

International human rights mechanisms and the Asia-Pacific

United Nations human rights system

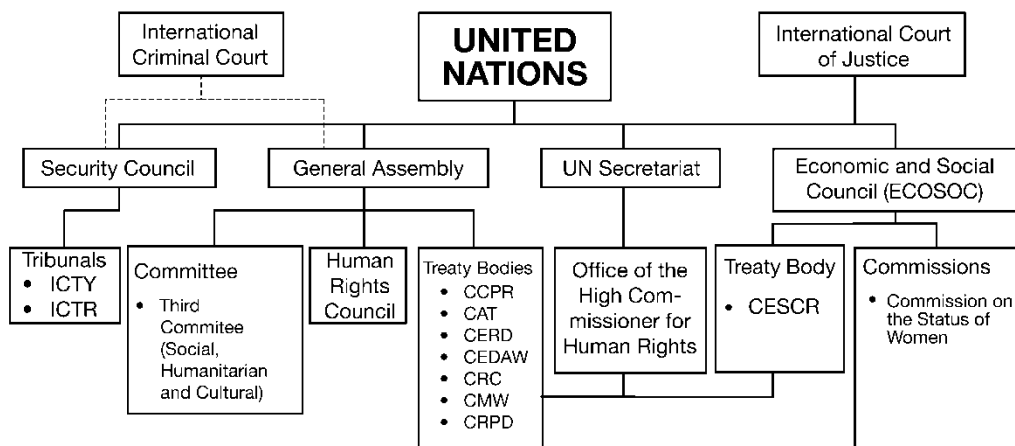


Figure 3.1 Human rights architecture at the United Nations

Source *United Nations Non-Governmental Liaison Services (NGLS), The United Nations Human Rights Systems: How To Make It Work For You, August 2008, p. 21.*¹

1 Key: CAT = Committee Against Torture; CCPR = Human Rights Committee; CEDAW = Committee on the Elimination of Discrimination Against Women; CERD = Committee on the Elimination of Racial Discrimination; CESCR = Committee on Economic, Social and Cultural Rights; CMW = Committee on Migrant Workers; CRC = Committee on the Rights of the Child; CRPD = Committee on the Rights of Persons with Disabilities; ICTR = International Criminal Tribunal for Rwanda; ICTY = International Criminal Tribunal for the Former Yugoslavia; Note: The International Criminal Court is independent of, but can work in cooperation with, the UN human rights system.

- 3.1 At the outset of this inquiry, the Committee noted that the need for reform of elements of the United Nations (UN) system has long been discussed. For example, this Committee has previously examined aspects of proposed UN reform in its 2001 report entitled *Australia's Role in United Nations Reform* and its 2005 report that looked at *Reform of the United Nations Commission on Human Rights*. In its evidence to the Committee, RegNet supported further reform of the UN system.²
- 3.2 In its discussion of the United Nations human rights system, it is not constructive for the Committee to reproduce in great detail the background and functions of the various components of the system. There are many publications that outline and evaluate – in varying degrees of detail – its machinery and operations.³ In this chapter, a brief outline of the principal organs of the UN human rights system is provided, and their application in the Asia-Pacific region discussed.
- 3.3 The establishment of the United Nations in 1945 was a significant development that followed the end of World War II. Fifty-one⁴ nations joined together to commit:
- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind;
 - to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small;
 - to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; and
 - to promote social progress and better standards of life in larger freedom.⁵
- 3.4 Three years later saw the adoption and proclamation of the *Universal Declaration of Human Rights* (UDHR) by the UN General Assembly, on 10 December 1948. This declaration recognised that the 'inherent dignity and ...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. It set out 30

2 CIGJ, *Transcript*, 7 April 2009, pp. 57-58.

3 For example, United Nations Non-Governmental Liaison Services (NGLS), *The United Nations Human Rights Systems: How To Make It Work For You*, August 2008; and Steiner HJ, Alston P and Goodman R, *International Human Rights in Context: Law, Politics, Morals*, 3rd Edition, 2008. There is an extensive range of resources examining, critiquing and seeking to reform the United Nations.

4 There are now 192 Member States.

5 UN website: <http://www.un.org/en/documents/charter/preamble.shtml/>, viewed 6 July 2009.

articles, to serve as a 'common standard of achievement' by which Member States and their peoples are to be guided:⁶

The human rights set out in the Universal Declaration represent common values drawn from the world's diverse religious, humanist, political and cultural beliefs.⁷

3.5 This was followed, in 1966, by the adoption of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) and the corresponding Optional Protocol. The Second Optional Protocol to the ICCPR was adopted in 1989, and focuses on abolishing the death penalty. These, in concert with the UDHR, are known informally as the International Bill of Human Rights.⁸

3.6 Despite turning 60 in December 2008, the UDHR remains at the cornerstone of the international human rights system which has emerged.⁹ When considering the potential future application of the UDHR, the Australian Bahá'í Community was optimistic that:

While there is clearly a long way to go before the commitments inherent in the Declaration and related instruments are translated into universal respect for human rights...the maturing consciousness of a global community, the development of mechanisms for implementation and monitoring of human rights and the rise of a vibrant civil society in support of these rights, holds promise that a global order capable of upholding the dignity and nobility of the individual will be realised.¹⁰

3.7 The values and standards set out in the UDHR have application in the Asia-Pacific. The Australian Bahá'í Community observed that:

All states in the Asia-Pacific region, regardless of their political, economic and cultural systems, have the duty to promote and protect all the rights and freedoms articulated in the Declaration.¹¹

6 UN website: <http://www.un.org/en/documents/udhr/>, viewed 6 July 2009.

7 APF, *Submission no. 21*, p. 4.

8 UN website: <http://www2.ohchr.org/english/law/>, viewed 6 July 2009.

9 See for example, APF, *Submission no. 21*, p. 4. The Committee marked this anniversary with a public forum, the transcript of which is available at: <http://www.apf.gov.au/house/committee/jfact/udhr/index.htm>.

