

# **Will the Universal Periodic Review make a Difference in the Pacific?**

## **Conference: Celebrating 60 years of the Universal Declaration of Human Rights**

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### **Introduction**

As we celebrate the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights (UDHR), there is indeed much to celebrate. Others have already spoken about several of the UDHR's significant achievements. As we celebrate what has been achieved, it is also timely to consider what might be yet to come. What might the Universal Declaration inspire in the future? This is in part the aim of this paper. The uptake of human rights in the Pacific region has been slower than in other parts of the world. The human rights discourse has not perhaps had the same degree of influence or impact as it has elsewhere. The Pacific region<sup>2</sup> has the lowest regional rate of ratification of international human rights treaties. There is minimal engagement with the United Nations international human rights framework, although the Office of the High Commissioner for Human Rights has, since 2006, had a Pacific regional office, based in Suva. Unlike other parts of the world, there is no regional Pacific human rights mechanism.

In light of these realities, this paper explores whether the Human Rights Council's new Universal Periodic Review (UPR) mechanism will make a positive contribution to human rights in the Pacific. In this 60<sup>th</sup> anniversary year of the UDHR, the Human Rights Council (HRC) has embarked on the first round of its universal periodic review of states. One of the yardsticks for assessing states' performance is the UDHR. Tonga was the first Pacific state to be considered under the UPR process. Tuvalu is currently being assessed, with its dialogue with the HRC occurring on 11 December. Vanuatu is due to be considered, along with New Zealand, in May 2009.

Part I of this paper sets the scene by looking at the current context of human rights in the Pacific. Part II explains the UPR mechanism and summarises some of its key features. Part III looks at Tonga's experience with the UPR process. Part IV discusses the potential strengths and weaknesses of the UPR for Pacific Island states, and considers whether a future legacy of the UDHR will be a strong and effective Universal Periodic Review mechanism aimed at securing real human rights progress in our region.

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<sup>1</sup> This paper is a work-in-progress and part of an ongoing project, so feedback is very welcome. Please send comments to [natalie.baird@canterbury.ac.nz](mailto:natalie.baird@canterbury.ac.nz). Please do not cite without permission.

<sup>2</sup> "Pacific" is used throughout the paper to mean the 14 island members of the Pacific Islands Forum: Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

At the outset, it is important to note that the question posed in the title of this paper could be answered at this point with a simple “don’t know.” It is, of course, too soon to be definitive about whether the UPR will make a difference in the Pacific. All this paper really does is set out some preliminary observations, based primarily on the experience of Tonga and drawing on some of the existing literature.

## **Part I: The current context: human rights in the Pacific**

This part of the paper summarises the way in which human rights norms are currently used in the Pacific. At the outset, it is important to note that while it is sometimes said that Pacific states have a low ratification rate of international treaties as if that were the end of the story, there is in fact a lot more to the picture. Both international human rights treaties themselves, and the universal norms on which they are based, are reflected and used in various other ways around the Pacific.

### *Constitutional protection of human rights*

Most Pacific Island countries gained written constitutions containing bills of rights as part of the decolonisation process in the 1960s and 1970s. In general, these constitutional protections are primarily concerned with standard civil and political rights – such as the right to life, rights of due process and the freedoms of religion, expression, press, assembly and movement. Some constitutions also provide protection for some economic, social and cultural rights. With the exception of the 1875 Tongan Constitution, the textual heritage of these Bills of Rights is generally the International Covenant on Civil and Political Rights (ICCPR) or the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

These domestic protections are important because the primary arena for promoting and protecting human rights is the domestic one. While international mechanisms for the protection of human rights have a role to play, if human rights are effectively protected at the local and national level, then international mechanisms play a useful monitoring role but are not the primary arena for protection. In the Pacific context, where the resources required to ratify, implement and monitor compliance with international treaty obligations are scarce, the existence and implementation of strong domestic protections is important.

### *Ratification of human rights treaties in the Pacific*

CRC and CEDAW are currently the most widely ratified treaties in the Pacific. All Pacific states are party to CRC. Most states, except Nauru, Palau and Tonga, are party to CEDAW. Some states are party to ICCPR, ICESCR and CERD. No states are party to CAT or CRMW. The 2007 Disability Convention has been signed, but not ratified, by the Solomon Islands, Tonga and Vanuatu. Recent 2008 ratifications of note include the ratification of ICCPR by Samoa in February, the ratification of ICCPR and ICESCR by Papua New Guinea in July and the ratification of ICCPR by Vanuatu in November. See Table One for detailed information of ratifications.

**Table One: Ratification of Core International Human Rights Treaties in the Pacific<sup>3</sup>**

Key: s – signature only

Country	ICESCR	ICCPR	CERD	CEDAW	CAT	CRC	CRMW	Disability	Disappearance
Cook Islands	28 Dec 78 <sup>4</sup>	28 Dec 78 <sup>6</sup>	22 Nov 72 <sup>6</sup>	10 Jan 85 <sup>5</sup> 11 Aug 06 <sup>6</sup>		6 Jun 97			
FSM				1 Sep 04		5 May 93			
Fiji			11 Jan 73	28 Aug 95		13 Aug 93			
Kiribati				17 Mar 04		11 Dec 95			
Marshall Islands				2 Mar 06		4 Oct 93			
Nauru		12 Nov 01 s	12 Nov 01 s		12 Nov 01 s	27 Jul 94			
Niue	28 Dec 78 <sup>6</sup>	28 Dec 78 <sup>6</sup>	22 Nov 72 <sup>6</sup>	10 Jan 85 <sup>7</sup>		20 Dec 95			
Palau						4 Aug 95			
Papua New Guinea	21 Jul 08	21 Jul 08	27 Jan 82	12 Jan 95		1 Mar 93			
Samoa		15 Feb 08		25 Sep 92		29 Nov 94			6 Feb 07 s
Solomon Islands	17 Mar 82		17 Mar 82	6 May 02		10 Apr 95		23 Sep 08 s	
Tonga			16 Feb 72			6 Nov 95		15 Nov 08 s	
Tuvalu				6 Oct 99		22 Sep 95			
Vanuatu		21 Nov 08		8 Sep 95		7 Jul 93		17 May 07 s	6 Feb 07 s

There are various reasons why Pacific uptake of international treaties has not been high. One reason is the perception of a conflict between customary practices and human rights. There is a concern that the values underlying human rights treaties do not “fit” with Pacific values. Other reasons are the lack of information about the benefits of ratification, and perhaps a desire to avoid international scrutiny of domestic practices.<sup>7</sup> Also relevant are financial constraints, finite human resources, competing domestic priorities and competing regional and international obligations.<sup>8</sup> At the practical level, geographical and political isolation may play a role.<sup>9</sup> There is perhaps a feeling that international conventions apply to larger countries, and are not designed for small, developing states.<sup>10</sup> A very real concern is the ability to meet the ongoing reporting requirements of international human rights treaty bodies.

<sup>3</sup> This information is as at November 2008, and is drawn from the following sources: <<http://www.ohchr.org>> <<http://www.bayefsky.com>> and New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), Appendix 5. “Ratification” is taken as including a state becoming party to a treaty by way of accession or succession.

<sup>4</sup> Advice of the New Zealand Ministry of Foreign Affairs and Trade is that the Cook Islands and Niue are bound by these treaties by virtue of New Zealand’s ratification. Although New Zealand’s reports previously contained information on Niue and the Cook Islands, they no longer do so.

