

## Asia Pacific Human Rights Mechanism Submission

### **Introduction**

The terms of reference of the Inquiry into Human Rights Mechanisms and the Asia-Pacific is looking at possible mechanisms which could be used to help prevent and redress human rights violations in the Asia-Pacific region. Regional human rights mechanisms exist in Europe, the Americas, Africa, and under the auspices of the Arab League in West Asia and North Africa. Regional instruments are felt to be an appropriate complement to the universal human rights processes of the United Nations due to, for example, greater cultural similarity within regions. Regional mechanisms are also stronger, with States agreeing to the adjudication of human rights cases by judicial bodies with powers to make binding decisions, while judicialisation at the global (UN) level remains lacking.

The Asia-Pacific is the only region which lacks a regional human rights mechanism. Other regions, as well as the global UN system, utilise a variety of mechanisms including:

- Individual complaints before courts (Regional courts in Europe, Americas, Africa, envisaged under Arab Charter)
- State reporting (eg to UN treaty bodies, and now Universal Periodic Review)
- Individual complaints before non-binding quasi-judicial bodies (UN, American Commission on Human Rights)

While the intentions of the inquiry are well placed, we feel that discussion of potential mechanisms for the region is premature. There are a number of other issues that must be addressed prior to engaging in discussion about the best possible model for the region. For example, a human rights mechanism would need to be underpinned by a recognised set of human rights standards enshrined in some sort of regional human rights instrument. Such an instrument is lacking in the region.

The Castan Centre will focus its submission on certain background issues that we feel must be addressed before a durable mechanism can be created for the Asia-Pacific region.

## Defining the 'Asia-Pacific' Region

The terms of reference do not identify which States are covered by the term, 'Asia-Pacific'. The 'Asia-Pacific' could literally cover an area from the Turkish border to the far reaches of the Pacific. Much of West Asia is now covered by the Arab Charter of Human Rights, and Russia is covered by the European system. We are assuming that Australia is interested in a regional body that it can actually join. In this respect, it seems unlikely that Australia would be invited to join in ASEAN's nascent moves towards a regional mechanism, at least not at this very early stage of that process (the ASEAN nations are having a hard enough time agreeing amongst each other on the modalities of moving forward on this issue). A human rights mechanism joining Australia to South Asia or China also seems politically unlikely. It seems more likely that Australia could join a grouping of Pacific nations. An ambition could be for such a mechanism to one day be united with an ASEAN mechanism. Alternatively, it may be that some ASEAN members will tire of the organisation's lack of consensus in moving forward on a human rights mechanism, and could be tempted to join in a functioning Pacific mechanism.

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are the core international human rights instruments, known colloquially as the International Bill of Rights. It would be advisable that they be used as a springboard from which any regional treaty is created. Many of the 'Asian' States have already ratified both of the Covenants,<sup>1</sup> whereas the vast majority of 'Pacific' States have ratified neither document.<sup>2</sup> Thus, if Pacific States are the primary focus of, or are intended to be included in a regional mechanism, we would recommend engaging in a dialogue with them to ascertain why they have not ratified these international instruments, as the reasoning should be taken into account when proposing a regional mechanism (discussed further below).

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<sup>1</sup> In East Asia, Cambodia, Hong Kong, Macau, South Korea, Thailand, Vietnam, Bangladesh, India, Maldives, Mongolia, Nepal, Russia, and Sri Lanka have ratified both documents. China and Laos have each ratified the ICESCR but have only signed ICCPR not ratified it. North Korea, Malaysia, Singapore, Tibet, Myanmar, and Pakistan (has signed ICESCR but not ratified it), have not ratified either treaty.

<sup>2</sup> Brunei, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Tonga, Taiwan, Tuvalu, Vanuatu, and Bhutan have not ratified either treaty. Nauru and Vanuatu have both signed but not ratified ICCPR. Samoa has ratified the ICCPR and Solomon Islands have ratified ICESCR. Indonesia, Japan, New Zealand, Australia, Philippines, and Timor-Leste have ratified both treaties. Please see the attached appendix which sets out which Asia Pacific States have or have not ratified the different human rights treaties.

Thus, before a mechanism can be proposed, it is important to have a clear definition of which States it is envisioned the mechanism would apply to as different groupings necessitate different strategies.

