

THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM AND THE CHALLENGES OF COMMITMENT AND COMPLIANCE IN THE SOUTH PACIFIC

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[This article examines the profile of international human rights in the South Pacific, with specific reference to the seven core United Nations human rights treaties. While acknowledging some of the weaknesses of the UN human rights treaty system, this article nonetheless views this system as a vehicle for strengthening the globally accepted notion of the universality of human rights and as a viable framework for the domestic implementation of those rights. This article underscores the significance of the UN human rights treaty system for the South Pacific and critically engages with some entrenched value constructs — cultural relativism, fiscal limitations and geopolitical challenges — that have become prominent arguments in justifying the attitude of South Pacific countries towards this system. Further, the performance of South Pacific countries is evaluated in relation to their accession to, reservations and declarations from, and compliance with the core UN human rights treaties. Finally, observing that discourses on international human rights in the South Pacific have been remarkably state-centric, this article argues for collaborative state and civil society-led initiatives to improve the profile of human rights in the region.]

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I INTRODUCTION

Following World War II, the United Nations emerged as a global mechanism for achieving

international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms for all* without distinction as to race, sex, language, or religion.¹

In an unequivocal way, therefore, the *Charter of the United Nations* signalled that human rights protection was no longer to be regarded as a matter exclusively for national observance, but one that must be of concern to all human beings and governments.²

Since its creation in 1945, the UN has expanded tremendously.³ The effect of this expansion is especially apparent in the realm of human rights, as illustrated by steady evolution and multiplication of the UN's human rights standardisation efforts. With the UN General Assembly's adoption of the *Universal Declaration of Human Rights*⁴ in 1948, and the *International Covenant on Civil and Political Rights*⁵ and the *International Covenant on Economic, Social and Cultural*

¹ *Charter of the United Nations* art 1(3) (emphasis added). For a pertinent historical discussion, see generally Thomas Buergenthal, 'The Human Rights Revolution' (1991) 23 *St Mary's Law Journal* 3, 3–6.

² The preamble to the *UN Charter* proclaims that '[w]e the Peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. Under art 13, the UN General Assembly is obliged to 'initiate studies and make recommendations for the purpose of ... assisting in the realisation of human rights and fundamental freedoms for all'. Also of significance are arts 55 and 56 of the *UN Charter*. Article 56 creates an obligation for all Member States to cooperate with the UN jointly and separately, 'for the achievement of the purposes set forth in Article 55'. Article 55, in turn, commits the UN to the promotion of

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

See also Hersch Lauterpacht, *International Law and Human Rights* (1968) 177–80, which contends that the inclusion of human rights in the *UN Charter* had elevated them beyond norms of exclusive state concern to international values.

³ For example, by 2005 the UN's membership had grown from 51 to 191 states: see UN, *Growth in United Nations Membership, 1945–2005* <<http://www.un.org/Overview/growth.htm>> at 22 May 2006.

⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948) ('*UDHR*').

⁵ *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). At 9 March 2006 the Office of the High Commissioner for Human Rights ('OHCHR') recorded that there were 154 states parties to the *ICCPR*: see OHCHR, *Status of Ratifications of the Principal International Human Rights Treaties* <<http://www.ohchr.org/english/bodies/docs/status.pdf>> at 22 May 2006 ('*Status of Ratifications*').

*Rights*⁶ in 1966, the UN evinced a clear commitment to the promotion and protection of human rights. In addition to these three normative human rights instruments,⁷ numerous other treaties have been adopted to deal with specific global challenges.⁸

Increasingly, UN human rights standards and implementation mechanisms have developed into significant yardsticks for measuring states' conduct, performance and attitudes towards human beings, thus strengthening the global notion of the universality of human rights.⁹ However, no matter how elaborately designed, the efficacy of international human rights standards and mechanisms can only be assessed at the domestic level. It is against this background that it becomes germane to evaluate the impact of the UN human rights system on the smaller countries of the South Pacific.¹⁰

⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). As at 9 March 2006, there were 152 states parties to the ICESCR: see OHCHR, *Status of Ratifications*, above n 5, 12. For a discussion on the growth and promise of universal human rights since 1948, see generally Mary Robinson, 'Making Human Rights Matter: Eleanor Roosevelt's Time Has Come' (2003) 16 *Harvard Human Rights Journal* 1, 1–4.

⁷ *The Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), which was adopted along with the ICCPR, is often added to these three. This instrument allows individuals whose countries are party to the ICCPR and the Protocol, who claim their rights under the ICCPR have been violated, and who have exhausted all domestic remedies, to submit written communications directly to the UN Human Rights Committee ('UNHRC').

⁸ Prominent among these are: *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 112 (entered into force 26 June 1987) ('CAT'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'); and *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 2 May 1991, 30 ILM 1517 (1991) (entered into force 1 July 2003) ('CMW'). As at 9 March 2006, there were 170, 180, 141, 192 and 34 states parties to the CERD, CEDAW, CAT, CRC and CMW respectively: see OHCHR, *Status of Ratifications*, above n 5, 12. Collectively these documents will be referred to as the 'core UN Human Rights treaties'. The core UN Human Rights treaties coupled with their associated committees will be referred to as the 'UN human rights system'.

⁹ The role of the UN human rights system has enjoyed considerable scholarly discussion: see, eg, Anne Bayefsky, 'Remarks by Anne Bayefsky: Does the United Nations Human Rights Program Make a Difference?' (1997) *American Society of International Law: Proceedings of the 91st Annual Meeting* 466, 470–2; Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000); Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights' [2003] *Public Law* 272, 272–85; Yuji Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law* (1998) 213–21.

¹⁰ The phrases 'South Pacific' and 'Pacific Island Countries' have been used by various writers and institutions in different contexts with varying meanings. For the purposes of this article, the term 'South Pacific' will refer to the 14 independent and self-governing States in the Pacific Ocean region that constitute the 'Pacific Islands Forum', excluding Australia and New Zealand. The countries are: the Cook Islands; Federated States of Micronesia; Fiji Islands; Kiribati; Republic of the Marshall Islands; Nauru; Niue; Palau; Papua New Guinea; Samoa; Solomon Islands; Tonga; Tuvalu; and Vanuatu. See Commonwealth of Australia, Department of Foreign Affairs and Trade, *Country and Regional Information: Department of Foreign Affairs and Trade* (2006) <http://www.dfat.gov.au/geo/spacific/regional_orgs/spf.html> at 22 May 2006.

By considering the ratification of the core UN human rights treaties by South Pacific states and the monitoring of their implementation, this article assesses the performance of these states in both theoretical and practical terms. Although human rights are the subject of considerable scholarly exploration in the South Pacific region, this article attempts to move beyond the confines of contemporary intellectual discourses and to advance discussion about the formal commitment of South Pacific countries to the UN human rights system and about their compliance with its basic implementation tenets at the domestic level. Bearing in mind the robust debates about the desirability of a regional human rights system as an alternative supranational human rights supervisory system for the Pacific region, this article highlights some pivotal issues with which rights discourses relating to the South Pacific must contend.

To put this article in perspective, the critical questions that it addresses are: Why has there been marked reluctance among South Pacific countries to ratify, or accede to, the core UN human rights treaties? Are the perceived or real impediments to the formal commitment of South Pacific countries to these core human rights treaties so formidable that advocating such a commitment is futile? If South Pacific countries are as prone to the dynamics of rational change as any other human society, should intellectual engagement with the human rights culture in the South Pacific not devise pragmatic approaches that would advance the integration of these countries with the rest of the world? In light of the absence of a regional human rights system as an alternative to the UN system, and of the institutional inertia and conceptual difficulties associated with the establishment of a viable regional system, might a more realistic approach be to examine how the existing normative and institutional mechanisms of the UN human rights system might facilitate the promotion and protection of human rights in the South Pacific?

While this author appreciates the discussions on the inherent weaknesses of the UN human rights system and a range of intellectual explanations for the dearth of formal commitment among South Pacific countries, the emphasis of this article is on advocating a vibrant, state-led, civil society-inspired and people-owned culture of response to international human rights standards — one that would open the South Pacific, to international standardisation and scrutiny. Underpinning this concern is the absence of a modality for transparent and objective human rights scrutiny in respect of South Pacific countries.

It must be borne in mind, however, that this article does not seek to answer all of the institutionalised ideological and conceptual problems pertaining to human rights in the South Pacific, nor does it seek to consider its theme with particular reference to a specific UN human rights treaty. In any event, there exist many

scholarly works on some of the pertinent philosophical challenges.¹¹ Only in so far as is necessary for analogical purposes does this article reflect on these issues and concepts.

In its thematic outlook, this article begins with a critique of contemporary justifications for non-participation by South Pacific states in the UN human rights system. The article then presents an overview of the formal expressions of commitment by South Pacific countries to this system. It will highlight the shortfall in the performances of certain countries in relation to the requirements of the system and will canvass a multidimensional, interdisciplinary approach to strengthening the value of human rights in these countries.

II ADVOCATING THE NEED FOR A UNIVERSAL HUMAN RIGHTS SYSTEM

There is an unmistakable trend among commentators on the state of human rights in the South Pacific to view the subject in an uncritical light. Specifically, there are three main theoretical arguments that opponents of the implementation of the UN human rights system in the South Pacific raise to support their intellectual opposition.

First, there is a tendency to limit efforts aimed at human rights scrutiny to the constitutional frameworks of the respective South Pacific countries. As long ago as 1992, Angelo noted that from the ‘internationalist point of view’, human rights ‘are not regarded as matters of high priority by the Pacific island states ... since most of the states have entrenched human rights of the international type [in their Constitutions]’. According to this point of view ‘there is no need for any further action in the human rights area’.¹²

¹¹ Perhaps the most engaging aspect of international human rights law for numerous scholars and commentators in the broader Pacific region is the issue of customary law relating to women, particularly with regard to the *CEDAW*. Some of the leading works in this area include: Kenneth Brown and Jennifer Corrin Care, ‘Conflict in Melanesia: Customary Law and the Rights of Women’ (1998) 24 *Commonwealth Law Bulletin* 1334; Margaret Wilson and Paul Hunt (eds), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (2000); Jean Zorn, ‘Women, Custom and International Law in the Pacific’ (Occasional Paper No 5, University of the South Pacific, Port Vila, Vanuatu, 2000) 8–9; Jennifer Corrin Care, ‘Customary Law and Women’s Rights in the Solomon Islands’ (2000) 51 *Development Bulletin* 24; 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 <http://www.usp.ac.fj/editorial/jpacs_new/Farran.PDF> at 22 May 2006; Sue Farran, ‘Human Rights in the Pacific Region — Challenges and Solutions’ [2005] *LAWASIA Journal* 39. The theme of this article is not exclusively about customary law, women’s rights or *CEDAW* and will only reflect on some of these writings where relevant to its analysis.

