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TABLE OF CONTENTS

List of abbreviations	1
Executive summary	2
Introduction	5
Overview of global, regional and national human rights systems	6
National human rights institutions	10
Regional human rights systems	14
A regional human rights framework for the Pacific	23
Pathways to a regional human rights framework	30
Summary	33
Appendix: List of consultations held on the establishment of a regional human rights mechanism for the Pacific	34

LIST OF ABBREVIATIONS

ACWC	ASEAN Commission for the Promotion and Protection of the Rights of Women and Children
AICHR	ASEAN Intergovernmental Commission on Human Rights
APF	Asia Pacific Forum of National Human Rights Institutions
ASEAN	Association of Southeast Asian Nations
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CSO	Civil society organisation
EU	European Union
FHRC	Fiji Human Rights Commission
FIC	Forum Island Country (a member of the Pacific Islands Forum, other than Australia or New Zealand)
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
LAS	League of Arab States (often known as the Arab League)
NGO	Non-governmental organisation
NHRI	National human rights institution
OAS	Organization of American States
OHCHR	(UN) Office of the High Commissioner for Human Rights
PIF	Pacific Islands Forum
PIFS	Pacific Islands Forum Secretariat
RHRC	Regional human rights commission
RHRM	Regional human rights mechanisms
SPC	Regional Rights Resource Team of the Secretariat of the Pacific Community
UN	United Nations
UPR	Universal Periodic Review

1. EXECUTIVE SUMMARY

Introduction

The Pacific Plan, endorsed by the Pacific Islands Forum (PIF) Leaders in October 2005, envisages a Pacific region 'that is respected for ... its defence and promotion of human rights'. The Plan accepts the need for further analysis on the 'establishment of a regional Ombudsman and human rights mechanisms'. The Forum Regional Security Committee has endorsed further exploration of the potential for regional human rights mechanisms (RHRMs) and approved the establishment of a dedicated Working Group to achieve this goal.

This paper seeks to advance the discussion by exploring the arguments for and against the establishment of a human rights system for the Pacific region.

Overview of global, regional and national human rights systems

The task of creating, promoting and enforcing human rights standards has generated a complex web of institutions and processes that operate at global, regional and national levels.

At the global level, human rights treaties or conventions set out international standards, which States then commit to observe. Compliance with those standards is monitored by various bodies set up under the United Nations, including the Human Rights Council and the specialist committees established under each of the nine core human rights conventions.

Regional human rights systems have been established by international political organisations operating across a geographic region, such as the African Union and the Council of Europe. Regional systems or frameworks typically consist of some or all of the following mechanisms: a regional declaration or charter of rights; a commission with functions to promote, monitor, report or protect human rights; and a court to interpret and enforce them. Each system has its distinctive features, reflecting the differing needs and capacities of the region. This paper considers whether a regional system should be developed for the Pacific, and if so, what form it should take.

At national levels, human rights protection may be included in the State's constitution, legislation or common law. Various institutions, including courts, parliamentary committees and national human rights commissions, may oversee the protection of these rights.

National human rights institutions

In the Pacific, only Australia and New Zealand have national human rights institutions (NHRIs) that meet the accepted international standards, known as the Paris Principles. These Principles set out requirements relating to the status, composition, mandate and finances needed to enable an NHRI to promote and protect human rights in an independent and effective manner. Papua New Guinea and Vanuatu have ombuds institutions with limited mandates to protect human rights, while other States are currently considering or actively pursuing the establishment of some form of NHRI. When operating effectively, NHRIs can greatly assist governments to meet their international human rights obligations.

Regional human rights systems

Regional systems already exist in Africa, Europe and the Americas, and are being developed in Southeast Asia and the Arab States. The United Nations (UN) has encouraged similar developments in the remaining areas of the world.

An examination of existing regional systems shows considerable variety in the institutional arrangements. It also reveals that the arrangements continue to develop and evolve, in response to past experiences, emerging needs and increasing commitment to human rights protection.

So, while all the regional charters have some similarity in the rights they proclaim, there are differences that reflect the concerns and aspirations of the peoples of each region. For example, the European States initially focused on civil and political rights, whereas the Inter-American region also recognised social and economic rights from the outset, and the African Charter included a number of communal rights, as well as individual rights and duties. The important point with all regional charters is that they should not lower the established international standards expressed in the Universal Declaration of Human Rights and the core UN human rights treaties.

There are also similarities and differences in the way complaints are handled. In all systems, the regional mechanisms are intended to operate as a last resort, available only when all reasonable attempts have been made to obtain a remedy in the national system. In the African and the Inter-American systems, complaints are first investigated by a commission, which attempts to reach a friendly settlement between the parties. If this process is not successful, the matter may then be brought before a court for a binding resolution. By contrast, under the Council of Europe system, all complaints are dealt with by a court from the outset. As yet, the Arab and Southeast Asian systems do not allow individuals, groups or non-governmental organisations (NGOs) to bring forward claims of rights violations; it remains to be seen whether these protective processes will eventually be accepted in these newer systems.

Experience in the existing regional systems suggests that civil society organisations have a significant role to play in the development and operation of an effective regional mechanism. In many regions, they have been influential advocates for the establishment and independent operation of RHRMs, and in their support of individuals or groups wishing to raise their concerns before regional institutions.

A regional human rights framework for the Pacific

There has been increasing discussion in recent years about the possibility of establishing a regional framework for the Pacific. It is envisaged that any such framework would be developed through the Pacific Islands Forum, and would include a charter of rights and a regional human rights commission. A human rights court might be added later. There are arguments for and against these developments.

Support for a Pacific human rights charter could be justified on the following grounds:

- ▶ it would give more specific content to the Leaders' vision, as expressed in the Pacific Plan, of a region where human rights are defended and promoted;
- ▶ it could help solidify commitment in the region to meeting established international human rights standards;
- ▶ it could recognise other emerging rights that are important to the development of Pacific peoples but are not yet adequately reflected in international conventions, such as the right to a safe environment;
- ▶ it could also assist in promoting a rights-based approach to challenges faced across the region, such as climate change or trafficking in persons.

A Pacific human rights commission could offer a number of potential advantages, including:

- ▶ the provision to Forum member governments, at their request, of technical support from Pacific experts regarding human rights treaty ratification, reporting and implementation;
- ▶ the provision to Forum member governments, at their request, of advice on addressing regional concerns in ways that uphold human rights standards;
- ▶ assistance in raising the international profile of particular Pacific human rights concerns and contributing Pacific perspectives to the international development of human rights standards;
- ▶ if required, an agency to work with stakeholders in the region to develop a Pacific charter of rights;
- ▶ support for national human rights programmes including the establishment of NHRIs;
- ▶ an alternative mechanism for those small island States that would struggle to establish national human rights commissions complying with the Paris Principles;
- ▶ the provision of a forum for addressing human rights concerns that is geographically closer and more familiar with Pacific conditions, characteristics and peculiarities than bodies operating under the UN system;
- ▶ provision of a more objective and independent forum than may be available in cases where national mechanisms were seen to be compromised or subject to excessive influence from any individual national government.

Among the objections or obstacles to the establishment of a regional system are the following:

- ▶ given the differences between Pacific cultures, it might be difficult to agree on what rights should be included in any regional charter;
- ▶ the formulation of rights in a Pacific charter might dilute current international standards;
- ▶ creating a regional mechanism has the potential to encroach on the sovereign rights of Forum members to run their own affairs;
- ▶ it is unclear what funds would be needed to establish and operate a regional system and where those funds would come from;
- ▶ priority should be given to developing NHRIs rather than a regional mechanism;
- ▶ priority should be given to meeting other pressing needs, such as in health, education or economic development.

Pathways to a regional human rights framework

If PIF member countries decide to establish a regional framework, there are various processes by which this could be achieved.

Two models for implementing a regional framework are outlined for consideration.

Model A envisages that PIF Leaders would appoint suitable persons to draft a treaty, setting out the terms of a Pacific charter of rights and establishing a regional commission to oversee compliance with the charter. The charter and commission would not become operational until a specified number of Forum members had ratified the treaty.

Model B offers a more gradual approach. Initially, PIF Leaders might endorse the creation of a commission with a limited initial mandate to promote human rights. Over time, a treaty of the kind envisaged in Model A could be drafted, possibly by or with the assistance of the commission. On this approach, a commission could begin to provide some services relatively quickly, particularly to less well resourced member States.

For either model, there would need to be extensive consultation among member States. It would also be important for civil society organisations to be meaningfully engaged in the process.

Summary and recommendations

The establishment of a regional charter and commission has the potential to enhance the recognition and observance of human rights in the Pacific region if the key obstacles can be overcome.

Further exploratory talks should be undertaken with stakeholders to flesh out the arguments and issues raised in this paper, including the suitability of the models proposed in section 7 and the options for funding.

2. INTRODUCTION

In recent years, the Pacific region¹ has seen increasing recognition of, and commitment to, international human rights standards. While various steps have been taken independently by PIF members² to better promote and defend human rights within their territories, there is also growing awareness of the potential benefits of collaborative action at a regional level. The Pacific Plan, endorsed by PIF Leaders in October 2005, recognises the importance of human rights, particularly under its third pillar (the goal of good governance). The Plan envisages a Pacific region 'that is respected for the quality of its governance, the sustainable management of its resources, its full observance of democratic values and its defence and promotion of human rights'.³ The Plan accepts the need for further analysis on the 'establishment of a regional ombudsman and human rights mechanisms to support implementation of Forum Principles of Good Leadership and Accountability, etc'. In June 2010, the Forum Regional Security Committee endorsed further exploration of the potential for RHRMs and approved the establishment of a dedicated Working Group to achieve this goal.

In 2011, PIF Leaders also acknowledged the benefits of a cooperative regional approach on human rights, when they welcomed the successful participation of all Forum members in the first round of the Universal Periodic Review (UPR) to the UN Human Rights Council as a major regional achievement. They acknowledged the support and assistance to members in their reporting efforts from three regional bodies, the Pacific Islands Forum Secretariat (PIFS), the Regional Rights Resource Team of the Secretariat of the Pacific Community (SPC RRRT) and the UN Office of the High Commissioner for Human Rights (OHCHR). Leaders noted that the development of this cooperation, and the networks created by this activity, represent an important source of human rights expertise for the entire region.⁴

This paper seeks to advance the discussion by exploring the case for the establishment of a regional human rights framework for the Pacific. It attempts to identify the benefits of such an initiative, as well as the constraints on, and objections to, setting up such an arrangement. In the process, it seeks to provide Pacific policy makers, civil society and regional organisations with an overview of existing RHRMs, their functions and structures, as well as their interaction with national and international human rights systems.

The paper first outlines the various institutional arrangements for the advancement of human rights (commonly referred to as 'human rights mechanisms') that operate at global, regional and national levels elsewhere in the world, with a particular focus on national human rights institutions and regional human rights mechanisms. It then examines the arguments for and against a regional human rights framework for the Pacific and sets out possible processes by which such a framework could be established.

The paper proceeds on the assumption that a regional human rights framework for the Pacific would initially be more likely to include a regional human rights commission and a regional charter of rights. Less attention is given to the establishment of a regional human rights court, as it is thought more likely that this would occur at a later stage of development. Such a progression would be consistent with the development of most existing regional systems; it is only in Europe that a regional human rights court was included from the outset.

1 In UN terminology, the Pacific is considered a 'subregion' of the Asia Pacific region. However, in this paper, the Pacific is referred to as a region.

2 The members of the Pacific Islands Forum are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

3 The Pacific Plan for Strengthening Regional Cooperation and Integration, www.forumsec.org/resources/uploads/attachments/documents/Pacific_Plan_Nov_2007_version.pdf accessed 28 May 2012.

