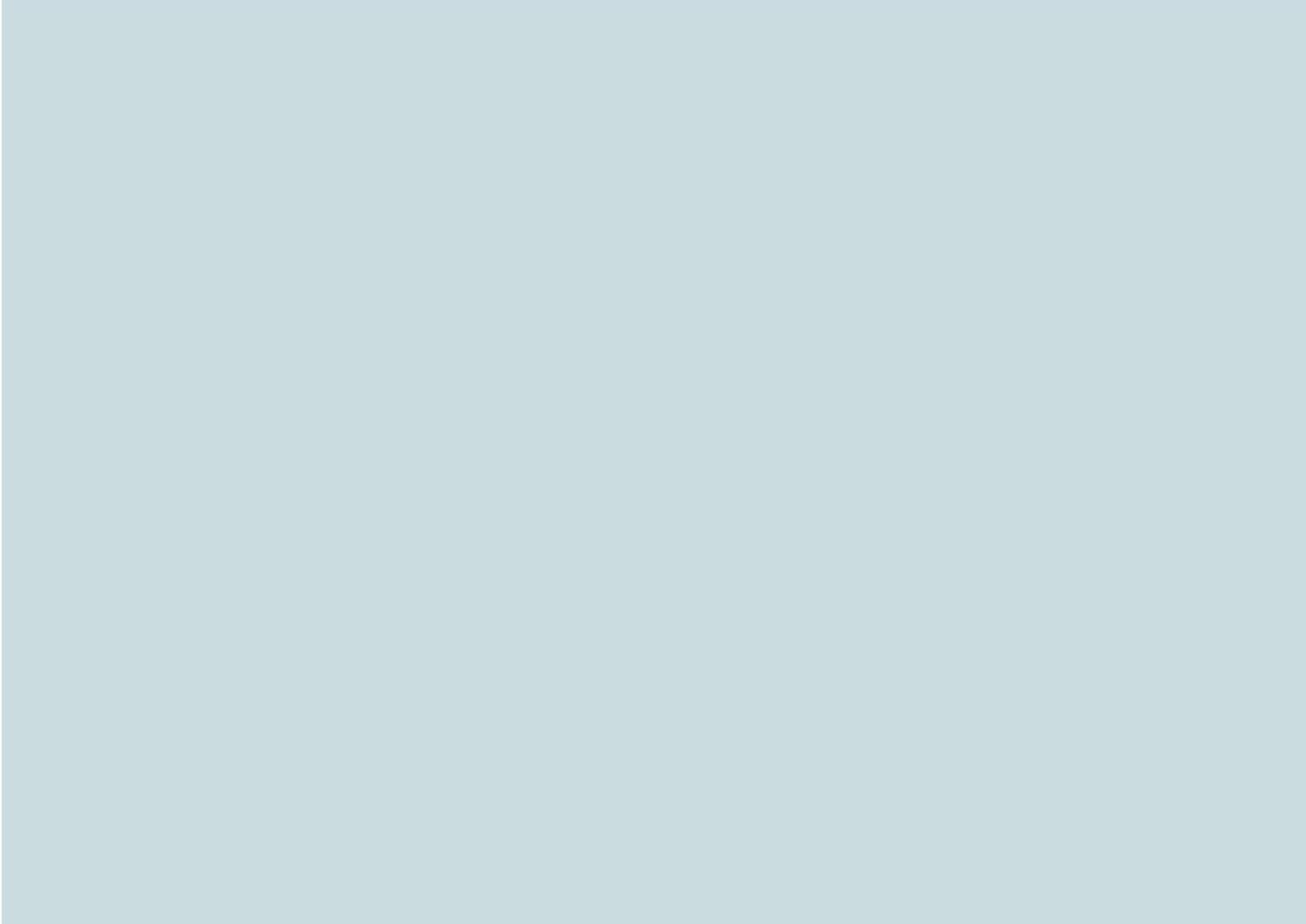




# **Human Rights Toolkit**

## **Additional Documentation**



# Human Rights in the Practice of Pacific Courts: A Toolkit

## Annex A: Introduction to Human Rights

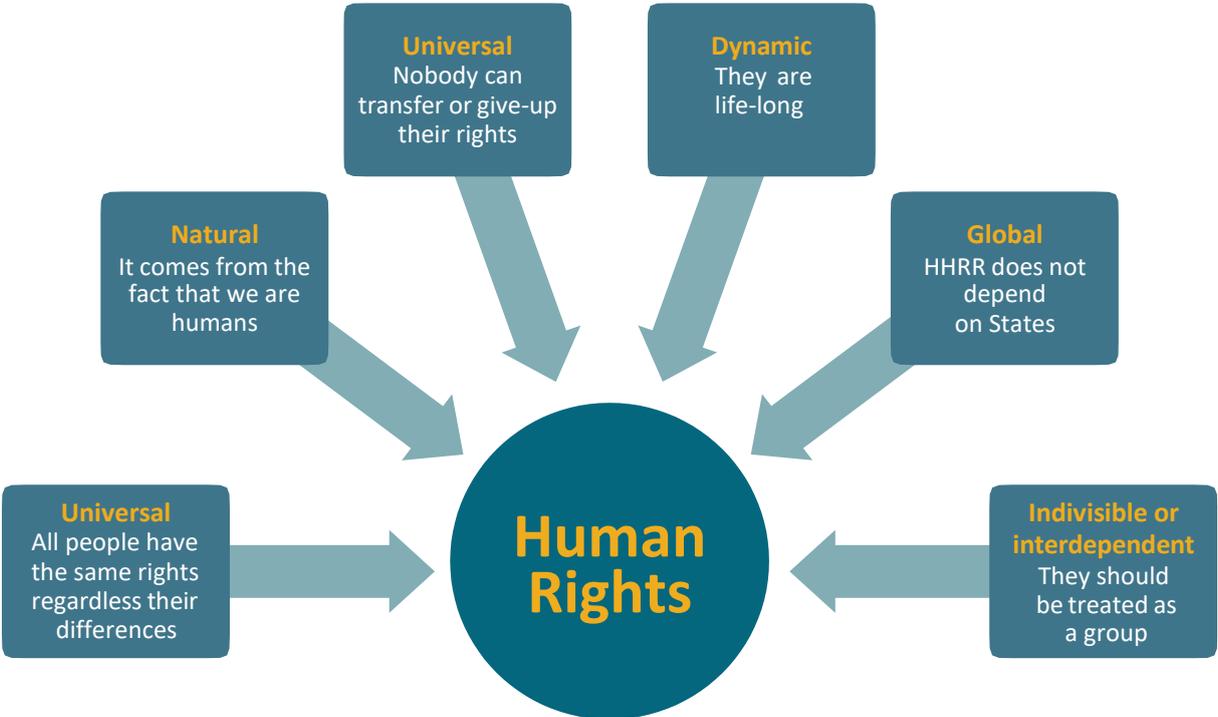
### A.1 What are human rights?

- Human rights are rights which are universal and inherent to all human beings, whatever their nationality, sex, national or ethnic origin, race, religion, language, or any other status. All people are equally entitled to enjoy their human rights without discrimination;
- Human rights include civil, political, economic, social and cultural rights;
- Human rights are all interrelated, interdependent and indivisible, meaning:
  - they cannot be granted or taken away, except in specific situations and according to due process. For example, everyone has the right to liberty but it may be restricted if a person is found guilty of a crime by a court of law; and
  - the enjoyment of one right affects the enjoyment of others and; they must all be respected.

**Why Human Rights are important**

Human rights:

- Reflect the minimum standards necessary for people to live with dignity
- Guarantee life, liberty, equality, and security
- Protect people against abuse by those who are more powerful including governments.
- Guarantee people the means necessary to satisfy their basic needs, such as food, housing, and education.



## A.2 Sources of Human Rights Law

The Universal Declaration of Human Rights adopted in 1948, is generally agreed to be the foundation of international human rights law. It contains the following 30 key human rights.

