with the funding of the ZHRC. It states:

(1) The funds of the Commission shall consist of – (a) moneys appropriated by Act of Parliament for the salaries and allowances payable to and in respect of members of the Commission and the recurrent administrative expenses of the Commission; and (b) any other moneys that may be payable to the Commission from moneys appropriated for the purpose by Act of Parliament; and (c) any donations, grants, bequests or loans made by any person or organisation or any government of any country to the Commission with the approval of the Minister; and (d) any other moneys that may vest in or accrue to the Commission, whether in terms of this Act or otherwise. (2) The Commission shall apply its funds to the fulfilment of its functions...

For the ZHRC to discharge its duties effectively, the government needs to ensure that the Commission has adequate resources, its members are adequately remunerated, that the institution itself is financially independent, and that any public funds should not be under the direct control of the government. However, due to the severe economic challenges in Zimbabwe, the ability of the ZHRC to function effectively has been adversely affected over the years. Such challenges have had a negative impact on the Commission, with the former Chairperson, Reg Austin, resigning and citing operational challenges, including lack of staff, office space, and the absence of political will.<sup>89</sup> At the

<sup>86</sup>S B(2) of the Paris Principles.

<sup>87</sup>See ICC SCA (2013) at 35.

<sup>88</sup>See ICC SCA (2013) at 34-35.

<sup>89</sup>SAPA "Zimbabwe appoints new Rights, Elections Chief" *News24* 2 February 2013. Available at <http://m.news24.com/news24/Africa/Zimbabwe/Zim-appoints-new-rights-election-chiefs-20130218> (accessed 22 August 2013).

time of his resignation the former commissioner also stated that the Commission had “no budget, no accommodation, no mobility, and no staff.”<sup>90</sup> In October 2014, the Chairman of the ZHRC, Elasto Mugwadi, also cited the lack of funding for the institution as a hindrance to the effective discharge of its duties.<sup>91</sup> The Chairman noted that the Commission had received less than 10 per cent of its budgetary needs and that this had adversely affected the operational capacity of the institution.<sup>92</sup> Donor support from the United Nations Development Fund, the European Union and the Danish Embassy has done little to ameliorate the dire financial situation of the ZHRC. Through donor support the Commission has secured offices in Harare to enable it to fully discharge its mandate.<sup>93</sup>

It should be noted that the issue of inadequate funding is not only unique to Zimbabwe.<sup>94</sup> Given the endemic human rights abuses in Zimbabwe it is all the more important that Zimbabwe has an effective Commission, and hence efforts need to be made by the State to ensure that the ZHRC is adequately funded.<sup>95</sup> This will enhance its operational efficiency and independence and ensure that the institution discharges its duties without any fear or favour. There is an urgent need for the Zimbabwean government to address the issue of funding for the ZHRC in order to improve the promotion and protection of human rights.

Adequate remuneration needs to be provided in order to ensure professionalism within the institution.<sup>96</sup> Due to the lack of resources, there have been reports that the

<sup>90</sup>SAPA-AFP “Zimbabwe Human Rights chief resigns in protest” *Mail and Guardian* 29 December 2012. Available at <http://mg.co.za/article/2012-12-29-zimbabwe-human-rights-chief-resigns-in-protest> (accessed 18 November 2014.).

<sup>91</sup>Zhangazha W “Paltry funding cripples Commissions” *Zimbabwe Independent* 24 December 2014. Available at <http://www.theindependent.co.zw/2014/12/24/paltry-funding-cripples-commissions/> (accessed 10 January 2015).

<sup>92</sup>Zhangazha W “Paltry funding cripples Commissions” *Zimbabwe Independent* 24 December 2014. Available at <http://www.theindependent.co.zw/2014/12/24/paltry-funding-cripples-commissions/> (accessed 10 January 2015).

<sup>93</sup>United Nations Development Programme in Zimbabwe “Capacity building support to the Zimbabwe Human Rights Commission (ZHRC).” Available at [http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic\\_governance/ca-capacity-building-support-to-the-zimbabwe-human-rights-commissio.html](http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic_governance/ca-capacity-building-support-to-the-zimbabwe-human-rights-commissio.html) (accessed 31 July 2015).