**Australia should not be perceived ‘the leader’ of a move towards a mechanism.**

Given the identification of Australia and New Zealand as ‘Western’ countries, anomalous in the region, a regional human rights mechanism unlikely to eventuate if it is perceived as essentially driven by either State. Australia must avoid any action that could be perceived as ‘imperialistic’,<sup>3</sup> as that would seriously jeopardise any agreement on a regional mechanism. Sensitivity must be exercised in orchestrating a regional mechanism. Australia should play a cooperative role in supporting the creation of such a mechanism, and may even be able to play an overtly prominent role, but should not be seen to be ‘the leader’ of the initiative.

Australia can alleviate suspicions of ‘Western imperialism’ by supporting policies that promote goodwill in the region. The new guest worker scheme, if fairly managed, may help here. So too could sensitive trade policies adopted by Australia towards its developing Pacific neighbours. For example, Australia could show some flexibility in its attitude towards Vanuatu’s attempts to revise its accession Protocol with the World Trade Organization. Australia should also take a proactive role with regard indigenous rights and climate change, issues of extreme importance to the Pacific Islands.

Australia must also explicitly recognise that its own human rights record is not perfect. Too often, there is a perception that Western countries act as if human rights apply more to ‘them’ (non-Western countries) than ‘us’. No State’s human rights record is perfect (though not all human rights records are equal). If Australia is seen to ‘cop its medicine’ when found in breach of human rights, for example by implementing the recommendations arising from adverse views issued by UN treaty bodies, it cannot be accused of double standards and hypocrisy, both of which would give rise to legitimate questions regarding Australia’s human rights bona fides, and act as a brake on the political will to develop a regional mechanism.

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<sup>3</sup> While such language may seem anachronistic, it cannot be denied that suspicion and resentment about potential Western imperialism, particularly with regard to human rights, is real.

## **Interdependence and indivisibility of human rights**

Any regional human rights mechanism must promote the interdependence and indivisibility of rights, espoused in the International Bill of Rights.<sup>4</sup> Such an approach recognises that economic, social and cultural rights and civil and political rights are correlated and are of equal importance. Civil and political rights cannot be fully enjoyed unless people are guaranteed their economic, social and cultural rights. For instance, freedom of expression and the right to education are inherently linked, as are the right to life and the right to an adequate standard of health care.

Civil and political rights have often been seen as more important than economic, social and cultural rights, which have sometimes been perceived as mere ‘aspirational’ goals. Over time, this asymmetry has whittled away, culminating with the adoption by the UN Human Rights Council of the Optional Protocol to ICESCR in June 2008. It would be unwise to concentrate solely or predominantly on civil and political rights, as economic, social and cultural rights are equally important and may indeed be more of a concern to nations in the Asia Pacific. Given the developing nature of many of the States in the region, it is likely that they would more willingly enact a regime that includes protection of economic, social and cultural rights as opposed to only civil and political rights.

Australia must not buy into the fallacious argument that economic, social and cultural rights are too ‘expensive’ for its developing neighbours. Such rights are economically relative, and thus a State’s level of economic prosperity is taken into account in the determination of a State’s obligations.<sup>5</sup> It must be noted that certain developing States, such as South Africa, India and Venezuela, are leading the world in the judicial protection of economic, social and cultural rights.

Australia should also ensure that it pays some attention to the right to development, a right of obvious concern to developing countries, particularly by improving its record in attaining the Millennium Development Goals.

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<sup>4</sup> See also Vienna Declaration and Programme of Action 1993, (World Conference on Human Rights, Vienna, 14-25 June 1993) para 5, UN Doc A/Conf.157/23; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht, January 22-26, 1997) art 4.

<sup>5</sup> Under the ICESCR, article 2(1), each State Party is obliged to implement the listed economic, social and cultural rights “to the maximum of its available resources”, meaning that States with greater prosperity carry higher expectations of realisation than poorer States.

## **Opening dialogue with States who have not ratified any human rights instruments**

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. The ICCPR and ICESCR have been in existence for over 40 years. These documents should be used as the basis for any new mechanisms; it is counterproductive to start from scratch. As such, it would be very helpful, and an almost necessary component of a regional initiative, to ascertain why most Pacific States have not ratified these basic documents. Since these instruments, with perhaps some minor modifications, should be used as the backbone of a treaty, or at least as a broader set of rights from which a regional mechanism can draw, any objections to them or the procedural obligations that accompany them must be ascertained.