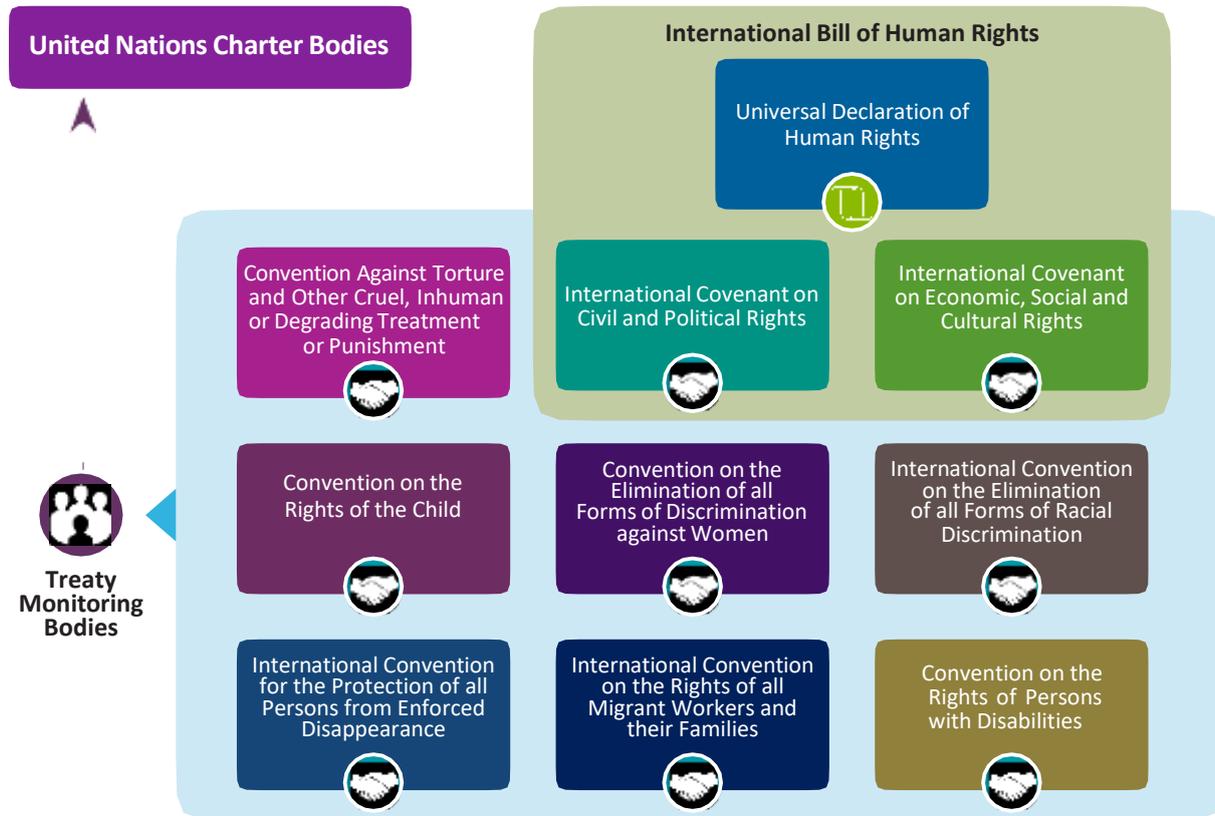
Article 1	Right to Equality
Article 2	Freedom from Discrimination
Article 3	Right to Life, Liberty, Personal Security
Article 4	Freedom from Slavery
Article 5	Freedom from Torture and Degrading Treatment
Article 6	Right to Recognition as a Person before the Law
Article 7	Right to Equality before the Law
Article 8	Right to Remedy by Competent Tribunal
Article 9	Freedom from Arbitrary Arrest and Exile
Article 10	Right to Fair Public Hearing
Article 11	Right to be Considered Innocent until Proven Guilty
Article 12	Freedom from Interference with Privacy, Family, Home and Correspondence
Article 13	Right to Free Movement in and out of the Country
Article 14	Right to Asylum in other Countries from Persecution
Article 15	Right to a Nationality and the Freedom to Change It
Article 16	Right to Marriage and Family
Article 17	Right to Own Property
Article 18	Freedom of Belief and Religion
Article 19	Freedom of Opinion and Information
Article 20	Right of Peaceful Assembly and Association
Article 21	Right to Participate in Government and in Free Elections
Article 22	Right to Social Security
Article 23	Right to Desirable Work and to Join Trade Unions
Article 24	Right to Rest and Leisure
Article 25	Right to Adequate Living Standard
Article 26	Right to Education
Article 27	Right to Participate in the Cultural Life of Community
Article 28	Right to a Social Order that Articulates this Document
Article 29	Community Duties Essential to Free and Full Development
Article 30	Freedom from State or Personal Interference in the above Rights

While not legally binding or enforceable (because it is a Declaration<sup>6</sup>), the *UDHR* has inspired a rich body of legally binding human rights law comprised of both customary international law and international *human rights* treaties.



<sup>6</sup> See key terms below. A Declaration is by definition a non-binding agreement between states.

## Introduction to the United Nations Human Rights Treaty

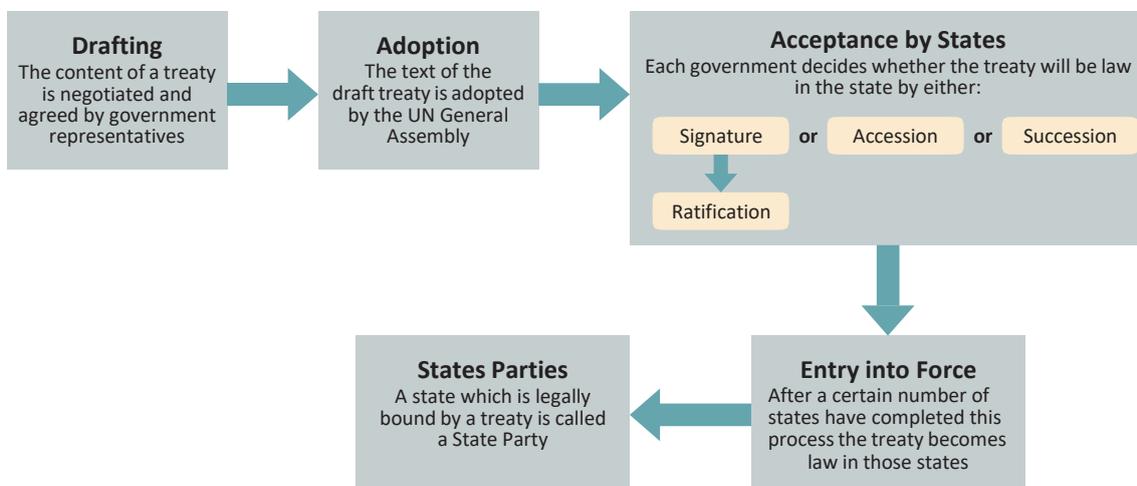


### A.3 How are Treaties Made?

The key standards in each of the core human rights treaties are annexed to this document. Particular attention in this toolkit is paid to the application of standards for fair trial (ICCPR), and human rights standards relating to women, especially violence against women (CEDAW), children (CRoC), and persons with disabilities (CRPD).

#### The Treaty Process

The Vienna Convention on the Law of Treaties 1969 establishes the rules for making treaties



The key standards in each of the core human rights treaties are annexed to this document. Particular attention in this toolkit is paid to the application of standards for fair trial (ICCPR<sup>7</sup>), and human rights standards relating to women, especially violence against women (CEDAW<sup>8</sup>), children (CRoC<sup>9</sup>), and persons with disabilities (CRPD<sup>10</sup>).

#### A.4 Key terms: Human Rights Treaties (most terms defined in Vienna Convention on the Law of Treaties 1969)

**Accede/Accession:** This is the act by which a country that has not previously signed a treaty already in force between other countries becomes a party to that treaty.

**Adopt/adoption:** This is the act by which the proposed text of a treaty is formally accepted by the General Assembly.

**Covenant:** A formal binding agreement between countries. It has the same meaning as ‘treaty’ and ‘convention.’

**Convention:** A formal binding agreement between countries. It has the same meaning as ‘covenant’ and ‘treaty.’

**Declaration:** A non-binding agreement between countries.

**Entry into force:** The point at which treaty becomes legally binding for a country that has ratified or acceded to the treaty.

**Ratify/Ratification:** This is the act by which a country that has signed a treaty agrees to be formally bound by its obligations.

**Reservations:** A formal statement lodged by a country with the United Nations at the time it ratifies or accedes to a treaty stating that it does not accept one or more of the obligations of the treaty.

**Sign/Signature:** This is an act by which a country indicates its intention to be bound by a treaty at some point in the future.

**State Party/State Parties:** A term used to describe a country that has agreed to be bound by a treaty (that is, the country has ratified or acceded to the treaty).

**Treaty:** A formal binding agreement between countries. It has the same meaning as ‘covenant’ and ‘convention.’

#### A.5 Pacific Ratification of Human Rights Treaties

All PICS have ratified the CRoC, all but two have ratified CEDAW and ten have already ratified the CRPD. However, ratification of so-called first and second generation core human rights treaties, (relating to civil and political, and social, economic and cultural rights, including the ICCPR, ICESCR<sup>11</sup> and CAT<sup>12</sup>), remains relatively low in the Pacific compared to other regions. See the chart on the following page.

<sup>7</sup> International Covenant on Civil and Political Rights.

<sup>8</sup> Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>9</sup> Convention on the Rights of the Child.

<sup>10</sup> Convention on the Rights of Persons with Disabilities.

<sup>11</sup> International Covenant on Economic, Social and Cultural Rights.

<sup>12</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.