<sup>94</sup>A report by the SAHRC reveals that it was historically the underfunded. The limited resources have inevitably impacted on institutional performance and the realisation of the intended outcomes of the Commission. See SAHRC “Strategic Plan 2014 to 2017: Annual Performance Plan 2014/2015.” Available at <http://www.gov.za/sites/www.gov.za/files/SAHRC%20Strategic%20Plan%202014-17%20and%20APP%202014-15a.pdf> (accessed 18 November 2014). It should be noted that there are issues of inadequate funding for Human Rights Commissions in Africa. The history of the underfunding of human rights in Africa has been well documented over the years with major challenges in countries, such as, Uganda, Malawi, and Burundi.

<sup>95</sup>For example, in Africa the SAHRC is viewed as one of the most adequately funded institutions which enjoy considerable independence.

<sup>96</sup>S 320(6) of the Constitution of Zimbabwe states: “Members of Commissions are entitled to such remuneration, allowances and other benefits as may be fixed by or under an Act of Parliament and their remuneration must not be reduced during the members’ tenure of office.” S 320(7) of the Constitution goes on to state that “[t]he remuneration and allowances of members of Commissions are a charge on the Consolidated Revenue Fund.”



Treasury has at times failed to pay the salaries of commissioners and staff on time.<sup>97</sup> The lack of resources has also hampered the work of the Commission, and has resulted in the Commission being unable to address certain human rights issues within the country.<sup>98</sup> Concerted efforts should be made to ensure that sufficient financial resources are made available to the Commission. Funds should therefore be made available either through local funding or through donations, grants or loans made by the government of any country in accordance with the provisions of the Zimbabwe Human Rights Commission Act.<sup>99</sup>

However, a major stumbling block to accessing donor funds in Zimbabwe is that the approval of the Minister is required before such funds can be given to the ZHRC.<sup>100</sup> This goes against the recommendations of the ICC SCA which is of the view that national institutions should not be required to obtain approval for external sources of funding, as this requirement may pose a threat to its independence.<sup>101</sup> It is crucial that the ZHRC must be given autonomy to source external funding without the approval of the Minister as envisaged under the Zimbabwe Human Rights Commission Act, and that financial systems be put in place to ensure accountability through regular financial reporting. Such accountability will ensure that the external funding sourced by the ZHRC does not compromise the independence of the ZHRC.

## 6 ACCESSIBILITY

The ICC SCA in its General Observations has noted that the proper funding of an NHRI is crucial in ensuring the accessibility of an NHRI. This is so because funding must be provided to secure premises and any other infrastructure required for the smooth operation of the institution.<sup>102</sup> It should be noted that accessibility is also influenced by an informed public with regards to the existence of the Commission and the projects of the Commission.<sup>103</sup> Accessibility of an NHRI is crucial particularly for the most vulnerable sections of society, who would have particular difficulty in drawing attention to any violation of human rights. In order to increase accessibility, it is also crucial that public information about the national institution and its method of work must be

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<sup>97</sup>Gumbo L "Human Rights Commission grounded" *The Herald* 23 June 2014. Available at <http://www.herald.co.zw/human-rights-commission-grounded/> (accessed 18 November 2014).

<sup>98</sup>Gumbo L "Human Rights Commission grounded" *The Herald* 23 June 2014. Available at <http://www.herald.co.zw/human-rights-commission-grounded/> (accessed 18 November 2014).

<sup>99</sup>It is crucial that in line with the ICC SCA recommendations, funding from external sources, such as international partners, should not constitute the core funding of the ZHRC as it is the responsibility of the State to do so.

<sup>100</sup>See s 17(c) of the Zimbabwe Human Rights Commission Act 2 of 2012.

<sup>101</sup>See ICC SCA (2013) at 34.

<sup>102</sup>See ICC SCA (2013) at 34.

<sup>103</sup>It should be noted that in order to enhance the accessibility of any Human Rights Commission, that funding be available for public awareness campaigns and civic education campaigns.

accessible in print and audio in relevant languages.<sup>104</sup> Accessibility can be improved through the opening of local offices in provinces and districts in order to ensure that victims of human rights violations are able to report such violations. The establishment of links with other human rights organisations also increases the accessibility of an NHRI as such other organisations can be used as a means of bringing forward any human rights violations. The employment of diverse staff from different cultural and ethnic backgrounds also aids in increasing accessibility of an NHRI.