¹² Anthony Angelo, ‘Lo Bilong Yumi Yet’ (1992) 22(2) *Victoria University of Wellington Law Review* 33, 39. This reasoning would appear to have enjoyed some following: see, eg, Don Paterson, ‘Human Rights in Island Countries of the Pacific: A Challenge to Courts, Chiefs and Lawmakers’ (Lecture delivered at the 16th Pacific Judicial Conference, Port Vila, Vanuatu, 26–30 July 2005) (commending the human rights provisions of South Pacific Constitutions); Anita Jowitt, ‘The Notion of Human Rights’ in Anita Jowitt and Tess Newton Cain (eds), *The Passage of Change: Law, Society and Governance in the Pacific* (2003) 185, 191 (inferring that human rights ‘are widely accepted’ in the Pacific since they are ‘generally adopted into Pacific constitutions’); Kenneth Brown, ‘Customary Law in the Pacific: An Endangered Species?’ (1999) 3 *Journal of South Pacific Law* 2, [33] <http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Brown1.htm> at 22 May 2006 (suggesting that the non-discrimination guarantees in most South Pacific constitutions suffice for the guarantees of the *CEDAW*).

Second, the fiscal incapacity of the South Pacific countries has also been stressed as a reason for their demonstrable lack of interest in international human rights norms. According to Angelo:

there is no doubt that international human rights carry a substantial cost burden. There is the cost in human and material resources of the internal mechanisms necessary to honour the international human rights obligations — costs which in the present environment cannot be met. There are also related costs of reporting as required by the various treaties. Those material costs, plus the political cost of perceived loss of autonomy, do not augur well for the implementation of international covenants. Some states may consider they could do much better with the money in the provision of education, health, communication services and better protection of the environment from exploitation.¹³

Third, the cultural peculiarities of South Pacific societies have also been offered as an explanation for the very low profile of South Pacific countries within the UN human rights system. The proponents of this theory emphasise the apprehension of the governments of South Pacific countries that international human rights norms pose a threat to traditional values and customary norms.¹⁴ Indeed, some scholars conceptualise human rights as norms that must exist only to the extent that the customary values of South Pacific societies would permit.¹⁵

Finally, there is a school of thought that views the establishment of a regional human rights system — one that comprehensively harnesses the cultural peculiarities of the states and territories of the broader Pacific — as the most viable alternative to the ‘estranged’ values of a global system.¹⁶

This author considers that all the foregoing arguments are capable of reinforcing the recalcitrance of governments towards submitting themselves to the scrutiny afforded by the UN human rights system. Furthermore, the argument anchored on the need to preserve customary values invariably fortifies the

¹³ Angelo, above n 12, 40.

¹⁴ Alex Frame, ‘Fundamental Rights in the Realm of New Zealand: Theory and Practice’ (1992) 22(2) *Victoria University of Wellington Law Review* 85, 88; Brown, above n 12, [34]. See also Leulua’iali’i Tasi Malifa, ‘The “Rights” Conflict in the Constitutions of the South Pacific: Seeking Toleration into the 21st Century’ in Nin Tomas (ed), *Collective Human Rights of Pacific Peoples* (1998) 119, 120–7 (analysing the undertones of culture and cultural norms in the constitutions of the states of the South Pacific, and advocating for a compromise between those cultural norms and a universal concept of human rights).

¹⁵ See, eg, Yash Ghai, ‘Constitution Making and Decolonisation’ in Yash Ghai (ed), *Law, Politics and Government in the South Pacific States* (1988) 1, 3 (arguing that in the incorporation of human rights into South Pacific constitutions, these norms were not viewed as the rights of individuals but as collective rights under culture and customary law); Angelo, above n 12, 40 (contending that ‘any human rights document that is to be effective in the region will have to go some greater distance towards recognizing the cultural imperatives of the region’); Malifa, above n 14, 125 (contending that even though not explicitly stated, the constitutions of South Pacific states are to protect ‘South Pacific societal values’).

¹⁶ See, eg, Tony Deklin, ‘Strongim Hiumen Raits: A Proposal for a Regional Human Rights Charter and Commission for the Pacific’ (1992) 20 *Melanesian Law Journal* 93; Ralph Wilde, ‘NGO Proposals for an Asia-Pacific Human Rights System’ (1998) 1 *Yale Human Rights & Development Law Journal* 137, 138; Pamela Jefferies, ‘The Case for a Human Rights Charter for the Pacific?’ in Paul Hunt (ed), *Human Rights — How Are They Best Protected?* (1998) 30; Farran, ‘Human Rights in the Pacific Region’, above n 11, 58.

cultural relativism albatross that, as will shortly be discussed, weakens and threatens the promise of international human rights.¹⁷

A Constitutional Guarantees

In the 21st century, to limit the assessment of the human rights profile of any country to the narrow confines of its domestic constitutional framework not only abandons the issue to state discretion but also misses the whole essence of the international human rights regime. Wickliffe painted the picture of the constitutional rights regime in the South Pacific region when he wrote:

National constitutions and institutions in the Pacific are not protecting the human rights of citizens of the Pacific. Human rights violations continue to occur. These violations include abuse of police powers, failure to meet minimal standards relating to the rights of prisoners, militarisation and its use against civilian communities, violence against women, abuse of children and young people, limitation of free speech and media freedom, discrimination based on gender, disability (including HIV/AIDS status), age, minority status or discrimination against immigrants, migrant workers or indigenous peoples. Other human rights violations are occurring in the economic, social and cultural sphere.¹⁸

To illustrate Wickliffe's point, despite the existence of constitutional guarantees protecting the right to equality and freedom from discrimination in South Pacific constitutions,¹⁹ institutionalised discrimination against women remains rife. For example, Tonga had no female judge, minister or governor notwithstanding the existence of qualified personnel.²⁰ Further, out of Vanuatu's 27-member national cabinet, only two are females, and in the Solomon Islands, even though land title devolves along matrilineal claims, only males can litigate them.²¹ In Tuvalu, the right to freedom from discrimination was recently subverted by a Falekaupule (traditional council) which disallowed the

¹⁷ For general background readings on the cultural relativism debate and its impact on the universality of human rights, see Makau Mutua, *Human Rights: A Political and Cultural Critique* (2002) 64–7; Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buffalo Human Rights Law Review* 211.

¹⁸ Caren Wickliffe, 'Human Rights Education in the Pacific: A Paper Prepared for the UNESCO Asia/Pacific Meeting on Human Rights Education' (1999) 3 *Journal of South Pacific Law* 1, [10] (citations omitted) <http://www.vanuatu.usp.ac.fj/journal_splaw/working_papers/wickliffe1.htm> at 22 May 2006.

¹⁹ See, eg, *Constitution of Cook Islands* art 64; *Constitution of Federated States of Micronesia art IV*; *The Constitution of Kiribati* ch II; *Constitution of the Marshall Islands* art II; *Constitution of Nauru* arts 3–15; *Constitution of the Republic of Palau* art IV; *Constitution of the Independent State of Papua New Guinea* div 3; *Constitution of the Solomon Islands* ch 2.

²⁰ See 'Ana Maui Taufe'ulungaki, 'Women, Politics and Democracy in Tonga' (Paper delivered at Konivesio Ki He Konisitutone Mo E Temokalati 'I Tonga (Convention on Tongan Constitution and Democracy), Nuku'alofa, Tonga, 24–27 November 1992), available at <http://www.planet-tonga.com/HRDMT/Articles/Convention_92/Convention_92.shtml> at 22 May 2006. See also 'Tongan Women Told to Ask for Gender Equality', *Matangi Tonga Online* (Tonga), 15 March 2006 <http://www.matangitonga.to/article/tonganews/women/inwd_tonga150306.shtml> at 22 May 2006. It is worthy to note that Tonga recently appointed its first female minister, Mrs Malia Viviana 'Alisi Numia Afeaki Taumoepeau, as Attorney-General in May 2006: see 'Tonga's First Woman Minister', *Matangi Tonga Online* (Tonga), 22 May 2006 <http://www.matangitonga.to/article/letters/comments/government/letter_olive220506.shtml> at 22 May 2006.

²¹ See Jennifer Corrin Care, 'Reconciling Customary Law and Human Rights in Melanesia' (2003) 4(1) *Hibernian Law Journal* 53, 65.

establishment of a duly registered Christian church group in a community simply because converts of the church refused to pay monetary tributes to the private coffers of traditional leaders.²² Notwithstanding the constitutional protection of other human rights in these constitutions, the customary practices of ‘payback’ killing, banishment and male domination in public and private spheres continue in varying degrees across the region.²³

Whilst many developing states have failed to fully secure constitutionalism and, invariably, their constitutional legal order, the legitimation of human rights claims at a supranational level has the capacity to reinforce the legal relations between a state and its citizens and to safeguard individuals from parochial ideologies and idiosyncrasies that would otherwise place such states beyond external scrutiny.²⁴ If the atrocities of World War II and the acts of despotic regimes around the world awoke human consciences and strengthened the resolve across diverse geopolitical regions to outlaw impunity through the language of ‘rights’, why should the South Pacific continue to present itself as a bastion of resistance to international human rights scrutiny? It is submitted that without South Pacific countries becoming parties to the core UN human rights treaties, there would simply be no basis upon which even the best intentions and practices of the regimes in the South Pacific region can be objectively assessed. The comprehensive nature of the UN human rights treaty system — the elaborate normative frameworks, implementation monitoring procedures and institutional mechanisms — facilitates such a basis.

B *Fiscal Constraints*

The argument that South Pacific countries are too poor to accede to the UN’s human rights treaties is advanced on two fronts. The first is that these countries cannot afford the costs of producing and transmitting the periodic reports to the appropriate treaty monitoring bodies, and the second is that they are not affluent enough to meet the obligations under those treaties.²⁵ This article will tackle each of these in turn.

