

TO RATIFY OR NOT TO RATIFY? AN ASSESSMENT OF THE CASE FOR RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN THE PACIFIC

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Intuitively, ratification of human rights treaties should support protection and promotion of human rights. But will it? This article considers whether ratifying human rights treaties is a useful strategy to advance the cause of human rights in the Pacific. It aims to contribute to the ratification debate in the region by assessing the potential responses of Pacific states to the pressure for ratification. The article first reviews the consequences of ratification and then discusses the specific benefits and challenges of ratification for Pacific states. Against this background, four strategies that states might adopt in response to calls for ratification are considered, ranging from wholesale ratification at one end of the spectrum, to a moratorium on ratification at the other. The article argues that a strategy of selective ratification of individual treaties, combined with the pursuit of one or more complementary rights frameworks (national, regional or international), is likely to be the most effective way to advance human rights in the region.

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I INTRODUCTION

The Pacific¹ region has the lowest regional rate of ratification of international human rights treaties in the world, and there is currently considerable pressure on Pacific Island states from various quarters to ratify² the core human rights treaties.³ In 2005, the Pacific Islands Forum ('PIF') Secretariat developed The Pacific Plan for Strengthening Regional Cooperation and Integration ('Pacific Plan'), which has as one of its goals the ratification of international human rights treaties.⁴ The Office of the High Commissioner for Human Rights ('OHCHR') and the PIF Secretariat have published a paper promoting the 'added value' for the Pacific region in ratifying international human rights treaties.⁵ Two 2006 papers by human rights scholars have strongly advocated ratification of the core

¹ 'The Pacific' is used throughout this article to refer to the 14 island members of the Pacific Islands Forum: the Cook Islands, Fiji Islands, Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. New Zealand and Australia are also members of the Pacific Islands Forum. However, these large metropolitan states are excluded from the scope of this article because they have each already ratified seven of the nine core human rights treaties.

² 'Ratify' and 'ratification' are used in this article to include any act of becoming party to a treaty. It therefore includes acts of accession (where a state accedes to a treaty, instead of following the two-step procedure of signature followed by ratification) or succession (where a state succeeds to the treaty obligations of all or part of the territory of another state). The key point for the purpose of this article is that ratifying, acceding to or succeeding to a treaty means that a state becomes a party to the treaty and incurs legal obligations.

³ These are: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008); and the *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, UN Doc A/61/488 (entered into force 23 December 2010).

⁴ Pacific Islands Forum Secretariat, 'The Pacific Plan for Strengthening Regional Cooperation and Integration' (Report, Pacific Islands Forum Secretariat, November 2007) 19 ('Pacific Plan').

⁵ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties: Added Value for the Pacific Region' (Discussion Paper, July 2009).

human rights treaties.⁶ Regional meetings on human rights regularly call for greater Pacific ratification of human rights treaties.⁷ Intuitively, ratification of human rights treaties as advocated by these organisations and scholars should advance human rights in the Pacific. But will it?

This article explores whether ratifying international human rights treaties is a useful strategy to advance the cause of human rights in the Pacific. Much of the recent discussion has promoted the advantages of ratification. The aim of this article is to contribute to the ratification debate by considering the potential responses Pacific states might make to the call for ratification. It assumes that the desired ultimate goal is greater protection of human rights in the Pacific, but suggests that in light of the challenges of ratification, there may be more effective means of advancing human rights in the Pacific than wholesale ratification of outstanding treaties. While in the long-term ratification remains a worthy goal, in the short-term it may not be the best way forward. Instead, it may be more appropriate to focus on alternative means of advancing human rights. This may be through a combination of stronger domestic means to protect and promote human rights, the development of a Pacific regional mechanism to promote rights, and active engagement with the United Nations' Human Rights Council's new Universal Periodic Review ('UPR') mechanism. Selective ratification of individual treaties may still be worthwhile, but on a gradual basis, and certainly not wholesale.

Part II of this article sets out two matters of background. First, it looks at the obligations on states once they have ratified a human rights treaty. Second, it presents a current snapshot of the ratification project in the Pacific, including the current levels of ratification, the reasons for low ratification and the recent calls for ratification. Part III provides a short overview of the principal benefits of ratifying human rights treaties, while Part IV examines the challenges of ratification for Pacific states. Part V aims to deepen the debate on ratification in the Pacific by considering different strategies that Pacific states might adopt in responding to the call for ratification. It suggests that individual Pacific states ought to consider carefully whether strategies other than ratification may be worth pursuing because they are more likely to improve human rights on the ground.

⁶ See P Imrana Jalal, 'Pacific Culture and Human Rights: Why Pacific Island Countries Should Ratify International Human Rights Treaties' (Discussion Paper, RRRT and UNDP, April 2006); 'Dejo Olowu, 'The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific' (2006) 7 *Melbourne Journal of International Law* 155.

⁷ See, eg, Pacific Regional Office, Office of the High Commissioner for Human Rights, 'Conclusions and Recommendations of the Colloquium and Workshop for Judges and Lawyers on the Justiciability of Economic, Social and Cultural Rights in the Pacific Region' (Statement adopted at the Colloquium and Workshop for Judges and Lawyers on the Justiciability of Economic, Social and Cultural Rights in the Pacific Region, Suva, 1-3 June 2006) [7], [15] <http://pacific.ohchr.org/docs/Conclusions_ColloquiumJudgesLawyers.doc>.

II RATIFICATION OF HUMAN RIGHTS TREATIES

A *The Consequences of Ratification*

In order to consider the benefits and challenges of ratification in context, it is necessary to first provide a brief overview of the consequences of ratification. Ratification results in legal obligations at the international level. As such, careful consideration is required before these obligations are incurred. A concern in the Pacific, discussed further below, is that some proponents of ratification appear, perhaps unintentionally, to suggest that states should take a 'ratify now, think about the consequences later' approach. However, if ratification is to be meaningful and result in positive human rights outcomes, then the implications of ratification need to be carefully considered before states take action.

Once a treaty has been ratified, a state incurs immediate legal obligations at international law. It must conform to all the obligations set down in a treaty and cannot generally avoid them without a good excuse.⁸ In particular, a state cannot use as an excuse for failing to fulfil international treaty obligations the fact that its domestic law prevents compliance with the international obligations.⁹ If a state anticipates that its domestic law will prevent it from complying with the requirements of a treaty, but nevertheless wishes to ratify the treaty — perhaps because it complies in most other areas, or intends to amend domestic law in due course — then the proper course is to ratify that treaty with a reservation.¹⁰ Ideally though, a state should not ratify a treaty until its domestic laws and policies comply with the international legal requirements.

The major — and indeed most important — requirement of ratifying an international human rights treaty is to give domestic effect to the treaty's provisions. Implementation at the national level is the most effective way of enforcing international human rights treaties. A state needs to give effect to the treaty in its domestic law, so that individuals — the primary beneficiaries of international human rights treaties — are able to enforce their rights at home. In an ideal world, the international human rights machinery should operate as a backup monitoring system rather than the primary enforcement mechanism for human rights protection.

For each treaty, the extent of domestic legislation required will depend on whether the state's legal system allows for ratified treaties to have direct legal effect, the nature of the obligations imposed by the treaty, and the existing state of a country's human rights framework. For example, most Pacific constitutions already provide protection for many civil and political rights, so if the *International Covenant on Civil and Political Rights* ('ICCPR') were to be ratified, the legislative change required may not be as extensive as for other treaties. Ratification may also require significant changes to government policies; government officials may need to be trained and new systems for data collection may be needed. Establishment of a national human rights institution might also be necessary to support implementation.

⁸ See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('VCLT').

⁹ VCLT art 27.

¹⁰ See generally VCLT arts 19–23.

At the international level, an important practical consequence of ratification is that states incur reporting obligations. Each human rights treaty establishes an independent committee of experts who oversee implementation of the treaty. One of the key functions of each committee is to monitor state compliance with treaty obligations by way of periodic reports. The reporting obligation varies according to the terms of the treaty, but commonly involves the submission of an initial periodic state report within one to two years of ratification, followed by regular periodic updates. Aside from the *International Convention for the Protection of All Persons from Enforced Disappearance* ('CPED') which does not have an ongoing reporting obligation, the reporting interval varies for each treaty, and ranges from two years under the *International Convention on All Forms of Racial Discrimination* ('CERD') to five years under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *Convention on the Rights of the Child* ('CRC') and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ('CRMW'). After the treaty body receives the state report, it engages in dialogue with the state concerned and then issues recommendations aimed at assisting states in meeting their obligations under the treaty.

A second important function of treaty bodies is deciding on individual communications. A number of the human rights treaties permit, either in the core text or by way of optional protocol, the submission of individual communications to the treaty body alleging that the state has violated the rights of an individual under the treaty. Currently, there are few Pacific states in which individuals are able to submit communications to treaty bodies¹¹ and to date there have been no individual communications to treaty bodies concerning those Pacific states. The focus of this article is accordingly on the nine core treaties and their periodic reporting mechanisms.

B *Ratification of Human Rights Treaties in the Pacific*

Ratification of the core human rights treaties in the Pacific is comparatively lower than in many other parts of the world. The *CRC* and *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW') are currently the most widely ratified treaties in the Pacific, with all Pacific states party to the *CRC* and most states — with the exceptions of Nauru, Palau and Tonga — party to *CEDAW*. Some states are party to the *ICCPR*, *ICESCR* and *CERD*, yet no states have ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'), *CRMW* or *CPED*. Uptake of the 2007 *Convention on the Rights of Persons with Disabilities* ('CRPD') looks promising — it has already been signed by four states and ratified by the Cook Islands and Vanuatu. Recent ratifications of particular note are the 2008 ratifications of the *ICCPR* by Papua New Guinea, Samoa and Vanuatu. Papua New Guinea also ratified the *ICESCR*. See Table One for detailed information of ratifications of the core treaties by country.

¹¹ The Cook Islands, Solomon Islands and Vanuatu are party to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000), which enables individuals to take complaints to the *CEDAW* Committee.

Table One: Ratification of Core Human Rights Treaties¹²

Country	ICESCR	ICCPR	CERD	CEDAW	
Cook Islands	28 Dec 78 ¹³	28 Dec 78 ¹²	22 Nov 72 ¹²	10 Jan 85 ¹⁴	11 Aug 06 ¹⁵
Fiji			11 Jan 73	28 Aug 95	
Kiribati				17 Mar 04	
Marshall Islands				2 Mar 06	
Micronesia				1 Sep 04	
Nauru		12 Nov 01 (s)	12 Nov 01 (s)		
Niue	28 Dec 78 ¹²	28 Dec 78 ¹²	22 Nov 72 ¹²	10 Jan 85 ¹³	
Palau					
Papua New Guinea	21 Jul 08	21 Jul 08	27 Jan 82	12 Jan 95	
Samoa		15 Feb 08		25 Sep 92	
Solomon Islands	17 Mar 82		17 Mar 82	6 May 02	
Tonga			16 Feb 72		
Tuvalu				6 Oct 99	
Vanuatu		21 Nov 08		8 Sep 95	
Country	CRC	CAT	CRPD	CPED	CRMW
Cook Islands	6 Jun 97		8 May 09		
Fiji	13 Aug 93		2 Jun 10 (s)		
Kiribati	11 Dec 95				
Marshall Islands	4 Oct 93				
Micronesia	5 May 93				
Nauru	27 Jul 94	12 Nov 01 (s)			
Niue	20 Dec 95				
Palau	4 Aug 95				
Papua New Guinea	2 Mar 93		2 Jun 11 (s)		
Samoa	29 Nov 94			6 Feb 07 (s)	

¹² The information in Table One is drawn from the following sources: Office of the High Commissioner for Human Rights, *Human Rights Bodies* <<http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>>; New Zealand Law Commission, 'Converging Currents: Custom and Human Rights in the Pacific' (Study Paper No 17, New Zealand Law Commission, September 2006) 272. Table One is current as at 5 June 2011. The letter '(s)' indicates signature only.

¹³ The advice of the New Zealand Ministry of Foreign Affairs and Trade is that the Cook Islands and Niue are bound by these treaties by virtue of New Zealand's ratification. Although New Zealand's reports previously contained information on Niue and the Cook Islands, they no longer do so. See New Zealand Law Commission, above n 13, 273.

¹⁴ The instrument of ratification indicates that it is extended to the Cook Islands and Niue in accordance with their special relationship with New Zealand.

¹⁵ Despite already being party to this treaty by virtue of New Zealand's ratification, the Cook Islands has made a separate act of accession.

Solomon Islands	10 Apr 95		23 Sep 08 (s)		
Tonga	6 Nov 95		15 Nov 07 (s)		
Tuvalu	22 Sep 95				
Vanuatu	7 Jul 93		23 Oct 08	6 Feb 07 (s)	

In light of comparatively low levels of ratification, there have been a number of calls from various quarters for more Pacific ratification of the core treaties. At the international level, the 1993 *Vienna Declaration and Programme of Action*, adopted following the World Conference on Human Rights, recommended that a ‘concerted effort’ be made to encourage ratification of the international human rights treaties and protocols.¹⁶ More recently, and more specifically, in the context of the Human Rights Council’s UPR exercise, there have been a number of calls at the international level for further ratification by individual Pacific states of the core international human rights treaties.¹⁷

Within the region, the Pacific Regional Office of the OHCHR, in conjunction with the PIF Secretariat, has published a paper promoting the ‘added value’ for the Pacific in ratifying the core treaties.¹⁸ This paper particularly promotes the links between human rights and development — specifically the development aims of the Pacific Plan and the Millennium Development Goals — and its key thesis is that ratifying human rights treaties will assist in improving development, promoting economic growth and reducing poverty. Academics have also promoted treaty ratification.¹⁹ Major aid donors, including Australia, New Zealand and the European Union, as well as local and international NGOs, encourage ratification of the core human rights treaties.²⁰ Regional workshops and meetings on human rights commonly urge treaty action.²¹

What has been the response of Pacific states to these calls for ratification of more treaties? At the regional level, Pacific Islands Forum leaders have made some commitments to international human rights standards. In the *Biketawa Declaration*²² in October 2000, PIF leaders committed themselves and their countries to a number of guiding principles. Although the key context for the *Biketawa Declaration* was regional security concerns in light of the July 2000 coup in Fiji and the development of ethnic tensions in Solomon Islands, there

¹⁶ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993) [II(4)].