10 Australian Bahá'í Community, *Submission no. 14*, p. 2.

11 Australian Bahá'í Community, *Submission no. 14*, p. 2.

- 3.8 The Australian Bahá'í Community is one group that have found the UN international mechanisms effective when dealing with specific human rights abuse cases affecting their community, and believes its organs are essential means for the promotion and protection of human rights and should be fully utilised for addressing human rights violations in the Asia-Pacific.¹²
- 3.9 In its evidence, the HRLRC referred to comments by Ms Jalal from the Pacific Regional Rights Resource Team, that:
- ...while it is not widely acknowledged or even understood, 'the human rights framework and the international human rights system has already brought considerable benefits to the Pacific Island countries and its citizens.' Jalal argues that Pacific Islanders who understand the implications of not having human rights to protect them 'would be loath to abdicate them, given a choice.' Even those who resist the role of human rights in the Pacific would agree that certain rights already maintain an important place in the Pacific, such as the right to a fair trial.¹³
- 3.10 Further, it noted Ms Jalal's summary of the gains of the international human rights framework for the Pacific as including:
- providing a framework for democracy and elections, constitutions and membership in the UN;
 - providing a legal framework of good governance for Pacific Island countries;
 - enabling the majority of Pacific Island countries to be perceived globally as functioning democracies and generally respecting of human rights;
 - enabling and promoting the establishment of an independent judiciary;
 - facilitating the allocation of considerable overseas aid where Pacific Island countries are able to demonstrate elected leadership and good governance;
 - providing protection against the arbitrary use of power by the state in terms of the rights to free movement, speech, fair trial, freedom from discrimination, free and fair elections and protection against torture; and

12 Australian Bahá'í Community, *Transcript*, 19 March 2009, p. 1.

13 HRLRC, *Submission no. 15*, p. 6.

- ratification of certain international human rights treaties has driven positive legislative development.¹⁴

3.11 However, SCIL was less confident about the effectiveness of UN human rights mechanisms in the Asia-Pacific. It saw these mechanisms as performing two main roles: a political role in developing awareness of human rights and enhancing human rights protections through political dialogue and negotiating human rights instruments; and a judicial role in monitoring and seeking to enforce human rights standards. SCIL observed that:

In terms of this second role, it should be noted that the ability of the relevant bodies to perform this function in relation to the Asia-Pacific region is limited by the fact that the region has a poor record of commitment to the relevant human rights treaties, with less than a quarter of countries in the region having ratified all major instruments. Thus while the international human rights framework may be a useful complement to national human rights initiatives, there is still room for enhancing the protection and monitoring of human rights at the regional level.¹⁵

3.12 In the Pacific, the RRRT saw geography as a constraining factor on access to UN mechanisms. It commented that:

...the location of most offices of the UN in Europe have made it very difficult for Pacific people to identify with them. Even UN offices located in the Pacific are regarded as inaccessible.¹⁶

3.13 Lack of resources was also highlighted as a constraining factor. The Committee noted DFAT's advice that:

Small island countries in the Pacific region often lack the resources to ensure effective participation in important human rights and other discussions at the various United Nations (UN) bodies. Participation of Pacific Island Countries at the United Nations in New York is assisted by the Joint Office for Commonwealth Permanent Missions to the United Nations and the Alliance of Small Island States (AOSIS).¹⁷

14 HRLRC, *Submission no. 15*, pp. 6-7.

15 SCIL, *Submission no. 5*, p. 3.

16 RRRT, *Submission no. 13*, p. 14.

17 DFAT, *Submission no. 17*, p. 1.

3.14 RegNet agreed that there are 'some extreme costs and burdens' associated with accessing the UN systems, but argued that:

...[this] is something Australia should help with... There are costs, but there are also benefits; that is, putting the human rights issues that do not have scale. If you want to talk about violence against women, people are going to naturally think about Afghanistan and Pakistan... It is very hard for a smaller country like Samoa to raise issues like that in the international system and to get international media interest when the scale is so small. There are some advantages to the Pacific, particularly around the climate change issue.¹⁸

United Nations human rights treaties and special procedures

3.15 The United Nations human rights system comprises two main types of mechanisms for monitoring human rights; treaty based (conventional) mechanisms, and independent and ad hoc (non-conventional) mechanisms separate to the treaty system.

Conventional mechanisms

3.16 Nine treaties are at the core of the UN's human rights treaty system:

- *International Covenant on Civil and Political Rights (ICCPR)*;
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*;
- *Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*;
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*;
- *Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*;
- *Convention on the Rights of the Child (CRC)*;
- *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW)*;
- *Convention on the Rights of Persons with Disabilities (CRPD)*; and