4 Forum Communiqué, 42nd PIF, 7–8 September 2011, Auckland, New Zealand, <http://www.forumsec.org/pages.cfm/newsroom/press-statements/2011/forum-communique-42nd-pif-auckland-new-zealand.html> accessed 2 April 2012.

3. OVERVIEW OF GLOBAL, REGIONAL AND NATIONAL HUMAN RIGHTS SYSTEMS

The task of creating, promoting and enforcing human rights standards has generated a complex web of institutions and processes that operate at global, regional and national levels. This section provides a brief overview of the components of the systems at each of those levels.

Global level

International human rights instruments are those documents, adopted by the General Assembly of the United Nations in the period since World War II, that establish basic standards for the protection of human rights. The United Nations Charter of 1945 committed all member States to take joint and separate action to achieve 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁵ These rights and freedoms were then spelled out in 1948 in the Universal Declaration of Human Rights and have since been expanded into nine core treaties (usually called Conventions),⁶ which are legally binding on those States that have ratified or acceded to them. Several of the core treaties have supplementary treaties known as optional protocols.⁷

The primary responsibility for ensuring observance of applicable human rights standards falls on the government of each State. This responsibility typically requires the State to take steps to promote, respect, protect and fulfil the rights in question, where:

- ▶ 'promote' involves increasing public awareness and understanding of rights;
- ▶ 'respect' requires States and those acting on their behalf to refrain from interfering with the enjoyment of the rights of others;
- ▶ 'protect' means that States must prevent violations of rights by third parties, such as private individuals or corporations, and provide for remedies where violations occur;
- ▶ 'fulfil' requires States to take positive action, such as implementing programmes or making budgetary allocations, to enable people to fully realise their rights.

A number of agencies have been created to encourage and assist States to meet their human rights responsibilities and to hold States to account when they fail in their duties. At the global level, the task of ensuring compliance with the nine core treaties and the optional protocols falls to:

- (i) the United Nations Human Rights Council;
- (ii) those appointed to undertake processes called 'special procedures'; and
- (iii) ten standing 'treaty bodies' established to oversee particular conventions.

The Human Rights Council was established in 2006 and consists of 47 member States, elected for three year terms.⁸ It operates a system of 'peer review', the UPR, under which each member of the UN is required every four years to report on, and be questioned about, its observance of human rights standards. Through a process of constructive dialogue, the Council and each State under review seek to reach agreement on areas where the State commits to improving its performance in meeting human rights standards.

The Human Rights Council also uses *special procedures*. Under these processes, individuals (often called 'special rapporteurs') or small working groups are appointed to investigate and report to the Council on specified human rights concerns. These may be either on the situation in a particular country or territory (a 'country mandate') or on a particular human rights issue of global concern, such as torture or religious intolerance (a 'thematic mandate'). On receipt of specific allegations of human rights violations, the appointees typically respond by making a written request for information from the government in question, or by conducting country visits with the consent of the host government. The mandate holders are independent experts in the relevant fields, who are appointed by the Human Rights Council on a voluntary basis.

5 UN Charter, Articles 55-56.

6 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965; International Covenant on Civil and Political Rights (ICCPR) 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984; Convention on the Rights of the Child (CRC) 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) 1990; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) 2006; Convention on the Rights of Persons with Disabilities (CRPD) 2006.

7 Optional Protocol of the Covenant on Economic, Social and Cultural Rights (ICESCR - OP) 2008; Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1) 1966; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP2) 1989; Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW) 1999; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC) 2000; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC) 2000; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) 2002; Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) 2006.

8 To date, no Forum member has been elected to the Council.

In addition, each of the nine core human rights treaties established a *treaty body*, a committee of experts to provide ongoing oversight of compliance by parties to the particular treaty. For example, the Committee on the Rights of the Child monitors compliance with the Convention on the Rights of the Child. A tenth treaty body, the Subcommittee on Prevention of Torture, was established under the Optional Protocol to the Convention against Torture to monitor places of detention in States that are parties to the Optional Protocol.

State parties to a core treaty are required to submit periodic reports to the relevant committee. The committee then engages in a process of constructive dialogue that encourages States to improve their compliance in particular areas. In addition, some treaty bodies also receive individual complaints (or 'communications') from, or on behalf of, persons claiming to have suffered violations of their human rights under the particular treaty. The committee then conducts a formal investigation into the complaint and, where a violation is established, makes recommendations to the State for redressing the violation. This procedure is only available against a State party to the treaty in question, and then only if the State has accepted the committee's authority to accept communications against it.

There is no international court with global jurisdiction over all human rights matters. However, the *International Criminal Court* deals with crimes involving the most serious infringements of human rights standards, such as genocide and crimes against humanity, while the *International Court of Justice* from time to time hears cases between States with human rights dimensions.

The Office of the High Commissioner for Human Rights is a part of the UN Secretariat and is based in Geneva. It provides Secretariat support for the Human Rights Council, the treaty bodies and those conducting special procedures. It also works to promote human rights globally, by education, research and advocacy, by assisting States to meet their human rights obligations, and by helping individuals and groups to realise their rights. To further this work, OHCHR has a number of regional offices, including a Pacific office based in Suva.

Non-governmental organisations also play a significant role in the protection of human rights at the global level. Their members may be based within one State or may be international. Many NGOs provide an alternative source of information about human rights observance throughout the world, contributing reports to the UPR process, to the treaty bodies and to special procedures. They are active in spreading knowledge of human rights in general or in relation to particular issues or disadvantaged groups. They may also assist individuals to bring complaints (communications) of human rights violations to treaty bodies or otherwise support their efforts to obtain redress.

Regional level

In most regions of the world, States have established regional frameworks for dealing with human rights issues. These frameworks have been developed by regional political organisations such as the Organisation of American States and the African Union. Systems now exist in Africa, Europe and the Americas, and are being developed in Southeast Asia and the Arab States.⁹ Each framework may consist of a regional charter of rights, a commission with promotional, monitoring, reporting or protection functions, and a judicial body or court. Each regional system has its own special features and characteristics, reflecting the stage of development of the system and the perceived needs and capacities of the region. The elements of each regional system are explained in greater detail in section 5 – Regional human rights systems.

A *regional charter of rights* is an instrument or document setting out the human rights standards to be observed within a regional system; it will usually also contain some arrangements for monitoring or enforcing compliance with those standards. These instruments give more substance and detail to the general expressions of support for human rights that usually appear in the founding vision or governing documents of the regional political organisation. Regional charters already exist in the Americas, Europe, Africa and the Arab States; another is being developed for Southeast Asia.

Regional systems are encouraged as they are a means of reinforcing and protecting universal human rights standards,¹⁰ so it is important that the regional charters should not be expressed in terms that undermine the global standards contained in the core human rights conventions. Even so, within that constraint, regional charters provide an opportunity for States within a region to develop new rights and new approaches to meet local needs, or to give greater emphasis to issues seen to be of particular importance to the region.

A *regional human rights commission* may have a range of functions, including promoting, monitoring, reporting and protecting human rights. However, they do not have the power to give binding decisions; that power is reserved for courts. They rely for their effectiveness on using powers of persuasion and exposure, the cooperation of governments and support from civil society.

⁹ International organisations that are not confined to a geographic region may also develop human rights mechanisms. For example, the 57 members of the Organisation of Islamic Cooperation established an Independent Permanent Human Rights Commission in June 2011 and the Commonwealth Heads of Government meeting in October 2011 mandated further evaluation of options relating to a proposal for a Commonwealth Commissioner for Democracy, the Rule of Law and Human Rights.

¹⁰ Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 (1993), para 37.

Regional commissions typically consist of several commissioners, who are independent experts in human rights, and a secretariat to support their work. They have been tasked with some or all of the following functions.

To promote human rights by:

- ▶ providing education and training about human rights issues;
- ▶ conducting research and publishing information on human rights issues;
- ▶ providing advice or assistance on human rights issues to governments and NGOs;
- ▶ encouraging governments to ratify and implement human rights treaties;
- ▶ encouraging the establishment of national human rights institutions, and supporting the operation of those that already exist;
- ▶ establishing awards or grants to acknowledge or support human rights activities.

To monitor and report on the observance of human rights by:

- ▶ receiving information and reports from governments, NGOs or individuals;
- ▶ conducting fact finding inquiries;
- ▶ identifying shortcomings in existing or proposed legislation, policies or practices;
- ▶ publishing reports to governments, legislatures, the media or directly to the public;
- ▶ make recommendations to governments for actions to improve human rights observance.

To protect human rights by:

- ▶ seeking friendly settlements between victims of human rights violations and the offender or the government responsible;
- ▶ initiating or intervening in court proceedings.

Three regions (Europe, the Americas and Africa) have also established *human rights courts*, providing a source of judicial enforcement that is largely absent from the global system. The decisions of the courts are binding only on those State parties to a regional treaty that have accepted the court's jurisdiction. Typically, the regional courts have been mandated to:

- ▶ give advisory opinions on human rights issues;
- ▶ hear and determine cases of alleged violations of human rights standards, once all reasonable steps have been taken to exhaust remedies at the national level;
- ▶ make temporary orders to prevent irreparable harm pending the determination of claims;
- ▶ order reparation for established human rights violations including payment of compensation to victims.

NGOs have played an important role in the development and operation of regional mechanisms. They perform a number of functions including:

- ▶ education about rights among the general community, marginalised and vulnerable groups, government agencies and service providers;
- ▶ advocacy for the establishment of regional mechanisms and their powers, mandates and structures;
- ▶ monitoring human rights observance;
- ▶ reporting to regional mechanisms and the media on human rights observance;
- ▶ investigation of complaints of human rights violations;
- ▶ assistance to victims of human rights violations to bring complaints either to a commission or a court;
- ▶ assistance to courts as *amici curiae* (friends of the court), by making independent submissions on matters at issue in a case.

It is notable that none of these regional or subregional mechanisms currently exists in the Pacific. It is the purpose of this paper to consider the potential advantages of and objections to establishing regional mechanisms in the Pacific, so that policy makers may be better informed in deciding what arrangements (if any) would be most appropriate in this region.

National level

A range of mechanisms may exist at national and sub-national levels to protect human rights. In many countries, at least some human rights standards have the force of law, either because ratified treaties have direct effect in domestic law, or because international standards have been incorporated into the national constitution or given domestic effect by legislation. These standards may in turn be implemented and enforced by a range of institutions: committees of the legislature may have responsibility to examine whether proposed laws comply with human rights standards; courts may play a vital role in authoritatively interpreting and applying human rights standards and providing remedies for those whose rights have been violated; and national human rights institutions (commissions or ombuds offices) may be tasked with promoting human rights, monitoring their observance or investigating claims of violations. In addition, civil society can provide further practical support for human rights through the vigilance and advocacy of individuals, NGOs and the media.

A number of Forum Island Countries (FICs)¹¹ are actively considering establishing a national human rights institution. For other FICs, setting up an NHRI may not be feasible in present circumstances. In either case, the role of an NHRI and its relationship with any regional human rights commission requires further consideration. Section 4 examines NHRIs in some detail.

Summary

While many States are committed to observing human rights standards, in practice none is fully successful in achieving that goal. Consequently, it is important to have a range of institutions and processes designed to monitor and report on human rights violations, advocate for the better observance of human rights, provide remedies for victims, and press for changes in laws and practices that will prevent further violations.

¹¹ In this paper, FICs refer to member of the Pacific Islands Forum other than Australia and New Zealand.

4. NATIONAL HUMAN RIGHTS INSTITUTIONS

NHRIs take on a number of forms and functions. In essence, they are institutions created by a constitution or legislative text, with the promotion or protection of human rights in their mandate. They include human rights commissions, ombuds offices, *defensores del pueblo* (public defenders) and procurators for human rights; but do not include government departments (for example, a human rights office in the ministry of foreign affairs) or NGOs.¹²

Some of these national human rights institutions have a mandate that goes beyond human rights to include administrative justice issues as well. Some institutions have mandates that extend only to a limited spectrum of rights or the protection of a particular sector of society — for example, bodies established to promote racial or sexual equality, or to prevent discrimination in all its forms.