¹⁷ This is discussed further Part V below.

¹⁸ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, ‘Ratification of International Human Rights Treaties’, above n 5.

¹⁹ See, eg, Olowu, ‘The United Nations Human Rights Treaty System’, above n 6.

²⁰ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, ‘Ratification of International Human Rights Treaties’, above n 5, 9.

²¹ See, eg, Pacific Regional Office, Office of the High Commissioner for Human Rights, ‘Conclusions and Recommendations of the Colloquium and Workshop for Judges and Lawyers on the Justiciability of Economic, Social and Cultural Rights in the Pacific Region’, above n 7, [15]; Commonwealth Secretariat and Pacific Islands Forum Secretariat, ‘Concluding Statement’ (Statement adopted at the Commonwealth Pacific Regional Workshop on the Ratification of International Human Rights Instruments under the Pacific Plan, Port Moresby, 28–30 March 2007) <http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=162660>.

²² Pacific Islands Forum, *Biketawa Declaration* (28 October 2000).

are nevertheless important references to human rights. These include commitment to a

[b]elief in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief and in the individual's inalienable right to participate by means of free and democratic political process in framing the society in which he or she lives.²³

The *Biketawa Declaration* also refers to the upholding of democratic processes and institutions, the rule of law, the independence of the judiciary, the importance of equitable economic, social and cultural development, and respect for and protection of indigenous rights and cultural values, traditions and customs.²⁴

More recently in 2004, PIF leaders adopted a vision for

a region of peace, harmony, security and economic prosperity ... respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights.²⁵

Ratifying and implementing the core human rights treaties was subsequently identified as one of the goals of the 2005 Pacific Plan. The third of the Pacific Plan's four 'pillars' is good governance, and within that pillar, Initiative 12.5 is to 'ratify and implement international and regional human rights conventions' where appropriate.²⁶

Since 2005, the annual communiqué following the meeting of PIF leaders has provided one way to chart the development of thinking on human rights at a regional level. The October 2005 Kalibobo Roadmap identified ratification and implementation of international and regional human rights conventions and support for meeting reporting and other requirements as one of 24 initiatives flagged for immediate implementation over the next three years.²⁷ The October 2006 Nadi Decisions on the Pacific Plan also identified 'implementing international conventions on human rights' as a priority over the subsequent twelve months.²⁸ Although the October 2007 Vava'u Decisions on the Pacific Plan do not explicitly mention human rights,²⁹ and nor do the 2008, 2009 or 2010 Decisions,³⁰ the Annex to the 2010 Pacific Plan Annual Progress Report does chart specific achievements in the human rights components of the Pacific Plan's Governance Pillar. Activities of the Secretariat of the Pacific Community are noted and include technical assistance for individual states on specific issues

²³ *Biketawa Declaration* [1(ii)].

²⁴ *Biketawa Declaration* [1(iii)], [1(iv)], [1(v)].

²⁵ Pacific Islands Forum, 'Special Leaders' Retreat: The Auckland Declaration' (Declaration, Pacific Islands Forum, 6 April 2004) 2.

²⁶ Pacific Islands Forum Secretariat, 'Pacific Plan', above n 4, 19.

²⁷ *Ibid* 36–9.

²⁸ *Ibid* 40.

²⁹ *Ibid* 42.

³⁰ Pacific Islands Forum Secretariat, 'Thirty-Ninth Pacific Islands Forum' (Forum Communiqué, Pacific Islands Forum, 19–20 August 2008) 16; Pacific Islands Forum Secretariat, 'Recommendations for Progressing the Pacific: Fortieth Pacific Islands Forum' (Forum Communiqué, Pacific Islands Forum, 5–6 August 2009); Pacific Islands Forum Secretariat, 'Forty-First Pacific Islands Forum' (Forum Communiqué, Pacific Islands Forum, 4–5 August 2010).

such as *CEDAW* reporting, participating in the UPR process, and model legislation to respond to HIV/AIDS.³¹

At the national level, as noted above, since 2008, it can be seen that some states (namely Papua New Guinea, Vanuatu, Samoa and the Cook Islands) have, perhaps partially in response to the pressure for ratification, responded with discrete ratifications. What this article aims to consider is whether, in view of the benefits and challenges of ratification, further ratification is a useful strategy.

III THE POTENTIAL BENEFITS OF RATIFICATION

In 2005, the Forum Regional Workshop on National Human Rights Mechanisms noted that there was a lack of quality information on the benefits of becoming a party to international human rights treaties.³² Since then, there have been a number of initiatives aimed in part or in full at providing information on the benefits of treaty ratification, including national and regional workshops, academic articles and the 2009 OHCHR and PIF Secretariat publication.³³ In this section, these potential benefits of ratification are briefly reviewed and critiqued.

A *Protection and Promotion of Human Rights*

The most important benefit of ratification is the actual improvement in the human rights of individuals and groups in the ratifying state. Greater realisation of human rights has the potential to empower the disadvantaged and marginalised, and contribute to a more just, inclusive and fair society. Ultimately, a state with a strong commitment to human rights is likely to be a state that is well-governed, secure and stable.

Historically, one of the significant contributions of the human rights movement in the Pacific region is the role it played in supporting decolonisation.³⁴ Today, even though the Pacific region is not known for gross violations of human rights, ratification, and more importantly, implementation of treaties, should ideally support improvements in human rights in all areas of life. The process of ratification, especially if accompanied by meaningful consultation, can itself raise awareness of the particular rights at stake and improve human rights literacy.³⁵ The experience with the *CRC* in the Pacific suggests that its ratification has contributed to better human rights for children. The *CRC* is said to be one of the factors leading to the decline in infant mortality

³¹ Pacific Islands Forum Secretariat, 'Pacific Plan 2010 Annual Progress Report Annex A' (Progress Report, Pacific Islands Forum, August 2010) 186–9.

³² Pacific Islands Forum Secretariat, 'Final Report' (Workshop Report, Regional Workshop on National Human Rights Mechanisms, 1 March 2005) 9 [4]. See also New Zealand Law Commission, above n 12, 68 [5.35].

³³ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties', above n 5.

³⁴ Jalal, 'Pacific Culture and Human Rights', above n 6, 22. See also New Zealand Law Commission, above n 12, [5.42] for a discussion of universalist and cultural relativist perspectives within the human rights discourse.

³⁵ Elise Huffer, 'Baseline Survey on the Status of Pacific Island Countries' Ratification of Main Human Rights Instruments and Their Possible Reservations, Traditional Governance Practices That Could Support Human Rights, and the Work of Other Agencies and Organisations in Promoting Human Rights in the Pacific' (Report, UNDP GOLD, October 2003) 4.

rates, as well as the provision of quality education for children, and the development of legislation against child pornography.³⁶

The 2010 report of the Australian Joint Standing Committee of Foreign Affairs, Defence and Trade inquiry on human rights in the Asia-Pacific region noted indications by the Pacific Regional Rights Resource Team ('RRRT') of some of the benefits that ratification of international human rights treaties had already brought to the Pacific, including the provision of a framework for democracy, elections and good governance; support for an independent judiciary; and protection against the arbitrary use of power in relation to the rights to free movement, speech, fair trial, freedom from discrimination, free and fair elections and protection against torture.³⁷

It is important to keep in mind here that ratification is only a first step towards improving human rights in the ratifying state. The more important step for realising human rights, and actually making a difference on the ground, is implementing the treaty obligations. Ratification without implementation is likely to achieve little. For example, although *CEDAW* is widely ratified, Pacific Island states have the lowest percentage of female members of Parliament out of all the regions of the world, with an average of just 4.5 per cent.³⁸ Failure to implement treaty obligations will minimise the effectiveness of those treaties in improving human rights and open the ratifying state to allegations of 'window-dressing'.

Indeed, ratification without implementation raises the unpalatable prospect that ratification may not in fact make any difference in the realisation of human rights. Disturbingly, some research suggests that ratification of human rights treaties may have the opposite consequence to that which might be anticipated, in that they may lead to the worsening of human rights standards.³⁹ The findings from this research are, however, keenly contested,⁴⁰ and it does appear that human rights outcomes are highly dependent on a number of variables, including the role of a strong civil society.⁴¹ Encouragingly, Beth Simmons, in her 2009 study on the linkages between the international human rights regime and domestic practices, argues that international human rights law has made a positive contribution to the realisation of human rights in much of the world.⁴² Nevertheless, it is important to bear these contradictory research findings in mind

³⁶ Jalal, 'Pacific Culture and Human Rights', above n 6, 33.

³⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Human Rights in the Asia-Pacific: Challenges and Opportunities* (2010) 34 [3.9]–[3.10].

³⁸ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties', above n 5, 5.

³⁹ See especially Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?' (1999) 36 *Journal of Peace Research* 95; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935.

⁴⁰ See especially Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 *European Journal of International Law* 171, for a critique of Hathaway, 'Do Human Rights Treaties Make a Difference?', above n 39; Oona A Hathaway, 'Testing Conventional Wisdom' (2003) 14 *European Journal of International Law* 185, for a response to Goodman and Jinks.

⁴¹ Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925.

⁴² Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).

and approach claims about the benefits of human rights treaties with some caution. At the very least, it should cause us to pause at the threshold before calling for ratification for ratification's sake.

B *Mechanisms for Enforcement of Human Rights Standards*

A benefit sometimes claimed to flow from ratification of international human rights treaties is that it enables 'enforceability' of rights. In the development context, it has also been argued that, given the absence of an enforcement mechanism for achieving the objectives in the Pacific Plan and the Millennium Development Goals, the enforcement regime of the international human rights framework can not only enforce human rights but also 'complement and reinforce the implementation of national and regional plans'.⁴³

As noted above, ratification means that a state is subject to the reporting requirements of the particular treaty. States may also choose to adopt optional procedures to enable individuals to take petitions to the relevant treaty body. While these two processes are a means of 'enforcing' treaty obligations, even with an optimistic lens, they can only really be described as soft enforcement mechanisms. There is no international police force for human rights. There is no system of fining a state or imposing any other penalty. Recommendations of treaty bodies, whether in periodic reports or in response to individual communications, are just that; they depend on the goodwill of the state for their implementation. Taken in this light, the 'enforceable' nature of human rights treaties might be seen as a marginal benefit, or perhaps even an illusory one.

On the other hand, while the strength of enforcement mechanisms is sometimes overstated by human rights advocates, what the reporting procedure offers, provided states comply with their reporting obligations in a timely fashion, is a means of regular, external, independent and expert scrutiny of a state's compliance with its human rights obligations. The periodic nature of reporting also encourages a state, and civil society, to regularly reflect on its human rights situation.

C *Certainty of Obligations*

A possible benefit of ratification for states is the certainty which ratification brings to the nature and extent of their human rights obligations. There are two aspects to this. First, even where a state has not ratified a treaty, or where a state has ratified a treaty but not yet given it domestic legal effect, the courts will sometimes derive obligations on states from those treaties. In some states, such as Papua New Guinea, the *Constitution* mandates looking to international human rights law for assistance in interpretation.⁴⁴ In most Pacific states, however, the orthodox legal approach is for a court to decline to give effect to a treaty unless a

⁴³ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties', above n 5, 8.

⁴⁴ *Constitution of the Independent State of Papua New Guinea 1975* (Papua New Guinea) s 39(3): 'For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind', a court may have regard to various instruments including international conventions, declarations, recommendations and judicial decisions. See also *Constitution Amendment Act 1997* (Fiji) s 43(2).

state has both ratified the treaty and given domestic legal effect to it.⁴⁵ However, in some cases, the courts will refer to a ratified but unincorporated treaty as an aid to interpretation of legislation in support of domestic legal obligations.⁴⁶ In others, a court may take an even more expansive and rights-centred approach and place obligations on a state even in relation to an unratified treaty.⁴⁷ While such approaches are of clear benefit to the human rights cause, for states there is undoubtedly an element of unwelcome surprise to find themselves measured against the standards of an international treaty that it has either not ratified or not yet incorporated into domestic legislation. Better then, it might be argued, to make a firm commitment to particular treaties, so that there is certainty around the extent of a state's human rights obligations.

The second area of uncertain obligation concerns customary international law. Customary international law is law which requires states to act or refrain from acting in a particular way. There is ongoing debate as to which aspects of international human rights law have become customary international law. Some commentators argue that the entire 1948 *Universal Declaration of Human Rights* ('UDHR')⁴⁸ has become customary international law.⁴⁹ Others say that while this is unlikely, at least the rules relating to prohibition of genocide, torture, slavery and the slave trade, prolonged arbitrary detention, murder/disappearances, and systematic racial discrimination have become customary international law.⁵⁰ Customary international law can be used to hold states to account at both the international and domestic levels; however, the extent to which it can be used by domestic courts will depend on whether the state recognises customary international law as a source of domestic law. While most states do, applying such customary law will in practice require a well-argued case and a well-informed domestic court. Even then, the precise content of a legal obligation under customary international law is likely to be uncertain. On the other hand, international human rights treaties, unlike customary international law, have the major benefit of providing certainty around the nature and extent of

⁴⁵ For example, in *Tepulolo v Pou* [2005] TVHC 1 (24 January 2005) (High Court of Tuvalu, Family Appellate Jurisdiction) (Ward CJ), the Court stated that it could not apply *CRC* or *CEDAW* unless an Act of Parliament was passed to implement their provisions.

⁴⁶ See for example *Attorney-General v Maumasi* [1999] WSCA 1 (27 August 1999) (Court of Appeal of Samoa), where the Court noted that '[a]ll Samoan Courts should have regard to [*CRC*] in cases within its scope.'