18 RegNet, *Transcript*, 7 April 2009, p. 58.

- *International Convention for the Protection of All Persons from Enforced Disappearance*.¹⁹
- 3.17 Treaty bodies are in place to support the mandate of each of the first eight treaties. Each comprises a committee of independent experts to monitor the implementation of the treaty under which it was established. The current treaty-based bodies are:
- Human Rights Committee;²⁰
 - Committee on Economic, Social and Cultural Rights;
 - Committee on the Elimination of Racial Discrimination;
 - Committee on the Elimination of Discrimination against Women;
 - Committee against Torture;
 - Committee on the Rights of the Child;
 - Committee on Migrant Workers; and
 - Committee on the Rights of Persons with Disabilities.²¹
- 3.18 Every UN Member is a party to one or more of these treaties.²² States enter into treaties on a voluntary basis, in keeping with the principle of state sovereignty that is intrinsic to international systems. However, the practical reality for many nation states is that they are facing many external and internal influences when considering whether or not to ratify a given treaty. The UN undertakes campaigns to promote and encourage ratification of its human rights treaties, regional bodies such as the European Union and the Commonwealth encourage the ratification of certain treaties (human rights and other) by their membership, and other key organisations, including NGOs, raise awareness and conduct monitoring activities on human rights.²³
- 3.19 Once a treaty is ratified the state assumes the legal obligation to implement the underlying rights of that treaty. The monitoring arrangements require nations that are party to a given treaty to produce, first an initial, and then periodic reports (every two to five years,

19 The OHCHR's Fact Sheet no. 30 provides a detailed grounding in the UN's core treaties and treaty bodies: <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>. For details of these treaties, see: <http://www2.ohchr.org/english/law/index.htm>.

20 Supporting the ICCPR and its two optional protocols.

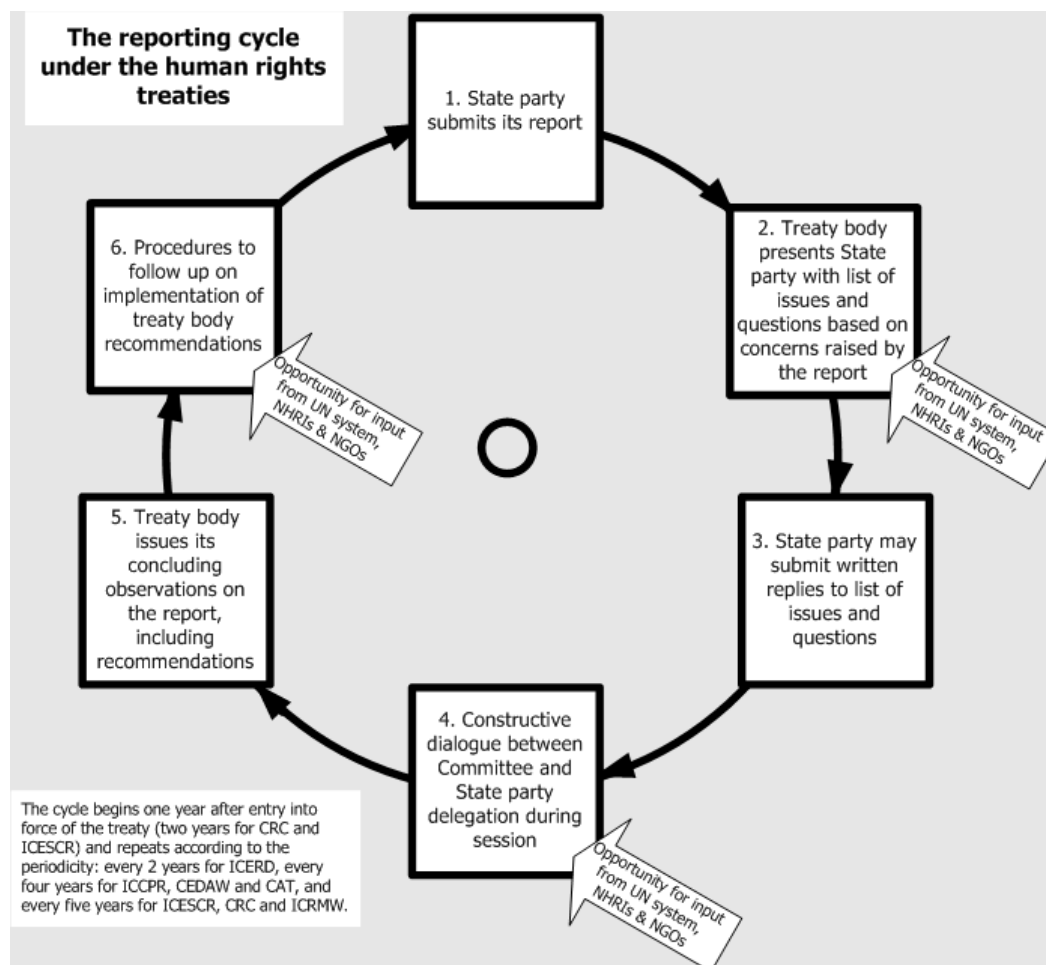
21 DFAT, *Submission no. 17*, p. 4.

22 APF, *Submission no. 21*, p. 5.

23 Parliamentary Library, Client Memorandum, *Role of UN in encouraging states to sign up to treaties*, 10 February 2010.

depending on the treaty) on the country's progress on the implementation of those rights. These reports are examined by the relevant treaty body, which makes comments or recommendations in the form of Concluding Observations in response to human rights concerns that may have emerged.²⁴

Figure 3.2 Treaty reporting cycle



Source OHCHR website²⁵

3.20 States are encouraged to publicise and use treaty body reports to guide domestic progress on meeting their treaty obligations. While the treaties bodies do not have the power to enforce their recommendations, Concluding Observations are generally taken seriously by its UN Member States.²⁶ Some of the treaty bodies are also empowered to undertake

24 DFAT, *Submission no. 17*, p. 5.

25 Source: <http://www2.ohchr.org/english/bodies/docs/ReportingCycle.gif>, viewed 6 July 2009.

26 OHCHR, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30, p. 32.

inquiries, examine complaints between states, and to examine individual complaints.²⁷

- 3.21 The Castan Centre stressed the important role that the core treaties play. It observed that:

Finding a common standard of human rights is a difficult process. The UDHR and its implementing treaties, the ICCPR and ICESCR, provide the best example of universal agreement of what human rights are.²⁸

