

# Draft Pacific Charter of Human Rights and Explanatory Memoranda UNASIA Human Rights Committee (Jensinger, NSW) 1989

## CONTENTS

INTRODUCTION	I
 PART A - THE IDEA OF A PACIFIC CHARTER OF HUMAN RIGHTS	
What would it be about?	3
Why is a Charter needed?	3
Which countries should be parties to the Pacific Charter?	6
How to make progress.	10

### PART B - RIGHTS TO BE RECOGNIZED AND DUTIES TO BE IMPOSED AND MACHINERY REQUIRED.

#### CHAPTER 1

RIGHTS TO BE RECOGNIZED AND PROTECTED AND DUTIES TO BE IMPOSED	
Introduction and Preamble	13
General Provisions	15
Civil and Political Rights	20
Economic, Social and Cultural Rights	45
Environmental Rights	50

Duties of Parties	51
Duties of Individuals	52
Limitations and Derogations	55

#### CHAPTER 2

### GIVING EFFECT TO THE CHARTER

Introduction	59
Establishment and Organization of the Pacific Human Rights Commission	62
Functions of the Commission	64
Procedures of the Commission	66

### APPENDIX A - DRAFT PACIFIC CHARTER OF HUMAN RIGHTS.

### APPENDIX B - AFRICAN CHARTER OF HUMAN AND PEOPLES' RIGHTS.

## INTRODUCTION

Following the example of the International Commission of Jurists in beginning the process which led to the African Charter of Human and Peoples Rights, Lawasia (the Law Association of Asia and the Pacific) took an initiative to encourage the development of a regional human rights body in the Pacific.

The Human Rights Committee of Lawasia conducted a conference on the question in Fiji in April 1985. After that a Drafting Committee was convened to give the idea some shape. The Drafting committee met in Sydney 24-27 June 1986 and comprised Nick O'Neill, a lawyer with substantial practical experience in Melanesia; Guy Powles, an academic lawyer with practical and research experience in Polynesia; and Jon Van Dyke, an academic lawyer with practical and research experience in Micronesia. Isikeli Maitaitoga and Mere Pulea were unable to attend the meeting but made comments of value to the Committee.

The Drafting Committee produced a report which raised the issues to be considered in relation to the establishment of a regional human rights body; developed a model treaty, based on the African Charter of Human and Peoples' Rights which set down civil political, economic, social, cultural and peoples' rights and suggested a body not only to supervise compliance with those rights, but also to assist governments with human rights issues in general and in meeting their obligations under regional and international human rights treaties in particular.

That report was submitted to a number of consultants for comment and was then considered in detail by a Working Party which met in Apia, Western Samoa 26-29 August 1986. The Working Party comprised Tony Deklin, an academic lawyer from Papua New Guinea, Visekota Peteru a practising lawyer from Western Samoa; Lani Tupu, a New Zealand citizen and the President of the Pacific Islands Advisory Council; Jon Van Dyke; and Nick O'Neill.

In the meantime Lawasia held a seminar entitled "Human Rights Today and Tomorrow: National Human Rights Commissions and Other Organs" in Manila in late 1987. It was attended by 37 delegates from 12 countries and made a recommendation that the following resolution should be submitted to appropriate United Nations (UN) bodies and agencies:

Request that the UN explore, in accordance with previous practice, the possibility of holding an Asian-Pacific regional seminar at the inter-governmental level to examine the possibility of some kind of regional institutions and arrangements for

the promotion and protection of Human Rights and that this regional seminar be held in 1989 with the participation of non-governmental organizations.

Since the conclusion of the Manila meeting LAWASIA has approached governments in the region with a request that they give consideration to hosting such a Seminar. Following on from this, the United Nations Centre for Human Rights is planning to conduct, in the Philippines in December 1989, a regional workshop on human rights issues, including the question of regional and national institutions and arrangements for the promotion and protection of human rights.

In Apia, Western Samoa 15-17 May 1989 a seminar of 20 delegates from Micronesia, Melanesia, Polynesia, New Zealand and Australia considered the report as amended by the working party. The seminar made amendments to the preamble of the draft Charter and to its interpretation provisions. It also recommended that the enforcement provisos of the Commission be increased.

The Seminar resolved that Lawasia encourage the governments of the Pacific region to send their representatives to a meeting to be held in 1990 to begin the process of drafting a treaty based on the draft Pacific Charter of Human Rights contained in the following report.

The report is divided into two parts. The first deals with the idea of a Pacific Charter of Rights and the argument for and against it. The second part the report deals with the rights to be recognized and protected and the duties to be imposed. It also deals with the machinery to give effect to those rights and duties. A draft Pacific Charter of Human Rights is set out in an Appendix A to this part of the report. The African Charter of Human and Peoples' Rights is set out in Appendix B.

## PART A

### THE IDEA OF A PACIFIC CHARTER OF HUMAN RIGHTS

A proposal for a Pacific Charter of Human Rights raises two immediate questions: what would it be about and why is it needed?

#### What would it be about?

The proposed Pacific Charter, discussed in Chapters 2 and 3, sets down the wide ranging rights that the people of the Pacific recognize as relevant for their protection and development. These rights include the basic civil and political rights, most of which are contained in the written constitutions of the Pacific region, economic, social, and cultural rights, including the right to development; and the rights of peoples, including indigenous peoples.

In addition the Charter includes two sets of duties, duties of governments, but more importantly, duties of individuals to the other members of society.

Finally the Charter sets down machinery for supervising the Charter and dealing with complaints about human rights violations. These provisions propose functions for a Pacific Human Rights Commission which would be of great benefit to the governments of the region. The Commission would be able to assist them with programmes to promote rights and educate people about rights. It would be able to assist them to review their legislation for consistency with the Charter rights, to ratify international human rights treaties, to prepare national efforts to the bodies monitoring those treaties, and generally to provide services to governments for the promotion and protection of rights.

#### Why is a Charter needed?

Two points must be made at the outset. Generally the human rights records of the governments of the region are good. Most of the independent and less than independent countries of the region have constitutionally entrenched and enforceable human rights.

It should not be overlooked that two of the larger Pacific countries, Australia and New Zealand, do not have constitutionally entrenched rights. The New Zealand

Parliament has before it a Bill of Rights, but the Hawke Labor Government in Australia recently abandoned its attempt to enact an Australian Bill of Rights Bill which would have implemented Australia's obligations under the International Covenant on Civil and Political Rights. The way some members of the executive arm of government in both those countries have treated both their indigenous and immigrant communities and the attitude towards them of too many of the citizens of those countries leaves a lot to be desired.

While the human rights record of this region is, comparatively speaking, quite good, problems exist regarding:

- the self-determination of peoples;
- the rights of indigenous peoples;
- the rights of cultural minorities - often immigrants from elsewhere in the region;
- the status of women;
- the rights of children and youths particularly with regard to education and jobs;
- the rights of the elderly;
- the right to participate in decisions affecting one's vital interests.

The group-based structure of island societies can inhibit the exercise of individual rights if it is abused or used in an oppressed manner, but techniques may nevertheless be developed which will reduce the possibility of conflict. For example, an approach which recognizes the duties of the individual to the group and society as a whole would help to encourage a balanced consideration of the vital relationship between the group and its members.

These are essentially negative reasons for a Pacific Charter, but many positive reasons also exist. In the Pacific the human rights that are protected are essentially civil and political rights although in a number of countries the economic and social interests of indigenous people are safeguarded by the protection of their land rights. The economic, social and cultural rights of all Pacific peoples require proper recognition and appropriate protection.

The existence of rights in individuals implies that those individuals are under a duty to ensure that other members of the community are able to enjoy their rights. This is why some rights need to be limited for the protection of rights and freedoms of others. But there is another element to this question. All societies recognize that individuals owe duties to the community at large, but this point is understood better in Pacific countries

than in most other places. The draft Charter sets out the duties of individuals appropriate to the circumstances of the Pacific region.

Constitutionally entrenched rights in the Pacific region are enforceable by the courts in two major ways. The courts exercise the right to set aside legislation that is inconsistent with those rights. Secondly the courts will grant remedies when breaches of rights are alleged and proved. Seen in this light the enforcement of rights is essentially reactive. Governments of the region, with the exception of Australia and New Zealand, maintain no institutions for the promotion of rights. Little is done in any of the countries of the region to educate people about their rights and their duties. The Commission proposed in the draft Charter would have as a major function the promotion of rights. It would be able to draw to the attention of ordinary citizens, public servants and others the issue of rights, how they can be promoted, enjoyed and protected.

Since World War II all the Pacific island nations have either obtained or regained their independence. Essentially this has been a peaceful process. Most of the metropolitan governments have been willing to give up their colonies or the dependancies they were given trusteeship of by the United Nations. However not all of the Pacific peoples have been able to determine their futures freely without extreme pressure from outside forces. There are grounds for belief that the remaining indigenous Pacific people who live under foreign regimes may be denied the opportunity of self-determination and of development within the context of their own cultures.

The world community has tended to ignore the Pacific region with its small nations spread across a vast ocean. As those nations have had to establish their own independence and then ensure that their countries ran smoothly, peacefully and effectively in the early post-independence era, they have tended to concentrate on domestic issues and have had little time or resources for regional and international concern. Now that their futures are set and their institutions of government stable, Pacific nations have more interest in playing their part in the world community. Regional organizations are growing in sophistication and influence in world affairs and the rest of the world is becoming more aware of the Pacific nations.

In the field of human rights the experiences of World War II and the decolonization which followed it have led to the establishment of a series of internationally recognized human rights. This was first done through the famous United Nations Declaration of Human Rights of 1948 which was developed into two major international treaties namely the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. As these were being developed two major

regional human rights treaties were drafted and the institutions provided in them put in place. These are the European Convention on Human Rights and Fundamental Freedoms with the European Commission and Court of Human Rights and the American Convention on Human Rights with its associated Commission and Court. More recently a third regional treaty has been developed, the African Charter on Human and Peoples' Rights.

The achievement of these treaties has required considerable commitment and effort from many of the world's nations but their work did not stop with those treaties. A number of other treaties and declarations have been developed and it is appropriate to mention the major ones of these; the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration of the Rights of the Child, which is about to become a treaty, the Declaration on the Rights of Disabled Persons and the Declaration on the Rights of Mentally Retarded Persons.

Few nations in the Pacific region have ratified these treaties, but they have played their role in supporting the making of the Declarations in the United Nations.

The time is now ripe for Pacific nations to play a greater role in the drive of the international community towards the achievement of effective and enforced human rights throughout the world. Pacific nations can do this with pride knowing that their records are good; they can serve as an example to most other regions of the world.

Establishing a Pacific Charter would be one way of achieving this goal. The creation of a Commission under that Charter would provide an institution to assist the nations to ratify and meet their obligations under the major human rights treaties thus enabling them to play their full role in the international community.

A Pacific Human Rights Commission could have many roles, and these are discussed below, but it could provide a mechanism for dealing with disputes between Pacific nations which have human rights elements. The questions of the rights and treatment of immigrant communities are examples of issues which can cause difficulties in the Pacific region.

#### Which countries should be parties to the Pacific Charter ?

The Pacific region comprises a large number of countries whose political status ranges from fully independent to unincorporated territory of another nation.

Each of these political entities deserves consideration as a possible party to the proposed Pacific Charter. These political entities, their status and consideration relevant to them are set out below.

The first group to be considered are the fully independent Pacific Island nations all of which happen to have constitutionally entrenched and enforceable human rights. These are no question but that they should be approached for inclusion. These, in alphabetical order, are:

Fiji,	Tonga,
Kiribati,	Tuvalu,
Nauru,	Vanuatu,
Papua New Guinea,	Western Samoa.
Solomon Islands,	

Next for consideration are two of the former metropolitan powers sited in the south-western reaches of the Pacific. They both see themselves as Pacific nations and maintain strong and positive links with the nations of the region. Whilst these nations have ratified the major international human rights treaties, except in the area of anti-discrimination, they have done little to implement them. Neither has a modern Bill of Rights protecting the long established civil and political rights and both have English common law based legal systems. The common law has proved itself incapable of asserting and protecting human rights. The cause of human rights in both these countries would be advanced if they joined in the proposed Charter. They are:

Australia,  
New Zealand.

There are a growing number of almost independent countries in the region. The United Nations trusteeship held by the United States of America over Micronesia is coming to an end. Compacts of free association have been concluded with the Federated States of Micronesia, and the Marshall Islands. The compact of free association with Palau is in its final stages of ratification. Under these compacts these countries will be responsible for their own foreign policy. These countries, in alphabetical order, are:

Federated States of Micronesia,  
Marshall Islands,  
Palau.

Theoretically New Zealand is responsible for the defence and foreign affairs of Cook Islands, Niue and Tokelau. In practice, in regional matters at least, the Cook Islands looks after its own interests. The situation is not so clear in relation to Niue and Tokelau; however all three countries should be approached to join in the Charter. Add to the list:

Cook Islands,  
Niue,  
Tokelau.

Next is the Commonwealth of the Northern Mariana Islands which, although it is part of Micronesia, has chosen to be a self-governing Commonwealth with the United States of America responsible for its defence and foreign aid and assisting in a significant way with economic development. For it to become a party to the Charter, the United States of America would have to ratify the Charter on its behalf. Nevertheless it should be invited to join in the process at this stage. Add:

Northern Mariana Islands.

Two other United States controlled territories remain, Guam in Micronesia in the north west Pacific and American Samoa in the central west Pacific. These are unincorporated territories of the United States of America, administered through that country's Department of the Interior. American Samoa appears happy with its present status. Attempts to change it are not seriously supported locally. In relation to Guam the position is not so clear. There the question of the rights of indigenous peoples arises. Some interest in this question of a proposed Charter has been shown in Guam. Both these territories should be approached. Add:

American Samoa,  
Guam.

Wallis and Futuna, New Caledonia and French Polynesia are incorporated into the French Republic as territories d'outre mer. Conflict is evident in New Caledonia where the indigenous population is outnumbered by French settlers who wish to remain part of France. In French Polynesia the French settlers hold a similar view, but they are a minority. Questions of the rights of indigenous peoples are likely to arise as very serious

matters in the short term future. The rights of individuals in these territories will need close watch and support in the future. Approaches should be made to these territories.  
Add:

French Polynesia,  
New Caledonia,  
Wallis and Futuna.

Four political entities remain for consideration. Norfolk Island in the south west Pacific would be involved in the Charter to the same extent as Australia of which, for the purposes of this matter, it is a part. Hawaii is a state of the United States of America and fully integrated into that country. The Working Party appreciated the arguments for its inclusion namely that these are substantial Samoan, Tongan, and Micronesian communities there as well as the large indigenous Hawaiian population, and a desire by many citizens of Hawaii to identify more closely with the Pacific. Nevertheless it considered that there are difficulties in seeking to include Hawaii, and decided that this question should be left unresolved at this stage.

The question of Rapanui or Easter Island, which is a province of Chile, was considered by the Working Party but difficulties in language and in approaching the central government of Chile led to a view that the question of Rapanui should be left undecided at this stage. Different factors led to the same conclusion about the British dependency the Pitcairn Islands. Here the isolation of the two islands and their miniscule populations were seen as reasons for leaving their inclusion undecided at this stage.