<sup>5</sup> The instrument of ratification indicates that it is extended to the Cook Islands and Niue in accordance with their special relationship with New Zealand.

<sup>6</sup> Despite already being party to this treaty by virtue of New Zealand’s ratification, the Cook Islands has made a separate act of accession.

<sup>7</sup> New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), para 5.35.

<sup>8</sup> Pacific Human Rights Issues Series 1: *National Human Rights Institutions: Pathways for Pacific States* (Pacific Islands Forum Secretariat and New Zealand Human Rights Commission, July 2007), 39.

<sup>9</sup> OHCHR, UNDP, UNFPA, UNIFEM, UNICEF *Advancing the Implementation of Human Rights in the Pacific: Compilation of Recommendations of the United Nations Human Rights Treaty Bodies to the Countries of the Pacific* (OHCHR, UNDP, UNFPA, UNIFEM, UNICEF, Suva, 2007), vii.

<sup>10</sup> Elise Huffer “Baseline Survey on the Status of Pacific Island Countries’ Ratification of Main Human Rights Instruments and their Possible Reservations, Traditional Governance Practices that could support Human Rights, and the Work of Other Agencies and Organisation in Promoting Human Rights in the Pacific” (October 2003), 8.

### *Reporting under international human rights treaties*

The low rate of treaty ratification has meant a correspondingly low rate of engagement with the treaty bodies. The human rights treaties are each associated with a treaty body of independent experts who are tasked with monitoring implementation of treaty obligations. One of the obligations on states party to a treaty is to produce periodic reports on compliance of domestic standards and practices with treaty obligations. Compliance with these reporting requirements is a huge task in itself.

There is a perception that international guidelines on reporting are onerous, geared more directly for larger states, and based on assumptions that are not relevant in the Pacific (such as the size of the Executive, or the data that is available for reporting purposes).<sup>11</sup> In addition, the process for reporting can sometimes take years requiring extensive consultation and gathering of information. It can be difficult to maintain momentum over such a period especially with changes of government, movements of staff, and intervening national priorities (such as responding to environmental events or security issues). The result is often frustration or ambivalence about reporting.<sup>12</sup> Even when a report has been submitted, it can take years for the treaty body to examine it and provide the country with its concluding observations.<sup>13</sup>

### *Human rights in the courts*<sup>14</sup>

Pacific Island courts are interpreting and applying the human rights provisions in their constitutional bills of rights as cases require. As well as the courts in the formal legal system, community justice mechanisms are also grappling with the application of human rights in the community and customary context. Anecdotally it seems that the large majority of disputes in much of the Pacific are being dealt with outside the formal court system in various community mechanisms. Information on how these mechanisms deal with human rights is scarce.<sup>15</sup>

In the courts, it is in the area of due process that rights issues most frequently arise. As in other parts of the world, cases concerning rights to a fair trial, such as the right to be tried without undue delay and the right to a lawyer, are regularly raised before the courts, with the rights provisions used to provide effective protection.

More difficult issues, particularly in relation to the intersection between human rights and custom law, also arise.<sup>16</sup> Issues around freedom of religion have arisen,

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<sup>11</sup> For a Pacific guide to reporting requirements under CEDAW, aimed at demystifying the process, see *CEDAW Roadmap: Reporting before the Committee* (RRRT 2003).

<sup>12</sup> Pacific Human Rights Issues Series 1: *National Human Rights Institutions: Pathways for Pacific States* (Pacific Islands Forum Secretariat and New Zealand Human Rights Commission, July 2007), 39.

<sup>13</sup> For example, Palau submitted its initial report under CRC on 21 October 1998, but it was not examined by the Committee on the Rights of the Child until 23 January 2001.

<sup>14</sup> For a useful summary of key human rights cases in the region, see *Pacific Human Rights Law Digest (Volume 1)* (Regional Rights Resource Team 2005).

<sup>15</sup> For further discussion of community justice mechanisms, see New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), chapter 11.

<sup>16</sup> See New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), chapters 7-10.

particularly in relation to the introduction of new churches into village settings.<sup>17</sup> Another hard issue arises in relation to the right to freedom of movement on the one hand, and the customary practice of banishment of individuals from a village to maintain public order on the other.<sup>18</sup> Freedom of expression has also knocked up against traditional cultural traditions and values such as respect for elders.<sup>19</sup>

As in other parts of the world, courts in the Pacific also refer to treaties which have been ratified by their country, although not given direct domestic legal effect. This has been most common in relation to CEDAW and CRC – illustrating the strength of the advocacy effort by civil society in respect of these treaties. For example, in a Samoan case involving sentencing of a child offender, the Supreme Court noted that “all Samoan Courts should have regard to [the CRC] in cases within its scope.”<sup>20</sup> In custody cases, the paramount principle of welfare of the child, expressed in the CRC, is regularly referred to.<sup>21</sup> CEDAW has been referred to in matrimonial proceedings.<sup>22</sup>

On occasion, courts have also referred to treaties to which their state is not a party. In a Vanuatu case concerning contempt proceedings for default on a monetary judgment, the Court of Appeal referred to the requirement under the ICCPR that no one is to be imprisoned on the grounds of failure to fulfil a contractual obligation, even though Vanuatu was not at the time a party to the ICCPR.<sup>23</sup> Of note here is the provision in the Tuvalu Constitution which enables reference to international conventions, declarations, recommendations and judicial decisions concerning human rights in determining whether a law or act is a reasonably justifiable limitation on a right in a democratic society that has proper respect for human rights and dignity.<sup>24</sup>

#### *A Pacific regional human rights mechanism?*

The final matter to note as part of the wider Pacific context is the possibility of future development of a Pacific regional mechanism for the protection of human rights. There are some positive signs of moves afoot. A symposium was held in Samoa earlier this year to discuss the possibility of such a mechanism.<sup>25</sup> And a recent development is an inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade of the Australian Parliament into human rights in Asia and the Pacific, with a particular focus on regional mechanisms.<sup>26</sup> Watch this space.

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<sup>17</sup> See for example *Teonea v Pule o Kaupule* [2005] TVHC 2; HC CC No 23/03 (11 October 2005 Ward CJ). This case has been appealed but the appeal has not yet been heard.

<sup>18</sup> This issue has arisen most often in Samoa. For a discussion of the cases, see New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), paras 9.46-9.78.

<sup>19</sup> See for example *Taione v Kingdom of Tonga* [2004] TOSC 47; CV 374/2004 (15 October 2004 Webster CJ).

<sup>20</sup> *Police v Taivale* (29 September 2000).

<sup>21</sup> See for example *Nauka v Kauua* (Vanuatu).

<sup>22</sup> See for example *Joli v Joli* [2003] VUSC 63 (Vanuatu).

<sup>23</sup> *Naylor v Foundas* [2004] VUCA 26 (Vanuatu).

<sup>24</sup> Constitution of Tuvalu 1986, cl 15(5)(c).

<sup>25</sup> See the papers from the Symposium “Strategies for the Future: Protecting Rights in the Pacific” (27-29 April 2008, Samoa, Apia), to be published in a forthcoming issue of the VUWLR.

