

Promoting and Enforcing Human Rights

State Sovereignty

State sovereignty - the authority of an independent state to govern itself (to create and implement laws; impose and collect taxes; make war and peace, and form treaties with foreign states)

The characteristics of a state are outlined in the [Montevideo Convention on the Rights and Duties of States \(1933\)](#):

- A permanent population
- A defined territory
- Government
- Capacity to enter into international relations

The issue of statehood can have implications for human rights. People may be unable to claim protections under the international human rights regime if they live within the territory of an unrecognised state.

Sovereignty is the source of a state's legal and political power to make laws over its own population and to enforce those laws. It is also a major issue in human rights since it means that no foreign state or law can interfere in another state's domestic jurisdiction.

Not all governments equally accept the idea that their own people have certain rights. The protection of human rights internationally undermines the idea of national sovereignty because it means interfering with a nation's domestic affairs. However, it is increasingly recognised that nations do have a responsibility to protect human rights within their own borders and that scrutiny of this protection is a legitimate international concern. While resenting interference in their own domestic human rights protection. Some nations also do recognise that the international community should interfere to stop human rights violations if such violations endanger world peace and security.

The Role of the United Nations and International Instruments

The United Nations was established through the [United Nations Charter in 1945, and Article 1](#) of the Charter outlines the five core purposes of the UN - one of which is to promote respect for human rights.

Office of the High Commissioner for Human Rights

The OHCHR offers support and expertise to the various human rights monitoring bodies and systems within the UN. It oversees the Human Rights Council, the Universal Periodic Review and the eight human rights treaty bodies who monitor the implementation of major human rights treaties.

The Human Rights Council

Established in 2006 as a subsidiary of the UN GA. It consists of 47 member states for the promotion and protection of human rights globally and replaced the UN Commission on Human Rights. Its chief purpose is to examine situations in which human rights violations are occurring and make recommendations for action back to the UN GA, and can also request the UNSC to take action to stop human rights violations.

It also runs the Universal Periodic Review, which is a review of the human rights record of all member states. The review is based on the will of each member state - up to representatives of each state to declare what actions they have taken to address human rights violations and to meet obligations.

Because the UNHRC is relatively new, it is too early to judge its success. The council has already received some criticism, from current and former Secretary-Generals Ban Ki-moon and Kofi Anan, as well as from the former High Commissioner for Human Rights. It has been criticised in not acting in the interests of human rights, but according to political considerations - particularly influential states, including China and Russia, have also been accused of backing and controlling certain candidates to block criticism of themselves. It remains to be seen if or how effective the council can become. Despite heavy criticism of Australia over the issue of asylum seekers in the past, the Australian Government showed strong interest in lobbying other UN member states to support Australia's election to the UNHRC in 2018.

UN Security Council

The chief decision-making arm of the UN and the Charter allows it to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'. This ability (humanitarian intervention) has been used four times to intervene in human rights abuses - Yugoslavia 1991, Somalia 1993, Rwanda 1994, East Timor 1999. It can also intervene to stop defined mass atrocities.

The International Court of Justice

The ICJ is the primary judicial organ of the UN. It has jurisdiction to settle international disputes submitted to it by member states, and produce advisory opinions on matters of international law submitted to it by international organs and the UN General Assembly. Its cases will only rarely relate to issues of human rights.

The Secretariat

The UN administrative body headed by the UN Secretary-General; contains the departments and offices of the UN.

International Criminal Court

The ICC is a permanent international court that hears cases relating to serious international crimes, and the first permanent court allowing individuals to be tried for crimes against humanity and human rights infringements. Refer to Rome Statute and ICC evaluations.

Tribunals

There have been two ad hoc tribunals in recent years set up by the Security Council (Yugoslavia and Rwanda). Other tribunals include the [European Court of Human Rights](#) and the [ASEAN Intergovernmental Commission on Human Rights](#).

Non-government Organisations

NGOs were instrumental in establishing the UN Charter and the International Bill of Rights, and many of them operate as observers with the UN and other specialised government agencies in the upholding of human rights around the world. Examples include Amnesty International and Human Rights Watch.

The media

The media plays a role in raising awareness of human rights abuses - the 24/7 news cycle and also refer to the CNN Effect.

The Effectiveness of International Responses in Promoting and Enforcing Human Rights

While the international legal system has been reasonably effective in promoting and publicising protection of human rights, there have been limits to its success in actually providing protection. Rwanda and Bosnia showcase ineffectiveness.