Australia needs to initiate dialogue with States in the region which have not ratified either Covenant, or those who have ratified one or the other but not both. It is necessary to understand the reasons behind the States' failure to ratify these basic human rights documents, as those reasons are currently unclear. Yet those reasons will have to be taken into account in devising an instrument/mechanism, or even in determining if such is viable. States may be unwilling to ratify the treaties on account of their perceived lack of capacity to implement them, a concern with technical requirements therein (such as reporting mechanisms), or a lack of understanding of the rights therein, or a strong disagreement with some of the rights contained therein. Alternatively, it may simply be that ratifying an international human rights treaty was not a high priority for the State in question, but that there is no technical or philosophical objection to doing so.

It would be helpful for Australia to engage directly with those States that have ratified only one of these international treaties, to find out why they have not ratified the other. Specifically, Samoa should be asked why it decided to ratify ICCPR but not ICESCR. Likewise Laos and Solomon Islands should be asked why they ratified ICESCR but not ICCPR.<sup>6</sup> Engaging these States will provide insight into why States might ratify a treaty

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<sup>6</sup> Laos has signed ICCPR but has not ratified it. It is interesting to note that both States provide guarantees for civil and political rights within their respective constitutions. Laos' Constitution provides protection for human rights generally in Chapter 3, and provides specific protection of civil and political rights in articles 21, 22, 23, 24, 27, 29, 30, 31, and 34. Chapter 2 of the Solomon Islands' Constitution protects fundamental rights and freedoms and provides specific protection of civil and political rights in articles 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, and 15.

regarding one set of rights but not another. After links are made with these States, they could be helpful partners in bringing other States that have not ratified either treaty on board.

In the engagement process, Australia should encourage States to ratify the Covenants and other international human rights treaties.<sup>7</sup> This could occur in a manner of soft diplomacy, perhaps through the provision of human rights education and training. Such programs, such as the Indonesia-Australia Specialised Training Program (orchestrated through AUSAID), probably played a role in prompting Indonesia to ratify both international Covenants recently. Other States should be encouraged to ratify the Covenants through similar programs.

### **Universality should not be sacrificed in favour of regionalism**

Australia must be mindful that a regional instrument should not be seen as repudiating the applicability of certain rights within the region, and thus undermining universality. In particular, rights that are included in the ICCPR and the ICESCR should not be omitted from a regional instrument or expressed in a form that reduces the scope that such rights currently enjoy at the international level, purportedly to reflect regional cultures. Regionalism must not be promoted in such a way as to undermine universalism.

However, a possible option, and probably a necessary evil, is that reservations be allowed, rather than rights excluded from a regional instrument. Indeed, reservations are normally allowed to regional and universal human rights treaties, subject to specific limitations. Reservations however should not be allowed to the most fundamental obligations, as such reservations contravene international law.

Provided that universality is not undermined, regional influences are not always inappropriate, and can improve the degree of acceptance or ‘ownership’ of a regional instrument among the people of the region. The African Charter on Human and Peoples’ Rights is instructive in this respect. It is highly likely that some Asian and Pacific States will suggest elements for a draft instrument that they consider to reflect their culture. We suggest that the criterion for evaluating such proposals should be whether or not they would detract from the universality of human rights, and that they should otherwise be approached with an open mind.

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<sup>7</sup> In this respect, one may note that Australia has not ratified the Migrant Workers Convention, the Disappearances Convention, and a number of Optional Protocols.

## **Enforceability and implementation**

One of the main benefits of a regional system over the existing UN-based international system is the greater capacity for implementation of the covered rights, hearing human rights complaints and granting concrete remedies. As noted above, regional systems have traditionally been entrusted with greater ‘judicialisation’ of human rights than the international system, due at least in part to the closer proximity – both geographically and culturally – to the people of the region, therefore making a regional system more practical and less alien than an international system.