#### How to make progress

The Working Party considered that governments would cautiously towards developing and ratifying a Pacific Charter of Human Rights. Community support for such a proposal would assist them to take it seriously. However the Working Party considered that governments would quickly come to appreciate the value of the proposed Charter if a Commission was set up in advance of the Charter to carry out a number of functions which would be helpful to regional governments as well as having the function of developing the Charter, in close consultation with those governments.

If this suggestion were adopted the Commission would have the following functions:

- a) to develop an awareness of human and peoples' rights among the peoples of the Pacific region by programmes of education, dissemination of materials and other appropriate means;
- b) when requested by a country, to advise it and assist it in the processes of acceding to and giving effect to regional or international treaties dealing with human and peoples' rights;
- c) when requested by a country, to assist it in the preparation of reports it is required to submit under regional or international treaties dealing with human or peoples' rights.
- d) to respond to enquiries made by governments on matters related to human and peoples' rights and, within the limits of its resources, to provide those governments with the services they request.
- e) to assist individuals and peoples to understand how to protect and enforce human rights within their own legal systems.
- f) to co-operate with other Pacific and international institutions concerned with the promotion and protection of human and peoples' rights.
- g) to make recommendations to the governments of the region, when it considered such action advisable or when requested to do so by a government of the region, for the adoption of measures in favour of human and peoples rights within the framework of their domestic law as appropriate measures to further the observance of those rights;
- h) to collect documents, undertake studies and research on Pacific problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, and encourage national and local institutions concerned with human and peoples' rights;

- i) in consultation with the governments of the region to draft for signature and ratification a Pacific Charter of Human Rights.

If this suggestion was not taken up an alternative approach would be to appoint a Human Rights Officer to be attached to an existing regional organisation, perhaps the South Pacific Bureau of Economic Cooperation based in Suva.

This Officer would provide support service in human rights matters and should be a person from within the region, acceptable to the governments, who should receive training at international centres such as the United Nations Centre for Human Rights (Geneva) and the International Institute of Human Rights (Strasbourg).

The Officer would be answerable to individual governments who would retain their freedom to accept or reject the Officer's services and advice.

The functions of the Officer should be educative and promotional, but part of the Officer's task would be to prepare the ground for the introduction of a Charter and, ultimately, for the Office to be incorporated in the functions of a Commission under the Charter.

More specifically, the Human Rights Officer would:

- a) assist in the general understanding and application of the international law of human rights;
- b) draw on the services of the international human rights agencies to assist in this task;
- c) provide such assistance as an individual country may request in regard to the better understanding and application of the human rights provisions in the Constitution and related laws of that state;
- d) co-ordinate initiatives and negotiations preparatory to the adoption of a regional Charter;

- e) assist individuals and peoples in understanding how to protect and enforce human rights within their own legal systems.

Finally the Working Party noted that one of the purposes of the United Nations Organization was, in the words of the U.N. Charter :

To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion .

further Article 55 of the Charter requires the U.N. to promote:

universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion .

Article 56 of the Charter requires all member nations to take joint and separate action to achieve that aim .

The Working Party believes that the time has now come for the U.N. to take an active role in encouraging the achievement of its policy objectives in the Pacific region by supporting the initiative taken in this report to establish a regional human rights treaty .

## PART B

## RIGHTS TO BE RECOGNIZED, DUTIES TO BE IMPOSED AND MACHINERY REQUIRED.

## Chapter 1

## RIGHTS TO BE RECOGNIZED AND PROTECTED AND DUTIES TO BE IMPOSED.

Introduction and Preamble

In order to make progress on this matter the rights and duties which require protecting or imposing must be set down as must some machinery to provide for supervision of the implementation of those rights and duties. This chapter will deal with rights and duties, Chapter 2 will deal with the machinery.

The African Charter of Human and Peoples' Rights, drafted between 1979 and 1981 and set out in full in Appendix B, provides a useful platform upon which to build a charter of rights for the Pacific Region.

The African Charter contains statements of civil and political rights, economic social and cultural rights; rights of peoples; and duties of governments and individuals. It is the most recent statement of rights and comes from a part of the world in which peoples have recently obtained their independence or are still pressing for it. Not only does it deal with the critical issue of the right to development but also it raises two other issues of considerable importance for Pacific nations which earlier treaties omit, namely the duties of individuals to the group, community and society, and the rights of indigenous peoples.

This Chapter suggests, article by article, a set of civil and political rights; economic, social, and cultural rights; rights of peoples; and duties of governments and individuals. At the end of the Chapter the questions of limitations of rights and derogations from rights are addressed. The influence of the African Charter is clearly in evidence, but rights omitted from it have been included in this Charter. Ideas from other precedents have also been used. The constitutions of many of the countries in the region offer suggestions and the international and regional human rights treaties have also been used as sources.

The constitutions of the region have been surveyed not only as sources of suggestions but also to show how most of the civil and political rights suggested in this chapter are already recognized in the domestic law of the countries of the region. The references to Tuvalu's Constitution are to its 1986 Constitution. The Fiji references are to the Protection of Fundamental Rights and Freedoms of the Individual Decree 1988.

The International Covenant on Civil and Political Rights (ICCPR) is surveyed because Australia and New Zealand which do not have modern bills of rights have ratified that treaty and so have obligations under international law to give effect to it. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is surveyed as a source of economic, social and cultural rights. The European Convention on Human Rights and Fundamental Freedoms (European Convention) is surveyed because it applies to protect the rights of individuals in the three French dependencies in the Pacific, Wallis and Futuna, New Caledonia and French Polynesia. The Bill of Rights provisions of the United States Constitution are relevant because they apply at least to the Commonwealth of the Northern Mariana Islands, the unincorporated territories of American Samoa and Guam and the State of Hawaii. Finally the American Convention on Human Rights, which most South American countries have ratified, is also surveyed because it is another recent international human rights treaty. It should be noted that the United States of America has signed but, as yet, has not ratified this treaty.

It is normal for treaties to begin with a preamble. A preamble for a Pacific Charter of Human Rights developed at the Apia Seminar in May 1989 is proffered below.

Preamble

The Parties to the present Charter.

Recognizing that the peoples of the Pacific who have formed diverse cultures, customs, and traditions are equal to all other peoples and societies in dignity and rights;

Recognizing that all peoples have contributed and continue to contribute to the progress of civilizations and cultures which constitute the common heritage of humankind;

Recognizing the need to promote and to protect those rights and characteristics which stem from Pacific peoples' history, philosophy of life, traditions and social structures, especially those tied to those territories of the earth which these peoples have traditionally occupied;



Convinced that all doctrines and practices of sound, ethnic or cultural superiority are legally wrong, morally condemnable and socially unjust;

Believing that peoples operating as a collective should be free to manage their own affairs to the greatest extent possible, while enjoying equal rights with other citizens in the political, economic and social life of states;

Acknowledging the need for minimum acceptable standards taking into account the diverse realities of peoples in all parts of the Pacific;

Mindful of the international instruments protecting the ideals of the individual and collective rights of persons;

Convinced that the states of the region should adopt a Charter reinforcing and complementing the protection of rights under the domestic law of Pacific jurisdictions; and

Concerned that persons, having duties to their families and communities, and to other persons, are under an obligation to observe the rights and duties recognised in the present Charter.

HAVE AGREED AS FOLLOWS:-

## General Provisions

### Article 1

### The Obligation of the Parties

The Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to adopt legislative, executive or other measures to give effect to them.

This Article sets down the international obligations of the parties to the Charter which are to:

- (a) recognize the rights, duties and freedoms set out in the Charter, and
- (b) to adopt legislature, executive and other measures to give effect to them.

The African Charter refers to "States". This may not be appropriate in the Pacific where a number of the potential parties to the Charter are, and are likely to continue to be, less than fully independent.

The remainder of the sentence indicates that the substantive norms of the Charter are probably not of themselves "self-executing" or enforceable in the courts of the region without implementing legislation (although the rights of petition would not need further implementing legislation). The parties are likely to be more comfortable with this approach. The European Convention is, however, enforceable directly in the domestic courts of a number of European nations (although not yet in the United Kingdom). In the United States, some norms of human rights are enforceable directly in U.S. courts as a component of "customary international law" which is part of the common law of the United States unless it conflicts directly with a statute, treaty, or the U.S. Constitution.

In order to ensure that it is clearly understood that the executive arms of the regional governments are required, under the treaty, to give effect the obligations contained in it, the word "executive" has been added.

It should be noted, however, that there are dangers in suggesting that duties might be adopted by "executive or other measures". Given the need to ensure that duties are not imposed by decree - and that extra-legal "penalties" are not exacted for failure to perform them - it would be preferable to require that duties be implemented pursuant to statute. It is for the legislature to weigh up the competing considerations.

#### Treaty references.

European C.	Art.1
ICCPR	Art.2
American C.	Art.1

## Article 2 - Equal enjoyment of Charter rights

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, economic status, birth or other status.

This Article is linked with Article 1 so as to require all parties to the Charter to recognize and to guarantee to all individuals the rights in the Charter without any of the listed forms of discrimination. The Article is also linked with all the other Articles stating rights as it operates to require that those rights are to be enjoyed without any of the listed forms of discrimination. The same approach is taken in the ICCPR, the European Convention and the American Convention as well as in some of the Pacific constitutions, namely, Cook Islands, Kiribati, Nauru, Solomon Islands, Tuvalu and Vanuatu. The Fiji decree is similar in intention.

The grounds upon which discrimination is outlawed are rather similar. Kiribati, Nauru, Solomon Islands and Tuvalu (with slightly varied wording) use the formula "race, place of origin, political opinions, colour, creed or sex". Cook Islands uses words that mean the same whilst Vanuatu omits "colour" but includes "language".

The European Convention and the ICCPR both use those grounds but also add "language", "social origin", "property, birth or other status". The American Convention uses a similar formula but replaces "property" with "economic status" and "other status" with "other social condition". The African Charter uses the term "fortune" which is somewhat ambiguous. The words "economic status" are suggested instead of it.

This Article is closely associated with Article 3 and some of the issues raised in relation to that Article are relevant here.

### Constitutional and treaty references.

A. Samoa	-	N. Mar. Is.	-
Cook Is.	Art.64(1)	Palau	-
F.S.M.	-	P.N.G.	-
Fiji	s.14	Sol. Is.	s.3
Guam	-	Tonga	-
Hawaii	-	Tuvalu	s.27
		Vanuatu	Art.5(1)
Kiribati	s.3	W. Samoa	-
Marsh. Is.	-	European C.	Art.14
Nauru	s.3	ICCPR	Art.2
		American C.	Art.1

## Article 3 - Equality before the law and equal protection.

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

This Article states the first two rights which parties to the Charter would be expected to recognize and guarantee, namely equality before the law and equal protection of the laws.

Article 2 must be read into this Article and indeed into all other Articles in the Charter which give rights. In other words Article 3.1., when combined with Article 2, reads:

Every individual shall be equal before the law (without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, economic status, birth or other status).

Similarly Article 3.2 reads:

Every individual shall be entitled to equal protection of the law (with distinction of any kind such as race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, economic status, birth or other status).

Equality before the law in Article 3.1 means that the law must not be discriminatory (on the grounds referred to in Article 2) in its application. In other words no one is above the law and public servants must conduct themselves within the limits of the law. Equal protection of the law on the other hand means that the substance of the law must not be discriminatory.

The constitutions of all the countries of the region save Papua New Guinea and Tonga provide that laws may not be discriminatory in their substance or application. In a number of countries there are exceptions provided for and the grounds of outlawed discrimination vary between countries.

Vanuatu's Constitution requires equal treatment under the law and under administrative action but allows for some forms of positive discrimination (Article 5(i)(k)). Fiji's new draft constitution of September 1988 raises similar questions. These two examples raise for consideration the question whether a Charter should make provision for limited positive discrimination, by recognizing the unique rights of indigenous persons. Proposed Article 14A, below, guarantees in any event the right of members of every ethnic group to maintain their culture, practice their religion, and speak their language.

This Article also raises the question whether a Pacific Charter should include special recognition for traditional leaders. Many Pacific constitutions already provide for such recognition in various ways. Traditional chiefs may be given substantial powers in the legislative process, may be given powers of appointment to crucially important bodies or advisory functions. In other ways constitutions may confer powers on holders of chiefly office such as executive authority or possibly even land rights.

#### Constitutional and treaty references.

A. Samoa	-	N. Mar. Is.	Art.I(6)
Cook Is.	Art.64(1)(b)	Palau	Art.III(5)
F.S.M.	Art.IV(3)&(4)	P.N.G.	-
Fiji	-	Sol. Is.	s.15
Guam	48 USC 1421b(n)	Tonga	-
Hawaii	Art.I(5)	Tuvalu	-
Kiribati	s.15	Vanuatu	Art.5(i)(k)
Marsh. Is.	Art.II(12)	W. Samoa	Art.15
Nauru	-		
European C.	-		
ICCPR	Art.26		
American C.	-		
United States Constitution	14th	Amendment.	

#### Civil and Political Rights

##### Article 4 - Right to Life and Integrity of the Person

Human beings are inviolable. All human beings shall be entitled to respect for their lives and the integrity of their persons. No one may be arbitrarily deprived of this right.

These rights are guaranteed either explicitly or implicitly in all the constitutions and human rights treaties relevant to the region.

A drafting point which is taken up in this Article and followed through in all subsequent Articles is to render the Charter in gender-free language. This explains why the second sentence in this Article appears in the plural whilst it is in the singular in the African Charter.

#### Constitutional and treaty references.

A. Samoa	Art.I(2)&(16)	N. Mar. Is.	Art.I(5)
Cook Is.	Art.64 (1)(a)	Palau	Art.IV(6)
F.S.M.	Art.IV(3)	P.N.G.	s.35
Fiji	s.2&3	Sol. Is.	s.3(a)&(4)
Guam	48 USC 1421b(e)	Tonga	-
Hawaii	Art.I(2)&(5)	Tuvalu	ss.11&16
Kiribati	s.3(a)&4	Vanuatu	Art.5(1)(a)&(c)
Marsh. Is.	Art.II(4)	W. Samoa	Art.5.
Nauru	Arts.3(a)&4		
European C.	Art.2		
ICCPR	Art.6		
American C.	Art.4		
United States Constitution		5th&14th	Amendments.

Article 5 - Respect for human dignity

All individuals shall have the right to the respect of the dignity inherent in all human beings and to recognition as persons before the law. All forms of exploitation and degradation of humans, particularly slavery, slave trade, torture, and cruel, inhuman or degrading punishment and treatment, shall be prohibited.

This Article contains a number of rights:

the right to respect of dignity  
the right to recognition as a person before the law (legal personality)  
the right not to be exploited or degraded by slavery etc.  
the right not to be tortured  
the right not to be subject to cruel and inhuman punishment or treatment.

These important rights are recognized in all the constitutions and the human rights treaties relevant to the region. Tonga's Constitution bars slavery but does not deal with punishments. The Cook Islands and Papua New Guinea Constitutions cover the latter, but not the former.

This Article may be presented in this way or in the alternative way set out on p.22.

Constitutional and treaty references.