### A.5.1 Pacific Island Table of Treaty Ratification as of May 2016<sup>13</sup>

Office of the United Nations High Commissioner for Human Rights-Regional Office for the Pacific

	Australia	Cook Islands	Fiji	Kiribati	Marshall Islands	Micronesia	Nauru	New Zealand
ICESCR	R 10/12/75							R 28/12/78
ICCPR	R 13/08/80						S 12/11/01	R 28/12/78
ICERD	R 30/09/75		R 11/01/73				S 12/11/01	R 22/11/72
CEDAW	R 28/07/83	A 11/08/06	A 28/08/95	A 17/03/04	A 2/03/06	A 01/09/04	A 23/06/11	R 10/01/85
CAT	R 08/08/89		R 14/3/16			S 15/09/15	R 26/09/12	R 10/12/89
CRC	R 17/12/90	A 06/06/97	R 13/08/93	A 11/12/95	R 04/10/93	A 05/05/93	A 27/07/94	R 06/04/93
ICMW								
CRPD	R 17/07/08	A 08/05/09	S 02/06/10	A 27/9/13	A 17/03/15	S 23/09/11	A 27/06/12	R 25/09/08
CPED								
ICCPR-OP1	A 25/09/91						S 12/11/01	A 26/05/89
ICCPR-OP2	A 02/10/90							R 22/02/90
OP-ICESCR								
OP-CAT	S 19/05/09						A 24/01/13	R 14/03/07
OP-CEDAW	A 04/12/08	A 27/11/07						R 07/09/00
OP-CRC-IC								
OP-CRC-AC	R 26/09/06		S 16/09/05	A 16/09/15		R 26/10/15	S 08/09/00	R 12/11/01
OP-CRC-SC	R 08/01/07		S 16/09/05	A 16/09/15		R 23/04/12	S 08/09/00	R 20/09/11
OP-CRPD	A 21/08/09	A 08/05/09	S 02/06/10					

	Niue	Palau	Papua New Guinea	Samoa	Solomon Island	Tonga	Tuvalu	Vanuatu
ICESCR	R 28/12/78	S 20/09/11	A 21/07/08		R 17/03/82			
ICCPR	R 28/12/78	S 20/09/11	A 21/07/08	A 15/02/08				R 21/11/08
ICERD	R 22/11/72	S 20/09/11	A 27/01/82		R 17/03/82	A 16/02/72		
CEDAW	A 10/01/85	S 20/09/11	A 12/01/95	A 25/09/92	A 06/05/02		A 06/10/99	A 08/09/95
CAT		S 20/09/11						A 12/07/11
CRC	A 20/12/95	A 04/08/95	R 02/03/93	R 29/11/94	A 10/04/95	A 06/11/95	A 22/09/95	R 07/07/93
ICMW		S 20/09/11						
CRPD		R/11/06/13	R/26/09/13	S 24/09/14	S 23/09/08	S 15/11/07	A/18/12/13	R 23/10/08
CPED		S 20/09/11		R 27/11/12				S 06/02/07
ICCPR-OP1								
ICCPR-OP2								
OP-ICESCR					S 24/09/09			
OP-CAT								
OP-CEDAW					A 06/05/02			A 17/05/07
OP-CRC-IC				A 29/04/16				
OP-CRC-AC				A 17/05/16	S 24/09/09			R 26/09/07
OP-CRC-SC				A 29/04/16	S 24/09/09			R 17/05/07
OP-CRPD		A 11/06/13			S 24/09/09			

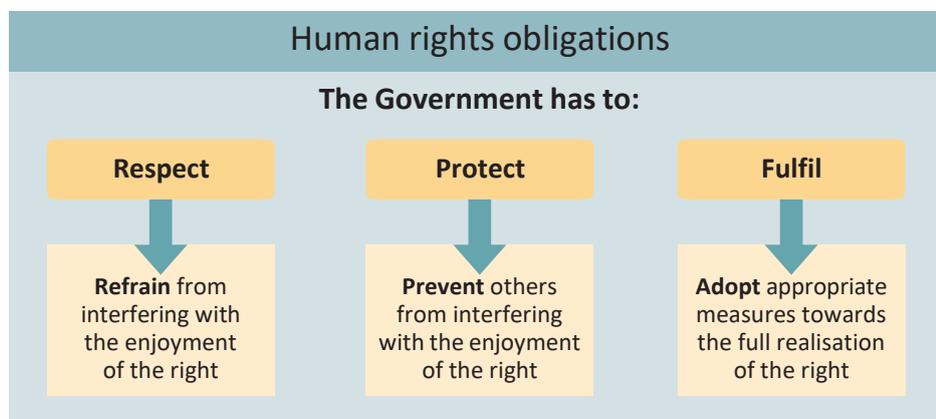
<sup>13</sup> Reproduced from 'Human Rights in the Pacific: A Situational Analysis' Pacific Community/OHCHR (2016), p4.



- **International Covenant on Civil and Political Rights (ICCPR)** (entered into force 1966);
- **International Covenant on Economic, Social and Cultural Rights (ICESCR)**, (entered into force 1966) (Together with ICCPR constitutes The International Bill of Human Rights);
- **Convention on the Elimination of All Forms of Racial Discrimination (ICERD)** (adopted in 1965 and entered into force in 1969);
- **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** (entered into force in 1981);
- **United Nations Convention Against Torture (CAT)** (adopted in 1984 and entered into force in 1987);
- **Convention on the Rights of the Child (CRC)** (adopted in 1989 and entered into force in 1990);
- **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)** (adopted in 1990 and entered into force in 2003);
- **Convention on the Rights of People with Disabilities (CRPD)** (entered into force on 3 May 2008);
- **International Convention for the Protection of All People from Enforced Disappearance** (adopted in 2006 and entered into force in 2010).
- OP1 Optional Protocol to the International Covenant on Civil and Political Rights;
- OP2-DP Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the Abolition of the Death Penalty;
- OP-ICESCR Optional Protocol to the **International Covenant on Economic, Social and Cultural Rights**;
- OP-CAT Optional Protocol to the Convention against Torture;
- OP-CEDAW Optional Protocol to the **Convention on the Elimination of All Forms of Discrimination Against Women**;
- P-CRC IC Optional Protocol to the Convention on the Rights of the Child on a communications procedure;
- OP-CRC AC Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;
- OP-CRC SC Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
- OP-CRPD Optional Protocol to the Convention on the Rights of Persons with Disabilities.

### A.6 Effect of Ratification in International Law

Through ratifying international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. This is why national courts have such an important role in protecting human rights.



Signature of a treaty alone does not impose on the State obligations under the treaty. Through ratification, States become parties to international treaties, and then assume obligations and duties under international law to respect, protect and fulfil human rights.

Courts, an independent branch of the state, are therefore ‘duty-bearers’ responsible for respecting, protecting and fulfilling human rights, in accordance with the law. This is done through court decisions and court processes, but also through providing accessible justice to everyone in the community.

Courts also play a crucial ‘watchdog’ or review role in ensuring that the other two branches of the state, the Executive and the Legislature are also meeting their obligations to respect, protect and fulfil human rights. Courts do this by ruling on the lawfulness of acts of the Executive that may breach human rights, and ensuring that the laws passed by the legislature are consistent with human rights protected by law. Some courts have declaratory powers to strike out laws in whole or in part if they are inconsistent with human rights. All courts are responsible for interpreting laws as consistently as possible with human rights standards (as discussed further below).

## A.7 Treaty Bodies, Monitoring and Reporting

All of the core human rights treaties (except for the International Convention for the Protection of All Persons from Forced Disappearance) have treaty bodies to monitor state party implementation of each treaty.

State parties must submit an initial, and then, periodic, reports every two to five years (depending on the treaty) on the country’s progress on implementing rights contained in the treaties. These reports are examined by the relevant treaty body, which can make comments or issue recommendations in the form of Concluding Observations, in response to any human rights concerns that they examine or find.

Aside from the treaties, there are also Special Procedures established under the Human Rights Council, (either individual Special Rapporteurs, Representatives, Independent Experts or working groups), who hold a mandate to examine, monitor, advise and publicly report on the human rights situations in a specific country, or on a specific theme. Special Procedures may respond to individual complaints, conduct studies, provide advice at the country level, and engage in the promotion of any human rights issue within their mandate.



In the Pacific, Vanuatu, Nauru, Marshall Islands, Palau and Papua New Guinea have all issued standing invitations to Special Procedures, meaning that they are welcome any time. For example, the UN Special Rapporteur on Torture visited Papua New Guinea in 2010 and made several recommendations which include that PNG ratify the Torture Convention, include a crime of torture in its penal code and establish an accessible and effective complaints mechanism for members of the public who allege mistreatment.

Another human rights monitoring mechanism is the **Universal Periodic Review (UPR)**: a cooperative mechanism of The Human Rights Council which assesses the human rights situations of all 192 UN Member States on a 4-year rotation basis. The UPR does not depend on state consent but states are encouraged to engage with the interactive dialogue process to tell their ‘human rights story’ and to accept the recommendations of the UPR (see <https://www.upr-info.org/en/upr-process/what-is-it> for further information). It is commendable that all PICs have actively engaged in both cycles of the UPR held to date.

## A.8 Effect of Ratification in Domestic Law

State constitutions usually clarify whether ratification of a treaty has the effect of automatically incorporating its articles into the country's domestic legal system (as in 'monist' states), or whether domestic legislation is first required before effect can be given to the articles of the treaty (as in 'dualist' states).

All PICs that participate in the PJSI (except for the Marshall Islands) are based on British-style legal systems, which are generally dualist. This means that before the terms of a treaty can be directly applied by courts, they must first be supported by domestic legislation to give them domestic legal effect.

However, the absence of domestic legislation does not mean that courts can simply ignore ratified treaties. Rather, often constitutions require or explicitly allow for the content of treaties to be considered, such as is provided for in the Constitutions of Fiji, Tuvalu, and Papua New Guinea. Yet even if the country has not ratified the convention and there is no explicit constitutional provision, it is still possible for courts to consider human rights treaties, at least to resolve ambiguity or fill a gap in interpreting domestic law.<sup>14</sup> Alternatively, common law precedent or customary international law may require the court to consider or give effect to the standard articulated in the treaty.