⁴⁷ For example in *Naylor v Foundas* [2004] VUCA 26 (5 November 2004) (Court of Appeal of Vanuatu), a case concerning contempt proceedings for default on a monetary judgment, the Court referred to the *ICCPR* requirement that no one is to be imprisoned on the grounds of failure to fulfil a contractual obligation — even though Vanuatu was not at the time a party to the *ICCPR*.

⁴⁸ *Universal Declaration of Human Rights*, GA Res 217(III) A, UN GAOR, 3rd Comm, 3rd sess, 183rd plen mtg, Agenda Item 58, UN Doc A/RES/217(III) A (10 December 1948).

⁴⁹ See Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 *Georgia Journal of International and Comparative Law* 287.

⁵⁰ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 702.

a state's obligation. That said, the customary international law of human rights has not (yet) been invoked by Pacific courts.⁵¹

D *Universality, Indivisibility and Inalienability*

There are a number of clear benefits to the wider human rights movement if Pacific states ratify the core treaties. At the global level, ratification of human rights treaties by more states, particularly non-Western states, strengthens claims of the universality of human rights. It also strengthens the development of a common language of human rights, allowing for broad international consensus and collaboration.⁵² Over time, it will in turn contribute to the development of customary international law on human rights.

At the regional level, the constitutions of many Pacific states contain most of the civil and political rights, although economic and social rights receive less protection. Even in Papua New Guinea, where there is some constitutional protection for economic and social rights, those rights, unlike the civil and political rights, are enshrined as 'National Goals and Directive Principles', rendering them essentially non-justiciable. This means that, at least in the formal legislative sense, civil and political rights are given domestic primacy ahead of economic, social and cultural rights. Ratification and implementation of more treaties — particularly the *ICCPR* and *ICESCR* — would help to confirm the indivisibility and interdependence of rights. Giving domestic legal effect to economic, social and cultural rights may also help allay Pacific concerns about the individual focus of rights. Economic, social and cultural rights are typically more group-oriented than civil and political rights, and so these rights may have more in common with Pacific values such as group harmony.

Ratification of human rights treaties would also strengthen the claim to inalienability of the rights protected by the treaties. Although human rights belong to individuals by virtue of their humanity, the stronger their legal protection, the stronger their claim to inalienability. From a practical point of view, if a state wishes to revoke its human rights protections, it has to repeal not only its domestic legislation, but also withdraw from the relevant treaty. In addition, the ability of states to withdraw from international human rights treaties is not entirely settled law. Some human rights treaties contain denunciation clauses, in which case denunciation is possible.⁵³ However, where a human rights treaty does not contain a denunciation clause, there is a view that denunciation is simply not possible.⁵⁴ In these instances, ratification is a one-way street, further strengthening the assertion that such rights are inalienable.

⁵¹ Submissions based on customary international law have been considered from time to time in Pacific courts. See, eg, *Application by Ireeuw, Wawar, Ap, and Wakum* [1985] PNGLR 430 (Papua New Guinea National Court of Justice), where the National Court of Papua New Guinea considered a submission that the rule of *non-refoulement* of refugees was customary international law.

⁵² United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties', above n 5, 8.

⁵³ For example, *CERD* art 21 provides that: 'A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.' See the discussion at below nn 78–9 and accompanying text on the denunciations by three Caribbean states of two human rights treaties.

⁵⁴ See Human Rights Committee, *General Comment 26: Continuity of Obligations*, 61st sess, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1 (8 December 1997).

E *Rewards for Ratification*

In preparing for ratification, technical assistance from UN agencies, multilateral and bilateral donors, and NGOs may be available. It is doubtful whether ratification of *CEDAW* by various Pacific states would have occurred but for the technical support provided by women's groups, NGOs, the Pacific Women's Bureau of the Secretariat of the Pacific Community, RRRT, UNIFEM, donors and development agencies.⁵⁵ Once a treaty has been ratified, there are likely to be ongoing opportunities for further technical assistance in implementing the treaty. This may be especially so where the relevant treaty has a dedicated UN agency such as the United Nations Entity for Gender Equality and the Empowerment of Women ('UN Women') for *CEDAW*. Such opportunities include the development of model legislation suited to the Pacific region, support in establishing national human rights institutions, technical assistance in writing state reports and training for officials. One commentator has optimistically suggested that 'the burden of [the] treaty body reporting process would not be too burdensome' as ratification would result in offers of resources, capacity building and training from various sources.⁵⁶

Aside from technical assistance directly linked to treaty ratification and implementation, ratification might also indirectly support efforts to attract foreign capital, trade, aid and political support. The OHCHR has noted that an environment in which the rule of law is respected will attract greater economic investment.⁵⁷ Private investors and potential trading partners may be more likely to invest in states with a strong commitment to human rights. Such a commitment may be perceived as providing some assurance that the state is less likely to erupt into civil unrest. At the individual level, those who invest in ethical investment funds, or seek to undertake responsible tourism, may rely on a state's commitment to human rights to support their decisions. A final asserted benefit of ratification is the reputational advantage to states. Ratification of more of the core human rights treaties may increase a state's standing as a member of the international community, contributing to the perception of the state as a 'good global citizen'.

It is necessary, however, to again sound a note of caution. Recent research suggests that the linkages between a state's human rights record and 'rewards' are not as strong as sometimes claimed. Research by Richard Nielsen and Beth Simmons investigated whether increased financial flows and public praise and recognition have followed ratification of four prominent human rights treaties, and found almost no evidence that states can expect increased tangible or

⁵⁵ Jalal, 'Pacific Culture and Human Rights', above n 6, 8.

⁵⁶ John von Doussa, 'The Potential Role of National Human Rights Institutions in the Pacific' (Speech delivered at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, 15 September 2008) <http://www.hreoc.gov.au/about/media/speeches/speeches_president/2008/20080915_pacific.html>.

⁵⁷ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties', above n 5, vi.

intangible rewards to follow upon ratification of core treaties.⁵⁸ Other scholars have made the complementary inquiry, namely whether a poor human rights record has an adverse impact on bilateral and multilateral aid flows. Here, the conclusion has been that although multilateral donors such as the World Bank may limit aid where there have been grave human rights abuses, a poor human rights record has had almost no impact on receipt of bilateral aid.⁵⁹

IV THE CHALLENGES OF RATIFICATION

Despite the benefits of ratification of international human rights treaties, there are also some significant challenges. In 2007, the New Zealand Human Rights Commission ('NZHRC') and the PIF Secretariat identified three broad concerns that arise repeatedly in dialogue about human rights in the Pacific — lack of resources, compliance with international treaty body reporting obligations, and the interface between custom and human rights.⁶⁰ From a more academic perspective but in a similar vein, 'Dejo Olowu refers to the three challenges of cultural relativism, fiscal limitations and geopolitical challenges.⁶¹ The 2010 Australian Select Committee Report on Human Rights in the Asia-Pacific region noted that the challenges included geographic and resource constraints, limited engagement with human rights concepts, and perceived tensions with culture.⁶² In this part of the article, four key challenges are summarised. These challenges cover those identified by others, while also identifying national sovereignty and the role of non-state actors as separate and discrete challenges.

A *Whose Rights?*

One of the major challenges for the promotion of human rights in the Pacific is the perception that human rights are an incursion into national and local cultures. Human rights are sometimes perceived as a foreign concept⁶³ and there is a concern that the values underlying human rights treaties do not 'fit' with Pacific values. These concerns go to the very heart of the human rights project. Pacific scholar Konai Helu Thaman puts it this way:

⁵⁸ Richard Nielsen and Beth A Simmons, 'Rewards for Rights Ratification? Testing for Tangible and Intangible Benefits of Human Rights Treaty Ratification' (Paper presented at the American Political Science Association Meeting, Toronto, 3–6 September 2009) 37 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451630>. Note, however, that despite this conclusion, Nielsen and Simmons are overall in favour of treaty ratification to improve domestic human rights.

⁵⁹ See especially Eric Neumayer, 'Is Respect for Human Rights Rewarded? An Analysis of Total Bilateral and Multilateral Aid Flows' (2003) 25 *Human Rights Quarterly* 510; James H Lebovic and Erik Voeten, 'The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators' (2009) 46 *Journal of Peace Research* 79.

⁶⁰ New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 'National Human Rights Institutions: Pathways for Pacific States' (Research Paper, New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 9 July 2007) 7. See also Joy Liddicoat, 'Human Rights Mechanisms in Small Pacific States: Implications for Dialogue about Regional Human Rights Mechanisms' (2009) 40 *Victoria University of Wellington Law Review* 279, 280–1.

⁶¹ Olowu, 'The United Nations Human Rights Treaty System', above n 6, 135.

⁶² Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 6 [2.2].

⁶³ Pacific Islands Forum Secretariat, 'Pacific Plan 2010 Annex', above n 31, 188.

My own view is that the delay of the full entry of Pacific Island nations into international debates on human rights may be due to the fact that, as with many ideas that emanate from the international community, it was assumed that the concept of human rights was self-evident, universal, culture-free and gender neutral! Such assumptions were at best naive and at worst arrogant, because most international covenants are based on Western liberal beliefs and values, and like all beliefs and values, they are embedded in a particular cultural agenda where indigenous peoples together with their assumptions and values have been and continue to be disregarded and marginalised.⁶⁴

There is a fear that ratification of human rights treaties may diminish the scope for states to claim a different approach to rights, or an appreciation of rights tailored to a different cultural context. This is a very real concern in the Pacific where human rights are seen by some as another (unwanted) form of globalisation. International human rights standards may be seen as failing to take account of national, or indeed local, peculiarities. A 'universal' approach to rights is seen as undermining cultural difference, which for many small states, or small minorities, is all they feel they have left in a globalised world.⁶⁵

A particular issue is the relationship between custom and human rights, and a concern that human rights will 'trump' local customs.⁶⁶ Unlike larger Western states, the 'reach' of central government in the Pacific is limited, with many communities largely governing themselves. In most Pacific states, the majority of the population live in rural areas. Contact with government agencies and the formal legal structure are limited. The major part of daily life is regulated by custom.⁶⁷ Traditional community and church leaders play a key role in domestic governance.⁶⁸ Hence, Pacific states may be wary of ratifying treaties that might not resonate with these stakeholders.

This issue requires close consideration. While the Western origins of the human rights movement cannot be denied, nor can the fact that significant sectors of Pacific populations are already committed to human rights and see a strong resonance between human rights and their own values. Perhaps the real question is the extent to which the international human rights framework is able to accommodate a Pacific conception of 'human dignity', and the extent to which Pacific rights advocates are able to translate the international framework into local understandings. The links between human rights and everyday living and sustainable development are not fully understood, even at government level.⁶⁹

⁶⁴ Konai Helu Thaman, 'Cultural Rights: A Personal Perspective' in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (Huia Publishers, 2000) 2–3.

⁶⁵ Huffer, above n 35, 11.

⁶⁶ See New Zealand Law Commission, above n 12. For discussion on the approach of the courts to conflicts between custom and human rights, see Sue Farran, 'Custom and Constitutionally Protected Fundamental Rights in the South Pacific Region: The Approach of the Courts to Potential Conflicts' (1997) 21 *Journal of Pacific Studies* 103; Jennifer Corrin Care, 'Reconciling Customary Law and Human Rights in Melanesia' (2003) 4 *Hibernian Law Journal* 53.

⁶⁷ Sue Farran, 'Human Rights in the Pacific Region — Challenges and Solutions' [2005] *LAWASIA Journal* 39, 53.

⁶⁸ Huffer, above n 35, 12.

⁶⁹ See Pacific Islands Forum Secretariat, 'Pacific Plan 2010 Annex', above n 31, 188.

Of particular note in this context is the 2009 decision of Tonga not to ratify *CEDAW*. Tonga is one of only seven countries in the world not to have done so. Following recommendations from other states during its 2008 UPR that Tonga ratify *CEDAW*, in 2009, the Tongan Government explicitly considered ratification and decided against doing so. The grounds on which Tonga decided not to ratify include that ratification ‘would cut across [the] cultural and social heritage that makes up the Tongan way of life’.⁷⁰ Instead, Tonga pledged to address specific areas of concern for women. This decision is a setback for the promotion of women’s rights in Tonga and has provoked a strong reaction from local women’s groups.⁷¹ It does, however, aptly illustrate the Pacific concern with human rights as a foreign imposition.⁷²

Of concern going forward is the ability of Pacific states and civil society to participate in the future development of new human rights standards. Although Pacific states did not participate in the drafting of early human rights documents given their colonised status at the time, they have been able to participate in some of the more recent international negotiations leading to new human rights standards. For example, Samoa played a role in the drafting of the 1998 *Rome Statute of the International Criminal Court*.⁷³ However, from a practical point of view Pacific states still have a limited ability in terms of resources to contribute to the development of new standards. Geographic and financial barriers prevent significant engagement in what are sometimes lengthy negotiation processes.

B *National Sovereignty and Constitutional Amendment*

Closely related to concerns around the perceived Western bias of the international human rights framework are concerns of national sovereignty and the potential need for constitutional amendments consequent to ratification. Imrana Jalal has noted that Pacific states may resist ratification as an ‘expression of hostility against what they consider to be forced ratification by the superpowers, and even the UN, and their hegemonic attitudes’.⁷⁴ There may be a desire to avoid international scrutiny of domestic practices.⁷⁵ Part of the context here is the comparatively recent decolonisation of the Pacific. With the exception of Tonga, which was never colonised, the remaining Pacific states gained independence comparatively recently during the 1960s–80s, with Palau only gaining full independence in 1994. In light of this recent history, the prospect of ceding sovereignty via submission to the international human rights framework may not be at all palatable. In the Pacific Plan itself, it is noted that, although the

⁷⁰ Prime Minister’s Office, Tonga, ‘Tongan Parliament Decides Not to Ratify CEDAW’ (Press Release, 17 September 2009) [3].

⁷¹ Radio New Zealand International, ‘Tongan Women Disgusted with Government for Snubbing CEDAW’ (18 September 2009) <<http://www.rnzi.com/pages/news.php?op=read&id=49190>>.

