

# A PACIFIC HUMAN RIGHTS MECHANISM: SPECIFIC CHALLENGES AND REQUIREMENTS

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*This article examines several key challenges that face Pacific leaders and other stakeholders in their consideration of a regional human rights mechanism, including the important question whether a regional mechanism is at all necessary. The article draws mainly on material from six interviews with participants from the Pacific region working in government and academia to examine those key challenges. The article closes with some suggested requirements in order for a regional human rights mechanism to be effective in the Pacific.*

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## **I INTRODUCTION**

The notion of establishing a regional human rights mechanism in the Pacific has been discussed in a range of fora for several decades. However, in spite of these deliberations there has been little commitment from Pacific leaders to develop and implement a formal human rights mechanism. This article will examine several key challenges that face Pacific leaders and other stakeholders in their consideration of a regional mechanism. Four key requirements deemed necessary for the advancement of a regional human rights mechanism in the Pacific are also presented.

For the purposes of this article, the Pacific region is defined as including the 16 member states of the Pacific Islands Forum (PIF).<sup>1</sup> A "regional human rights mechanism" is defined broadly as including one or more of the following instruments: a human rights desk or officer position within a regional institution such as the PIF Secretariat, a treaty or charter, a commission, a court, associated legislation and policy. A regional human rights mechanism would require the broad consensus of PIF member states and would be expected to reflect the specific context, needs, and priorities of the region. In essence, it would mirror the cultural and political environments of the Pacific. This article

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<sup>1</sup> The Pacific Islands Forum [PIF] member states include Australia, Cook Islands, Federated States of Micronesia, Fiji Islands, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

is concerned with the development of a formal or state(s)-led institution, rather than a non-government initiative even though some non-state programmes may have similar functions.

A regional institution may be seen to be more effective than global or international human rights mechanisms given its focus on local values and concerns.<sup>2</sup> Other advantages of regional human rights instruments may include more accessible technical and legal support for individual states especially in regard to the adoption, implementation and monitoring of international human rights conventions, and a pool of local staff and resources that can address human rights concerns particular to the regional context.<sup>3</sup> A regional mechanism might also support the existing legal services within states, provide monitoring assistance for ensuring human rights standards and norms are upheld within the area, and have a promotional and educational role throughout the region. The disadvantages of a regional mechanism may include having an approach that is too broad so that it overlooks the needs and priorities of individual states and local communities. It may be seen to threaten state sovereignty and it may duplicate the work of national human rights institutions.

The concept of a regional human rights mechanism is complex and there are many associated challenges if one is to be advanced. The first section of this article outlines the methodology of this research and provides a brief discussion of the contextual and historical setting. This is followed by an examination of several challenges, although this is by no means comprehensive. The second section will discuss some of the requirements for the successful establishment of a regional human rights mechanism. I wish to stress however, that this approach does not mean that a regional human rights mechanism is necessarily the only, or the best, mechanism for ensuring the promotion and protection of human rights in the Pacific region.

## **II METHODOLOGY**

This article primarily draws on interviews with six participants from the Pacific region conducted by the author as the first part of a doctoral research project. A further twenty participants were interviewed throughout 2008 to provide a broader cross-section of knowledge on the research area. The doctoral research seeks to examine the factors that have thus far impeded the development of a Pacific human rights mechanism (RHRI), and may potentially influence any future development of such a mechanism.

The material included in this discussion is drawn from participants who all live and work in the Pacific. Four of the participants live in small Pacific island states and two of these individuals are indigenous to their countries. Another participant resides in Australia, the other in New Zealand. Two of the participants are political officials or advisers (one from a small state and one from a

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2 Hidetoshi Hashimoto *The Prospects for a Regional Human Rights Mechanism in East Asia* (Routledge, New York, 2004); New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC 17, Wellington, 2006).

3 Dave Peebles *Pacific Regional Order* (ANU E-Press, Canberra, 2005).

metropolitan country). The other four participants are academics in the law and/or Pacific Studies fields. All of the participants have written and published material on human rights in the Pacific.

These individuals participated in interviews with the author between November 2007 and January 2008. At this initial stage of the data collection the author approached six well-known people within the research field. These people were living in or visiting countries to which the author had immediate access, and they all agreed to be interviewed. While they have provided permission for their comments to be attributed, the participants will remain anonymous in other writing prior to the publication of the final dissertation.

The participants were each asked a series of questions pertaining to the overall research statement above. In particular, they were asked for their views on the utility of a regional human rights mechanism in the Pacific; factors that influence political decision-making in this domain; actors, whether individuals, groups or organisations, that may be supporting (or not) a regional mechanism; risks and opportunities and the legitimacy of a regional human rights mechanism in the Pacific. All the participants were invited to provide any additional comments relating to the research area.

Face to face semi-structured interviews were selected as the primary method of data collection as it enables engagement from both the interviewer and the participant. Although specific questions were asked, which created a level of structure, the participants were also able to present information from their own perspectives and tell their own story. While this article only draws on the data collected from six participants, the final thesis will present a broader opinion on the issue of a regional human rights mechanism in the Pacific.

### **III SETTING THE SCENE**

The concept of a regional human rights mechanism in the Pacific has been a subject of discussion by government representatives, civil society organisations, lawyers, judges and academics on several occasions over the past three decades. In 2004 the leaders of the PIF adopted a vision for the Pacific region. Within this vision, commonly referred to as the "Auckland Declaration", the promotion and protection of human rights<sup>4</sup> is explicitly stated. The subsequent Pacific Plan<sup>5</sup> outlined strategic objectives to assist in realising of the Pacific leaders' vision. Specifically, the Pacific Plan emphasised individual state ratification of international human rights treaties and protocols and the development of national human rights institutions. The Pacific Plan, in

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4 The term "human rights" is used in this paper to incorporate both the rights and duties of people accorded to them because they are human beings. Tom Head "Introduction" in Tom Head (ed) *What is the State of Human Rights?* (Thomson Gale, New York, 2005) 9-10.

