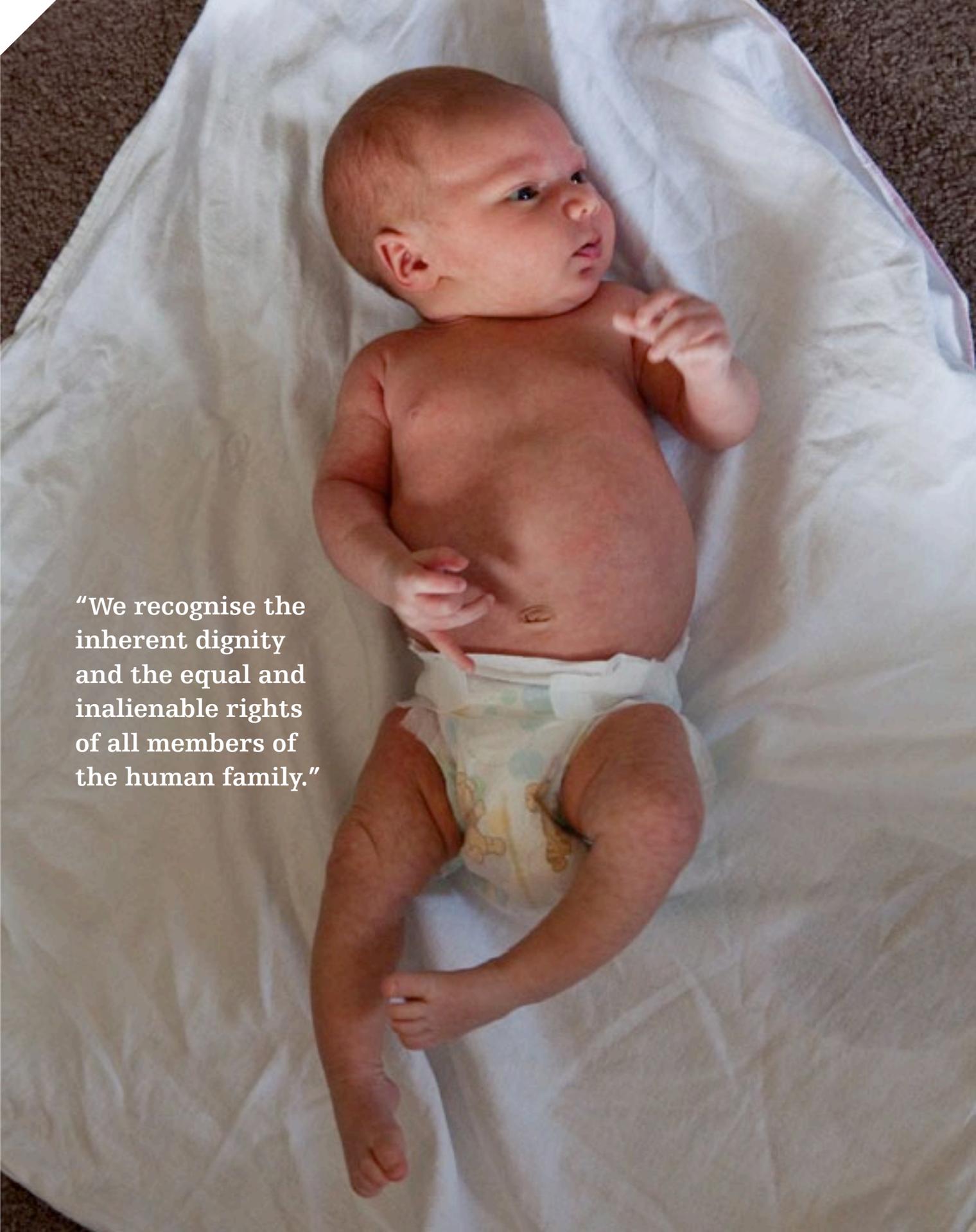


2. International Human Rights Framework

Pou Tarāwaho Tika Tangata o te Ao



“We recognise the inherent dignity and the equal and inalienable rights of all members of the human family.”

We recognise the inherent dignity and the equal and inalienable rights of all members of the human family.

Universal Declaration of Human Rights, Preamble (edited)

Introduction Tīmatatanga

When the Commission undertook its review of human rights in New Zealand in 2004, it recorded New Zealand's engagement in the development of the international human rights standards and ratification of the six major human rights treaties. Since then, a further convention, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), has been added to the international human rights framework, together with the Optional Protocol to the Convention Against Torture (OPCAT). A new process for examining states' performances under the international framework, the Universal Periodic Review (UPR), has been introduced, and the Declaration on the Rights of Indigenous Peoples (UNDRIP) has been adopted by the United Nations General Assembly.

There is also greater recognition of corporate responsibility and the role that multinationals, in particular, play in the protection and promotion of human rights, and there have been some significant shifts in how national sovereignty is viewed. It is no longer conceived of as entirely unfettered – a state's treatment of its citizens has become the subject of legitimate inquiry, and increasingly justifiable intervention by the international community.¹

Despite these advances, however, the relationship between international human rights standards and what happens in practice is still not well understood. This chapter provides an introduction to the international human rights framework and New Zealand's response to it in the 21st century.

1 Ministry of Foreign Affairs and Trade (2008), *The New Zealand Handbook on International Human Rights* (3rd ed) (Wellington: MFAT), p 16

2 The charter was unanimously adopted on 25 June and signed on 26 June 1945. Poland was not represented at the conference. The United Nations officially became an institution with the ratification of the charter on 24 October 1945.

3 The ILO, which was founded in 1919 by the Treaty of Versailles, was transformed into a specialised agency of the United Nations under an agreement with the Economic and Social Council (ECOSOC) in 1946.