1 *The Irrelevance of Fiscal Constraints to Accession*

A brief comparative survey of recent empirical data reveals that South Pacific nations are less fiscally disadvantaged than African countries, many of which have at least signed up to the UN human rights system. According to the World Bank’s classification of national economies, apart from the Solomon Islands and Papua New Guinea that belong to the category of Low Income Countries (‘LIC’), all other countries of the South Pacific belong to the Lower Middle

²² See generally Dejo Olowu, ‘When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v. Pule O Kaupule & Another*’ (2005) 9(2) *Journal of South Pacific Law* <<http://www.paclii.org/journals/jspl/current/comm1.html>> at 22 May 2006.

²³ See Corrin Care, ‘Reconciling Customary Law and Human Rights in Melanesia’, above n 21, 66–9.

²⁴ For supportive readings on this point, see Jerome Shestack, ‘Globalization of Human Rights Law’ (1997) 21 *Fordham International Law Journal* 558, 563–4. See also Gerald Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review* 1863, 1866–73.

²⁵ Angelo, above n 12, 40.

Income Countries ('LMC') category.²⁶ In contrast, an overwhelming majority of African countries belong to the LIC category.²⁷ In terms of Foreign Direct Investment and Official Development Assistance since the 1990s, the countries of the South Pacific have benefited more than many African states that are bigger in size and population.²⁸ Further, many South Pacific countries have Gross Domestic Products which exceed those of numerous developing African and Latin American states.²⁹ Yet, despite the increasing poverty and indebtedness of many African states, they have at least formally embraced the UN's human rights system, as is evident by the number of African states parties to the core human rights treaties.³⁰ This analysis demonstrates that national economic prosperity is not a prerequisite for accession to the core UN human rights treaties.

It is conceded that mere formal commitment to the core UN human rights treaties has not fully secured their implementation in Africa. However, the reporting and complaints mechanisms that accompany accession provide tremendous opportunities for supranational scrutiny of the conduct of African states. Further, the alternative 'shadow' treaty reporting procedures under the UN human rights system have become channels for active civil society involvement in the monitoring of the implementation of these treaties in African states.³¹ As a topical illustration, in 2001, the Committee on Economic, Social and Cultural Rights ('CESCR') proceeded to examine the alternative reports submitted by

²⁶ World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (2005) 255.

²⁷ *Ibid.*

²⁸ See United Nations Development Programme, *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (2004) 198–201 (Table 18: Flows of Aid, Private Capital and Debt); World Bank, above n 26, 262–3 (Table 4: Trade, Aid and Finance).

²⁹ United Nations Development Programme, *Human Development Report 2005: International Cooperation at a Crossroad* (2005) 222.

³⁰ There are 50, 52, 51, 50, 48, 51 and 21 African states parties to the *ICESCR*, *ICCPR*, *CERD*, *CEDAW*, *CAT*, *CRC* and *CMW* respectively: see OHCHR, *Status of Ratifications*, above n 5.

³¹ As states parties to UN human rights treaties regularly report only the positive steps they have taken to fulfil their treaty obligations, each UN treaty monitoring body has developed a procedure through which it collaborates with civil society groups by considering reports submitted by these groups. This procedure, known in human rights circles as 'alternative' or 'shadow' reporting, enables the treaty bodies to embark on effective and constructive considerations of the practical challenges confronting each state party in relation to the implementation of the relevant human rights treaty. For scholarly discussions of the impact of alternative reporting in the UN human rights system, see generally Jane Conners, 'NGOs and the Human Rights of Women at the UN' in Peter Willetts (ed), *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (1996) 147, 162–9; Afra Afsharipour, 'Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the *Women's Convention*' (1999) 99 *Columbia Law Review* 129; Carole Petersen and Harriet Samuels, 'The *International Convention on the Elimination of All Forms of Discrimination against Women*: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong' (2002) 26 *Hastings International & Comparative Law Review* 1. For an example of shadow reporting on African schools, see Brent Wible, 'Achieving the Promise of Girls' Education: Strategies to Overcome Gender-Based Violence in Beninese Schools' (2005) 36 *Columbia Human Rights Law Review* 513, 554.

civil society groups in Togo after numerous invitations to the Eyadema Government had been rebuffed.³²

The opportunity for supranational monitoring has also allowed the CESCR to issue comprehensive concluding observations and recommendations following critical considerations of official and alternative reports on treaty implementation. While the CESCR's concluding observations and recommendations are not legally binding, they are nonetheless potent pronouncements that might constitute the definitive assessment of a state's disposition toward responsible governance within the international arena.³³

To illustrate the operation of this mechanism it is germane to consider the CESCR's impact in Nigeria during the period of repressive military rule. The CESCR was able to express what might be considered the opinion of the international community about Nigeria's persecution of opposition leaders, labour and democracy activists and students on the pretext that they were security threats.³⁴ The CESCR particularly criticised the mass evictions of underprivileged Nigerians from their homes.³⁵ The CESCR's stance not only censured further arbitrary evictions at that time but also strengthened the popular democratic agitations that culminated in the exit of Nigeria's junta in 1999.

The CESCR has also used its concluding observations and recommendations to expose some of the most egregious yet undocumented human rights

³² See CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Togo*, UN Doc E/C.12/1/Add.61 (21 May 2001) [2]–[5], in which the CESCR noted that although Togo became a state party to the *ICESCR* in 1984, by 2001 it had still not filed its initial report.

³³ For a particularly dramatic effect of the CESCR's approach, see Matthew Craven, 'The Committee on Economic, Social and Cultural Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd ed, 2001) 455, 466–7, showing how the CESCR succeeded in dissuading the Government of the Philippines from carrying out an imminent eviction of 200 000 families in 1995.

³⁴ See CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria*, UN Doc E/C.12/1/Add.23 (16 June 1998) [10], [15], [33].

³⁵ *Ibid* [42].

deprivations in many other countries.³⁶ These concluding observations and recommendations can have significant impact if they are followed up by civil society and the media at the domestic level.³⁷

2 *Fiscal Obligations Imposed by Accession*

In another way, the fiscal constraints justification misses the essence of the UN human rights treaty system. Pervading all of the UN human rights treaties is the obligation to adopt 'appropriate' measures (and/or policies) that would secure their respective human rights guarantees.³⁸ The language both of the core treaties and of the General Comments of the respective treaty monitoring bodies allow a margin of appreciation that enables each state party to implement the provisions of these treaties to the best of its ability.³⁹ The positive obligations created by the core treaties do not have to be interpreted strictly in terms of direct claims on specific items in states' budgets. The obligations contemplated are much more about appropriate *policies* than about monetary entitlements or outlays. All that would be required to meet the duties imposed in this respect, in the first instance,

³⁶ See, eg, CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Zimbabwe*, UN Doc E/C.12/1/Add.12 (20 May 1997) [11], in which the CESCR observed that, pursuant to the amended *Constitution of Zimbabwe*, public servants, teachers and nurses could not join professional unions, and that doctors and nurses who had organised strikes had been subjected to arrest and dismissal. The CESCR has also had occasion to highlight the devastating impact of foreign debts and Structural Adjustment Programs in the enjoyment of economic, social and cultural rights in Africa: see CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sudan*, UN Doc E/C.12/1/Add.48 (1 September 2000) [15]; CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc E/C.12/1/Add.55 (1 December 2000) [10]; CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt*, UN Doc E/C.12/1/Add.44 (23 May 2000) [10]; CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon*, UN Doc E/C.12/1/Add.40 (8 December 1999) [10]; CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal*, UN Doc E/C.12/1/Add.62 (24 September 2001) [10]; and CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo*, UN Doc E/C.12/1/Add.45 (23 May 2000) [11]. All of the Concluding Observations of the CESCR referred to in this study are also available at <<http://www.ohchr.org/english/>> at 22 May 2006.

³⁷ See generally Bruce Porter, 'Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights' (2000) 15 *Journal of Law and Social Policy* 117, 130-45, which describes how civil society groups in Canada have rigorously monitored the application and implementation of the concluding observations and recommendations of the various UN human rights treaty monitoring bodies in relation to alleviating poverty among vulnerable groups in Canada. This has been an ongoing process since 1993.

³⁸ See *CERD*, above n 8, art 2(1); *ICESCR*, above n 6, art 2(1); *ICCPR*, above n 5, art 2(1); *CEDAW*, above n 8, art 2; *CAT*, above n 8, art 2(1); *CRC*, above n 8, art 2(2); and *CMW*, above n 8, art 25(3).

³⁹ For all the General Comments emanating from each UN treaty monitoring body, see UNHRC, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 (12 May 2004); UNHRC, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Addendum*, UN Doc HRI/GEN/1/Rev.7/Add.1 (4 May 2005).

is for a state to put credible and equitable policy frameworks in place, or to refrain from embarking on policies that would remove people's rights. For example, where there has been age-long institutionalised discrimination against people on grounds of their sex, religion, or status, there should be an official policy response emphasising anti-discrimination. Where people already have shelter, a government should not evict them *en masse* in the name of city beautification without at least providing alternative sites to construct new homes. Where health facilities are already provided and staffed, a government's commitment should not be decreased in the name of structural adjustment policies dictated by so-called international financial institutions, without thorough consultations with the people. Where people already have farmlands which provide them with subsistence livelihood, a policy of compulsory acquisition should not be adopted where the purpose of such acquisition is to construct a white elephant project that will serve no public benefit. Surely it would not take much fiscal commitment for a government to refrain from *arbitrarily* depriving its people of equality, of the equitable distribution of scarce resources, or of the facilities that they already have for their wellbeing?

The mass evictions carried out by the Government of Fiji Islands in the country's municipalities in 2005 and the eviction of market women in Vanuatu's capital town of Port Vila without prior notice suggest that a proactive policy attitude has generally been lacking or tenuous in much of the South Pacific.⁴⁰

C Cultural Relativism

The third commonly invoked justification for South Pacific resistance to the UN human rights system is cultural relativism.⁴¹ Proponents of cultural relativism in the context of human rights discourses contend that the scope of the rights guaranteed to individuals in any society should be tested and determined by local cultural values. This term is used even within UN circles.⁴² It is common for states parties to the core UN human rights treaties to plead cultural relativism as a justification for manifest human rights violations.⁴³ As Tesón points out, states that have sought solace in cultural relativism to avoid responsibility for non-compliance with human rights norms have always found allies among both Western and non-Western writers.⁴⁴

In the South Pacific context, there have been similar scholarly arguments about the alien nature of international human rights as espoused in the UN human rights system, thereby making accession appear unattractive to South Pacific countries.⁴⁵ For example Wickliffe noted:

⁴⁰ Both events were personally witnessed by the author.

⁴¹ See Frame, above n 14, 88; Brown, above n 12, [33]; Malifa, above n 14, 120–7.