5 PIF *The Auckland Declaration* (PIF Secretariat, Suva, 2004) [www.forumsec.org.fj/](http://www.forumsec.org.fj/) (accessed 15 May 2007); PIF *The Pacific Plan: For Strengthening Regional Co-operation and Integration* (PIF Secretariat, Suva, 2005) [www.forumsec.org.fj/](http://www.forumsec.org.fj/) (accessed 15 May 2008).

section 12.1, suggests the establishment of a regional ombudsman and other human rights mechanisms, although how this latter part is defined is unclear.

In November 2006 the PIF Secretariat indicated that the establishment of a regional ombudsman and human rights mechanism required further analysis. While the regional ombudsman initiative had been advanced by the time of the 2007 Pacific Plan Progress Report, the proposed human rights mechanism had not, and nor was it mentioned in the Report as a separate mechanism. It is not clear from PIF communiqués why this occurred. Due mainly to the strategic objectives of the Pacific Plan, the establishment of regional institutions by the PIF has gained momentum in the past three years. These new regional initiatives have included, amongst others, a regional ombudsman, a regional audit office and a regional policing initiative. Why, then, has a regional human rights mechanism not gained such attention or commitment?

The promotion and protection of human rights throughout the Pacific region is mainly occurring through a range of non-government organisations that are often issue-specific, for example, focusing on women's rights, children's rights, or the rights of people with HIV/AIDS. The Regional Rights Resource Team (RRRT) based in Fiji, is the most prominent and active human rights-focussed regional organisation in the Pacific, aiming to educate and train people in human rights issues. The United Nations Development Programme Pacific Centre (UNDP-PC) is also active in supporting specific initiatives using a rights-based approach to programming in the areas of, for example, parliamentary strengthening, civic education and HIV/AIDS. In December 2007, RRRT and the UNDP-PC organised a consultation for Pacific judges and magistrates. At the consultation Imrana Jalal, a human rights advisor with RRRT and lawyer Ratu Joni Madraiwiwi, former Fiji Human Rights Commissioners, presented the idea of a regional human rights mechanism for the Pacific. The judicial officers at the consultation showed considerable interest and support for the concept of a regional human rights commission.

Law associations and members of the judiciary have actively encouraged greater understanding and discussion of Pacific views on human rights. This is evident, for example, in the New Zealand Law Commission Report<sup>6</sup> on customary rights in the Pacific and the strong Pacific links in the international civil law network. Several academics have also sought to advance a deeper understanding of human rights in the Pacific.<sup>7</sup>

#### ***IV CHALLENGES***

There are significant challenges associated with advancing the concept of a regional human rights mechanism. In 2005 the Prime Minister of Samoa and Chair of the PIF 2004-2005, Prime

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<sup>6</sup> New Zealand Law Commission, above n 2.

<sup>7</sup> For example, research undertaken by the Pacific Institute of Advanced Studies in Development and Governance, University of the South Pacific and the State, Society and Governance in Melanesia Project, Australian National University.

Minister Tuilaepa Saliele Aiono Malielegaoi raised several critical issues facing the Pacific region as it embarked on the development and implementation of the Pacific Plan. A number of these concerns are pertinent in this discussion of the challenges associated with the possible establishment of a Pacific human rights mechanism. In particular, Prime Minister Tuilaepa emphasised the value of determining whether there is a need for specific regional institutions and the importance of ensuring that they would offer real, practical benefits to local communities. He questioned the role and intention of New Zealand and Australia as larger, wealthier states vis-à-vis the smaller island states in the Pacific region and encouraged the exploration of the concept of shared sovereignty, considering how this might be beneficial for both individual states as well as for the region.

These issues correlate with several of the key challenges currently facing Pacific leaders and other stakeholders as they deliberate the development of a regional human rights mechanism in the Pacific. While there are multiple issues associated with the idea of a regional human rights mechanism, five challenges will be discussed here. These challenges include deciding what conceptualisations and definitions of human rights could underpin a possible institution; determining whether a regional human rights mechanism is necessary or a priority for Pacific states; addressing the perception that the mechanism is New Zealand-led or Australia-led; recognising issues of state sovereignty; and defining the region that would fall under the jurisdiction of the human rights mechanism.

#### *A Conceptualisations and Definitions of Human Rights*

Human rights are often defined according to the international standards of the United Nations, and the associated conventions and protocols. There is, however, debate as to whether human rights should be defined in a way that more closely reflects specific cultures and values. One participant raised this concern in relation to the idea of the development of a regional human rights mechanism:<sup>8</sup>

Different countries have different cultures and different attitudes towards the place of human rights and the relationship between human rights and customary law and state law, and so, for some people at least, there would be the concern that a regional body would almost be a homogenisation, this idea that there wouldn't be space for specific cultures to breathe.

The geographical and ethnic differences of PIF member states are considerable and there are myriad attitudes towards definitions of human rights and the relationship between human rights, customary or traditional law and state law. As another Pacific academic explained:<sup>9</sup>

The Pacific is a diverse area of the world. It's diverse in culture, it's diverse in ethnicity, it's diverse in terms of geography, it's diverse in terms of attitudes and it's also diverse in terms of modernisation

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8 Interview with A, anonymous (the author, 6 December 2007).

9 Interview with B, anonymous (the author, 6 December 2007).

because colonialism has created different things for different parts of the Pacific. So even though there is a uniform label, "The Pacific", within that label there are many diversities.