4 UN General Assembly (1948), Universal Declaration of Human Rights, Preamble.

WHAT ARE HUMAN RIGHTS?

Human rights, as presently conceived, have their origin in the Universal Declaration of Human Rights (the Declaration). The Declaration is based on the Charter of the United Nations.² The preamble to the charter reads:

We the peoples of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...

The charter includes the following goals:

...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...

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The declaration drew on earlier initiatives, such as those of the International Labour Organisation (ILO).³ It marks the beginning of the transformation of human rights from moral or philosophical imperatives into rights that are legally recognised internationally and, increasingly, across nations. The UN General Assembly proclaimed the declaration as

...a common standard of achievement for all peoples and all nations.⁴

The declaration clarifies that individuals also have responsibilities. Article 29, for example, states:

...everyone has duties to the community in which the free and full development of his personality is possible.

This translates into the duty of individuals to:

- respect, promote and protect human rights

- exercise their rights responsibly
- recognise they also have general duties to others and their community.⁵

International context Kaupapa ā taiao

To give the standards in the declaration legal force, two major covenants were developed. The International Covenant on Civil and Political Rights (ICCPR) deals with civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) with economic, social and cultural rights. Both were adopted by a special resolution of the UN General Assembly in 1966 and came into effect in 1976 when the necessary number of countries had ratified them.⁶ The two covenants and the declaration are often referred to as the International Bill of Rights.

The rights in the ICCPR take effect as soon as a state ratifies the Covenant. They apply to everybody equally, without discrimination. The rights may be limited only in situations of public emergency, where the life of the nation is under threat, and “to the extent strictly required by the exigencies of the situation”.⁷ Some articles also include limitation clauses. For example, Article 19 (which relates to freedom of expression) can be restricted to protect the rights or reputations of others, in situations of public emergency, and if prescribed by law.

The rights in the ICESCR must also be provided equally and on a non-discriminatory basis. They are, however, subject to the concept of progressive realisation and resource limitations. Given the potential cost, compliance with the substantive rights is expected to happen incrementally or, to use the language of the covenant, “progressively”, depending on the resources available and the competing claims and priorities on those resources.⁸

To avoid this being used as reason for non-compliance, states must demonstrate that they have made every effort to use the resources at their disposal to satisfy at least the minimum or core obligations as a matter of priority. It follows that there is a strong presumption against any deliberately retrogressive measures. Further, a state cannot commit itself to the covenant and then delay for too long taking steps towards meeting the commitments it has assumed.

In addition to the two major treaties, there are a series of instruments that apply to thematic issues, such as racial discrimination or discrimination against women. These include the International Convention on the Elimination of All Forms of Racism (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (UNCROC), the Convention on the Rights of Migrant Workers and their Families (MWC) and the Convention on the Rights of Persons with Disabilities (CRPD).

There are also a large number of United Nations resolutions or declarations that are not binding in the same way as treaties but establish standards of practice and can acquire significant status as a result of their moral force and specific application. The most recent of these is the Declaration on the Rights of Indigenous Peoples (UNDRIP).

THE PROCESS OF RATIFICATION

International treaties are developed through a process of negotiation among member states of the United Nations. Individual states then decide whether to accede to or ratify the final treaty.

Ratification is acceptance by a State that it will be bound by the terms of a treaty. In ratifying a treaty, a

5 International Council on Human Rights Policy (1999), *Taking duties seriously: individual duties in international human rights law* (Versoix: International Council), p 16. Accessible online at www.ichrp.org/files/reports/10/103_report_en.pdf

6 The 1993 Vienna World Conference reaffirmed that human rights are indivisible and interrelated and that no right is superior to another (the 1993 Vienna Declaration and Programme of Action, Article 5). For a discussion on the concept of interdependence in the context of human rights, see Scott C (1989), ‘The interdependence and permeability of human rights norms: towards a partial fusion of the international covenants on human rights’, *Osgoode Hall Law Journal* 27, p 769. It follows that individual rights should not be considered in isolation, since the enjoyment of one will often depend on the realisation of another. For example, the right to vote is closely linked to the right to education.

7 ICCPR, Article 4

8 ICCPR, Article 4. See also Alston P and Quinn G (1987), ‘The nature and scope of States Parties’ obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, 9(2), 156–229

state recognises it as international law and accepts an obligation to respect, protect, promote and fulfil the rights within it. The duty to respect a right requires the state to refrain from carrying out any actions which violate it. The duty to protect requires action by that state to prevent violation by others. The duty to promote means a state should raise awareness of the right, and the duty to fulfil requires the state to take steps to ensure the full realisation of the right.