⁴² See Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400, 400–2; Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 *Human Rights Quarterly* 316, 321–4.

⁴³ See generally Jack Donnelly, *Universal Human Rights in Theory and Practice* (1989) 118–24, which discusses various experiences from developing countries.

⁴⁴ See Fernando Tesón, 'International Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 869, 870.

⁴⁵ See Wickliffe, 'Human Rights Education in the Pacific', above n 18, [27]; Angelo, above n 12, 39.

there is little commitment from Pacific states to international human rights instruments and no serious debate among the leaders about a regional instrument has occurred. In general, Pacific Governments, excluding Australia and New Zealand, have been slow to respond to calls from the international community to sign, accede [to] or ratify international or regional human rights instruments. The reason why Pacific governments have been slow to respond to these calls may relate to a misconception of what human rights are or a long standing perception that human rights are only about individual civil and political rights. As in other parts of the world, there have been criticisms of the international human rights framework as one that reflects popular western culture (the cultural relativism debate), internationalisation and globalisation. In the main there is a perception that the international human rights regime [is] western in origin. To a degree this view is valid because of the unbalanced emphasis in the past on individual rights and freedoms. There was little attention given to collective rights and duties — concepts that fit easily within Pacific cultures.⁴⁶

In relation to those arguments, as lucidly captured in Wickliffe's summation, it is difficult to ascertain the basis of the relativists' claim that South Pacific traditions are so fundamentally different from the basic human values expressed in the core UN human rights treaties. It is contended that the Western versus non-Western socio-cultural contrast is often overstated.⁴⁷ In any culture, no societal ideal ever remains static. Rather, such ideals are subject to the pressures and dynamics of human growth and experience. The evolutionary processes behind the rights that today constitute the nucleus of international human rights were themselves products of tremendous social, cultural and economic transformations in the so-called Western world, over many centuries.⁴⁸ The cultural relativists' argument fails to take into account the rapid changes in social organisation, the pace of modernised socioeconomic activity, the impact of democratisation and the influences of intercontinental migration in the broader context of globalisation. Studies have shown that the cultural values and customary world view of Pacific Island communities have undergone tremendous change since the 1990s, and this change is still rapidly unfolding today.⁴⁹

Despite these observations, it is commonly recognised that South Pacific countries have a fundamentally different notion of 'collective rights' or

⁴⁶ Wickliffe, 'Human Rights Education in the Pacific', above n 18, [27].

⁴⁷ For one, the belief systems and cultural practices and institutions in the societies of the South Pacific are so extensive, pluralistic and variable that no singular communal worldview can be distilled as representing the whole. See Ian Fraser, 'Human Rights vs Custom in the Pacific: Struggle, Adaptation, or Game?' in Anita Jowitt and Tess Newton Cain (eds), *The Passage of Change: Law, Society and Governance in the Pacific* (2003) 199, 202–3; Jennifer Corrin Care, 'Customary Law in Conflict: The Status of Customary Law and Introduced Law in Post-Colonial Solomon Islands' (2001) 21 *University of Queensland Law Journal* 167, 174; Miranda Forsyth, 'Beyond Case Law: *Kastom* and Courts in Vanuatu' (2004) 35 *Victoria University of Wellington Law Review* 427, 440.

⁴⁸ See Sompong Sucharitkul, 'A Multi-Dimensional Concept of Human Rights in International Law' (1987) 62 *Notre Dame Law Review* 305, 306; Koani Helu Thalman, 'A Pacific Island Perspective of Collective Human Rights' in Nin Tomas (ed), *Collective Human Rights of Pacific Peoples* (1998) 1, 2–4.

⁴⁹ See Victoria Lockwood, 'The Global Imperative and Pacific Island Societies' in Victoria Lockwood, *Globalization and Culture Change in the Pacific Islands* (2004) 1, 7–31; Toon Van Meijl, 'Introduction' in Toon Van Meijl and Jelle Miedema (eds), *Shifting Images of Identity in the Pacific* (2004) 1, 3–5.

'individual duties' from Western states. However, even if this is accepted, it does not justify the exclusion of South Pacific countries from the UN human rights treaty system. Commentators on the perceived failure of Western human rights to cater for Pacific notions of 'collective rights' and 'individual duties' are quick to cite equivalent African philosophical ideas,⁵⁰ contained in the *African Charter on Human and Peoples' Rights*,⁵¹ as basis for their arguments. Missing in the analyses of such writers, however, are evaluations of the contemporary juridical value and of the contextual peculiarities of these two concepts in Africa.⁵²

The *African Charter's* provisions on the 'rights' of 'peoples' are specifically related to the collective enjoyment of certain rights — namely, the inalienable right to self-determination and socio-economic development;⁵³ to exercise autonomy over their wealth and natural resources;⁵⁴ to economic, social and cultural development;⁵⁵ to national and international peace and security;⁵⁶ and to a satisfactory environment.⁵⁷

However, since the notion of 'collective rights' and 'duties' surfaced in the *African Charter* in 1981, there has been no pronouncement or definition of the scope of these concepts by the African Commission on Human and Peoples' Rights ('African Commission') — the treaty monitoring body for the *African Charter*.⁵⁸ In fact, the uncertainty over what constitutes 'peoples' within the context of 'collective rights' in the *African Charter* has ensured that the concept of collective rights remains one of the weakest aspects of that regional treaty.⁵⁹ It

⁵⁰ See, eg, Guy Powles, 'Duties of Individuals: Some Implications for the Pacific Including "Duties" in "Human Rights" Documents' (1992) 22(3) *Victoria University of Wellington Law Review* 49, 54–6. See also Brown and Corrin Care, above n 11, 1351 (relying on Bennett's contention about perceptions that constitutional rights are foreign to African peoples).

⁵¹ Opened for signature 27 June 1981, 1520 UNTS 227 (entered into force 21 October 1986) (*African Charter*).

⁵² For scholarly discussions of the idea of 'peoples' rights' in the *African Charter*, see Richard Kiwanuka, 'The Meaning of "People" in the *African Charter on Human and Peoples' Rights*' (1988) 82 *American Journal of International Law* 80, 80–101; Philip Alston, 'Peoples' Rights: Their Rise and Fall' in Philip Alston (ed), *Peoples' Rights* (2001) 259, 286.

⁵³ *African Charter*, above n 51, arts 19, 20.

⁵⁴ *Ibid* art 21.

⁵⁵ *Ibid* art 22.

⁵⁶ *Ibid* art 23.

⁵⁷ *Ibid* art 24.

⁵⁸ The history of the African Commission shows that it has always avoided pronouncing on the right of peoples to self-determination: see, eg, *Katangese Peoples' Congress v Zaire*, Communication No 75/92 [1995] IIHRL 77 (2 October 1995) <<http://www.worldlii.org/int/cases/IIHRL/1995/77.html>> at 22 May 2006, where the African Commission had declared the complaint admissible but eventually evaded the question of defining 'peoples' by holding that there was 'no evidence of violations'. Similarly, despite the groundbreaking decisions of the African Commission on other provisions of the *African Charter* in *SERAC*, art 21 was the only allegedly violated provision on which the African Commission made no pronouncement of jurisprudential value.

⁵⁹ See 'Dejo Olowu, 'Emerging Jurisprudence on Economic, Social and Cultural Rights in Africa: A Critique of the Decision in *SERAC & Another v Nigeria*' (2005) 2(1) *Turf Law Review* 29, 40. See also, Joe Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' (2003) 18 *American University International Law Review* 851, 893–5. Oloka-Onyango observes that:

is also interesting to observe that no national court in Africa has made a pronouncement on these concepts. Similarly, the notion of the 'duties' enunciated in the *African Charter* has remained exhortatory, conferring no enforceable obligation on anyone.⁶⁰ Although these provisions were originally considered to be the expression of indigenous African cultural values, time has proven that they are merely cosmetic moral code.⁶¹ If these two concepts are more honoured in their breach than in their observance in African human rights jurisprudence, why should scholars writing on human rights in the Pacific be interested in strengthening the orientation of South Pacific human rights thinking towards such conceptually problematic ideas?

It is instructive to note that while there has been such a negligible development of jurisprudence on the idea of collective rights in the African context, the UN — even apart from the guarantees of equality and non-discrimination in its core human rights treaties — provides a platform for the further development of instruments on this subject.⁶² Equally importantly, collective rights have been elucidated and have been accorded at least some juridical force through the UN human rights system.⁶³ Therefore, it is understandable that a number of commentators, when discussing the Pacific context, rely heavily on the UN framework regarding 'collective rights' for their theoretical discussions.⁶⁴

The UN human rights system seeks to safeguard the overall wellbeing and (moral, mental, physical, economic and social) development of every human being. In the light of current harmful cultural practices, gender-based

The African Commission is generally coy about addressing issues that relate to the question of self-determination ... Prior to the Ogoni case, the Commission had only declared admissible one communication concerning the right to self-determination ...: at 893 (citations omitted).

- ⁶⁰ The provisions on the 'duties of individuals' are contained in arts 27–29 of the *African Charter*. For further scholarly discussions on the idea of 'duties' in the *African Charter*, see Makau wa Mutua, 'The *Banjul Charter* and the African Cultural Fingerprints: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339.
- ⁶¹ See generally Osita Eze, 'Human Rights and Social Justice: An African Perspective' (Lecture delivered at Empowerment and Action Research Centre, Annual Lecture Series 4, Lagos, Nigeria, 1998) 40–4 (copy on file with author).
- ⁶² See, eg, *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17th sess, 1194th plen mtg, UN Doc A/RES/1803 (XVII) (14 December 1962); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/RES/47/135 (3 February 1993) ('*Declaration on Minorities*'); *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, signed 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).
- ⁶³ Some of the pertinent jurisprudence on this point includes *Sandra Lovelace v Canada*, UNHRC, Communication No 24/1977, UN Doc CCPR/C/13/D/24/1977 (30 July 1981); *Ilmari Lämsman et al v Finland*, UNHRC, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (8 November 1994), on the rights of minorities; *Grand Chief Donald Marshall et al (Mikmaq People) v Canada*, UNHRC, Communication No 205/1986, UN Doc CCPR/C/43/D/205/1986 (3 December 1991), on the collective right of self-determination.
- ⁶⁴ Examples of such writings include Aroha Te Pareake Mead, 'Law-Based and Culture-Based Models of Human Rights' in Nin Tomas (ed), *Collective Human Rights of Pacific Peoples* (1998) 109, 111–14; Caren Wickliffe, 'An Overview of Collective Human Rights Developments in the Pacific Region with an Emphasis on the Collective Right to Self-Determination' in Nin Tomas (ed), *Collective Human Rights of Pacific Peoples* (1998) 151, 152–62; Angelo, above n 12, 42–3.

discrimination, the threat of militarism, the marginalisation of minorities, an increasing HIV/AIDS pandemic, incessant labour crises, high unemployment rates, mass poverty, and diverse human rights violations in West Papua, Bougainville, and across other countries of the South Pacific,⁶⁵ no appeal to cultural relativism must be allowed to insulate the South Pacific from the ever-widening promise of international human rights.