The Paris Principles

The Paris Principles are the main source of normative standards for national human rights institutions. Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in 1991, they marked the beginning of serious international co-operation and standardisation of NHRIs. Both the UN Commission on Human Rights¹³ and the General Assembly¹⁴ later endorsed them.

The Paris Principles are broad and general. They apply to all NHRIs, regardless of structure or type. They provide that a national institution should be established in the national constitution or by a law that clearly sets out its role and powers and that its mandate should be as extensive as possible. They state that national institutions should be pluralist and should co-operate with a range of social and political groups and institutions, including NGOs, judicial institutions, professional bodies and government departments. They should also cooperate with the UN and its agencies, as well as regional and other national human rights institutions. The Principles state that NHRIs should have an infrastructure that allows them to carry out their functions, suggesting that provision must be made for suitable support staff and premises. Particular importance is attached to the need for adequate funding to allow the institution 'to be independent of the government and not be subject to financial control which might affect this independence'.¹⁵ The members of the NHRI should be formally appointed for a designated period of time, so that their positions are secure, even if they disagree with the government of the day on matters of human rights.

The Principles provide that NHRIs should make recommendations and proposals to governments on various matters relating to human rights, including existing and proposed laws, human rights violations, and the national human rights situation in general. They also require national institutions to promote teaching and research on human rights, and organise public awareness and education programmes.

The Paris Principles also address methods of operation and, by implication, the powers of national institutions. NHRIs are entitled to consider any issue falling within their competence without authorisation from any higher authority. They are entitled to hear any person or gather any evidence needed to consider matters falling within their competence.

National institutions are called on to meet regularly and to publicise their decisions and concerns. The Principles do not require NHRIs to have a quasi-judicial function — that is, to handle complaints or petitions from people whose human rights are alleged to have been violated. However, where NHRIs do have this function, the Principles list particular obligations:

- ▶ to seek an amicable settlement through conciliation, a binding decision or on the basis of confidentiality;
- ▶ to inform petitioners of their rights, and available remedies, and promote access to them;
- ▶ to hear complaints and transmit them to competent authorities;
- ▶ to make recommendations to competent authorities.

¹² International Council on Human Rights Policy, *Performance & Legitimacy: National human rights institutions*, Geneva: ICHRP, 2nd ed, 2004, p3

¹³ UN Commission on Human Rights, Human Rights Resolution 2005/74: National Institutions for the Promotion and Protection of Human Rights, 20 April 2005, E/CN.4/RES/2005/74.

¹⁴ UNGA Res 48/134, 20 December 1993, UN Doc. A/RES/48/13.

¹⁵ Paris Principles, Composition and guarantees of independence and pluralism, 2.

Collaboration among NHRIs

Collaboration among NHRIs occurs through the *International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights* (ICC). Formed in 1993, the ICC is a representative body of national human rights institutions. To obtain full membership of the ICC (or 'A' status) an NHRI must demonstrate to the Sub-Committee on Accreditation that it fully complies with the Paris Principles. That status may be withdrawn if there is sufficient evidence that a particular institution has ceased to comply with the Principles. Hence, ICC 'A' status provides independent international verification of ongoing compliance with the Paris Principles.

NHRIs within the Asia Pacific region collaborate through the *Asia Pacific Forum of National Human Rights Institutions* (APF), which also supports efforts to develop new NHRIs in the region.¹⁶ At present, only two of the 18 members of the APF are from the Pacific: the Australian Human Rights Commission and the New Zealand Human Rights Commission; the Fiji Human Rights Commission was suspended by the ICC in 2007, after which Fiji resigned from the APF and the ICC.¹⁷

Collaboration between NHRIs and regional mechanisms

In the light of the Paris Principles and experience in other regions, NHRIs in the Pacific could be expected to also work collaboratively with any Pacific RHRM that might be established in future. Not only could a regional commission assist with the establishment and capacity building of new or emerging NHRIs, the national bodies could also provide valuable support for the regional body. They could do so by providing a regional commission with information, assessments and submissions regarding human rights issues in their countries, and also by taking a role in implementing at the national level any standards or policies developed at the regional level.

NHRIs in the Pacific

The only Pacific NHRIs currently accorded 'A' status by the ICC are those in New Zealand and Australia.

The New Zealand Human Rights Commission is an independent Crown entity given a wide range of functions and powers by the Human Rights Act 1993. An object of the Act is to provide better protection of human rights in New Zealand in general accordance with United Nations' covenants or conventions on human rights. The Commission's major functions are:

- ▶ to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society;
- ▶ to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society;
- ▶ to lead, monitor and advise on equal employment opportunities;
- ▶ to receive complaints of unlawful discrimination.

The Commission achieves these functions through a range of means including:

- ▶ education about human rights;
- ▶ production and distribution of human rights information and resources;
- ▶ inquiring into and reporting on human rights matters;
- ▶ providing dispute resolution services for issues involving unlawful discrimination.

¹⁶ Other regional organisations, including OHCHR Pacific office, PIFS and SPC RRRT, also offer support for the establishment of NHRIs in the Pacific.

¹⁷ Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Implementing Human Rights in the Pacific Through National Human Rights Institutions: The Experience of Fiji' (2009) 40 VUWLR 251, 267, also available at <http://www.austlii.edu.au/au/journals/UNSWLRS/2008/66.html>, accessed 17 October 2011.

The Office of Human Rights Proceedings is an independent office within the Commission and provides legal representation for complainants to take their case to the NZ Human Rights Review Tribunal should mediation not be successful.

In Australia, the *Australian Human Rights Commission* provides education and promotes public awareness on human rights issues, engages in research on human rights issues, and contributes to policy development and provides legal advocacy on human rights issues. It also deals with complaints of discrimination and breaches of human rights under federal legislation, including the following:

- ▶ *Racial Discrimination Act 1975*
- ▶ *Sex Discrimination Act 1984*
- ▶ *Australian Human Rights Commission Act 1986*
- ▶ *Disability Discrimination Act 1992*
- ▶ *Age Discrimination Act 2004*

The Commission cannot resolve the complaints by issuing binding orders in the way that courts do. Instead, it seeks to negotiate a settlement of the complaint by conciliation between the parties. The settlement may include an apology, the payment of compensation, or the introduction of training, practices or policies to prevent further infringements of rights.

In addition to the national commission, similar agencies operate under State or Territory law in each of the Australian States, the Australian Capital Territory and the Northern Territory.

The *Fiji Human Rights Commission* (FHRC) was originally recognised by the ICC. Established under the 1997 Constitution and the Human Rights Commission Act 1999, the FHRC's functions included 'providing education about human rights, conducting inquiries and investigations into possible infringements of human rights, encouraging governmental compliance with Fiji's international human rights obligations, advising government of the human rights implications of its actions and policies and resolving complaints by conciliation or by referral to the courts'.¹⁸ For some years, it effectively carried out these functions. However, in the events following the 2006 coup in Fiji, the independence of the FHRC was called into question.¹⁹ On 22 March 2007, the ICC suspended the 'A' status of the FHRC pending provision of information by FHRC about its independence. The FHRC then withdrew from the ICC and resigned from the APF. Following the abrogation of the 1997 Constitution, the FHRC has operated with a more limited mandate under the Human Rights Commission Decree No. 11 of 2009. It remains outside the ICC.

The Papua New Guinea Ombudsman Commission has a limited human rights role conferred on it by the national constitution. In addition to the usual ombuds role of investigating alleged wrong conduct and defective administration by governmental bodies, the office is also charged with investigating any alleged unlawful discriminatory practices by any person or body.²⁰ The Vanuatu Ombudsman has similar powers.²¹

Although the ombuds institutions in Papua New Guinea and Vanuatu are constitutionally protected, both have been subject to attempts to curb their powers. In PNG, the Parliament took a preliminary vote in 2010 to amend the constitution by removing powers of the Ombudsman Commission which had been used to prevent improper payments from public funds to officeholders.²² In Vanuatu, the Council of Ministers resolved in 1997 to initiate action to dismiss the first Ombudsman, who had exposed corruption and misuse of power among some prominent politicians. The Council's decision was held unlawful by the Supreme Court.²³ In turn, Parliament repealed the *Ombudsman Act 1995* and replaced it with a new Act that curtailed the powers of the office, most notably by removing the Supreme Court's power to enforce recommendations of the Ombudsman.²⁴ These instances serve as an important reminder of the susceptibility to political interference of national supervisory bodies, particularly where they use their powers to investigate the conduct of politicians.

18 Ibid.

19 Ibid.

20 Constitution, Section 219(1)(c). The Ombudsman Commission also investigates alleged misconduct in office under the Leadership Code.

21 The ombuds offices in Cook Islands, Samoa and Solomon Islands do not currently have a specific mandate in relation to human rights issues.

22 US Department of State, 2010 Human Rights Report: Papua New Guinea, <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154398.htm>, accessed 17 October 2011.

23 *Ombudsman v Attorney-General* [1997] VUSC 41.

24 *Ombudsman Act* [Cap 252] which commenced on 11 January 1999. See Edward R Hill, 'The Vanuatu Ombudsman' in Anita Jowitt and Tess Newton (eds), *Passage of Change: Law, Society and Governance in the Pacific*, ANU, E Press, 2010, http://epress.anu.edu.au/ex_pandanus/passage_change/pdf/ch04.pdf, accessed 17 October 2011.

Consideration has been given to the establishment of NHRIs in several FICs. For example, in Apia in 2009, workshop participants from seven FICs issued the 'Samoa Declaration' on NHRIs. They recognised the importance of taking necessary measures to establish NHRIs in accordance with the Paris Principles.

In its 2011 UPR State Report, the government of PNG reported that it was committed to establishing a national human rights commission with the minimum standards set by the Paris Principles. It had completed a Draft Constitutional Amendment and Draft Organic Law for this purpose. These drafts are yet to be implemented.

Samoa included within its Law and Justice Sector Plan 2008–2012 a proposal to establish a human rights commission. In 2011, Samoa reported as part of its UPR that legislation was being drafted for the establishment of an NHRI and also discussed with APF the steps needed to establish a national human rights institution within the existing Office of the Ombudsman.

Similarly, during its 2011 UPR, Solomon Islands indicated support for recommendations that it establish an NHRI. In January 2012, it undertook a scoping study on the possible establishment of an NHRI.

Nauru, Palau and Vanuatu have also held consultations on the possibility of establishing a national institution.

The establishment of independent, adequately resourced NHRIs could do much to assist national governments to meet their international obligations in the field of human rights. When operating effectively, NHRIs promote awareness and understanding of human rights standards; they advise governments, corporations and NGOs on how best to meet those standards; and they assist individuals to obtain a remedy for violation of their rights by relatively cheap and accessible processes of negotiation and friendly settlement. Further, by drawing the attention of government to laws and policies that may infringe human rights standards, they provide an opportunity to address problems at home rather than in the face of international scrutiny and criticism.

However, significant difficulties remain to be addressed before NHRIs can be established throughout the FICs. The challenges, which apply differently in each country but may be more acute in the smaller FICs, include the following:

- ▶ a shortage of qualified personnel with the experience and technical capacity to provide leadership and staffing of NHRIs;
- ▶ difficulty in obtaining sufficient financial resources from governments that have limited available funds and many pressing needs;
- ▶ a limited understanding or acceptance in the political culture of some member States of the importance of independent monitoring and evaluation of government performance;
- ▶ the potential influence of family and communal ties in small societies on decision making and accountability.