A. Samoa	Art.I(6)	N. Mar. Is.	Art.I(4)(h)
Cook Is.	Art.65(1)(b)	Palau	Art.IV(10)&(11)
F.S.M.	Art.4(8)&(10)	P.N.G.	s.36.
Fiji	ss.5&6	Sol. Is.	ss.6&7
Guam	48 USC 1421b(h)	Tonga	Cl.2
Hawaii	Art.I(12)	Tuvalu	ss.18&19
Kiribati	ss.6&7	Vanuatu	Art.5(1)(e)
Marsh. Is.	Art.II(2)&(b)	W. Samoa	Arts.7&8
Nauru	Arts.6&7		
European C.	Arts.3&4		
ICCPR	Arts.7&8&16		
American C.	Arts.5&6		
United States Constitution		8th & 13th	Amendments.

Article 6 - Liberty and Security of the Person

All individuals shall have the right to personal liberty and security. No one may be deprived of freedom unless the reasons for doing so have been laid down previously in law and the person is provided with due process of law. In particular, no one may be arbitrarily arrested or detained.

These principles are included in all the relevant human rights treaties and in the constitutions in the Pacific region. One possible ambiguity could exist in the phrase in the second sentence "except for reasons and conditions previously laid down by law." If this phrase is interpreted to mean "in accordance with the due process of law" and thus to mean simply that freedom cannot be denied except pursuant to duly enacted statutes and appropriate procedural protections then it would be consistent with all legal systems in this region and other human rights conventions. If, on the other hand, it is interpreted to allow rights otherwise applicable to be derogated from in certain circumstances, then the specific circumstances in which such a derogation could occur should be stated explicitly.

Article 6 raises the question of appropriate protection against unreasonable searches or seizures. This matter is taken up in Article 6A.

This Article may be presented in this way or in the alternative way set out on p.22.

Constitutional and treaty references.

A. Samoa	Art.I(2)&(5)	N. Mar. Is.	Art.I(3)&(5)
Cook Is.	Arts.64(1)(a)&65(1)(a)	Palau	Art.IV(4)&(6)
F.S.M.	Art.IV(3)&(5)	P.N.G.	ss.42&44
Fiji	ss.4&8	Sol. Is.	ss.5&9
Guam	48 USC 1421b(c)&(e)	Tonga	Cl.16
Hawaii	Arts.I(5)&(7)	Tuvalu	ss.17&21
Kiribati	ss.5&9	Vanuatu	Art.5(i)(b)&(c)
Marsh. Is.	Art.II(3)&(4)	W. Samoa	Art.6
Nauru	Arts.5&9		
European C.	Arts.5&8		
ICCPR	Arts.9&17		
American C.	Arts.7&11		
United States Constitution		4th&14th	Amendments.

Possible Composite Article

1. All individuals shall have the right to the respect of the dignity inherent in all human beings and to recognition as persons before the law. All forms of exploitation and degradation of humans, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. All individuals shall have the right to personal liberty and security. No one may be deprived of freedom unless the reasons for doing so have been laid down previously in law and the person is provided with due process a law. In particular, no one may be arbitrarily arrested or detained.
3. The right of individuals to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, or invasions of privacy may not be violated. A warrant may not issue except on probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized or the communication sought to be intercepted.
4. All individuals shall have the right to be free from unlawful attacks on their honour or reputation.

The elements of this composite Article are discussed on pp.21 - 24.

Article 7

Access to Justice Rights

1. All individuals shall have the right to have their causes heard in fair and public hearings by independent, competent and impartial tribunals established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a civil or criminal case shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. All individuals shall have the right to an appeal to competent national organs against acts violating their fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

Article 7 of the African Charter is somewhat awkward in its drafting and it provides only a limited list of protections. The approach taken in this draft is to divide the rights into two categories and to expand on them. Access to justice rights are dealt with in this Article, rights to a fair trial in the next.

Constitutional and treaty references.

A. Samoa	-	N. Mar. Is.	-
Cook Is.	Art.75(1)(d)	Palau	-
F.S.M.	-	P.N.G.	ss. 34(11)&(12), 22, 23, 57 & 58.
Fiji	s.9	Sol. Is.	s.10(8)&(9)
Guam	-	Tonga	-
Hawaii	-	Tuvalu	s.22
Kiribati	s.10(8)&(10)	Vanuatu	Art.6
Marsh. Is.	-	W. Samoa	Art.9(1)
Nauru	Art.10(9)&(10)		
European C.	Art.6(1)		
ICCPR	Art.14(1)		
American C.	-		

Article 7ARights to a Fair Trial

1. Every individual charged with a criminal offence shall be presumed innocent until proved guilty according to law.
2. Every individual who is charged with a criminal offence has the right
  - (a) to be informed of the right to obtain legal assistance;
  - (b) to communicate with a lawyer;
  - (c) to receive legal assistance without cost if the interests of justice so require and the person lacks sufficient means to pay for the assistance;
  - (d) to have adequate time and facilities to prepare a defence;
  - (e) to be present at any trial relating to the offence and to present a defence;
  - (f) to examine the witnesses against the person;
  - (g) to obtain the attendance of, and to examine, witnesses for the person;
  - (h) to have the free assistance of an interpreter if the person cannot understand or speak the language used in court; and
  - (i) not to be compelled to testify or confess guilt.
3. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.
4. Every individual convicted of a criminal offence shall have the right to have the conviction or sentence reviewed by a higher tribunal according to law.
5. No individual finally convicted or acquitted of a criminal offence shall be tried or punished again for the same offence or for substantially the same offence arising out of the same facts.

The approach taken in this Article is to take the fair trial rights listed in Article 7 of the African Charter.

- (a) the right to be presumed innocent until proved guilty by a competent court or tribunal;
- (b) the right to defence, including the right to be defended by counsel of his choice;
- (c) the right to be tried within a reasonable time by an impartial court of tribunal.
- (d) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

and add to them the additional rights found in Article 14 of the ICCPR. These are:

- (1) the requirement that the tribunal be "independent" as well as "competent" and "impartial" (the African Charter does mention the independence of courts in Article 26);
- (2) the right to a "public" trial, except when "morals, public order,... national security in a democratic society, [or] the private lives of the parties so require;"
- (3) the right to prompt notice of the charges;
- (4) the right to "adequate time and facilities" to prepare a defence;
- (5) a right to be present at the trial;
- (6) a right to be provided counsel if the accused is indigent "in any case where the interests of justice so require;"
- (7) a right to confront and cross-examine the accusers;
- (8) a right to an interpreter, if needed;
- (9) a right "not to be compelled to testify against [oneself] or confess guilt;"
- (10) if found guilty, a right to appeal to a higher tribunal;

The European and African Conventions also contain those protections, but the European Convention omits the protection against being forced to testify against oneself. The constitutions of the Pacific region contain most or all of the eleven protections listed above. Those based on the United States Constitution contain them all, although the right to appointed counsel for indigents may not exist in all jurisdictions.

In relation to criminal cases the constitutions of Kiribati, Solomon Islands and Tuvalu do not give the indigent accused the right to counsel paid for by the state nor do the constitutions of the Cook Islands and Papua New Guinea. The constitutions of Western Samoa (Article 9(1)(c)) and Nauru (Article 10 (3)(e)) give accused persons the right to lawyers paid for by the state where the interests of justice so require. Vanuatu's gives a right to counsel for serious defences (Article 5(2)(a)) and Fiji in cases where so prescribed (s.9(1)(d)). Papua New Guinea and Vanuatu have constitutional Public Solicitors Offices.

However, Tuvalu and Kiribati have Peoples Lawyers (Public Defenders) and Solomon Islands has established a Public Solicitors Office. Fiji's system of granting legal aid to needy persons in criminal and matrimonial cases is prescribed in its Legal Aid Act (Cap 15) and in the Cook Islands legal aid is usually granted to unrepresented persons in criminal cases.

Constitutional and treaty references.

A. Samoa	Art.I(6)	N. Mar. Is.	Art.I(4)
Cook Is.	Art.65(i)(c)-(h)	Palau	Art.IV(6)&(7)
F.S.M.	Art.IV(6)-(8)	P.N.G.	s.37
Fiji	s.9	Sol. Is.	s.10
Guam	48 U.S.C. 1421b(g)&(h)	Tonga	Cls.10-15
Hawaii	Art.I(11)-(14)	Tuvalu	s.22
Kiribati	s.10	Vanuatu	Art.5(2)
Marsh. Is.	Art.II(4)	W. Samoa	Arts.9&10
Nauru	Art.10		
European C.	Arts.6&8		
ICCPR	Arts.14&15		
American C.	Arts.8&9		
United States Constitution		4th,5th,6th,8th&14th Amendments.	

Article 8 - Freedom of Conscience and Religion

1. Freedom of conscience and the profession and free practice of religion shall be guaranteed.
2. Nothing in this Article shall be construed to invalidate reasonable restrictions imposed by law on the time, place, or manner of conduct, provided
  - (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
  - (b) there exist no less restrictive means of doing so; and
  - (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

The freedoms of conscience and religion are guaranteed by the constitutions of the Pacific region and by the relevant human rights treaties. Some of the region's constitutions specifically preclude the establishment of a religion by the government. As used in these provisions, "religion" includes all systems of belief, and the freedom of religion includes the right not to believe in anything.

The African Charter provided a very open ended limitation clause to this right. The preferable approach is to spell out more specifically the conditions in which limitations could be imposed upon the free exercise of religion. The ICCPR and the European and American Conventions all contain similar language to achieve this. As an example the American Convention states:

Freedom to manifest one's religion and beliefs may be subject only to the limitations provided by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

The Marshall Islands Constitution, Article II(1)(2) spells out this idea in even more detail. It is set out as paragraph 2 of this Article.

Recommendation: the choice is between the Article as printed, the right with the limitation clause from the American Convention or a limitation clause found later on in the charter.

## Constitutional and treaty references.

A. Samoa	Art.I(1)	N. Mar. Is.	Art.I(2)
Cook Is.	Art.64(1)(d)	Palau	Art.IV(1)
F.S.M.	Art.IV(2)	P.N.G.	s.45
Fiji	s.10	Sol. Is.	s.11
Guam	48 USC 1421b(a)	Tonga	Cl.5
Hawaii	Art.I(4)	Tuvalu	s.23
Kiribati	s.11	Vanuatu	Art.5(i)(f)
Marsh. Is.	Art.II(1)	W. Samoa	Art.11&12
Nauru	Art.11		
European C.	Art.9		
ICCPR	Art.18		
American C.	Art.12		
United States Constitution		1st	Amendment.

## Article 9 - Freedom of Expression

1. All individuals shall have the right to receive information.
2. All individuals shall have the right to express and disseminate their opinions.
3. Nothing in this Article shall be construed to invalidate reasonable restrictions imposed by law on the time, place, or manner of conduct, provided
  - (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
  - (b) there exist no less restrictive means of doing so; and
  - (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

The twin rights to express and to receive information are found almost universally in the constitutions of the Pacific region as well as the human rights treaties.

The African Charter uses the phrase "within the law" at the end of Article 9(2). It seems awkward because it may enable a government significantly to restrict speech as long as it does so pursuant to duly enacted statutes. The power to restrict speech in certain limited circumstances is recognized in the other Conventions, but they list the circumstances in more detail.

The American Convention is typical and states:

The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

- (a) respect for the rights or reputations of others; or
- (b) the protection of national security, public order, or public health or morals.

The approach used in the proposed Article is taken from the Marshall Islands Constitution. It is set out as paragraph 3 of this Article.

The rights to expression and information are easy to state but are more difficult to implement effectively in countries where individuals do not have easy access to the few mass media outlets. This point is taken up in section 46(3) of the Papua New Guinea Constitution which provides:

Notwithstanding anything in this section, an Act of the Parliament may make reasonable provisions for securing reasonable access to mass communications media for interested persons and associations-



- (a) for the communication of ideas and information; and
- (b) to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs.

and generally for enabling and encouraging freedom of expression.

It should also be incumbent on governments to attempt in good faith to distribute information in the languages regularly used in the countries they govern.

The choice is between the Article as printed, the right with the limitation clause from the American Convention or a limitation clause found later on in the Charter.

#### Constitutional and treaty references.

A. Samoa	Art.I(1)	N. Mar. Is.	Art.I(2)
Cook Is.	Art.64(1)(e)	Palau	Art.IV(2)
F.S.M.	Art.IV(1)	P.N.G.	s.45
Fiji	s.11	Sol. Is.	s.12
Guam	48 USC 1421b(a)	Tonga	Cl.7
Hawaii	Art.I(4)	Tuvalu	s.24
Kiribati	s.12	Vanuatu	Art.5(1)(g)
Marsh. Is.	Art.II(1)	W. Samoa	Art.13
Nauru	Art.12		
European C.	Art.10		
ICCPR	Art.19		
American C.	Art.13		
United States Constitution		1st	Amendment.

#### Article 10 - Freedom of Association

1. All individuals shall have the right to free association with others including the right to form and join trade unions for the protection of their interests.

Most, but not all, of the Pacific constitutions guarantee freedom of association. The governing documents of Guam, Hawaii, and the Northern Mariana Islands do not explicitly mention this right, but it has been interrupted by the courts to be implicit in the freedom of speech. The Constitution of Tonga also does not explicitly mention this right. All relevant human rights treaties guarantee the right as do a number of International Labour Organisation Treaties. Many countries include in this right the right to form and join trade unions, and trade unionism is well established in a number of Pacific countries.

The major issue for this right is the formulation of the limitations clause. The African Charter contains the limitation "provided he abides by the law". This is very broad drafting as it may enable a government to enact legislation which would restrict the freedom of association very significantly. The ICCPR, European and American Conventions all address this problem by providing that freedom of association may be limited in certain stated circumstances and under certain stated conditions. The American Convention is typical when it states:

The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interests of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

Another alternative is to use the limitation clause from the Marshall Islands set out in Articles 8.2 and 9.3. However the ability to restrict the right of association by time, manner and place considerations may be very restrictive.

It is appropriate that the right should be established subject to a limitation clause. The choices of limitation clause are,

- (a) the African provision set out above
- (b) the American provision set out above
- (c) the Marshall Island provision set out above in Articles 8.2 and 9.3.
- (d) the Marshall Island provision without its time, place or manner provision.

Using the established drafting of that provision, it could be rendered as follows :

Nothing in this Article shall be construed to invalidate reasonable restrictions imposed by law provided

- (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
- (b) there exist no less restrictive means of doing so; and
- (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

The final option would be a limitation clause found later in the Charter.

Constitutional and treaty references.

A. Samoa	Art.I(1)	N. Mar. Is.	-
Cook Is.	Art.64(1)(f)	Palau	Art.IV(3)
F.S.M.	Art.IV(1)	P.N.G.	s.47
Fiji	s.12	Sol. Is.	s.13
Guam	48 USC 1421 6(a)	Tonga	Cl.-
Hawaii	Art.I(4)	Tuvalu	s.25
Kiribati	s.13	Vanuatu	Art.5(1)(h)
Marsh. Is.	Art.II(1)	W. Samoa	Art.13
Nauru	Art.13		
European C.	Art.11		
ICCPR	Art.22		
American C.	Art.16		
U.S. Constitution		1st Amendment	

Article 11 - Freedom of Assembly

Every individual shall have the right to assemble freely with others.