Over a decade ago, at the World Conference on Human Rights in Vienna, 171 nations unanimously asserted that 'the universal nature of [human] rights and freedoms is beyond question'.⁶⁶ Further, as Donnelly noted after examining notions of human dignity in various non-Western socio-cultural milieus, 'even if, for the sake of argument, we grant the assumption that human rights are not universal ... [this does not imply] that an alternative or competing approach to human dignity is necessarily defensible, let alone preferable'.⁶⁷

D The Implementation of a Regional System

Since 1980, when the then Chief Human Rights Commissioner for New Zealand, Patrick Downey, called for the establishment of a human rights commission for the Pacific region, there have been a spate of discussions and various initiatives aimed at the establishment of a focussed regional approach to human rights in the Pacific.⁶⁸ Certainly, it would be desirable for areas that are currently lacking a regional human rights system, such as the South Pacific, to establish such systems. Regional human rights mechanisms are commonly thought to be potentially more effective than UN mechanisms because they are able to take better account of regional conditions and peculiarities.⁶⁹ In fact, the UN itself encourages the creation of regional mechanisms to deal with security and human rights, to complement its own mechanisms.⁷⁰ Therefore, if human

⁶⁵ See generally Scott MacWilliam, 'The Changing Face of Racism and Racial Development in Fiji' (2002) 59 *Development Bulletin* 24; Fergus Hanson, 'Promoting a Pacific Pacific: A Functional Proposal for Regional Security in the Pacific Islands' (2003) 4 *Melbourne Journal of International Law* 254, 259; UNICEF, *At a Glance: Solomon Islands — The Big Picture* (2006) [3] <<http://www.unicef.org/infobycountry/solomonislands.html>> at 22 May 2006; Fiji Women's Crisis Centre, *Child Sex Tourism Offences in the Pacific* <<http://www.fijiwomen.com/index.php?id=1310>> at 22 May 2006; Marietta Gross and Selwyn Manning, 'Time Runs Out on South Pacific HIV/AIDS Crisis', *Scoop Independent News* (New Zealand), 1 June 2005 <<http://www.scoop.co.nz/stories/HL0506/S00001.htm>> at 22 May 2006; Elizabeth Brundige et al, *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (2004) 9–48.

⁶⁶ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (12 July 1993) 20.

⁶⁷ Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *American Political Science Review* 303, 314. For further critical assessment of cultural relativism, see Shestack, above n 24, 567–8.

⁶⁸ Deklin, above n 16, 97.

⁶⁹ See Dinah Shelton, 'The Promise of Regional Human Rights Systems' in Burns Weston and Stephen Marks (eds), *The Future of International Human Rights* (1999) 351, 353–6. See also Allan Rosas, 'Economic, Social and Cultural Rights in the External Relations of the European Union' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd ed, 2001) 479, 484–7, which explains the increasing commitment to the 'human rights clause' in European Union policies as a notion founded on the desire to advance and reinforce the 'commonly shared values and principles, as laid down in [the UN human rights system]': at 485.

⁷⁰ See Burns Weston, Robin Lukes and Kelly Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law* 585, 591.

rights instruments and institutions were established for Pacific countries, such instruments and institutions would be region-specific, and would naturally be expected to take into consideration any perceived values and customs peculiar to the societies of the South Pacific region.⁷¹

While the initiatives led by the Law Association of Asia and the Pacific ('LAWASIA') in the mid-1980s have generated considerable scholarly and institutional contributions,⁷² a pervading undercurrent of these and subsequent initiatives is the lack of consensus on the conceptual, institutional and geopolitical parameters of any regional system. It is apt to note that prior to LAWASIA's conference on *The Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific* in April 1985, there had been a plethora of ideas outlining proposals for the structure of the regional system. While there were contributors who favoured an 'Asian' or 'Asia-Pacific' approach (encompassing the broader Pacific), some called for a 'strictly Pacific' organisation, and others desired a 'South Pacific' system.⁷³ The lack of consensus has continued to manifest itself in the divergent directions in which contemporary discussions on the issue have been moving ever since.⁷⁴ Apart from the *Draft Pacific Charter of Human Rights* that emerged under the auspices of LAWASIA in 1989,⁷⁵ the zeal towards the establishment of a regional human rights system for the South Pacific had greatly waned, until very recently.⁷⁶ Commendable as the renewal of discussions on the prospects of a

⁷¹ Deklin, above n 16, 93.

⁷² Apart from the vast literature assembled at the LAWASIA Conference in 1985, some of the notable works on the idea of a regional human rights system for the Pacific include Angelo, above n 12; Deklin, above n 16; Jefferies, above n 16.

⁷³ See, eg, Marcelo Fernan, 'UN Moves to Establish Regional Structures to Protect Human Rights in the Asian Region' in Patricia Hyndman (ed), *Conference on the Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific Convened by the LAWASIA Human Rights Standing Committee in Fiji, 12–14 April 1985* (1985) 25; Patrick Downey, 'Proposal for a South Pacific Human Rights Commission: Background Paper' in Patricia Hyndman (ed), *Conference on the Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific Convened by the LAWASIA Human Rights Standing Committee in Fiji, 12–14 April 1985* (1985) 466.

⁷⁴ For some of the prominent writings that demonstrate the lack of consensus on what is actually desired, see, eg, Jon Van Dyke, 'Prospects for the Development of Intergovernmental Human Rights Bodies in Asia and the Pacific' (1988) 16 *Melanesian Law Journal* 28, 28–33; Kelly Dawn Askin, 'Issues Surrounding the Creation of a Regional Human Rights System for the Asia-Pacific' (1998) 4 *ILSA Journal of International & Comparative Law* 599, 599; Ralph Wilde, 'NGO Proposals for an Asia-Pacific Human Rights System' (1998) 1 *Yale Human Rights & Development Law Journal* 137, 137–41; Seth Harris, 'Asian Human Rights: Forming a Regional Covenant' (2000) 1(2) *Asia-Pacific Law & Policy Journal* 1, 18–20, available at <<http://www.hawaii.edu/aplpj/pdfs/17-seth.pdf>> at 22 May 2006. See also Wickliffe, 'Human Rights Education in the Pacific', above n 18, [37]–[39], calling for the establishment of a 'Pacific Centre for Human Rights' and a 'Pacific Commission or Court'.

⁷⁵ See generally Patricia Hyndman, 'Appendix 1: Report on a Proposed Pacific Charter of Human Rights Prepared under the Auspices of LAWASIA, May 1989' (1992) 22(2) *Victoria University of Wellington Law Review* 99.

⁷⁶ Among the notable fora in which the idea of a regional system for the South Pacific has been pursued is the University of the South Pacific/Fiji Human Rights Commission Working Group — of which this author is a serving member — which commenced its activities in late 2005. There is also ongoing renewal of discussions through the platform of LAWASIA: see LAWASIA, *Human Rights Activities* <<http://www.lawasia.asn.au/index.php?contentPKey=77>> at 22 May 2006.

regional human rights system might be, should these developments come at the exclusion of the UN human rights treaty system? Arguably not, as the well-established UN system has the potential to provide significant impetus to the promotion and protection of human rights.

E *Concluding Remarks*

This Part has identified and critically engaged with some of the more pronounced factors militating against a culture of formal commitment among South Pacific countries, at least as perceived by notable scholars. This Part has argued, first, that merely placing human rights guarantees in domestic constitutions has not generated a vibrant culture of human rights protection in the South Pacific. Second, it has been contended that acceding to UN human rights treaties does not necessarily create onerous fiscal obligations. Third, in responding to the argument of the cultural peculiarities of South Pacific countries, this article has contended that these peculiarities are not only exaggerated, but that they are malleable to the dynamics of social change, just as in any other human society. While some scholars have also relied on their preference for a regional human rights system as an absolute alternative to the UN human rights treaty system, apart from being a desire that remains not immediately feasible, the prospect of a regional human rights system cannot be a tenable reason for South Pacific countries to shun the well-established normative and institutional mechanisms of the UN human rights system.

III OVERVIEW OF COMMITMENT AND COMPLIANCE IN THE SOUTH PACIFIC

Given the significance of the UN human rights system for the South Pacific, the central questions to ask at this juncture are: how have South Pacific countries responded to global human rights standards as expressed through the UN, in terms of their formal commitment to its core human rights treaties? And, where these countries have expressed some formal commitment, to what extent have they complied with their obligations arising under the relevant treaties?

A *Formal Expression of Commitment*

Despite the increasing pace of the globalisation of human rights ideas since the 1990s, there remains marked reluctance among South Pacific countries towards the ratification of, or accession to, the core UN human rights treaties.

As at 9 March 2006, the only UN human rights treaty to which all the South Pacific countries are states parties is the *CRC*.⁷⁷ This is in fact the only core UN human rights treaty to which certain South Pacific countries (namely Cook Islands, Marshall Islands, Niue and Palau) are states parties.⁷⁸ The *ICCPR* has no South Pacific state party, while the Solomon Islands, which ratified the *ICESCR* in 1982, is its only state party in the South Pacific.⁷⁹ The *CERD* has Fiji Islands, Papua New Guinea, Solomon Islands, and Tonga as its South Pacific states parties;⁸⁰ while the Fiji Islands, Kiribati, Federated States of Micronesia,

⁷⁷ See OHCHR, *Status of Ratifications*, above n 5, 4–11.

⁷⁸ *Ibid* 4–11.

⁷⁹ *Ibid* 10.

⁸⁰ *Ibid* 5, 8, 10.

Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tuvalu, and Vanuatu are states parties to the *CEDAW*.⁸¹ Neither the *CAT* nor the *CMW* have any South Pacific states parties. Excluding the Solomon Islands, which is a state party to four of the core UN human rights treaties, the maximum number ratified by any other South Pacific state is three.⁸²

1 *Reservations, Understandings and Declarations*

Treaties are a prominent source of international human rights law, as they create a framework for identifying rights-holders and duty-bearers.⁸³ However, it is commonplace for states to enter reservations, interpretive declarations, partial objections or principled understandings (collectively, ‘RUDs’) when signing, ratifying or acceding to human rights treaties,⁸⁴ thereby lessening the formal commitment of the state party to the particular treaty. Diverse reasons and factors are often responsible for the entry of RUDs by states. Such factors will be discussed only to the extent to which they affect South Pacific countries.

The entering of RUDs is undeniably contentious⁸⁵ and, specifically in regard to South Pacific nations, gives cause for concern. For example, in respect of the *CRC*, the Cook Islands’ individual total of four reservations and two declarations mean that its RUDs effectively limit its obligations under the treaty to extend only to its nationals, and deny the automatic conferral of nationality on displaced children.⁸⁶ Kiribati’s reservation to arts 24, 26 and 28 of the *CRC*, together with its singular declaration to render the rights stipulated in arts 12–16 of the treaty subsidiary to Kiribati’s traditional practice, effectively deny human rights

⁸¹ *Ibid* 5–11.

⁸² See below Table 1, which outlines the status of ratifications of the core UN human rights treaties as at 9 March 2006.

⁸³ By virtue of the doctrine of *pacta sunt servanda*, which is codified by the *VCLT*, ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’: see *VCLT*, above n 89, art 26. See also David Harris, *Cases and Materials on International Law* (6th ed, 2004) 828.

⁸⁴ *VCLT*, above n 89, art 19 recognises the liberty of states to make a reservation when they are signing, ratifying or acceding to a treaty. For scholarly discussions on the impact of RUDs on international human rights in the contemporary context, see Catherine Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’ (1993) 64 *British Yearbook of International Law* 245; Curtis Bradley and Jack Goldsmith, ‘Treaties, Human Rights, and Conditional Consent’ (2000) 149 *University of Pennsylvania Law Review* 399, 404–23.

⁸⁵ See Brownlie, above n 89, 586; Madeline Morris, ‘Few Reservations about Reservations’ (2000) 1 *Chicago Journal of International Law* 341, 342–6; Ryan Goodman and Derek Jinks, ‘Measuring the Effects of Human Rights Treaties’ (2003) 14 *European Journal of International Law* 171, 179. See also UNHRC, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or Optional Protocols Thereto, or in relation to Declarations under Article 41 of the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.6 (11 November 1994) [6]–[8], where the Committee extensively reflected on the question of reservations to the *ICCPR*.

⁸⁶ See OHCHR, *Convention on the Rights of the Child* (2006) <<http://www.ohchr.org/english/countries/ratification/11.htm>> at 22 May 2006.

TABLE 1: STATUS OF RATIFICATIONS OF THE CORE UN HUMAN RIGHTS TREATIES AS AT 9 MARCH 2006⁸⁷

<i>South Pacific State</i>	<i>ICCPR 1966</i>	<i>ICESCR 1966</i>	<i>CERD 1965</i>	<i>CAT 1984</i>	<i>CEDAW 1979</i>	<i>CRC 1989</i>	<i>CMW 1990</i>
Cook Islands	-	-	-	-	-	6/7/97	-
Fiji	-	-	10/2/73	-	27/9/95	12/9/93	-
Kiribati	-	-	-	-	16/4/04	10/1/96	-
Marshall Islands ⁸⁸	-	-	-	-	2/03/06	3/11/93	-
Federated States of Micronesia	-	-	-	-	1/10/04	4/6/93	-
Nauru ⁸⁹	-	12/11/01*	12/11/01*	12/11/01*	-	26/8/94	-
Niue	-	-	-	-	-	19/1/96	-
Palau	-	-	-	-	-	3/9/95	-
Papua New Guinea	-	-	26/2/82	-	11/2/95	31/3/93	-
Samoa	-	-	-	-	25/10/92	29/12/94	-
Solomon Islands	-	17/3/82	17/3/82	-	5/6/02	9/5/95	-
Tonga	-	-	17/3/72	-	-	6/12/95	-
Tuvalu	-	-	-	-	5/11/99	22/10/95	-
Vanuatu	-	-	-	-	8/10/95	6/8/93	-

* Signed but not ratified

⁸⁷ OHCHR, *Status of Ratifications*, above n 5, 4–11. The dates shown here make no distinction between actual ratification and accession. What is essential here is to show which treaties are binding on which South Pacific state, and when each state became a party to each treaty.

⁸⁸ The Marshall Islands acceded to the *CEDAW* on 2 March 2006: Division for the Advancement of Women, *States Parties* (2006) <<http://www.un.org/womenwatch/daw/cedaw/states.htm>> at 22 May 2006.

⁸⁹ Nauru has signed, but not ratified, the *ICCPR*, the *CERD* and the *CAT*: see OHCHR, *Status of Ratifications*, above n 5, 8. This makes Nauru the only South Pacific state that has signed these treaties but not ratified them. By virtue of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 18 (entered into force 27 January 1980) ('*VCLT*'), Nauru is obliged to refrain from any act that is capable of frustrating the objects and purpose of any of the treaties it has signed, even though it has not ratified them. For further discussions on the effect of signature in the law of treaties, see Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 582.

protection to children.⁹⁰ The Government of Samoa entered a single reservation that excludes its obligation to provide free primary education to children, as stipulated under art 28 of the *CRC*, and asserts the prerogative of the Government to allocate resources as it deems fit.⁹¹

With reference to the *CERD*, the Fiji Islands entered a strong reservation that essentially defines its obligation to prevent, prohibit, eradicate and redress all racially discriminatory practices as a matter subject to its political convenience.⁹² Tonga reserved its right to apply the *CERD* only to the extent that its municipal laws on land ownership and alienation would permit.⁹³ In its reservation, Papua New Guinea declined to guarantee the provisions of the *CERD* beyond the corresponding provisions of its *Constitution*.⁹⁴ Regarding the *CEDAW*, the Federated States of Micronesia entered a reservation that essentially denies its obligation to make laws that would ensure equal pay for equal work and maternity leave with pay or comparable benefits, as required by art 11 of that treaty.⁹⁵ By this same reservation, the Micronesian Government absolved itself from the obligations under arts 2(f), 5 and 16 to adopt all appropriate measures

⁹⁰ According to the OHCHR, *ibid*, the declaration of Kiribati reads:

The Republic of Kiribati considers that a child's rights as defined in the *Convention*, in particular the rights defined in articles 12–16 shall be exercised with respect for parental authority, in accordance with the Kiribati customs and traditions regarding the place of the child within and outside the family.

⁹¹ *Ibid*.

⁹² See OHCHR, International Convention on the Elimination of All Forms of Racial Discrimination: *Declarations and Reservations*, <<http://www.ohchr.org/english/countries/ratification/2.htm>> at 22 May 2006 ('*CERD Reservations*'). The reservation states, *inter alia*, that

to the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3, or 5 (e) (v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the *Convention*.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ See OHCHR, International Convention on the Elimination of All Forms of Discrimination against Women, *Declarations and Reservations*, <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> at 22 May 2006. The reservation entered by the Federated States of Micronesia is the only subsisting reservation against the *CEDAW* in the South Pacific. Fiji Islands withdrew its earlier reservation to arts 5(a) and 9 on 24 January 2000: see UN Division for the Advancement of Women, *Declarations, Reservations and Objections to CEDAW* [27] <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N27>> at 22 May 2006.

that would correct age-long customary practices that subjugate women in public and private spheres.⁹⁶

Further investigation into the RUDs entered by South Pacific countries to UN human rights treaties should be the subject of distinct scholarly exploration. Instead, this article will move on to consider the actions that South Pacific countries have taken towards the implementation of their obligations under the core UN human rights treaties.

B Compliance with Treaty Obligations

To monitor the compliance of states parties effectively, the supervision of the implementation of each of the core UN human rights treaties is entrusted to an appropriate body of experts.⁹⁷ It must be noted, however, that the specific methods of supervising these treaties depend on the applicable contents of each treaty.⁹⁸ One common feature of all UN human rights treaties is the existence of a reporting procedure. All states parties to each treaty are required to submit periodic reports on the measures they have adopted to give effect to the provisions of the relevant treaties. These obligatory reports are usually in the form of an initial report and, subsequently, periodic reports at regular intervals.⁹⁹ It is apt in the context of this article to examine this mechanism in some detail.¹⁰⁰

⁹⁶ UN Division for the Advancement of Women, above n 95. It must be noted here that the treaty monitoring body for the *CEDAW*, the Committee on the Elimination of Discrimination against Women, has declared that art 2 is central to the objects and purpose of the *Convention*, and that, therefore, states parties to the *Convention* agree thereunder that discrimination against women in all its forms should be denounced while the strategies set out in art 2(a)–(g) must be implemented by states parties to eliminate it. According to the view of the Committee, religious or cultural practices or municipal laws cannot justify violations of *CEDAW*. The Committee also contends that reservations to art 16, lodged for any reasons, are incompatible with the *Convention* and are therefore impermissible and should be revoked: see Committee on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No 4: Reservations*, UN Doc A/42/38 (15 May 1987) [579].

⁹⁷ The relevant treaty monitoring bodies for the treaties are as follows: *ICCPR* — UNHRC; *ICESCR* — CESCR; *CERD* — the Committee on the Elimination of All Forms of Racial Discrimination; *CAT* — the Committee against Torture; *CEDAW* — the Committee on the Elimination of Discrimination against Women; *CRC* — the Committee on the Rights of the Child; and the *MWC* — the Committee on the Rights of Migrant Workers: see OHCHR, *Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties* <<http://www.ohchr.org/english/bodies/treaty/index.htm>> at 22 May 2006.

⁹⁸ UN human rights treaties generally have three mechanisms for their supervision, namely: states' periodic reports, inter-state complaint procedures, and individual complaint mechanisms. While the *ICCPR*, *CAT*, *CERD*, *CEDAW* and *CMW* each employ these three mechanisms, the *ICESCR* and *CRC* do not have any procure for individual and inter-state complaints: see OHCHR, *Human Rights Treaty Bodies: Complaints Procedures* <<http://www.ohchr.org/english/bodies/petitions/index.htm>> at 22 May 2006.

⁹⁹ See *ICCPR*, above n 5, art 40; *ICESCR*, above n 6, art 16; *CERD*, above n 8, art 9; *CAT*, above n 8, art 19; *CEDAW*, above n 8, art 18; *CRC*, above n 8, art 44; and *CMW*, above n 8, art 73.