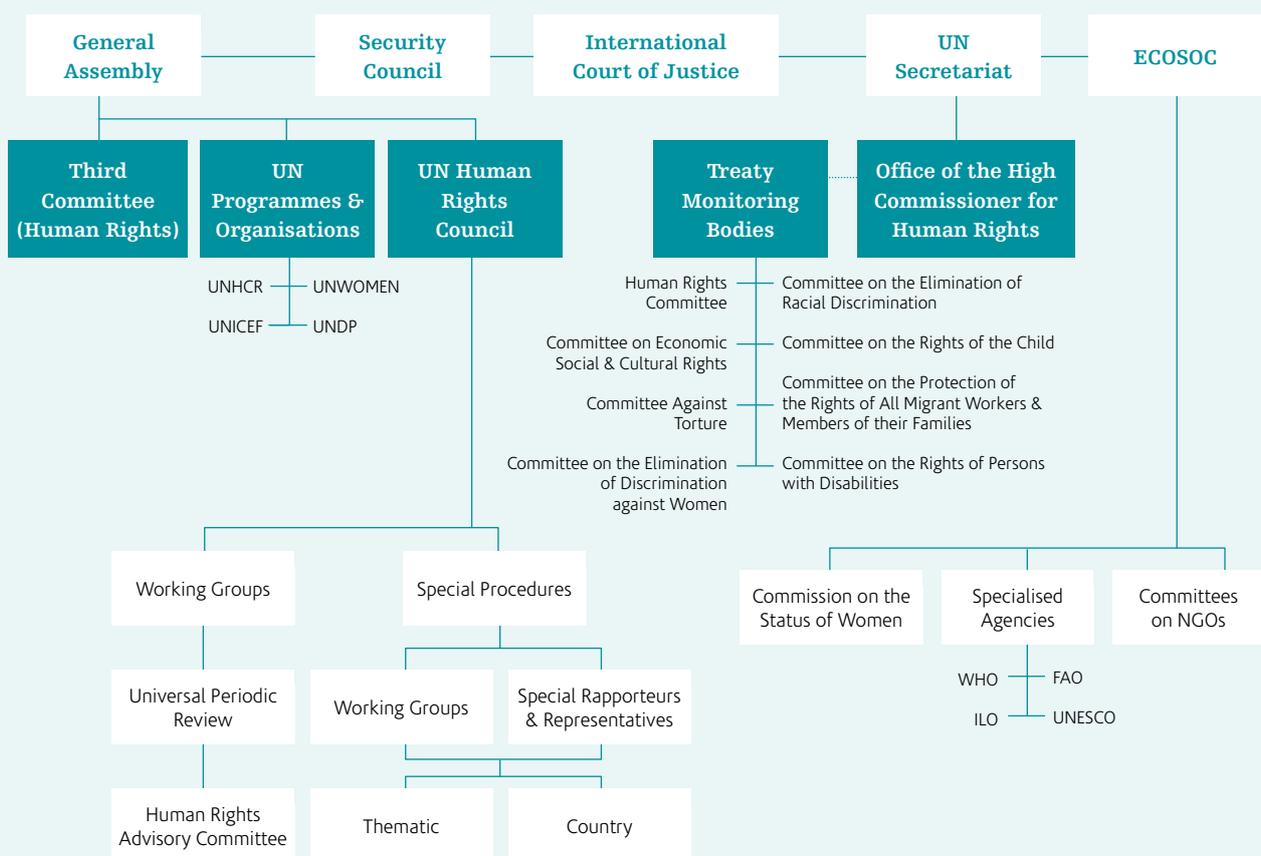
States approach ratification differently. Some ratify with the intention of working towards implementing the objectives and standards of the documents. Others ratify only when their laws substantially comply with the

instrument. Where a country cannot bring its domestic legislation into line with all the articles in a particular convention or covenant before ratification, a state can register a unilateral reservation "...whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state".⁹ Countries such as New Zealand, which postpone ratification until their domestic legislation is principally compliant with the treaty in question, tend to seek few reservations.

INTERNATIONAL ACCOUNTABILITY

Once a state has ratified a treaty, it does not have an unfettered discretion in how it goes about giving effect to

FIGURE 1: ELEMENTS OF THE UNITED NATIONS HUMAN RIGHTS FRAMEWORK ¹⁰



9 Vienna Convention on the Law of Treaties, 1969. A reservation cannot be registered against an essential (or non-derogable) provision of a treaty, since this would defeat the purpose of ratifying it in the first place.

10 Ministry of Foreign Affairs and Trade (2008), p 2. The diagram was amended in 2010 to reflect changes to the UN structure since 2008.

the resulting commitments. There are a variety of ways in which the performance of states is monitored.

Reporting standards

A state's treatment of its citizens can be the subject of legitimate enquiry by a UN body. The major way this is done is through the treaty reporting process. Most treaties provide for international review of a country's performance by a United Nations Committee of Experts. The committee's reports provide an indication of how well a country is observing its international obligations. Non-compliance can attract the censure of the United Nations.

Complaints to UN bodies

Some of the treaties are supplemented by optional protocols. These create a mechanism to allow individuals to make complaints directly to the relevant UN body about a breach of the treaty if they have exhausted their domestic remedies. The ICCPR, for example, requires states to ensure that a person has an effective remedy for a violation of the covenant.¹¹ The optional protocol to ICCPR therefore allows individuals to complain directly to the UN Human Rights Committee about the violation of an ICCPR right. In 2008, after lengthy deliberation, a broadly similar complaints procedure in relation to ICESCR was adopted by the General Assembly. The optional protocol to the CAT establishes a process for monitoring places of detention at national and international level. The intention of this is to prevent torture by providing objective assessments and enabling dialogue between visiting experts and states' parties.¹²

Special procedures

There are also 'special procedures' which deal with specific issues or thematic matters. They may be individuals (known as special rapporteurs or special representatives) or a working group of up to five people, and are designed to promote and ensure compliance with human-rights standards.¹³

Universal Periodic Review

In 2007, the United Nations Human Rights Council agreed to a new package of procedures to complement the older reporting mechanisms. The most significant was the introduction of the Universal Periodic Review (UPR) mechanism, which is designed to review the human rights performance of member states in a way that ensures universality of coverage. The UPR is a regular, inclusive process that assesses the human rights situations of individual UN member states. It provides an opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and fulfil their human rights obligations, as well as commit to further improvements. The process involves a state-to-state peer review, based on a dialogue that is intended to be co-operative and constructive.