- 3.22 In a joint Office of the High Commissioner on Human Rights Pacific Regional Office and Pacific Island Forum Secretariat discussion paper, it was argued that:

Ratification and implementation of those treaties is widely recognized as a basic requirement for promoting and protecting human rights on the national level. The treaties oblige State Parties to take measures to ensure that their domestic legislation and policies conform to international standards.²⁹

- 3.23 The HRLRC contended that the ongoing review and reporting obligation under the treaty system is:

...a really important process for...[educating] countries about how human rights matter within their countries. It gives governments the opportunity to report on human rights and it gives NGOs the opportunity to respond, and then there is created a body of knowledge about how human rights are relevant in particular countries.³⁰

The low ratification rate of treaties in the Pacific

- 3.24 If it is the case that the ratification of these core international treaties are an important step in a nation's human rights development, the Committee is concerned to see the low rate of ratification of core treaties by Pacific nations.

27 OHCHR website: <http://www2.ohchr.org/english/bodies/petitions/index.htm>, viewed 6 July 2009.

28 Castan Centre, *Submission no. 10*, p. 5.

29 OHCHR Regional Office for the Pacific and the Pacific Islands Forum Secretariat, *Ratification of International Human Rights Treaties: Added value for the Pacific region*, Discussion Paper, July 2009, p. vii.

30 HRLRC, *Transcript*, 15 April 2009, p. 25.

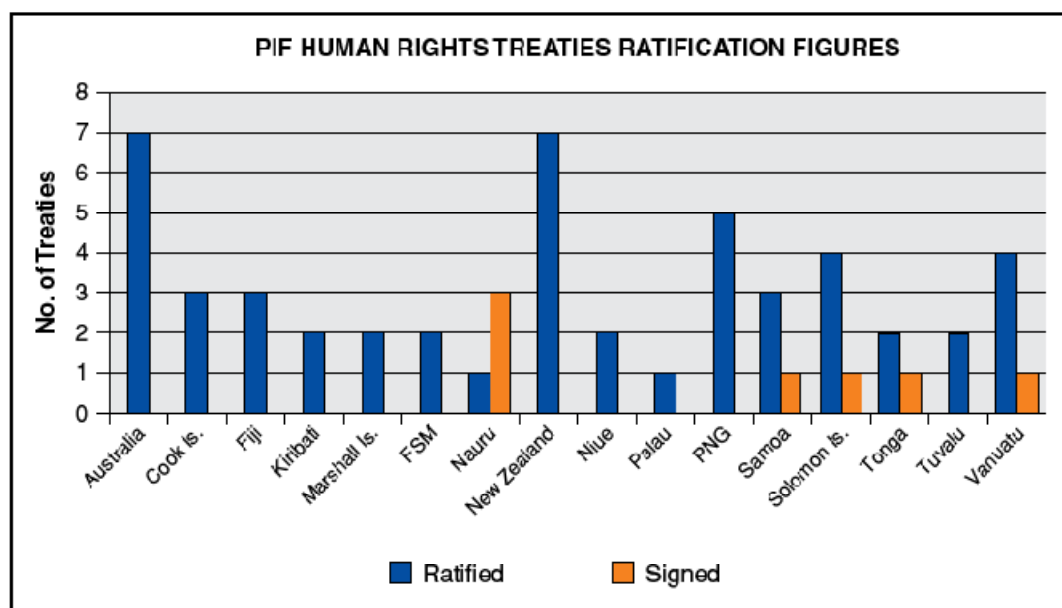


Figure 3.3 Treaty ratification in the Pacific

Source OHCHR Pacific Regional Office and PIF Secretariat, *Ratification of international human rights treaties: Added value for the Pacific region, Discussion Paper, July 2009, p. viii.*

3.25 DFAT provided the Committee with a table of the breakdown of ratifications of the major treaties by nation and treaty. With the exception of the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child*, the rate of ratification of treaties is very low across the Pacific.³¹

3.26 RegNet made the point that the low level of ratification of human rights treaties:

...takes away one forum for pressure to make governments more accountable. One mechanism that is hardly original is to promote ratification which at least provides a forum for countries [that] have ratified to have to put in their periodic reports and so on. That provides one pressure point for them with the knowledge that they are going to have to report against those to improve things on those particular indicators.³²

3.27 States enter into a given treaty voluntarily. There is no requirement in the United Nations or any other international system compelling states to ratify the core human rights treaties. A number of external and internal considerations will influence a nation state's decision on whether to ratify.

31 DFAT, (Supplementary) *Submission no. 35*, p. 4.

32 RegNet, *Transcript*, 7 April 2009, pp. 53-54.

The United Nations, international organisations, NGOs, internal stakeholders and other countries all have the power to encourage – and where appropriate provide support for – the ratification of core human rights treaties.