5. REGIONAL HUMAN RIGHTS SYSTEMS

In most parts of the world, regional frameworks have been established for the promotion and protection of human rights. No two are the same and there is no perfect model for a regional system. Of the five examples discussed in this section, the most substantial and significant regional frameworks yet developed are the systems operating in Europe, the Americas and Africa. There have also been developments in the Arab States and Southeast Asia. All systems are still evolving in terms of their structures, powers and methods of operation, in response to new human rights challenges and regional political realities. As yet, there are no authoritative standards for regional mechanisms equivalent to the Paris Principles for NHRIs, although some criteria have been suggested.²⁵

THE EUROPEAN HUMAN RIGHTS SYSTEM

The movement to establish a European system for the protection of human rights emerged after World War II. Respect for human rights was viewed as an essential means of promoting peace and avoiding the international warfare and internal conflict from which Europe had suffered for centuries. A commitment to treat all people with dignity and justice grew from a shared desire to avoid the excesses of war, particularly those experienced under the Nazi regime. Human rights were also accepted as a foundation for economic development, and as a precondition for membership of Europe's economic union. As a result, Europe has a number of highly developed mechanisms for promoting and protecting human rights as part of a system of governance that seeks to preserve national identities within a more integrated Europe. The main mechanisms are outlined here.

Human rights protection under the Council of Europe²⁶

The Council of Europe now consists of 47 European countries, having expanded in the 1990s to include most of the countries of central and eastern Europe. Its permanent headquarters are in Strasbourg, France. The Council seeks to develop democratic governments based on human rights principles and respect for the rule of law. All members of the Council are parties to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (the European Convention), which focuses mainly on civil and political rights. Indeed, acceptance of the rule of law and human rights principles is a condition for membership of the Council, and several States have been suspended on this ground. Over time, the Council has adopted other treaties, dealing with matters such as economic and social rights (in the *European Social Charter*), freedom from torture and the death penalty and particular protections for national minorities and children. These other treaties generally establish specialised mechanisms to give effect to the rights in question.

In addition, the Council has established the *Council of Europe Commissioner for Human Rights* with a mandate to promote awareness of and respect for human rights in the member States. The Commissioner does this by promoting education on human rights, assisting member States to implement human rights standards, identifying possible shortcomings in member States' law and practice concerning human rights, facilitating the work of national human rights institutions and providing advice and information regarding the protection of human rights across the region. The Commissioner does not deal with individual complaints, but may intervene in proceedings in the European Court of Human Rights.

The Council also has a judicial process for deciding on complaints about violations of the European Convention and its protocols in member States. The process initially consisted of two stages, involving a preliminary assessment by a commission²⁷ and then a reference by the commission to a court. The process was streamlined in 1999, so that all claims are now dealt with exclusively by the *European Court of Human Rights*, which also sits in Strasbourg, France.

Each member State must allow individuals, NGOs or groups of individuals to bring claims against it in the Court, provided the claimants have taken all reasonable steps to obtain a domestic remedy. The Court may also hear complaints from one State against another State, although in practice these are rare; almost all cases are brought by individuals against a member State. The Court can also deliver advisory opinions at the request of the Committee of Ministers, which is composed of the ministers of foreign affairs from each member State. The Court consists of one judge from each of the member States, although once appointed, all judges are expected to act independently. The Court's proceedings are conducted in public and its procedures are continually being refined to enable it to better handle its rapidly expanding caseload. By way of illustration of that load, in 2010 the Court received 61,307 complete applications, more than half of which were brought against four countries: Russia, Turkey, Romania and Ukraine. It struck out or declared inadmissible 38,576 applications and delivered judgments on 2,607 applications. However, it still appears ill-equipped to deal with the demand; in 2011, more than 150,000 applications were still pending, with cases taking up to seven years to be resolved.²⁸

25 See for example Christof Heyns and Magnus Killander, 'Towards Minimum Standards for Regional Human Rights Systems,' in Mahnouch Arsanjani et al (eds) *Looking to the Future: Essays on International Law in Honor of W Michael Reisman*, Martinus Nijhoff, 2010; Office of the High Commissioner for Human Rights, Regional Office for Southeast Asia, 'Principles for Regional Human Rights Mechanisms,' <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>, accessed 11 April 2012.

26 For further information, see <http://www.coe.int/lportal/web/coe-portal>.

27 The European Commission of Human Rights, which was abolished in the reforms of 1999.

28 The European Court of Human Rights, *Analysis of Statistics 2011*, http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF, accessed 12 April 2012.

As these figures suggest, many complaints are unsuccessful before the Court; but where the Court upholds a claim against a member State, the State is expected to accept and act on the Court's decision. The decision will often include an order to pay compensation to the person whose rights have been violated. A State that fails to accept the Court's rulings can be expelled from the Council by the other member States, acting through the Committee of Ministers. In addition, where the Court has found that the laws or practices of a State infringe the rights set out in the European Convention on Human Rights, the government of that State will be expected to amend the law or practice to bring it into compliance with the Convention. Failure to do so would expose the State to further claims before the Court.

The European Court of Human Rights is widely respected for the quality of its decisions. It has applied human rights principles consistently, while allowing for changes in society's values and leaving a measure of discretion to national governments in deciding how best to apply the principles to their domestic situations. As such, the Court has influenced the development of human rights law and practice in other parts of the world by contributing European insights to the international understanding of human rights. Its principle challenge lies in meeting the enormous demand for its services.

Human rights protection under the European Union²⁹

The European Union (EU) currently consists of 28 members (all of whom are also members of the Council of Europe.) Although the EU is focussed on achieving economic development and integration in Europe, its members have increasingly recognised the importance of human rights to reaching this objective. In fact, observance of human rights principles is a precondition to membership of the EU, so that States wishing to enjoy the economic advantages of EU membership must also meet the required human rights and democratic standards. All EU member States are parties to the *Charter of Fundamental Rights of the European Union*, which recognises a broad range of rights that belong to its citizens. The Charter is enforceable in the *European Court of Justice* — a court established specifically to apply all aspects of EU law, including human rights. Its decisions are directly enforceable throughout the member States.

The *EU Agency for Fundamental Rights* provides assistance and independent expertise relating to human rights, in the context of EU law. It collects data on human rights, conducts research and analysis, provides independent advice to policy-makers, networks with human rights stakeholders, publishes the results of its work, and works to raise awareness of human rights. If requested, it can provide a legal opinion to EU institutions that are developing new EU legislation, to ensure conformity of the law with human rights.

Human rights protection under the Organisation for Security and Cooperation in Europe³⁰

The linkage between human rights and peace and security is highlighted in the Organisation for Security and Cooperation in Europe. This important political body has 57 member States from Europe, Central Asia and North America, with a Secretariat based in Vienna, Austria. It was established to promote security in Europe. The Organisation states that respect for human rights and fundamental freedoms forms a key part of its comprehensive security concept. Responding to its mandate, the Organisation created an Office for Democratic Institutions and Human Rights, a Representative on Freedom of the Media and a High Commissioner on National Minorities.

Summary

The European system continues to develop in response to the need for independent bodies to promote and protect human rights, the willingness of individuals to raise human rights concerns and the recognition by all parties of the many advantages of taking action at a regional level. The European system, similar to the regional systems in Africa and the Americas, has failed to prevent some instances of gross human rights violations or eliminate systemic abuses altogether. Nevertheless, the European system is robust and there exists widespread acceptance by governments of the need for regional institutions to protect the rights of individuals and, in so doing, support the integrity of social cohesion regionally.

²⁹ For further information, see http://europa.eu/pol/rights/index_en.htm

³⁰ For further information, see <http://www.osce.org/what/human-rights>.

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM³¹

The 35 members of the Organization of American States (OAS) are from North, Central and South America and the island States of the Caribbean. Although its members adopted the *American Declaration on the Rights and Duties of Man* as early as 1948, the existence of numerous undemocratic, repressive governments in the region created major obstacles to the realisation of those rights in practice. Even so, the region's human rights institutions effectively maintained a voice for the people of the region who suffered human rights violations and continued to advocate for the observance of human rights standards. In recent years, the emergence of democracies throughout the region has prompted far stronger commitment to human rights, and corresponding improvements in the regional machinery for their protection.

Inter-American human rights standards

The *American Declaration on the Rights and Duties of Man* provides the standards against which all member States of the OAS may be assessed. The American Declaration contains a broad range of civil, political, economic, social and cultural rights, similar to the United Nations' Universal Declaration of Human Rights. The American Declaration also lists a number of citizens' duties.

In addition, 24 States are parties to the *American Convention on Human Rights*, which came into force in 1978. The Convention mainly deals with civil and political rights, and strengthens the mechanisms for protecting those rights.

Over time, States have added to the rights in the Convention by a series of Protocols (supplementary treaties) dealing with economic, social and cultural rights,³² and other measures, including conventions to end violence against women³³ and discrimination against persons with disabilities.³⁴ The desire to avoid a repetition of the abuses experienced under military regimes prompted further treaties dealing with torture³⁵ and the forced disappearance of persons.³⁶

The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) was originally established in 1960 by resolution of the OAS, followed by the adoption of a governing statute by the OAS Council. An expanded mandate was conferred by the *American Convention on Human Rights* when it came into force in 1978.

The Commission is a principal organ of the OAS. It has seven members appointed by the General Assembly of the OAS and is located in Washington DC. It has a number of functions: it engages in education and research about human rights, and provides advice to member States about their obligations; it investigates, documents and reports on alleged violations of rights within any OAS member State; and it reports to the General Assembly of the OAS on the general human rights situation in specific member States, usually after conducting an inspection visit to the State in question. The Commission also appoints special rapporteurs to investigate thematic areas of concern.

Where its investigations reveal that a relevant violation has occurred, the Commission may secure a friendly settlement of the claim or make recommendations to the State to remedy the violation. In cases where the recommendations are not complied with, the Commission must generally refer the matter to the Inter-American Court of Human Rights, if the State in question has accepted the jurisdiction of the Court under the American Convention. The Commission does not investigate complaints that are being or have been examined before another international forum such as the UN treaty bodies.

31 For further information, see http://www.hrea.org/index.php?doc_id=413

32 Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights (Protocol of San Salvador).

33 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

34 The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

35 The Inter-American Convention to Prevent and Punish Torture.

36 The Inter-American Convention on Forced Disappearance of Persons.

The Inter-American Court of Human Rights

The Court was established under the Convention and sits in San Jose, Costa Rica. It consists of seven judges elected by the General Assembly of the OAS. A State involved in a case before the Court may also appoint a judge to sit in that case. Only the Commission or the State parties may refer matters to the Court, either to obtain an advisory opinion or to adjudicate on a claim that a State has committed a human rights violation.

Where a violation is established, the court may recommend action by the State to remedy the matter, including the payment of compensation.

The Barrios Altos case

In 1991, members of Peru's armed forces murdered 15 innocent civilians and seriously injured a further four at a house in Barrios Altos, in the Peruvian capital, Lima. In 1995, Peru passed an Amnesty Law to exonerate all military and civilian personnel from responsibility for these actions. In 2001, the Inter-American Court of Human Rights ruled that the Amnesty Law was of no effect, and ordered Peru to make reparation to the victims of the extra-judicial killings and inhuman treatment, including the families of the deceased victims.

Peru paid a total of USD 3.4 million in compensation to the victims. The Court also ordered Peru to:

- ▶ Provide free health care and educational support to victims' families
- ▶ Make a public apology to the victims and establish a memorial to them
- ▶ Repeal the Amnesty Law
- ▶ Establish the crime of extrajudicial killing in its domestic law
- ▶ Take steps to ratify the International Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity
- ▶ Publicise the court's judgment in Peru

Source: <http://www1.umn.edu/humanrts/iachr/C/87-ing.html>, accessed 18.10.11

Summary

The Inter-American system was unable to prevent the gross systemic human rights violations that occurred for several decades in many countries in the region. But it helped to draw attention to those violations, document them and provide evidence for the later prosecution of the offenders.