<sup>26</sup> See <[http://www.aph.gov.au/house/committee/jfadt/asia\\_pacific\\_hr/index.htm](http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/index.htm)> (accessed 4 December 2008).

## Part II: The Universal Periodic Review Mechanism

This part of the paper outlines the key features of the Human Rights Council's Universal Periodic Review (UPR) mechanism.

The 47 member Human Rights Council (HRC) was established in 2006 as successor to the Commission on Human Rights. Its first year was devoted to "institution building" – working out how it would operate, including what institutions and mechanisms of the Commission on Human Rights it would retain and whether any new mechanisms would be established. The Council decided to retain a large number of the mechanisms of the former Commission on Human Rights, with some refinement of how those mechanisms operate. The major new innovation of the Council is the UPR mechanism.<sup>27</sup> The UPR involves a review of the human rights records of all 192 UN member states once every four years. As the most tangible innovation of the reform process that created the HRC, the UPR mechanism carries a heavy burden of delivering on the overall promise of reform.<sup>28</sup> There is therefore a high degree of expectation as to what the UPR might be able to achieve, and a sense that the reputation of the HRC as a successor to the Commission on Human Rights will stand or fall depending on the success of the UPR mechanism.

The relevant passage of the General Assembly resolution establishing the HRC calls on the Council to:<sup>29</sup>

"undertake a universal periodic review based on objective and reliable information of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all Member States. The review shall be a cooperative mechanism based on an interactive dialogue with the full involvement of the country concerned and with consideration given to its capacity-building needs. Such a mechanism shall complement and not duplicate the work of treaty-bodies. The Council shall develop the modalities and necessary time allocation of the universal periodic review mechanism within one year after the holding of its first session."

Further detail as to how the UPR will operate is set out in the HRC's institution-building package.<sup>30</sup> The review is to be cooperative and be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner.<sup>31</sup> It is to be an inter-governmental process, driven by UN member states, and fully involving the country under review.<sup>32</sup> Here, the UPR can be most obviously contrasted with the periodic state reporting process under the treaty bodies where the monitoring is conducted by a treaty body comprised of independent experts. The UPR is explicitly required to complement and not duplicate other human rights

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<sup>27</sup> The UPR is however not a completely novel mechanism. Before the days of treaty bodies and periodic state reporting, the Commission on Human Rights itself ran a very similar process to the UPR, generally regarded as a "dismal failure." See Philip Alston "Reconceiving the UN Human Rights Regime: challenges confronting the new UN Human Rights Council" (2006) 7 *Melbourne Journal of International Law* 185, 207-214.

<sup>28</sup> Meghna Abraham "Building the New Human Rights Council: Outcome and analysis of the institution-building year" (Friedrich Ebert Stiftung, *Dialogue on Globalization* Occasional Paper No 33, August 2007), 35.

<sup>29</sup> *Human Rights Council* GA Res 60/251, UN GAOR, 60<sup>th</sup> sess, 72<sup>nd</sup> Plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [5(e)].

<sup>30</sup> See A/HRC/RES/5/1, Annex, paras 1-38.

<sup>31</sup> A/HRC/RES/5/1, Annex, para 3 (b) and (g).

<sup>32</sup> A/HRC/RES/5/1, Annex, para 3 (d) and (e).

mechanisms, and to “add value.”<sup>33</sup> Of particular interest for smaller Pacific Island states with capacity issues, the UPR is not to be “overly burdensome” to the concerned state (or the agenda of the HRC), and should not be “overly long.”<sup>34</sup> It should also take into account the level of development and specificities of countries.<sup>35</sup> There may be some interesting comparisons (yet to be drawn) in this context with the concept of “progressive realisation” in ICESCR.

The primary objective of the UPR is to improve the human rights situation on the ground.<sup>36</sup> Other objectives are the fulfilment of the State’s human rights obligations and commitments, the assessment of positive development and “challenges” faced, the enhancement of the State’s capacity and of technical assistance, the sharing of best practice, support for cooperation in the promotion and protection of human rights, and the encouragement of full cooperation and engagement with human rights agencies.<sup>37</sup>

Each state is to be reviewed every four years, with a review of 48 states each year in three groups of 16 states, considered in a two-week session of the Working Group of the HRC.<sup>38</sup> All member states of the HRC will be reviewed during their term of membership.<sup>39</sup> Otherwise, the order of review has been determined taking into account various factors including the mix of member and observer states of the Council, equitable geographic distribution, alphabetical order of the states selected, and any volunteer states.<sup>40</sup>

When assessing a state under the UPR, the HRC is required to consider the “fulfilment by each State of its human rights obligations and commitments.”<sup>41</sup> The basis, or yardstick, for the review is the Charter of the United Nations, the Universal Declaration of Human Rights, human rights instruments to which the particular state is party, and voluntary pledges and commitments made by States.<sup>42</sup> In addition, the review is to take into account applicable international humanitarian law.<sup>43</sup> The reference here to the UDHR as part of the basis for the review is of particular significance for Pacific Island states which have ratified few of the core human rights treaties, and in particular have mostly not ratified the ICCPR or ICESCR.

Three documents, all publicly available, are considered during the review.<sup>44</sup> The HRC has issued guidelines as to the broad content of the reports.<sup>45</sup> The first report is the 20-page national report prepared by the state being reviewed. States are encouraged to prepare this by consulting with stakeholders. The UPR state report can be contrasted with periodic state reports to treaty bodies which are considerably longer and more

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<sup>33</sup> A/HRC/RES/5/1, Annex, para 3(f).

<sup>34</sup> A/HRC/RES/5/1, Annex, para 3(h) and (i).

<sup>35</sup> A/HRC/RES/5/1, Annex, para 3(l).

<sup>36</sup> A/HRC/RES/5/1, Annex, para 4(a).

<sup>37</sup> A/HRC/RES/5/1, Annex, para 4(b)-(f).

<sup>38</sup> A/HRC/RES/5/1, Annex, para 14.

<sup>39</sup> A/HRC/RES/5/1, Annex, para 8.

<sup>40</sup> A/HRC/RES/5/1, Annex, paras 10-12.

<sup>41</sup> *Human Rights Council GA Res 60/251*, UN GAOR, 60<sup>th</sup> sess, 72<sup>nd</sup> Plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [5(e)].

<sup>42</sup> A/HRC/RES/5/1, Annex, para 1.

<sup>43</sup> A/HRC/RES/5/1, Annex, para 2.

<sup>44</sup> A/HRC/RES/5/1, Annex, para 15.

<sup>45</sup> Human Rights Council, Decision 6/102 (27 September 2007), section I.

detailed. New Zealand's most recent report to the Human Rights Committee under the ICCPR was nearly 100 pages long with many more pages of annexes. The second document for the UPR is a 10-page compilation by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in various other UN reports. The third is a 10-page summary report prepared by OHCHR summarising "credible and reliable information provided by other stakeholders." "Stakeholders" have been described as including NGOs, national human rights institutions, human rights defenders, academic institutions and research institutes, regional organisations and civil society representatives.<sup>46</sup>

The involvement of other stakeholders is significant. A "peer review" as proposed in early documents on the UPR would perhaps, according to some states and commentators, only have involved states and not civil society.<sup>47</sup> There are however a number of opportunities for civil society to be involved in the UPR process. States are encouraged to engage in broad consultation in the preparation of their national report. It is also hoped that some states may choose to include representatives of civil society in their delegations to Geneva. Stakeholders are able to make five-page submissions to OHCHR which summarises those submissions in its summary report to the HRC.<sup>48</sup> NGOs with ECOSOC consultative status may attend the Working Group review, albeit not taking part in the interactive dialogue. And such NGOs also have the opportunity to make general comments before the adoption of the outcome by the plenary. The opportunity for stakeholder involvement has been seized on with alacrity by civil society. To date, it is generally seen as a positive aspect of the UPR. The availability of an alternative stream of information to the state report partly offsets the absence of independent fact-finding powers of the HRC Working Group.