The concern associated with this diversity is that there is not a harmonious view on what human rights are or how they can best be protected across Pacific cultural or ethnic groupings. Indeed, in many Pacific countries the majority of citizens have little knowledge of what the term "rights" means and therefore the concept of having human rights or knowing what these might be is "interminably foreign".<sup>10</sup> Merelyn Tahī, co-ordinator of the Vanuatu Women's Centre, commented, "you know the big question would be what is a right anyway? And I think that's the basic thing that we have to answer".<sup>11</sup>

There is a perception in some sectors of the Pacific (and other parts of the developing world) that "human rights" is a Euro-Western construct and has little relevance to the cultures of non-Western peoples.<sup>12</sup> In particular, the Western approach to human rights may be seen to emphasise individual rights and duties over collective rights and the rights of an individual as they are in relationship with other people and society.<sup>13</sup> From this perspective, a regional human rights mechanism may be seen to be driven by Western values and thus not be as effective or relevant for Pacific states, other than New Zealand and Australia. In contrast, supporters of universal rights might see that international human rights standards are relevant to all peoples, regardless of the ethnicity, culture, age and so on.

Some Pacific scholars have argued for increased engagement in the debates around traditional culture, custom, and human rights.<sup>14</sup> There has been some support for the development of a Pacific charter of human rights that could embody individual and collective rights and duties.<sup>15</sup> This

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<sup>10</sup> Ibid.

<sup>11</sup> M Tahī "Time to Talk" (2002) Radio Australia Programme Series [www.abc.net.au/](http://www.abc.net.au/) (accessed 25 February 2008) 1.

<sup>12</sup> Interview with C, anonymous (the author, 30 November 2007); E Huffer "Baseline survey on the status of Pacific Island countries' ratification of main human rights instruments and their possible reservations, traditional governance practices that could support human rights, and the work of other agencies and organization in promoting human rights in the Pacific" (paper presented to UNDP GOLD, Suva, 2003).

<sup>13</sup> Huffer, above n 12.

<sup>14</sup> See for example, Gina Houg Lee "Embracing a Culture of Human Rights in the Pacific" 235-236; Huffer, above n 12; Ratu Joni Madraiwiwi "Navigating Passage Between Human Rights and Culture in Fijian Waters" 50-52 in Michael Powles *Pacific Futures* (Pandanus Books, Canberra, 2006); New Zealand Law Commission, above n 2.

<sup>15</sup> For instance, LAWASIA drafted a Pacific Charter of Human Rights in the 1980s [the Draft Charter]. This was largely based on the African Charter on Human Rights and People's Rights, discussed below. Pacific leaders did not support the Draft Charter at the time. See for a discussion on the Draft Charter I Jalal in this volume.

approach could jointly acknowledge the diversity of Pacific cultural and ethnic groupings and harness the connections and commonality between them. Further dialogue on the meanings of these aspects of rights may assist in ensuring that individuals are aware of the essence of human rights<sup>16</sup> and are also able to meaningfully participate in political agenda-setting and aspects of decision-making in their own communities, nations and the wider region.<sup>17</sup> A set of "Pacific" human rights that has been agreed upon by Pacific communities and leaders may achieve greater ownership by Pacific peoples across the region. A charter that incorporates "Pacific values" could potentially more effectively inform the work of a regional human rights commission, for instance, than a charter composed of rights that are seen as being imposed by the international community or are perceived to be based on Western values.

The African Charter on Human Rights and People's Rights ("the Charter"),<sup>18</sup> adopted in 1981, attempted to reflect what were considered the essential values of African society, specifically the concept of community duties and the importance of family and traditional values. While the Charter espouses "African values" there are many difficulties in fully implementing both the rights and the duties. This is especially so in the African states that have not amended their domestic legislation in accordance with the standards in the Charter.<sup>19</sup> This example illustrates another issue that would arise if a regional human rights mechanism were to be established in the Pacific: that is, how it would be upheld or integrated into the domestic legislature.

One participant had concerns about this approach and preferred to base any development of a regional human rights mechanism on the universal standards of the United Nations. The participant warned:<sup>20</sup>

Using a regional mechanism to realise those standards [set by the UN] I think there can be a danger sometimes, with regional instruments that the global commitments that most or all countries have made can be slightly diluted.

One of the main challenges, then, facing the Pacific leaders if they choose to pursue a regional human rights initiative is to find an acceptable position in the debate on collective and individual human rights and the position of the universal standards for human rights. Culture, customs and

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16 Madraiwiwi states the essence of human rights is "to accord everyone dignity and allow individuals to participate in decisions about their lives." Madraiwiwi, above n 14, 52.

17 New Zealand Law Commission, above n 2.

18 African Charter on Human Rights and People's Rights (27 June 1981) OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

19 Jacques Fremont "Legal Pluralism, Customary Law and Human Rights in Francophone African Countries" in this volume.

20 Interview with D, anonymous (the author, 29 January 2008).

views on human rights are not static and reflect societal realities at particular points in time.<sup>21</sup> In this respect, reviewing and conceptualising human rights as they pertain to the Pacific is an appropriate, necessary and ongoing process. Greater discussion at the community as well as the inter-governmental level is critical if Pacific peoples are to reach any consensus on a concept of human rights that could underpin a regional human rights institution.<sup>22</sup>

***B Is a Regional Human Rights Mechanism Necessary?***

Several Pacific commentators on human rights have raised the important issue as to whether a Pacific human rights mechanism is necessary and a priority for individual states and the wider region.<sup>23</sup> The question of whether a Pacific human rights mechanism is necessary has been debated from a range of perspectives. One view is that a regional mechanism would not add any additional value to the existing arrangements within individual states as well as the wider region. These current human rights initiatives include, for example, constitutional arrangements, national human rights institutions in New Zealand, Australia and Fiji, regional training and education programmes such as those conducted by the RRRT, and the ongoing work of other civil society and legal organisations. One participant commented:<sup>24</sup>

The argument also for them [Pacific states] is because they are all have the Constitution with a bill of rights why do we need anything in addition, why should we spend any resources on something which we actually have already.