The persistence of its advocacy of human rights, democracy and the rule of law has contributed to the establishment of democratic governments committed to avoiding the excesses of their predecessors. The system continues to be developed by member States in their pursuit of better ways to protect the human rights of people in the region.

THE AFRICAN HUMAN RIGHTS SYSTEM³⁷

The countries of Africa have developed a distinctive approach to the formulation of human rights standards that reflects African concerns and experiences. The African approach places greater emphasis on decolonisation and the right to development, recognition of peoples' or group rights in addition to individual rights, and the involvement of NGOs in the system. However, the process for giving effect to human and peoples' rights is still relatively new and underdeveloped, and large scale violations of rights still occur in a number of member States.

African human rights standards

The *African Charter on Human and Peoples' Rights* was adopted by the Organisation of African States (now the African Union) in 1981 and came into force in 1986.³⁸ It recognises the indivisibility of all rights, and strengthens the case for fulfilling economic, social and cultural rights by regarding them as 'a guarantee for the enjoyment of civil and political rights'. It is among the first documents to recognise a right to development and the right to a generally satisfactory environment. The importance of the community and society in African culture is reflected in the recognition of a number of peoples' rights such as the right to existence as a people, the right to dispose of wealth and natural resources and the right to international peace and security. All rights in the Charter must be observed at all times; there is no allowance for the suspension of rights in times of war or emergency.

The Charter also sets out duties of individuals such as the duty to the family, to society and to culture, and the duty of non-discrimination and tolerance.

There are additional African Conventions dealing with the treatment of refugees, children, youth and women.³⁹

The African Commission on Human and Peoples' Rights

The Commission consists of 11 experts appointed by the African Union (AU). It is based in The Gambia, but usually meets twice a year in different member States. It also appoints special rapporteurs and working groups on particular themes. The Commission's functions include the *promotion* of human and peoples' rights by means of educational activities, support for national and local human rights organisations, cooperation with African and international human rights institutions, and making recommendations to governments. It also develops rights-based principles and rules upon which African governments may base their legislation. Additionally, the Commission considers the periodic reports submitted by member States on measures they have taken to give effect to rights and freedoms in the African Charter. This process involves dialogue between the Commission and representatives of the reporting States.

The Commission may also provide *interpretation* of the African Charter at the request of a member State or an organ of the AU.

Finally, the Commission engages in *protection* of the rights in the Charter. It may receive complaints from member States, individuals, groups or NGOs, although it will not consider a case which is pending before, or has been dealt with by, another international human rights body. Where possible, the Commission secures a friendly settlement. In other cases, the Commission proceeds to decide the case on its merits and reports its findings to the Assembly of Heads of State and Government, which makes the final decision. The Commission may also submit cases to the African Court of Human and Peoples' Rights.

³⁷ For further information, see <http://www.achpr.org/> and <http://www.african-court.org/en/home/>.

³⁸ In 2007, all 53 members of the AU were also parties to the African Charter. The newly independent Republic of South Sudan has expressed an intention to join the AU and ratify the Charter. See <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5410/South-Sudan--Birth-of-a-Nation-What-Comes-Next-for-the-New-Country.aspx>, accessed on 7 September 2011.

³⁹ The Convention Governing the Specific Aspects of Refugee Problems in Africa; the African Charter on the Rights and Welfare of the Child; the African Youth Charter; the Protocol on the Rights of Women in Africa; and the African Charter on Democracy, Elections and Governance.

Interights v Mauritania

In 2010, the African Commission on Human and Peoples' Rights concluded its examination of claims brought by three NGOs against Mauritania. The Commission had previously found that Mauritania was in breach of the African Charter's guarantee of freedom of association when it dissolved the main opposition political party. On this occasion, the Commission also found that the confiscation of the party's property had been a violation of its right to property.

To rectify the violations of the opposition party's rights, the Commission recommended that Mauritania:

- ▶ Pay adequate compensation to the party for the loss suffered
- ▶ Ensure that its law on freedom of association, in particular the establishment and functioning of political parties, was in conformity with the provisions of the African Charter
- ▶ Inform the African Commission within 180 days on the measures it had adopted to implement the Commission's recommendations.

Source: <http://caselaw.ihlda.org/doc/373.09/view/#>, accessed 6 June 2012.

In addition to the Commission, a separate African Committee of Experts on the Rights and Welfare of the Child promotes and monitors observance of the African Charter on the Rights and Welfare of the Child.

The African Court of Human and Peoples' Rights

The Protocol establishing the Court came into effect in 2004 and the first judges were appointed in 2006. The court consists of 11 judges from 11 member countries, who are elected by the AU, from amongst 'jurists of high moral character and of recognised practical judicial or academic competence and experience in the field of human and peoples' rights'. The Protocol contains strong provisions to guarantee the judges' independence. The court sits in Arusha, Tanzania. The Court may give advisory opinions on the African Charter and other relevant human rights instruments. It may also make binding decisions in cases of rights violations and may grant remedies, including compensation to the victim. The court may only consider claims by individuals or NGOs if the State in question has accepted the right of individuals or NGOs to bring complaints against it. The execution of court judgments is the responsibility of the member State against which any order is made, and is monitored by the AU Committee of Ministers.

In 2008, the AU adopted a Protocol to merge the African Court of Human and Peoples' Rights with the African Court of Justice, creating a new body to be known as 'The African Court of Justice and Human Rights'. However, the Protocol has not yet come into force.

Summary

The African system contains significant developments in terms of the recognition of rights and the role of NGOs in the promotion and protection of rights. The African Commission has made substantial progress in promoting and protecting rights but, like other regional systems, it faces considerable challenges, with serious rights abuses still occurring in a number of member States and the unwillingness of some States to abide by its decisions. It is still too early to assess the effectiveness of the African Court, as it has only decided a handful of cases.

THE ARAB HUMAN RIGHTS SYSTEM⁴⁰

The League of Arab States (LAS), often known as the Arab League, is an organisation of 22 Arab States situated in North Africa and the Middle East. As such, it has some overlapping membership with the African Union. After a lengthy development phase, during which some members demonstrated ambivalent or even hostile attitudes towards human rights, the LAS has recently adopted a regional charter of rights and established a commission to oversee its implementation.

Arab human rights standards

In 1994, the LAS adopted an Arab Charter of Human Rights, which had been prepared under the auspices of the Permanent Arab Commission for Human Rights.⁴¹ This draft never came into effect. The Commission then promoted a revised version, which was adopted with some modifications by the LAS in 2004. The 2004 Charter came into effect in 2008.

The Charter's first aim is to 'place human rights at the centre of the key national concerns of Arab States'. It recognises an extensive range of political, civil, economic, social and cultural rights, broadly based on the ICCPR and ICESCR, but extending them in some respects, such as by recognising the right to development. Although the Charter provides that it is to be interpreted so as not to impair rights and freedoms under applicable international or regional treaties, concern has been expressed that some of the Charter rights still fall below international standards.⁴² For example, children under 18 may suffer the death penalty where that is allowed by national law; some economic and social rights are not extended to non-citizens; and the treatment of men and women is to be equal 'within the framework of the positive discrimination established in favour of women by the Islamic Shari'a, other divine laws and by applicable laws and legal instruments'.

The LAS also adopted an Arab Declaration on the Rights of the Child in Tunisia in 1983.

The Arab Human Rights Committee

The Arab Human Rights Committee consists of seven experts elected by the member States. The Committee is mandated to monitor implementation of the Charter by member States. It does so by receiving national reports from the parties, engaging in dialogue with them, and issuing comments and recommendations. States must submit an initial report within the first year of being bound by the Charter and every three years thereafter. At the end of each year, the Committee makes a report to the Council of the LAS of all its comments and recommendations.

The Charter makes no provision for complaints to be made by individuals, NGOs or States concerning alleged violations by a State party. Nor is there a judicial body with power to adjudicate on alleged breaches of the Charter.

Summary

The adoption of the Charter and setting up of the Arab Human Rights Committee are important recent developments towards wider recognition and observance of human rights standards in the Arab States. It is too early to assess both the commitment of all the LAS members to universally recognised human rights standards and the effectiveness of the new framework as a means of addressing the serious human rights violations that have been reported in some member States.

41 The Permanent Arab Commission for Human Rights is an agency of the LAS, established in 1968. Its functions are: (1) to support joint Arab action in the field of human rights; (2) to endeavour to protect individual rights, while emphasising the human rights dimensions of Arab concerns; and (3) to promote awareness among the Arab People about human rights and the need for their protection. This body should be distinguished from the Arab Commission for Human Rights, which is a non-governmental organisation of human rights activists, founded in 1998 and based in France. On 26 January 2009, the NGO was suspended from the ECOSOC.

42 Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update', *Human Rights Law Review* 10:1(2010), 169–178.

THE ASEAN HUMAN RIGHTS SYSTEM⁴³

The Association of Southeast Asian Nations (ASEAN) is a regional intergovernmental organisation consisting of ten States. Established in 1967, its aims include the promotion of regional peace and stability, and the acceleration of economic growth, social progress and cultural development. Its preference for non-interference in the domestic affairs of member States and consensus decision-making has slowed the development of strong regional mechanisms for the protection of human rights. However, the Charter of the Association of Southeast Asian Nations (ASEAN Charter), adopted in 2007, listed the promotion and protection of human rights and fundamental freedoms as one of the purposes of the organisation, and a fundamental principle that all members committed to respect. Member States also agreed, in Article 14, to establish an ASEAN human rights body. The ASEAN Intergovernmental Commission on Human Rights (AICHR) came into existence in 2009, while the more specialised ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) was launched in 2010. ASEAN does not yet have a regional statement of rights and freedoms, nor a regional judicial body capable of enforcing human rights standards.

ASEAN human rights standards

The AICHR has been tasked to develop an ASEAN Human Rights Declaration. As one of the purposes of the AICHR is to ‘uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties’,⁴⁴ the proposed Declaration may be expected to reflect those international standards.

The ASEAN Intergovernmental Commission on Human Rights

The AICHR was not created by treaty. Rather, terms of reference for the Commission were drafted by a High Level Panel and endorsed by the ten ASEAN ministers for foreign affairs in July 2009. The Commission was then formally launched by a declaration of ASEAN heads of government on 23 October 2009, which acknowledged that AICHR would become ‘the overarching institution responsible for the promotion and protection of human rights in ASEAN’.⁴⁵ The ASEAN leaders also confirmed that AICHR would receive adequate resources and promised a review of the AICHR’s mandate every five years to strengthen its mandate and functions.

The Commission consists of ten State representatives who are each chosen by their State according to their own national processes. They are accountable to their own governments and can be replaced at any time within their three year terms. This lack of tenure has been criticised as undermining the independence of the Commission,⁴⁶ thereby weakening its capacity for objective evaluation and reporting on the human rights performance of governments.

The initial functions of AICHR are essentially promotional and facilitative. They include:

- ▶ developing strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community;
- ▶ enhancing public awareness of human rights through education, research and dissemination of information;
- ▶ promoting capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;
- ▶ encouraging ASEAN Member States to consider acceding to and ratifying international human rights instruments;
- ▶ promoting the full implementation of ASEAN instruments related to human rights;
- ▶ providing advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;
- ▶ engaging in dialogue and consultation with other bodies and entities associated with ASEAN.

There does not appear to be any capacity for the Commission to receive complaints of human rights violations from individuals, NGOs or Member States. Nor is there specific power to conduct independent fact-finding missions.

⁴³ For further information, see <http://www.aseanhrmech.org/>

⁴⁴ Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, Article 1.6.

⁴⁵ The Cha-Am Hua Hin Declaration on the Intergovernmental Commission On Human Rights.