- 3.28 The Committee noted that encouraging the ratification and implementation of international human rights treaties is one of the governance initiatives under the Pacific Plan. Amnesty noted that:

The Pacific Plan requires a 6 monthly report by the Forum Secretariat on the implementation by the member countries. It has seen a number of key collaborations on human rights - the New Zealand Law Reform Commission, the New Zealand Human Rights Commission and the Forum Secretariat - to examine the cultural relativist argument and to determine how human rights are relevant and fundamental for everyone in the Pacific.³³

- 3.29 Some groups argued that the low ratification rate was indicative of governments simply directing (limited) resources to other priorities.³⁴ Others contended there could be other concerns, such as cultural objections, at the root of the low level of treaty ratification. The Castan Centre suggested that:

...if there are genuine political or cultural objections to certain elements, we should find out what precisely they are...Country by country, treaty by treaty.³⁵

- 3.30 There are implications of ratifying a treaty that also need to be considered. A number of groups were of the view that while it is a simple enough task to sign on to these treaties, once ratified, meeting obligations, such as ongoing review and reporting requirements, is a resource intensive activity.³⁶

- 3.31 Of the Pacific nations that have ratified core treaties, it appears that there are some cases of reporting obligations not being met. For example, with initial reports for CEDAW still outstanding from the Federated States of Micronesia, Kiribati, Marshall Islands, Solomon Islands; and CRC initial reports outstanding from the Cook Islands, Nauru, Niue, Tonga and Tuvalu. A number of nations also seem to have fallen behind on

33 Amnesty, *Submission no. 26*, p. 8.

34 Castan Centre, *Transcript*, 15 April 2009, p. 13.

35 Castan Centre, *Transcript*, 15 April 2009, p. 13.

36 HRLRC, *Transcript*, 15 April 2009, p. 26.

subsequently reports for other treaties, for example Papua New Guinea and Solomon Islands on their reporting on CERD.³⁷

- 3.32 The Uniting Church made the point that even in some cases where states have signed on to a convention or agreement, the impact on those who are party to them may be questionable. It raised the case of Bangladesh, who, as a full party to the convention on banning anti-personnel landmines, have not conceded any of their mines since signing on, instead retaining 13,000 for 'training purposes'. The Uniting Church representative stated:

We have raised concerns with them but they say: 'Hang on. All our neighbours haven't even signed on to this treaty yet, so we're a lot further down the path than they are. It's a little rich, you raising concerns about our stockpile of mines and expecting us to deal with it.' These are some of the practical difficulties.³⁸

- 3.33 In seeking to assist nations with treaty ratification and implementation of obligations, the Uniting Church suggest the use of templates as:

...one mechanism worth exploring...Australia has offered templates that could be implemented, with some local modification, by countries in the Pacific region to become party to certain treaties. That is a mechanism that appears to have had some success, so that is certainly a possibility.

Other bodies have promoted those templates as well. The International Committee of the Red Cross, for example, has also offered template legislation that can be modified to a local context and then further technical assistance down the track to implement all the provisions of a treaty.³⁹

- 3.34 There are clearly a number of factors to be considered in addressing the low ratification rate of treaties by nations in the Pacific, and evidence to the Committee has raised a number of ways that the international community and its regional neighbours can assist.

Non-conventional mechanisms

- 3.35 The special procedures mechanisms are the more flexible companion to the formal treaty based system. Under this arrangement, special rapporteurs (independent experts or working groups) are given a special country or theme mandate. DFAT commented that:

37 DFAT, (Supplementary) *Submission no. 35*, p. 4.

38 Uniting Church, *Transcript*, 15 April 2009, p. 32.

39 Uniting Church, *Transcript*, 15 April 2009, p. 402.

They are sometimes the only mechanism that will alert the international community to certain human rights issues.⁴⁰

3.36 The Uniting Church observed that:

UN Special Rapporteurs offer an independent and potentially effective way of putting pressure on governments to improve their respect for human rights.⁴¹

3.37 There are currently 30 thematic and eight country mandates. The former ranging from adequate housing to contemporary forms of slavery, and the country mandates covering the human rights situations in Burundi, Cambodia, the Democratic People's Republic of Korea, Haiti, Myanmar, the occupied Palestinian territories, Somalia and the Sudan.⁴² Special rapporteurs are typically independent experts, prominent in their field, who work on a voluntary basis.⁴³ The special procedures system operates through the UN Human Rights Council.

Human Rights Council

3.38 The Human Rights Council (HRC) is the main international UN body specifically addressing human rights issues. It was established by the General Assembly on 15 March 2006, replacing the UN Commission on Human Rights.

3.39 The HRC's main elements are the:

- Universal Periodic Review (UPR), a cooperative mechanism, based on interactive dialogue, to assess the human rights situations of the 192 UN Member States on a four-year rotation basis;⁴⁴
- special procedures system, involving the appointment of country and thematic mandate holders to investigate human rights situations;
- the Advisory Committee, comprised of 18 experts serving as a think-tank for the Council; and
- complaint procedures to address consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

40 DFAT, *Submission no. 17*, p. 4.

41 Uniting Church, *Submission no. 20*, p. 3.

42 OHCHR website: <http://www2.ohchr.org/english/bodies/chr/special/index.htm>, viewed 26 August 2009.

43 DFAT, *Submission no. 17*, p. 4.

44 A calendar for the first period of review (2008-2011) is available at: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf>.

3.40 DFAT noted that the HRC is 'empowered to prevent abuses, inequity and discrimination, protect the most vulnerable, and expose perpetrators'.⁴⁵

3.41 However, concerns about the effectiveness of the new body have been raised. For example, Amnesty commented that the HRC:

...is a highly politicised body and with its track record in the last couple of years there has been an undue emphasis on particular issues. Israel and the occupied territories spring to mind. The council, as I mentioned before, because the inherent geographical voting blocs still characterise its composition, has dropped the ball on particular issues such as major human rights crises in Darfur and the Democratic Republic of the Congo.⁴⁶

3.42 Amnesty did observe though that the HRC was still a 'work in progress' and that:

...there are saving graces within the Human Rights Council process. Amongst these are the retention of the special procedures, including special rapporteurs, and the adoption of the process of Universal Periodic Review.⁴⁷

Universal Periodic Review

3.43 DFAT commented that:

A significant development in the Human Rights Council's work is the universal periodic review, which we regard as providing a positive and value-adding process because it allows for peer review of states' human rights records. It also enables the engagement of civil society and national human rights institutions in the work.⁴⁸