⁷² For further discussion on the thorny issue of women’s rights in the Pacific, see especially Jean G Zorn, ‘Women, Custom and International Law in the Pacific’ (Occasional Paper No 5, University of the South Pacific School of Law, 2000); Jennifer Corrin, ‘Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies’ (2006) 5 *The Indigenous Law Journal* 51.

⁷³ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁷⁴ Jalal, ‘Pacific Culture and Human Rights’, above n 6, 16.

⁷⁵ New Zealand Law Commission, above n 12, 68 [5.35].

Pacific Plan is based on the concept of regionalism, '[r]egionalism under the Pacific Plan does not imply any limitation on national sovereignty'.⁷⁶ In the context of discussions around a regional human rights mechanism, it has been noted that 'maintaining a high level of state sovereignty is more important than regional co-operation or integration given the recent consolidation of nationhood'.⁷⁷

A related issue with significant implications for state sovereignty is the future prospect of adjudication by treaty bodies of individual complaints of human rights violations in the Pacific. As noted above, the focus of this article is on ratification of the nine core human rights treaties. This is because the pattern to date, and the likely approach in the immediate future, is that most states will choose ratification of the core treaties, without — at least initially — the optional individual communication mechanisms. Nevertheless, the prospect of future adjudication by treaty bodies, and its consequent effect on national sovereignty, may be an underlying concern. A cautionary tale from the three Caribbean states of Jamaica, Trinidad and Tobago and Guyana is pertinent here. The context was a protracted dispute over capital punishment and the 'death row phenomenon', involving decisions by the Privy Council, the Human Rights Committee under the *First Optional Protocol to the ICCPR*,⁷⁸ the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. It led ultimately to denunciation of the *American Convention on Human Rights* by Trinidad and Tobago, and denunciation of the *First Optional Protocol to the ICCPR* by all three states. Laurence Helfer has suggested that this incident can be understood, at least in part, as a backlash to the 'overlegalisation' of the three governments' human rights commitments.⁷⁹

International human rights commitments may require significant constitutional amendment. For many states and their citizens, there is a strong sense of 'ownership' of the constitution. For example, in Samoa's report to the *CRC* Committee, a perception by Samoans that human rights were introduced into the education system because of ratification of the *CRC* and *CEDAW* was noted, '[h]owever, once they get the information on their human rights as stated in the Constitution, they then find it easier to accept the rights that are being taught in the context of *CEDAW* and the *CRC*'.⁸⁰ This illustrates, however, that if constitutional amendment is required in order to comply with international obligations, this might be perceived as an unwanted intrusion into national sovereignty.

From a practical point of view, some constitutions have special amendment procedures requiring special majorities, a referendum, or a constitutional

⁷⁶ Pacific Islands Forum Secretariat, 'Pacific Plan', above n 4, 3 [6].

⁷⁷ Kathryn Hay, 'A Pacific Human Rights Mechanism: Specific Challenges and Requirements' (2009) 40 *Victoria University of Wellington Law Review* 195, 205.

⁷⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*First Optional Protocol to the ICCPR*').

⁷⁹ Laurence R Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832.

⁸⁰ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Initial Report of States Parties Due in 1996: Samoa*, UN Doc CRC/C/WSM/1 (16 February 2006) [191(b)].

convention. If constitutional change is required to give effect to international human rights treaties, then it may take considerable time to bring this about. For example, Kiribati has referred to ‘the high threshold required in order to adopt an amendment to the Bill of Rights’ in responding to calls that sexual orientation and gender be added as prohibited grounds of discrimination in its constitution.⁸¹

For some states, where there is a constitutional review exercise underway, this offers an opportunity to consider constitutional amendment in a wider context. States such as Solomon Islands and Nauru have recently been engaged in broad constitutional renewal exercises. Such exercises are ideal times to consider whether additional rights should be protected by the constitution or if additional mechanisms for protecting rights should be introduced. Considering such issues as part of a broader constitutional review process may ameliorate concerns about loss of national sovereignty.

An important issue to discuss in this context is that of timing. If ratification of a particular treaty will require constitutional or legislative amendment, should that occur before or after ratification? There is a divergence of views on this issue. As noted above, as soon as ratification occurs, legal obligations are incurred at the international level. Therefore, it is preferable for the necessary legislative or constitutional amendments to be made before ratification. However, the OHCHR and the PIF Secretariat have been explicit in advising Pacific states of the ‘fallacy’ of pre-ratification compliance.⁸² The view of these agencies is that:

There is a common misperception, in the Pacific region and elsewhere, that full compliance with treaty provisions is a pre-requisite for ratification. This is not true. In fact, no country in the world manages full compliance. There is always room for improvement. Ratification should signal the beginning of a process to amend national legislation so that it conforms to international human rights standards. States should not regard their current domestic human rights situation as a barrier to treaty ratification. Instead, ratification should be seen as an opportunity to effect change.⁸³

Certainly it is true that the aspirational nature of human rights treaties allows states some leeway or ‘margin of appreciation’ in determining how to give effect to the treaty. In the context of the *ICESCR*, this is further particularised by requiring states to take steps ‘to the maximum of available resources’ to progressively realise rights.⁸⁴ Nevertheless, in light of the arguments raised in this article, the OHCHR might be moved to reconsider its position on ratification. The concern is that such a pronounced emphasis on ratification may encourage some states to pursue ratification as an end in itself, ‘a means to easy accolades for empty gestures’.⁸⁵

⁸¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kiribati*, 15th sess, Agenda Item 6, UN Doc A/HRC/15/3 (17 June 2010) [61].

⁸² United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, ‘Ratification of International Human Rights Treaties’, above n 5, 10.

⁸³ *Ibid.*

⁸⁴ *ICESCR*, art 2.

⁸⁵ Anne Bayefsky, ‘Report on the UN Human Rights Treaties: Facing the Implementation Crisis’ (Paper presented at the International Law Association Helsinki Conference, Helsinki, 11–17 August 1996) <<http://www.bayefsky.com/reform/ila.php>>.

C *The Influence of Non-State Actors*

A key challenge in advancing human rights in the Pacific is the role and influence of non-state actors. There is a very real risk that human rights treaties will not touch the actions of some of the key rights transgressors in the Pacific. As noted above, traditional community and church leaders have a major governance role and often have a bigger impact on the lives of individuals than does the state. Activities aimed at protecting and promoting human rights therefore need to reach not only the states but also these significant non-state actors. Strategies to improve human rights outcomes in the Pacific need to extend to the actions of non-state actors.

While some treaties seek to address the actions of non-state actors,⁸⁶ most are primarily concerned with the actions of states. Although human rights treaties require states to protect individuals from human rights abuses committed by third parties, those who are directly breaching human rights are not targeted by the treaties. Although courts sometimes seek to apply rights 'horizontally' between individuals (as opposed to 'vertically' between individuals and the state),⁸⁷ the primary guarantor of human rights remains the state. Human rights treaties, like a number of other good governance measures, ignore alternative loci of power.⁸⁸ Ratification of treaties, with the consequent primary focus on states rather than traditional community leaders and churches, may have only limited impact in terms of improving human rights outcomes.

D *Resources and Priorities*

Adopting any new international obligation, whether in the human rights field or otherwise, will be a drain on limited resources. Most Pacific states have limited resources for engaging in foreign policy. Faced with such limitations, competing regional and international obligations often appear more pressing. These might include obligations with regard to terrorism, organised crime, money laundering, fisheries, shipping, trafficking in persons and, importantly in the Pacific, responding to the very real threat of climate change.

A 2003 study by Elise Huffer noted that there is perhaps a feeling in the Pacific that international human rights conventions apply to larger countries and are not designed for small, developing states.⁸⁹ Despite the advances of modern technology, geography remains a constraining factor in terms of access to international mechanisms. In November 2008, RRRT noted that 'the location of most offices of the UN in Europe have made it very difficult for Pacific people to

⁸⁶ See, eg, *CEDAW* arts 2(e), 5(a).

⁸⁷ See especially Jennifer Corrin, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific' (2009) 58 *International and Comparative Law Quarterly* 31; Miranda Forsyth, 'Is there Horizontal or Vertical Enforcement of Constitutional Rights in Vanuatu?' *Family Kalontano v Duruaki Council of Chiefs* (2005) 9 *Journal of South Pacific Law* 20.

⁸⁸ Scott Walker, 'Human Rights and the South Pacific: A New Voice in the Global Dialogue' (2011) 10 *Journal of Human Rights* 214, 222.

⁸⁹ Huffer, above n 35, 8.

identify with them. Even UN offices located in the Pacific are regarded as inaccessible.⁹⁰

If ratification is to be meaningful, it requires resources. The scale of resources required varies from treaty to treaty and the resource implications are two-fold — upfront implementation costs and ongoing compliance costs. An example of the extent of action required can be seen from the *CEDAW* legislative indicators project, which provides a road map of over 100 indicators for individual Pacific countries to use as they progress towards legislative implementation of their *CEDAW* obligations.⁹¹ Even with donor assistance, ratification and implementation will result in significant costs for individual states. This reality is reflected in a comment by Vanuatu during its UPR, where it indicated that it is not in a position to ratify the *ICESCR* ‘due to the high threshold of its obligations and the financial constraints’.⁹²

As well as the costs of implementation arising from ratification, the costs of ongoing compliance in meeting the reporting obligations are significant. If Pacific states were to ratify all nine of the core treaties, this could result in an obligation to either report to or appear before a treaty body almost every year. In its UPR, Fiji noted that the task of fully complying with every reporting and implementing obligation under the core treaties and their protocols ‘could be insurmountable’.⁹³ Although the treaty bodies release guidelines on the content of state reports, Pacific states see these as onerous, geared for larger states, and based on assumptions that are not relevant in the Pacific.⁹⁴

Comprehensive reporting requires internal consultations, possibly the hiring of consultants to write the report, engagement with civil society, and the gathering of data from poorly resourced departments.⁹⁵ Once the report has been submitted, a team of officials is then required to travel to Geneva or New York to meet with the treaty body. As has been noted by the Australian Department of Foreign Affairs and Trade, there are no Pacific countries represented in Geneva, which imposes an additional burden.⁹⁶ For smaller Pacific states especially, the ongoing burden of reporting is, and will continue to be, significant. This is reflected in a comment by Tuvalu during its UPR where it noted that it had no objection to the substance of the *ICCPR* and *ICESCR*, but ‘the Government did

⁹⁰ The Pacific Regional Rights Resource Team, Submission No 13 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Rights Mechanisms and the Asia-Pacific*, November 2008, 14, quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, [28(1)].

⁹¹ See Vedna Jivan and Christine Forster, ‘Challenging Conventions: In Pursuit of Greater Legislative Compliance with *CEDAW* in the Pacific’ (2009) 10 *Melbourne Journal of International Law* 655.

⁹² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Vanuatu*, 12th sess, Agenda Item 6, UN Doc A/HRC/12/14 (4 June 2009) [19].

⁹³ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Fiji*, 14th sess, Agenda Item 6, UN Doc A/HRC/14/8 (23 March 2010) [48].

⁹⁴ New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, ‘National Human Rights Institutions’, above n 60, 39.

⁹⁵ Jalal, ‘Pacific Culture and Human Rights’, above n 6, 10.

⁹⁶ Evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, 13 August 2009, 6 (Craig MacLachlan, Assistant Secretary, Department of Foreign Affairs and Trade), quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 6 [2.5].

not have the resources required to report on or implement these and many other international conventions'.⁹⁷

Along with many other states, Pacific states have had difficulty meeting their existing reporting obligations. It can be difficult to maintain momentum during the reporting process — changes in government, movement of key personnel and traumatic environmental events can all result in long delays.⁹⁸ There is a perception by many in the Pacific that further ratification will lead to 'scarce resources being expended on reporting obligations to United Nations treaty bodies, [rather] than on making a difference in the everyday lives of the people'.⁹⁹ See Table Two for more detail on current reporting by each state.¹⁰⁰

Table Two: Reporting Status of Pacific Island States¹⁰¹

Country	Ratified treaties	Reports Submitted	Reports Overdue ¹⁰²
Cook Islands ¹⁰³	<i>CRC</i>	nil	1 st , 2 nd , 3 rd
	<i>CEDAW</i>	1 st	nil
	<i>CRPD</i>	nil	nil
Federated States of Micronesia	<i>CRC</i>	1 st	2 nd , 3 rd , 4 th
	<i>CEDAW</i>	nil	1 st , 2 nd
Fiji	<i>CRC</i>	1 st	2 nd , 3 rd
	<i>CEDAW</i>	1 st , 2 nd –4 th (combined)	nil
	<i>CERD</i>	1 st , 2 nd –3 rd (combined), 4 th , 5 th , 6 th –15 th (combined), 16 th –17 th (combined)	nil
Kiribati	<i>CRC</i>	1 st	nil
	<i>CEDAW</i>	nil	1 st , 2 nd
Marshall Islands	<i>CRC</i>	1 st , 2 nd	nil
	<i>CEDAW</i>	nil	1 st
Nauru	<i>CRC</i>	nil	1 st , 2 nd , 3 rd

⁹⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Tuvalu*, 10th sess, Agenda Item 6, UN Doc A/HRC/10/84 (9 January 2009) [18].

⁹⁸ New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 'National Human Rights Institutions', above n 60, 39.

⁹⁹ Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Human Rights Protection in the Pacific: The Emerging Role of National Human Rights Institutions in the Region' (2010) 8 *New Zealand Journal of Public International Law* 117, 119.

¹⁰⁰ See Olowu, 'The United Nations Human Rights Treaty System', above n 6, 177–9.

¹⁰¹ Anne Bayefsky (ed), *Documents by State, The United Nations Human Rights Treaties* (2010) <<http://www.bayefsky.com/bystate.php/alist/af>>: state reporting history is drawn from this database and information is current as at July 2010.

¹⁰² Treaty bodies have adopted the practice, in their Concluding Observations on a state's report, of inviting states with significantly overdue reports to subsequently submit consolidated reports. If this occurs, the deadline is in effect extended, and such reports are no longer overdue. In these situations, the state's status is noted as 'nil' overdue reports.