Freedom of assembly is guaranteed in all the relevant human rights treaties and in all the constitutions of the Pacific region except that of Tonga.

The right itself is easily stated. The appropriate permissible limitations on that right are more difficult to formulate. The African Charter provides the following which appears to be based on similar sentences in the other human rights conventions but is drafted in a rather awkward way. "The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others." The American Convention uses the following formula:

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.

The Marshall Islands limitations clause is set out in Articles 8.2 and 9.3 above.

Two other alternatives are to have a limitations clause without the time, place or manner of conduct provisions in the following terms:

Nothing in this Article shall be construed to invalidate reasonable restrictions imposed by law provided

- (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
- (b) there exists no less restrictive means of doing so; and
- (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

or to have a general limitations clause later in the Charter.

## Constitutional and treaty references.

A. Samoa	Art.I(1)	N. Mar. Is.	Art.I(2)
Cook Is.	Art.64(1)(f)	Palau	Art.IV(3)
F.S.M.	Art.IV(1)	P.N.G.	s.47
Fiji	s.12	Sol. Is.	s.13
Guam	48 USC 1421b(a)	Tonga	-
Hawaii	Art.I(4)	Tuvalu	s.25
Kiribati	s.13	Vanuatu	Art.5(1)(h)
Marsh. Is.	Art.II(1)	W. Samoa	Art.13
Nauru	Art.13		
European C.	Art.11		
ICCPR	Art.21		
American C.	Art.15		
United States Constitution		1st	Amendment.

Article 12 - Freedom of Movement

1. Every individual shall have the right to freedom of movement and residence within the borders of a State subject to those restrictions established by law that are necessary in a democratic society in the interest of national security or to protect public health.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order or public health.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

## This Article guarantees:

- (a) freedom of movement within a country
- (b) the right to leave a country;
- (c) the right to return to one's own country;
- (d) the right to seek asylum;
- (e) the right to due process before expulsion from a country; and

prohibits mass expulsion of non-nationals.

None of the constitutions of the Pacific region addresses all these points. The Papua New Guinea Constitution guarantees the rights in (a), (b) and (c) to citizens and it is arguable that the principles of natural justice laid down in section 59 encompass (e). Subject to a number of conditions, the rights in (a), (b) and (c) and a right against expulsion are guaranteed to citizens in the Constitutions of Kiribati, Solomon Islands, Tuvalu and Papua New Guinea as well as in Fiji under its Protection of Fundamental Rights and Freedoms of the Individual Decree 1988, whilst the rights in (a)(b) and (c) are guaranteed in the Palau Constitution. Vanuatu's constitution leaves the matter at large, simply guaranteeing "freedom of movement".

It has long been established both in the United States and Australia that freedom of movement within a country is an incident of citizenship of that country. The Constitutions of Western Samoa and the Federated States of Micronesia specifically recognize that right.

The rights in (a), (b), and (c) are guaranteed in the ICCPR and the European and American Conventions. Both the ICCPR and the European Convention guarantee the right

in (e) but only the American Convention prohibits the "collective expulsion of aliens" and gives a right to seek and be granted asylum.

The question of asylum is one which is addressed in international treaties and whilst the Convention Relating to the Status of Refugees has been in place since 1951 it is quite appropriate for a right to seek asylum to be stated in a regional treaty in the terms that it is in the African Charter.

The question of mass expulsion is also one which is relevant to the Pacific region.

Articles 12(1) of the African Charter suffers the vagueness of terminology noted above when it uses the words "provided he abides by the law". It is sensible to state explicitly what the acceptable limitations to Article 12(1) are. These are "restrictions established by law that are necessary in a democratic society in the interest of national security or to protect public health".

#### Constitutional and treaty references.

A. Samoa	-	N. Mar. Is.	-
Cook Is.	-	Palau	Art.IV(9)
F.S.M.	Art.IV(12)	P.N.G.	s.52(1)&(2)
Fiji	s.13	Sol. Is.	s.14
Guam	-	Tonga	-
Hawaii	-	Tuvalu	s.26
Kiribati	s.14	Vanuatu	Art.5(1)(i)
Marsh. Is.	-	W. Samoa	Art.13
Nauru	-		

European C. Art.2 of Protocol 4  
 ICCPR Arts. 12&13  
 American C. Art.22  
 United States Constitution Article V and the 14th Amendment.

#### Article 13 - Right to Vote and to Participate in Political Life

1. All citizens shall have the right to participate freely in the government of their country, either directly or through freely chosen representatives.
2. All citizens shall have the right of equal access to the public service of their country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.
4. Every citizen shall have the right to participate effectively in the decisions affecting the citizen in relation to economic and social development in the country.

This Article establishes four rights for citizens and one for everyone. These are:

- (a) the right to take part in political life;
- (b) the right to vote;
- (c) the right of equal opportunity to join the public service; and
- (d) the right to participate effectively in decisions affecting the citizen; and
- (e) equal access by every individual to public property and to services provided by government.

The first three of these rights are reflected in the human rights treaties that are relevant to the region, but none of them are reflected in many of the constitutions of the Pacific region. This may be because the human rights provisions of the former British, New Zealand and Australian colonies and Trust Territories are based on the European Convention which at that time did not contain those rights. However most of these nations do allow full political participation and some of the constitutions of the region do contain some of these rights. These are American Samoa, Federated States of Micronesia, Guam, Hawaii, Marshall Islands, Northern Mariana Islands, Palau and Papua New Guinea.

These rights may present certain difficulties in relation to Western Samoa and Tonga, although both of these countries have defended their systems of governance as democratic in their essential components.

The first three rights do not ensure that citizens can participate effectively in decisions affecting them in relation to the economic and social development of their country. Such participation requires that their governments should have institutions that examine, in an orderly fashion, such matters as land-use issues, environmental management, development planning and zoning, and should allow full public input into decisions affecting such matters and full disclosure of the basis for the decisions affecting such matters and full disclosure of the basis for the decisions ultimately reached. This type of citizen participation would appear to be essential in island

communities when such economic and social decisions have great impact on all aspects of life.

The words in Article 13.1 of the African Charter "in accordance with the provisions of the law" are too vague in their effect for a limitations clause. No specific limitation is necessary. The Article as drafted would allow for legislation to control the electoral process and does not require a country to follow a particular voting system or electoral process.

Recommendation: that the Article read as printed above.

Constitutional and treaty references.

A. Samoa	Art.II(9)	N. Mar. Is.	Art.VII(1)
Cook Is.	-	Palau	Art.VII
F.S.M.	Art.VI(1)	P.N.G.	ss.50&56
Fiji	-	Sol. Is.	-
Guam	48 USC 1421b(m)	Tonga	-
Hawaii	Art.I(1)	Tuvalu	-
Kiribati	-	Vanuatu	-
Marsh. Is.	Art.IV(3)	W. Samoa	Art.15
Nauru	-		
European C.	Art.16 & Art.1 of Protocol I.		
ICCPR	Art.25		
American C.	Art.23		

United States Constitution, ArticleI,(2); 15th,17th,19th,24th, and 26th Amendments.

Article 14 - The Right to Property

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with a law that provides for appropriate compensation

This Article encompasses three concepts:

- (1) the right to property is seen as a guarantee that the opportunity to own property is open to all citizens (no discrimination in relation to opportunity to own).
- (2) the rights of property holders are to be protected in relation to State powers of appropriation.
- (3) appropriation of property is not valid unless appropriate compensation is paid for it.

The first two concepts are combined in the Western Samoan Constitution and by implication in the Constitutions of American Samoa, Palau and Tonga. Other countries guarantee the first right by implication, namely Hawaii, Guam, Marshall Islands, the Northern Mariana Islands; whilst Fiji, Kiribati, Nauru, Papua New Guinea, Solomon islands and Tuvalu guarantee the second right. Vanuatu adopts a different position by guaranteeing all the land to the ni-Vanuatu but making provision for the government to acquire land and for others to gain interests in land.

Most regional constitutions recognize the concept of no appropriation of property by the government without the payment of compensation. This matter is dealt with inadequately in Article 14 of the African Charter with the words "in accordance with the provisions of appropriate law". The right to compensation should be as explicit as it is in the formulation set out above. The words "appropriate compensation" are taken from the 1975 Charter of Economic Rights and Duties of States, Article 2(2)(c).

The Universal Declaration of Human Rights in Article 17 declared the right to own property and not to be deprived of it arbitrarily, but the ICCPR does not provide for such a right.

The European Convention in Article 1 of Protocol I, entitles individuals to the peaceful enjoyment of their "possessions", which include unmoveable property and the American Convention provides for the use and enjoyment of property in Article 21.

It should be noted that there are constitutional provisions further entrenching the land rights of land holding groups in Western and American Samoa. There are different

but significant provisions in the Vanuatu, Papua New Guinea, Tongan and Hawaiian Constitutions. These provisions usually protect the land rights of indigenous people but they raise questions about the capacity of others, who are citizens or permanent residents of these countries to enjoy full property rights.

The constitutional protection of the legislation guaranteeing the land rights of indigenous Fijians and certain leasehold interests of Fijian Indians was swept away in the 1987 coups d'etat.

#### Constitutional and treaty references.

A. Samoa	Art.I(2)	N. Mar. Is.	Art.I(5)
Cook Is.	Art.64(1)(c)	Palau	Art.IV(6)
F.S.M.	Art.IV(3)	P.N.G.	ss.53&54
Fiji	s.7	Sol. Is.	ss.8&14(3)(d)
Guam	48 USC 1421b(e)	Tonga	Cl.18
Hawaii	Art.I(5)	Tuvalu	s.20
Kiribati	s.8&14(3)(d)	Vanuatu	Arts.71-79
Marsh. Is.	Art.II(4)	W. Samoa	Art.14
Nauru	Art.8		
European C.	Art.I of Protocol 1.		
ICCPR	-		
American C.	Art.21		
United States Constitution	5th & 14th Amendments.		

#### Article 14A - Rights of Minorities

In those Parties in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The question of protection of minority rights is becoming more relevant as ethnic minority communities develop as a result of travel and migration among Pacific nations and as ethnic groups, once the majority, become a minority in their own lands.

No Pacific countries address this question directly in the Bill of Rights provisions of their Constitutions. Until 1987 Fiji uses the mechanism of constitutionally entrenched legislation to protect the customs, land rights and elements of self government of the indigenous Fijians, the Rotumans and the Banabans.

The matter is taken up in the ICCPR which Australia, France and New Zealand have ratified. The right set out above is in the same terms as Article 27 of the ICCPR.

The purpose of minority rights is not to encourage the development of separate and discreet communities within a single country but to support multiculturalism within countries. Nevertheless individuals will have the choice of maintaining full or partial links with their own cultures, religions and languages or abandoning them altogether and integrating fully into the majority society.

### Economic, Social and Cultural Rights

#### Article 15A - Right to Adequate Living Standards

Every individual shall have the right to an adequate standard of living both for that person and that persons' family including adequate food, clothing and housing, and to the continuous improvement of living standards.

#### Article 15 - Right to Work

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for work of equal value.

#### Article 16 - Right to Health

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive counselling and medical attention when they are sick.

#### Article 17 - Right to Education

1. Every individual shall have the right to education.
2. All individuals may freely take part in the cultural life of their communities.
3. Each Party shall protect the traditional values recognized by its communities.

#### Article 18 - Right of the Family

1. The family shall be the natural unit and basis of society and shall be protected by each Party.

#### Article 18A - Rights of Women, Children and Youths

Each Party shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women, children and youths as stipulated in international declarations and conventions.

#### Article 18B - Rights of the Aged and the Disabled

The aged and the disabled shall also have the right to special measures of protection in keeping with their physical and social needs.

These Articles cover a number of the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the African Charter. Within the Pacific, only Solomon Islands, Australia and New Zealand have ratified that Covenant. However it also applies to the three French territories as a result of the ratification of the Covenant on the part the French Republic, to Pitcairn as a part of the United Kingdom's ratification, and to Tokelau as a part of New Zealand's ratification.

These rights are also reflected in Papua New Guinea's constitutional statement of National Goals and Directive Principles and will be reflected in Tuvalu's amended

Constitution. The Constitutions of the Federated States of Micronesia and the Marshall Islands also have provisions that correspond to these articles.

These rights are consistent with the aspirations that national governments have for the people they are elected to represent and serve. They are intended to be achieved over a period of time as the economic circumstances of each country in the region improves. In order to fill out these rights it is suggested that the fundamental economic right in the ICESCR (Article 11) be included. Using the drafting style of the African Charter this would be stated in the following way:

Every individual shall have the right to an adequate standard of living both for that person and that person's family including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The obligations on Parties referred to in Article 18A & 18B are in the African Charter but not the ICESCR. The provisions relating to elimination of discrimination against women and protection of their rights come mainly from the Convention on the Elimination of All Kinds of Discrimination Against Women which in relation to the Pacific region, only Australia, France and New Zealand have ratified.

The obligations in relation to children arise mainly from the Declaration on the Rights of the Child whilst the obligations in relation to the disabled arise from the Declaration on the Rights of Disabled Persons.

A significant point of detail: the African Charter in Article 15 refers to equal pay for equal work, whilst the ICESCR refers to equal pay for work of equal value. The latter formulation is to be preferred as it allows for the notion of equal pay to be used to improve the working conditions of workers, usually women, in callings which have been traditionally under-regarded but which cannot easily be aligned with other callings for the purposes of comparing equal work. An example is nursing which is usually underpaid for the responsibilities borne and skills required but which is difficult to compare with other better paid occupations.

Treaty references

ICESCR Arts. 6,7,10,11,12 and 13.

### Rights of Peoples

#### Article 19 - Rights to Equality and Non-Domination.

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another and in particular Articles 19 to 23 of the Charter shall apply to indigenous people who have become a minority in their own land.

#### Article 20 - Rights to Existence and Self Determination

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

#### Article 21 - Rights to Dispose of own Resources

1. All peoples shall have the right to dispose of their wealth and natural resources freely. This right shall be exercised in the exclusive interest and benefit of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to benefit fully from the advantages derived from their national resources.

#### Article 22 - Right to Economic, Social and Cultural Development

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of humankind.
2. Parties shall have the duty, individually or collectively, to ensure the exercise of the right to development.

#### Article 23A - Right to Peace and Security.

All peoples shall have the right to national and international peace and security.

These Articles, which are taken from the African Charter, refer to "peoples" and their rights. These group rights are important to Pacific communities, which have long recognized the collective rights of groups and have protected individual rights in the context of the group. The term "peoples" is not defined in the African Charter, but it can be assumed that the term is used in the same sense as it is used in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations which was passed by the U.N. General Assembly in 1970 (Resolution No. 2625 (XXV)). That Declaration recognizes that all peoples have equal rights and rights to self determination, and that alien subjugation, domination, and exploitation violate fundamental human rights and the U.N. Charter. The Declaration is also careful, however, to define the situations in which "peoples" are entitled to "self-determination" and appears to deny that right to a minority ethnic group which is able to participate without discrimination in a multi-ethnic independent nation:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

However this definition does not take account of that form of colonialism which, by encouraging migration into a Territory, has rendered the original ethnic people, who were once the sole owners, a minority group in their own land.