Another view queries whether a regional human rights mechanism would enhance the daily lives of Pacific citizens given its regional mandate. This perspective may support the argument for national human rights institutions and the work of grassroots non-government organisations which are sometimes considered to be more accessible and relevant to local peoples. However, national human rights institutions may be too resource intensive for some smaller Pacific states and therefore a regional mechanism may in fact be more practicable. Civil society organisations focusing on human rights issues may also be resource limited or may not currently exist in some of the smaller states. A related issue is whether and how Pacific peoples are able to influence or voice their views on regional policy developments. If a regional human rights mechanism was to be established how could it be informed by, accessible and relevant to the diverse local communities and peoples throughout the Pacific area?

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21 Madraiwiwi, above n 14.

22 Huffer, above n 12, also argues for greater dialogue at the local community level on the conceptualisation and expectations of human rights.

23 New Zealand Law Commission, above n 2; Interview with A, above n 8; Interview with B, above n 9; Interview with C, above n 12.

24 Interview with C, above n 12.



If some form of regional human rights mechanism was deemed to be necessary then ascertaining the type of instrument most appropriate would also be required. There are a number of possible policy instruments that could be considered, including a human rights desk or officer at the PIF, a Pacific charter, a human rights commission or court. Drawing on the experiences and work of other regional institutions in other parts of the world would assist in illuminating what might also be effective for the Pacific region. There are a range of perspectives on what type of mechanism, if any, would be most suitable for promoting and protecting human rights at the regional level and greater discussion as to the advantages and disadvantages of each is required before further decision-making is possible.

To date there is little evidence to show that the development of a regional human rights mechanism is a priority for Pacific leaders. The research respondents also raised this as a critical issue:<sup>25</sup>

There are so many other really big issues that a regional human rights mechanism, whilst it might be an interesting idea, is it really a priority, and probably not in many people's minds.

Another respondent stated:<sup>26</sup>

In terms of the way governments in the Pacific behave and how governments in the Pacific have their priorities, if their priorities are to do with human rights, you will probably see it...usually the first priority is staying in power, and then probably, the second priority is probably economic considerations ...and so it does get in the way of other big issues, and good issues, like human rights.

While Pacific leaders have committed themselves to promoting and protecting human rights in the region, the human rights objectives that have been implemented thus far have focussed on domestic policy such as national human rights institutions and the ratification of international human rights treaties and conventions by individual countries. Within individual Pacific states a range of issues are prioritised on a regular basis by governments. On the whole, human rights do not sit on or even near the top of the political agenda, perhaps because it is a contested issue and perhaps because other needs such as education, health, welfare and economic development are considered more vital for the immediate and on-going life of the nation, local communities and individual citizens. By placing the issue of a regional human rights mechanism on the agenda of the PIF it may be that individual states will become more agreeable to making such a mechanism a priority. This may, however, depend on the costs and opportunities associated with such a development.

Widespread support is needed for the establishment of a regional human rights mechanism, not just from the PIF and individual governments but also from the civil society sector. Civil

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25 Interview with A, above n 8.

26 Interview with B, above n 9.

organisations have an important role in contributing to the dissemination of information about regional institutions and monitoring their accessibility, accountability and effectiveness. Civil organisations working in the human rights domain also have significant knowledge about the issues and abuses that may be occurring in countries throughout the region and can actively support individuals, communities and other bodies in having these addressed at the regional level.

Establishing the need for and feasibility of a regional human rights mechanism is imperative. If a mechanism is established without a mandate from key stakeholders in individual Pacific states, relevant civil organisations and Pacific citizens then it is unlikely to be successful and may reinforce the view that widespread regional co-operation in the Pacific is unrealistic, unnecessary and unattainable.<sup>27</sup> As a regional mechanism is only one of several possible approaches to ensuring the promotion and protection of human rights in the Pacific it is crucial to have widespread support across both the state (formal) and non-state (informal) sectors to pursue such an initiative.

***C The Perception that a Regional Human Rights Mechanism is led by New Zealand and Australia***

Concerns over the dominance, or perceived dominance, of New Zealand and Australia in Pacific affairs have been raised with respect to a range of regional policy issues.<sup>28</sup> There are differing views as to whether New Zealand and Australia are promoting a regional agenda to suit their own purposes or are concerned at a broader level about the development of individual states and the wider region. One view is that Australia and New Zealand will encourage the development of a regional human rights mechanism as it will contribute to them remaining as powerful players in the region.<sup>29</sup> As the standard effect of supranational institutions is to dilute the influence of nation states this argument may bear little weight.

It could also be argued that as New Zealand and Australia already have established national human rights institutions they will be less inclined to support a regional mechanism that may be resource-intensive and perhaps duplicate the work of the existing national commissions. If a regional human rights mechanism was to be established under the PIF, then New Zealand and Australia, as members, would be obliged to meet the duties and responsibilities as prescribed by the human rights institution and thus some concerns about their potential influence or power may be allayed.<sup>30</sup>

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<sup>27</sup> Interview with E, anonymous (the author, 9 December 2007).

<sup>28</sup> Dr Shaista Shameem "Fiji Human Rights Head Queries New Zealand and Australia Stance" (2007) *Radio New Zealand International* [www.rnzi.com/](http://www.rnzi.com/) (accessed 13 December 2007).