¹⁰³ Table One notes that the Cook Islands is party to the *ICESCR*, *ICCPR*, and *CERD* by virtue of New Zealand's ratification of these treaties. This is the advice of the New Zealand Ministry of Foreign Affairs and Trade. However, the relevant treaty bodies do not require reports from the Cook Islands for these treaties, and so they are not noted in Table One.

Niue ¹⁰⁴	<i>CRC</i>	nil	1 st , 2 nd , 3 rd
Palau	<i>CRC</i>	nil	2 nd , 3 rd
Papua New Guinea	<i>CRC</i>	1 st	2 nd , 3 rd (combined)
	<i>CEDAW</i>	1 st -3 rd (combined)	4 th
	<i>CERD</i>	1 st	2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th , 8 th , 9 th , 10 th , 11 th , 12 th , 13 th , 14 th
	<i>ICESCR</i>	nil	1 st
	<i>ICCPR</i>	nil	1 st
Samoa	<i>CRC</i>	1 st	nil
	<i>CEDAW</i>	1 st -3 rd (combined)	4 th -5 th
	<i>ICCPR</i>	nil	1 st
Solomon Islands	<i>CRC</i>	1 st	2 nd -3 rd (combined)
	<i>CEDAW</i>	nil	1 st , 2 nd
	<i>CERD</i>	1 st	2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th , 8 th , 9 th , 10 th , 11 th , 12 th , 13 th , 14 th
	<i>ICESCR</i>	1 st	2 nd , 3 rd
Tonga	<i>CRC</i>	nil	1 st , 2 nd , 3 rd
	<i>CERD</i>	1 st , 2 nd , 3 rd , 4 th -5 th (combined), 6 th , 7 th , 8 th , 9 th -10 th (combined), 11 th -13 th (combined), 14 th	15 th , 16 th , 17 th , 18 th , 19 th
Tuvalu	<i>CRC</i>	nil	1 st , 2 nd , 3 rd
	<i>CEDAW</i>	1 st -2 nd (combined)	nil
Vanuatu	<i>CRC</i>	1 st	2 nd , 3 rd , 4 th
	<i>CEDAW</i>	1 st -3 rd (combined)	nil
	<i>ICCPR</i>	nil	1 st
	<i>CRPD</i>	nil	nil

V RATIFICATION STRATEGIES: ASSESSING THE OPTIONS

In light of the benefits and challenges of ratifying human rights treaties, four possible strategies which Pacific states might conceivably adopt to respond to the call for ratification are now considered.

A *Strategy One: Wholesale Ratification*

Wholesale ratification of the outstanding core human rights treaties is the strategy encouraged by many other states. In the context of the UPR, many states recommend to Pacific states that they ratify all remaining core treaties. For

¹⁰⁴ Table One notes that Niue is party to the *ICESCR*, *ICCPR*, *CERD* and *CEDAW* by virtue of New Zealand's ratification of these treaties. However, the relevant treaty bodies do not require reports from Niue for these treaties, and so they are not noted in Table One.

example, in Kiribati's UPR, Hungary recommended that Kiribati ratify all outstanding core treaties 'as soon as possible'.¹⁰⁵ Similarly, Chile recommended to the Federated States of Micronesia that it 'consider ratifying international human rights treaties that are still pending'.¹⁰⁶ An advantage of wholesale ratification is that it reinforces the principles of indivisibility and interdependence of all human rights. In contrast, selective ratification, in particular of treaties targeting specific populations, may make other minorities more vulnerable, by potentially preferring the rights of one group over another. Wholesale ratification would be a strong statement that the state intended to actively protect and promote all human rights.

However, if a state were to ratify those of the nine core treaties not yet ratified then, as noted above, both the immediate implementation requirements and the ongoing reporting requirements would be significant. Given well-known resource constraints, there is potential dishonesty in taking this approach; it seems likely from the outset that, in the absence of significant additional resources, both the implementation and ongoing compliance obligations are unlikely to be met. It would potentially result in allegations of 'window-dressing' or, to use Tonga's description when it decided not to ratify *CEDAW*, to a 'ratification of convenience'.¹⁰⁷ It also needs to be noted that at the global level, while a number of states have ratified seven of the core treaties, few have ratified all nine. It would be a remarkable achievement indeed for Pacific states, some of the smallest and most poorly resourced in the world, to take a lead by way of wholesale ratification.

Aside from the practical resource issues, wholesale ratification is not a viable strategy in view of the philosophical concerns with the human rights project. Wholesale ratification will further alienate those who have fundamental concerns with the underlying values in human rights treaties and could lead to backlash, including from non-state actors such as traditional and church leaders who are yet to be convinced of the merits of the human rights project.

B *Strategy Two: Moratorium on Ratification*

A second strategy, at the other end of the spectrum, is for states to decide not to ratify any more of the core treaties. Such a strategy may have a certain amount of appeal, at least in the short-term. It avoids immediate concerns about further unwelcome imposition of Western values. National sovereignty concerns are allayed, constitutional amendment is not required, influential non-state actors are not alienated and scarce resources are not stretched even further. This strategy may also leave space for states and civil society to undertake rights awareness and education activities which in any event should arguably precede ratification.

¹⁰⁵ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kiribati: Addendum*, 15th sess, Agenda Item 6, UN Doc A/HRC/15/3/Add.1 (30 September 2010) [9].

¹⁰⁶ Human Rights Council Working Group on the Universal Periodic Review, *Draft Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 9th sess, UN Doc A/HRC/WG.6/9/L.14 (12 November 2010) [61.7].

¹⁰⁷ Prime Minister's Office, Tonga, above n 70.

It could enable further development of a distinctive regional Pacific view of human rights.¹⁰⁸

This strategy could perhaps underlie the current approach of a number of states — if not intentionally, then perhaps by default. It also needs to be noted that this strategy does not necessarily mean that a state intends to violate human rights. Rather, a state, for various reasons, is simply choosing not to ratify a set of treaties, even though it may still act in accordance with human rights values. Indeed, this could be presumed from the existing constitutional protection of rights in most Pacific constitutions.

Despite its possible appeal, this strategy is an isolationist one. As noted by one commentator, ‘rejection of the strident global push for individual rights would be highly controversial’.¹⁰⁹ It means not only that the challenges of ratification are avoided, but so too are the potential benefits. The galvanising effect of human rights treaties in protecting and promoting human rights at the national level is lost. International scrutiny of Pacific human rights is avoided. It would leave scope for creative courts to refer to human rights treaties anyway, thereby creating uncertainty. It would limit access to potential rewards for ratification — technical assistance, external investment and reputational advantage. In light of the human rights initiative in the Pacific Plan, such an approach would also be at odds with the already agreed goals of PIF leaders set out in the Pacific Plan. Realistically, it is not a viable strategy.

C *Strategy Three: Selective Ratification*

Obviously, the treaties not yet ratified do not all have to be ratified at once. Indeed, for Pacific states with resource constraints and competing national, regional and international priorities, a gradual approach to ratification makes sense. In support of a gradual approach, it can also be noted that the ratification pattern for virtually all states has been a gradual one. Indeed, it is only for more recently established states that the possibility of wholesale ratification has arisen, as more established states have had the opportunity to address ratification on a gradual basis as treaties have been concluded.

What is needed to support a strategic selective ratification approach is for individual Pacific states to undertake a prioritisation exercise and assess each treaty in terms of its potential consequences, benefits and challenges. The prioritisation exercise should be informed by an assessment of the current human rights issues in individual states. UPR reports are one very useful source for this. All Pacific states, except the Cook Islands and Niue (which are not UN members and so not obliged to report under the UPR), have now prepared a national report for the first round of the UPR. The national reports are prepared by the state in consultation with civil society, and usually indicate the key human rights challenges. As the UPR process only began in 2008, the reports are all recent documents which address current human rights issues. For example, Samoa’s national report indicates that some of the key challenges are gaps in human rights legislation, pervasive violence against women and children, access to health services and education, facilities for people with disabilities, and cultural

¹⁰⁸ See discussion in Part V(D)(2) below.

¹⁰⁹ Walker, above n 88, 226.

constraints.¹¹⁰ In assessing human rights needs, it will be important to seek wide input from civil society, including church and traditional communities, as to what the current human rights issues are within individual states. In some cases, local NGOs will also have prepared reports for inclusion in the OHCHR stakeholder summary for the UPR, which will also be useful.¹¹¹

While it is for individual states to assess which treaties are likely to be of most benefit to them, and for civil society to lobby according to its own view of ratification priorities, some general observations can be made. Regional consultations and meetings have identified some common themes across the region. For example, issues identified during the 2004 Pacific Human Rights Consultation and the 2005 Regional Workshop on National Human Rights Mechanisms included restrictions on freedom of expression and information; freedom from ethnic and racial discrimination; and the rights of migrant workers; discrimination against women; children's rights; protection of people living with HIV/AIDS; labour rights; environmental degradation and the rights of prisoners.¹¹² Participants at the 2009 Workshop on the Establishment of National Human Rights Mechanisms in the Pacific identified current human rights issues as including violence against women; gender equality; women's political participation; children's rights; trafficking in persons; the rights of persons with disabilities; and the economic and social rights of education, housing, employment and health.¹¹³ The 2010 Australian Select Committee Report on Human Rights in the wider Asia-Pacific region referred to children's rights; climate change and the environment; gender discrimination and violence; and realising the Millennium Development Goals as some of the key human rights issues.¹¹⁴

Thinking outside the traditional scope of human rights, at the 2008 Symposium on Human Rights in the Pacific, which was focused in particular on the possibility of a regional human rights mechanism, participants offered some thoughts on rights issues which might be considered peculiar to the Pacific. Possibilities included the right to land, the right to fish and the right to a safe or quality environment.¹¹⁵ Sue Farran, in her thoughtful book on human rights in the region, has also singled out freedom to give and receive information as the

¹¹⁰ Human Rights Council Working Group on the Universal Periodic Review, *National Report: Samoa*, 11th sess, UN Doc A/HRC/WG.6/11/WSM/1 (14 February 2011) [17].

¹¹¹ For national reports by the state, and the individual NGO reports, see Office of the High Commissioner for Human Rights, *Universal Periodic Review* (2011) <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>>; see also UPR Info, *Database of UPR Recommendations* (2011) <www.upr-info.org/database/>.

¹¹² New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 'National Human Rights Institutions', above n 60, 14–15.

¹¹³ Benjamin Lee, 'Regional Workshops on the Establishment of National Human Rights Mechanisms in the Pacific: Aims and Outcomes' (2009) 40 *Victoria University of Wellington Law Review* 413, 414.

¹¹⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 11–18 [2.25]–[2.57].

¹¹⁵ See P Imrana Jalal, 'Why Do We Need a Pacific Regional Human Rights Commission?' (2009) 40 *Victoria University of Wellington Law Review* 177, 184; Susan Glazebrook, 'Human Rights and the Environment' (2009) 40 *Victoria University of Wellington Law Review* 293; Sue Farran, 'Land as a Fundamental Right: A Cautionary Tale' (2009) 40 *Victoria University of Wellington Law Review* 387.

most important right currently needed to advance human rights in the region.¹¹⁶ She also considers the right to property in more depth, looking at three forms of property — land, intellectual property and the ocean.¹¹⁷ Many in the region might also support a vision of human rights that better protects the collective rights of groups.¹¹⁸

Looking at the existing treaties themselves, the *ICCPR* and *ICESCR* may be priorities on the basis that these two treaties, along with the 1948 *UDHR*, represent the foundation of human rights and cover the main areas of civil, political, economic, social and cultural rights. With the development focus of the Pacific Plan, the *ICESCR* is likely to be particularly important, as it is the human rights treaty that links sustainable development to human rights.¹¹⁹ It may assist in dealing with some of the challenges in the economic and social areas.¹²⁰ The *ICESCR* could also be a useful ‘shield’ to respond to donors who seek to impose economic policies which would negatively impact on the economic and social rights protected by the *ICESCR*.¹²¹ Furthermore, the right to culture in the *ICESCR* could also be used to address fundamental concerns about preservation of language, culture and tradition.

For the *ICCPR*, most Pacific constitutions already provide protection for civil and political rights, so one appeal of this treaty is that minimal legislative adjustment may be all that is required. The rights protected by the *ICCPR* are also typically rights which require the state to refrain from taking certain actions. As such, they may require less expenditure and input of state resources than economic, social and cultural rights. Ratification of the *ICCPR* might therefore be a ‘quick win’. In 2008, although Papua New Guinea ratified both the *ICCPR* and *ICESCR*, Samoa and Vanuatu chose to ratify only the *ICCPR*, with Vanuatu later pointing to the additional resources required for ratification of the *ICESCR* as a reason for choosing not to ratify.¹²²

The treaties aimed at particular population groupings merit consideration. Given their targeted nature, ratification and implementation of these treaties is likely to lead to human rights gains for the target groups. These treaties are also those around which civil society can effectively mobilise. Given their specific beneficiary groups, they may be more likely to attract donor support and technical assistance. Only Nauru, Palau and Tonga have yet to ratify *CEDAW*, so this may, including for the additional reason of regional solidarity, be a priority. As discussed above, Tonga did however consider ratification in 2009 and explicitly decided against it.¹²³ Palau has recently indicated that the underlying

¹¹⁶ Sue Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009) 305.

¹¹⁷ *Ibid* ch 4.

¹¹⁸ Walker, above n 88, 224. See also New Zealand Law Commission, above n 12, 219 [14.55]–[14.57].

¹¹⁹ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, ‘Ratification of International Human Rights Treaties’, above n 5, 4.

¹²⁰ For further discussion, see ‘Dejo Olowu, ‘Invigorating Economic, Social and Cultural Rights in the South Pacific: A Conceptual Approach’ (2007) 7 *Queensland University of Technology Law and Justice Journal* 71.

¹²¹ Paul Hunt, ‘Using Rights as a Shield’ (2002) 6 *Human Rights Law and Practice* 111.

¹²² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Vanuatu*, 12th sess, Agenda Item 6, UN Doc A/HRC/12/14 (4 June 2009) [19].