⁴⁶ OHCHR, ‘Frequently Asked Questions on ASEAN and Human Rights’ http://bangkok.ohchr.org/files/Regional_Dialogue_ASEAN_Background_Paper.pdf; Christof Heyns and Magnus Killander, ‘Towards Minimum Standards for Regional Human Rights Systems,’ in Mahnoush Arsanjani et al(eds) *Looking to the Future: Essays on International Law in Honor of W Michael Reisman*, Martinus Nijhoff, 2010.

The ASEAN Commission for the Promotion and Protection of the Rights of Women and Children

The ACWC was launched on 7 April 2010, with two representatives appointed from each Member State (one for women's rights and one for children's rights). Like the AICHR, the ACWC has mainly promotional and facilitative functions, which are specifically limited to the rights of women and children. This includes assisting Member States to report under and implement both CEDAW and CRC, to which all ASEAN States are parties. In addition, the ACWC is specifically mandated to advocate on behalf of women and children, especially the most vulnerable and marginalised, and to support the participation of ASEAN women and children in dialogue and consultation processes in ASEAN related to the promotion and protection of their rights.

Human rights NGOs have played a prominent part in promoting human rights in the ASEAN region, drawing attention to rights violations, advocating for the establishment of RHRMs and making submissions as to the terms of reference for the AICHR and ACWC. There is not as yet a formalised process for involving NGOs in the ongoing work of the two regional commissions.

Summary

The ASEAN regional structure is a modest first step towards the better promotion and protection of human rights in the region. The AICHR is in a transition stage and still has a limited mandate. In its current form, it is not sufficiently independent from member governments. It remains to be seen whether it will evolve to be a significant champion of human rights in the region, through the development of a regional charter of rights that are consistent with international standards, and a more expansive mandate that will allow it to take on a stronger role in monitoring and protecting human rights.

Regional human rights mechanisms: Conclusion

A combination of different historical, political, economic, social and cultural factors has influenced the formation and development of RHRMs in Europe, Africa, the Americas, Southeast Asia and the Arab States. The frameworks in each region continue to evolve to meet new challenges, and to respond to the growing acceptance of the need for stronger measures to protect human rights. Although there is no single template for the development of a regional human rights framework for the Pacific, the existing models provide valuable guidance in determining the most suitable system for the countries of the Pacific.

6. A REGIONAL HUMAN RIGHTS FRAMEWORK FOR THE PACIFIC⁴⁷

Historical background

The proposal to set up a human rights framework for the Pacific has been around for three decades. The first attempt was made in 1982 when the UN sponsored a seminar in Colombo on National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asia Pacific Region. The seminar was followed by a series of annual workshops. In 1985, LAWASIA, a non-governmental organisation comprising lawyers in Asia and the Pacific, started exploring the possibility of a regional system for the Pacific at a meeting in Fiji. The meeting was attended by 63 government and NGO delegates but was overwhelmingly dominated by Asian, Australian and New Zealand delegates.

After various working party meetings, a Draft Pacific Charter of Human Rights was adopted at a meeting held in Fiji in 1989 under the auspices of LAWASIA. The draft was modelled closely on the African Charter on Human and Peoples' Rights and provided for civil and political rights, and some economic, social and cultural rights. It foresaw the establishment of a commission to supervise implementation. At the time, the LAWASIA initiative was unable to attract support from Pacific governments.

One commentator⁴⁸ identified the following reasons for the failure of these initiatives:

- ▶ lack of follow-up and evaluation;
- ▶ inadequate space for participation from non-government stakeholders;
- ▶ some participants at the government level were not of high enough rank to have real impact;
- ▶ some of the relevant agencies and personnel had not been brought on board;
- ▶ lack of a regional commitment by governments.

To these reasons can be added other contemporary political and social factors:

- ▶ the perception that the initiative was to be driven by 'outsiders' and not Pacific Islanders;
- ▶ the perception that human rights promoted 'western' values which were irrelevant to the Pacific situation or clashed with Pacific values;
- ▶ a lack of recognition of the value of ratifying international human rights treaties, with very limited ratification of the core human rights treaties by FICs;
- ▶ the absence of a mandate for any particular regional organisation at the time to oversee the establishment of a regional mechanism envisaged by LAWASIA;
- ▶ the failure to allow meaningful participation in the process by Pacific-based NGOs.

It may be that the time was not right then. However, much has changed in recent years, with increasing awareness of human rights issues in the region. There has been a steady increase in the number of ratifications of core human rights treaties; Forum members have all undergone the UPR process; the courts in the region have increasingly referred to human rights standards in their judgments; and more Pacific-based NGOs have adopted a human rights focus in their work.

⁴⁷ This part of the paper draws from P Imrana Jalal, 'Why do we Need a Pacific Regional Human Rights Commission?' (2009) 40 VUWLR 177, available at http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_14_2008/Jalal.pdf, accessed 26 September 2011, and SPC RRRT Submission to the Parliament of Australia Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into Human Rights Mechanisms and the Asia-Pacific', available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/asia_pacific_hr/subs.htm, accessed 28 May 2012.

⁴⁸ V Muntarbhorn, 'In Search of the Rights Track: Evolving a Regional Framework for the Promotion and Protection of Human Rights in the Asia-Pacific Region'. Discussion Paper, OHCHR, June 2005, p9.

Support for an RHRM has also emerged from Pacific leaders. In October 2007, Pacific Island members of parliament⁴⁹ met in Auckland for a consultation on human rights issues.⁵⁰ They called for the establishment of a regional human rights body to help Forum member countries with their obligations under the Pacific Plan, to ratify, report on and implement international human rights conventions. A similar call was made in December 2007⁵¹ by Pacific Island judicial officials. In September 2010, regional human rights defenders meeting in Suva informally endorsed the proposal to set up a regional human rights commission or mechanism. Subsequently, the discussions about the development of an RHRM has led to wider regional discussions including, but not limited to, the Pacific Islands Forum Regional Security Committee meetings in 2009, 2010 and 2011; all of which requested SPC RRRT in partnership with PIFS to further explore the concept.⁵²

More recently, the Pacific Islands Forum Leaders in their 2011 communiqué acknowledged important progress on human rights in the region:

35. Leaders welcomed the successful participation of all Forum members in the first round of the Universal Periodic Review (UPR) to the UN Human Rights Council as [a] major regional achievement. They acknowledged the support and assistance to Members in their reporting efforts from the Forum Secretariat, the Regional Rights Resource Team of the Secretariat of the Pacific Community and the UN Office of the High Commissioner for Human Rights. Leaders noted the development of this cooperation, and the networks created by this activity, represent an important source of human rights expertise for the entire region.

This is a significant development in the region, given that it is the first time a Forum Leaders' communiqué specifically endorsed human rights work in the region.

In November 2011, PIFS and SPC RRRT brought together representatives from parliaments, governments and civil society in a Pacific Consultation on Advancing Regional Human Rights Mechanisms. The participants supported and encouraged the creation of a Working Group to make progress with investigations into the establishment of a Pacific RHRM. They also acknowledged that a Pacific regional mechanism, while primarily promoting and protecting human rights in the region, would need to be unique to the Pacific, be influenced by Pacific values, be mandated to promote and protect Pacific cultures and reflect the common aspirations of the region to support the vision of Pacific Island Leaders in the Pacific Plan. It was notable that the participants did not dispute the need for better mechanisms to advance human rights protection in the Pacific; rather, the debate focused on what the various possible mechanisms could offer, in the context of competing demands on State resources.

An earlier draft of this paper was prepared for that Consultation. It has been revised to take account of the valuable feedback provided during and after the Consultation.

The advantages of regional mechanisms⁵³

The United Nations General Assembly has encouraged the development of regional and subregional human rights mechanisms for over 30 years. For example, in 1977 it appealed to States in areas without regional human rights arrangements 'to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.'⁵⁴ In 1986, the General Assembly specifically called on the Asia-Pacific region to address the need for regional arrangements.⁵⁵

The UN World Conference on Human Rights in Vienna in 1993 stated:

Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.⁵⁶

49 From Cook Islands, Kiribati, Samoa, Federated States of Micronesia, Nauru, Niue, Papua New Guinea, Solomon Islands, Tuvalu and Vanuatu.

50 The Consultation was organised by RRRT with support from the Forum Secretariat, the Commonwealth Secretariat and the UNDP Pacific Centre and was held in Auckland. In most cases both opposition and government parties from each country were represented at the meeting.

51 From Cook Islands, Tonga, Vanuatu, Samoa, Kiribati, Fiji, Solomon Islands and Tuvalu.

52 A list of the discussions and consultations is provided in Annex 3.

53 For further discussion, see Christof Heyns and Magnus Killander, 'Towards Minimum Standards for Regional Human Rights Systems,' in Mahnoush Arsanjani et al (eds) *Looking to the Future: Essays on International Law in Honor of W Michael Reisman*, Martinus Nijhoff, 2010.

54 UNGA Res 32/127.

55 UNGA Res 41/153.

56 Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 (1993), para 37.

As recently as 2009, the General Assembly reaffirmed its support of existing regional human rights arrangements and reiterated the desirability of establishing regional human rights arrangements where they do not exist.⁵⁷

A number of reasons can be advanced for supporting a regional mechanism. Such a mechanism could:

- ▶ empower people from within the region to claim their universal human rights in a way that is sensitive to local cultural and social preferences (due to the geographical proximity of the mechanism, and the fact that it is made up of people from the region);
- ▶ assist national governments in the implementation of their international human rights obligations; for example, assisting in the implementation of concluding observations of treaty bodies that national governments are party to, and helping to follow up on recommendations of special procedures;
- ▶ help national governments to better address human rights concerns that cross national borders; for example, human rights violations and abuses that come from organised crime (including terrorism, human trafficking, sexual exploitation of migrant workers and children), migration and migrant workers, diseases and pandemics;
- ▶ provide regional input to the development of international human rights standards and the improvement of international human rights mechanisms, acting as a bridge between national systems and an international human rights system that can often seem remote and inaccessible;
- ▶ offer people protection from human rights violations when national mechanisms fail;
- ▶ act as a check and balance on national processes;
- ▶ provide help to national institutions to strengthen their role in the promotion and protection of human rights at the national level; for example, by providing advisory services to national governments in the administration of justice, legislative reform, human rights education and capacity-building of governmental and non-governmental institutions;
- ▶ promote regional peace and security (through the promotion and protection of human rights);
- ▶ provide a forum in which serious or systemic human rights problems within a member State can be identified and addressed constructively, and can help prevent those problems developing into political instability or violence.⁵⁸

A region based on PIF membership

Although the United Nations treats the Asia-Pacific as one region, a consideration of the potential advantages of RHRMs suggests that it would be preferable to confine the mechanisms to the Pacific sub-region.

Asia itself is probably too vast and culturally divergent an area to embrace a single regional framework and it is more likely that sub-regional arrangements will emerge in parts of Asia, as the ASEAN precedent suggests. The absence of a political body bringing together all States in the Asia-Pacific region both reflects the diversity of those States and militates against the development of human rights structures across the entire region. Even if a single Asia-Pacific structure were established, it would be difficult to provide adequately for the Pacific, both in terms of geographic proximity and an appreciation of Pacific issues, cultures and traditions. Further, Pacific concerns could easily be overlooked in a body required to service the vast populations in many Asian countries. It is therefore more appropriate to consider a human rights system based on the existing political structure of the Pacific Islands Forum.

The precise relationship between membership of the Forum and acceptance of a regional framework would need to be determined. It would be open to the member States to make acceptance of the entire regional system obligatory for all Forum members (as occurs in the Council of Europe). Given the commitment to human rights in the Pacific Plan, it might at least be expected that all member States would endorse a charter setting out the rights in question. However, it would also be possible to make some features optional. For example, in the Organisation of American States, all members endorsed the American Declaration on the Rights and Duties of Man, and all are subject to review by the Inter-American Commission, applying the standards of the Declaration. However, only some members are party to the American Charter and subject to the processes established by the Charter, including those in the Inter-American Court of Human Rights. While a commitment to the entire regional system by all Forum members may be optimal, a more flexible approach may have some advantages. It would mean that progress need not be delayed should one or more members be unwilling to accept a Commission, while others wished to proceed. The resolution of this issue may depend partly on the model adopted for introducing the mechanism⁵⁹ and, perhaps more importantly, on member assessments of what is realistically attainable.