<sup>29</sup> Interview with E, above n 27.

<sup>30</sup> Interview with D, above n 20.

New Zealand is sometimes considered to be more philosophically and politically aligned with Pacific views while Australia has often been viewed as wanting to control but not be obligated by Pacific policy.<sup>31</sup> Australia's political allegiances have recently been seen to be allied more to the United States rather than the Pacific region although this may change under the new administration. While in opposition the Australian Labour Party undertook substantial research on Pacific institutions that might potentially be part of a broader Pacific regional order.<sup>32</sup> The ideas of a Pacific government, legal system or greater regional integration are contentious, however the concept of Australia meeting its obligations and commitments under this proposed regional system was supported in a Labour Party policy document.<sup>33</sup>

Another view was that since the PIF Secretary General was an Australian citizen then as long as Australia supports the idea of a regional human rights mechanism it will be developed.<sup>34</sup> While New Zealand and Australia may dispute the contention that they are imposing their views of regional development on the other Pacific states there is a perception in some sectors of the Pacific that this is the case. If a regional mechanism is to be developed support will have to be gained from states other than the two metropolitan countries.

#### **D Issues of State Sovereignty**

Independence from colonial rule for smaller Pacific states is relatively recent, only occurring from the 1960s. These states have since focussed largely on the needs of their own people and on cementing a sense of nationhood. Within one specific Pacific country there may be several distinct cultural or ethnic groups. Uniting these groupings is a significant challenge in some Pacific countries and considerably more so under a sub-regional or regional umbrella.<sup>35</sup> Although cultural ties are strong for many Pacific peoples, allegiance with their political nation is also important. One attitude within the smaller Pacific states is that maintaining a high level of state sovereignty is more important than regional co-operation or integration given the recent consolidation of nationhood. As one research respondent commented, "it is more this Pacific sentiment, it is almost a sovereignty issue, leave us to sort out our own things, leave us to set our own agendas, leave us to set our own priorities".<sup>36</sup>

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31 Greg Fry "Whose Oceania? Contending Visions of Community in Pacific Region-Building" in M Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 204-215.

32 See Peebles, above n 3; B Sercombe *Towards a Pacific Community* (Australian Labour Party Policy Discussion Paper, Melbourne, 2005); B Sercombe and D Peebles "Towards a Pacific Community" (2005) 20(3) *Pacific Economic Bulletin* 130.

33 Sercombe, above n 32.

34 Interview with E, above n 27.

35 Ron Crocombe *The South Pacific* (University of the South Pacific, Suva, 2001).

36 Interview with A, above n 8.

While there may be concern from some Pacific states that a regional human rights mechanism might threaten their sovereignty, this is likely to be underpinned by another issue: the low priority given to human rights issues. Indeed, there seem to be opposing views as to whether the establishment of regional institutions in the Pacific threatens the sovereignty of individual states. There is a tension between those politicians and other policy actors who wish to maintain absolute state sovereignty and the more contemporary view that collective action in the region may enhance and strengthen the position and role of the nation-state.<sup>37</sup> The PIF has sought to balance the increasing emphasis on regional co-operation with a continued commitment to and acknowledgement of individual state sovereignty. As regional institutions have developed largely from the PIF structure it could be argued that as all member states of the PIF contribute to the regional policy-making process, sovereignty is maintained within these regional processes.

While the issue of state sovereignty is relevant for the Pacific, regional and international initiatives have been sustained for some time. Most Pacific states have political, social and economic relationships with a range of supranational institutions, for example, the United Nations, the World Trade Organisation and the European Union. International agreements such as ratified human rights covenants influence executive and legislative decision-making. Regional agreements, especially between members of the PIF, are numerous and operate across a range of policy domains including nuclear testing, climate change, security and fisheries. These agreements also influence and limit state decision-making.

The phenomena of regionalisation and globalisation have also made the concept of state sovereignty more complex. For example, when an individual state signs a treaty, convention, or joins an international organisation they are relinquishing part of their sovereignty to that regional or international grouping.<sup>38</sup> Many regional examples of this are evident in the Pacific, with the Pacific Plan, the Biketawa Declaration,<sup>39</sup> and the Forum Economic Ministers Meetings being just three of an extensive number of agreements and institutions that currently exist. Conversely, it could also be argued that individual nation states do maintain sovereignty in these regional or international agreements as the primary decision-making process is through the national legislature. In addition, the expansion of regional institutions could be seen not as eroding state sovereignty but rather supporting its capacity to fulfil a range of functions, responsibilities and obligations.<sup>40</sup>

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37 Transform Aqorau "Rethinking Sovereignty in the Pacific" in *Pacific Futures*, above n 14, 216-224.

38 Hon Tuilaepa Suilele Aiono Malielegaoi, Prime Minister of Samoa "Foreword" *Pacific Futures*, above n 14, vii-ix.

39 Biketawa Declaration (28 October 2000) Attachment 1 to Thirty-First PIF *Forum Communiqué* [www.forumsec.org.fj/](http://www.forumsec.org.fj/) (accessed 1 June 2008).

40 Pierre de Senarclens "The Politics of Human Rights" in Jean-Marc Coicaud, Michael W Doyle and Anne-Marie Gardner (eds) *The Globalization of Human Rights* (United Nations University Press, Tokyo, 2003) 137-159.

The adoption of UN and other multilateral treaties, especially in the human rights and economic policy domains, curtail the sovereign powers of individual states through the obligations and responsibilities on which agreement is reached. All Pacific states have ratified international human rights treaties and conventions, although the level of application and integration of these into domestic law is variable. Pacific states, through the PIF, have also supported the establishment of a range of regional institutions and thus it could be argued that while the issue of state sovereignty is important, a human rights mechanism would not take away from this sovereignty any more or less than other existing regional institutions. Reluctance by Pacific leaders to support a regional human rights mechanism might reflect a low priority for promoting and protecting human rights rather than a concern for any loss of state sovereignty.