Civil Society and National Human Rights Institutions

As the process of reporting has developed, provision has been made for a greater role to be taken by civil society organisations (CSOs) and, more recently, NHRIs. They may provide 'shadow' or 'parallel' reports to a treaty body and to the UPR process, and meet with representatives from the relevant committee before or during the course of dialogue sessions. They may also be invited to take part in discussions around particular themes. CSOs and NHRIs can facilitate domestic discussion during the preparation of the state report, influence the 'list of issues' prepared by the committee, advise on what might be included in the concluding observations, and monitor their implementation nationally.¹⁴

Despite the strengths of the UN system, the proliferation of treaties and ratifications without increases in funding means that the system is in need of reform. This would ensure that it is more effective in protecting human rights at the domestic level, and there is greater congruence in the work of the treaty bodies themselves.¹⁵ In 2009, a group of past and present representatives of the treaty bodies issued the 'Dublin Statement' on the strengthening

11 ICCPR, Article 2(3)(a)

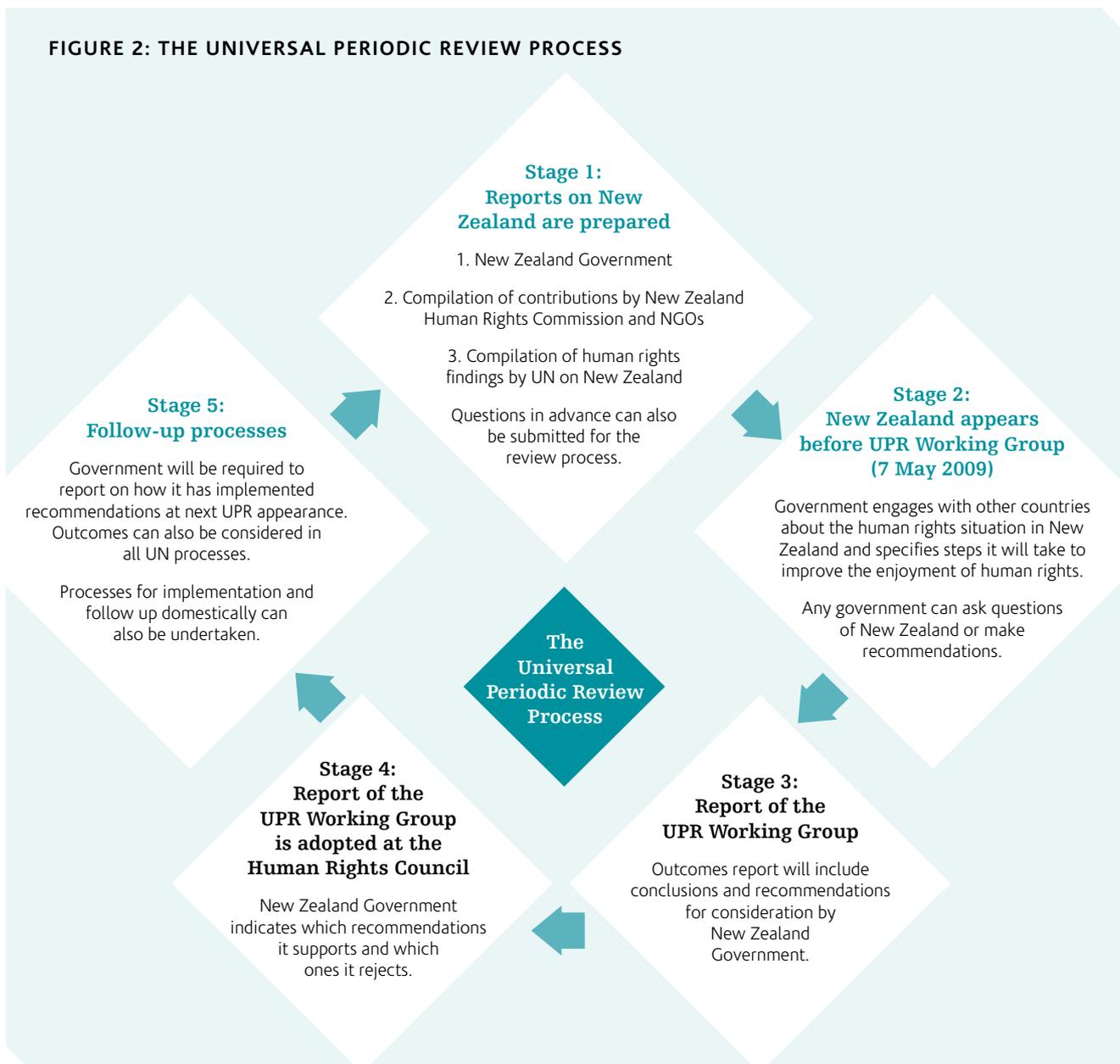
12 Ministry of Foreign Affairs and Trade (2008), p 53

13 Ministry of Foreign Affairs and Trade (2008), p 31

14 Bedgood M (2010), 'The International Law Dimension of Human Rights in New Zealand', in Bell S (ed), *Brookers Human Rights Law* (Wellington: Brookers), para IHRL3.04

15 O'Flaherty M (2010), 'International treaty body reform should protect human rights on the ground', *HRLRC Bulletin*, 51, pp 1–3

FIGURE 2: THE UNIVERSAL PERIODIC REVIEW PROCESS



of the UN human rights treaty-body system.¹⁶ This identifies what the authors consider to be the key elements for reform and engagement of all relevant stakeholders. The current range of treaty body practices and their interaction with NHRIs and civil society, in particular, is considered to be challenging, and to reduce their ability to contribute effectively to the work of the treaty body system.