The accessibility factor requires that national human rights institutions must be accessible to citizens, with the public having knowledge of the institution and its physical location, and with diversity of composition.<sup>105</sup> The accessibility of the ZHRC is crucial in order to ensure that individuals who are exposed to human rights violations or non-fulfilment of their rights can seek redress.<sup>106</sup> Additionally, information should be readily available about the role and purpose of any Commission. In order to enhance accessibility more provincial and district offices need to be opened across all the provinces in Zimbabwe.<sup>107</sup> The opening of such offices should be effectively disseminated to the general populace through various forms of media. This will ensure that Zimbabweans are aware of the existence of such an institution and the purpose that it seeks to serve.

The fact that the former Chairperson of the Commission, Reg Austin, cited the lack of resources for the Commission as one of his reasons for resignation highlights the challenges that await the ZHRC with regards to it being an accessible public institution.<sup>108</sup> It is therefore crucial that efforts should be made to make the Commission accessible and such efforts should ensure that the work of the Commission is spread across the country. This will result in the Commission being able to effectively spread its work throughout the whole country and will also aid it in effectively discharging its constitutional mandate.

It is therefore imperative that adequate resources should be made available for such effort to take place. It is also important that in order to enhance the accessibility of the Commission, the appointment of staff to the Commission should reflect the diverse cultures in Zimbabwe in order to improve accessibility of the Commission. The accessibility of the Commission countrywide will also ensure that it is able to carry out

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<sup>104</sup>International Council on Human Rights *Assessing the effectiveness of national human rights institutions* (Switzerland: International Council on Human Rights Policy 2005) at 16.

<sup>105</sup>See Reif (2000) at 26.

<sup>106</sup>See International Council on Human Rights (2005) at 16.

<sup>107</sup>Currently there is the Northern Regional office which caters for the Harare Metropolis, Mashonaland Central, East and West and the Manicaland provinces. The Southern office covers the Bulawayo Metropolis, Matabeleland North and South, Midlands and Masvingo provinces. See Gumbo L "Human Rights Commission grounded" *The Herald* 23 June 2014. Available at <http://www.herald.co.zw/human-rights-commission-grounded/> (accessed 18 November 2014).

<sup>108</sup>SAPA-AFP "Zimbabwe Human Rights chief resigns in protest" *Mail and Guardian* 29 December 2012. Available at <http://mg.co.za/article/2012-12-29-zimbabwe-human-rights-chief-resigns-in-protest> (accessed 18 November 2014.).

general education programmes on human rights issues for the general populace.<sup>109</sup> Such programmes will ensure that the people of Zimbabwe are made aware of human rights issues within the aim and scope of the Commission with regards to human rights promotion and protection. Such education programmes will therefore ensure that individuals know the exact steps to take when their rights are violated.<sup>110</sup>

## 7 MANDATE OF THE COMMISSION

The Paris Principles recognise that for an NHRI to be effective it must enjoy a clearly defined and appropriate mandate. Such mandate will ensure that the community it serves is aware of its functions. Sections A(1) and (2) of the Paris Principles provide that a national institution shall be given as broad a mandate as possible to promote and protect human rights. Such mandate must be clearly provided in a constitutional or legislative text and must specify the composition and sphere of competence of the institution.

The ICC SCA has further noted that all NHRIs should be legislatively mandated with specific functions to both promote<sup>111</sup> and protect<sup>112</sup> human rights.<sup>113</sup> It has also gone further to note that the mandate of a national institution should be interpreted in a broad, liberal and purposive manner so as to promote a progressive definition of human rights.<sup>114</sup> Section A(3) of the Paris Principles, which deals with the specific mandate of a national institution, states:

A national institution shall, *inter alia*, have the following responsibilities: (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matters without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicise them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas: (i) Any legislative or administrative provisions, as well as provisions relating to judicial organisations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and

<sup>109</sup>For example in South Africa the SAHRC has its headquarters in Johannesburg as well as regional offices which has improved its accessibility to the general populace. However, concerns have been raised that the regional offices, are located in urban areas, thus putting them far from rural villages.