¹⁰⁰ The efforts of the courts of the South Pacific countries to apply UN human rights treaty provisions in human rights cases has been explored in Laita Tamata, 'Application of Human Rights Conventions in the Pacific Islands Courts' (2000) 4 *Journal of South Pacific Law* <http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Tamata1.html> at 22 May 2006.

1 *Reporting Procedures*

Over the years, the UN human rights reporting system has emerged as an means of promoting and monitoring the implementation of its human rights treaties. Today, the elaborate reporting provisions under each of the core UN human rights treaties have made it possible for bodies of experts, officials of states parties, civil society groups at the national level, and international non-governmental organisations ('INGOs') to address the difficult questions of: the extent to which a state party has fulfilled its treaty obligations; what more needs to be done; any impediments to progress; and strategies for surmounting such obstacles.¹⁰¹ The high point of the reporting process is the issuance of 'concluding observations' by the respective treaty monitoring bodies — essentially a collection of all of the views, advice and directions on the challenges, gaps and opportunities so that a state may further promote and protect the treaty provisions within its territory.¹⁰²

Even though the reporting mechanism in the UN human rights treaty system has been a subject of criticism,¹⁰³ its importance in making states parties keep their treaty obligations in constant view must not be overlooked. When a treaty monitoring body issues its concluding observations after considering a state's report, the views and recommendations contained in these well-reasoned, high-profile and objectively standardised statements ordinarily become veritable tools for legal and policy reform activism at the domestic level.¹⁰⁴ The reporting mechanism is particularly helpful and significant in assessing the performance of South Pacific countries in light of their overall refusal to accept the competence of the monitoring bodies to receive communications (complaints) from individuals.¹⁰⁵

Another reason the reporting mechanism is significant, in the context of this article, is the pervasive reluctance of South Pacific countries to submit their obligatory reports when they are due. Even though these countries are not party to an overwhelming number of UN human rights treaties, their reporting performance has been dismal. An inspection of the reporting performance by South Pacific countries under the *CRC* — undoubtedly the

¹⁰¹ OHCHR, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, *Fact Sheet No 30* (2005) 27, 29–30 <<http://www.ohchr.org/english/about/publications/docs/fs30.pdf>> at 22 May 2006 ('*Fact Sheet No 30*').

¹⁰² *Ibid* 22–3.

¹⁰³ As early as 1982, Professor Meron had observed that the proliferation of human rights treaties in the UN will clog the effectiveness of their supervision: see Theodor Meron, 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order' (1982) 76 *American Journal of International Law* 754, 764–5. See also Bayefsky, above n 9, 467–8.

¹⁰⁴ In practice, each of the monitoring bodies asks the relevant state party to publicise the 'Concluding Observations' in order to inform ordinary citizens of the state's obligations. States are then expected to include in the next periodic report an explanation of the ways in which they have strengthened the implementation of the treaty through those recommendations: see OHCHR, *Fact Sheet No 30*, above n 101, 23–4.

¹⁰⁵ Nauru is the only South Pacific state that has signed the first *Optional Protocol* to the *ICCPR*. It did so on 12 November 2001, but no further step towards ratification has been taken. All other South Pacific states that are parties to those UN human rights treaties that provide for individual complaints procedures have not acceded to the protocols that allow individual complaints: see OHCHR, *Status of Ratifications*, above n 5, 8.

most ratified UN human rights treaty — is insightful. Although, under this treaty, states parties are obliged to submit their initial reports within two years of its entry into force in their territories, and every five years thereafter,¹⁰⁶ the majority of South Pacific countries have at least one report overdue.¹⁰⁷ Under the *CEDAW*, every state party is required to submit its initial report within one year of the treaty coming into force in its territory.¹⁰⁸ However, Fiji Islands submitted its initial report, due 27 September 1996, on 29 February 2000,¹⁰⁹ and its second and third reports are still overdue.¹¹⁰ Samoa submitted its initial report, due 25 October 1993, on 2 May 2003,¹¹¹ while Vanuatu submitted its initial report, due 8 October 1995, on 2 March 2005 — each almost 10 years late.¹¹² Kiribati, Papua New Guinea, Solomon Islands and Tuvalu have not submitted any reports.¹¹³ In respect of the *CERD*, Papua New Guinea and Solomon Islands rank among the nations with the highest numbers of overdue reports.¹¹⁴ Tonga is overdue on its 15th, 16th and 17th periodic reports.¹¹⁵ While it is recognised that erratic submission of reports by states parties to the core UN human rights treaties is rife beyond the South Pacific region, it is a particularly significant problem for effective human rights monitoring in this region in light of the absence of any regional human rights treaty system.¹¹⁶

The existing UN monitoring bodies have devised an innovative response to the general inability of states parties to submit their periodic reports as and when they fall due. Once a state has defaulted for a long time in submitting its report, the relevant treaty body proceeds to examine and consider all other 'shadow reports' before it, such as submissions from civil society groups or NGOs, and to issue its concluding observations where appropriate. This response is a positive step capable of strengthening the role of civil society groups in the UN human rights treaty monitoring process. The application of this new procedure to the review of Solomon Islands' initial CESCR report in

¹⁰⁶ *CRC*, above n 8, art 44(1).

¹⁰⁷ The Cook Islands, Fiji Islands, Kiribati, Federated States of Micronesia, Palau, Samoa and Vanuatu have one overdue report whilst Nauru, Niue, Tonga and Tuvalu have two overdue reports: see OHCHR, *Overdue by Treaty: Convention on the Rights of the Child* (2006) <<http://www.unhchr.ch/tbs/doc.nsf/newhvoerduebytreaty?OpenView&Start=1&Count=250&Expand=3#3>> at 22 May 2006.

¹⁰⁸ *CEDAW*, above n 8, art 18(a).

¹⁰⁹ See OHCHR, *All Reports by Convention* <<http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet>> at 22 May 2006.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Papua New Guinea's initial report was due on 11 February 1996: see *ibid.*

¹¹⁴ Papua New Guinea has a total of 12 overdue periodic reports, while Solomon Islands has 11: see OHCHR, *Overdue by Country* <<http://www.unhchr.ch/tbs/doc.nsf/newhvoerduebycountry?OpenView>> at 22 May 2006.

¹¹⁵ *Ibid.*

¹¹⁶ See above Part II(D).

2002 is instructive for its potential adoption in respect of other South Pacific countries.¹¹⁷

Apart from the prevalent lack of consistent treaty reporting, however, the contribution of South Pacific civil society groups has been relatively insignificant in the activities of UN human rights treaty bodies.¹¹⁸ It is contended that without effective civil society input, UN human rights treaty bodies will have little grasp of the issues of critical concern in the South Pacific.

2 *Concluding Observations and Recommendations*

The practice of the UN human rights treaty bodies in adopting concluding observations after reviewing each state's report not only portends a quasi-judicial value to the relevant treaties but also reinforces their provisions at the domestic level.¹¹⁹ However, a study of the concluding observations issued by various UN human rights treaty monitoring bodies in respect of the few South Pacific countries' reports reveals that these states have engaged in little or no reflection on previous recommendations, which can be seen as evidence of inadequate follow-up processes at the domestic level.¹²⁰ Despite repeated recommendations by the Committee on the Rights of the Child that South Pacific states parties to the *CRC* should implement the treaty through national legislation,¹²¹ none of these states has enacted a comprehensive statute that

¹¹⁷ See CESCR, *Summary Record of the 38th Meeting*, 29th sess, UN Doc E/C.12/2002/SR.38 (22 November 2002) [1]–[4] ('*Summary of the 38th Meeting*'), where, in the absence of a government delegation from the Solomon Islands, the Committee reviewed the following report: CESCR, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Addendum: Solomon Islands*, UN Doc E/1990/5/Add.50 (30 July 2001).

¹¹⁸ In this regard, it is worthy to note that the consideration of the initial report of the Solomon Islands, mentioned above, was facilitated through the vigorous input of an INGO, namely the Centre on Housing Rights and Evictions: see the CESCR, *Summary of the 38th Meeting*, above n 117, [5].

¹¹⁹ See generally Scott Leckie, 'An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights' (1991) 13 *Human Rights Quarterly* 545, 546–8, analysing the importance of the reporting procedure under the *ICESCR*.

¹²⁰ See, eg, Committee on the Elimination of All Forms of Racial Discrimination, *Reports Submitted by States Parties under Article 9 of the Convention: Fifteenth Periodic Reports of State Parties Due in 2002: Fiji*, UN Doc CERD/C/429/Add.1 (15 November 2002) [1]–[5], which reveals the 20-year gap between the submission of Fiji's fifth periodic report in 1982, and its sixth to 15th periodic reports in 2002.

¹²¹ See, eg, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Fiji*, UN Doc CRC/C/15/Add.89 (24 June 1998) [7]–[26]; Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Marshall Islands*, UN Doc CRC/C/15/Add.139 (26 October 2000) [8]–[9]; Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Federated States of Micronesia*, UN Doc CRC/C/15/Add.86 (4 February 1998) [6]; and Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Vanuatu*, UN Doc CRC/C/15/Add.111 (10 November 1999) [7].

would fully secure the provisions of that treaty. The situation is similar for the other treaties.¹²²

IV THE FUTURE OF HUMAN RIGHTS IN THE REGION: CHALLENGES AND STRATEGIES

The fundamental challenges to the efficacy of international human rights in the South Pacific relate to the non-ratification of UN human rights treaties and non-compliance with the reporting obligations. In all, the overarching challenge in the South Pacific is to make UN human rights treaties meaningful to the lives of ordinary people. Without doubt, the struggle to invigorate the relevance and significance of the UN human rights treaty system in the South Pacific demands a clear agenda and strategic responses that would involve critical input from all strata of civil society.¹²³ This article proceeds to highlight some of these strategies.

The role of organised civil society in the approach being canvassed here cannot be overemphasised. Across the world, both within regional arrangements as well as institutions of global governance, the human rights enforcement paradigm is consistently shifting towards effective partnership between governments and civil society groups. The aim is to create an atmosphere conducive to good and responsible governance through strong and active civil society participation.¹²⁴ It is in this light that this article advocates a repositioning of civil society in the South Pacific to serve as the focal point for the required domestic activism across the region.