In terms of the practicalities of the review, a group of three rapporteurs (the troika) is selected by random ballot from HRC member states to facilitate each review, with OHCHR providing the necessary assistance and expertise to the troika.<sup>49</sup> The review itself is conducted in Geneva in the HRC's Working Group on the UPR, comprised of all 47 member states of the HRC.<sup>50</sup> Observer states (UN member states who are not members of the HRC) may participate, including in the interactive dialogue.<sup>51</sup> Other stakeholders may attend the review. Although stakeholders may not participate in the interactive dialogue, there is an opportunity to make general comments before the adoption of the outcome by the plenary.<sup>52</sup> The review is conducted by way of a three-hour interactive dialogue between the country and the Working Group of the HRC. The state being reviewed is required to make an oral presentation of its report of no

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<sup>46</sup> OHCHR "Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism" (July 2008), fn 1. See also A/HRC/RES/5/1 (18 June 2007), Annex, para 3(m), giving NGOs and NHRIs as illustrations of stakeholders.

<sup>47</sup> Elvira Dominguez Redondo "The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session" (2008) 7 Chinese Journal of International Law 721, 725.

<sup>48</sup> OHCHR "Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism" (July 2008), para 9.

<sup>49</sup> A/HRC/RES/5/1, Annex, para 18(d).

<sup>50</sup> A/HRC/RES/5/1, Annex, para 18(a).

<sup>51</sup> A/HRC/RES/5/1, Annex, para 18(b).

<sup>52</sup> A/HRC/RES/5/1, Annex, paras 18(c) and 31.



more than one hour.<sup>53</sup> Following the interactive dialogue, the Working Group discusses the adoption of the “outcome report.” The HRC subsequently considers and adopts the outcome report from the Working Group.<sup>54</sup>

It is the troika, with the involvement of the state reviewed, and with assistance from OHCHR, which prepares the “outcome report.” This report contains a summary of the proceedings of the review process, the conclusions and/or recommendations and the voluntary commitments of the State concerned.<sup>55</sup> The content of the report may include an assessment of the human rights situation in the country under review, including positive developments and the challenges faced by the country, a sharing of best practices, identification of opportunities for capacity-building and technical assistance, and any voluntary pledges and commitments made by the country being reviewed.<sup>56</sup> The individual recommendations made during the interactive dialogue are identified and it is specifically noted which recommendations are supported by the state, and which are not.<sup>57</sup> It is significant to note that although the state is involved in the preparation of the outcome report, the completion of the outcome report does not require the state’s consent.<sup>58</sup> The subsequent UPR of the state is to focus on the implementation of the preceding report.<sup>59</sup> The HRC will decide on a case-by-case basis whether specific follow-up is necessary.<sup>60</sup>

As at the time of writing, the first two sessions of the UPR had been held in April and May 2008. The third session is currently being held in December 2008. Some documents have been submitted for the fourth and fifth sessions in 2009, but are not yet all available.

### **Part III: Tonga’s experience under the Universal Periodic Review**

Tonga was the first Pacific Island state to go through the UPR in the second session held in May 2008. Tuvalu is shortly to be heard in the third session in December 2008, with the interactive dialogue to be held on 11 December. Vanuatu, along with New Zealand, is to be heard in the fifth session in May 2009. This part of the paper therefore looks primarily at Tonga’s experience under the UPR.<sup>61</sup>

#### *The UPR in Tonga*

A key element of Tonga’s experience with the UPR was the facilitated participatory process which took place to prepare the national report. An external

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<sup>53</sup> See <www.hrc.co.nz> “HRC Processes.” Also Elvira Dominguez Redondo “The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session” (2008) 7 Chinese Journal of International Law 721, 727.

<sup>54</sup> A/HRC/RES/5/1, Annex, paras 21-23 and 25.

<sup>55</sup> A/HRC/RES/5/1, Annex, para 26.

<sup>56</sup> A/HRC/RES/5/1, Annex, para 27.

<sup>57</sup> A/HRC/RES/5/1, Annex, para 32.

<sup>58</sup> Meghna Abraham “Building the New Human Rights Council: Outcome and analysis of the institution-building year” (Friedrich Ebert Stiftung, *Dialogue on Globalization* Occasional Paper No 33, August 2007), 40.

<sup>59</sup> A/HRC/RES/5/1, Annex, para 34.

<sup>60</sup> A/HRC/RES/5/1, Annex, para 37.

<sup>61</sup> The author notes with appreciation a useful discussion with Mr Gerard Winter, Advisor to the Tongan Government, and member of the Tongan UPR delegation.

consultant/facilitator, Gerard Winter, was engaged to facilitate national consultation and assist with the report writing. The external facilitator enabled dialogue between government officials and others (NGOs, church groups) with different, and sometimes entrenched, views. The merits of this kind of process for small island states are significant. A lot of issues can be thrashed out during the preparation process, and for those on the ground, this process is likely to be as important as what subsequently happens in Geneva. For example, the external facilitator has reported that during the consultation process, the Government of Tonga, initially reluctant to admit that domestic violence was a problem in Tonga, when confronted with statistics from the hospital's accident and emergency unit, admitted that domestic violence does exist.<sup>62</sup> For Winter, the strength of the UPR is in the consultation phase – he stresses that the process is 75% consultation and 25% report writing.<sup>63</sup> What happens informally in Tonga is therefore as important as the formal process in Geneva.

In terms of consultation during preparation of that national report, Tonga's report notes that this took place within capacity constraints.<sup>64</sup> Almost all of the 49 civil society organisations that are members of the Civil Society Forum of Tonga were unaware of the UPR process, but the government met with CSFT and considered their concerns. One Tongan-based civil society organisation, the Legal Literacy Project of the Catholic Women's League, made a submission directly to Geneva, which was included in the OHCHR summary.

As well as using a participatory process to draft the national report, another important element of the process at the national level is the involvement of the media. While there appears to have been some reporting of both the preparatory process, and the formal review, there was room for more.<sup>65</sup> The formal parts of the process in Geneva, including the three hour interactive dialogue are webcast on the internet. Further broadcasting of these sessions by national media on either TV or radio would be very useful in raising awareness about the UPR and supporting robust national dialogue.

### *The UPR in Geneva*

The troika appointed to facilitate Tonga's UPR comprised Nigeria, Qatar, Mexico. Three states submitted advance questions via the troika to Tonga before the interactive dialogue – Latvia, Netherlands and the United Kingdom. Thirty-four states made statements during the interactive dialogue, including Australia and New Zealand.<sup>66</sup> Of these 34, twenty were members of the HRC, with the remaining 14 being observer states. In the plenary of the HRC before the outcome report was adopted, seven states expressed views – three were members of the HRC (Qatar,

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<sup>62</sup> Shaila Koshy "Report card on human rights tells all" *The Star* (Malaysia) (24 August 2008), available at <[www.thestar.com.my](http://www.thestar.com.my)> (accessed 25 November 2008).