Article 19 may also be the appropriate place to address the special status and rights of indigenous peoples, which is recognized by the constitutions of a number of Pacific communities, for example, Fiji, Hawaii, the Northern Mariana Islands, and American Samoa. Article 14A recognizes the rights of all ethnic groups to enjoy their culture, practice their religion, and use their language.

Article 22 covers the right to development which, although it has only recently emerged as a right, it has been recognized as such by the United Nations General Assembly.

People's rights and the rights of minorities have some similarities but really are different. Minority rights are about protecting the identity of minority groups within a larger society. Peoples rights refer to the rights of subject people not only to their own identity but to self-determination, development, control over their own resources and to



peace and security. Because of these differences the two different kinds of rights are found in different parts of this draft Charter.

At the Apia seminar held in May 1989 it was noted by the delegate from New Caledonia, Mr. Guy Agniel, that France would not accept articles 19-22A. France considers the matters raised in those articles to be domestic matters..

### Environmental Rights

#### Article 24 - Right to a Safe Environment

All peoples shall have the right to a clean, healthful and safe environment favourable to their development.

Environmental rights are not found in many of the constitutions of the Pacific region, but they are found in some of the more recent constitutions.

Article I(9) of the Constitution of the Northern Mariana Islands states:

Each person has the right to a clean and healthful public environment,

whilst Article XI(9) of the Hawaii Constitution reads:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.

The constitutions of the Federated States of Micronesia (Article XIII(2)) and Palau (Article XIII(6)) also have provisions restricting the storage, testing, use, or disposal of radioactive, toxic, chemical, or other harmful substances.

The African Charter in its Article 24 refers to a "general satisfactory environment". However it is considered appropriate that the words "clean, healthful and safe" should be used instead as they contain clearer content. Although the word "safe" is not used in the precedents referred to, after the Bhopal disaster in India and in the light of the experience of Pacific Island people with nuclear weapons and nuclear waste, it was considered appropriate to include it in this right.

Duties of the PartiesArticle 25 - Duty to Promote Respect for Rights.

Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26 - Duty to Guarantee the Independence of the Courts and Other Institutions Protecting Rights.

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

Article 26A - Duty of Governmental Bodies to Give Effect to the Charter.

It is the duty of all governmental bodies within each Party to apply and give effect to the provisions of this Charter.

Individuals will best learn to respect the rights of others and thus be able better to enjoy their own rights if they live in an environment in which rights are promoted through education. Effective education should, over time, reduce the need for enforcement of rights. Nevertheless it is essential that the courts are manifestly independent of the executive arm of government and that there exist appropriate national institutions to promote and protect rights.

The first two Articles which are Articles 25 and 26 of the African Charter take up those points and impose obligations on parties to give effect to them. The third Article is intended to impose a clear duty on all members of the executive arm of government to respect and apply the rights given in the Charter and to accept policies and administrative practices which enhance the enjoyment of and do not conflict with the rights granted by the Charter.

Whilst these Articles are not replicated in any human rights treaties other than the African Charter, they are the logical consequences of the earlier part of the Charter which establishes a series of rights and imposes obligations on States to give effect to those rights.

Duties of IndividualsArticle 27 - Duties Towards Family, Society and Communities

1. Individual shall have duties towards their families and society, the Parties and other legally recognized communities and the regional and international community.
2. Individuals shall exercise their rights and freedoms with due regard to the rights of others, collective security, morality and common interest.

Article 28 - Duty to Respect Other Individuals Without Discrimination

Individuals shall have the duty to respect and consider their fellow beings without discrimination, and to develop and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29 - Certain Specific Duties of Individuals

Individuals shall have the duty:

1. To preserve harmonious development of the family and to work for its cohesion and respect.
2. To work to the best of their abilities and competence, to use their skills and abilities for the betterment of their communities, and to pay taxes imposed by law in accordance with their means in the interests of society.
3. To preserve and strengthen positive Pacific cultural values in their relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the well being of society.

The idea of personal obligation was established in the U.N. Universal Declaration of Human Rights (Art. 29) and the American Convention (Art. 32). Not many of the constitutions of the Pacific region explicitly address the question of duties; however the notion of duties is well understood in the Pacific, and recognition of the duties owed to the community at large can be found in some of the Pacific constitutions. The Palau Constitution states in its Preamble :

We renew our dedication to preserve and enhance our traditional heritage, our national identity and our respect for peace

and the preamble 1986 Tuvalu Constitution refers to "the maintenance of Tuvaluan values, cultures and tradition.

The Western Samoan Constitution specifically recognizes that certain "work" and "service" "is required by Samoan custom ... which forms part of normal civil obligations". In Fiji, Kiribati, Nauru, and Solomon Islands people may be required to provide labour as part of reasonable and normal communal or other civic obligations. In Tuvalu, "traditional" obligations are added.

The Preamble to the Papua New Guinea Constitution imposes basic obligations on everyone to themselves, their descendants and to each other. Under Article 7 of the

Vanuatu constitution these are fundamental duties. In both countries, the duties are generally non-justiciable.

It is to be implied from the existence of rights of individuals that everyone has duties to everyone else. This point is made explicitly in the constitution of the Cook Islands which states in Article 64(2):

It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment of rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.

The African Charter contains three Articles (Articles 27-29) dealing with duties, the first two deal with the notions of fundamental duties and duties arising out of the need to respect and protect the rights of others, whilst the third sets out a series of specific duties.

Articles 27 and 28 of this Charter are almost identical with Articles 27 and 28 of the African Charter. In relation to Article 27 attention has been given to Basic Social Obligation (f) of the Papua New Guinea Constitution which states:

WE HEREBY DECLARE that all persons in our country have the following basic obligations to themselves and their descendants, to each other, and to the Nation:-  
to respect the rights and freedoms of others, and to co-operate fully with others in the interests of interdependence and solidarity ;

Article 29 is based on Article 29 of the African Charter but has been substantially redrafted. In relation to the duty to pay tax in Article 29.2 Basic Social Obligation (g) of the Papua New Guinea Constitution is of interest. It states :

WE HEREBY DECLARE that all persons in our country have the following basic obligations to themselves and their descendants, to each other, and to the Nation:-  
to contribute, as required by law, according to their means to the revenues required for the advancement of the Nation and the purposes of Papua New Guinea ;

Recommendation: that the Articles read as printed above.

#### Constitutional references.

A. Samoa	-
Cook Is.	Art.64(2)
F.S.M.	-
Fiji	s.5(3)
Guam	-
Hawaii	Art.1(2)
Kiribati	s.6(3)
Marsh. Is.	-
Nauru	Art.6(2)(d)

N. Mar. Is.	-
Palau	Preamble
P.N.G.	Preamble, s.63
Sol. Is.	s.6(3)
Tonga	-
Tuvalu	Preamble, s.10
Vanuatu	Art.7 and 8.
W. Samoa	Art.8(2)(d)

### Limitations and Derogations

Whilst there is a tendency to describe them all as derogations, there is a clear distinction between limitations and derogations.

#### Limitations

Limitations are restraints put on the enjoyment of rights by an individual in the interests, for example, of public order or of the enjoyment of their rights by others. Limitations are usually required to be imposed by law and to be necessary before they can stand.

Some countries have general limitation clauses to their constitutional rights. The recent Canadian Charter of Rights and Freedoms is an example. It states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However international and regional human rights treaties usually state the rights at the beginning of an article and then state the permissible limitations as the article proceeds. The Canadian approach makes for more concise and elegant drafting and the statement of rights looks good on the school room wall but the alternative approach in the treaties allows for the crafting of appropriate limitations for each particular right.

It should be noted that the limitations set down, whether general or particular in nature, are what is permissible; they may be, but they do not have to be imposed.

It is recommended that the approach taken in the treaties be adopted for the Pacific Charter. The working draft deals with some limitation clauses specially crafted for particular rights but more work has to be done on this part of the Charter.

#### Derogations

In the context of human rights treaties, derogation of rights means removal of rights by government action for a particular period. The African Charter does not provide for the derogation of rights, but the ICCPR and the European and American Conventions do. They all limit the circumstances in which treaty rights may be derogated from, they

exempt certain rights from derogation and they require the derogating country to advise an outside body of the derogations and the reasons for them.

The terms of the derogating powers are similar yet different.

The ICCPR states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The European Convention states:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

The American Convention states:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

The provision of the European Convention has been considered by the European Commission of Human Rights which said that it contained the following elements:

- (1) The public emergency must be actual and imminent.
- (2) Its effects must involve the whole nation
- (3) The continuance of the organized life of the community must be threatened.
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the treaty for the maintenance of public safety, health, and order are plainly inadequate.

These elements significantly reduce the capacity of a government to introduce a state of emergency that would be recognized as justifying it taking action to derogate from the rights guaranteed in the treaty.

The following table shows which rights may not be derogated from under the three treaties:

	ICCPR	EUROPEAN	AMERICAN
Life	/	/	/
Imprisonment for debt	/		
Torture and other ill-treatment	/	/	/
Slavery and servitude	/	/	/
Retroactive penal laws	/	/	/
Recognition before the law	/		/
Conscience and religion	/		/
Marriage and family			/
Children			/
Name			/
Nationality			/
Participation in government			/

In addition the American Convention renders non-derogable the right to judicial protection of those substantive rights which may not be derogated from (Articles 25 and 27).

In relation to derogation clauses there are two major points for decision. Whether or not to have a derogation clause and if so how to frame it.

As to the first point the African position is not to allow derogations, but to allow limitation on rights. The alternative position is to allow for derogations but tightly circumscribe the circumstances in which they were acceptable and to exclude certain rights from derogation. A third protection is to require a government derogating from rights to report to an international body explaining the circumstances of and need for the derogation.

Since independence none of the Pacific nations have faced an emergency that threatened the life of the nation in the terms outlined above. During World War II a number of them were over-run as colonies or dependencies and Australia was threatened with invasion but there has been no major threat internal or external since then.

However some nations contain elements which could lead to seriously destabilising internal strife.

Recommendation: if a derogation were to be included in the treaty, then it should be in the following terms:

- (i) In time of war, public danger, or other emergency that threatens the life of a Party, it may take measures derogating from its obligations under the present Charter to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
- (2) The foregoing provision does not authorize any suspension of the following articles: (all of those in the American Convention)

## CHAPTER 2

### GIVING EFFECT TO THE CHARTER

#### Introduction

Articles 30 to 63 set down the institutions and machinery for giving effect, at the regional level, to the rights in the Charter.

They establish a Commission with powers to receive and consider communications from Parties and individuals, to investigate and evaluate the matters, and to recommend solutions to such disputes. Although the Commission has no coercive powers, it could play a constructive role in monitoring human rights concerns and ventilating the differences in views on regional problems. The recommendations offered by the Commission could, over time, provide a valuable source for understanding the Pacific approach toward human rights and how the balances should be struck between individual and group rights and between traditional customs and emerging norms.

The Articles are set out at the end of these introductory comments.

Article 30: the recommended name is the Pacific Human Rights Commission.

Articles 31 - 44: the Commission members are elected by the Parties, but serve in their individual capacities as independent experts. It is recommended that a small commission be used in the Pacific, consisting of seven members. This number ensures that the Commission would be diverse enough to reflect the different perspectives and sub-regions found in the region but would be small enough to function efficiently. All Parties to

the Charter would participate in electing the Commission members. It is recommended that Commission members be eligible for reelection only once to ensure an appropriate turnover of membership. It is recommended that the Director of the South Pacific Bureau of Economic Cooperation play the role of supervising the elections for the Commission, and fulfill certain other administrative roles, but that the Commission be otherwise autonomous from any existing regional organisation. It is recommended that the staff be selected by the President of the Commission (who is elected by the Commissioners), in consultation with the other Commissioners, and that the costs of the Commission and its staff be borne by the parties along the lines of the formulae used by other regional organizations.

Article 45: The broad ranging functions of the Commission set out in Article 45 will make it useful to the governments of the region for example by advising and assisting

them to review their laws and regulations to make them more consistent with the Charter and other treaties, and assisting them to prepare reports they are obliged to make under treaties like the International Convention on the Elimination of All Forms of Racial Discrimination. The Commission will also investigate communications alleging human rights violations from governments individuals and groups. When called upon to investigate a matter, the Commission may undertake field investigations, hold hearings, interview witnesses, examine documents, or use any other investigative techniques to assemble a factual basis for its analysis. The Commission will receive and comment on reports received from Parties to the Charter but its major function will be through education and dissemination of information to promote respect for human rights in the Pacific region.

Articles 47 - 54: this procedure for allowing Parties to file complaints is similar to that found in other human rights treaties. The requirement in Article 50 that domestic remedies must be exhausted before the Commission can deal with the matter is standard in international treaties, but the language used here allows some flexibility in those situations where waiting for exhaustion of domestic remedies would cause undue delay or would be futile.

Articles 55 - 59: these deal with communications to the Commission from individuals and groups rather than governments. They give the Commission flexible investigation, recommendatory, and reporting powers, but deny it the power to coerce any Party.

Articles 60 - 61: these lay down the principles the Commission is to use in interpreting the Charter and determining whether or not a breach of rights has occurred. International and domestic jurisprudence is to be used as well as the experience gained in interpreting other human rights treaties.

Article 62: this must be read with Article 45(i). Between them they require Parties to report every two years to the Commission on their efforts to implement the Charter and require the Commission to consider, and where necessary, to comment on those reports.

Article 63: this provides for the membership of the Charter opening it to all the political entities of the Pacific, without regard to their formal independent status. This approach is taken to ensure the widest possible adherence to human rights problems of the region. Hawaii and New Zealand, although separated by thousand of miles, share common challenges relating to the fair treatment of the indigenous Polynesian populations and the significant immigrant populations from other Pacific islands. All the political

communities of the region share common legal traditions and common cultures and it makes sense to look at the human rights problems of the region as a whole.

Articles 64 - 67: these are machinery provisions providing the means of getting the Commission elected and established, for Parties to join in the Charter and for protocols (amendments) to it to be made.

Establishment and Organisation of the Pacific Human Rights

Commission

Articles 30 - 63

30. A Pacific Human Rights Commission, hereinafter called "the Commission", shall be established to promote human and peoples' rights and ensure their protection in the Pacific region.
31. 1. The Commission shall consist of seven members chosen from amongst Pacific personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights with particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.
32. The Commission shall not include more than one national of the same Party.
33. The members of the Commission shall be elected by secret ballot by the Parties to the Charter, from a list of persons nominated by the Parties to the present Charter.
34. Each Party to the present Charter may not nominate more than two candidates. The candidates must be residents of one of the Parties to the present Charter. When two candidates are nominated by a Party, one of them may not be resident of that Party.
35. 1. The Director of the South Pacific Bureau of Economic Cooperation shall invite Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Director shall make an alphabetical list of the persons thus nominated and communicate it to the Parties at least one month before the elections.