3.44 The Australian Bahá'í Community submitted that:

The new mechanism of Universal Periodic Review (UPR) has had a good start and is encouraging constructive dialogue and evaluation of the fulfilment of human rights obligations of all member states in a transparent and impartial manner. UPR should prove of value in the prevention and redress of human rights violations in the Asia-Pacific region.⁴⁹

45 DFAT, *Submission no. 17*, p. 3.

46 Amnesty, *Transcript*, 7 April 2009, p. 17.

47 Amnesty, *Transcript*, 7 April 2009, p. 10.

48 DFAT, *Transcript*, 13 August 2009, p. 4.

49 Australian Bahá'í Community, *Submission no. 14*, p. 3.

3.45 RegNet agreed that:

One of the advantages the UN system offers countries like the Solomon Islands, Tuvalu, Kiribati or any of those other very small places...[is the opportunity to] engage in an international forum. It means that when climate change has an adverse effect on very small countries like those, those issues can be represented to the globe in an effective way...The Universal Periodic Review made people in the Human Rights Council think about Tuvalu in a way that I do not think they have ever thought about Tuvalu before.⁵⁰

3.46 Amnesty was more restrained in its appraisal of the UPR, stating:

Time will tell whether new Council mechanisms, notably the Universal Periodic Review, will facilitate robust international scrutiny and response when members fail to honour such commitments, and make a real difference to the day-to-day lives of the people of the Asia-Pacific region.⁵¹

3.47 The Vietnam Committee on Human Rights felt that, in the case of Vietnam:

The Universal Periodic Review (UPR) could be a useful mechanism, providing that certain reforms are made to make it more effective. Vietnam's first UPR review in May 2009 showed the strengths and weaknesses of this process.⁵²

3.48 The Vietnam Committee perceived three key weaknesses in the UPR process as it applies to Vietnam:

Firstly, UPR preparation is supposedly based on consultation with civil society. In Vietnam, where there is no independent civil society, it was prepared with para-governmental bodies or "mass organisations" controlled by the CPV, thus giving a biased view of human rights practices and realities. Secondly, Vietnam lobbied its regional partners and other members of the "Axis of Sovereignty" (formerly the "Like Minded Group") to restrict their comments to "complimentary speeches". Last but not least, although some 15 countries made very specific and positive recommendations to genuinely advance human rights, the Vietnamese delegation rejected them all. Australia, for example, urged Vietnam to consider strengthening press freedom and ensure that its Penal

50 RegNet, *Transcript*, 7 April 2009, p. 58.

51 Amnesty, *Submission no. 26*, p. 3.

52 Vietnam Committee on Human Rights, *Submission no. 32*, p. 2.

Code and Criminal Procedures Code are consistent with its international treaty commitments...

Unfortunately, since only proposals accepted by the state under review are retained in the final report... Vietnam will escape with very few obligations to fulfil before its next review in 2013. This is a major obstacle in the UPR process which needs serious reconsideration by Australia and its UN partners.⁵³

Special Procedures

3.49 DFAT noted that there are three country mandate holders in the Asia-Pacific, the Special Rapporteurs on the human rights situations in Burma and the Democratic People's Republic of Korea, and the Special Representative of the Secretary-General for human rights in Cambodia.⁵⁴

3.50 The Special Rapporteur on the situation of human rights in Myanmar was established in 1992 and the mandate was last extended in 2008. The Special Rapporteur, Mr Tomás Ojea Quintana, visited Myanmar from 14 to 19 February 2009. In a previous report to the HRC, the Special Rapporteur recommended that the Government of Myanmar complete four core human rights actions:

- conduct a review of national legislation in accordance with the new Constitution and international obligations;
- progressive release of prisoners of conscience;
- a number of measures to be adopted by the military and policy in order to improve the human rights situation in the country; and
- a series of measures to be taken to address the lack of independence and impartiality of the judiciary.⁵⁵

3.51 During the Special Rapporteur's visit, the Government of Myanmar indicated its readiness to implement these four core elements, but the results are yet to be seen. The report concluded that the situation of human rights in Myanmar 'remains challenging', but stated that:

In less than one year, the new Special Rapporteur has already travelled twice to Myanmar. A very small number of prisoners of

53 Vietnam Committee on Human Rights, *Submission no. 32*, pp. 2-3.

54 DFAT, *Submission no. 17*, p. 4.

55 Human Rights Council, A/HRC/10/19, Human Rights Situations that require the Council's attention: Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, 11 March 2009, pp. 18-21.

conscience were released during that period, which the Special Rapporteur hopes is the beginning of the progressive release of more than 2,100 others. The Special Rapporteur engaged in constructive dialogue with the authorities in Myanmar with a view to achieving the minimum requirements to ensure that the elections in 2010 and its aftermath will comply with the international standards of a democratic society and the expectations of the international community.⁵⁶

3.52 The mandate for the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (DPRK) was established in 2004 and has since been renewed annually. In the most recent report of February 2009, the Special Rapporteur concluded that:

The predicament ensuing from the broad range of systematic and widespread human rights violations in the Democratic People's Republic of Korea requires urgent attention at all levels, from national to international. Of particular concern are the pervasive transgressions in relation to food and other basic necessities, personal security, freedoms, asylum and migration, and specific groups, such as women and children.⁵⁷

3.53 The Special Rapporteur found it regrettable that 'the authorities of the country in question have declined to cooperate with this mandate, despite efforts... to engage with the country in a constructive manner'. He also noted that in 2008, the Government of the DPRK had failed to reply to the following communications:

- A joint communication with other theme relevant special rapporteurs,⁵⁸ concerning the alleged public executions of 15 nationals. Thirteen women and two men were reportedly accused of planning to cross into a neighbouring country to receive economic assistance with the help of relatives living abroad.
- A request for clarification on the whereabouts and safety of 22 nationals. The group, comprising 14 women and eight men, including three teenagers, were returned to the Democratic People's Republic of

56 Human Rights Council, A/HRC/10/19, Human Rights Situations that require the Council's attention: Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, 11 March 2009, p. 18.