⁵⁷ UN General Assembly Resolution A/HRC/12/L.2/Rev.1.

⁵⁸ Adapted from OHCHR, 'Frequently Asked Questions on ASEAN and Human Rights' http://bangkok.ohchr.org/files/Regional_Dialogue_ASEAN_Background_Paper.pdf.

⁵⁹ Two models for implementing a regional mechanism are outlined in Section 7.

Advantages of regional mechanisms for the Pacific region

Applying the general arguments for regional mechanisms to the situation in the Pacific, a Pacific charter of rights would be valuable as a way of giving more specific content to the Leaders' vision, as expressed in the Pacific Plan, of a region where human rights are defended and promoted. It could help solidify commitment in the region to meeting established international human rights standards, while also recognising other emerging rights that are important to the development of Pacific peoples, such as the right to a safe environment, which are not yet adequately reflected in international Conventions. It could also assist in promoting a rights-based approach to challenges faced across the region, such as climate change or trafficking in persons.

Turning to the advantages of establishing a regional human rights commission (RHRC), such a body could:

- ▶ take account of Pacific conditions, characteristics and peculiarities: a regional commission would be physically located within the region, and resourced by Pacific Island specialists who would understand the values of the region and would be better attuned to its development challenges and problems;
- ▶ provide to Forum member governments, at their request, legal advice, legislative drafting and other support regarding human rights treaty ratification, reporting and implementation; the advice would be provided by Pacific experts, familiar with Pacific laws and working methods;
- ▶ provide to Forum member governments, at their request, advice on addressing regional concerns, such as the impacts of climate change, sexual- and gender-based violence, and the need for sustainable development that benefits all members of the community, in ways that uphold human rights standards;
- ▶ help to raise the international profile of these particular Pacific concerns and contribute Pacific perspectives to the international development of human rights standards;
- ▶ if a charter of rights were not already established, work with stakeholders in the region to develop a charter of rights that would reflect Pacific values and concerns while maintaining international standards; engagement in the process of developing the charter should promote greater commitment to the rights that are agreed on;
- ▶ work to support and complement national programmes, consistent with the Pacific Plan, which encourages 'regional approaches to overcoming capacity limitations on service delivery at a national level', including the establishment of national human rights institutions;
- ▶ overcome the disadvantage experienced in those small island States that would struggle to establish national human rights commissions complying with the Paris Principles;
- ▶ by drawing its membership from more than one Forum member, offer a more objective and independent alternative forum in cases where national mechanisms were seen to be compromised or unable to adequately protect people's human rights;
- ▶ avoid excessive influence from any individual national government;
- ▶ promote and facilitate regional peace and security through the promotion and protection of human rights.

It should be recognised that some of these functions of the RHRC would offer greater benefits to some PIF members than to others. For example, Australia and New Zealand, with their greater resources and existing human rights institutions, would have less need for support in terms of treaty ratification, reporting and implementation. It might be expected that the RHRC would give priority in these areas to the Forum members in greatest need of its support.

Some of these potential functions of an RHRC are already being provided by existing regional agencies. For example, SPC RRRT is currently working with a number of FIC governments to address law reform on issues relating to sexual- and gender-based violence; PIFS and the OHCHR Pacific Office have advised FIC governments considering ratification of human rights conventions; and all three agencies have assisted many FICs to meet their reporting obligations under the UPR process and under conventions. These activities show both the governments' need for assistance and the benefits of sharing expertise in meeting common problems across the region.

While some Forum members may be content to maintain the existing arrangements, a regional commission could enhance these efforts by providing a more financially and politically secure base for continuing the work, and by creating a body with the status to better represent the region in international human rights forums. It could also be given broader mandates for monitoring, reporting and protecting human rights, beyond those currently performed by existing agencies. Once formally established, the RHRC would have the status and independence from individual governments to carry out the roles assigned to it by member States. It would also be in a better position to attract funding from donors.

The role of civil society in establishing and operating regional human rights mechanisms

Experience in other regions suggests that civil society organisations (CSOs), such as human rights NGOs, law societies, women's organisations, disabled persons' organisations, churches and trade unions, must play a significant role in the development and operation of any regional mechanism. In many regions, they have been influential advocates, urging governments to commit to regional human rights standards and to establish regional institutions to oversee compliance with those standards. CSOs have also been important in ensuring that the regional standards at least maintain existing international norms. They have provided vital support to individuals or groups wishing to raise their concerns before regional commissions or courts. They have also been valuable in scrutinising the work of existing regional institutions to ensure that they remain effective and independent of national governments. For this reason, it is important that CSOs are given a voice in the processes for establishing a regional mechanism, and have standing before the institutions once they are established. It is also important that Pacific CSOs continue to develop their own awareness and capacity to perform these crucial roles.

ARGUMENTS AGAINST THE ESTABLISHMENT OF A REGIONAL HUMAN RIGHTS FRAMEWORK

A number of arguments have been raised against establishing a regional human rights framework in the Pacific, either in the near future or at all. The principal objections are discussed below.

The difficulty of reaching agreement on the contents of a regional charter

Concern has been expressed that, given the differences between Pacific cultures, there might be disagreement as to what rights should be included in any regional charter. Clearly, culture and tradition are of great importance to Pacific peoples, and there are significant differences of culture and tradition among the Forum member States. But similar or greater differences in the other regions have not prevented them from finding consensus on the contents of a charter. The experience in the other regional systems is that the member States have begun with a basic list of rights that all could accept, and then gradually expanded the list by subsequent agreement, in the form of protocols. In this respect, there are several sources for finding common ground in the Pacific: some rights in the Universal Declaration of Human Rights such as freedom from slavery or torture are unlikely to be in dispute; other rights such as the right to a fair trial or to be presumed innocent are widely recognised in the constitutions, legislation or common law of many Forum members; and the widespread ratification of some Conventions such as CRC and CEDAW would provide further evidence of common standards. The importance of traditional ways might itself be recognised by the inclusion of the right to enjoy one's culture.

The process of settling the terms of a charter might be time-consuming, but it would also be of value in giving content to the human rights vision contained in the Pacific Plan.

A related concern about the content of a Pacific charter of rights is that it might be used to weaken international human rights standards. Similar arguments have been raised regarding other regional mechanisms, particularly those being developed by the Arab States and ASEAN members. The risk is that States in a region might set their own, less exacting standards, and then seek to justify their subsequent conduct by reference to those standards, without regard to the higher international norms.⁶⁰ Several steps might be taken to try to counter this concern: the mandate given to the persons or body tasked with drawing up a draft charter of rights might insist that the charter be consistent with international standards; that the task be given to those with experience and expertise in international human rights law; and that civil society organisations with an interest in human rights protection be given a significant role in the process leading to the formation of the charter of rights.

A restriction on sovereignty

It may be argued that a regional mechanism will encroach on the sovereign rights of countries to run their own affairs. The strength of this objection depends on the mandate of any regional commission. If its role were essentially facilitative — promoting human rights and assisting States to meet their obligations regarding treaty reporting and implementation — then there would be no restriction on sovereignty. If protective functions were given to a commission, they would be invoked only after all domestic processes had been exhausted. This would preserve the sovereignty of the State in question by giving it an opportunity to address the issue at home.

60 Christof Heyns and Magnus Killander, 'Towards Minimum Standards for Regional Human Rights Systems,' in Mahnoush Arsanjani et al. (eds) *Looking to the Future: Essays on International Law in Honor of W Michael Reisman*, Martinus Nijhoff, 2010.

In cases where domestic processes prove unsuccessful for a claimant and a regional commission becomes involved, its recommendations might indeed increase the pressure on a government not to act in ways that undermine human rights. But this is not unusual. In an era of increasing globalisation, no State is entirely autonomous. Forum members already accept some limits on their sovereignty in order to gain the benefits seen to flow from trade, security or environmental treaties. In this sense, no State's sovereignty is absolute. Similarly, every Forum member has already accepted some responsibility towards human rights by ratifying Conventions, by being subject to Universal Periodic Review of their human rights record and by being bound to respect the rights and freedoms guaranteed in their own constitutions. Many FICs also appreciate that development assistance and trade agreements may also be conditioned on a good human rights record.

A regional mechanism could only be established with the consent of participating governments. Viewed in this light, making a further commitment to regional human rights protection would itself be an *exercise* of sovereignty, a free exercise of self-determination by each State in the region, in order to better fulfil their responsibilities to protect and uphold human rights.

Funding

Arguably the most contentious issue surrounding the possible establishment and viability of an RHRM for the Pacific is the question of funding. What will it cost and who will pay for it?

A regional commission need not be prohibitively expensive to operate. For example, the budget for the African Commission on Human and Peoples' Rights in 2009 was USD 3.67 million, while funds for the Inter-American Commission on Human Rights amounted in recent years to around USD 6.5 million.⁶¹ Yet these commissions operate in vastly more populous regions, with many more member States, and it may be expected that a Pacific commission could operate with a smaller budget, although the precise cost would depend on factors such as the extent of its mandate, its location and staffing levels.

Precedents already exist for funding regional organisations in the Pacific region. For example, the University of the South Pacific draws on pooled resources to achieve common regional objectives with reasonable success. There is no reason why a similar model could not be replicated for an RHRC.

In addition, an RHRC could seek to attract funding through donor arrangements. These need not all require additional money. Donor funded programmes, such as SPC RRRT and the PIFS Human Rights Advisor's programme, currently perform some of the functions envisaged for an RHRC. If an RHRC for the Pacific were developed, it would be possible to reduce or phase out some of these existing programmes, thereby freeing up funds that could be redirected to a Pacific RHRC. Similarly, if a commission were mandated to undertake tasks such as assisting FICs to draft legislation to implement human rights obligations, donor funds currently supplied as bilateral aid could be diverted to fund these tasks. It is also possible that new donors could be found to support the work of a regional commission. It is notable that the Inter-American Commission on Human Rights received over 62% of its special donor funding in 2010 from sources outside the Americas, mostly from European governments.⁶²

Priority should be given to developing NHRIs

It is sometimes said that it is inappropriate to develop a regional mechanism until national mechanisms exist in all Forum members. After all, it is argued, it is national governments that bear the primary duty in relation to human rights observance, so mechanisms at the national level are more important.

61 *Ibid.*
62 http://www.cidh.oas.org/annualrep/2010eng/2010.Contributions.to.IACHR_certified.pdf accessed 8 September 2011.

Nothing in this paper is intended to cast doubt on the value of NHRIs. They will have an important role to play in those FICs where it is currently realistic to establish institutions capable of meeting the Paris Principles. In other FICs, a more limited national institution might be established with the prospect of evolving gradually into a body that complies with the Paris Principles. However, given their limited human and financial resources, some less populous FICs are unlikely in the foreseeable future to establish NHRIs. For them, a regional mechanism is a more practicable alternative. It may be possible for a regional commission to set up small offices in these countries or on a sub-regional basis, to enable ease of access. This would be a significantly cheaper option than having fully fledged national commissions in each country, having to be compliant with the Paris Principles. A regional mechanism could also be expected to develop a supportive and complementary relationship with any NHRIs that are established within the region.