<sup>110</sup>It should be noted that at the moment there is no clear method of case uptake by the ZHRC and hence an evaluation of the method may be needed so that such information is readily available to the public. However, it should be noted that despite this uncertainty, the ZHRC has set up the Complaints Handling and Investigations Unit which is responsible for receiving all complaints that come to the Commission. The Unit is also responsible for investigating the reported cases.

<sup>111</sup>The ICC SCA understands “promotion” to include “those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy”.

<sup>112</sup>The ICC SCA understands ‘protection’ to include “functions that address and seek to prevent actual human rights violations. Such functions include monitoring, inquiring, investigating and reporting human rights violations, and may include individual complaint handling”.

<sup>113</sup>See ICC SCA (2013) at 12.

<sup>114</sup>See ICC SCA (2013) at 12.

proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures; (ii) Any situation of violation of human rights which it decides to take up; (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters; (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government.<sup>115</sup>

Section A(3) of the Paris Principles goes further to provide for the mandate of national institution and includes mandates such as the following:

(b) To promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation; (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation; (d) To contribute to the reports which States are required to submit to the United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect to their independence; (e) To cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights; (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles; (g) To publicise human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.<sup>116</sup>

The ICC SCA has also endorsed the mandate under the Paris Principles and has also stated that any mandate of a national institution should include the following:

[E]xtend to the acts and omissions of both the public and private sectors; -vest the national institution with the competence to freely address public opinion, raise public awareness on human rights issues and carry out education and training programs;-provide the authority to address recommendations to *public authorities*, to analyse the human rights situation in the country, and to obtain statements or documents in order to assess situations raising human rights issues; -authorise unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice; -authorise the full investigation into alleged human rights violations, including the military, police and security officers.<sup>117</sup>

The provision of such a broad mandate will ensure that an NHRI is able to conduct its duties of promoting and protecting human rights.

## 7.1 Mandate of Zimbabwe Human Rights Commission

The mandate of the ZHRC is dealt with under section 243 of the Constitution of Zimbabwe. In line with the Paris Principles, the ZHRC is given a mandate to promote and protect fundamental rights. Section 243 of the Constitution of Zimbabwe states:

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<sup>115</sup>S A(3) of the Paris Principles.

<sup>116</sup>S A(3) of the Paris Principles.

<sup>117</sup>See ICC SCA (2013) at 13.

(1) The Zimbabwe Human Rights Commission has the following functions- (a) to promote awareness of and respect for human rights and freedoms at all levels of society; (b) to promote the protection, development and attainment of human rights and freedoms; (c) to monitor, assess and ensure observance of human rights and freedoms; (d) to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate; (e) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions; (f) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by the authority or person; (g) to secure appropriate redress, including recommending prosecution of offenders, where human rights or freedoms have been violated; (h) to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of such investigation; (i) to recommend to Parliament effective measures to promote human rights and freedoms; (j) to conduct research into issues relating to human rights and freedoms and social justice; and (k) to visit and inspect-(i) prisons, places of detention, refugee camps and related facilities; and (ii) places where mentally disordered or intellectually handicapped persons are detained; in order to ascertain the conditions under which persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places. (2) The Commissioner-General of Police must comply with any directive given to him or her by the Zimbabwe Human Rights Commission under subsection (1) (h).

Section 4 of the Zimbabwe Human Rights Commission Act<sup>118</sup> also deals with the functions of the ZHRC. It states:

In addition to the functions and powers set out in section 100R(6) and (7)<sup>119</sup> of the Constitution, the Commission shall have the following functions and powers- (a) to conduct investigations on its own initiative or on receipt of complaints; (b) to visit and inspect prisons, places of detention, refugee camps and related facilities in order to ascertain the conditions under which inmates are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places or facilities; (c) to visit and inspect places where mentally disordered or intellectually handicapped persons are detained under any law in order to ascertain the conditions under which those persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places; and (d) to ensure and provide appropriate redress for the violations of human rights and for injustice; (e) to co-operate with human rights institutions belonging to international, continental or regional organisations of which Zimbabwe is a member.

In accordance with the Paris Principles and the ICC SCA recommendations, the Constitution of Zimbabwe grants the ZHRC a broader mandate<sup>120</sup> with regards to the protection and promotion of human rights. In accordance with the Paris Principles, the Commission is mandated to receive complaints on any alleged human rights violations in the country.<sup>121</sup> The mandate of the ZHRC is comparable to the mandate of the SAHRC

<sup>118</sup>Act 2 of 2012.