<sup>63</sup> Shaila Koshy "Report card on human rights tells all" *The Star* (Malaysia) (24 August 2008), available at <[www.thestar.com.my](http://www.thestar.com.my)> (accessed 25 November 2008).

<sup>64</sup> A/HRC/WG.6/2/TON/1, para 2.

<sup>65</sup> In relation to the first UPR session a "severe lack of reporting" in national media was noted. See Elvira Dominguez Redondo "The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session" (2008) 7 *Chinese Journal of International Law* 721, 734.

<sup>66</sup> The others to make statements were Algeria, Azerbaijan, Bangladesh, Bhutan, Brazil, Canada, China, Cuba, Czech Republic, Egypt, France, Holy See, Israel, Italy, Japan, Republic of Korea, Latvia, Malaysia, Maldives, Mexico, Morocco, Netherlands, Philippines, Saudi Arabia, Senegal, Slovenia, Switzerland, Syrian Arab Republic, Tunisia, Turkey, United Kingdom, United States of America.

Switzerland, United Kingdom) and four were observer states (Algeria, Maldives, Morocco, New Zealand).<sup>67</sup>

A notable feature of civil society input is the involvement of international NGOs in the UPR process. In Tonga’s case, the involvement of international NGOs in the Geneva part of the process was greater than that of local Tongan NGOs. In addition to the submission of the Tongan Legal Literacy Project, two international NGOs made submissions for the OHCHR summary - the London-based Global Initiative to End All Corporal Punishment of Children (GIEACPC) and a joint submission from the International Lesbian and Gay Association, the European branch of the International Lesbian and Gay Association, the International Gay and Lesbian Human Rights Commission, and ARC International. During the plenary debate in the HRC on the outcome report, four international NGOs made general comments – the Canadian HIV/AIDS Legal Network, the Foundation for Aboriginal and Islander Research Action, the International Women’s Rights Action Watch Asia Pacific, and Amnesty International.<sup>68</sup>

*Recommendations*<sup>69</sup>

It is the recommendations section of the outcome report that is of particular interest. When Tonga is next reviewed in 2012, the basis of the review will partly be whether or not these recommendations have been implemented. Altogether, there were 42 recommendations, 31 of which were accepted by Tonga, and 11 of which were rejected. The 31 recommendations accepted by Tonga provide what is in essence a program of action for the next four years. It is a list of undertakings, given on the international stage, which Tonga has pledged to achieve. The 42 recommendations relating to Tonga are attached as Annex One to this paper. An approximate and broad categorisation of the recommendations is set out in tables two and three below.

**Table Two: 31 recommendations accepted by Tonga**

Type of recommendation	Number of recommendations
Interaction with international human rights machinery	7
Civil and political rights (including democratisation)	5
Economic, social and cultural rights	-
Vulnerable groups (women, disabled)	5
Technical assistance and capacity building	5
National/regional human rights machinery	3
Regional cooperation	2
Engagement with civil society	1
Miscellaneous	3

<sup>67</sup> A/HRC/8/L.10/Rev.1, paras 943-949.

<sup>68</sup> A/HRC/8/L.10/Rev.1, paras 950-953.

<sup>69</sup> See Elvira Dominguez Redondo “The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session” (2008) 7 Chinese Journal of International Law 721, 728 for discussion of the format of the “recommendations” in the outcome report, and in particular whether the recommendations rejected should be listed as well as those accepted.

**Table Three: 11 recommendations rejected by Tonga**

Type of recommendation	Number of recommendations
Interaction with international human rights machinery	1
Civil and political rights	3
Economic, social and cultural rights	-
Vulnerable groups (women, sexual minorities)	6
Technical assistance and capacity building	-
National/regional human rights machinery	-
Regional cooperation	-
Engagement with civil society	-
Miscellaneous	1

There are a number of points of interest in the recommendations. Recommendations concerning interaction with the international machinery involved suggestions for ratification of more of the core human rights treaties, meeting reporting obligations under existing treaties to which Tonga is a party, and engaging with the special procedures mechanisms of the Human Rights Council. This is of note given the need for a workable relationship to be established between the UPR mechanism and the treaty bodies and their similar reporting function. It also indicates a primary focus, by some states at least, on the importance of human rights treaties as the primary tool for protection and promotion of human rights at the international level.

Another interesting and positive development in relation to the recommendations on ratification of the core treaties, is that some states inserted some nuance in their recommendations by suggesting selective ratification rather than wholesale ratification. Tonga has ratified two of the core treaties, so instead of recommending a blanket (and unmanageable) ratification of the remaining seven core treaties, some states adopted a more nuanced approach to focus on only one treaty. So, New Zealand, Turkey, Japan, Israel and the United Kingdom simply recommended that Tonga ratify CEDAW, while Canada recommended ratification of CAT. It is heartening to see the recommendation of gradual ratification which appears to recognise that it is simply unrealistic to expect a small state like Tonga, with limited capacity, to ratify the remaining core treaties all at once.

In terms of the types of rights issues commented on, there was clearly a focus on civil and political rights, with no recommendations on economic and social rights. This was perhaps because two of the key issues raised in the documents were the ongoing democratisation process in Tonga and the 16 November 2006 riots – both raising a number of issues around civil and political rights. But, the absence of recommendations on economic, social and cultural rights is a little surprising. Although it is too soon to draw conclusions, it perhaps suggests that the approach of the HRC may not be holistic, and that despite its use of the full range of human rights standards as the basis for the review, it will, like other international mechanisms, give primacy to civil and political rights. A more positive interpretation is perhaps that civil and political rights were a greater area of concern in Tonga than economic, social and cultural rights. Tonga's national report referred to free health care for life and free education to age 14 and emphasised a positive "progressive domestic realisation" of the rights set out in ICESCR.<sup>70</sup> This was recognised by some states in

<sup>70</sup> A/HRC/WG.6/2/TON/1, para 48.

their statements. For example, New Zealand noted that economic, social and cultural rights are well protected in Tonga, as shown in the UN Human Development Index, but that civil and political rights might require more protection.<sup>71</sup>

Another point of interest in the recommendations is the number accepted and rejected relating to minorities and vulnerable groups. Recommendations which Tonga accepted included one from Slovenia that Tonga pay increased attention to persons with disabilities and their related needs.<sup>72</sup> Four recommendations relating to the human rights of women were also accepted – to enact laws to protect women in employment from discrimination (Algeria), to promote its goals in education and improve the ratio of women in leading positions in the country (Algeria), to pursue its efforts to curb violence against women (Turkey), and to integrate a gender perspective in the follow-up process to the review (Slovenia).<sup>73</sup>

In contrast to these positive outcomes were six recommendations relating to women and sexual minorities which Tonga rejected. In relation to women, Tonga rejected two recommendations – to consider repealing discriminatory inheritance laws (Switzerland), and to amend discriminatory legislation in relation to inheritance, ownership of land and child support (Czech Republic).<sup>74</sup>

In relation to sexual minorities, there were three recommendations (made by the Netherlands, Canada and the Czech Republic) to decriminalise consensual same-sex activities, and one recommendation (by Bangladesh) to continue to criminalise same-sex conduct. Tonga accepted none of these four recommendations and commented as follows:<sup>75</sup>

“whilst current laws might criminalize certain consensual sexual conduct, Tonga is a Christian society that believes in tolerance and respect across difference. A respect for difference allows the widest margin of appreciation to lawmakers as well as other stakeholders and encourages robust debate about equality within society.”