*"Even though Samoa is not a signatory or party to The Hague Convention of Civil Aspects of International Child Abduction of 1980, the court must have regard to the principle and philosophy of the Convention in applying common law principles to the case ...and...as a tool to guide and aid the court, it could use the Conventions."*

Chief Justice of Samoa [1997] WSSC 2.

### A.8.1 Monist systems: Direct application

The treaty articles can be directly applied and used as the legal standard or test to be met. Any law or part of law inconsistent with the treaty standard can be:

1. Struck out in its entirety;
2. Struck out in part, to the extent that it is inconsistent with the treaty standard; and
3. Retained but interpreted consistently with treaty standard.

### A.8.2 Use in Dualist Systems: Indirect Application

Dualist systems are a little more complicated because enacting domestic legislation is required to make the treaty standard directly applicable. However, human rights treaty standards can still nearly always be used but to different degrees, depending on the legal 'set up' of each country, as shown below.

There are at least six ways in which a court can use international conventions in dualist systems:

1. As a precedent—much as if it were the ruling in an earlier case—helping the court to interpret and apply the common law, Constitutional law or statutory law;
2. As an interpretive aid when there is ambiguity in a national law;
3. To fill a gap or omission in a national law;
4. As an authority for making changes in the common law;
5. As an authority for courts to make declarations that statutes or custom containing provisions or norms that conflict with the convention, no longer have effect; and
6. In limited circumstances, (such as where no other law applies), courts can apply Conventions although they were domestic laws.<sup>15</sup>

<sup>14</sup> E.g. As in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* [1995] HCA 20.

<sup>15</sup> For example, in *Joli v. Joli* [2003] VUSC 63, (Vanuatu), the case involved the divorce of two French foreign nationals to which no law of custom or any Vanuatu statute or common law rule applied. The judge decided not to apply the 1882 British statute, which discriminates against women, and instead applied CEDAW directly, informing the court's decision to divide the couple's marital property equally.

### A.8.3 Domestication of Human Rights Treaties: The Solomon Islands

Solomon Islands is a dualist state, its 1978 Constitution does not make provision for automatic incorporation of international law into domestic law. These two cases demonstrate how Court can in practice use human rights treaties even when they have not been given specific effect in domestic law.

In *Kelly v Regina* the Court of Appeal considered the application of the Convention on the Rights of the Child (CRC) in an appeal from a conviction and sentence to life imprisonment of a 14-year-old convicted of murder. While the Appeal Court stated that international treaties and conventions relating to the treatment of children “may provide interpretive assistance in applying local law” it restricted this to situations where there was ambiguity in the domestic law. However, on appeal the High Court considered the provisions of the CRC, noting:

“[T]he guidelines set out in the Convention on the Rights of the Child regarding how young persons’ ought to be treated. That the best interests of the child should be the central concern in any sentencing process and that care and rehabilitation should be the main focus of any order of the courts on conviction.”

In *Regina v Gua*, the High Court was asked to rule on whether, as a matter of law, a man could be found guilty of raping his wife. In finding that he could, (contrary to the existing common law rule), the Court relied on the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), referring to Articles 15 and 16 of CEDAW as reasons for the decision and holding that:

“[I]n this modern time, marriage is now regarded as a partnership of equals and this principle of equality has been reflected, not only in international conventions to which Solomon Islands is a party, but also in the entrenched provisions of the Constitution.”

## Annex B: Templates and Tools For Developing Human Rights Strategy/Action Plan

### B.1 Example of Template: Development of One Goal

Goal	Current	Actions	Indicator	Target	Time	Resources	Who
More poor women use family courts to claim their rights.	<p>Cite (or generate) evidence few poor women using family courts</p> <p>Cite (or generate) evidence poor women deterred from using family court due to application fee.</p>	<p><b>Main Action:</b> Create fee waiver process for financial hardship</p> <p><i>Break down of further subsidiary actions needed to support main action:</i></p> <ul style="list-style-type: none"> <li>collect data showing evidence of low use/ deterrence of poor women from using family court;</li> <li>assess if any laws/ regulations would need to be changed, obtain national poverty data to create financial eligibility criteria;</li> <li>develop policy and SOP for court staff on administering waiver process;</li> <li>develop and disseminate public information materials publicizing the policy change.</li> </ul>	% of women family law applicants below income threshold to receive fee waiver at time of application	80%	>1 year	<p>Staff time</p> <p>\$x court staff training</p> <p>\$x promotion policy (poster, pamphlet, TV ad)</p> <p>\$x fee waiver application form</p> <p>administration staff time</p>	<p>* Civil Court staff;</p> <p>* Court services Dept;</p> <p>* Communication staff.</p>

## B.2 Example of Priority Area/Possible Indicators for Implementing Human Rights Standards re Children

Substantive Justice Standards Normative	Procedural Justice Standards Including Access	Access to Justice	Accountability and Transparency
No. legally trained/ lay judges trained in international human rights standards relating to children, including juvenile justice	No. court staff trained in helping children in court	% criminal cases where child suspect was legally represented	Age-disaggregated data kept for across all case types concerning children? (criminal (Y/N), family (Y/N), other civil (Y/N))
No. cases involving child party where CRC or constitutional human rights standards referred to/discussed/applied in judgment	% criminal cases before the court involving child, where child had been detained by police	% criminal cases where child suspect received legal aid representation (state funded/Bar pro bono/NGO)	Annual Report includes data (Y/N) and trend analysis section (Y/N) on cases involving children
No. cases where 'best interests of the child' considered and applied as 'primary consideration'	Of those children detained, % brought before court within 24 hours of detention? % released by the court?	Existence of court fee waiver process (Y/N)	% cases involving children published on PaCLII
Existence of child-specific criminal law standards? (Y/N)	% cases involving children where names were suppressed in court records	% cases involving children when court application fee waived	
Age of Criminal Responsibility 12+ (Y/N)	% cases involving children where hearings held in closed court		
% criminal cases involving child aged between 10-14 where judge considers and finds child capable of understanding wrongdoing	% cases involving children where court room formalities were modified to create less intimidating environment		
Prohibition of death penalty or life imprisonment of children (Y/N)	% cases involving child suspect when judge proactively inquired regarding treatment of child		
	% cases involving child party where judge sought views of the child		

For templates and guidance in relation to developing an action plan regarding family and gender-based violence, see Gender and Family Violence Toolkit Annex A 'Court Family Violence Self-Assessment Tool' and Annex B 'Court Family Violence Plan Template'.

## Annex C: Quick Reference Guides Annexes

### C.1 Procedural Justice Definitions

- **Natural Justice:** ‘common law’ rule against bias and the right to a fair trial;
- **Procedural Justice = Due Process:** General duty to act fairly; and
- **Fair Trial Standards:** Initially developed mainly to guarantee fairness of criminal law cases, most are also applicable to civil (including family) law cases too.

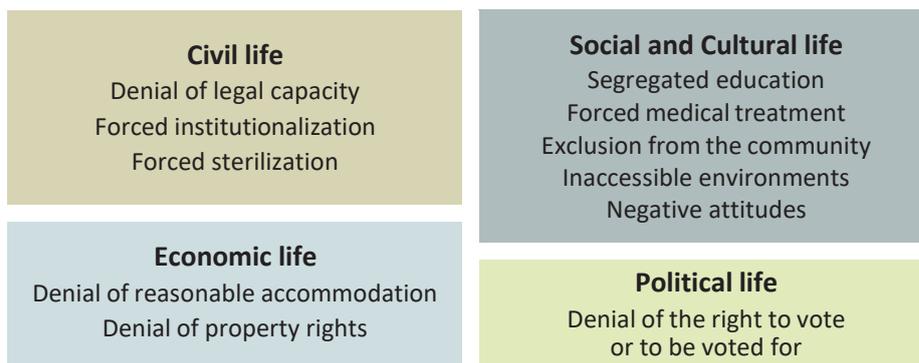
### C.2 Regional Support for Gender Equality and Women’s Human Rights

- The *Pacific Gender Equality Leaders Declaration* (2012),<sup>16</sup> renewing the commitment of Pacific leaders to lift the status of women and empower them in economic, political and social life;
- The *Denarau Declaration on Human Rights and Good Governance* (2015),<sup>17</sup> specifically recognising the standing of CEDAW and urging parliamentarians and governments to ‘to act boldly to ensure that women’s human rights are realised through laws, policies, social and community norms and values that reject all forms of discrimination.’; and
- The *Pacific Island Judges Declaration on Gender Equality* (1997), at which: ‘Judges recognised that many opportunities exist for judges to draw on CEDAW and CRC and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, common law and customary law. **No law, custom, tradition, culture or religious consideration should be invoked to excuse discrimination against women.**’<sup>18</sup> (Emphasis added).

### C.3 Optional Protocol to CRPD (Pacific parties limited to Palau, Cook Islands and Australia)

- Creates an individual complaints mechanism;
- Individual complaints must meet admissibility criteria, including exhaustion of domestic remedies;
- Committee of experts receives arguments and submission from complainant and state party, then makes decision re admissibility and substance of complaint; and
- Decisions not directly enforceable but highly persuasive/pressure for state party to comply.