It is also the case that NHRIs may play an important role in establishing a regional mechanism. For example, in the ASEAN region several NHRIs were significant drivers of the process that led to the establishment of the ASEAN Intergovernmental Commission on Human Rights. However, it should not be thought that regional commissions can be effective only if NHRIs are already in place. The history elsewhere in the world suggests otherwise. Some regional commissions were established at times when few national commissions existed, and played an important part in the later development of national institutions. For example, the Inter-American human rights system developed at a time when NHRIs were virtually non-existent in the countries of the region. In fact, NHRIs were established in response to repeated calls from the Inter-American Commission as well as from UN bodies. Now almost every member of the Inter-American Commission has a national institution. There is no obvious 'right order' in which to proceed; experience shows that advancement in one area tends to promote advancement in the other.

In order to achieve the maximum effectiveness in the protection of human rights, both a regional system and a national institution should operate together, if the resources permit. It will be for each Forum member government to assess where its priority lies and some may prefer to focus on establishing an NHRI in the immediate future, while others may favour the early establishment of a regional mechanism. If sufficient funding for an RHRM can be found without imposing significant new burdens on FIC governments, it may be possible to move on both fronts simultaneously.

Priority should be given to issues such as health, education, and economic development

It is sometimes suggested that FIC governments should be more concerned with meeting pressing needs in areas such as health, education and poverty reduction, rather than promoting human rights. There is no doubt that these issues present significant challenges throughout the FICs and require concentrated efforts from governments to tackle them. However, there is no conflict in principle between addressing those concerns and respecting human rights: human rights Conventions recognise, among others, the rights to health, education and an adequate standard of living. The Conventions also emphasise the need to ensure that these rights are enjoyed by all, especially the most marginalised and vulnerable members of the community. A human rights approach emphasises the importance of addressing these concerns by explicitly imposing responsibility on States to progressively realise these rights. A regional commission could help to raise the profile of economic, social and cultural rights, which are not generally recognised in FIC national constitutions, and assist governments to give effect to them.

It is important to appreciate that in other parts of the world, regional human rights mechanisms have been seen as *means* of achieving economic development, peace and security, rather than *alternatives* to those goals. This is highlighted particularly in Europe, where both the European Union, with its focus on economic goals, and the Organisation for Security and Cooperation in Europe, with its mandate to promote security, have both created mechanisms to promote and protect human rights.

Even so, in practical terms, there may still be a competition for funds, between health, housing or education programmes and the costs of establishing and operating a human rights mechanism. If suitable arrangements can be made for funding the RHRM, without drawing heavily on FIC resources, then this difficulty can be minimised.

7. PATHWAYS TO A REGIONAL HUMAN RIGHTS FRAMEWORK

Just as there are different institutional frameworks in the various regions with established regional mechanisms, so are there different processes by which these frameworks have been brought into existence. For example, the Council of Europe system was created by treaty, with a charter of rights, a commission and a court established from the outset. Over time, the charter of rights was supplemented by protocols, the commission and court were merged, and many more States joined the system. In the Inter-American system, a declaration of rights was agreed in 1948, a commission was established in 1960 by resolution of political leaders, while a court was established only after the American Charter came into effect in 1978. From time to time, additional protocols supplemented the initial charter of rights. In Africa and the Arab States, a charter of rights and a commission were established by treaty at the outset, with Africa adding a court by subsequent protocol. In ASEAN, a commission was first established, by resolution of political leaders, with one of its tasks being to develop a charter of rights. Given this diversity of approach, it is clear that there is no single process that must be followed to establish a regional system. If there is sufficient support from national governments to establish a regional mechanism, it should be possible to devise a procedure consistent with regional practice to produce that outcome. This section of the paper lists two broad models, although each is capable of further modification.

Model A: A treaty to establish a Pacific charter and commission

Under this model, the Leaders would appoint a committee or eminent persons group to prepare a draft treaty that would include a charter of rights as well as establish a commission to oversee compliance with the rights; it could also be asked to consider the feasibility of establishing a regional court of human rights. The committee would need to consult widely with Forum member governments, as well as CSOs and other interested parties, in determining the content of the charter and the mandate of the commission. The Leaders could also authorise the establishment of a secretariat to provide technical and administrative support for the committee.

The committee's terms of reference would make it clear that the charter of rights should be consistent with international human rights standards but might give greater focus to issues and principles of particular importance to the region, taking into consideration its unique cultural heritage and social fabric. The committee would also recommend the composition and mandate of the commission, the qualifications and means for selecting commission members, and measures to guarantee their independence. Provision would also be made to ensure an active ongoing role for CSOs.

It is envisaged that, at a minimum, the commission would be given a role of *promoting* human rights.

If accepted by member States, a mandate to **promote** human rights could include:

- ▶ providing education and training about human rights issues;
- ▶ conducting research, collecting data and publishing information on human rights issues;
- ▶ providing advice or assistance to Pacific governments on human rights issues, including their reporting and implementation obligations;
- ▶ encouraging and assisting governments to ratify and implement human rights treaties;
- ▶ drafting legislation and policy that are compliant with human rights standards;
- ▶ providing advice or assistance to NGOs on human rights issues;
- ▶ establishing awards or grants to acknowledge or support human rights activities;
- ▶ supporting the establishment and work of national human rights institutions.

To achieve all its potential advantages, however, a commission could also be given *monitoring*, *reporting* and *protection* tasks.

If accepted by member States, a mandate to **monitor or report on** human rights could include:

- ▶ receiving information and reports from governments, NGOs or individuals;
- ▶ conducting fact finding visits to member states;
- ▶ identifying shortcomings in existing or proposed legislation, policies or practices;
- ▶ publishing annual reports to PIFS regarding their activities and the state of human rights observance within PIF member states;
- ▶ making recommendations for actions to improve human rights observance within member States.

If accepted by member States, a mandate to **protect** human rights could include:

- ▶ seeking friendly settlements between victims of human rights violations and the offender or the responsible government;
- ▶ intervening in court proceedings where human rights issues are at stake.

The terms of the draft treaty would eventually need to be accepted by the Leaders at a Forum meeting and subsequently ratified by member States. The Leaders would need to decide whether accession to the treaty would be a condition of membership of the Forum and, if not, specify how many States must ratify before the treaty took effect.

On this approach, the essential framework, at least for a charter of rights and a commission, would be settled at the outset. It might take longer for a commission to become operational, but member States would have a clearer picture of what was envisaged before any commitments were made.

Model B: A more gradual approach

Under this model, a commission could be established by a relatively informal process at the outset. Over time, more formal arrangements could be agreed by the governments of the region, and could be implemented in stages. On this approach, PIF Leaders could endorse the creation of a commission with a limited initial mandate to *promote* human rights. The details of the commission's initial mandate could be defined by terms of reference developed by a Forum Working Group. With the terms of reference settled, one or more commissioners could be appointed by the Leaders, with an appropriate secretariat to support the work of the commission.

Additionally, the Leaders could endorse the development of a treaty in similar terms to Model A. The task of developing the treaty, in consultation with governments and other interested parties, might be given to the commission itself or to an eminent persons group supported by the commission.

On this approach, the commission could at an early stage begin to provide some services to member States at their request, such as advising on reporting or implementation requirements under human rights Conventions or the UPR. At the same time, it could support the longer term work of drafting the terms of a treaty that would include a charter of rights and would establish the longer term mandate of the commission. On this more gradual approach, States could commit to arrangements on a step by step basis, and they would be familiar with the commission in its initial, limited mandate before deciding whether to proceed further.

It might be that not all Forum members would avail themselves of the support of the commission in this initial stage. For example, Australia and New Zealand have substantial resources for promoting human rights, including their NHRIs, and might elect not to call on the resources of the regional commission in its initial phase. This would leave the commission to focus on providing its services to FICs with greater need. This could also foster the development of a commission attuned to the concerns and values of people within the FICs, who in turn might be more receptive to an institution not seen to be too closely associated with the more developed countries of the region.

Once the terms of the treaty were established, approved and in force, as envisaged in Model A, the commission would commence operating under those terms.

Locating and financing a commission

The commission would be based in a suitably located Forum member country, under a regional hosting arrangement. It might also have national officers in other member States or on a sub-regional basis, to enable ease of access.

It is envisaged that a combination of member State and international donor contributions would fund the commission and its secretariat. It is important to note that many existing programmes obtain donor funding for some of the activities that a commission might perform, and these external funds might be re-directed to the commission. Member States would then need to finance core costs through a joint agreement, which could possibly be based on the user-pay arrangements used for existing regional institutions such as the University of the South Pacific.

8. SUMMARY

Awareness is growing in the Pacific of the significance of human rights, and it has been argued that the establishment of a regional charter and commission could both increase that awareness and assist governments to meet their responsibilities in this field. This in turn would ultimately enhance progress towards human development and the building of just and sustainable societies. It would also demonstrate to the rest of the world that Forum members are committed to giving effect to human rights, and that they wish to participate more fully in the international dialogue regarding the formulation, interpretation and progressive realisation of human rights.

However, it is not clear that there is sufficient support for such a development in the near future. While some in the Pacific are already committed to the early establishment of a regional mechanism, and others are sceptical or opposed, it is probable that the majority need further information and reflection before they would be willing to form a definite opinion.

Realising the vision of a regional system will require considerable consultation and dialogue with interested persons and institutions. Extensive discussions have already taken place, as the Appendix shows. It is suggested that further exploratory talks be undertaken with key stakeholders. These talks could flesh out the arguments and issues raised in this paper, including the suitability of the models proposed in Section 7 and the options for funding. Once adequate consultation has occurred within the region, it will be necessary to seek to include the proposal on the agenda of a meeting of the PIF Leaders. If the proposal were to find broad political acceptance by the Leaders, then the foundations could soon be laid for the establishment of a regional human rights system that will assist in protecting the rights of Pacific people in their own region.

APPENDIX – LIST OF CONSULTATIONS HELD ON THE ESTABLISHMENT OF A REGIONAL HUMAN RIGHTS MECHANISM FOR THE PACIFIC

- Pacific Island MPs Human Rights Consultation, Auckland, New Zealand (Oct 2007)
- Pacific Island Judges & Magistrates Human Rights Training, Brisbane, Australia (Dec 2007)
- Regional NGOs' regional human rights Seminar, Nadi, Fiji (Feb 2007)
- VUW/ Interrights /Samoa Government Meeting on 'Strategies for Advancing Human Rights', Apia, Samoa (April 2008)
- Fiji Law Society / South Pacific Bar Association Conference, Nadi, Fiji (July 2008)
- Australian Federal Parliament, Subcommittee of Human Rights Mechanisms, Canberra, Australia (March 2009)
- Asia Pacific Forum of National Human Rights Institutions meeting, Apia, Samoa (June 2009)
- Australia & NZ Society of International Lawyers, 'The Future of Multilateralism in a Plural World' Wellington, NZ (July 2009)
- Asia Pacific Forum of National Human Rights Institutions meeting, Jordan (July 2009)
- Forum Leaders Meeting, Cairns, Australia (August 2009)
- Secretariat of the Pacific Community, Committee of Representatives of Governments and Administrations Nuku'alofa, Tonga (October 2009)
- MPs regional human rights consultation, Brisbane, Australia (December 2009)
- Australian Federal Parliament, Subcommittee of Human Rights Mechanisms Publication, 'Human Rights in the Pacific: challenges and opportunities' Joint Standing Committee on Foreign Affairs, Defence and Trade (April 2010)
- OHCHR, Asia Pacific Regional Meeting, Bangkok, Thailand (April 2010)
- 15th Workshop on the Framework of Regional Cooperation; Action Point 8, Asia Pacific Regional Outcome Statement (April 2010)
- Forum Regional Security Meeting (June 2010)
- OHCHR, International Service for Human Rights and SPC RRRT Pacific Regional Consultation and Training for Human Rights Defenders, Suva, Fiji (September 2010)
- PIFS and SPC RRRT, Pacific Consultation on Advancing Regional Human Rights Mechanisms, Suva, Fiji (November 2011)