¹²³ Prime Minister’s Office, Tonga, above n 70.

reason for lack of action on *CEDAW* is that ‘Palauan women have not spoken with a unified voice in favour of ratification’.¹²⁴ Despite this, *CEDAW* is noted as a treaty requiring action under the human rights initiative of the Pacific Plan.¹²⁵ The Pacific Plan also refers to the Biwako Millennium Framework for the Disabled,¹²⁶ and, under the auspices of the Plan, the Pacific Regional Strategy on Disability 2010–2015 has been adopted.¹²⁷ The Strategy notes the desirability of states ratifying the *CRPD*.¹²⁸

Action in relation to *CERD* is also listed as a milestone under the Pacific Plan’s human rights initiative.¹²⁹ As with civil and political rights, most Pacific constitutions already prohibit discrimination on the grounds of race, so minimal legislative adjustment may be required. On the other hand, for those Pacific states such as the Cook Islands and Niue, where the population is relatively homogeneous, ratification of *CERD* may be a lower priority.

The *CRMW* is aimed at providing protections for migrant workers and their families. Migration from, to and around the Pacific region is a notable feature of the region. Remittances remain a key source of revenue. One argument here is that of reciprocity — as the region enjoys the benefits of remittances from migrant workers outside the region, there is a duty to respect the rights of migrant workers within the region.¹³⁰ Particularly in the Northern Pacific where there are a large number of short-term migrant workers who are vulnerable to exploitation, the *CRMW* may be higher up the priority list. Indeed, during Palau’s UPR, local civil society organisations identified the *CRMW* as one of two priorities along with *CEDAW*.¹³¹ Like *CEDAW* and *CERD*, it too is specifically noted in the milestone chart for the human rights initiative in the Pacific Plan.¹³²

Treaties which may perhaps be of lower priority are *CAT* and the *CPED*. Although instances of police brutality and poor prison conditions do arise,¹³³ Pacific states do not face issues of systemic state-sanctioned torture. The *CPED* is intended to combat situations of state-sponsored disappearances. This is not a problem in the Pacific, and in small societies such as Niue, which has a

¹²⁴ Human Rights Council Working Group on the Universal Periodic Review, *National Report: Palau*, 11th sess, UN Doc A/HRC/WG.6/11/PLW/1 (2 February 2011) [73].

¹²⁵ See Pacific Islands Forum Secretariat, ‘Pacific Plan’, above n 4, 19.

¹²⁶ *Ibid.*

¹²⁷ Pacific Islands Forum Secretariat, ‘Pacific Regional Strategy on Disability 2010–2015’ (Conclusions of Session No 9, Forum Disability Minister’s Meeting, 21–23 October 2009) <<http://www.forumsec.org.fj/resources/uploads/attachments/documents/Pacific%20Regional%20Strategy%20on%20Disability.pdf>>.

¹²⁸ *Ibid.* 10.

¹²⁹ Pacific Islands Forum Secretariat, ‘Pacific Plan’, above n 4, 19.

¹³⁰ Jalal, ‘Pacific Culture and Human Rights’, above n 6, 34.

¹³¹ Human Rights Council Working Group on the Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights: Palau*, 11th sess, UN Doc A/HRC/WG.6/11/PLW/3 (16 February 2011) [1]–[3].

¹³² Pacific Islands Forum Secretariat, ‘Pacific Plan’, above n 4, 19.

¹³³ See United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, ‘Ratification of International Human Rights Treaties’, above n 5, 5. See also Community Para-Legal Taskforce on Human Rights, *Documenting the Treatment of Detainees and Prisoners by Security Forces in the Kingdom of Tonga* (May 2007) Pacific Island Report <<http://archives.pireport.org/archive/2007/may/report%20-%20torture%20in%20tonga.pdf>>.

population of 1625, is unlikely to ever be so. While ratification of this treaty would be a sign of international solidarity, it would have limited benefits for national human rights and would perhaps be a poor use of resources.

Practical considerations are also worth bearing in mind. For example, the frequency of the reporting requirement for the particular treaty should be considered. Under *CERD*, states are required to report every two years. Fiji, Tonga, Papua New Guinea and Solomon Islands have all struggled to meet these reporting requirements. This practical requirement might therefore make compliance with *CERD* a lower priority than compliance with treaties such as the *ICESCR* or the *CRMW*, which have five year reporting intervals. However, the recent practice of treaty bodies, particularly where the reporting interval is shorter, has been to suggest that states should consolidate two or more of their periodic reports.

It is encouraging to see that some states in the international community are beginning to endorse selective ratification in their engagement with Pacific states during the UPR. For example, Tonga has currently ratified only the *CRC* and *CERD*. During Tonga's 2008 UPR, instead of recommending a blanket and unmanageable ratification of the remaining seven core treaties, some states adopted a more nuanced approach to focus on only one treaty. New Zealand, Turkey, Japan, Israel and the United Kingdom simply recommended that Tonga ratify *CEDAW*,¹³⁴ while Canada recommended ratification of *CAT*.¹³⁵ Along similar lines, Slovenia recommended and Kiribati accepted that it '[m]ake a long-term plan for the ratification or accession, step by step, to all core international human rights instruments'.¹³⁶ Algeria recommended that the Federated States of Micronesia 'envisage the gradual ratification of other main international human rights instruments'.¹³⁷ Similarly, the Australian Select Committee Report also recognised that a targeted approach to ratification was sensible.¹³⁸ This endorsement of selective ratification is to be welcomed, as it recognises that it is unrealistic to expect small Pacific states to ratify the outstanding core treaties on a wholesale basis.

Some Pacific states have also responded to requests for ratification by indicating a preference for a selective or gradual approach. For example, the Federated States of Micronesia made voluntary pledges during its UPR to ratify the *CRPD* and *CAT*.¹³⁹ Kiribati, while accepting the recommendation to make a plan for step-by-step ratification, rejected all recommendations for ratification of individual treaties, noting that '[t]his is not feasible in light of the existing

¹³⁴ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Tonga*, 8th sess, Agenda Item 6, UN Doc A/HRC/8/48 (5 June 2008) [63(5)]–[63(7)].

¹³⁵ *Ibid* [63(5)].

¹³⁶ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kiribati: Addendum*, 15th sess, Agenda Item 6, UN Doc A/HRC/15/3/Add.1 (30 September 2010) [7].

¹³⁷ Human Rights Council Working Group on the Universal Periodic Review, *Draft Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 9th sess, UN Doc A/HRC/WG.6/9/L.14 (12 November 2010) [61.1].

¹³⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, [6.78].

¹³⁹ Human Rights Council Working Group on the Universal Periodic Review, *Draft Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 9th sess, UN Doc A/HRC/WG.6/9/L.14 (12 November 2010) [63].

national capacity and resource constraints'.¹⁴⁰ In response to calls for ratification of more of the core treaties in its UPR, Fiji noted that it had 'set for itself a timeframe of 10 years wherein it [would] endeavor all it could to implement all Core Human Rights Conventions'.¹⁴¹ In its UPR response, Vanuatu accepted recommendations to ratify *CAT*, but rejected recommendations to ratify *CERD*, the *ICESCR* and the *CRMW*.¹⁴² Similarly, Nauru accepted recommendations to ratify the *ICCPR*, *CAT* and *CEDAW*, but rejected recommendations to ratify the *ICESCR*, *CERD*, the *CRPD*, *CPED* and *CRMW*.¹⁴³

This strategy of selective ratification, accompanied by a rigorous prioritisation exercise, takes into account not only the subject matter of individual treaties, but is also alive to the benefits and challenges of ratification identified above. It would allow Pacific states to engage in a gradual and manageable way with the international human rights treaty system.

D Strategy Four: Alternative Rights Frameworks

A final strategy is for states to focus their efforts on alternative rights frameworks, which potentially offer more effective ways to improve the human rights situation on the ground in the Pacific. Focusing exclusively or disproportionately on ratification may divert energy away from more viable frameworks for protecting rights. Given the very real challenge of resources, it is important that available resources be used where they will have the biggest impact.

Three alternative frameworks are discussed here. In assessing these alternatives, it is useful to keep in mind the distinction between standard-setting on the one hand and mechanisms for protecting human rights on the other. The core international human rights treaties encompass both of these functions. Their primary purpose is standard-setting: each treaty sets out an agreement between states on the human rights standards in a particular area. However, the treaties also have the secondary purpose of establishing mechanisms (treaty bodies) for 'enforcement' — primarily by monitoring state compliance with those standards. Both the standards and the mechanisms are important: 'for rights to be meaningful, mechanisms for their exercise must exist in practice and these must function effectively'.¹⁴⁴ The current call for Pacific states to ratify more of the core treaties is concerned with both aspects of the treaties, that is, a desire for Pacific states to commit to more of the human rights standards themselves and a desire that they then be held to account via the treaty body mechanisms.

¹⁴⁰ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kiribati: Addendum*, 15th sess, Agenda Item 6, UN Doc A/HRC/15/3/Add.1 (30 September 2010) [9]–[14].

¹⁴¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Fiji Addendum*, 14th sess, Agenda Item 6, UN Doc A/HRC/14/8/Add.1 (23 March 2010) [1].

¹⁴² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Vanuatu Addendum*, 12th sess, Agenda Item 6, UN Doc A/HRC/12/1/4/Add.1 (24 September 2009) [1]–[3], [5].

¹⁴³ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru: Addendum*, 17th sess, Agenda Item 6, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [2]–[10].

¹⁴⁴ Liddicoat, above n 60, 282.

Assessment of the merits of the three frameworks below shall therefore consider both the standard-setting and institutional elements of each framework.

1 *National Frameworks*

At the national level, all Pacific states except Niue currently have constitutional documents which provide some rights protection, binding them to protecting and promoting certain human rights. Most of these are concerned with civil and political rights, although some also provide protection for economic and social rights.¹⁴⁵ Although these domestic rights requirements are by no means comprehensive, they may be adequate at the current time. Given limited state resources, focusing on strengthening the operation and implementation of these existing provisions may provide the greatest improvement in human rights in the short-term. A question which arguably deserves more investigation, but is beyond the scope of this article, is why these existing legal rights are not more regularly invoked.¹⁴⁶ Concern has been expressed that these constitutional protections have little meaning or relevance for many Pacific peoples, who instead ‘solve most of their day-to-day issues and problems under the customary laws or via the chieftains within the villages’.¹⁴⁷ As such, legal frameworks, whether they be national, regional or international, may not be the most effective way of promoting and protecting human rights. Rather, human rights education, awareness and literacy may be a better way forward.

Nevertheless, focusing on implementing and strengthening the existing national frameworks, as opposed to introducing new regional or international frameworks, may mitigate some of the philosophical concerns about human rights, as well as concerns about loss of national sovereignty. For example, during a human rights consultation conducted in Samoa in 2007, there was broad acceptance that human rights needed to be progressed, but also a strong call that human rights be ‘framed in a Samoan context and not as a Palagi or “Western” concept’.¹⁴⁸

In terms of institutional protection, national human rights institutions (‘NHRIs’) potentially offer a viable alternative to the monitoring function of international treaty bodies. NHRIs are independent bodies generally established by domestic constitutional or legislative provisions, with a mandate to ensure that states act to protect and promote human rights. In terms of their structure,

¹⁴⁵ See, eg, *Constitution of the Republic of the Marshall Islands 1979* (Marshall Islands) s 15, which contains protections for health and education; *1st 2009 Draft Federal Constitution of Solomon Islands* (Solomon Islands) ss 47–50, which contains protections for health, housing, education and cultural traditions. See also *Constitution of the Independent State of Papua New Guinea 1975* (Papua New Guinea) pt 3, div 3.

¹⁴⁶ See also Farran, ‘Human Rights in the Pacific Region’ above n 67, 60; von Doussa, above n 56.

¹⁴⁷ Evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, 15 April 2009, 25 (Rachel Ball, Human Rights Law Resource Centre), quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 82 [4.95].

¹⁴⁸ New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, ‘National Human Rights Institutions’, above n 60, 20.

NHRIs should ideally comply with the *Paris Principles*.¹⁴⁹ These principles were endorsed by the General Assembly in 1993 and are intended to ensure independence, effectiveness and pluralism of NHRIs. It is likely to be a challenge for small Pacific states to fully comply with the principles, and in 2007, the NZHRC and the PIF Secretariat released a paper looking at ways in which small Pacific states might give their 'own unique expression' to the *Paris Principles*.¹⁵⁰ Functions undertaken by NHRIs include investigating and conciliating complaints, referring complaints on to state agencies for prosecution, undertaking thematic inquiries, encouraging governments to pass legislation, and monitoring compliance with domestic and international human rights standards. NHRIs have been described as a 'bridge' between civil society and government and between the international human rights system and the national system.¹⁵¹

Internationally, momentum has developed around the establishment of NHRIs, with 64 of the 192 UN members currently having such institutions.¹⁵² In the Pacific region, only New Zealand and Australia currently have NHRIs which are compliant with the *Paris Principles*. The experience and fate of the Fiji Human Rights Commission following the December 2006 coup illustrates some of the challenges Pacific states may face in maintaining an independent NHRI in a complex socio-political context.¹⁵³ In recent years, interest in NHRIs in the Pacific has grown. In 2007, when the NZHRC conducted its consultation on NHRIs, support for establishment of NHRIs was muted. In Samoa, there was mixed opinion about NHRIs being the right machinery at that time.¹⁵⁴ In Tuvalu, concern was expressed about the resource implications of establishing and maintaining an NHRI, but there was support for the conciliation functions of an NHRI.¹⁵⁵ In Niue, the small pool of people and the already overburdened budget were identified as major barriers to establishing an NHRI.¹⁵⁶ As one Niuean participant stated: 'We don't need a new institution. We need people to help us make things work.'¹⁵⁷ Also in 2007, the Nauru Constitutional Review Commission recommended against the establishment of an NHRI in Nauru 'due to resource constraints'.¹⁵⁸ However, by April 2009, government representatives from Niue and Nauru, as well as the Marshall Islands, Palau, Samoa, Solomon Islands and Vanuatu, committed to the Samoa Declaration in which they

¹⁴⁹ *Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights*, GA Res 48/134, UN GAOR, 3rd Comm, 48th sess, 85th plen mtg, Agenda Item 114b, UN Doc A/RES/48/134 (20 December 1993).