### C.4 Types of Rights under CRDP



<sup>16</sup> Full policy is available at <http://www.forumsec.org/pages.cfm/newsroom/press-statements/2013/2012/forum-leaders-gender-equality-declarationcelebrated.html>. [Accessed:29/12/2016] <http://rrrt.spc.int/publications-media/publications/item/599-denarau-2015-declaration-on-human-rights-and-good-governance>.

<sup>17</sup> <http://rrrt.spc.int/publications-media/publications/item/599-denarau-2015-declaration-on-human-rights-and-good-governance>

<sup>18</sup> Pacific Human Rights Law Digest, Volume 1; 2005; p.10-11. <http://www.spc.int/rrrt/publications-media/publications/item/63-pacific-human-rights-law-digestvol-1>.

## Annex D: Relevant Case Law All Areas/Themes

### D.1 Case Law Relating to Fair Trial Standards, Detention, Police Brutality and Death Penalty

*In Re Application of Enforcement of Human Rights, in Re Jacob Okimbari* [2013] PGNC 166 (Papua New Guinea): Plaintiff was accused of bank robbery. At the time he was arrested, he was told to lie on the floor, was shot in both legs by police, transferred unconscious to hospital, discharged against advice of medics and taken back to the police station where he was beaten until he confessed. The Court found the plaintiff was denied full protection of the law, subjected to inhumane treatment, denied the right of detained persons to contact family members and a lawyer, and the right to be treated with humanity and respect. The plaintiff was awarded constitutional remedies of reasonable and exemplary damages.

*Lome v Sele* [2017] PGNC 184 (Papua New Guinea). An off duty police officer assaulted a person. The victim alleged that his constitution rights to protection of the law and protection against inhuman treatment, had been breached. The court rejected the State's submission that the state was not vicariously liability as the police officer was acting beyond the scope of his duty and also not on duty.

*In Re Application of Enforcement of Human Rights, in Re Namson Lamaning* [2013] [2013] PGNC 165 (Papua New Guinea): Plaintiff was accused of robbery. On his arrest he was assaulted, denied medical treatment, denied access to a lawyer, detained without charge and not taken before a court for 10 days. He was detained for a further five months before he was granted bail. Although there was no medical evidence to corroborate the alleged facts, the court determined that on the balance of probabilities the plaintiff's evidence was sufficiently credible. The court awarded the plaintiff constitutional remedies of reasonable and exemplary damages.

*State v Dhamendra* [2016] FJHC 386 (Fiji) The High Court considered whether a magistrate's decision was constitutional to grant an extension of detention beyond the 48 hour limit, applied for by police and granted ex parte. The court considered the Fijian constitutional framework, ICCPR clauses and jurisprudence in several other countries, concluding that the constitution did not permit detention beyond the 48 hour limit merely so that investigations could continue.

*Bau v Bine* [2016] PGNC 137 A prisoner was refused medical treatment on multiple occasions and died six months later in hospital. His family brought a claim of breach of duty of care (negligence) and breach of constitutional human rights. The Court considered relevant constitutional provisions relating to the right to be treated humanely when in custody and upheld both claims for negligence and breach of human rights.

*Re Enforcement of Basic Rights under s. 57 of the Constitution of the Independent State of PNG* [2017] PGNC 266 This proceeding for a human rights inquiry was initiated by the court under s. 57(1) of the constitution. The purpose of the inquiry was to consider the human rights of prisoners sentenced to death in PNG, as while PNG revived the death penalty in 1991, it had never carried it out and many prisoners were held in protracted detention in poor conditions on death row. The court concluded that the constitutional rights of 14 prisoners had been breached due to the delay in the implementation of their sentences and because of the dysfunction of the Advisory Committee on the Power of Mercy (members had not been appointed), meaning that the prisoners had no effective opportunity to invoke their right to the full protection of the law by applying for consideration of the power of mercy. The Court ordered the National Executive Council to facilitate the appointment of members of the Advisory Committee on the Power of Mercy and to ensure staff arrangements were made by 1 January 2018. Failure on the part of the National Executive Council to act accordingly would enliven a stay order on the execution of any prisoner who had been sentenced to death.

## D.2 Cases Involving Children and Application of Convention on the Rights of the Child (CRC) in Pacific Jurisdictions

### D.2.1 Criminal Law and Sentencing Decisions Involving Children

*State v K.R.A.K [2013] FJHC 339* (Fiji) ‘Generally, when a juvenile is the subject of sentencing, the sentencing court should be mindful that, while the juvenile bears the responsibility for their own actions or offences committed, they are in need of guidance, assistance and protection because of their state of dependency, vulnerability and immaturity.’ In this case, the Court convicted the 10-year-old of manslaughter and imposed a fine and bond on his parents. However, (notably), the CRC Committee has discouraged the imposition of penalties on parents as it may deter parents from playing a positive role in the child’s rehabilitation.

*Kelly v Regina [2006] SBCA 21* <http://www.pacii.org>. (Solomon Islands) The Court of Appeal overturned on appeal a conviction and sentence to life imprisonment of 14-year-old murder convict. The Court referred to CRC and substituted life imprisonment for an eight-year sentence, reduced to four, taking into account the three years the child had already spent in custody. The Court of Appeal then ordered that instead of spending the four remaining years in prison, the defendant could serve out the remainder in the community in the case of a relative or other fit person.

*Fo’oka v Regina [2014] SBCA 10* (Solomon Islands). The court varied the nine-year sentence for manslaughter to allow the last two years to be served extramurally under the supervision of a guardian. The appellant was 17 and a half when he fatally struck his wife in the head with an axe following a dispute.

*Public Prosecutor v Tiobang [2013] VUSC 206* (Vanuatu): A 13-year-old boy sexually assaulted a 5-year-old girl and the court sentenced him to a two year suspended sentence based on condition of good behaviour. Sentencing in cases where children are both the offender and the victim are very difficult due to the need to uphold the rights of both parties. It may have been open to a court on appeal to impose a heavier sentence that included a supervisory aspect to reflect the gravity of the offence.

*State v SS (the Juvenile) [2017] FJMC 128* (Fiji) A child charge with raped was interviewed by police under caution with his father present, but then taken to a reconstructed crime scene, without his father, where he confessed to the rape. The Court found that the confession was not admissible in court as it was considered part of the police interview and the legal requirement that a parent be present had not been met. The Court referred to the Convention on the Rights of the Child (Article 37(a)) and the ICCPR (Article 14(3)(g)).

### D.2.2 Children as Victims of Corporal Punishment

The CRC is clear that all forms of corporal punishment of children by parents or teachers are contrary to international standards, although some Pacific courts have struggled to apply this principle.

*Dakai v The State* (Fiji) [2015] FJHC 129; HAA04.2015 (27 February 2015) (5 PHRLD 38) a parent whipped his 10-year-old son with an extension cord causing serious injuries and was found guilty of assault. The sentence of two years in prison (with parole only after 18 months) was reduced on appeal to one year and 9 months (suspended for three years).

*R v Rose* SILR [1987] 45 Criminal Appeal (Solomon Islands). The original court acquitted a school headmaster who had administered four strokes of the cane to two 10-year-old boys during school assembly. The Court of Appeal found that the punishment was not inherently unlawful but a question of degree, but that the public nature of the punishment and the emotional trauma suffered by the boys rendered it degrading treatment and thus unconstitutional.

*Regina v Ludawane [2010] SBHC 128; HCSI-CRC 233 of 2008* (5 October 2010), in which the so-called common right of parental disciplinary corporal punishment of children was discussed.

### D.2.3 Use of Degrading Punishments on Children

Have also been found to be contrary to law: *Chief Education Officer v Gibbon*, (Fiji) An 11-year-old student was punished for talking in class by having his pants pulled down by an older student in front of the class. The court found against the education department and awarded damages against the state. The decision was upheld on appeal.

### D.2.4 Children as Witnesses/Victims of Crimes

*Kumar v The State*: [2015] FJCA 32; AAU0049.2012 (4 March 2015) (5 PHRLD 36) Appellant tried to argue the conviction was flawed because it was based on uncorroborated evidence of children. The Court found corroboration of child evidence was not necessary and based on outdated stereotypes.

*People of Guam v Mendola*: Offence required evidence of penetration. The Court was willing to infer 'penetration'. Even though no direct evidence was given by the 10-year-old victim, the language that she used when combined with evidence of the examining nurse, supported a reasonable inference of penetration.

### D.2.5 Adoption Cases

Adoption cases, many with inter-country adoption dimensions, seem to come quite often before the courts. The CRC specifically states that in adoption cases the 'best interests of the child' must be the primary consideration (Article 21 CRC). The meaning of this in the context of adoption was considered below:

*Saavedra v Solicitor General* (Tonga). The Court found in an adoption case that the 'best interests of the child' were not confined to material wellbeing and educational advantages but also included love, family support and the wishes of the child.

*re Adoption of BR* (Nauru) The Supreme Court of Nauru (2013) held that the provision of the Nauruan Adoption Law stating that the ethnicity of the adoptive parent and child must match, was upheld as valid, not applying CRC or the CERD (Convention Against Racial Discrimination).

*Sing v Singh* (Fiji) In which the court – while citing the CRC and the provisions of art. 21 – nevertheless made an adoption order contrary to the provisions of the Adoption of Infants Act (by allowing the adoption of a girl by a single non-resident male).