Despite the polar views from contributing states as to what is necessary to meet human rights standards, Tonga attempted to assert a middle ground between the two which arguably reflected its own cultural position on the issue. Interestingly, this was acknowledged in the intervention by the Canadian HIV/AIDS Legal Network which, while expressing its disappointment that the recommendations concerning decriminalisation of certain forms of consensual sexual conduct were not accepted, did welcome Tonga’s cultural commitment to the respect for all people, the values of community and inclusiveness and the commitment to human rights.<sup>76</sup>

The recommendations were generally phrased in “broad-brush” terms in comparison with the technical detail often found in the concluding comments of treaty bodies responding to periodic state reports. For example, a recommendation by Mexico,

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<sup>71</sup> New Zealand Ministry of Foreign Affairs and Trade “Universal Periodic Review: May 2008: Tonga, 14 May 2008, Statement by New Zealand” available at <[www.mfat.govt.nz](http://www.mfat.govt.nz)> (accessed 4 December 2008).

<sup>72</sup> A/HRC/8/48, para 63(28).

<sup>73</sup> A/HRC/8/48, para 63(9), (10), (11), (12).

<sup>74</sup> A/HRC/8/48, para 64.

<sup>75</sup> A/HRC/8/48, para 65.

<sup>76</sup> A/HRC/8/L/10/Rev.1, para 950.

accepted by Tonga, was “to favourably consider ratifying the core international human rights treaties within a reasonable period of time and participating more fully with the international human rights mechanisms, especially the special procedures of the Human Rights Council.”<sup>77</sup> Another example was the recommendation of Turkey, accepted by Tonga, “to continue its endeavours towards better serving its people by securing a higher standard of human rights.”<sup>78</sup> Although a number of international human rights treaties were mentioned in the context of requests for Tonga to ratify them, no recommendations were linked to specific articles or text of any human rights standards.

Recommendations also sometimes reflected the recommending state’s particular interests. So, for example, France recommended that Tonga establish a national human rights institution in accordance with the Paris Principles (accepted by Tonga)<sup>79</sup> and Italy recommended that Tonga ratify the Rome Statute of the International Criminal Court (not accepted by Tonga).<sup>80</sup>

### *Human rights outcomes*

The nature of the UPR as a cooperative, dialogue-based process means that it is difficult to directly trace outcomes to the UPR. Nevertheless, there are three particular types of outcome which it is useful to note.

The first is that there are now 31 recommendations which Tonga has publicly pledged that it will act on to improve human rights outcomes in Tonga. In four years time, when Tonga is next reviewed, these will be used as one of the measures of assessing Tonga’s performance. In the meantime, these 31 recommendations or “pledges” can be used by Tongan Government officials to chart a course of action and reform over the next four years, by NGOs to lobby for developments in key areas, and by other states and international organisations to identify areas where they may be able to provide support by way of technical assistance or capacity-building. An example of the utility of a pledge to the HRC arises in the context of Tonga’s ongoing democratisation process. Although this had begun before the UPR process, recording the moves towards democratisation in the outcome report provide a useful external, international “check and balance” to support the ongoing domestic process. Highlighting these developments on the international stage may add impetus and gravitas to the ongoing domestic process.

More generally, the review has enabled Tonga to clearly put to the HRC, the OHCHR and other states some of the limitations and challenges it faces in complying with international human rights standards. This is one of the hard-to-measure factors which may have long-term benefits. One of the frustrations with the treaty body system is that it does not seem to respond to the technical assistance needs and capacity limitations of small island states. These include difficulties in complying with reporting guidelines, meeting reporting deadlines, and other capacity issues. Because of the greater frequency of the UPR, because it will consider all states, and because it is other states rather than independent experts who are part of the process, these very

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<sup>77</sup> A/HRC/8/48, para 63(3).

<sup>78</sup> A/HRC/8/48, para 63(27).

<sup>79</sup> A/HRC/8/48, para 63(24).

<sup>80</sup> A/HRC/8/48, para 64.

real concerns of smaller states and barriers to greater engagement may get a more receptive airing under the UPR.

Finally, of importance to the Pacific region is that we may see the emergence of a regional approach to UPR, and there may be other spin-offs for a broader regional approach to human rights. Tonga accepted a Philippines recommendation to share its experiences of the UPR with other Pacific Island states.<sup>81</sup> New Zealand is hosting a workshop on the UPR in February next year with Pacific Island states at which Tonga will do just this.<sup>82</sup> A number of suggestions were also made as to the possibility of establishing a regional Pacific representation in Geneva. More broadly, Tonga also accepted an Algerian recommendation to create a regional human rights institution (if a national human rights institution is not possible).<sup>83</sup>

#### **Part IV: Discussion**

In this part of the paper, drawing on both the Tongan experience, and international commentary to date, some observations are made on the potential strengths and weaknesses of the UPR process. Some comparisons are also made with other periodic reporting processes.

##### *Strengths*

One of the main potential strengths of the process is that it encourages a robust national dialogue on domestic human rights.<sup>84</sup> The Tongan experience suggests that the preparatory phase for the national report and the consultations and facilitated dialogue that took part during that phase was indeed one of the successes of the Tongan UPR experience. Because the process is essentially state-driven, much will depend here on the approach of the state to consultation, and a willingness to be open, participatory, and engage meaningfully with civil society. Also important here is the role of the national media in reporting on the process and stimulating dialogue on the issues raised. Civil society also needs to be informed in order to contribute meaningfully to the process. Because of the size of small island states, it may be easier to achieve robust national dialogue in the Pacific than in some larger states, although this will require considerable organisational effort.

A second strength of the process, particularly relevant in the Pacific, is that it is, explicitly, a cooperative and non-confrontational process. The intention is not “naming and shaming.” This style of engagement may better suit Pacific Island states, and traditional Pacific processes of interaction than the more forthright processes adopted by other international human rights mechanisms such as treaty bodies.

A related strength is that the emphasis on dialogue potentially provides space to negotiate the meaning, interpretation and application of particular human rights in local situations. This, too, may suit Pacific states which are sometimes reluctant to

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<sup>81</sup> A/HRC/8/48, para 63(15).

<sup>82</sup> A/HRC/8/L.10/Rev.1, para 954.

<sup>83</sup> A/HRC/8/48, para 63(25).

<sup>84</sup> Philip Alston “Reconceiving the UN Human Rights Regime: challenges confronting the new UN Human Rights Council” (2006) 7 *Melbourne Journal of International Law* 185, 211.

engage or take on international human rights obligations because of a perceived conflict with local custom and culture.<sup>85</sup> An international mechanism which enables, and indeed encourages, dialogue about the meaning of rights in local cultures may be more palatable than one which is perceived as using rights to “trump” local custom. In its national report, Tonga put considerable emphasis on the harmony between its cultural values and human rights values.<sup>86</sup> This was acknowledged in one of the pledges accepted by Tonga (recommended by Algeria) “to continue to uphold the core values that are in the Tongan constitutional and customary history, in its work to ensure full compliance with human rights and fundamental freedoms for all Tongans.”<sup>87</sup> Negotiation on the meaning of rights was seen in the discussion of decriminalising same-sex conduct. Tonga was arguably able to assert its “margin of appreciation” in favour of its position – respect for difference, while leaving open, and being encouraged by an NGO intervention, its position in the future. If the same issue arose in the context of the concluding observations of a treaty body, the outcome would have more likely been a “naming and shaming” of Tonga’s approach. It may be that the UPR approach, being less confrontational, may in the end produce a positive human rights outcome (repeal of the offending criminal provisions) more quickly.