¹⁵⁰ New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 'National Human Rights Institutions', above n 60, 5.

¹⁵¹ United Nations Office of the High Commissioner for Human Rights and Pacific Islands Forum Secretariat, 'Ratification of International Human Rights Treaties', above n 5, 11.

¹⁵² Renshaw, Byrnes and Durbach, 'Human Rights Protection in the Pacific', above n 99, 118.

¹⁵³ For further discussion, see Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Implementing Human Rights in the Pacific through National Human Rights Institutions: The Experience of Fiji' (2009) 40 *Victoria University of Wellington Law Review* 251.

¹⁵⁴ New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 'National Human Rights Institutions', above n 60, 21.

¹⁵⁵ *Ibid* 21–2.

¹⁵⁶ *Ibid* 22–3.

¹⁵⁷ *Ibid* 23.

¹⁵⁸ Nauru Constitution Review Commission, 'Naero Ituga Report' (Research Report, Nauru Constitution Review Commission, 28 February 2007) 42.

recognised 'the importance of taking necessary measures in order to establish NHRIs in compliance with the *Paris Principles*'.¹⁵⁹ Research conducted in 2010 noted that a number of Pacific states have indicated their intention to create NHRIs, including the Cook Islands, Nauru, Palau, Papua New Guinea, Samoa and Solomon Islands.¹⁶⁰ In the context of the UPR, a number of states including Nauru,¹⁶¹ Papua New Guinea,¹⁶² Samoa,¹⁶³ and Tonga¹⁶⁴ have either indicated that they will establish an NHRI or accepted recommendations that they do so. Others, however, continue to point to resource limitations that make it difficult to establish and maintain an NHRI.¹⁶⁵

From a practical perspective, if states are engaging in constitutional review and renewal exercises, then these offer an opportunity to consider both strengthening the existing human rights standards in the constitution and considering whether to make provision for an NHRI, or other mechanisms, for monitoring compliance with those standards. For example, the *1st 2009 Draft Federal Constitution of Solomon Islands* contains significant additional human rights protections,¹⁶⁶ and also establishes a national human rights commission.¹⁶⁷ In 2007, although the Nauru Constitutional Review Commission decided not to recommend the establishment of an NHRI, it did recommend that certain economic and social rights, as well as the rights of women and children, be added to Part II of the *Constitution of Nauru*.¹⁶⁸

Recent scholarship promoting NHRIs in the Pacific has summarised the three particular benefits of NHRIs as the ability of an NHRI to work closely with Government in implementing strategies to realise human rights, the awareness of the NHRI of the socio-cultural context into which human rights must be translated, and a sense of ownership of the NHRI by civil society.¹⁶⁹ It has also been noted that the appeal of establishing an NHRI may partly lie in the fact that its existence may appease international and domestic critics without the sacrifice of sovereignty that would be required by accepting the jurisdiction of any supra-national human rights body.¹⁷⁰ All of these factors could lead NHRIs to

¹⁵⁹ 'Samoa Declaration' (2009) 40 *Victoria University of Wellington Law Review* 417, 418.

¹⁶⁰ Renshaw, Byrnes and Durbach, 'Human Rights Protection in the Pacific', above n 99, 144.

¹⁶¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru: Addendum*, 17th sess, Agenda Item 6, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [19].

¹⁶² Human Rights Council Working Group on the Universal Periodic Review, *National Report: Papua New Guinea*, UN Doc A/HRC/WG.6/11/PNG/1 (9 May 2011) [36], [89].

¹⁶³ Human Rights Council Working Group on the Universal Periodic Review, *National Report: Samoa*, 11th sess, UN Doc A/HRC/WG.6/11/WSM/1 (14 February 2011) [42], [57].

¹⁶⁴ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Tonga*, 8th sess, Agenda Item 6, UN Doc A/HRC/8/48 (5 June 2008) [63(23)]–[63(25)].

¹⁶⁵ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Marshall Islands: Addendum*, 16th sess, Agenda Item 6, UN Doc A/HRC/16/12/Add.1 (4 March 2011) [II 55.9].

¹⁶⁶ *1st 2009 Draft Federal Constitution of Solomon Islands* (Solomon Islands) ch 4.

¹⁶⁷ *Ibid* cls 238–9.

¹⁶⁸ Nauru Constitution Review Commission, above n 158, 33, 42. The proposed amendments to the *Constitution of Nauru* (Nauru) were however rejected by public referendum in 2010.

¹⁶⁹ Renshaw, Byrnes and Durbach, 'The Experience of Fiji', above n 153, 252. See also Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, [4.113].

¹⁷⁰ Renshaw, Byrnes and Durbach, 'Human Rights Protection in the Pacific', above n 99, 122–3.

‘effectively, inclusively and gradually inform the human rights culture of a Pacific nation’s government and executive’¹⁷¹ and ‘reach communities in ways that resonate with the different traditions and cultures that exist across the Pacific’.¹⁷²

Strong national human rights frameworks, both in terms of human rights standards and monitoring mechanisms, are undoubtedly important for the protection and promotion of human rights. At the end of the day, ‘states remain the primary actors, the key conduits through which respect for our rights must be realized’.¹⁷³ In terms of standard-setting, the adoption of standards by national legislatures is essential to further the human rights project in the region. Indeed, it is required with or without ratification of the international treaties. As for monitoring, a well-functioning national framework is likely to be more accessible than either a regional or the international framework. However, while an NHRI is a ‘nice-to-have’, the resource constraints of Pacific states, particularly those with a smaller population base, such as Niue (1625), Tuvalu (10 000), Nauru (9233), the Cook Islands (19 569) and Palau (19 907), suggest that this worthy goal might be unattainable in the short-term.¹⁷⁴ Similarly, the small size of a number of states may be problematic in terms of maintaining independence, and the experience of the Fiji Human Rights Commission is apposite here.¹⁷⁵ Finally, despite the professed good intentions of a number of states, and the numerous initiatives over the last five years, the reality is that no new NHRI has yet been established in the region.

2 *A Regional Framework*

Despite the intrinsic appeal of mechanisms at the national level, in 2010 the Secretariat of the Pacific Community noted that ‘most countries do not have sufficient resources to have national human rights mechanisms that can provide support and services’ and that there is therefore a need for a regional human rights mechanism.¹⁷⁶ There are a number of possibilities as to exactly what form a regional approach might take. Some of these involve only human rights standards, some involve only human rights monitoring mechanisms, and some involve both. A regional mechanism could potentially comprise three elements — an establishing charter (containing the human rights standards), an executive body or commission, and a form of judicial body or court. Amongst these, a regional commission is seen as a sensible first step.

In the short-term at least, a regional human rights approach of some sort might offer a more realistic and effective means of promoting and protecting human rights. A key advantage of a regional mechanism, in contrast to the international framework, is that it is ‘better able to take account of regional

¹⁷¹ Renshaw, Byrnes and Durbach, ‘The Experience of Fiji’, above n 153, 252.

¹⁷² Renshaw, Byrnes and Durbach, ‘Human Rights Protection in the Pacific’, above n 99, 144.

¹⁷³ Louise Arbour, ‘Address by the High Commissioner for Human Rights’ (Speech delivered at the opening of the 61st session of the Commission on Human Rights, Geneva, 14 March 2005) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2799&LangID=E>>.

¹⁷⁴ Pacific Islands Forum Secretariat, *Member Countries*, Pacific Islands Secretariat Forum <www.forumsec.org.fj/pages.cfm/about-us/member-countries>.

¹⁷⁵ Renshaw, Byrnes and Durbach, ‘The Experience of Fiji’, above n 153.

¹⁷⁶ Pacific Islands Forums Secretariat, ‘Pacific Plan 2010 Annex’, above n 31, 188.

conditions and peculiarities',¹⁷⁷ as '[r]egional arrangements allow for norms, institutions and processes to be designed to fit the distinctive characteristics of the region'.¹⁷⁸ For example, a regional arrangement might provide a dialogue space for the philosophical concerns with the human rights project to be addressed and a distinctively Pacific approach to rights to be developed. A regional mechanism could further explore issues such as the commonality between traditional values and human rights.¹⁷⁹ It could translate universal concepts into Pacific understandings, engage traditional and church leaders with the human rights project and collaborate with regional and local NGOs. It could also explore ways in which both a commitment to international human rights standards and an appreciation of the cultural context in which rights operate can be realised. While these issues can be explored within the international framework, a regional framework might result in a greater sense of ownership, along with more prominence and momentum than is possible with the international framework.

Regional frameworks for human rights are endorsed by the 1993 *Vienna Declaration* which 'reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights'.¹⁸⁰ The broader Asia-Pacific region remains the only region in the world without some form of human rights machinery, although the Association of Southeast Asian Nations ('ASEAN') has now developed a human rights body covering that subregion. Although focus at the international level was for some time on the Asia-Pacific as a single region,¹⁸¹ it is now widely accepted that efforts should focus on the subregional level, effectively enabling the Pacific to be treated as a separate region.¹⁸² The possibility of a regional mechanism in the Pacific has been discussed periodically over the years. In the late 1980s, a draft *Pacific Charter of Human Rights* ('Charter') modelled on the *African Charter of*

¹⁷⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 56 [4.4], quoting The Pacific Regional Rights Resource Team, Submission No 13 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Rights Mechanisms and the Asia-Pacific*, November 2008, 13.

¹⁷⁸ Ibid 56–7, quoting Human Rights Law Resource Centre, Submission No 15 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Rights Mechanisms and the Asia-Pacific*, December 2008, 35.

¹⁷⁹ A 2003 Fijian survey found that 56 per cent of respondents believed that human rights principles were in harmony with traditional values, while 44 per cent thought that they were contradictory to traditional values. See Steven Ratuva and David Hegarty, 'Baseline Study on Civic Education Needs and Attitudes towards Democratic Governance' (Survey Report, United Nations Development Programme and Fiji Parliament, May 2003) 40–1. See New Zealand Law Commission, above n 10, 12, which advocates seeking out common values underlying custom and human rights as a means of resolving conflicts between them.

¹⁸⁰ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157.23 (12 July 1993) [37].

¹⁸¹ See, eg, Ralph Wilde, 'NGO Proposals for an Asia-Pacific Human Rights System' (1998) 1 *Yale Human Rights and Development Law Journal* 137; Pamela Jeffries, 'The Case for a Human Rights Charter for the Pacific?' in Paul Hunt (ed), *Human Rights: How Are They Best Protected?* (Human Rights Commission, 1998) 30.

¹⁸² Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 7 [2.13], 107 [5.58].

Human and Peoples' Rights was developed by the LAWASIA Association.¹⁸³ In addition to standard protections for civil and political rights, the *Charter* covered economic and social rights, and referred to the rights of 'peoples' and 'indigenous peoples' and duties owed by the individual to the community. The idea failed to gain traction at the time, in part because it was promoted largely by Australians and New Zealanders with little Pacific support or engagement.¹⁸⁴ Further work in the late 1990s on a Pacific Centre for Human Rights stalled at the discussion stage.¹⁸⁵

The prospect of a regional Pacific mechanism has recently resurfaced, and this time appears to have more indigenous Pacific support. Initiative 12.1 of the Pacific Plan, as revised in 2007, suggests that further analysis be carried out into the 'establishment of a regional ombudsman and human rights mechanisms to support the implementation of Forum Principles of Good Leadership and Accountability etc' and expressly contemplates the possibility of a regional human rights arrangement, urging states to '[w]here appropriate, ratify and implement international and regional human rights conventions, covenants and agreements; and support for reporting and other requirements.'¹⁸⁶ Since the adoption of the Pacific Plan, the possibility of a regional human rights mechanism has been discussed in a number of fora around the region. At a number of regional meetings between 2007 and 2009, Pacific Island Members of Parliament, judicial officials and NGOs called for the establishment of a regional mechanism.¹⁸⁷ In April 2008, a symposium in Samoa explicitly considered the possible development of a regional Pacific human rights mechanism.¹⁸⁸ In April 2010, the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade released its report on international and regional mechanisms for human rights in the Asia-Pacific.¹⁸⁹ A regional human rights mechanism is currently being actively explored by the Secretariat of the Pacific Community (through the RRRRT) and the PIF Secretariat. The 2010 Annex to the Pacific Plan Progress Report noted that within 12 months, these two organisations would further develop a policy paper on the viability of a regional human rights mechanism for the Pacific.¹⁹⁰ Tonga and Tuvalu have also referred positively to the prospect of

¹⁸³ For the text of the draft *Charter*, see 'Appendix 1: Report on a Proposed Pacific Charter of Human Rights Prepared under the Auspices of LAWASIA, May 1989' (1992) 22 *Victoria University of Wellington Law Review* 99. For discussion of the proposal and its prospects, see Tony Deklin, 'Strongim Hiumen Raits: A Proposal for a Regional Human Rights Charter and Commission for the Pacific' (1992) 20 *Melanesian Law Journal* 93.

¹⁸⁴ Jalal, 'Why Do We Need a Pacific Regional Human Rights Commission?', above n 115, 181–2.

¹⁸⁵ See Caren Wickliffe, *Pacific Centre for Human Rights: A Discussion Document* (Discussion Paper, Institute of Justice and Applied Legal Studies, University of the South Pacific, 1998); C Wickliffe, 'Human Rights Education in the Pacific' (Paper prepared for UNESCO Asia-Pacific Regional Meeting on Human Rights Education, Pune, India, 3–6 February 1999) <http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Wickliffe1.htm>.

¹⁸⁶ Pacific Plan, above n 4, 19 Initiative 12.5.

¹⁸⁷ Jalal, 'Why Do We Need a Pacific Regional Human Rights Commission?', above n 115, 182, 186.

¹⁸⁸ For a summary of the symposium, see Farran, above n 116, 285–6; Symposium, 'Strategies for the Future: Protecting Human Rights in the Pacific' (2009) *Victoria University of Wellington Law Review* v.