<sup>119</sup>The sections referred to here are those of the Lancaster House Constitution which has since been replaced. There is a need therefore for the legislature to amend this provision and bring it in line with the provisions in the new Constitution.

<sup>120</sup>The broad mandate of the ZHRC will ensure that there are no jurisdictional conflicts with other State institutions, and also ensure that the police and other security forces, and prisons which are often sources of human rights problems are included within the jurisdiction of the institution.

<sup>121</sup>See s 243(1)(d) of the Constitution of Zimbabwe.

which is also conferred a broad mandate to ensure the effective promotion and protection of human rights in South Africa.<sup>122</sup>

The ZHRC is empowered to be the driving force in human rights education. The Commission is also mandated with investigating the conduct of any person or authority, where it is alleged that any of the rights and freedoms set out in the Declaration of Rights have been violated.<sup>123</sup> The Commission is given the powers to gather information and evidence, and in the process of gathering such, the Commission is given a number of powers which include: requiring witnesses to appear before it<sup>124</sup>, and the power to visit all places of detention to ascertain the conditions of such places.<sup>125</sup> In addition the Commission is mandated with securing the appropriate redress for complaints and recommend the prosecution of offenders, where human rights have been violated.<sup>126</sup> The Commission can also recommend the payment of compensation to individuals who are victims of human rights violations; and recommend that individuals seek redress in a court of law. The broader powers that are given to the Commission will therefore enable it to deal with individual cases and also ensure that violations of human rights are addressed. The constitutional guarantee of such powers will further enhance the promotion and protection of human rights and further ensure that the Commission is able to discharge its duties efficiently.

It is crucial to note that the broadening of the rules of standing<sup>127</sup> and the provision for the *amicus curiae* procedure<sup>128</sup> have laid a solid platform for the ZHRC to be actively involved in the promotion and protection of human rights. The ZHRC should gain inspiration from the SAHRC which has over the years successfully acted as *amicus curiae* in a number of cases in South Africa, thus strengthening the culture of human rights protection.<sup>129</sup> It should be noted that it is crucial that the government of Zimbabwe must ensure that adequate funding is given to the ZHRC so as to ensure that the institution is able to discharge its mandate effectively. The current underfunding of the institution and the lack of resources will greatly hamper the effectiveness of the institution which will lead to lack of public confidence in the ZHRC.

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<sup>122</sup>S 184 of the Constitution of South Africa deals with functions of the SAHRC. It states: “(1) The South African Human Rights Commission must: (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic. (2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power: (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate.’ See also s13 of the South African Human Rights Commission Act 40 of 2013 which deals further with the powers and functions of the SAHRC.

<sup>123</sup>See s 243 (1) (e) of the Constitution of Zimbabwe.

<sup>124</sup>See s 241 of the Constitution of Zimbabwe.

<sup>125</sup>See ss 243(1)(k)(i) and (ii) of the Constitution of Zimbabwe.

<sup>126</sup>See s243(1)(g) of the Constitution of Zimbabwe.

<sup>127</sup>S 85 (1) of the Constitution of Zimbabwe.

<sup>128</sup>See s 85(3) of the Constitution of Zimbabwe.

<sup>129</sup>See the case of *Government of Republic of South Africa & others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

## 8 ACCOUNTABILITY

The Paris Principles require that NHRIs should be responsible for the submitting to government, Parliament and any other competent body, reports on any matters concerning the promotion and protection of human rights.<sup>130</sup> In accordance with the Paris Principles such reports shall relate to: recommendations on the creation or amendment of any legislative or administrative provisions, including Bills and proposals; any situation of violation of human rights; human rights in general and on more specific matters; and proposals to put an end to human rights violations, and its opinion on the proposals and reaction of government to these situations.<sup>131</sup> The ICC SCA has furthermore noted that such reports and accountability of an NHRI serve to highlight key developments in the human rights situation in a country and provide a public account and effectiveness of an NHRI.<sup>132</sup>

The ICC SCA has also reiterated the importance of the enabling legislation of a NHRI establish a process whereby the institution's reports are required to be widely circulated, discussed and considered by the legislature.<sup>133</sup> As such it is important that a NHRI should table its reports directly in the legislature so as to promote action on such reports.<sup>134</sup> It is also crucial to note that these reports bear much significance for a NHRI to be accredited or re-accredited by the ICC SCA.