Another strength of the process for small Pacific states with small bureaucracies, and significant capacity challenges is that the UPR process explicitly takes into account capacity restrictions. A state can be quite upfront about the limitations that prevent it from progressing in certain areas. Ideally, this should then open the door for international cooperation in terms of technical assistance and support. One way to conceptualise the UPR process and the “outcome report” is by analogy with a school report.<sup>88</sup> The outcome report records a snapshot in time of progress made in different areas and some of the difficulties faced on various issues. Like a school report, equally as important as the report itself is what happens next. Ideally, what will happen next is that there will be deeper analysis as to why particular areas are challenging, needs-assessments and investigations of ways to improve those areas, and linkages with other states to access technical assistance to improve performance in particular areas. However, the risk with the emphasis on capacity building is that discussion of capacity limitations might simply be tendered and received as “exculpatory explanations of non-compliance” rather than leading to actual recommendations and outcomes in terms of technical assistance.<sup>89</sup>

A fifth strength of the process is that NGOs are able to make their own submissions directly to Geneva. These reports are then summarised by OHCHR in the summary report, with the original NGO submissions being publicly available on the OHCHR extranet.<sup>90</sup> Although NGOs can make shadow reports under the treaty body system, these reports are not formally part of the treaty body process. Under the UPR, there

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<sup>85</sup> See generally New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006).

<sup>86</sup> A/HRC/WG.6/2/TON/1, paras 6-9.

<sup>87</sup> A/HRC/8/48, para 63(26).

<sup>88</sup> Shaila Koshy “Report card on human rights tells all” *The Star* (Malaysia) (24 August 2008), available at <[www.thestar.com.my](http://www.thestar.com.my)> (accessed 25 November 2008).

<sup>89</sup> Felice D Gaer “A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System” (2007) 7 *Human Rights Law Review* 109, 135.

<sup>90</sup> Another site for accessing UPR documents is <[www.upr-info.org](http://www.upr-info.org)>.



are clearer “avenues for independent information.”<sup>91</sup> These avenues arguably mitigate to some extent the concern that the process is otherwise very much driven by the state under review. NGOs also have other opportunities for input including speaking in the plenary session of the HRC considering the outcome report.

A potential, but perhaps not necessarily always realised, strength of the process is that it is more holistic than reporting to treaty bodies. Because the criteria for assessment include not only the treaties which the particular state has ratified, but also the Universal Declaration of Human Rights, this arguably enables a more holistic and indivisible approach to human rights.<sup>92</sup> The UPR can theoretically cover all human rights issues including economic, social, cultural, civil, and political rights, the rights of minorities and vulnerable groups, human rights defenders and gender. One commentator has noted that a holistic approach was apparent in the first session of the UPR.<sup>93</sup> Whether this continues remains to be seen. Given the limitations in terms of pages and hours, and the absence of an independent expert analysis of the human rights situation in the state under review, the process is likely to focus on those issues identified by one or more of the participants in the process. In the case of Tonga, although the recommendations on sexual minorities were not ultimately accepted, the issue was at least considered at the international level. Without the UPR, this issue would be unlikely to be raised in the treaty bodies since Tonga has only ratified CERD and CRC.

A final strength of the process is that it does result in a concrete list of pledges undertaken by the state. Tonga has made 31 pledges to improve the human rights situation in Tonga. Examples of specific pledges are a pledge to ratify four human rights treaties – ICCPR, ICESCR, CAT and CEDAW; a pledge to enact laws to protect women from discrimination in employment, and a pledge to continue with its democratisation process.<sup>94</sup> As noted above, these pledges can be used in a variety of ways. They provide a useful roadmap for Tonga to chart a course of action and reform, they can be used by local and international NGOs for lobbying, and they can be used by other states and international organisations to identify areas for technical cooperation.

### *Weaknesses*

A primary weakness of the process is that it is state-led. The agenda is very much set and controlled by the state under review. The starting point for the process is the 20-page national report of the state being reviewed. The state also participates in the drafting of the outcome report, and decides which recommendations to accept or reject. In assessing a state’s achievements, the process also takes into account the level of development and specificities of countries. This high level of influence of the state on the outcome may ultimately be fatal to the credibility of the whole UPR

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<sup>91</sup> Nana Yeboah “The Establishment of the Human Rights Council” in *Managing Change at the United Nations* (Centre for UN Reform Education, April 2008), 92.

<sup>92</sup> Elvira Dominguez Redondo “The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session” (2008) 7 Chinese Journal of International Law 721, 726.

<sup>93</sup> Elvira Dominguez Redondo “The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session” (2008) 7 Chinese Journal of International Law 721, 730.

<sup>94</sup> A/HRC/8/48, paras 63(1), (2), (5), (5), (7) and (9).

process.<sup>95</sup> Writing before the detail of the UPR emerged, Philip Alston was of the firm view that the trigger for the UPR should not be with information compiled by the state being reviewed.<sup>96</sup> Rather, an analysis by independent experts would provide a stronger base from which to review the state. Certainly, with the state in the driving seat, much depends on its attitude in terms of transparency, openness and honesty.

A related weakness is that there may be too much emphasis on “cooperation.” Although, as noted above, the cooperative nature of the mechanism may be particularly suited to Pacific states, there is perhaps a risk that it might be too much of a good thing. One commentator has noted that many states interpret “cooperation” as meaning that there is a restriction or prohibition on any criticism of the failure of a state to fulfil its human rights obligations.<sup>97</sup> Under this interpretation, a state cannot be criticised for its failures, but should instead be supported in addressing these. This may enable some states to hide behind the veil of cooperation to avoid facing up to serious human rights problems. A cooperative approach may also mean that specific country criticism of grave human rights violations will never be an outcome of the UPR process.

A third weakness, closely linked to the first two, is the political nature of the mechanism. Unlike the more legal approach of the independent treaty bodies, this is explicitly and deliberately a state process. This is likely to mean that inevitably, international politics will play a role in the UPR process. One commentator has noted that despite the disestablishment of the Commission on Human Rights and the establishment of the HRC, the “[p]olitics of human rights ... has not changed.”<sup>98</sup> Alston has commented that although agreement on major institutional restructuring may have been achieved, it is likely to be more problematic to achieve deep-rooted change.<sup>99</sup> A hint of these underlying political differences can be seen from the disagreement between states on the proper approach to criminalisation of same-sex conduct on Tonga. In undertaking some of its other functions, the HRC has already been roundly criticised for its overtly political approach.<sup>100</sup>

A second group of potential weaknesses can be considered under the general grouping of involvement of other participants – NGOs, independent experts, OHCHR - in the UPR process. Although many NGOs have welcomed the opportunities for involvement in the UPR, and see the opportunities for input as a strength in the process, others such as the International Service for Human Rights have noted that in

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<sup>95</sup> Nana Yeboah “The Establishment of the Human Rights Council” in *Managing Change at the United Nations* (Centre for UN Reform Education, April 2008), 91.