¹⁸⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37.

¹⁹⁰ Pacific Islands Forum Secretariat, 'Pacific Plan 2010 Annex', above n 31, 187.

a regional mechanism of some sort in the context of their individual UPR reviews.¹⁹¹

In light of these positive noises, some advocates have suggested that the current climate offers a greater chance for a regional approach to be realised than has been the case in recent years and that a regional human rights mechanism is ‘an idea whose time has come’.¹⁹² This view may, however, reflect the eternal optimism of human rights advocates. Other commentators are more pessimistic, referring to ‘institutional inertia and conceptual difficulties’ in establishing a viable regional system.¹⁹³ The ultimate requirement for the initiative to gain momentum is political will, and aside from the lofty ideals in the Pacific Plan, the development of a regional human rights mechanism does not yet appear to be a priority for Pacific leaders.¹⁹⁴

There are strong proponents both for and against a regional approach. The issue has tended to be approached in terms of an either/or scenario: establish either NHRIs or a regional framework. Those in favour of a regional framework point to the resource constraints in establishing separate NHRIs in individual states. One commentator has noted that with the exception of Papua New Guinea, Solomon Islands and perhaps Samoa, it is unlikely that Pacific states would have the resources to support an NHRI.¹⁹⁵ It is argued that a regional mechanism could potentially deal with human rights problems that nation states are either unable or unwilling to deal with.¹⁹⁶ A regional body is said to be more likely to ‘insulate itself from problems of cronyism, “wantokism” and nepotism’.¹⁹⁷ Resources could be pooled for one institution to serve a number of states. In addition, the language of human rights is now more common in the Pacific than it was in the late 1980s and the emergence of a regional human rights body in the ASEAN region leaves the Pacific as one of the world’s only regions without such a body.¹⁹⁸ Finally, in the wake of the Pacific Plan, there is now a ‘greater sense of regional identity and self awareness’,¹⁹⁹ which may support a regional approach to human rights.

Those who argue against a regional framework and in favour of NHRIs assert that ‘first things should be attended to first’ and that focusing on a regional

¹⁹¹ See Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Tonga*, 8th sess, Agenda Item 6, UN Doc A/HRC/8/48 (5 June 2008) [63(25)]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Tuvalu*, 10th sess, Agenda Item 6, UN Doc A/HRC/10/84 (9 January 2009) [65].

¹⁹² Jalal, ‘Why Do We Need a Pacific Regional Human Rights Commission?’, above n 115, 183. See also Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, [5.100], citing the Sydney Centre for International Law, Submission No 5 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Rights Mechanisms and the Asia Pacific*, 20 November 2008, 10.

¹⁹³ Olowu, ‘The United Nations Human Rights Treaty System’, above n 6, 158.

¹⁹⁴ Hay, above n 77, 203.

¹⁹⁵ Kathryn Hay, ‘The Canoe Will Sail When the Wind is Right: The Shaping of Regional Human Rights Institutional Arrangements in the Pacific’ (Paper presented at Oceania Conference on International Studies, Auckland, 30 June–2 July 2010) 13–14.

¹⁹⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 93 [5.5].

¹⁹⁷ Jalal, ‘Why Do We Need a Pacific Regional Human Rights Commission?’, above n 115, 189.

¹⁹⁸ *Ibid* 183, 188.

¹⁹⁹ Renshaw, Byrnes and Durbach, ‘Human Rights Protection in the Pacific’, above n 99, 143.

mechanism will divert attention from NHRIs.²⁰⁰ More fundamentally, they argue that a regional approach is an ‘incomplete response’ to the needs of Pacific states,²⁰¹ and question whether there is sufficient commonality for a regional approach. They note that establishing NHRIs will not raise the same concerns for states about loss of national sovereignty. Proponents of NHRIs also assert that the educational and promotional functions of NHRIs can only be effectively carried out at a national, or even sub-national, level.²⁰² A further concern with a regional approach is that it may undermine universal human rights and ‘water down’ human rights standards.²⁰³

Other commentators, attempting to steer a middle ground, suggest that it is not necessarily a case of either a regional mechanism or NHRIs, and that work on both national and regional frameworks could proceed simultaneously;²⁰⁴ ‘[s]trong national machineries will foster stronger regional machineries and vice versa’.²⁰⁵ From a practical point of view, momentum for both national and regional initiatives needs to come from Pacific states themselves; otherwise, these regional initiatives will be likely to suffer the same fate as the LAWASIA initiative in the 1980s. This was reflected in the conclusion reached by the Australian Select Committee in 2010, which noted that, while there was a need for some sort of regional human rights mechanism(s) in the Asia-Pacific, and that one or more sub-regional mechanisms in particular would be feasible, it would be premature for the Select Committee itself to propose models as an outcome of the inquiry.²⁰⁶

3 Universal Periodic Review Mechanism

An alternative, or at least complementary, framework at the international level is the UN Human Rights Council’s new UPR mechanism. The UPR involves a review by the Human Rights Council of the human rights records of all 192 UN member states once every four years. One of the key objectives of the review is ‘[t]he improvement of the human rights situation on the ground’.²⁰⁷ The primary benchmarks for the review are the *Charter of the United Nations*, the *UDHR*, human rights instruments to which the particular state is party and voluntary pledges and commitments made by states.²⁰⁸

²⁰⁰ von Doussa, above n 56, 9.

²⁰¹ Renshaw, Byrnes and Durbach, ‘Human Rights Protection in the Pacific’, above n 99, 118.

²⁰² *Ibid* 144.

²⁰³ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 57 [4.8]–[4.9].

²⁰⁴ Liddicoat, above n 60, 280, commenting on the views of participants at the April 2008 Symposium, ‘Strategies for the Future: Protecting Rights in the Pacific’ (27–29 April 2008, Apia, Samoa). See also Jalal, ‘Why Do We Need a Pacific Regional Human Rights Commission?’, above n 115, 183.

²⁰⁵ Liddicoat, above n 60, 288.

²⁰⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 122 [5.121]–[5.124].

²⁰⁷ Human Rights Council, *Institution-Building of the United Nations Human Rights Council*, UN Doc A/HRC/RES/5/1, (18 June 2007) annex (‘*United Nations Human Rights Council: Institution-Building*’) [4(a)].

²⁰⁸ *Ibid* [1].

The review is to be ‘conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner’.²⁰⁹ The UPR should ‘[b]e an intergovernmental process, United Nations Member-driven and action-oriented’,²¹⁰ and ‘[f]ully involve the country under review’.²¹¹ The UPR is explicitly required to ‘[c]omplement and not duplicate other human rights mechanisms, thus representing an added value’.²¹² Of particular interest for small Pacific states with capacity limitations, the UPR is not to be ‘overly burdensome’²¹³ and should not be ‘overly long’.²¹⁴ It should also ‘take into account the level of development and specificities of countries’.²¹⁵

At the conclusion of each review, an ‘outcome report’ is adopted. This records the discussion between the state under review and other states and also the bilateral recommendations of individual states to the state under review. The responses of the state to each recommendation are recorded in an addendum to the outcome report. The overall result is a set of recommendations accepted by the individual state, which can be used by the state itself to chart a course of action and reform for the next four years. It can also be used by NGOs to lobby for developments in key areas, and by other states and international organisations to identify areas where they may be able to provide support by way of technical assistance or capacity building. The set of recommendations will also be used in the next UPR to monitor state progress.

One of the major advantages of the UPR is that, unlike the international human rights treaties, there is no choice about whether to opt in or out; by virtue of membership in the UN, the UPR mechanism will operate. As noted above, all Pacific states, with the exception of the Cook Islands and Niue, have now undertaken their first UPR. In general, they appear to have engaged enthusiastically with the UPR process. There are a number of strengths to the process which are particularly suited to the Pacific region,²¹⁶ including the participatory nature of the process, the focus on dialogue and cooperation rather than confrontation, and the ability to take into account the capacity limitations of small island states. A particular benefit, given the comparatively low levels of Pacific ratification of core human rights treaties, is that the basis for the review includes not just the treaties ratified by the state but also the *UDHR*. The UPR potentially enables a more holistic human rights approach than the treaty monitoring system, where separate treaty bodies focus on discrete sets of rights. The process is also more concise than the treaty body process. State reports are limited to 20 pages, compared with 100 plus pages for each treaty body. The time between submission of the state report and consideration under the UPR is

²⁰⁹ Ibid [3(g)].

²¹⁰ Ibid [3(d)].

²¹¹ Ibid [3(e)].

²¹² Ibid [3(f)].

²¹³ Ibid [3(h)].

²¹⁴ Ibid [3(i)].

²¹⁵ Ibid [3(l)].

²¹⁶ See Natalie Baird, ‘The Universal Periodic Review as a Legacy of the Universal Declaration of Human Rights: Potential Pacific Impact’ in Roderic Alley (ed), *Celebrating Human Rights: Sixty Years of the Universal Declaration: Proceedings of the Wellington Conference* (New Zealand Institute of International Affairs and New Zealand Human Rights Commission, 2009).

typically around three to four months, compared with up to three years for some treaty bodies. This enables momentum and national interest to be more easily maintained. The UPR also enables Pacific states to engage with other states in a unique way. It offers a means for the international community to be better educated about the Pacific region. As was noted by the research centre RegNet during the Australian Select Committee inquiry: ‘The Universal Periodic Review made people in the Human Rights Council think about Tuvalu in a way that I do not think they have ever thought about Tuvalu before.’²¹⁷ Overall, the UPR potentially offers a more meaningful way to engage with the international human rights framework than that offered by the treaty bodies.

There are, however, some weaknesses of the UPR process. A key weakness is that UPR is very much a state-led process, with the state under review effectively setting the agenda by way of the content of its national report and other states making what are essentially bilateral recommendations in response. The process is explicitly a political one, with states the key participants, in sharp contrast to the treaty bodies comprised of independent experts. There is no role for independent human rights experts in the UPR process, and only a limited role for the OHCHR. Finally, as noted, the UPR process does not cover the Cook Islands and Niue, since they are not UN members.²¹⁸

4 *Assessment of Alternative Frameworks*

In deciding whether to pursue one or more of these alternative frameworks in order to improve human rights at the national level, different Pacific states are likely to make different decisions based on their individual needs. What is suggested here is simply that, in considering whether to ratify human rights treaties, states could usefully consider the potential effectiveness of alternative frameworks at the national, regional and international level, before deciding to commit scarce resources to the human rights treaties.

National frameworks potentially enable standard-setting by way of legislative or constitutional amendment, and establishing an NHRI would provide a mechanism for monitoring. It is also true that for human rights to be effectively protected, strong national frameworks are required. As such, it may make sense for states to pursue these before ratifying more treaties. A particular drawback though, especially for smaller states, is the level of resources required to establish and maintain an NHRI.

Given the resource limitations of the smaller states in particular, a regional mechanism may be a viable alternative to NHRIs. A regional mechanism also has the potential to comprise both standard-setting and institutional elements. An advantage when compared to the international system is that it may enable a distinctive regional approach to developing rights. A key disadvantage is that it

²¹⁷ Evidence to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, 7 April 2009, 58 (Susan Gail Harris Rimmer), quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific*, above n 37, 45 [3.45].

²¹⁸ The Cook Islands and Niue are self-governing territories in free association with New Zealand, but are not covered by New Zealand’s UPR review. See Human Rights Council Working Group on the Universal Periodic Review, *National Report: New Zealand*, 5th sess, UN Doc A/HRC/WG.6/5/NZL/1 (9 April 2009) [18]. Note that in contrast, Tokelau is covered by New Zealand’s Report, see Annex 1.

may be too distant from the communities and individuals it is to serve to be accessible in a meaningful way.

Finally, at the international level, the UPR is not concerned with standard-setting and so only offers the prospect of a different monitoring mechanism to that overseen by the treaty bodies. A particular advantage is that the mechanism is mandatory for all UN members. The mechanism also has a number of elements which may make it more attractive to Pacific states than treaty body monitoring.

VI CONCLUSION

In considering how to respond to the calls for ratification of international human rights treaties, Pacific states need to evaluate both the benefits of ratification and also the challenges. Amongst the likely benefits are better human rights for individuals and groups, greater clarity around states' human rights obligations, and, ultimately, a more inclusive society. Practical benefits may include rewards for ratification such as technical assistance, capacity building and foreign investment. It is also important for states to be cognisant of the challenges of ratification. Ratification may limit the scope for states to claim a distinctively Pacific approach to rights, and without significant additional resources for implementation, may raise expectations, but ultimately have no impact on human rights outcomes. Even with strong implementation efforts, the behaviour of some key non-state transgressors of rights may fall outside the reach of the treaties. Significant practical hurdles consequent on ratification include the possible need for constitutional and legislative amendment and the ongoing compliance burden to meet reporting requirements.

There are a number of strategies which could be adopted by Pacific states in response to the pressure for ratification. Ideally, a response should maximise the benefits of ratification while ensuring that the challenges of ratification are addressed. Wholesale ratification is unlikely to address the challenges of ratification and as a result, the benefits will be limited. At the other end of the spectrum, a moratorium on ratification will avoid many of the ratification challenges, but none of the benefits will be realised. It is also an isolationist strategy and inconsistent with already agreed goals in the Pacific Plan. In the middle of these two extremes is the strategy of selective ratification. This would involve individual states prioritising areas for action and pursuing ratification and implementation of specific treaties on a gradual basis. This strategy could be endorsed by other states and UN agencies in their engagement with Pacific states on the issue of ratification. A complementary strategy to selective ratification which could be pursued simultaneously is to pursue one or more of the three alternative rights frameworks at the national, regional or international level. Different states are likely to make different decisions on whether to pursue these alternative frameworks based on their individual needs and priorities.

To return to the question posed by this article — to ratify or not to ratify? — the conclusion reached by this author is a qualified 'yes'. A strategy of selective ratification, combined with pursuit of one or more complementary frameworks, would gradually deliver many of the benefits of ratification, while enabling states to grapple with some of the challenges.