Some limits to the effectiveness of international law in protecting human rights are:

- Not all countries are party to human rights treaties.
- Lack of adequate enforcement mechanisms
- Enforcement by consensus and nations don't always feel compelled by these reasons to follow international law
- Reliance on state reporting - relies on states to report and comply, and sometimes they choose not to report
- Lack of Security Council - UNSC has only used humanitarian intervention four times and didn't sufficiently intervene to stop mass genocide in Rwanda 1994. State sovereignty serves as a hindrance here.
- War crimes tribunals - war crimes tribunals represent a willingness by the international community to create structures to enforce human rights in times of war. However, their effectiveness of the tribunals is hampered by the fact that they may actually help entrench the conflict rather than end it. In some instances, such as Afghanistan, such structures have not been instituted to deal with these.

- Lack of funding - the UN has established many specialist international organisations - these suffer from a chronic lack of funding that inhibits effectiveness.
- Informal recognition of NGOs - reporting procedures can result in the provision of biased information. NGOs can and do provide independent information to the UN. however, the role in reporting human rights violations to international organisations has been informal. A more formalised recognition is needed for greater effectiveness.
- Effectiveness of the media - the media is effective - however, it results in ‘compassion fatigue’ and coverage can be broad and not ignored.

Toonen v Australia, UNHRC 1994 AND Croome v Tasmania

This was a landmark case on Australia’s human rights. It was brought to the UNHRC by Nicholas Toonen, a Tasmanian resident, whose complaint that existing Tasmanian laws that criminalised consensual sex between adult males were in violation of his human right to privacy. This right is protected under Article 12 of the UDHR and Article 17 by the ICCPR. Anti-homosexuality laws were slowly being repealed and by 1991, Tasmania was the last remaining state to maintain these laws.

The UN committee found that adult consensual sexual activity in private was covered by the human right to privacy, and that Toonen’s right was interfered with by Tasmania’s laws, violating Article 17 of the ICCPR, and ultimately ordered Australia to respond to the committee’s finding and repeal the incompatible law.

However, Tasmania refused to repeal the law (of course, why is it always Tasmania) and so the federal government was forced to enact the Human Rights (Sexual Conduct) Act 1994 (Cth), which legalised consenting sexual activity between adults throughout Australia. Tasmania still refused to repeal its law (oh FFS Tasmania), and the matter was taken to the High Court of Australia (Croome v Tasmania (1997)), where the law was deemed illegal as it was now inconsistent with both Australian law and the ICCPR. Tasmania has since become one of the most progressive states in Australia in its human rights record (this is the greatest redemption arc since Jaime Lannister - *ps: after watching the finale, I guess not).

The Role of the UN Evaluations

Effective	Ineffective
The International Bill of Rights has PROMOTED Human Rights effectively - inspiring over 200 different international Treaties, Conventions, Declarations, Constitutions, etc.	Countries like China still believe that ‘human’ rights don’t exist - it is up to individual states to decide on the rights of their people.
The ICCPR and ICESR are binding/enforceable.	It took 28 years to get them through - 30 plus countries have not agreed to be bound by them. Individual countries are also not fulfilling their obligations under these treaties (State sovereignty is a

	hindrance)
The UN Summit (2005) brought in the Responsibility to Protect the humans in other countries where widespread human rights violations are happening.	The UN Summit failed to fix the problem of veto power - R2P only really applies to countries that are not in the P5.
The Secretary-General of the UN, Ban Ki-Moon, stated in 2011 that he is willing to take any measures to protect human rights.	The UN's measures are generally weak (mostly moral pressure through 'soft law', unless an immediate threat exists.
In 2011, the Security Council voted to act against Libya, enforced mainly by the US.	Failure to act in Syria, with thousands of civilians dead.

Courts, Tribunals, and Independent Statutory Authorities

ICJ - Organ of UN, hears cases on the violation of law by states and may hear disputes regarding abuses of international and humanitarian law and gives advisory opinions.

Limitations of the ICJ - Needs consent of state parties and little power of enforcement or influence for human rights breaches.

The ICJ had slow recognition of human rights due to the slow nature of HR developing post WWII.

ICC - first permanent international court towards individuals. Limited jurisdiction on HR violations specifically but prosecutes serious international crimes such as genocide, crimes against humanity and war crimes, crimes of aggression but these acts still constitute HR's abuses. Jurisdiction to prosecute individual people rather than states. Costly, slow but gives hope to victims.

Ad Hoc Tribunals - ICTY, ICTR, and ECCC. More effective because it held trials on the actions of individuals.

European Court of Human Rights - set up in 1959. It considers cases brought by individuals, as well as by organisations and states, against all countries bound by the European Convention on Human Rights.