In the recent 'Marrakech Statement' on the strengthening of relationships between national human rights

institutions and the human rights treaty-body systems, NHRIs recognised that the treaty-body system was under considerable stress. NHRIs also recognised that the multiple challenges confronting treaty bodies impact on NHRIs' ability to interact effectively with them, in a way that strengthens the authority of their reports and increases the ability to use those reports to make a real difference to the promotion and protection of human rights on the ground. The statement makes a number of proposals to treaty bodies, UN member states, the Office

16 The Dublin Statement is accessible online at www.nottingham.ac.uk/hrlc/documents/specialevents/dublinstatement.pdf

of the High Commissioner for Human Rights, and NHRIs themselves. Those recommendations include the holding of treaty-body meetings in UN regional centres outside of New York and Geneva.¹⁷

DOMESTIC ACCOUNTABILITY

Protection by the courts

A country's commitment to its international obligations is also addressed through the domestic court system.

While the role of the courts in upholding the rule of law relating to civil and political rights is well accepted, their role in relation to economic and social rights is less clear. Historically, courts have been unwilling to provide a remedy for aggrieved individuals claiming a violation of their economic and social rights. As such decisions almost inevitably involve the allocation of resources – a function considered to belong more properly to the executive arm of government – it is thought that the courts should not become involved. That is, the issue is not justiciable.

In *Lawson v Housing New Zealand*,¹⁸ the complainant sought judicial review of a government policy to increase the rent of state housing to market levels, claiming that she was unable to pay the rent and, as a consequence, would be forced to leave her home. This amounted to depriving her of affordable shelter and breaching the right to an adequate standard of living and, therefore, Article 1 of ICESCR. Williams J in the High Court held that the matter involved “strong policy considerations and was [therefore] not amenable to judicial review”.

Despite this, economic and social rights are increasingly being viewed as justiciable, and assumptions that courts are ill-equipped to deal with such rights are seen as questionable and not able to withstand robust scrutiny.¹⁹ It is also considered that a legal process for

hearing and adjudicating claims is an inherent part of a state's accountability under ICESCR. The Committee on Economic, Social and Cultural Rights, for example, has explicitly stated:

[W]ithin the limits of the appropriate exercise of their function of judicial review, courts should take account of covenant rights where this is necessary to ensure that the state's conduct is consistent with its obligations under the covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.²⁰

Optional protocols

As noted already, a state may be held accountable through the optional protocol process. While optional protocols exist for a variety of international instruments, the complexities of the social and economic rights, and the potential economic implications if a state is found to have not fulfilled its responsibilities in relation to such rights, hampered the development of an optional protocol for ICESCR. In 2008, however, the UN General Assembly adopted an optional protocol to ICESCR. This deals with progressive realisation and resource limitation by the incorporation of a reasonableness test, which explicitly recognises that states may employ a range of possible policy measures to determine the best use of their resources to meet their obligations.

Policy-making

A state's commitment to its international human rights obligations is also reflected in how it develops policy. The relationship between international obligations and the development of economic and social policy tends to be poorly understood. As a result, social policy is often

17 The Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System (2010) is accessible online at [http://www.nhri.net/2010/Marrakech%20Declaration%20Jun%202010%20\(EN\).pdf](http://www.nhri.net/2010/Marrakech%20Declaration%20Jun%202010%20(EN).pdf)

18 [1997] 2 NZLR 474

19 See, for example, Nolan A, Porter B, and Langford M (2007), 'The justiciability of social and economic rights: an updated appraisal', paper prepared for the Human Rights Consortium, Belfast. Accessible online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944. See also Hanks P, Walker K and Hill G (2009), 'ESC Rights: Legal Opinion on Justiciability of ESC Rights in an Australian Human Rights Act (Dec 2009)', Human Rights Law Resource Centre website. Accessible online at www.hrlrc.org.au/content/topics/esc-rights/esc-rights-legal-opinion-on-justiciability

20 CESR (1998), general comment no. 9, 'The Domestic Application of the Covenant' (19th session, 1998) UN Doc.E/C.12/1998/24, para 14

based solely on needs, rather than on human rights. However, needs and rights are not mutually exclusive, and complement each other in a number of ways.

A human rights approach stresses the moral importance of the interests at stake and emphasises the priority they should be accorded in the allocation of resources, the status of the rights-holder (as an autonomous and empowered holder of entitlements), and the prescriptive (rather than merely aspirational) nature of the duties imposed on the state with respect to realisation.²¹ A human rights approach also prioritises the rights of the most vulnerable groups.

While the development of a human rights approach to social policy will still be subject to limitations of progressive realisation and resource constraints, it emphasises the importance of the relevant right. This can influence its priority in terms of resources, as well as ensure principled decisions about resource allocation and progressive realisation that take account of human rights standards.

The role of civil society

Civil society organisations (CSOs) play a critical role as watchdogs of human rights. The UN has made strong statements about the importance of CSOs, and some are accredited to the UN. Arguably, without the monitoring of CSOs, international standards and process could remain unobserved. The persistent campaigning by CSOs (for example, the initiatives which led to the banning of land mines) has played a large part in the community of nations agreeing to the international code of rights, which has evolved over recent decades.

In New Zealand, CSOs contribute to, and monitor compliance with, international conventions by participating in the preparation of New Zealand's periodic reports to the UN committees. CSOs may also provide independent commentaries on the country reports and monitor the implementation of the concluding observations of the

committee. Similarly, the impact of international human rights in New Zealand is directly related to the vitality of the national civil-society community and their knowledge of human rights law.²² For example, the Human Rights Foundation and Amnesty International New Zealand played a role in promoting the case of Ahmed Zaoui;²³ various women's organisations have had a significant part in the CEDAW reporting process; and Māori groups have a major impact on how New Zealand's compliance with CERD is viewed, as well as on perceptions of the Declaration on the Rights of Indigenous Peoples.