Although it is our view that a regional human rights mechanism for the Asia Pacific is premature, it is important to have long-term enforceability and implementation in mind when taking the preliminary steps we recommend, such as strengthening national human rights institutions, engaging in regional dialogue and preparing to draft a regional human rights instrument. Accordingly, terminology that is vague and potentially unenforceable, particularly in relation to the scope of a State’s obligations and the conditions that will give rise to a breach, should be steadfastly avoided, even if there is no intention for a regional enforcement mechanism in the near future.

Judicial enforcement at the regional level is not the only means for implementing human rights. National human rights institutions have an educative and facilitative role. In some countries, domestic courts and administrative bodies may be able to incorporate a regional human rights instrument into their decision-making. For these reasons, clarity and practicality are important considerations.

## **National Human Rights Institutions**

Some States in the region have National Human Rights Institutions (NHRIs), such as the Australian Human Rights Commission, which comply with the Paris Principles (e.g. regarding independence and expertise).<sup>8</sup> The development of such bodies at a local level is arguably a necessary prerequisite to a regional mechanism. Such bodies ensure that local

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<sup>8</sup> See Paris Principles relating to the Status of National Institutions, 20 December 1993, at <http://www2.ohchr.org/english/law/parisprinciples.htm>

expertise in human rights is nurtured, and will help overcome perceptions that human rights might be foreign to local cultures. In the Asia-Pacific region (taking that term to mean South East Asia and the Pacific), relevant NHRIs are those in Australia, New Zealand, Indonesia, Thailand, Malaysia, Timor Leste, and the Philippines. Fiji had a Paris-compliant NHRI until the 2006 coup; its independence is now widely questioned.

These NHRIs, along with others in Asia (India, Nepal, Mongolia, South Korea, Sri Lanka, Afghanistan, and Jordan), are members of the Asia Pacific Forum of Human Rights Institutions (APF), a network of NHRIs formed in 1996 which engages in information sharing and capacity building for existing Members and other bodies which are aspiring to become Paris-compliant NHRIs. This body has also coordinated its Members' positions in submissions to global bodies, and established an Advisory Council of Jurists, made up of eminent human rights experts from the region, which reports on topical human rights matters.

The APF is effectively operating as a surrogate 'regional body', in the absence of a more formal regional system. It is of course a very different 'body' to those that operate in more formal systems, such as the American or European Court of Human Rights. It operates in a more informal, grassroots manner. It also covers an idiosyncratic 'Asia-Pacific' area, including for example Afghanistan whilst currently excluding all Pacific islands. However, the formation of a mechanism on the basis of Paris-compliant NHRIs rather than strict geographic concerns is not illogical.

Consideration should be given to enhancing the capacities of the APF and its members, as well as the capacities of new potential members (eg more Paris-compliant NHRIs in the region, especially in the Pacific). The APF and the Advisory Council could perhaps be tasked with drafting a human rights instrument for the countries of its members. We suspect that the APF will be submitting on this issue, so we will not duplicate such material.

### **Summary of Recommendations**

1. Australia must decide which countries it wishes to engage with in creating a regional human rights mechanism. The most likely candidates seem to be



- Australia, NZ and Pacific Islands, and SE Asian nations outside ASEAN (eg Timor Leste). If efforts by ASEAN to form its own regional mechanism continue to stall, certain ASEAN members that are more in favour of such a mechanism (eg Thailand, Indonesia) could be invited to join the “Pacific” mechanism.
  - A grouping based on the countries of origin of the NHRIs that are members of APF
2. Australia should not be perceived as the driving force behind a move towards a regional mechanism. Australia must be mindful of the need to promote goodwill towards it in the region, so its bona fides regarding human rights are not questioned (or questionable).
  3. Australia must not lobby for an instrument that focuses on civil and political rights only. Any instrument should recognise the indivisibility of human rights, and contain economic, social and cultural rights as well.
  4. Australia should engage with the Pacific island States to find out why they have failed to ratify either Covenant, or only one Covenant. It should consider promoting ratification, as well as facilitating the development of greater human rights understanding and expertise in the region, for example by way of AUSAID training programmes.
  5. Universality should not be sacrificed on the altar of regionalism. Australia must be mindful that a regional instrument does not imply the non-application of certain fundamental rights in the region.
  6. Australia should strengthen the capacity of APF, as well as the capacities of nascent NHRIs in the region to facilitate their joining to APF. The APF could form the basis of a regional instrument/mechanism; it is premature to make a solid recommendation in that respect now.