It has been noted that the submission of reports by a NHRI seeks to ensure the accountability of the institution. The accountability of any independent institution dealing with human rights is essential in ensuring the effectiveness of such institution in the promotion and protection of human rights. Accountability is usually implemented by imposing a legal duty on the institutions to regularly report on their work to a State body directly (Parliament or Parliamentary Committees). Reif emphasises the point that accountability to the public is also essential and can be carried out by ensuring that annual and special reports are distributed in the public sphere and through the regular communication between the institution and complainants during investigations.<sup>135</sup>

In seeking to enhance the accountability of the ZHRC, section 323 of the Constitution of Zimbabwe states:

(1) Every Commission must submit to Parliament, through the responsible Minister, an annual report describing fully its operations and activities, the report being submitted not later than the end of March in the year following the year to which the report relates. (2) An Act of Parliament may require a Commission to submit further reports in addition to the annual report specified in subsection (1), and may prescribe the way in which such reports are to be submitted.

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<sup>130</sup>S A(3)(a) of the Paris Principles.

<sup>131</sup>S A(3)(a) of the Paris Principles.

<sup>132</sup>See ICC SCA (2013) at 37.

<sup>133</sup>See ICC SCA (2013) at 37.

<sup>134</sup>See ICC SCA (2013) at 37.

<sup>135</sup>See Reif (2000) at 27.

Section 244 of the Constitution further provides:

(1) The Zimbabwe Human Rights Commission may require any person, institution or agency, whether belonging to or employed by the State or otherwise- (a) to inform the Commission of measures they have taken to give effect to the human rights and freedoms set out in the Declaration of Rights; and (b) to provide the Commission with information it needs to prepare any report required to be submitted to any regional or international body under any human rights convention, treaty or agreement to which Zimbabwe is a party. (2) In addition to the report it is required to submit in terms of section 323, the Zimbabwe Human Rights Commission may<sup>136</sup>, through the appropriate Minister, submit reports to Parliament on particular matters relating to human rights and freedoms which, in the Commission's opinion, should be brought to the attention of Parliament.

The above sections of the Constitution recognise the importance of the Commission to report to Parliament about its operations and activities. Parliament is given the legal duty to consider reports submitted by the ZHRC. In order to assist the ZHRC to effectively discharge its mandate, individuals, institutions and other agencies can be required by the ZHRC to table reports relating to human rights issues in Zimbabwe. It should be noted that the submission of reports to Parliament serves as a tool to inform it, as a valuable public record of the monitoring process. The reporting procedure amongst many issues enables the ZHRC to engage with organs of State on how to improve access to rights, educating them about their obligations, making well considered recommendations, raising public awareness, and identifying areas of priority for the next monitoring cycle.<sup>137</sup> It can also be stated that essence of the Commission's accountability to Parliament lies in not only reporting to Parliament but in the fact that the ZHRC will complement Parliament in its accountability and oversight role over the executive as well as in legislation monitoring.<sup>138</sup>

The tabling of such reports will enhance the mandate of the ZHRC and also ensure that it is privy to the status of the promotion and protection of human rights in Zimbabwe. The reporting mechanism will strengthen the work of the Commission and also ensure that it is properly accountable in relation to its mandate.

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<sup>136</sup>It should be noted that criticism can be drawn on the use of the word "may" in this context. The use of such a word is weak and the submission of reports via the Minister can potentially compromise the "independence of the ZHRC" previously addressed in this article.

<sup>137</sup>See SAHRC "Parliamentary accountability mechanisms for poverty reduction: the case of South Africa". Available at <http://www.ohchr.org/Documents/Issues/SForum/3sfMsMajodinaSouth%20Africa.pdf> (accessed 11 August 2015).

<sup>138</sup>See SAHRC "Parliamentary accountability mechanisms for poverty reduction: the case of South Africa". Available at <http://www.ohchr.org/Documents/Issues/SForum/3sfMsMajodinaSouth%20Africa.pdf> (accessed 11 August 2015).