36. The members of the Commission shall be elected for a six year period and shall be eligible for re-election once. However, the term of office of three of the members elected at the first election shall terminate after three years and the term of office four others, at the end of six years.
37. Immediately after the first election, the Director of the South Pacific Bureau of Economic Cooperation shall draw lots to decide the names of those members referred to in Article 36.
38. After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.
39. 1. In case of death or resignation of a member of the Commission, the President of the Commission shall immediately inform the Director of the South Pacific Bureau of Economic Cooperation, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his or her duties for any reason other than a temporary absence, the President of the Commission shall inform the Director, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Parties shall replace the member whose seat became vacant for the remaining period of that member's term unless the period is less than six months.
40. Every member of the commission shall be in office until the date the successor assumes office.
41. The President of the Commission shall appoint the Executive Director and the other staff of the commission, in consultation with the other commissioners. The Parties along the lines of the formulae used by other regional organizations shall bear the costs of the staff and services.
42. 1. The Commission shall elect its President and Vice President for a two year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Four members shall form a quorum.



4. In case of an equality of votes, the President shall have a casting vote.

43. In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities.

#### Functions of the Commission

45. The main functions of the Commission shall be to promote respect for and defence of human and peoples rights. In the exercise of its mandate, it shall have the following functions and powers:

- a) to develop an awareness of human and peoples rights among the peoples of the Pacific region by programmes of education, dissemination of materials, and other appropriate means;
- b) to make recommendations to the governments of Parties, when it considers such action advisable or when requested to do so by the government of a Party, for the adoption of measures in favour of human and peoples rights within the framework of their domestic law as appropriate measures to further the observance of those rights;
- c) to collect documents, undertake studies and research on Pacific problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights;
- d) co-operate with other Pacific and international institutions concerned with the promotion and protection of human and peoples' rights;
- e) when requested by a Party, to advise it and assist it in the processes of acceding to and giving effect to regional or international treaties dealing with human and peoples' rights;
- f) when requested by a Party, to assist it in the preparation of reports the Party is required to submit under regional or international treaties dealing with human or peoples' rights;

- g) to respond to enquiries made by the Parties on matters related to human and peoples' rights and, within the limits of its resources, to provide those Parties with the services they request;
- h) to assist individuals and peoples to understand how to protect and enforce human rights within their own legal systems;
- i) when requested by the affected Parties, to assist them settle disputes which have arisen between them relating to human and peoples' rights;
- j) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 47 to 59 of the present Charter;
- k) to consider and to make comments on and recommendations to the Director of the South Pacific Bureau of Economic Co-operation on reports submitted to it under Article 62 by the Parties to the present Charter;
- l) to prepare such studies and reports it considers advisable in the performance of its duties; and
- m) to make an annual report on its activities through the Director of the South Pacific Bureau for Economic Co-operation, to the Parties to the present Charter. This report shall be published and available to the public.

#### Article 45A

The Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any of the provisions of the present Charter.

### Procedures of the Commission

46. The Commission may resort to any appropriate method of investigation.

### Communications from States

47. If a Party to the present Charter has good reasons to believe that another Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that Party to the matter. This communication shall also be addressed to the President of the Commission. Within three months of the receipt of the communication, the Party to which the communication is addressed shall give the enquiring Party a written explanation or statement elucidating the matter. This response should include as much relevant information as possible relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

48. If within three months from the date on which the original communication is received by the Party to which it is addressed, the issue is not settled to the satisfaction of the two Parties involved through bilateral negotiation or by any other peaceful procedure, either Party shall have the right to submit the matter to the Commission through the President and shall notify the other Parties involved.

49. Notwithstanding the provisions of Article 47, if a Party to the present Charter considers that another Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the President and the Party concerned.

50. The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of pursuing these remedies would be unduly prolonged.

51. 1. The Commission may ask the Parties concerned to provide it with all relevant information.

2. When the Commission is considering the matter, Parties concerned may be represented before it and may submit written or oral representations.

52. After having obtained from the Parties concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the Parties concerned and communicated to all Parties to the Charter.

53. When transmitting its report, the Commission may make to the Parties such recommendations as it deems useful.

- [ 54. Note Article 54 is now covered by Article 45(k) ]

### Communications from Individuals or Groups

55. 1. Before each Session, the Executive Director of the Commission shall make a list of the communications other than those of Parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.

2. A communication shall be considered by the Commission if a simple majority of its members so decide.

56. 1. Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

- a) Indicate their authors even if the latter request anonymity;
- b) Are compatible with the present Charter;
- c) Are not written in disparaging or insulting language directed against the Parties concerned;

- d) Are not based exclusively on news disseminated through the mass media;
  - e) Are sent after exhausting domestic remedies;
  - f) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
  - g) Do not deal with cases that have been settled by the Parties involved in accordance with the principles of the Charter of the United Nations or the provisions of the present Charter.
2. The requirement of exhausting of domestic remedies in paragraph 1 shall not apply when:
- a) the domestic law of the Party does not afford due process of law for the protection of the right or rights that allegedly have been violated;
  - b) the person or group alleging violation of rights or suffering has been prevented from exhausting their violation of rights or has been denied access to remedies under the domestic law;
  - c) there has been unwarranted delay in finalizing domestic remedies.
57. Prior to any substantive consideration, all communications shall be brought to the knowledge of the Party concerned by the President of the Commission.
58. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases that reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission may decide to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
59. 1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Parties concerned have had sufficient time to address the problems identified.
2. However, the report shall be published by the Commission upon the decision of the Commission, undertaken after consultation with the affected parties.

#### Applicable Principles

60. The Parties and the Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various Pacific constitutions and regional agreements, the Charter of the United Nations, the present Charter, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by Pacific countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.
61. The Parties and the Commission shall also take into consideration, as subsidiary measures to determine the principles of law other general or special international conventions, laying down rules expressly recognized by Parties to present Charter; Pacific practices consistent with international norms on human and peoples' rights; customs generally accepted as law; general principles of law recognized by Pacific states; as well as legal precedents and doctrine.
- 61A. The Parties recognize the customs and traditions of the diverse communities of this region. The rights, freedoms and duties recognized in this Charter shall be interpreted and understood by the Parties and the Commission in the light of these customs and traditions.
62. Each Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.
- The Apia seminar held in May 1989 recommended that the drafting group of representatives that the Commission be empowered to request a Party to Whom it has made recommendations to advise it on what progress had been made towards implementing those recommendations and if that progress has been insufficient to report that fact to the appropriate regional organization.
- It also recommended to the drafting group of representatives that the Parties to the Charter be empowered to suspend a Party for protracted refusal to comply

with the recommendations of the Commission and to receive such a Party back after a period of suspension.

63. 1. The present Charter shall be open to signature, ratification or adherence of all communities in the Pacific, including Australia, New Zealand, and Papua New Guinea in the southwest, the Northern Mariana Islands and Guam in the northwest, Hawaii in the northeast, Easter Island in the southeast, and all political entities contained within these geographical boundaries.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Director of the South Pacific Bureau of Economic Cooperation.
3. The present Charter shall come into force three months after the reception by the Director of the instruments of ratification or adherence of eight of the political entities of the Pacific.

#### General Provisions

64. 1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
  2. The Director of the South Pacific Bureau of Economic Cooperation shall convene the first meeting of the Commission at the Headquarters of the Bureau within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its President whenever necessary but at least once a year.
65. For each of the Parties that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by the Party of its instrument of ratification or adherence.
66. Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.
67. The Director of the South Pacific Bureau of Economic Cooperation shall inform each political entity in the region of the deposit of each instrument of ratification or adherence.

68. The present Charter may be amended if a Party makes a written request to that effect to the Director of the South Pacific Bureau of Economic Cooperation. The Parties may only consider the draft amendment after all the Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring Party. The amendment shall be approved by a simple majority of the Parties. It shall come into force for each Party which has accepted it in accordance with its constitutional procedure three months after the Director has received notice of the acceptance.

APPENDIX A

DRAFT PACIFIC CHARTER OF HUMAN RIGHTS

Preamble

The Parties to the present Charter,

Recognizing that the peoples of the Pacific who have formed diverse cultures, customs and traditions are equal to all other peoples and societies in dignity and rights;

Recognizing that all peoples have contributed and continue to contribute to the progress of civilizations and cultures which constitute the common heritage of humankind;

Recognizing the need to promote and to protect those rights and characteristics which stem from Pacific peoples' history, philosophy of life, traditions and social structures, especially those tied to those territories, of the earth which these peoples have traditionally occupied;

Concerned that all doctrines and practices social, ethnic or cultural superiority are legally wrong, morally condemnable and socially unjust;

Believing that peoples operating as a collective should be free to manage their own affairs to the greatest extent possible, while enjoying equal rights with other citizens in the political, economic and social life of the states;

Acknowledging the need for minimum acceptable standards taking into account the diverse realities of peoples in all parts of the Pacific;

Mindful of the international instruments protecting the ideals of the individual and collective rights of persons;

Convinced that the states of the region should adopt a Charter reinforcing and complementing the protection of rights under the domestic law of Pacific jurisdictions; and

2

Concerned that persons, having duties to their families and communities, and to other persons, are under an obligation to observe the rights and duties recognized in the present Charter.

Have agreed as follows:

General Provisions

Article 1 - The Obligation of the Parties

The Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to adopt legislative, executive or other measures to give effect to them.

Article 2 - Equal enjoyment of Charter rights

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, economic status, birth or other status.

Article 3 - Equality before the law and equal protection.

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Civil and Political Rights

Article 4 - Right to Life and Integrity of the Person

Human beings are inviolable. All human beings shall be entitled to respect for their lives and the integrity of their persons. No one may be arbitrarily deprived of this right.

Article 5 - Respect for human dignity

All individuals shall have the right to the respect of the dignity inherent in all human beings and to recognition as persons before the law. All forms of exploitation and degradation of humans, particularly slavery, slave trade, torture, and cruel, inhuman or degrading punishment and treatment, shall be prohibited.

Article 6 - Liberty and Security of the Person

All individuals shall have the right to personal liberty and security. No one may be deprived of freedom unless the reasons for doing so have been laid down previously in law and the person is provided with due process of law. In particular, no one may be arbitrarily arrested or detained.

Article 6A - Searches, Seizures and Invasion of Privacy

The right of individuals to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, or invasions of privacy may not be violated. A warrant may not issue except on probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized or the communication sought to be intercepted.

#### Article 6B - Right to Honour and Reputation

All individuals shall have the right to be free from unlawful attacks on their honour or reputation.

#### Possible Composite Article

1. All individuals shall have the right to the respect of the dignity inherent in all human beings and to recognition as persons before the law. All forms of exploitation and degradation of humans, particularly slavery, slave trades, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. All individuals shall have the right to personal liberty and security. No one may be deprived of freedom unless the reasons for doing so have been laid down previously in law and the person is provided with due process a law. In particular, no one may be arbitrarily arrested or detained.
3. The right of individuals to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, or invasions of privacy may not be violated. A warrant may not issue except on probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized or the communication sought to be intercepted.
4. All individuals shall have the right to be free from unlawful attacks on their honour or reputation.

#### Article 7 - Access to Justice Rights

1. All individuals shall have the right to have their causes heard in fair and public hearings by independent, competent and impartial tribunals established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a civil or criminal case shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. All individuals shall have the right to an appeal to competent national organs against acts violating their fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

#### Article 7A - Rights to a Fair Trial

1. Every individual charged with a criminal offence shall be presumed innocent until proved guilty according to law.
2. Every individual who is charged with a criminal offence has the right
  - (a) to be informed of the right to obtain legal assistance;
  - (b) to communicate with a lawyer;
  - (c) to receive legal assistance without cost if the interests of justice so require and the person lacks sufficient means to pay for the assistance;
  - (d) to have adequate time and facilities to prepare a defence;

- (e) to be present at any trial relating to the offence and to present a defence;
- (f) to examine the witnesses against the person;
- (g) to obtain the attendance of, and to examine, witnesses for the person;
- (h) to have the free assistance of an interpreter if the person cannot understand or speak the language used in court; and
- (i) not to be compelled to testify or confess guilt.

3. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.
4. Every individual convicted of a criminal offence shall have the right to have the conviction or sentence reviewed by a higher tribunal according to law.
5. No individual finally convicted or acquitted of a criminal offence shall be tried or punished again for the same offence or for substantially the same offence arising out of the same facts.
  - (a) the right to be presumed innocent until proved guilty by a competent court or tribunal;
  - (b) the right to defence, including the right to be defended by counsel of his choice;
  - (c) the right to be tried within a reasonable time by an impartial court of tribunal.
  - (d) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

#### Article 8 - Freedom of Conscience and Religion

1. Freedom of conscience and the profession and free practice of religion shall be guaranteed.
2. Nothing in this Article shall be construed to invalidate reasonable restrictions imposed by law on the time, place, or manner of conduct, provided
  - (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
  - (b) there exist no less restrictive means of doing so; and
  - (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

#### Article 9 - Freedom of Expression

1. All individuals shall have the right to receive information.
2. All individuals shall have the right to express and disseminate their opinions.
3. Nothing in this Article shall be construed to invalidate reasonable restrictions imposed by law on the time, place, or manner of conduct, provided
  - (a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others;
  - (b) there exist no less restrictive means of doing so; and
  - (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed.

Article 10 - Freedom of Association

1. All individuals shall have the right to free association with others including the right to form and join trade unions for the protection of their interests.

Article 11 - Freedom of Assembly

Every individual shall have the right to assemble freely with others.

Article 12 - Freedom of Movement

1. Every individual shall have the right to freedom of movement and residence within the borders of a State subject to those restrictions established by law that are necessary in a democratic society in the interest of national security or to protect public health.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order or public health.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13 - Right to Vote and to Participate in Political Life

1. All citizens shall have the right to participate freely in the government of their country, either directly or through freely chosen representatives.
2. All citizens shall have the right of equal access to the public service of their country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.
4. Every citizen shall have the right to participate effectively in the decisions affecting the citizen in relation to economic and social development in the country.

Article 14 - The Right to Property

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with a law that provides for appropriate compensation

Article 14A - Rights of Minorities

In those Parties in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Economic, Social and Cultural Rights

Article 15A - Right to Adequate Living Standards

Every individual shall have the right to an adequate standard of living both for that person and that persons' family including adequate food, clothing and housing, and to the continuous improvement of living standards.

Article 15 - Right to Work

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for work of equal value.

Article 16 - Right to Health

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive counselling and medical attention when they are sick.

Article 17 - Right to Education

1. Every individual shall have the right to education.
2. All individuals may freely take part in the cultural life of their communities.
3. Each Party shall protect the traditional values recognized by its communities.

Article 18 - Right of the Family

1. The family shall be the natural unit and basis of society and shall be protected by each Party.

Article 18A - Rights of Women, Children and Youths

Each Party shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women, children and youths as stipulated in international declarations and conventions.

Article 18B - Rights of the Aged and the Disabled

The aged and the disabled shall also have the right to special measures of protection in keeping with their physical and social needs.

Rights of Peoples

Article 19 - Rights to Equality and Non-Domination

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another and in particular Articles 19 to 23 of the Charter shall apply to indigenous people who have become a minority in their own land.

#### Article 20 - Rights to Existence and Self Determination

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

#### Article 21 - Rights to Dispose of own Resources

1. All peoples shall have the right to dispose of their wealth and natural resources freely. This right shall be exercised in the exclusive interest and benefit of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to benefit fully from the advantages derived from their national resources.