A particularly significant challenge before South Pacific civil society groups, scholars and activists is the way in which to mobilise rhetoric and action in responding to distorted conceptions of international human rights. The challenge here has direct implications for the Pacific Concerns Resource

¹²² See, eg. *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 57th sess, Agenda Item 102, Supp 38, UN Doc A/57/38 (7 May 2002) [48], [57], [66], [67], in which the Committee lamented the failure of Fiji Islands to adopt the necessary legislation that would give full domestic legal effect to the *CEDAW*. See also the Committee for the Elimination of All Forms of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Tonga*, UN Doc CERD/C/304/Add.63 (10 February 1999), in which the Committee lamented the lack of legislation or any 'express policy on the elimination of racial discrimination': at [7].

¹²³ This author recognises that the term 'civil society' has acquired diverse meanings under various writers. Within different paradigms, it has been used to denote NGOs, community-based organisations, peoples' organisations, INGOs, etc. In the context of the present analysis, however, the terminology encompasses independent groups of activists, private individuals, scholars, South Pacific writers, professional groups, research institutes, media, artisans, religious organisations, local leaders, traditional societies, unaffiliated persons, and networks existing within the South Pacific region, or outside the South Pacific but with a focus on the region, without subservience or duty of allegiance to any ruling administration or government in the South Pacific.

¹²⁴ See generally Mary Kaldor, 'Civil Society and Accountability: Occasional Paper for Human Development Report 2002' (Occasional Paper No 6, United Nations Development Programme, 2002), available at <http://hdr.undp.org/docs/publications/background_papers/2002/Kaldor_2002.pdf> at 22 May 2006. See also Peter Sollis, 'Partners in Development? The State, NGOs, and the UN in Central America' in Thomas Weiss and Leon Gordenker (eds), *NGOs, the UN, and Global Governance* (1996) 189, 189–206, discussing the political and economic context of the tripartite partnership among the UN, NGOs and governments in Central America.

Centre, the Pacific Islands Association of Non-Governmental Organisations, the Pacific Regional Human Rights Education Resource Team, churches, scholars, lawyers, professionals, women's groups, technocrats, student bodies and even private individuals and social activists across South Pacific countries.

First, civil society groups in South Pacific countries cannot continue to defer the UN human rights treaty monitoring process to state officials, diplomats and other bureaucrats. If these treaties are to have meaning in the South Pacific, civil society groups within each state and across the region must collaborate with a view to making the process effective. 'Alternative' or 'shadow' reporting is a strategy yet to be thoroughly explored by South Pacific civil society.

Constitutions, being the fundamental laws of modern states, are veritable channels for advancing the domestic implementation of UN human rights treaties. Perhaps one of the most significant cases in this regard was the input of civil society groups in the drafting process of the 1996 *Constitution of South Africa*, which ensured the entrenchment of all categories of human rights in justiciable terms. The Assembly of the Poor in Thailand was also keenly aware of the importance of securing the promises of international human rights and thus participated actively in drafting the *Constitution of Thailand* and other laws, which are now used to agitate for their domestic implementation. These experiences have been supplemented by elaborate legislation. The ongoing constitutional review processes in some parts of the South Pacific present an appropriate forum for civil society input into the domestic implementation of human rights provisions in accordance with global trends.

Another increasingly formidable strategy is the budgetary process through which civil society groups can urge that annual government financial plans should respect the state's obligations under human rights treaties. Civil society groups in some countries prepare and publicise alternative or parallel budgets. In Canada, for example, the process is monitored by a coalition of civil society groups which has developed alternative budgets that take into account the need to decrease yearly national debt and deficits while still fulfilling human rights treaty obligations. The coalition has been of tremendous influence in the annual federal and municipality budgets in Canada in recent times.¹²⁵ In India, the Developing Initiatives for Social and Human Action has used the budgetary process as a tool for advancing the human rights of the poor and tribal peoples, emphasising that budget books have to be available by law to expose the prioritisation of budgetary allocations.¹²⁶ Similarly, in South Africa, concerted efforts are being made to

¹²⁵ See Maurizio Bevilacqua, 'The Budget-Making Process' in *Report of the Standing Committee on Finance* (2001) <<http://www.parl.gc.ca/infocomdoc/37/1/FINA/Studies/Reports/FINARP10/ch1-e.htm>> at 22 May 2006. See also Josh Lerner and Estair Van Wagner, *Participatory Budgeting in Canada: Democratic Innovations in Strategic Spaces* (2006) <<http://www.tni.org/newpol-docs/pbcanada.htm>> at 22 May 2006.

¹²⁶ Nadia Hijab, 'Human Rights and Human Development: Learning from Those Who Act' (Background Paper, United Nations Development Programme, 2000) [B3] <http://hdr.undp.org/docs/publications/background_papers/Hijab2000.html> at 22 May 2006.

entrench the culture of people-oriented national budgets. Regrettably, this is an area where activism is still largely undeveloped in South Pacific countries. There is no gainsaying the fact that it holds great potential for the advancement of human rights in the region.

Furthermore, enormous influence accrues to the work of civil society groups through careful, detailed, persistent and appropriately circulated studies on the plight of marginalised and vulnerable people, and by special urgent appeals when necessary. This author's informal survey of South Pacific civil society groups reveals that few groups give sufficient attention to such strategies, while those that would have given greater commitment lack the resources to do so.¹²⁷ Effective activism in this field requires that public opinion must be well sensitised over a sustained period. The relative success of the Legal Resources Centre in promoting the land rights struggle in South Africa,¹²⁸ and the progress recorded by the Social and Economic Rights Action Centre ('SERAC') in respect of the slum demolitions in Nigeria, point to the great value of research-based activism and proper documentation.¹²⁹ In this regard, South Pacific civil society groups must obtain, confirm, and widely distribute their findings within and beyond their immediate domains.

Equally so, while insufficient data could be excuses for the culture of inefficient documentation by South Pacific civil society groups in the past, advances in technology have ensured that basic socio-economic data has become regularly available at national and international levels, particularly through the electronic publications of the World Bank, United Nations Development Programme and UNICEF. Additionally, intellectual exchanges at workshops, seminars and other fora have great potential to help with information verification and consistency.

Research should also be directed at showing the aggravated repercussions of development assistance, multilateral loans and donors' aids, from the perspective of both South Pacific regimes and the governments of donor countries. The perpetuation of corruption and poverty should become central issues in the evaluation of aid and loans to South Pacific countries. Again, both academic literature and activists' efforts should emphasise that development agencies, aid donors and recipient states should make explicit reference to integrative human rights in their negotiations with one another. It is the protection of legal *entitlements* to the basic necessities of life that will empower all people. Total respect for UN human rights treaties will go a long way to promoting this outcome.

¹²⁷ In October 2005, the University of the South Pacific provided a grant enabling independent research on the topic 'Rethinking Development in the South Pacific: The Challenges of Women's Rights, Women Empowerment and the Role of the Civil Society'. This ongoing research has afforded this author the opportunity to interact with civil society groups across the South Pacific. Findings from that research will be discussed in a future publication.

¹²⁸ For more information about the Centre, see generally <<http://www.lrc.org.za/home>> at 22 May 2006.

¹²⁹ In 1998, SERAC was able to achieve a review of the report of the World Bank Inspection Panel on the social implications of its sponsored drainage and sanitation project in Lagos, Nigeria, by submitting a well-documented alternative report which considered the group of persons, numbering more than 2000, who lost their homes in two of the 15 slums earmarked for demolition. The demolitions were to be completed in phases: see Hijab, above n 126, [B10], [B11].

Apart from activism within national territories, however, efforts should be made to synergise local endeavours with ongoing regional initiatives aimed at strengthening the profile of human rights in the South Pacific region. The recent Pacific Plan for Strengthening Regional Cooperation and Integration, encompassing the proposed Pacific regional human rights system, is a significant advancement in this regard.¹³⁰

In addition, it has been demonstrated elsewhere that the success of any endeavour that seeks to address the deprivations and needs of human beings will invariably depend on its level of patronage from and cooperation with the affected people themselves.¹³¹ In a region laden with astounding levels of mass illiteracy and ignorance, organised civil society groups will have to shoulder the responsibility of popular awareness, mass mobilisation, grassroots education and participation founded on existing platforms.

V CONCLUSION

An effort has been made in this article to evaluate the status of the formal commitment of South Pacific countries to the prominent international human rights standards — especially those that have evolved through the UN human rights treaty system. While it is not intended to be a passage of verdict on the level of commitment and compliance with these standards by South Pacific countries, it is nonetheless a critical piece that may serve as a platform for further theoretical assessment of the situation regarding international human rights in the region.

In the present age, no nation would consciously wish to earn the appellation of ‘human rights violator’. In increasing measures, human rights have thus emerged as potential foreign policy and international development tools for securing a nation’s relevance in the global political arena. As Shestack argued, ‘a nation enhances its own liberties through its concern for the liberties of others’.¹³² If the South Pacific countries are to remain relevant in global political dynamics, their unqualified embrace of international human rights standards would assist in that objective. This article is a modest attempt to stimulate debate in that direction.

Apart from the formal obligations of South Pacific countries to implement the provisions of human rights treaties that they have ratified, this article has contended that the responsibility for the promotion and protection of international human rights in each state of the South Pacific belongs to all and sundry and demands multidimensional strategies and interdisciplinary

¹³⁰ See generally Pacific Islands Forum Secretariat, *The Pacific Plan for Strengthening Regional Cooperation and Integration* (2005) <<http://www.pacificplan.org/tiki-page.php?pageName=The+Pacific+Plan>> at 22 May 2006.

¹³¹ See, eg, Siddiq Osmani, ‘Participatory Governance and Poverty Reduction’ in Alejandro Grinspun (ed), *Choices for the Poor: Lessons from National Poverty Strategies* (2001) 121, 125–37 (demonstrating how the weak level of public participation in national resource management and poverty alleviation programs have affected their overall productivity in Nepal, India, Uganda, Kenya, Tanzania and Mongolia); Julian May, ‘Lesotho, Uganda, Zambia and Maldives’ in Alejandro Grinspun (ed), *Choices for the Poor: Lessons from National Poverty Strategies* (2001) 231, 241–4 (showing the critical role of public engagement and participation in the formulation and success of anti-poverty policies).

¹³² Shestack, above n 24, 567.

responses. Whatever the case may be, success will largely depend on pragmatic civil society initiatives.

Far from being an *ex cathedra* pronouncement on all the dynamics that would inform the strengthening of the international human rights profile of South Pacific countries, this article would have fulfilled its mission if it helps in galvanising further scholarly discussions on its theme.