### *E Defining the Pacific Region*

The UN call throughout the 1990s and into the 2000s for a regional human rights institution within the Asia-Pacific region has not gained significant favour. This is in part due to the vastness of this region which encompasses 41 countries including states as diverse as Iran, Afghanistan, China, India, Australia, and Fiji. There has been an increasing amount of unease about the utility and practicality of having one large region given the considerable cultural, political and religious differences between these parts of the world. The suggestion of separate sub-regional groupings of Asia and the Pacific is more appropriate and workable.<sup>41</sup> A range of groupings have been proposed in other fora and the current PIF arrangement is recommended here as a starting point for advancing a Pacific human rights mechanism.

The PIF has a longstanding history of working in the Pacific and has successfully developed and implemented a range of regional initiatives. The creation of the Pacific Plan, as a regional blueprint, has also opened the way for the future establishment of other regional bodies, such as one focussed on human rights. In the first instance then, the PIF is likely to be the most appropriate place for further deliberation and decision-making about the possibility of a regional human rights mechanism. That said, the PIF is only one of several possible regional groupings of Pacific states and, while the Forum may be in the best position to establish another regional institution, there should also be allowance for the consideration of other Pacific states being able to come under the jurisdiction of a Pacific human rights mechanism.

A related issue is that of executive authority over the regional mechanism. If the mechanism was formed under the PIF structure, decision making would be based on the current inter-governmental model whereby all member states have the ability to influence the shape and execution of a regional institution. The PIF would also need to address issues of the independence and neutrality of a human rights mechanism. The sensitive, contentious and political nature of human rights means that agreement between the Pacific leaders on the independence and mandate of a regional human rights

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41 Hashimoto, above n 2; Peebles, above n 3.

mechanism may be difficult to achieve. In addition, resolutions as to whether a charter or decisions from a human rights commission or court are binding or non-binding will impact on the effectiveness, or otherwise, of the institution. Decisions as to whether staff would need to be representative of the region or are employed on a rotational basis and whether they can proceed without undue political interference also need consideration.

## V *REQUIREMENTS*

Although the challenges outlined are complex they are not insurmountable and depending on the political will of Pacific leaders and other key stakeholders, they could be addressed effectively. What then is required if a regional human rights mechanism in the Pacific is to be established? Depending on one's perspective, priority may be placed on one or more of the numerous legal, social, cultural and political issues that need to be considered. The pivotal requirements include clarifying definitions of human rights, gaining widespread support for the initiative, adequately resourcing the mechanism and designing a mechanism that reflects the Pacific definitions and conception of human rights.

### A *Pacific Definitions of Human Rights*

Fundamental human rights as expressed in the international human rights covenants are incorporated into most Pacific constitutions. Human rights instruments are now used widely in court decisions across the Pacific even though the rate of ratification of international covenants remains low.<sup>42</sup> These rights, however, are not always perceived as sitting comfortably alongside customary values or traditional practice. This can create conflict or uncertainty for chiefs, governments, non-governmental organisations and local citizens. As mentioned, in some Pacific countries the concept of human rights is little discussed. The human rights constructs as outlined in UN covenants are also not widely known or understood at either the governmental or grassroots levels in many Pacific states.<sup>43</sup>

There is a particular tension in the Pacific between collective and individual rights and responsibilities. This tension needs to be addressed at all levels of society so that greater understanding of what the phrases mean, both theoretically and in practical terms, can be achieved.<sup>44</sup> A better understanding of the universal standards of human rights is also critical. Debates on custom and human rights have been underway in the Pacific for a number of years but whether these deliberations have been observed or raised at a local grassroots level is

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42 Huffer, above n 12.

43 Interview with B, above n 9.

44 Huffer, above n 12.

questionable.<sup>45</sup> It is important that local communities are given the opportunity to contribute to both the definitive work on human rights as well as any development of human rights institutions.

For these reasons, Elise Huffer, a Pacific academic and newly appointed Human Development Adviser for the Secretariat of the Pacific Community, has suggested that *tanaloa*<sup>46</sup> sessions should be held throughout the region to discuss human rights conceptualisations in the Pacific. These fora should involve a wide cross-section of groups and individuals including government officials and politicians, civil society representatives, church groups and interested citizens. The gatherings would require careful coordination and facilitation to ensure that each Pacific state is able to participate and that more powerful or influential members of each society do not dominate or dictate the outcomes from the meetings. The process could be initiated from the PIF Secretariat given their existing relationship with the member states but individual *tanaloa* sessions should be organised and run by local people. The PIF Secretariat could assist in collating the comments or any outcomes and disseminating these to the individual states. Further dialogue on the Pacific conceptualisations and definitions of human rights could then occur within Forum meetings.

The *tanaloa* sessions might also assist in raising the "literacy" of human rights in the Pacific. There has been little effort within Pacific governments, particularly in the smaller island countries, to develop and impart knowledge about international human rights.<sup>47</sup> Access to information about human rights has been limited in some countries and there has been a general perception in many states that the international conventions are not especially relevant or helpful.<sup>48</sup> In addition, conveying information on human rights across a diverse range of cultural and political groupings, with many Pacific peoples also being geographically isolated, is challenging. As one respondent commented:<sup>49</sup>

In order to deliver information about rights there has to be a medium of communication and I think the bulk of people in the Pacific still communicate verbally, and so to communicate something technical like rights and the idea about human rights really requires 120% effort in trying to, first of all take the idea in the Western concept, put it into language and a medium that can be understood and then hopefully getting it across.