### D.2.6 Custody Cases

*Prakash v. Narayan* (Fiji) [2000] FJHC 145 The case concerned a custody dispute between a divorcing couple. The appellate court held that it could use the CRC to interpret the domestic law, even though it had not been adopted into Fijian domestic law, and cited the High Court of Australia case of *Teoh*, 'If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes ... then that construction should prevail.'<sup>19</sup>

Conversely, *In Tepulolo v. Pou* [2005] TVHC 1 the Court found that local law which gave custody to the father for children over the age of two, was not ambiguous and therefore there was no scope to apply either the CRC or CEDAW despite the local law having a discriminatory effect against the mother, and resulting in largely severing contact with the child, as the father was moving overseas.

<sup>19</sup> *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* [1995] HCA 20.

### D.3 Cases Involving Women and the Application of CEDAW

As noted earlier, Pacific judges (especially those from the country they work in) are uniquely well-placed to translate global human rights standards into meaningful local norms, having had the benefit of being socialised into a legal culture as well as often being members of local indigenous cultures. They are therefore well positioned to decipher how to best harness aspects of local cultural flexibility to give effect to non-discrimination principles reflected in CEDAW. In the words of Zorn:

*The recognition that gender violence is not only wrong but unlawful, presents such a moment for judges in Pacific Islands nations: a moment when it might be up to them to reinterpret or reapply old common law doctrines in new ways, perhaps even to make new common law. CEDAW gives judges both a reason to do so and support for doing it.<sup>20</sup>*

Most cases concerning violence against women continue to be dealt with through local customary justice mechanisms. When women do seek and, despite the heavy pressures to withdraw their cases, persist, in demanding the protection of the state through state courts, it is critical that they reliably receive it, and have positive experiences of the justice system. Aside from providing effective justice to individuals, ensuring reliable and fair processes will also magnify the social effects of judicial decisions including on community norms. Changes to the law, (including through judge-made law), and reliable, fair enforcement of those laws, does over time (although to greater or lesser extents), shape community expectations of behaviour to match what the law will allow them.

#### Study of Sentencing in S-GBV and ‘Culture’ Cases in 7 Pacific Countries

A study by ICAAD of nearly 1000 cases across 7 Pacific countries between 2005-2014 found that gender stereotypes and ‘cultural’ factors, especially the fact of customary reconciliation between the parties, continue to be given heavy mitigation weight in sentencing decisions in domestic violence and sexual assault cases.

This was despite some countries’ laws banning consideration of these factors and many judges citing these provisions, showing how ingrained these factors can be in judicial reasoning. The study found that these gender stereotype and ‘cultural’ mitigation factors resulted in:

- **A reduction in sentences in 60% of domestic violence cases (from an average of 2.48 years to .93 years); and**
- **A reduction in sentences in 40% sexual assault cases (from an average of 8.71 years to 5.19 years).**

The report concluded that the discriminatory nature of gender stereotypes and customary reconciliation means that victims of domestic violence and sexual assault are often being denied equal protection under the law.

The following cases look at how Pacific Court judges are using CEDAW and integrating principles of gender equality in domestic legal systems, and thus contributing to gradual societal change to combat discrimination and violence against women and girls.

#### D.3.1 Sentencing Cases Involving Violence Against Women/Girls

Pacific courts have generally shown greater reluctance to applying principles of gender equality in sentencing (than some other human rights principles), when they involve clashes with customary practices. This was highlighted in a recent study of sentencing decisions in Fiji Courts, which found that heavy weight was placed on customary defences (including reconciliation with the victim), to reduce sentences in cases of sexual and gender-based violence (S-GBV). (See box on page A-15).

While sexual violence is generally thought to be very under-reported in the Pacific (as it is in most other countries), many of the sexual violence cases that make it to the courts concern young children,<sup>21</sup> and

<sup>20</sup> Zorn, J.G ‘Translating and Internalising International Human Rights Law: The Courts of Melanesia Confront Gendered Violence’ in A Biersack, M Jolly & M Macintyre (eds) Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu (ANU Press) 2016, p 243.

<sup>21</sup> Likely due to greater community consensus that sexual abuse of young children (as opposed to adolescent girls or women) is criminal behavior.

typically involve family members or other persons known to the victim. There appears to be increasing willingness of higher courts to correct lower court leniency in sentencing in these cases, also in response to new legislation introduced in some jurisdictions to toughen penalties. For example, PNG enacted the *Sexual Offences and Crimes Against Children Act* (2013), which provides for increased penalties for sexual assault of children, and additional penalties where the perpetrator is related to, or trusted by, the victim.<sup>22</sup>

*Rex v VP* [2020] TOSC 26 (Tonga) The defendant was convicted of rape against his wife, as well as causing serious bodily harm and domestic violence. In convicting the defendant the court stated that: “in Tonga, the *Criminal Offences Act* does not distinguish between rape of a stranger or of a spouse or other relational partner. In short, rape is rape. The essential characteristics are sexual violation without consent, regardless of any relationship between the perpetrator and the victim. The introduction of the *Family Protection Act* in 2014 seeks to reinforce and accentuate that all persons in the Kingdom are entitled to be free and protected from domestic violence in any form. Section 29 expressly provides for additional prosecution under the *Criminal Offences Act* in cases such as the present. The message therefore ought to be clear: in any civilized society, there are no circumstances in which resort to unwanted sexual violence can be justified or tolerated.”

The court then went on to examine relevant authorities regarding sentencing, using five years imprisonment as the starting point for the rape count, adding an additional year for the violence inflicted, and a further year for the breach of trust against his wife, and then subtracting one quarter of 7 years to take account of mitigating factors (first offence, early cooperation in guilty plea and genuine expressions of remorse resulting in the victim forgiving him). The court also sentenced him to an additional two years for the other offences, to be served concurrently, with 21 months of the head sentence conditionally suspended for 2 years.

*Regina v Bonuga* (Solomon Islands) The defendant was convicted of three counts of rape of his adopted daughter when she was 12, 13 and 15-years-old. The court overturned a three-year sentence for each count to be served concurrently and imposed a 10-year sentence for each of the offences to be served concurrently, reflecting the seriousness of the crimes, including the abuse of trust involved.

*State v. Narakavi* [2009] PGNC 109 (Papua New Guinea) a man, was sentenced to five years jail and a compensation payment for sexual touching a 14-year-old girl who was his ‘de facto’ daughter. The Court increased the sentence due to the abuse of trust involved in the offence, as well as referred to the integration of CEDAW into the underlying law of PNG.

*State v. William Patangala* [2006] PGNC 43; N3027. (Papua New Guinea) the defendant who admitted to sexually touching his 14-year-old niece, was sentenced to three years jail, with only the first to be served in prison and the remainder on parole subject to good behaviour. It may have been open to an appeal court to increase this sentence.

*In R v Gua* (Solomon Islands) the court recognised the crime of rape within marriage and increased the sentence in this case from four years to seven years.

*Latu v Rex* (Tonga) the court upheld an appeal against a sentence for rape, reducing the 14-year sentence to eight years, and leaving unchanged the 14 months for 2 additional counts of indecent assault to be served concurrently.

*Vao’omotou v Rex* (Tonga) the Court of Appeal reduced a 16-year manslaughter sentence to 10 years with the last two years suspended. According to the facts stated in the judgment, the victim was the estranged wife of the suspect: they had separated and she had commenced another relationship. The original court accepted the suspect’s defence of provocation (being the victim commencing a new relationship) to murder notwithstanding the defendant stabbed the victim 23 times while she slept.

<sup>22</sup> Sexual Offences and Crimes Against Children Act 2013 (Papua New Guinea).

The manslaughter sentence was then reduced on appeal.

### D.3.2 Other Cases Involving Violence Against Women

*State v. Bechu* [1999] FJMC 3, (Fiji) The defendant admitted that the victim had struggled, said she did not want sex with him and that he had punched her to get her to give in, and raped her. The judge sentenced the defendant to five years imprisonment, emphasising:

*‘Women are your equal and therefore must not be discriminated on the basis of gender. Men should be aware of the provision of ‘Convention on the Elimination of all forms of Discrimination Against Women’ (CEDAW), which our country had ratified in 1981 ... The old school of thoughts, that women were inferior to men; or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society.’*<sup>23</sup> *Keoa v Keoa* [2017] PGNC 263 12 October 2017 (PNG) In this civil case, a former wife sought compensation from her ex-husband for abuse of her constitutional rights due to four years of family violence alleged under affidavit, which had not previously been the subject of criminal or other legal proceedings. The Court found that the abuse had occurred based on the civil law burden of proof and found that the plaintiff’s human rights under Article 36 of the Constitution, relating to torture and ill-treatment, had been breached, and ordered that he pay compensation to the victim.

*Balelala v. State* [2004] FJCA 49 (Fiji) found that no corroboration of a rape victim’s evidence was necessary. The Court relied on both the provision of the Fiji Constitution prohibiting gender discrimination, as well as the provision requiring courts to interpret the constitution with ‘regard to public international law’, thus establishing the basis for also relying on CEDAW.

*State v. S.N.M.* (Fiji) [2011] FJHC 26. The Fiji High Court was asked to issue a restraining order, prohibiting a husband convicted of wife-beating, from approaching his de facto wife. In granting the order, the court referred to the objectives of the Domestic Violence Decree law, which included the aim ‘to implement the Convention on the Elimination of All Forms of Discrimination against Women’. The judge used this as the basis for concluding he was authorised to issue the order.