57 OHCHR website, <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/KPIndex.aspx>, viewed 21 September 2009.

58 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the right to food.

Korea after they reportedly drifted by accident to southern waters in the western sea near Yongpyong Island.⁵⁹

- 3.54 The position of Special Representative of the Secretary-General on the situation of human rights in Cambodia was established in 1993 and was last renewed in 2008. The Special Representative's fourth mission to Cambodia was from 1 to 10 December 2007, focusing on the rule of law framework, including access to justice. The Special Representative concluded that:

Year after year, the Special Representative's predecessors and others have addressed the problems of the legal and judicial system in Cambodia and made numerous recommendations, to no avail. The Government has no incentives for reform, as the international community continues to make large financial contributions regardless of widespread violations of human rights.⁶⁰

- 3.55 The Australian Bahá'í Community asserted that:

It is evident that the Special Procedures themselves require more adequate budgetary and administrative support if they are to operate more effectively in the Asia-Pacific region. It is also clear that human rights violations would be more effectively prevented and redressed if Government cooperation with Special Procedures was not limited to access, but included full implementation of recommendations made.⁶¹

- 3.56 Further, it suggested that the:

...OHCHR should be encouraged to take steps to bolster interactive dialogue with the Special Procedures and ensure that dialogues include Member States' reports on the status of implementation of the Special Procedures' recommendations.⁶²

59 Human Rights Council, A/HRC/10/18, Human Rights Situations that require the Council's attention: Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn, 29 February 2009, pp. 4 and 16.

60 Human Rights Council, A/HRC/7/42, Technical Assistance and Capacity-Building: Report of the Special Representative of the Secretary-General for human rights in Cambodia, Yash Ghai, 29 February 2008, p. 22.

61 Australian Bahá'í Community, *Submission no. 14*, p. 4.

62 Australian Bahá'í Community, *Submission no. 14*, p. 4.

The Social, Humanitarian and Cultural Affairs Committee

3.57 The Social, Humanitarian and Cultural Affairs Committee, known as the 'Third Committee', is one of the United Nations General Assembly's six main committees that cover special theme areas. The Third Committee's agenda covers a range of social, humanitarian affairs and human rights issues that affect the world's population. Its examination of human rights issues, include the reports of the special procedures of the Human Rights Council.

Office of the United Nations High Commissioner for Human Rights

3.58 The OHCHR mandate is:

...to work for the protection of all human rights for all people, to help empower people to realise their rights, and to assist those responsible for upholding such rights in ensuring that they are implemented. The OHCHR's method of work focuses on three dimensions: human rights standard setting, monitoring and implementation on the ground.⁶³

3.59 OHCHR's work is guided by the UN Charter, the UDHR and subsequent human rights instruments, the 1993 Vienna Declaration and Programme of Action, and the 2005 World Summit Outcome document. Support for the constructive role played by the OHCHR was reflected in evidence to the Committee.⁶⁴

3.60 In addition to headquarters in New York and Geneva, OHCHR operates worldwide. The OHCHR has operations covering South East Asia and the Pacific, with offices in Bangkok, Thailand and Suva, Fiji. It also has country offices in Cambodia and Nepal, and provides human rights advice and support to Timor-Leste, Indonesia, Papua New Guinea and Sri Lanka.⁶⁵ An office to cover South and West Asia is proposed.⁶⁶

3.61 A major priority for the OHCHR South East Asia regional office, since 2006, has been to assist ASEAN to establish a human rights mechanism. DFAT noted that the office's other priorities include:

- implementing recommendations of international treaty body mechanisms and special procedures;

63 DFAT, *Submission no. 17*, p. 2.

64 See, for example, Amnesty, *Transcript*, 7 April 2009, p. 10.

65 ACFID, (Supplementary) *Submission no. 30*, p. 4.

66 OHCHR website: <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>, viewed 22 September 2009.

- launching capacity-building programs in the administration of justice, legislative reform and human rights education in Indonesia, Lao People's Democratic Republic, Malaysia, the Philippines, Thailand and Vietnam;
- preparing the region for the UN Human Rights Council's Universal Periodic Review (UPR) process; and
- building the capacity of the UN system to promote and protect human rights in Burma.⁶⁷

3.62 DFAT observed that the OHCHR Pacific regional office had made progress on addressing pressing human rights issues, including violence against women and children, lack of judicial independence, ill-treatment in detention, social instability, weak justice systems and racial discrimination:

...by raising awareness about and encouraging the use of international human rights norms, standards and mechanisms; and supporting regional initiatives aimed at reinforcing national protection systems, including through the Pacific Islands Forum and the Asia-Pacific Forum of National Human Rights Institutions (APF).⁶⁸

3.63 Pacific regional office priorities for 2009 included:

...expanding its cooperation with regional organisations and institutions, such as the Pacific Islands Forum Secretariat (PIFS) and the Pacific Islands Chiefs of Police, to establish regional judicial structures; build national or regional human rights institutions; improve detention conditions; and work with other human rights mechanisms to improve coordination across the region.⁶⁹

3.64 The OHCHR has also worked closely with the APF in seeking to address human rights issues in the region:

The OHCHR has consistently supported the development of the APF and emphasised its role in the promotion of regional co-operation in the Asia-Pacific. The OHCHR's close partnership with the APF, and with individual institutions in the region, emphasises a shared interest in ensuring that individual NHRIs are compliant with the Paris Principles and have the capacity to