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45 See for example, Madraiwiwi, above n 14; New Zealand Law Commission, above n 2.

46 Huffer, above n 12, 41 describes *Tanaloa* as "an Austronesian term which refers to an informal discussion...It is a dialogue through which the space between people is mutually explored and understood so that a meeting point between divergent views can be found."

47 Huffer, above n 12.

48 Huffer, above n 12; Interview with F, anonymous (the author, 7 December 2007).

49 Interview with B, above n 9.

Developing a greater understanding of human rights and the relevance of these to Pacific peoples is important in any future process of developing a regional human rights mechanism. It is not clear whether all Pacific states would be willing to engage in this process. Nevertheless, if a regional human rights charter, a commission, or a court, for example, is to be advanced and is to be effective, it is essential there is an increased understanding of what human rights are. For this to eventuate, extensive discussion and debate must necessarily occur across all sectors of Pacific society.

### ***B Widespread Support***

There is a degree of scepticism that exists in some sectors of the Pacific as to the intentions of New Zealand and Australia's involvement in regional affairs. There is also some doubt as to whether the smaller Pacific states are especially interested in the development of regional institutions. As one Pacific academic remarked, "why should the Pacific have a human rights mechanism? Whose assumption is this? If it is the Pacific Islands' idea then great, go ahead."<sup>50</sup> There is an understandable need for a majority of Pacific states to be in support of the development of a regional human rights mechanism if it is to have any chance of success. Gathering support from some of the more prominent political leaders in the Forum, for example, Vanuatu, Solomon Islands, Samoa, Fiji, and Papua New Guinea may assist in the initiative gaining momentum.<sup>51</sup> It has been suggested that a politically stable country such as Samoa may be a suitable candidate for showing support for an initiative and for being in a position to rally support from other PIF member states.<sup>52</sup>

As previously mentioned, establishing whether there is a need for a Pacific human rights mechanism is critical. Pacific states and civil society will not waste time and resources on supporting an initiative that is deemed unnecessary. A feasibility study would illuminate the views of a range of stakeholders, including local communities and individual citizens, relevant civil society organisations, members of the legal profession as well as government officials and political leaders from the member states of the PIF.<sup>53</sup> A cost-benefit analysis, an evaluation of existing human mechanisms in individual Pacific states, and comparative research examining other regional human rights mechanisms, would also provide valuable information to assist the decision-making process.

Following the example of other regional human rights institutions throughout the world, the development of a Pacific mechanism could be completed in stages. Estimating the financial and human resource costs for individual PIF states might also enable Pacific leaders to better determine

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50 Interview with E, above n 27.

51 Interview with B, above n 9.

52 Ibid.

53 Ibid.



their country's ability to contribute to a human rights mechanism. While resourcing is of importance, the foremost issue is to gain a broad consensus across Pacific states for advancing a regional human rights mechanism.

### *C Resourcing a Human Rights Mechanism*

Significant human and financial costs are inevitably associated with both the establishment and the on-going work of a regional human rights mechanism. Securing adequate resources is essential if a regional human rights mechanism is to be effective. In the words of one research respondent:<sup>54</sup>

Simply, it takes a lot of resources to try and get something like this established so, and that's as well as money, it's human resources, and we haven't had the human resources to put into something like this.

Resourcing has been seen to be one of the main reasons why the draft Pacific Charter proposed by the Law Association of Asia and the Pacific (LAWASIA) in the 1980s was not advanced. As one participant commented, "there was not enough financial power to implement it, there weren't enough legally trained people, there were no courts."<sup>55</sup> Human resources not only cost financially but may also be restricted given the limited number of Pacific people who may be suitably qualified to work in the human rights domain. While Australia and New Zealand might have a greater number of potential applicants at the current time for any positions within a regional human rights institution it is highly questionable as to whether this is satisfactory.

The reporting requirements of international human rights treaty bodies within the United Nations are also expensive and time-consuming and several Pacific states have been reluctant to ratify some international human rights treaties for these reasons.<sup>56</sup> As the reporting and monitoring of these international treaties are likely to be functions of a regional human rights mechanism the costs for this would need to be borne by the individual states under the jurisdiction of the mechanism.

If the development of a regional human rights mechanism was led by the PIF all member states would be expected to contribute towards its expenses. It is possible though that New Zealand and Australia as the wealthier states of the Pacific would fund the majority of the costs. In this scenario, concerns as to the perceived control over the mechanism by the two more affluent countries may be heightened. This could, however, be counteracted through the instigation of rotational procedural measures such as the governing, staffing and decision-making processes for the mechanism.

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54 Interview with A, above n 8.

55 Interview with C, above n 12. Another view is that the LAWASIA draft Pacific Charter was not inclusive of Pacific values: Huffer, above n 12.

56 Elise Huffer "The Pacific Plan: A Political and Cultural Critique" in Jenny Bryant-Tokalau and Ian Frazer (eds) *Redefining the Pacific? Regionalism Past, Present and Future* (Ashgate Publishing Ltd, Aldershot, 2006) 157-174.

Adequate communication across Pacific states is also necessary if the concept of a regional human rights mechanism is to be widely debated. Enabling this communication is resource-intensive with travel around the Pacific being expensive and time-consuming. Another respondent supported face-to-face communication and commented:<sup>57</sup>

You can do lots by email now, also websites, but I still think there is a huge value actually meeting person to person, sitting around a table, thrashing ideas out, but that is of course harder if you are so far apart, travel is such a big issue.