#### Article 22 - Right to Economic, Social and Cultural Development

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of humankind.
2. Parties shall have the duty, individually or collectively, to ensure the exercise of the right to development.

#### Article 22A - Right to Peace and Security.

All peoples shall have the right to national and international peace and security.

#### Article 24 - Right to a Safe Environment

All peoples shall have the right to a clean, healthful and safe environment favourable to their development.

#### Duties of the Parties

#### Article 25 - Duty to Promote Respect for Rights.

Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

#### Article 26 - Duty to Guarantee the Independence of the Courts and Other Institutions Protecting Rights.

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

#### Article 26A - Duty of Governmental Bodies to Give Effect to the Charter.

It is the duty of all governmental bodies within each Party to apply and give effect to the provisions of this Charter.

#### Duties of Individuals

#### Article 27 - Duties Towards Family, Society and Communities

1. Individual shall have duties towards their families and society, the Parties and other legally recognized communities and the regional and international community.
2. Individuals shall exercise their rights and freedoms with due regard to the rights of others, collective security, morality and common interest.

#### Article 28 - Duty to Respect Other Individuals Without Discrimination

Individuals shall have the duty to respect and consider their fellow beings without discrimination, and to develop and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

#### Article 29 - Certain Specific Duties of Individuals

Individuals shall have the duty:

1. To preserve harmonious development of the family and to work for its cohesion and respect.
2. To work to the best of their abilities and competence, to use their skills and abilities for the betterment of their communities, and to pay taxes imposed by law in accordance with their means in the interests of society.
3. To preserve and strengthen positive Pacific cultural values in their relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the well being of society.



Establishment and Organization of the Pacific Human  
Rights Commission

Article 30.

A Pacific Human Rights Commission, hereinafter called "the Commission", shall be established to promote human and peoples' rights and ensure their protection in the Pacific region.

Article 31.

1. The Commission shall consist of seven members chosen from amongst Pacific personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights with particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

Article 32.

The Commission shall not include more than one national of the same Party.

Article 33.

The members of the Commission shall be elected by secret ballot by the Parties to the Charter, from a list of persons nominated by the Parties to the present Charter.

Article 34.

Each Party to the present Charter may not nominate more than two candidates. The candidates must be residents of one of the Parties to the present Charter. When two candidates are nominated by a Party, one of them may not be resident of that Party.

Article 35.

1. The Director of the South Pacific Bureau of Economic Cooperation shall invite Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Director shall make an alphabetical list of the persons thus nominated and communicate it to the Parties at least one month before the elections.

Article 36.

The members of the Commission shall be elected for a six year period and shall be eligible for re-election once. However, the term of office of three of the members elected at the first election shall terminate after three years and the term of office four others, at the end of six years.

Article 37.

Immediately after the first election, the Director of the South Pacific Bureau of Economic Cooperation shall draw lots to decide the names of those members referred to in Article 36.

Article 38.

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39.

1. In case of death or resignation of a member of the Commission, the President of the Commission shall immediately inform the Director of the South Pacific Bureau of Economic Cooperation, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his or her duties for any reason other than a temporary absence, the President of the Commission shall inform the Director, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Parties shall replace the member whose seat became vacant for the remaining period of that member's term unless the period is less than six months.

Article 40.

Every member of the commission shall be in office until the date the successor assumes office.

Article 41.

The President of the Commission shall appoint the Executive Director and the other staff of the commission, in consultation with the other commissioners. The Parties along the lines of the formulae used by other regional organizations shall bear the costs of the staff and services.

Article 42.

1. The Commission shall elect its President and Vice President for a two year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Four members shall form a quorum.
4. In case of an equality of votes, the President shall have a casting vote.

Article 43.

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities.

Functions of the Commission

Article 45.

The main functions of the Commission shall be to promote respect for and defence of human and peoples rights. In the exercise of its mandate, it shall have the following functions and powers:

- a) to develop an awareness of human and peoples rights among the peoples of the Pacific region by programmes of education, dissemination of materials, and other appropriate means;
- b) to make recommendations to the governments of Parties, when it considers such action advisable or when requested to do so by the government of a Party, for the

adoption of measures in favour of human and peoples rights within the framework of their domestic law as appropriate measures to further the observance of those rights;

- c) to collect documents, undertake studies and research on Pacific problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights;
- d) to advise and assist international institutions concerned with human and peoples' rights;
- e) when requested by a Party, to advise it and assist it in the processes of acceding to and giving effect to regional or international treaties dealing with human and peoples' rights;
- f) when requested by a Party, to assist it in the preparation of reports the Party is required to submit under regional or international treaties dealing with human or peoples' rights;
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- h) to assist individuals and peoples to understand how to protect and enforce human rights within their own legal systems;
- i) when requested by the affected Parties, to assist them settle disputes which have arisen between them relating to human and peoples' rights;
- j) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 47 to 59 of the present Charter;
- k) to consider and to make comments on and recommendations to the Director of the South Pacific Bureau of Economic Co-operation on reports submitted to it under Article 62 by the Parties to the present Charter;
- l) to prepare such studies and reports it considers advisable in the performance of its duties; and
- m) to make an annual report on its activities through the Director of the South Pacific Bureau for Economic Co-operation, to the Parties to the present Charter. This report shall be published and available to the public.

#### Article 45A

The Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any of the provisions of the present Charter.

#### Procedure of the Commission

##### Article 46.

The Commission may resort to any appropriate method of investigation.

#### Communications from States

##### Article 47.

If a Party to the present Charter has good reasons to believe that another Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that Party to the matter. This communication shall also be addressed to the President of the Commission. Within three months of the receipt of the communication, the Party to which the communication is addressed shall give the enquiring Party a written explanation or statement elucidating the matter. This response should include as much relevant information as possible relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

##### Article 48.

If within three months from the date on which the original communication is received by the Party to which it is addressed, the issue is not settled to the satisfaction of the two Parties involved through bilateral negotiation or by any other peaceful procedure, either Party shall have the right to submit the matter to the Commission through the President and shall notify the other Parties involved.

##### Article 49.

Notwithstanding the provisions of Article 47, if a Party to the present Charter considers that another Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the President and the Party concerned.

Article 50.

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of pursuing these remedies would be unduly prolonged.

Article 51.

1. The Commission may ask the Parties concerned to provide it with all relevant information.
2. When the Commission is considering the matter, Parties concerned may be represented before it and may submit written or oral representations.

Article 52.

After having obtained from the Parties concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the Parties concerned and communicated to all Parties to the Charter.

Article 53.

When transmitting its report, the Commission may make to the Parties such recommendations as it deems useful.

- [ 54. Note Article 54 is now covered by Article 45(k) ]

Communications from Individuals or GroupsArticle 55.

1. Before each Session, the Executive Director of the Commission shall make a list of the communications other than those of Parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56.

1. Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:
  - a) Indicate their authors even if the latter request anonymity;
  - b) Are compatible with the present Charter;
  - c) Are not written in disparaging or insulting language directed against the Parties concerned;
  - d) Are not based exclusively on news disseminated through the mass media;
  - e) Are sent after exhausting domestic remedies;

- f) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
  - g) Do not deal with cases that have been settled by the Parties involved in accordance with the principles of the Charter of the United Nations or the provisions of the present Charter.
2. The requirement of exhausting of domestic remedies in paragraph 1 shall not apply when:
    - a) the domestic law of the Party does not afford due process of law for the protection of the right or rights that allegedly have been violated;
    - b) the person or group alleging violation of rights or suffering has been prevented from exhausting their violation of rights or has been denied access to remedies under the domestic law;
    - c) there has been unwarranted delay in finalizing domestic remedies.

Article 57.

Prior to any substantive consideration, all communications shall be brought to the knowledge of the Party concerned by the President of the Commission.

Article 58.

When it appears after deliberations of the Commission that one or more communications apparently relate to special cases that reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission may decide to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.

Article 59.

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Parties concerned have had sufficient time to address the problems identified.
2. However, the report shall be published by the Commission upon the decision of the Commission, undertaken after consultation with the affected parties.

### Applicable Principles

#### Article 60.

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various Pacific constitutions and regional agreements, the Charter of the United Nations, the present Charter, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by Pacific countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

#### Article 61.

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law other general or special international conventions, laying down rules expressly recognized by Parties to present Charter; Pacific practices consistent with international norms on human and peoples' rights; customs generally accepted as law; general principles of law recognized by Pacific states; as well as legal precedents and doctrine.

#### Article 61A.

The Parties recognize the customs and traditions of the diverse communities of this region. The rights, freedoms and duties recognized in this Charter shall be interpreted and understood by the Parties and the Commission in the light of these customs and traditions.

#### Article 62.

Each Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

#### Article 63.

1. The present Charter shall be open to signature, ratification or adherence of all communities in the Pacific, including Australia, New Zealand, and Papua New Guinea in the southwest, the Northern Mariana Islands and Guam in the northwest, Hawaii in the northeast, Easter Island in the southeast, and all political entities contained within these geographical boundaries.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Director of the South Pacific Bureau of Economic Cooperation.
3. The present Charter shall come into force three months after the reception by the Director of the instruments of ratification or adherence of eight of the political entities of the Pacific.

### General Provisions

#### Article 64.

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Director of the South Pacific Bureau of Economic Cooperation shall convene the first meeting of the Commission at the Headquarters of the Bureau within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its President whenever necessary but at least once a year.

#### Article 65.

For each of the Parties that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by the Party of its instrument of ratification or adherence.

#### Article 66.

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

#### Article 67.

The Director of the South Pacific Bureau of Economic Cooperation shall inform each political entity in the region of the deposit of each instrument of ratification or adherence.

#### Article 68.

The present Charter may be amended if a Party makes a written request to that effect to the Director of the South Pacific Bureau of Economic Cooperation. The Parties may only consider the draft amendment after all the Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring Party. The amendment shall be approved by a simple majority of the Parties. It shall come into force for each Party which has accepted it in accordance with its constitutional procedure three months after the Director has received notice of the acceptance.

## African Charter on Human and Peoples' Rights

### PREAMBLE

The African States members of the Organization of African Unity, parties to the present Convention entitled "African Charter on Human and Peoples' Rights";

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and

other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of the duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

### PART I—RIGHTS AND DUTIES

#### CHAPTER I—HUMAN AND PEOPLES' RIGHTS

##### Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

##### Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

##### Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

##### Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.

##### Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

##### Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
  - (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
  - (c) the right to defence, including the right to be defended by counsel of his choice;
  - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

##### Article 8

Freedom of conscience, the profession and free practice of religion, shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

##### Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

##### Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

##### Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interests of national security, safety, health, ethics and the rights and freedoms of others.

##### Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

#### Article 13

1. Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services, in strict equality of all persons before the law.

#### Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

#### Article 15

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

#### Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

#### Article 17

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

#### Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

#### Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

#### Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

#### Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

#### Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:
  - (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;
  - (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

#### Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

#### Article 25

States Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

#### Article 26

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

### CHAPTER II—DUTIES

#### Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

#### Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

OUTLINE OF THE ACTIVITIES OF THE LAWASIA HUMAN RIGHTS STANDING COMMITTEE TOWARDS THE ULTIMATE ESTABLISHMENT OF AN ASIAN-PACIFIC REGIONAL COMMISSION ON HUMAN RIGHTS.

The LAWASIA Human Rights Standing Committee has had a continuing interest in the establishment of Human Rights Commissions in the Asian region since the Committee came into being at the Sixth LAWASIA Conference held in Colombo in 1979. In the terms of reference by which the Committee was constituted, it was resolved that the duties and functions of the Committee should be:

- i. to work towards the establishment of a Centre or Centres for Human Rights in the LAWASIA Region, the principal function of such centre or centres being the promotion, propagation and protection of human rights in the region, by research, education, the use of mass-media and the publication of literature concerning Human Rights, and by other means;
- ii. to initiate, as a matter of priority, steps towards the ultimate establishment of an Asian Commission and/or a Court for Human Rights in the LAWASIA region;
- iii. to take steps towards the implementation of the principles of the Universal Declaration of Human Rights in specific form within the LAWASIA region;
- iv. to promote by education and publicity awareness of human rights among the members of LAWASIA;
- v. to prepare and publish reports on matters affecting human rights within the LAWASIA region;
- vi. to urge the ratification of the International Conventions relating to Human Rights by Governments within the LAWASIA region, and to work towards adherence to other UN instruments in the field of human rights, including those concerning law enforcement and refugees;
- vii. to safeguard the independence and freedom of judges and lawyers in the discharge of their duties in matters concerning human rights.

At this Sixth LAWASIA Conference, Mr. P.J. Downey (later to become the Co-Chairman, with Mr. F.S. Nariman of India, of the LAWASIA Human Rights Committee, and then the Chief Commissioner of Human Rights for New Zealand), presented a paper advocating the setting up of a Human Rights Commission for the South Pacific Region. The setting up of such a sub-regional commission is seen as a viable first step towards the eventual establishment of a Commission of Human Rights for the entire Asian region.

Thus, from the time of its inception, the LAWASIA Human Rights Standing Committee has had, as one of its objectives, the aim of contributing to the establishment of a Human Rights Commission for the Asian region. Unlike other regions of the world eg. Europe, Africa and the Americas, where Human Rights Commissions have been established, the Asian region has no presently existing inter-governmental structure with which a regional Commission could be associated. For this and other reasons the establishment of such a Commission seemed to be a long-term project and hence the Committee has felt it desirable to approach its establishment in stages. As a consequence, a variety of different approaches have been underway: firstly, the dissemination of information concerning human rights and the promotion of awareness of human rights throughout the region; secondly, the setting up of a coalition of non-governmental organisations concerned with human rights issues in the region; and thirdly steps which it is hoped will lead to the establishment of sub-regional Human Rights Commissions.

1. Dissemination of information on human rights matters within the Asian Region.

LAWASIA has participated actively in the dissemination of information on human rights matters within the Asian region.

1. For instance the Committee has commissioned the translation of the Universal Declaration on Human Rights, the International Covenant on Political and Civil Rights and the International Covenant on Economic and Social Rights into several important Asian languages, in which these documents were not then available to people in Asia - Thai, Filipino, Hindi, Malay and Burmese.

2. The dissemination function has been undertaken also through the twice yearly publication of the LAWASIA Human Rights Bulletin, and the more frequent LAWASIA Human Rights Newsletter both of which cover human rights issues within the region. There are many ways in which the recognition of human rights may be brought about. One of these ways is through the provision of information as to human rights and what is happening in relation to them. It is, in the Committee's view, important that information regarding both inadequacies and improvements in human rights matters be widely published. The Committee strongly believes that information about human rights issues will stimulate and encourage those working in the field, and deter, or provide the occasion for the remedying of, infringements. Since information as to what is happening in the LAWASIA region in relation to human rights has not been easily or systematically available, it has been the purpose of the Bulletin and the Newsletter to remedy, as far as they may, this deficiency.

The Committee believes that the organisation of LAWASIA gives it a particular advantage in the collection and publication of information of this kind. It has established correspondents in a number of the countries in the LAWASIA area, and receives from them information in respect of their countries.

3. The LAWASIA Human Rights Committee has convened a number of conferences on matters of human rights concern within the region, on topics such as The Status of Women, the Independence of the Judiciary, and Child Labour and Child Prostitution. Reports of these meetings are published and their conclusions and recommendations circulated to appropriate government departments in the region.