67 DFAT, *Submission no. 17*, p. 3.

68 Ibid.

69 Ibid.

effectively investigate and seek redress for human rights violations. For the OHCHR, which has significantly expanded its regional presence and country engagement, strengthening regional institutions to protect human rights is also a priority focus...The OHCHR has in recent times directed particular effort to encouraging greater participation by Pacific nations in the UN human rights mechanisms, including by encouraging Pacific nations to establish NHRIs and accede to international human rights instruments.⁷⁰

3.65 The Committee noted the Australian Bahá'í Community's suggestion that:

...the more presence there is of the Office of the High Commissioner for Human Rights Pacific Region, the more opportunities there are for people to have their rights defended, for people to understand the human rights system and for general human rights education and promotion to take place.⁷¹

International criminal tribunals and special courts

3.66 As evident in Figure 3.1 illustrating the UN's human rights architecture, the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) are the major international tribunals developed to deal with the serious cases for which they are named. These tribunals aim to provide justice for victims and deter the perpetration of such atrocities in the future. They report directly to the UN Security Council.

3.67 In May 1993, the UN Security Council established the ICTY to address the occurrence of ethnic cleansing, genocide and other serious crimes during the war in Bosnia in the early 1990s. By August 2009, the ICTY had indicted 161 persons, concluded proceedings against 120, leaving 41 cases ongoing. It estimates that the major remaining trials will be covered over the next couple of years, with only a few small cases to continue into 2013.⁷²

3.68 The ICTR was established in 1994 for the prosecution of persons responsible for genocide and other serious violations committed in the territory of Rwanda during that year. UN General Assembly appointed independent judges sit between the three Trial Chambers in Arusha, Tanzania and the Appeals Chamber in The Hague. Since the first trial in

70 APF, *Submission no. 21*, p. 14.

71 Australian Bahá'í Community, *Transcript*, 19 March 2009, p. 1.

72 ICTY website: <http://www.icty.org/>, viewed 18 August 2009.

1997, as of 4 May 2009, the ICTR has handed down 38 judgements involving 47 accused, including Ministers, parliamentarians, military officers and others holding leadership positions. It is anticipated that this process will be completed in 2010.⁷³

3.69 There are also the Special Court of Sierra Leone, Special Tribunal for Lebanon and Special Tribunal for Cambodia. They were established with the involvement of the United Nations and the governments of those countries to, respectively:

- Try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the Sierra Leone since 30 November 1996.⁷⁴
- Try all those who are alleged to be responsible for the attack of 14 February 2005 in Beirut that killed the former Lebanese Prime Minister Rafiq Hariri and 22 others.⁷⁵
- Try former senior leaders of the Khmer Rouge, whose regime lasted from 1975 to 1979 in Cambodia. It is estimated that up to three million people perished during this period of 3 years, 8 months and 20 days. The end of Khmer Rouge period was followed by a civil war. That war finally ended in 1998, when the Khmer Rouge political and military structures were dismantled.⁷⁶

International Court of Justice

3.70 The International Court of Justice (ICJ), established under the UN Charter, is the highest judicial body in the UN system. It deals with contentious international legal disputes submitted to it by the participating States⁷⁷ and requests for advisory opinions on legal questions referred by a UN body. The UN General Assembly and Security Council elect 15 judges to serve nine-year terms on the ICJ. It has helped to settle international disputes over territory, non-interference in domestic state affairs, diplomatic relations, hostage-taking, rights of asylum and economic rights.⁷⁸

73 ICTR website: <http://www.ictr.org/>, viewed 17 September 2009.

74 Source: <http://www.sc-sl.org/>, viewed 18 September 2009.

75 Source: <http://www.stl-tsl.org/action/home>, viewed 18 September 2009.

76 Source: http://www.eccc.gov.kh/english/about_eccc.aspx, viewed 18 September 2009.

77 States must be a UN member or have 'accepted' the ICJ's jurisdiction. Source: <http://www.icj-cij.org/court/index.php?p1=1&p2=6>, viewed 23 September 2009.

78 Source: <http://www.icj-cij.org/homepage/index.php?lang=en>, viewed 23 September 2009.

- 3.71 Since it commenced its work in April 1946, few of the cases brought before the ICJ have involved countries in the Asia-Pacific region.⁷⁹

The International Criminal Court

- 3.72 In 2003, the International Criminal Court (ICC) was established by treaty, under the Rome Statute,⁸⁰ as an independent permanent court to try cases of those accused of the 'most serious crimes of international concern, namely genocide, crimes against humanity and war crimes'. While the UN international criminal tribunals played a part in spurring the formation of the ICC, it is an independent international organisation, which operates outside of – but in cooperation with – the UN system.⁸¹
- 3.73 The ICC Prosecutor may initiate an investigation on (a) referral from a state party, (b) referral from the UN Security Council or (c) *proprio motu*, on the basis of 'communications' received from individuals or organisations on crimes within the jurisdiction of the Court. Since its creation, the ICC has received – and has opened investigations into – three referrals from State parties on the situations in Uganda, the Congo and the Central African Republic, and a Security Council referral on the situation in Darfur in the Sudan.⁸² The ICC is significant for providing a permanent body for bringing perpetrators of serious human rights violations to justice. Australia can play a role in encouraging countries in the region to sign on and ratify the treaty.

79 Source: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>, viewed 23 September 2009.

80 The Rome Statute is available at: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>.

81 Information on the ICC is available on its website at: <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>.

82 ICC website: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>, viewed 18 September 2009.