The laws of all 27 member states of the EU must comply with the rulings of the CHR. this has had an enormous effect on member state laws - for example, numerous laws of the UK have had to be revised following ECHR rulings.

There are 8 human rights treaties, which have committees of independent experts that monitor compliance with the chief international human rights treaties by signatory states. The roles of these bodies include hearing, matters of compliance by member states with the treaties and considering individual complaints or communications.

NGOs

- Engaged in human rights, inform the global community, governments and the UN human rights violations and progress.
- Help ensure greater government compliance by investigating, researching, documenting and publicising cases of human rights violations.

- Some NGOs work directly with violators or victims, providing evidence to international courts, or encouraging other states or the UN to apply diplomatic pressure or take action against violating states.

Reporters without Borders - international NGO aims to promote press freedom by fighting censorship and laws undermining the press, defending journalists imprisoned or persecuted in their job and working for the safety of journalists especially in war zones. According to RWB, 61 journalists were killed in 2014. Almost 221 were jailed worldwide in 2014, with most in China and Cuba. over half of these imprisoned were in relation to internet reports.

Human Rights in Australian Domestic Law

Monist system - a legal system that deems treaties enforceable in domestic law as soon as they have been signed. Australia has a dualist system, which means that ratification and incorporation are involved.

The Australian Constitution

The constitution established the separation and division of powers. It is also the source of some human rights.

Separation of powers - preventing one person or group from gaining total power by dividing power between the executive, the legislature and the judiciary.

Division of powers - how powers are divided between the federal and state governments.

The external affairs power (s 51 (xxix)) is essential in maintaining Australia's treaty obligations and enabled the Federal Parliament's ability to enact human rights treaties. Australia's constitution does have some express rights, and the High Court has found that certain rights must have been intended in order for the Constitution to function effectively - these are known as implied rights.

Express rights include

- Freedom of religion (s 116)
- Right to vote in Commonwealth elections (s 41)
- Right to a trial by jury in federal indictable cases (s 80)
- Right to 'just terms' where the Commonwealth compulsorily acquires property's (s 51 (xxxii)).

The High Court has interpreted some implied rights, such as **Lange v Australian Broadcasting Corporation (1997)**, holding that the Constitution contains an implied right to freedom of political communication, a type of freedom of speech, in order for Australia's political system as established in the Constitution to function effectively.

Rights conferred by Common Law

Common law gives some rights to people - such as the right of a tenant to quiet enjoyment of the property they rent. **Dietrich v The Queen (1992)** established the right to legal representation for serious matters, and that a

case could be delayed indefinitely until legal aid is acquired. The Mabo case of 1992 is an important case in the recognition of human rights in Australia, enabling land rights.

Mabo and others v The State of Queensland (no.2) (1992)

Eddie Mabo and the Meriam People began High Court proceedings in 1982 seeking a declaration that the people had prior title to the Murray Islands. They did this because they did not want to participate in the Queensland land rights scheme which would make their land subject to parliamentary regulation.. The High Court had to decide whether the Meriam people had right to the land, and whether this right existed independently of the Queensland government, ultimately deciding that was a 'native title' to land if Indigenous occupiers of the land could demonstrate an ongoing traditional connection and if title had not been extinguished by valid government action.

Statute Law and Parliament

Examples of human rights statutes in Australia include the [Racial Discrimination Act 1975](#), [Sex Discrimination Act 1984](#), [Disability Discrimination Act 1992](#), and the [Social Security Act 1991](#).

Additional bodies also exist, such as the NSW Anti-Discrimination Board and the federal Australian Human Rights Commission (AHRC). The AHRC was established in 1986 and is an independent statutory authority which administers federal human rights legislation, including anti-discrimination legislation and privacy legislation. It investigates and conciliates complaints about abuses of human rights in legislation under its jurisdiction, but cannot make legally binding decisions.

Parliamentary committees and law reform bodies investigate the protection of human rights in Australia and make recommendations for change. The Human Rights subcommittee 1991, is an example.

Many human rights for Australian citizens simply because the law doesn't interfere with them (e.g. freedom of movement unless you're trespassing).

Courts and Tribunals

Have had a role of human rights in Australia, even when there is no Commonwealth legislation protecting the right.

Domestic courts and tribunals

- The AHRC doesn't have the power to make legally binding decisions, but state tribunals do.
- The NSW Administrative Decisions Tribunal (ADT), can hear discrimination complaints about discrimination and make legally binding about the matter. An example of this is *Abdulrahman v Toll Pty Ltd* (2006).

- Both ACT and Victorian courts can also hear and make decisions about the abuse of human rights contained in their legislative Charter of Rights.