4. The Committee also sends observer missions to contentious human rights trials and to trouble spots in the region, and publishes the reports of these missions.

5. Also, the LAWASIA Human Rights Committee has actively urged the governments in the region to accede to international human rights instruments. The countries of Asia have a poor record in terms of the numbers of accessions to, and ratifications of, international human rights instruments. It is the belief of the LAWASIA Human Rights Committee that it is extremely important to encourage countries throughout the Asian-Pacific region to accede to major international human rights instruments, hence its letters to Asian governments requesting their serious consideration of, and action upon, this matter.

The feeling behind these various activities has been that a very important task within the Asian-Pacific region is that of the promotion of, and increase of awareness about, human rights matters amongst the peoples of the area. As there is no overall Commission or inter-governmental structure which is fulfilling this need, it has fallen to non-governmental organisations to attempt to promote such awareness.

2. Formation of a coalition of non-governmental human rights organisations

Another initiative which the LAWASIA Human Rights Standing Committee has undertaken as a step preparatory to the setting up of an Asian-Pacific Human Rights Commission has been to play the role of catalyst in the formation of a coalition of non-governmental human rights organisations.

As noted above, the lack of inter-governmental structures to protect human rights in the Asian-Pacific region has meant that the activities of non-governmental organisations has assumed greater

significance in the protection and promotion of human rights matters here than might otherwise have been the case. In the absence of any Asian-Pacific inter-governmental structure, and with the establishment of an Asian-Pacific Human Rights Commission appearing to be a very long-term goal, the Committee felt that co-operation and contact between active non-governmental organisations was important and had the potential to fulfil a variety of useful purposes: firstly, that of furthering their aims; secondly, that of providing the organisations with contact, information and support - enabling them to learn from the experiences of other organisations, and to avoid duplication of effort; and, thirdly, the provision of protection for their members who are from time to time subject to harassment simply by virtue of their activities.

Accordingly, LAWASIA organised a meeting of a group of non-governmental human rights bodies immediately prior to the Seventh LAWASIA Conference held in Bangkok in 1981. The meeting considered ways in which human rights non-governmental organisations might co-operate, work together, and benefit from this co-operation in their human rights activities, and also considered the question of whether the non-governmental organisations at the meeting themselves felt that some kind of a loose co-operative arrangement would be useful. The feeling of the non-governmental organisations attending the Bangkok meeting was very much in favour of establishing some loose form of organisation of like bodies, and the LAWASIA Human Rights Standing Committee undertook to perform a co-ordinating role at the outset.

Shortly after this 1981 Bangkok meeting, Dr. D.H. Geddes, Secretary-General of LAWASIA, was invited to present a background paper at the U.N. Convened Seminar on "National, Local and Regional Arrangements for the Promotion and Protection of Human Rights within the Asian Region", held in Colombo in June 1982.

At that Seminar it was clear that the participants felt that the establishment of an Asian Human Rights Commission would indeed take considerable time to achieve. While in Colombo, Dr. Geddes took the opportunity of organising a meeting of the non-governmental organisations present, to assess the possibility of their further co-operation. Great interest was there expressed in the idea of non-governmental organisations establishing greater contact and co-operation and, thereafter, LAWASIA organised two further meetings. The first took place in New Delhi in October 1982. This meeting was attended by 34 organisations from 12 countries, and passed resolutions in favour of the formation of a loose coalition of human rights organisations. The second meeting took place in Manila in September 1983. At this meeting 37 organisations from 12 countries attended, and, at this time was formed the coalition known as ACHRO (Asian Coalition of Human Rights Organisations). The first chairman of the Coalition, Professor Cesar Espiritu, was elected at that meeting, and took over the organisation of the Coalition. This body as established in Manila is separate from, and independent of, LAWASIA and pursues its own vigorous programme of activities.

3. The establishment of Sub-Regional Human Rights Commissions

i) A Commission for the Pacific region.

The paper presented by Mr. P.J. Downey to the Sixth LAWASIA Conference in Colombo in 1979 in which he advocated the establishment of a Human Rights Commission for the South Pacific Region, has already been mentioned, as has the background paper prepared by Dr. D.H. Geddes for the U.N. Convened Conference held in Colombo in June 1982.

In his background paper, Dr. Geddes canvassed the desirabilities and difficulties of setting up an Asian Human Rights Commission. He looked at the history of the establishment of the European, African, American and Arab Commissions, and pointed out that, with these as examples, it should be possible, allowing for the differences appropriate to the context of an Asian situation, to set up such a body in Asia. However, he concluded that since there was no inter-governmental structure in the region here such, as had existed in other regions prior to the setting up of Human Rights Commissions there, and although the establishment of an Asian Human Rights Commission should be the ultimate aim, it would be wise to approach the setting up of such a Commission in stages.



Indeed, that meeting did not resolve to establish such a Commission, seeing it as a very long term project indeed.

Dr. Geddes, in his conclusions, recommended, amongst other approaches, the setting up of sub-regional Human Rights Commissions as a step preliminary to the setting up of an overall Asian Human Rights Commission.

For this purpose he divided Asia into four sub-regions: these being the Western Region (Iran, Afghanistan, India, Pakistan, Bangladesh and Sri Lanka); the Central, i.e. expanded ASEAN, region (Burma, Thailand, Laos, Kampuchea, Vietnam, Malaysia, Singapore, Indonesia, Philippines); the South and Western Region (Australia, New Zealand, Papua New Guinea, Fiji and the countries of the Western Pacific); and the North and North-Eastern Region (China, Hong Kong, North Korea, South Korea and Japan).

In many ways it seemed that the South Pacific region would be the region easiest to tackle first for the reasons outlined in Mr. P.J. Downey's paper presented to the Sixth LAWASIA Conference - cultural affinity, a good degree of political understanding, a certain historical involvement, relationships of trade and movements of people of a direct and continuous nature - and for the reasons outlined in a paper written by Mr. P. Bailey, former Deputy Chairman of the Australian Human Rights Commission. In his paper Mr. Bailey points out the good human rights record of these countries, something seen as a hopeful sign in that it indicates a climate favourable to, and respectful of, human rights. Also emphasized is the existence of structural groupings within the region such as the South Pacific Forum and the South Pacific Commission. Further, Judicial Conferences (meetings of judges of the region), take place regularly every two years. Such existing structures and contacts could form a base of co-operation from which to begin to build.

For these reasons the LAWASIA Human Rights Standing Committee convened, in Fiji in April 1985, a Seminar to discuss the prospects for the establishment of a South Pacific Human Rights Commission.

The 63 participants were all people keenly interested in human rights and included lawyers, social workers, judges, church workers and academics. Delegates attending from Fiji, Solomon Islands, France, Australia, Malaysia, Philippines, Korea, New Zealand, Belau, Hawaii, French Polynesia, Western Samoa, New Caledonia, Cook Islands, Nauru, Eastern Caroline Islands and Sri Lanka.

Included amongst the speakers were Maud Buquicchio, Senior Lawyer with the European Commission of Human Rights; Yann Celene Uregei, Minister for Foreign Affairs of the Provisional Government of Kanaky; Hayden Burgess of Hawaii, lawyer and Vice President of the World Council of Indigenous People; Roman Bedor, anti-nuclear lawyer from the Republic of Belau; Justice Wallace, Chairman of the New Zealand Human Rights Commission and Mr Peter Bailey, Deputy Chairman, Australian Human Rights Commission. The conference was opened by the Fijian Minister of Justice and Attorney-General, the Hon. Q. Bale.

Government observers from Fiji, Papua New Guinea, Australia, New Zealand, Hong Kong, Guam, Western Samoa, Kiribati, India and Malaysia were also in attendance.

Amongst the topics discussed at the conference were: decolonisation movements in New Caledonia and French Polynesia; nuclear issues affecting the Pacific; the position of women; the rights of indigenous populations and development issues.

It was the first time that people from around, or interested in, the Pacific region have agreed to come together to discuss many of these issues in such a way.

Immediately after the Conference, the LAWASIA Secretariat sent its Conclusions, together with a brief report on the Conference and the speech by the Hon. Q. Bale, the Attorney-General of Fiji, to Asian and Pacific Governments. A report of the proceedings of the Conference became available in January 1986 and was distributed to heads of government in the Asia Pacific region, participants and relevant NGOs. Governments were again urged to ratify major human rights conventions,

invited to promote greater awareness of human rights among their people and consider the early establishment of an inter-governmental treaty-based human rights body. The Committee has since produced and published a report containing both the proceedings of the Conference and the papers presented at it. (See LAWASIA publications list, at end of this Report for particulars).

In accordance with Recommendation 10 of the Fiji Conference the Committee established a Drafting Committee and a Working Party of representatives from the Pacific region to conduct a research project to investigate whether or not a human rights commission for the area might be feasible. The people invited to participate in this study all possess considerable experience and expertise within the Pacific area. A meeting of the Drafting Committee was held in Sydney in late June 1986 in a brain-storming session which proved fruitful and worthwhile. Draft proposals were then drawn up.

After this first meeting a Working Party was constituted and met in Apia during the first South Pacific Law Conference, held at the end of August, 1986, to discuss the suggestions and the draft which had emerged from the Sydney meeting. At that stage contacts were made also with Law Ministers who were in Western Samoa to attend the South Pacific Law Conference.

After the Apia meeting the members of the Working Party remained in contact, and as a result of their discussions, have drawn up a revised draft. This draft contains proposals and possible alternative suggestions for a Pacific Human Rights Commission and a Charter of Human Rights for the region. (This Draft was the subject of discussion at the most recent LAWASIA Seminar on this topic held in Apia in May 1989 and reported here).

From May 9-12 1987 a regional UNESCO Conference was held at the University of New South Wales Human Rights Centre, Sydney, Australia, on the subject Human Rights Teaching, Documentation and the Dissemination of Information. The LAWASIA Human Rights Committee played a major part in the composing of the programme and in the selection of speakers for this Seminar. During the Seminar, 14 different sessions were held.

In Session 13, What is to be Done? The Need for a Regional Impetus the current LAWASIA initiative towards a Human Rights Commission for the Pacific area was the subject of discussion. The paper-writer for this session, Dr. Tony Deklin is the Papua New Guinean representative on the LAWASIA Working Party, and a LAWASIA Human Rights Committee member. His paper was entitled Towards a Regional Recognition of Human Rights in the Pacific.

In commenting on Dr. Deklin's paper, the participants noted that discussion by Pacific participants during the seminar had reflected a concern in the region about the adoption of human rights instruments from outside the region. The point was made that it is often not how human rights are phrased in charters, but how they are interpreted and applied, that is important. The European application of the European Convention constitutes almost the only available jurisprudence. The Pacific, through a regional charter, would be able to develop its own distinct jurisprudence, which would both assist in avoiding "Eurocentric" interpretations of human rights, and would also be of international benefit.

In reaching a number of conclusions and recommendations, the participants acknowledged the useful work done in the field of human rights teaching and dissemination by LAWASIA. It was agreed that this work should be encouraged, and possible avenues for co-operation between UNESCO and LAWASIA explored.

Since then the Committee has organised a seminar entitled Human Rights Today and Tomorrow: National Human Rights Commissions and Other Organs. The seminar was held in Manila August 26-28 1988. The Manila Seminar programme dealt with the following topics:

- (1) Human Rights and the Role of International, Regional and National Governmental Human Rights Commissions: The Existing Scene:

Role of Inter-Governmental Human Rights Commissions and Advisory Services: UN Centre for Human Rights;  
Regional Developments in the Pacific--A Proposal;  
Function of Regional commissions in the Quest of Better Human Rights;  
The System for the Protection of Human Rights in Japan--Activity of Human Rights Commissioners;  
National Human Rights Commissions: Current Initiatives.

- (2) Human Rights in National Constitutions:

ASEAN Constitutions and Human Rights: A Comparative Perspective.  
Human Rights in the Constitutions of Malaysia, Brunei and Singapore;  
Restrictions on Human Rights: States of Emergency, National Security, Public Safety and Public Order.

- (3) Dissemination of Human Rights and Education:

Education in Human Rights: Role of Educational Institutions;  
Practical Programs for Human Rights Education;  
Non-Governmental Organisations (NGO's): Their Educative Role in Promoting Human Rights.

- (4) Implementation of Human Rights:

ASEAN Courts and Human Rights: The Philippine Experience;  
Role of Courts and Human Rights: The Mechanism of Public Interest Litigation;  
NGOs and the Implementation of Human Rights;  
National Governmental Human Rights Commissions - Their Potential Roles in the Region.

37 Delegates from 12 countries attended the Seminar, and a delegate was sent from Geneva by the UN Centre for Human Rights. The Seminar was most successful.

One recommendation from the Seminar, Recommendation 8, is as follows:

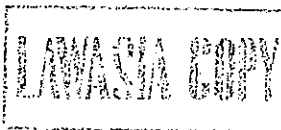
"The Conference recognized the importance of the need for Human Rights Commissions at various levels - national, sub-regional, regional and international - for the Asian-Pacific region. Such a Commission may be more a long-range objective. However, concrete steps must now be taken. In this connection, the following resolution should be submitted to appropriate United Nations (UN) bodies and agencies:

'Request that the UN explore, in accordance with previous practice, the possibility of holding an Asian-Pacific regional seminar at the inter-governmental level to examine the possibility of some kind of regional institutions and arrangements for the promotion and protection of Human Rights and that this regional seminar be held in 1989 with the participation of non-governmental organizations'."

LAWASIA has since approached governments in the region with a request that they give consideration to hosting a Seminar to be conducted by the United Nations in co-operation with LAWASIA in 1989 to continue exploration of the possibility of setting up a regional mechanism to promote and protect human rights. As a direct result of this meeting the UN Centre for Human Rights plans to hold, in Manila in December 1989, a Seminar to discuss human rights in the region and proposes to include human rights commissions on the agenda.

LAWASIA

THE LAW ASSOCIATION FOR ASIA AND THE PACIFIC



**DRAFT PACIFIC CHARTER  
OF HUMAN RIGHTS  
AND EXPLANATORY MEMORANDA**

LAWASIA Human Rights Committee  
Law School, U.N.S.W.  
P.O. Box 1 Kensington N.S.W. 2033  
AUSTRALIA  
Tel: (02)6972240  
Fax: (02)6633753  
Telex: AA26054

Returning to its activities in the Pacific region the LAWASIA Human Rights Committee convened in May 1989 the present Seminar to discuss proposals for a Pacific Charter of Human Rights drawn up by its Drafting committee and Working Party. The Drafting Committee had produced a report which raised the issues to be considered in relation to the establishment of a regional human rights body. The Drafting Committee also developed a model treaty based on the African Charter of Human and People's Rights which set down civil, political, economic, social, cultural and people's rights and suggested a body not only to supervise compliance with those rights, but also to assist governments with human rights issues in general and in meeting their obligations under regional and international human rights treaties in particular. As mentioned above the report had been subsequently considered in detail by a Working Party which met in Apia, Western Samoa from 26-29 August 1986. The Draft drawn up was the subject of discussion at the Apia Seminar 15-17 May, and is reproduced here as amended by that meeting.

Patricia Hyndman  
Secretary  
LAWASIA Human Rights Standing Committee