*Allegations of Sorcery* are another justice concern in some parts of the Pacific, and can motivate very serious crimes, in some cases amounting to violation of the right to life. Victims facing witchcraft allegations are frequently vulnerable individuals who lack protection. The number of women victims is reportedly higher and increasing, and in many cases also involve sexual-GBV.<sup>24</sup> Those few cases involving witchcraft allegations that do come before the courts generally involve male victims and are generally dealt with at local or village court levels.<sup>25</sup> Responses by police to protect individuals at threat of being seriously harmed or killed have been found to be inadequate in some instances, partly because of lack of resources and limited presence, but also because of widespread perceptions that attacks or killings are justified and should remain a community matter. Magistrates report that they find sorcery-related

<sup>23</sup> *State v. Bechu* [1999] FJMC 3, p. 9.

<sup>24</sup> See JP. Taylor & N.G. Araújo ‘Sorcery Talk, Gender Violence and the Law in Vanuatu’ in A Biersack, M Jolly & M Macintyre (eds) *Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu* (ANU) 2016, 197. See also the following two articles highlighting the gendered nature of some sorcery allegations. The Guardian ‘PNG women accused of sorcery saved from murder in remote village’, 23 January 2015 (accessed on 15 Jan 2017 at <https://www.theguardian.com/world/2015/jan/24/png-women-accused-of-sorcery-saved-from-murder-in-remote-village>); and The Guardian ‘Papua New Guinea students share video appearing to show women tortured for ‘witchcraft’’, 23 October 2015, accessed on 15 Jan 2017 at <https://www.theguardian.com/world/2015/oct/23/witchcraft-papua-new-guinea-students-share-video-appearing-show-torture>.

<sup>25</sup> For an excellent analysis of how PNG courts have dealt with the few sorcery cases before it, see Ravunamu Auka, Barbara Gore and Pealiwan Rebecca Koralyo ‘Sorcery- and Witchcraft-Related Killings in Papua New Guinea: The Criminal Justice System Response’, <http://press-files.anu.edu.au/downloads/press/p316611/pdf/13.-Sorcery-and-Witchcraft-Related-Killings-in-Papua-New-Guinea-The-Criminal-Justice-System-Response.pdf>. See also M. Demian ‘Sorcery Cases in Papua New Guinea’s Village Courts’ ANU Press In Brief 2015/27.

cases amongst the most difficult cases to deal with as they are left to improvise in the absence of any clear legal framework to deal with the particular legal and evidential dimensions of sorcery-related crime.<sup>26</sup>

The challenge that witchcraft/sorcery-related cases present to state justice processes reveal a real legal protection gap. Sorcery is a sociological reality for many in the Pacific and an abiding problem that generates strong community fears. For example, according to a national study of the status of women in Vanuatu, 'violence due to sorcery' was of greater concern to women (at 49 per cent) than any other type of violence.<sup>27</sup> As with any effort to change underlying community beliefs or values, combating sorcery-related violence will require a broad-based strategy led by community and religious leaders but well supported by a coordinated approach across the justice system to demonstrate that sorcery-related violence will not be tolerated.

### D.3.3 Cases Involving Discrimination Against Women/Discussion of CEDAW

#### **Womens' right to inherit land/administer property:**

*Awop v. Lapemal* [2007] VUIC 2 (Vanuatu) One of several Vanuatu cases where male disputants have argued that customary law prohibits women from inheriting land. In this case, while the Court made some strong comments, it limited its finding to allowing women to inherit only where no male heirs existed, stopping short of recognising women's right to inherit on the same terms as men.

*Lapemal v Awop* [2016] VUSC 8 July 2016 (Vanuatu) The primary court found in favour of the sole direct (female) descendant to be the custom owner and relevant parties to continue to have rights to use the land subject to the authority of the declared owners. Some original claimants appealed to the Supreme Court making several claims including that the primary court had erred in custom law in allowing a woman, and her family by marriage, hereditary rights to land by succession, which is contrary to the patrilineal custom. The Court considered the relevant provisions in the constitution, case law and relevant clauses of CEDAW and dismissed the appeal, upholding the primary decision, which included an exceptional right of succession of the surviving daughter in the absence of any surviving sons. Notably the court found that customary law must not be in conflict with any written law and considered the constitutional provisions and as well as CEDAW. The provision that the rules of custom shall form the basis of ownership and use of land provided under article 74 of the constitution was to be considered alongside CEDAW and article 5 (equality) of the constitution.

*Noel v Toto* [Case No 18 of 1994 (19 April 1995), (Vanuatu) Referred to the non-discrimination provision in the Constitution as well as Vanuatu's ratification of CEDAW to enforce women's economic rights. The court held that custom used as the basis of ownership of land is subject to the constitutional provision on non-discrimination. The court accordingly ruled that female family members had equal customary rights with regards to land ownership and were entitled to an equal share of income deriving from the land.

*Joli v. Joli* [2003] VUSC 63, (Vanuatu). The Court applied CEDAW directly as though it were domestic law. The case involved the divorce of two French foreign nationals to which no law of custom or any Vanuatu statute or common law rule applied. The judge decided not to apply the 1882 British statute, containing discriminatory provisions against women, and instead applied CEDAW directly, using the principle of gender equality to divide the couple's marital property equally.

*Estate of Chinsami Reddy* [2000] FJHC 134, the Fiji High Court referenced CEDAW as authority to change the discriminatory British common law rule which preferred the appointment of male to female administrators of deceased estates. In this case, the Court changed Fiji's common law, voiding the rule that dis-favoured women. The Court stated:

<sup>26</sup> The colonial era PNG Sorcery Act (1971) was repealed in 2013, and aside from introduction of the death penalty for sorcery related cases in 2013, no legal framework for dealing with such cases exists.

<sup>27</sup> Vanuatu Women's Centre/Vanuatu National Statistics Office, 2011, Vanuatu National Survey on Women's Lives and Family Relationships, Port Vila: Vanuatu Women's Centre, p. 54.

Formerly, males were preferred over females ... Fortunately, the law no longer gives effect to such a negative inference about the ability of women to administer an estate, and with the widespread ratification of international human rights instruments such as the United Nations Convention Against the Elimination of Discrimination Against Women, this last principle is of no persuasive value at all.<sup>28</sup>

### Arranged Marriage:

In several Fijian cases,<sup>29</sup> Indian Fijian women have sought annulment (as opposed to divorce) of arranged marriages on the basis of coercion. The Fijian High Court has consistently granted annulments on the basis that arranged marriages are null and void because they lack the consent of both parties. The Court has found that the custom of arranged marriage common in Indian Fijian families is itself coercive and that no additional evidence of physical violence or threat of violence was necessary.

## D.4 Cases Involving Persons with Disabilities and application of CRPD

### D.4.1 Cases in the Pacific

*The State v George Joshua*: CR 1064 of 2010, (Papua New Guinea). In this case the victim (who alleged rape) was found by the court to have an intellectual disability. On the basis of her oral evidence the court concluded that she was an unreliable witness. The court's consideration of the veracity of the victim's evidence included comments that she had appeared to have been coached in her use of the word 'rape'. As the case rested mainly on her evidence, the suspect was acquitted. The Court concluded that it could not consider the victim's capacity to consent due to her disability because this particular ground had not been put forward by the prosecution at the time the suspect was initially charged. In light of the many complexities of this fact situation, it may have been open to an appeal court to either order a retrial on the issue of consent or to reverse the decision on a question of law arising from the overarching community interest for the courts to provide protection for the human rights of victim.



*Haraksin v Murray Australia Limited* [2013] FAC 217] The Federal Court of Australia found that the private coach company providing public transportation services from Sydney to Canberra had directly discriminated against the applicant by refusing to provide a wheelchair accessible service. The Court rejected the respondent's 'unjustifiable hardship' defence and ordered the respondent to provide wheelchair accessible services between Sydney to Canberra for at least two years (It is not clear why the Court considered it appropriate to place this time limit on the order).

### D.4.2 CRPD Committee

As noted in 6.1.4, the CRPD Committee is mandated to receive and consider individual complaints made by persons from signatory countries where they have exhausted domestic remedies. Here are some examples of complaints considered so far by the Committee.

*Communication No. 12/2013 against Australia*: The complainant, a person with a hearing disability, complained that he would be excluded from jury duty due to refusal to allow sign language interpreters and stenographers to assist deaf jurors in the court and jury deliberations. As the complainant had not been selected for jury duty but was putting forward a hypothetical situation, he had not already actually faced discrimination, and therefore the Committee found it did not have standing to decide the complaint, so no substantive decision was given.

*Communication No. 21/2014 against Austria*: The Complainant, a person with a visual impairment, brought a complaint against the public transport tram service for failing to install digital audio systems

<sup>28</sup> *In the Estate of Chinsami Reddy* [2000] FJHC 134 (22 December 2000) p. 8–9.