Advancing the notion of a regional human rights mechanism as well as any future implementation of such a mechanism is resource-intensive and this may influence whether Pacific leaders see it as being of priority. Even if leaders committed to developing a regional human rights mechanism the issue of resourcing may greatly affect its final shape and the extent of its mandate.

#### ***D Designing a Regional Human Rights Mechanism***

To advance the concept of a regional human rights mechanism it will be critical for both political and civil society actors to not only support its development but also be involved in the processes that determine the institutional arrangements. Political leaders of the region must commit their governments to making a regional mechanism one of their priorities and agree to contribute adequate resourcing. Endorsement from the existing national human rights institutions will be important as these organisations have significant knowledge of the countries in which they are situated as well as the requirements for implementing and monitoring the international human rights covenants. National human rights commissioners are also likely to have considerable knowledge and expertise to offer during the development phase of a Pacific charter, commission, court or other policy instrument. Many of these commissioners have been involved in research regarding the issue of culture, custom and human rights in the Pacific. Their independent voices could greatly contribute to the development of any future regional mechanism.

Relevant non-governmental and legal organisations would offer a vital perspective on what may be beneficial for individual Pacific states as well as the wider region. Their connection with Pacific peoples at the grassroots level may assist with an analysis of the feasibility of a regional mechanism and provide critical knowledge of human rights in local communities. Many non-governmental organisations throughout the Pacific region are currently involved in the promotion and protection of human rights and it will be important to ensure a regional human rights mechanism does not unduly duplicate activities.

Establishing a human rights desk or officer in the PIF Secretariat might be appropriate as a first step in the process of ascertaining the need for and priority of a regional human rights mechanism. The mandate for this position could include coordinating the development of a Pacific

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<sup>57</sup> Interview with E, above n 27.

conceptualisation or definitions of human rights, as described above, and undertaking a feasibility study into whether a regional mechanism is viewed as necessary or a priority for Pacific leaders, civil society organisations and other key stakeholders. Work on drafting a Pacific charter encompassing the rights and duties that reflect the diversity of Pacific cultures and ethnic groups could also be undertaken.

Promotional and educational work could be part of the desk role although there would be a need to co-ordinate this with other organisations working in the human rights domain to limit duplication. If requested, advice and support could be provided to states in regard to their international and regional obligations. Again, it would be necessary to ensure this does not duplicate the services of other organisations, such as the Commonwealth Secretariat and the United Nations Development Programme. A desk or officer position at the PIF may be viewed as a satisfactory mechanism for states that already have national human rights institutions and active civil society organisations working on protecting and promoting human rights. The scope of the position, however, may seem somewhat inadequate to smaller Pacific states that do not have other supporting institutions.

A regional human rights commission based on a Pacific human rights treaty might be a second part of the institutional process. The advantages of a commission might include adding value to the region by having an educational, promotional and monitoring role.<sup>58</sup> A commission might also facilitate a stronger voice for the Pacific in the relevant UN committees.<sup>59</sup> A regional human rights court might be the final institutional arrangement in the development of a regional human rights mechanism. A regional court could either solely address human rights cases or have a broader jurisdiction.<sup>60</sup> The idea of a regional court might have less appeal to individual states that already have robust court systems in place. Every Pacific country currently has its own system of courts that can address human rights issues raised by individuals and groups. If it is accepted that, these courts are largely successful in their work then the question must be asked what benefit would a regional human rights court add to individual states?<sup>61</sup> Another respondent cautioned against establishing a regional human rights court "that needs resources and it needs money and I think that's a long way away now unless you want to stack it with New Zealand and Australia judges".<sup>62</sup>

While these formal institutional arrangements imitate regional human rights mechanisms in other parts of the world, additional policy instruments appropriate for the Pacific context may emerge during consultation processes. The order of implementation is also flexible as it may be

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58 See Peebles, above n 3, 205-210 for a discussion on these roles.

59 Interview with D, above n 20.

60 Peebles, above n 3, suggests a regional court with four chambers addressing human rights, environmental, common market and constitutional issues.

61 Interview with A, above n 8.

62 Interview with C, above n 12.

considered more appropriate to first establish a regional human rights commission and then judge the need for and feasibility of a charter or a court.

## **VI CONCLUSION**

The concept of a regional human rights mechanism in the Pacific has been debated in a range of fora since the 1970s. Despite these discussions there has been little advancement toward such a mechanism. While there are many challenges that need to be effectively addressed before significant progress can occur, some Pacific commentators argue that it is the right time for increasing the debate across a broad spectrum of stakeholders throughout the Pacific region. A co-ordinated approach to these deliberations is required if the momentum for discussing the possible development of a Pacific human rights mechanism is to be sustained.

The PIF leaders have clearly placed on their agenda a regionalist approach that is contributing to an exploration of the possible levels of co-operation or integration between individual Pacific states. This has been especially evident since the creation of the Auckland Declaration and the Pacific Plan. Prime Minister Tuilaepa, the Prime Minister of Samoa and Chair of the PIF from 2004-2005 at the beginning of the consultation process for the Pacific Plan, raised an important question which lies at the heart of the discussions on regionalisation and is pertinent to this particular deliberation on a regional mechanism for human rights. He asks, "are there new issues and arrangements now facing the Pacific that would be best dealt with through binding regional decision-making?"<sup>63</sup> This remains the fundamental question for Pacific leaders and other stakeholders as they consider whether the establishment of a formal human rights mechanism in the Pacific is one of the best ways to promote and protect the human rights of all peoples in the region. If this question is answered in the affirmative then clarity on what human rights means to Pacific peoples, widespread support and adequate resourcing and agreement on the appropriate policy instruments are necessary prerequisites for the successful establishment and implementation of a regional human rights mechanism in the Pacific.

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<sup>63</sup> Tuilaepa, above n 38, ix.