National human rights institutions

NHRIs have an internationally recognised role in advocating for, contributing to the implementation of and monitoring the delivery of human rights within their own jurisdiction. Based on the UN Paris Principles,²⁴ NHRIs are considered to offer higher levels of accessibility than the courts.²⁵

In recent years, NHRIs have developed networks to share information and promote their work. The Office of the UN High Commissioner for Human Rights (UNHCHR) has a national institutions unit designed to foster the establishment and development of NHRIs in a variety of countries, and acts as the national secretariat to the International Co-ordinating Committee (ICC), which grants accreditation. The Chief Commissioner of the New Zealand Human Rights Commission is the current ICC Chair.

NEW ZEALAND'S INTERNATIONAL COMMITMENTS

New Zealand has actively supported the development of international human rights law through the UN. It played a significant role in the deliberations on the declaration in 1948 and, most recently, chaired the Working Party on the Convention on the Rights of Persons with Disabilities.

New Zealand has ratified most of the major treaties with few reservations, and is committed to removing most

21 Geiringer C and Palmer M (2007), 'Human Rights and Social Policy in New Zealand', *Social Policy Journal of New Zealand*, 30, pp 12–41

22 Bedggood M (2010), 'The International Law Dimension of Human Rights in New Zealand', in Bell S (ed), *Brookers Human Rights Law* (Wellington: Brookers), para IHRL1.3

23 See *Zaoui v Attorney-General* (no. 2) [2005] NZSC 38, [2006] 1 NZLR 289

24 The Paris Principles were established in 1991 at a meeting of NHRIs in Paris and later adopted by the UN General Assembly. The principles are broad-ranging, but establish certain fundamental criteria which NHRIs are required to meet to obtain accreditation.

25 Ministry of Foreign Affairs and Trade (2008), p 70

Universal Declaration of Human Rights (UDHR)	1948
Convention relating to the Status of Refugees	1960
Protocol relating to the Status of Refugees	1973
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1972
International Covenant on Civil and Political Rights (ICCPR)	1978
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1978
Convention on the Prevention and Punishment of the Crime of Genocide	1978
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1985
Declaration on the Right to Development	1986
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1989
First Optional Protocol to International Covenant on Civil and Political Rights	1989
Second Optional Protocol to International Covenant on Civil and Political Rights	1990
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	1992
Declaration on the Elimination of Violence Against Women	1993
Convention on the Rights of the Child (UNCROC)	1993
Optional Protocol to CEDAW	2000
Optional Protocol to CAT	2007
Convention on the Reduction of Statelessness	2006
Declaration on the Rights of Indigenous Peoples (UNDRIP)	2007
Convention on the Rights of Persons with Disabilities (CRPD)	2008

of those that remain. The major international treaties to which New Zealand is a party (together with the year of ratification) are listed above, along with some of the most important declarations and the year in which they were adopted by the UN General Assembly:

New Zealand has reservations against articles in the following treaties:

- ICESCR: Article 8 on trade unions. The reservation on 10(2) relating to parental leave was withdrawn in 2003.
- ICCPR: Articles 10(2)(b) and 10(3) on the separation of

juveniles and adults in prisons, 14(6) on compensation for people pardoned for an offence, 20 on the need for further legislation on national and racial hatred, 22 on trade unions and the declaration²⁶ under Article 41.

- CAT: Article 14 on compensation to torture victims; declaration under Articles 21 and 22
- UNCROC: general reservation²⁷ and Articles 32(2), on minimum age of employment, and 37(c), on separation of children and adults in detention; general declaration.

The reservation on Article 11(2)(b) in CEDAW was

26 A declaration sets out a state's intentions about how it intends to go about applying the provisions of a treaty – for example, in relation to territories under its control.

27 This reservation reserves the right of the Government to provide different benefits and other protections in the convention “according to the nature of their authority to be in New Zealand”.

withdrawn in 2003. The reservation against the recruitment or service of women in armed combat or situations of violence was withdrawn in relation to New Zealand in 2008, although it remains in place for Niue and Tokelau.

New Zealand has also been a strong supporter of the ILO and has ratified the following six of the eight major or 'fundamental' ILO conventions:

- Convention 29 on Forced Labour (1938)
- Convention 98 on the Right to Organise and Collective Bargaining (2003)
- Convention 100 on Equal Remuneration (1983)
- Convention 105 on the Abolition of Forced Labour (1957)
- Convention 111 on Discrimination (Employment and Occupation) (1983)
- Convention 182 on the Worst Forms of Child Labour (1999).

Although New Zealand complies substantially with Convention 87 on Freedom of Association and Protection of the Right to Organise and Convention 138 on the Minimum Age for Admission to Employment,²⁸ it has ratified neither and in its UPR report indicated that it has no intention of doing so. In August 2006, the Government stated that no further decisions have been made concerning Convention 87, but it was continuing to monitor both national and international developments, including ILO jurisprudence, with a view to future ratification. With regard to Convention 138, a proposal is currently being prepared describing possible reforms that might ensure compliance of New Zealand law, practice and policy with the Convention.²⁹

New Zealand has also not ratified ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries.

NEW ZEALAND'S REGIONAL COMMITMENTS

New Zealand has a particular interest and involvement in the promotion and protection of human rights in the Pacific.³⁰ The promotion and protection of human rights are considered to be at the core of stability in the region. While there has been some progress in addressing human rights issues in the Pacific, the protection has been described as "fragile" and efforts to promote human rights as "variable".³¹

The Pacific has not developed a regional human rights instrument. Ratification of human rights instruments is low, with a correspondingly low level of engagement with the treaty bodies. Most of the Pacific states are party to UNCROC and CEDAW. Some are party to the ICCPR, ICESCR and CERD. None, however, is party to the CAT or the Convention on the Rights of All Migrant Workers and their Families (CRMW). Among the reasons given for non-ratification are the demands of the reporting requirements, the conflict between customary practices and human rights, and the limited resources, capability and capacity of the Pacific States generally.³²

Until 2007, Fiji had an accredited NHRI. As a result of events following the coup in 2006, there is now no accredited NHRI in the Pacific, other than those of Australia and New Zealand.