<sup>29</sup> *FJN and MRK* [2009] FJHC 94. *LK and JVR* [2009] FJHC 60. *NK and ZMR* [2009] FJHC 95. *PP and RP* [2009] FJHC 72. *RPN v. SPP* [2008] FJHC 166. *TZS and FSB* [2009] FJHC 97. *VDC and VNS* [2009] FJHC 69.

in a new section of the track, as it had already done on other tram services since 2004. The Committee found that the digital audio system was an integral part of the transportation service provided and could have been installed at a limited cost at the time of the construction of the new line. The State party was found to be under an obligation to remedy the lack of accessibility to information for visually impaired passengers to the same as that available for all lines of the tram network and ordered the State to provide compensation to the complainant for his legal costs.

## D.5 Solomon Islands Case Law and Case Study on Application of Human Rights and Customary Law

In most cases where customary practices and human rights have clashed, the Courts have usually prioritised and applied the Constitutional provisions protecting human rights. For example:

- In *Sukutaona v Houanihou*, and *Kelly v Regina*, the courts applied the Convention on the Rights of the Child 'best interests of the child' test, in the former granting custody to the mother (against customary law) and in the latter, relating to the sentencing of a minor;
- In *R v Loumia and Others*: The Court of Appeal upheld a conviction for murder on the basis that the Bill of Rights in the Constitution operated in both private and public fields and that the customary duty to kill in retaliation was inconsistent with s 4 of the Constitution, which protects the right to life;
- In *Remisio Pusi v James Leni and Others*, in obiter, the court relied on the preamble and schedule 3 and commented that constitutional provisions would not necessarily be applied in preference to customary law but that it depends on the circumstances of the case. However subsequent decisions such as *The Minister for Provincial Government v Guadalcanal Provincial Assembly* have challenged this approach and found that the preamble cannot be relied on to found a whole legal principle, especially one in conflict with more specific articles (such as in the Bill of Rights) of the Constitution;
- In *Punitia v Tutuila* (Samoa), the court upheld the decision and increased the damages awarded by the court of first instance against the village fonos for banishing the applicant and her family from the village and damaging their property. The court found that the applicants' constitutional rights had been breached.

### D.5.1 Case Study on Application of Human Rights and Customary Law

**Constitution:** \*The Solomon Islands Constitution recognises customary law as a source of law. Schedule 3 contains the most important provision: “Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.” \*Customary law also emphasized in Constitution preamble, requires Parliament to make laws for applying customary law and take it into account in drafting legislation ( s 75) and paragraph 3.

Yet, Schedule 3(2) also clearly strikes out any customary law that is inconsistent with the Constitution or any legislation. “The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.”

\* This is emphasised also in s 2 of the Constitution, which provides: “This Constitution is the supreme law of Solomon Islands and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.”

\* While the Constitution does not explicitly protect the right to gender equality, it does prohibit discrimination in any law including on the grounds of sex (s 15), (although it may be necessary to also address s 15(5)(d) which could arguably allow discriminatory customary laws, however any doubt or ambiguity should also be read in light of CEDAW).

**Legislation:** Customs Recognition Act 2000 (passed in 2000 but not yet brought into operation)

\* This law further clarifies how constitutional recognition of custom as a source of law is to operate and clarifies it will always be second to ‘the interests of justice’ and other provisions of the constitution. It creates particular requirements before a customary law can be taken into account or relied on by the Court. It requires:

1. That the existence of a customary law must be proven as a matter of fact (i.e. pleaded and proved like any other fact by bringing witnesses etc.). (s 3);
2. Even if ‘proven’, a customary law would not be recognized if, in the opinion of the court, it causes ‘an injustice or is ‘against the public interest’, or is ‘inconsistent with the Constitution’ (s 6) and;
3. Places limits on how customary law can be used in criminal cases (s 7); and
4. Limits application of customary law to certain civil cases concerning: customary land (including inheritance) and sea rights, fishing rights, animal trespass, and matters arising out of customary marriage (marriage, divorce or the right to the custody or guardianship of infants).

### D.6 Cases involving Asylum Seekers, Migrants and Citizenship Issues

Namah v Pato [2016] PGSC 13 (Papua New Guinea). The court had to decide whether the detention of asylum seekers at the relocation centre on Manus Island was contrary to their constitutional rights guaranteed by s. 42 of the PNG constitution. The court also had to decide upon the validity of a constitutional amendment, purporting to create an exception to asylum seekers’ rights to freedom and liberty. The court unanimously held that while the constitutional amendment satisfied the formal requirements for a constitutional amendment, it failed to satisfy the specific considerations that laws seeking to restrict guaranteed rights must specify the public purpose for the restriction, which must be “reasonably justifiable in a democratic society” as required under the constitution. The court found that the detention of the asylum seekers was unconstitutional and unlawful.

**Tomscoll v Mataio** [2016] PNGC 58 The applicant was born in PNG prior to Independence Day but then lost her PNG citizenship when she turned 19 years of age by operation of the constitution due to her dual nationality. She had lived in PNG most of her life and was earlier married to a PNG citizen. Her mother and three children were all PNG citizens. At the age of 40, soon after she was released from prison after serving a sentence for receiving stolen property, the relevant authority directed her to leave the country under the Migration Act. She sought a declaration that she was a PNG citizen and also an injunction to restrain the authority from removing her from PNG. The National Court found that she had lost her PNG citizenship when she turned 19 years old, however held that the applicant was protected under the constitution and that in her circumstances, removing her would be harsh and oppressive, contrary to s. 41 of the constitution, which prohibits any act that is done under a valid law but that is, in the particular case, harsh or oppressive or fails to satisfy the proportionality test applicable in a democratic society, having a proper regard for people's rights and dignity. A declaration and detailed orders were made by the NC requiring the authority to reconsider the applicant's citizenship application expeditiously.

**Arorangi Timberland Limited and others (appellants) v Minister of the Cook Islands National Superannuation Fund (respondent) (Cook Islands)** [2016] UKPC 32 (United Kingdom for the Cook Islands) This case concerned a challenge to the constitutionality of the state superannuation scheme in relation to discrimination against migrant workers. The first instance court upheld the constitutional challenge on the basis that it impermissibly infringed a personal right to own property protected under article 64 of the constitution. The Court of Appeal reversed that finding and the appellants took the matter to the Privy Council (PC). The majority held that the provisions in relation to migrant workers, in which migrant workers would be disentitled to the refund of their employers' contributions on their departure from the Cook Islands, were discriminatory and constitutionally invalid. It referred to the ICESCR and also then came to the conclusion that such discriminatory treatment of migrant workers was both an anomaly and unfair and that the State had failed to justify why the disadvantaged migrant workers should be further discriminated against.

## D.7 Eviction cases

**Proceedings Commissioner v Kant** [2017] FJHC 407 (Fiji) The tenant, with her family of five children and four adults, occupied a property owned by the respondent under an agreement initially for one year from May 2015, but continued to pay rent until April 2017, although was in arrears. The respondent locked the house while the applicant was attending a funeral and the applicant's child was left alone outside the house. The tenant complained to the Human Rights Commission which wrote to the landlord informing him that the arbitrary eviction had breached section 39(1)/(2) (freedom from arbitrary eviction) of the constitution. The respondent replied saying that he had lawfully exercised his rights to collect the rent and that he was not responsible for the tenant's family being deprived of food, clothes and shelter. The applicants asked the court to intervene and sought an interim order allowing the tenants to repossess the property according to the status quo. On 5 May 2017, the court granted an interim order, unopposed, allowing the repossession and ordering a stay of any execution of purported distress for rent pending the hearing. The respondent removed items from the applicant's house nonetheless. The court found that the eviction method used was arbitrary and unlawful, contrary to constitutional prohibitions on arbitrary eviction from a person's home. The court also ordered the respondent to pay \$25,000 compensation for treating a child inhumanly, stayed the purported distress for rent permanently. The orders were granted without prejudice to the respondent's right to institute an action for eviction.

**Naembo v National Housing Corporation** [2015] PGNC 194 The applicant moved into a property in 1981 based on a tenancy with the National Housing Corporation (NHC). He was not given a copy of the agreement. No maintenance was carried out by the NHC after the agreement commenced. In 1985, the applicant wrote to the NHC asking if he could purchase the house. The NHC responded that it did not own the land and therefore could not sell the house. In October 2000, the NHC issued the applicant with an

eviction notice. The applicant responded asking again if he could purchase the property under the government's 'give-away' scheme and asked for 15 days to settle his rent arrears. The NHC did not respond and in December 2014 engaged the police to evict the applicant and his family from the house. The applicant had moved back into the house but alleged intimidating and malicious conduct of the NHC violated their human rights. The court found that NHC, aided by the police, violated the applicant's human rights under s. 44 (freedom from arbitrary search and entry) and s. 37(1) (right to the full protection of the law) of the constitution. It gave the applicant a period in which to pay the arrears and granted orders to restrain the NHC, the police and all relevant people from taking any steps to evict the applicant without an order from the court.

## Annex E: Six Human Rights Checklists: Translating Theory to Practice

Please note the Six Human Rights Checklists are available on the PJSI website:

[https://www.fedcourt.gov.au/\\_data/assets/pdf\\_file/0011/81668/Human-Rights-Checklists-all-combined.pdf](https://www.fedcourt.gov.au/_data/assets/pdf_file/0011/81668/Human-Rights-Checklists-all-combined.pdf)

Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website <http://www.fedcourt.gov.au/pjsi/resources/toolkits>

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.



# Human Rights Toolkit

PJSI Toolkits are available on: <http://www.fedcourt.gov.au/pjsi/resources/toolkits>