High Court of Australia

- Matters involving human rights might appear before any state or federal courts or tribunals
- However, High Court has power to set binding precedents, and overturn legislation incompatible with the Constitution
- Recognised international law 'a legitimate and important influence on common law, esp with human rights'

The Australian Human Rights Commission

- An independent national body established to deal mainly with issues relating to Australia's human rights legislation. Established by the [Human Rights and Equal Opportunity Commission Act 1986 \(Cth\)](#)
- It has two complaints functions:
 - Can receive and investigate complaints into many kinds of discrimination including race or ethnic origin, age (young or old), disability or gender, and can also investigate workplace discrimination relating to sexual preference.
 - Can hear complaints on many other human rights breaches in Australian law and international human rights law
- Can also conduct public inquiries into human rights issues and issue recommendations. While this is an important function, these findings are not enforceable and the complainant will have no right to have the wrong rectified.
- Advises parliament and government on the development of laws, policies, and programs consistent with human rights.
 - In 2015 - 1308 conciliation processes of which 989 (76%) were successfully resolved.
 - 37% complaints lodged under Disability Discrimination Act
 - 21% under racial
 - 20% under sex discrimination

International Tribunals

- Complaints can be lodged to various international bodies, with varying effectiveness
- [A V Australia UNHRC \(1997\)](#) is an example, where Mr A arrived from Cambodia in 1989 seeking refugee status, but was detained for 4 years when refugee status was being determined.
- [Toonen v Australia 1994 \(discussed in 2.1\)](#)
- Toonen's case led to legislative changes, but A's case had no effect as the Australian government ignored this case and several similar cases that have occurred subsequently. These laws remain in force.

Non-government Organisations

- Amnesty International and Red Cross
- The Australian Human Rights Centre at UNSW - provides information about human rights and publishes material about current developments that affect human rights law
- The NSW Council for Civil Liberties which monitors and comments on developments that may affect civil rights.

The Charter of Rights

A Declaration of Rights is a document which sets out the basic rights to which every human should be entitled. More nations have incorporated a Charter of Rights into their domestic law so that, today, Australia is the only Western democracy that does not have a Charter of Rights. Since 2004, both the Australian Capital Territory and Victoria have incorporated a Charter of Rights into their legal system. Charter of Rights can be a part of a country's laws by being entrenched or legislative.

Entrenched Charter of Rights

- Part of the constitution
- Government can't pass a law which contradicts a right given by that charter
- Sometimes it needs to be amended because of changing social values, but governments can do little about this

Legislative Charter of Rights

- Passed by parliament like any other law
- Can be changed by legislature → citizens do not have the same level of protection
- Britain, NZ, Vic, and ACT have legislative Charter of Rights

<i>Arguments FOR an Australian Charter of Rights</i>	<i>Arguments AGAINST an Australian Charter of Rights</i>
- The common law has not protected human rights adequately, as seen in various court cases such as <i>McInnes v the Queen</i>	- Human rights are already adequately protected through international agreements and common and statute law
- A Charter of Rights would protect minority groups who are not adequately protected at present, such as Aboriginal people.	- A Charter of Rights can only protect people within the limits of the rights it lists. There is a danger that people will have no rights, except for those within the charter.
- The common law is too slow to meet contemporary needs, such as those posed by technological advances, for example electronic surveillance.	- a Charter of Rights may mean that the judiciary would take on a political role because it would have to decide whether laws infringed the Charter of Rights
- A Charter of Rights would protect people from government interference in basic human rights. At present, governments can make laws that infringe on these rights and people can do little to challenge these laws.	- An entrenched Charter of Rights is difficult to change and may become irrelevant or inappropriate over time.
- A Charter of Rights would adopt a major recommendation of the National Human Rights Consultation Committee, whose report was released in October 2009, after one of the largest public consultations in Australia's history.	- A legislative Charter of Rights is too easy to change and can be amended according to the political policies of the party in power.

Effectiveness of Australian Domestic Responses in Promoting and Enforcing Human Rights

Australia has generally a good record on human rights, and has also helped in drafting the UDHR, ICESCR, and ICCPR.

Some limitations to effectiveness

- AHRC lacks sufficient power for legally binding decisions → many recommendations to government have been ignored
- Unwillingness by governments to adopt laws and practices to address some of the following challenges
 - Anti-terrorist laws → Dr Mohammad Haneef 2007 example → detained for 12 days and released without charge, violating ICCPR
 - Lack of Charter of Rights → many human rights have not been officially granted and ratified
 - Treatment of Indigenous Australians → low life expectancy and historical discrimination
 - Mandatory detention of asylum seekers