## 9 CO-OPERATION WITH THE INTERNATIONAL HUMAN RIGHTS SYSTEM AND OTHER DOMESTIC HUMAN RIGHTS BODIES

### 9.1 Interaction with the International Human Rights System

The ICC SCA has noted the importance of the Paris Principles<sup>139</sup> in recognising the importance of monitoring and engaging with the international human rights system as an effective role for an NHRI in the promotion and protection of human rights domestically.<sup>140</sup> The ICC SCA has stated:

Depending on existing domestic priorities and resources, effective engagement with the international human rights system may include: submitting parallel or shadow reports to the Universal Periodic Review, Special Procedure mechanisms and Treaty Bodies Committees; making statements during debates before review bodies and Human Rights Council; assisting, facilitating and participating in country visits by United Nations experts, including special procedures mandate holders, treaty bodies, fact finding missions and commissions of inquiry; and monitoring and promoting implementation of relevant recommendations originating from the human rights system.<sup>141</sup>

The ICC SCA has noted that such interaction with international bodies is an important dimension for the work of any NHRI. Interaction will enhance the effectiveness of an NHRI and its participation in regional and international co-ordination bodies will enhance its independence and effectiveness. International and regional co-operation will also ensure that an NHRI is able to monitor a State's compliance with treaty obligations and a State's reporting obligations under the Universal Periodic Review.<sup>142</sup>

The ZHRC has identified the continued lack of funds for the Commission as a reason for its lack of progress in affiliating with international human rights bodies such as, the International Coordinating Committee of National Human Rights Institutions (ICC), the Network of African National Human Rights Institutions (NAHRI) and the African Commission on Human and Peoples Rights (Africa Commission).<sup>143</sup> In order to enhance the effectiveness of the ZHRC, it is important that it establishes co-operation with other international human rights bodies in order to ensure the effective promotion and protection of human rights in Zimbabwe. It is crucial that the Commission should also comply with its reporting obligations internationally and regionally<sup>144</sup> and that

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<sup>139</sup>See ss A(3)(d) and (e) of the Paris Principles.

<sup>140</sup>See ICC SCA (2013) at 18.

<sup>141</sup>See ICC SCA (2013) at 18.

<sup>142</sup>See ICC SCA (2013) at 18.

<sup>143</sup>ZHRC "Media engagement workshop- overview of the mandate and work of the Zimbabwe Human Rights Commission" Available at <http://www.zhrc.org.zw/index.php/2014-07-02-07-41-38/speeches/59-media-engagement-workshop-overview-of-the-mandate-and-work-of-the-zimbabwe-human-rights-commission-zhrc> (accessed 11 August 2015).

<sup>144</sup>As contemplated in s 244(1)(b) of the Constitution of Zimbabwe. It is important to note that although the ZHRC may be required to assist the State in preparing country reports, the ICC SCA recommends that an NHRI (ZHRC in this case) should neither prepare the country report nor should it report on behalf of the government.

such reports must be drafted independently for a true reflection of the state of human rights in Zimbabwe.

## 9.2 Co-operation with Domestic Human Rights Bodies

The ICC SCA has noted the importance of NHRIs to have regular and constructive engagement with all relevant domestic stakeholders in order to effectively fulfil their mandates.<sup>145</sup> It has noted that NHRIs must develop and formalise and maintain working relationships with other domestic institutions established for the promotion and protection of human rights. These include sub-national statutory human rights institutions, thematic institutions, civil society and NGOs.<sup>146</sup> Such co-operation with other human rights bodies is in accordance with the Paris Principles. The Principles require institutions to “maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights”.<sup>147</sup>

It should be noted that the Paris Principles recognise the fundamental role played by NGOs in expanding the work of NHRIs. The Principles thus encourage NHRIs to develop relations with NGOs that are devoted to the promotion and protection of human rights. Reif also supports this view and notes that in order to develop relationships and co-operation, it is essential for a Human Rights Commission to encourage co-operation and dialogue with NGOs and other institutions charged with human rights protection.<sup>148</sup> Such co-operation will ensure the exchanging of views and information which should enhance the activities of a NHRI.<sup>149</sup> NGOs play a crucial role in the promotion and protection of human rights<sup>150</sup> and as such it is crucial that they work together with NHRIs to promote and protect human rights.