The Asia Pacific Forum, the Office of the UNHCHR, the Pacific Islands Forum (PIF) (as the region's inter-governmental organisation) and the New Zealand Commission have all played a major role in promoting and protecting human rights in the region. In 2007, PIF and the Commission published the first in a series of human rights publications aimed at intensifying regional co-operation as a basis for dialogue among countries of the PIF.

28 See the 'Right to Work' chapter for further information on this issue.

29 ILO Committee on Legal Issues and International Labour Standards: GB.300/LILS/7 (2007), accessible online at www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_084298.pdf

30 Pacific encompasses the 14 members of the Pacific Islands Forum: Australia, New Zealand, Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

31 Liddicoat J (2007), *Pacific Human Rights Issues Series 1: National Human rights institutions – pathways for Pacific States* (Suva and Wellington: Pacific Islands Forum Secretariat and New Zealand Human Rights Commission), p 14

32 Baird N (2009), 'The Universal Periodic Review as a legacy of the Universal Declaration of Human Rights: potential Pacific impact', in Alley R (ed), *Celebrating human rights: sixty years of the Universal Declaration* (Wellington: Human Rights Commission), p 54. See also Ministry of Foreign Affairs and Trade (2008), p 67

The Cook Islands, Niue and Tokelau have a special relationship with New Zealand. All three are part of the realm of New Zealand and their citizens have full rights of New Zealand citizenship. New Zealand also has a high domestic population of people from the Cook Islands, Niue and Tokelau. This population is likely to increase, given that it is probable Pacific states will be disproportionately affected by global warming and climate change. New Zealand's constitutional relationships with the Cook Islands and Niue and its administration of Tokelau will be relevant in the proposed review of New Zealand's constitutional arrangements.

The UPR has created an impetus for Pacific States that may lead to the emergence of a regional approach to engaging both with the UPR itself and with human rights generally. At least four states (Papua New Guinea, Samoa, Nauru and Palau) are actively considering the establishment of an NHRI.

New Zealand context **Kaupapa o Aotearoa**

The strongest commitment a state can make to protecting the human rights of its citizens is to embed them in a constitution, creating a statutory regime to enforce the international standards.³³

Although the New Zealand Bill of Rights Act 1990 (BoRA) affirms New Zealand's commitment to the ICCPR, it is not supreme law. Despite arguments that it has attained a "constitutional status", because of the nature of the rights that it protects, the BoRA³⁴ can still be overridden by Parliament. However, New Zealand's policy of not ratifying a treaty until the necessary laws are in place, and its longstanding commitment to social welfare, has meant that its domestic law generally provides a framework for enforcing the international standards.³⁵

Section 4 of the act deals with the concept of parliamentary sovereignty and makes it clear that the courts cannot override an act of parliament. Since 2001, the Human

Rights Review Tribunal has had the ability to issue a declaration of inconsistency in relation to legislation that is incompatible with the right to freedom from discrimination in section 19 of BoRA under the HRA.³⁶ The first declaration of inconsistency, *Howard v Attorney-General* (No.3), was issued in 2008.

Under section 7, the Attorney-General is required to report to Parliament on any apparent inconsistencies between proposed legislation and the rights in the BoRA. Section 7, therefore, provides a tool for ensuring transparency in the development of legislation. It is discussed further in the chapter on the right to justice.

Some legislation gives an organisation or agency a role in overseeing compliance with the international instruments. The most obvious example is the Human Rights Act, which provides the statutory basis for the Human Rights Commission. The long title of the HRA refers to the role of "better protect[ing] human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights". The functions of the Commission are laid out in more detail in section 5 of the HRA. These include promoting respect, understanding and appreciation of human rights in New Zealand. They also include the ability to report to the Prime Minister on the desirability of legislative or administrative action to ensure better compliance with the standards in the international instruments on human rights, or the desirability of New Zealand becoming bound by any international instrument on human rights. The Commission also has responsibility for promoting human rights generally, including providing education on the role of the treaty bodies and monitoring their recommendations.

New Zealand today **Aotearoa i tēnei rā**

New Zealand has become more active and has engaged internationally over the period since 2004, with cabinet ministers participating in treaty-body processes and

33 Ministry of Foreign Affairs and Trade (2008), p 23

34 Rishworth P, Huscroft G, Optican S and Mahoney R (2003), *The New Zealand Bill of Rights* (Auckland: OUP)

35 Not all of the rights contained in the international Bill of Rights are given explicit domestic legal expression or protection. It does not include property rights or the right to privacy.

36 HRA, section 92]. To date, there have been two findings of inconsistency; *Howard v Attorney-General* (No.3) (2008) 8 HRNZ 378, and *Atkinson v the Ministry of Health* HRRT 33/05, decision no. 01/2010.

fronting country reports such as CEDAW, ICCPR and the UPR. The Commission has become more involved in the treaty reporting process and monitoring the outcomes.

In 2006, the UN General Assembly adopted the UN CRPD.³⁷ The first treaty of the 21st century, the CRPD is designed to ensure people with disabilities can enjoy the same rights as everyone else. Although the Convention does not create any new rights, it reformulates existing rights to reflect the experience of persons with disabilities. New Zealand ratified the CRPD in 2008, following an exercise in which domestic legislation was examined for compliance with the Convention. This led to changes to a wide variety of legislation that contained provisions premised on the assumption that people with certain disabilities were unable to carry out particular statutory roles.