It should be noted that previously civil society organisations in Zimbabwe faced a number of challenges as a result of government being suspicious of their activities as claims arose that they were working with the opposition to advance regime change in Zimbabwe.<sup>151</sup> Thus, the work of a number of civil society organisations was severely curtailed through the enactment of repressive legislation, such as the Private Voluntary Organisations Act (PVOA).<sup>152</sup> The Act was used to undermine NGOs involved in human rights work by requiring them to register with the then Ministry of Public Service,

<sup>145</sup>See ICC SCA (2013) at 21.

<sup>146</sup>See ICC SCA (2013) at 21.

<sup>147</sup>Section C(f) and (g) of the Paris Principles.

<sup>148</sup>See Reif (2000) at 16.

<sup>149</sup>Welch CE *NGOs and human rights: promise and performance* (Philadelphia: Pennsylvania Press 2001) at 5.

<sup>150</sup>Marcinkute L “The role of human rights NGOs: human rights defenders or state sovereignty destroyers” (2011) 4:2 *Baltic Journal of Law and Politics* 52 at 54.

<sup>151</sup>Chamboko M “ZANU- PF ban of NGO’S in Zimbabwe self-defeating” *Nehanda Radio* 19 February 2012. Available at <http://nehandaradio.com/2012/02/19/zanu-pf-ban-of-ngos-in-zimbabwe-self-defeating/> (accessed 30 October 2013).

<sup>152</sup>Act 22 of 2001/Chap 17:05.

Labour and Social Welfare or risk prosecution.<sup>153</sup> However, despite such challenges it should be noted that the ZHRC has since it became fully operational realised the importance of civil society organisations in the promotion and protection of human rights. Over the years the ZHRC has engaged civil society organisations in various meetings in an effort to establishing working relationships that will improve the human rights situation in Zimbabwe.<sup>154</sup> The ZHRC must therefore be commended for its diligent efforts in incorporating various members of civil society with regards to issues of human rights. Such efforts will encourage co-operation and will result in the exchanging of views and information which should enhance the activities of the ZHRC. It is worthy of note that the ZHRC has prioritised the continued engagement and collaboration with various civil society organisations on different human rights thematic issues.<sup>155</sup> Such constant engagement will aid the ZHRC to effectively carry out its constitutional mandate.

## 10 CONCLUSION

The Constitution of Zimbabwe recognises the important role of the ZHRC in human rights promotion and protection. It has thus put into place a framework that seeks to ensure that the Commission is able to effectively discharge its duties. Such framework should ensure that the Commission is able to discharge its mandate in the Constitution. The ZHRC has made considerable efforts to improve the promotion and protection of human rights. This can be seen from the efforts that the leadership of the ZHRC has made to establish relationships with the wider civil society in order to address the issue of human rights in Zimbabwe. Such efforts will therefore enhance the capacity of the ZHRC to effectively carry out its broader mandate with regards to human right promotion and protection. However, despite being an independent institution, there are a number of challenges that might threaten the institution in effectively discharging its mandate. In order to guarantee the independence of the ZHRC, well-qualified individuals with no political links are to be appointed. There is need to ensure that the Commission is adequately funded so as to ensure that it is able to discharge its constitutional obligations without any hindrance. This will ensure that the ZHRC in collaboration with other human rights stakeholders is able to contribute positively in addressing the human rights situation in Zimbabwe.

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<sup>153</sup>See s 6 of the PVOA.

<sup>154</sup>ZHRC “Media engagement workshop- overview of the mandate and work of the Zimbabwe Human Rights Commission” Available at <http://www.zhrc.org.zw/index.php/2014-07-02-07-41-38/speeches/59-media-engagement-workshop-overview-of-the-mandate-and-work-of-the-zimbabwe-human-rights-commission-zhrc> (accessed 11 August 2015).

<sup>155</sup>ZHRC “Media engagement workshop- overview of the mandate and work of the Zimbabwe Human Rights Commission” Available at <http://www.zhrc.org.zw/index.php/2014-07-02-07-41-38/speeches/59-media-engagement-workshop-overview-of-the-mandate-and-work-of-the-zimbabwe-human-rights-commission-zhrc> (accessed 11 August 2015).