Changes made to the Human Rights Act prior to ratification of the CRPD include:

- amending section 36 (which relates to partnerships) by adding provisions for reasonable accommodation and mitigation of harm
- making similar changes to sections 37, 39 and 41, which relate to professional associations, vocational training bodies and bodies that confer qualifications
- amending section 56 to ensure reasonable accommodation in residential accommodation
- extending section 60 to reasonably accommodate people with disabilities in educational establishments.

New Zealand became a party to the 1961 Convention on the Reduction of Statelessness in 2006, although it has still not ratified the earlier Convention on the Status of Stateless Persons. It was felt that accession to the 1961 convention demonstrated an active commitment to ensuring that statelessness is avoided for people who already have an established link to New Zealand.³⁸

New Zealand ratified the Optional Protocol to the Convention against Torture (OPCAT) in March 2007.

This followed the enactment of the Crimes of Torture Amendment Bill, which made a number of changes to the principal act, including providing for the establishment of certain organisations as National Preventive Mechanisms (NPMs). The Human Rights Commission is the central co-ordinating body. The Office of the Ombudsmen is the NPM with responsibility for prisons, immigration detention, health and disability places of detention, and youth justice facilities. The Children's Commissioner deals with children and young people in youth justice residences. The Independent Police Conduct Authority has responsibility for people held by the police, and the Inspector of Service Penal Establishments monitors custody arrangements of the defence forces.

New Zealand has withdrawn reservations to some treaties as part of an ongoing review process. Following introduction of the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002, the reservations to Article 10(2) of ICESCR and Article 11(2)(b) of CEDAW, relating to paid parental leave, were withdrawn in 2003, as it was considered that New Zealand was able to fulfil its obligations in this respect. The CEDAW reservation relating to employment of women in the armed forces in conflict situations was removed in 2007, following the repeal of section 33 of the HRA. The Government has also recently indicated that it is working towards amending regulations on detention, to permit the withdrawal of reservations to Article 10(2)(b) and (3) of ICCPR.³⁹

The Optional Protocol to ICESCR was adopted by the UN General Assembly in 2008. While New Zealand engaged constructively in the negotiation of the optional protocol, it has not agreed to ratification, although it has indicated it may consider reviewing this position – along with its position on the Optional Protocol to CRPD – in due course.⁴⁰

The UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) in September

37 International Convention on the Rights of Persons with Disabilities and its Optional Protocol UNGAOR 61st session, Item 67(b), UNDoc. A/61/611(6/12/06) accessed 4 November 2010 from www.un.org/esa/socdev/enable/rights/convtexte.htm

38 Foreign Affairs, Defence and Trade Committee (2003), *International Treaty Examination of the 1961 Convention on the Reduction of Statelessness* (Wellington: House of Representatives), p 2

39 Consideration of reports submitted by states parties under Article 40 of the covenant: 'Concluding observations of the Human Rights Committee', CCPR/C/NZL/CO/5, para 5

40 National report submitted in accordance with paragraph 15(A) of the annex to Human Rights Council, resolution 5/1, para 2.1

2007. The UNDRIP is aspirational and does not contain binding legal obligations. Although New Zealand was actively involved in negotiations on UNDRIP, it was one of only four countries that voted against the final text. In 2010, the Government pledged its support for UNDRIP.

In terms of reporting commitments, the introduction of the UPR signals a new mechanism for monitoring human rights. Under the UPR mechanism, the human rights situation of all UN member states will be peer-reviewed every four years. The examination by a group of fellow member states is based on reports by states, NGOs and NHRIs and a summary of treaty-body and special-procedures recommendations to the country concerned. It deals with both advances and challenges in the country under examination. New Zealand submitted its first report in March 2009 and was examined in May 2009. There has also been increasing recognition of the importance of involving civil society and national human rights mechanisms in the reporting process.

Since 2004, there have been a number of communications (individual complaints) to the UN Human Rights Committee alleging breaches of covenant rights by the New Zealand Government. In one case,⁴¹ the committee found (with one member dissenting) that the author's right to an expeditious trial was violated under Article 14, and that measures should be taken to ensure such violations did not recur. In 2010, the committee remained unconvinced that the author had not received reparation for the breach of his rights, while in another⁴² it found that the author's inability to challenge the justification for his preventive detention breached Article 9 (right to approach a court for determination of the lawfulness of the detention period).

Conclusion

Whakamutunga

New Zealand has a good record of ratification of and compliance with its international obligations. It has demonstrated some commitment to considering further constitutional protection of human rights. There has also been strengthened engagement in the treaty-body

reporting process and growing input from civil society. However, New Zealand's human rights obligations are not reflected in a single entrenched constitutional instrument, but simply remain part of the ordinary statutory scheme and the common law. Parliament is able to disregard them and they are therefore much less secure than they should be.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance New Zealand's international human rights commitments:

Constitutional arrangements

Identifying opportunities to give greater effect in New Zealand's constitutional arrangements to the Treaty of Waitangi and human rights protections generally.

Parliament

Strengthening Parliament's human rights responsibilities by the establishment of a Human Rights Select Committee and by tabling in Parliament New Zealand's reports on implementation of human rights covenants and conventions and subsequent treaty-body recommendations as well as those of the Human Rights Commission.

Domestic legislation

Fully incorporating ratified international human rights standards in domestic legislation, policy development and in public-sector professional development and training.

Civil society

Ensuring wider and more active civil-society participation in international human rights mechanisms by advocating for a range of mechanisms, including establishment of a fund to support civil society to more effectively engage with the international treaty processes.

41 EB v New Zealand, United Nations Human Rights Committee, CCPR/C/89/D/1368/2005 (21/06/2007)

42 Dean v New Zealand, United Nations Human Rights Committee, CCPR/C/95/D/1512/2006 (29 March 2009)