<sup>96</sup> Philip Alston “Reconceiving the UN Human Rights Regime: challenges confronting the new UN Human Rights Council” (2006) 7 *Melbourne Journal of International Law* 185, 214.

<sup>97</sup> Meghna Abraham “Building the New Human Rights Council: Outcome and analysis of the institution-building year” (Friedrich Ebert Stiftung, *Dialogue on Globalization* Occasional Paper No 33, August 2007), 36.

<sup>98</sup> Nana Yeboah “The Establishment of the Human Rights Council” in *Managing Change at the United Nations* (Centre for UN Reform Education, April 2008), 87.

<sup>99</sup> Philip Alston “Reconceiving the UN Human Rights Regime: challenges confronting the new UN Human Rights Council” (2006) 7 *Melbourne Journal of International Law* 185, 211.

<sup>100</sup> See for example Yvonne Terlingen “The Human Rights Council: A New Era in UN Human Rights Work?” (2007) 21 *Ethics & International Affairs* 167, 172-176; Claire Callejon “Developments at the Human Rights Council in 2007: A reflection of its Ambivalence” (2008) *Human Rights Law Review* 1.

fact the involvement of NGOs is quite limited.<sup>101</sup> Over time, the assessment as to whether the opportunities for NGO input are a strength or a weakness may depend on the way in which NGO input is used by states as the primary drivers of the process.

One other aspect of NGO involvement is worth mentioning. First, there is the involvement of local NGOs based in the state under review, and the involvement of international NGOs. One concern is the possible distorting effect of international NGOs submitting reports, especially on niche issues. The very fact of a submission may give an issue greater gravitas or priority than in fact is warranted when considered amongst other human rights challenges faced by the state. With Tonga, only one local NGO made a submission, and there were two submissions from international NGOs (on corporal punishment and sexual minorities), and four interventions from international NGOs in the HRC's final plenary debate on Tonga. It is important that the voice of local civil society is heard at least as strongly as that of international civil society.

There is no formal role for independent human rights experts in the process. As noted, the process is very much a state-driven one. Independent human rights experts could be included by the state under review in their delegation. They could also be nominated by states as their representatives on the HRC or in the Working Group or plenary sessions of the HRC. However, the lack of formal involvement of independent experts is a stark and notable contrast with the treaty body system. It is likely to mean that in some situations, there is a lack of analytical depth in the outcome report. In many ways, the ultimate quality of the UPR will depend on the knowledge and expertise of the examining states.<sup>102</sup>

The absence of a role for independent experts in the UPR process is arguably compounded by the limited role for OHCHR. OHCHR prepares two ten-page summaries on the state under review (the summary of NGO submissions, and the compilation of UN information on the state), and also supports the troika facilitating each review, but does not provide any independent analysis.<sup>103</sup>

A further potential weakness, yet to fully emerge, is the consequences of duplication and overlap with the existing reporting mechanisms under the human rights treaties. The UPR is intended to complement the human rights mechanisms, and "add value" but inevitably there will be areas of overlap and tension. A particular risk, although of lesser weight in the Pacific given lower levels of treaty ratification, is that the UPR process will result in substantive reassessments of treaty body findings.<sup>104</sup> This risk

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<sup>101</sup> Nana Yeboah "The Establishment of the Human Rights Council" in *Managing Change at the United Nations* (Centre for UN Reform Education, April 2008), 91. See also Elvira Dominguez Redondo "The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session" (2008) 7 *Chinese Journal of International Law* 721, 731-732.

<sup>102</sup> Felice D Gaer "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System" (2007) 7 *Human Rights Law Review* 109, 136.

<sup>103</sup> Interestingly, Philip Alston discusses the historical origins of this limitation on technical analysis by the UN Secretariat in human rights matters to the Commission on Human Rights own experience with a forerunner to the UPR in the period 1956-1981. See Philip Alston "Reconceiving the UN Human Rights Regime: challenges confronting the new UN Human Rights Council" (2006) 7 *Melbourne Journal of International Law* 185, 211-212.

<sup>104</sup> Felice D Gaer "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System" (2007) 7 *Human Rights Law Review* 109, 136.

did not however materialise in the first session of the UPR.<sup>105</sup> For smaller Pacific states with limited resources, having had a positive experience with the UPR, they may be less inclined to put resources into meeting obligations under the treaties to which it is party. There may also be an added reluctance to ratify the core human rights treaties, if sufficient benefits (support for capacity building, technical assistance, improved human rights credibility) are secured through the UPR process.

In terms of the international human rights machinery itself, it is too soon to tell whether the treaty body reporting process and the UPR process will be truly complementary or whether they will instead be competing. Patch protection and institutional competition may emerge as a real issue. Alternatively, the energy and momentum which seems to be accompanying the early days of the UPR process may prompt some positive change in the way in which treaty bodies deal with state reports. At this stage, the most that can be said is that the relationship between the UPR and the treaty monitoring processes is likely to be complex, and the full implications remain to be seen.

A final weakness, whose implications also remain to be seen, concerns the language of the pledges adopted by states. The recommendations to states, with those accepted becoming “pledges” of the state, are not at all systematic. There are at least three reasons for this. First, the recommendations are responding to the three documents forming the basis of the review which may themselves be a distortion of the human rights situation, or at least, not an independent comprehensive analysis of it. Second, the recommendations are those made by individual states, so to some extent they reflect the priorities or interests of the individual state, rather than a considered contribution to a holistic human rights picture for the state under review. Third, the recommendations are general rather than specific. Specific human rights standards, or the jurisprudence or analysis of treaty bodies, at least in Tonga’s case, were rarely referenced. It might have been expected, particularly given the low level of ratification of the core treaties by Tonga that the UDHR would be the key yardstick by which it was assessed. However, the specific international standards were very much in the background in the review. While they might inform particular views of states, specific human rights standards, including those in the UDHR, are infrequently mentioned.

The language used in recommendations and pledges is more rhetorical than legal. This was noted by Switzerland in its final comments on Tonga’s UPR, which noted that next time, recommendations should be “formulated in a targeted manner so as to enable small countries to accept and implement them.” It may be that protocols will evolve as to the language used in pledges so that over time, they become more specific. Certainly, as Tonga’s pledges currently stand, there is considerable “wriggle room” for determining what is required to implement many of them.

#### *Comparisons with other reporting processes*

As more states go through the UPR process, some useful comparisons will be able to be made with other state reporting systems. There are three areas worthy of particular

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<sup>105</sup> Elvira Dominguez Redondo “The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session” (2008) 7 Chinese Journal of International Law 721, 730.

mention. First, interesting comparisons will be made with the treaty body periodic reporting system. For the Pacific, a particular issue will be whether the UPR provides an opportunity for Pacific governments to engage more meaningfully and productively with the international human rights framework than does the treaty body system.

A second interesting comparison will be with the Commission on Human Rights' earlier experience with periodic reporting. This was established in 1956, and eventually abolished in 1981. Philip Alston's verdict on the achievements under the Commission's process is perhaps a salutary and sobering reminder that the jury is still out on the UPR:<sup>106</sup>

“Its achievements could readily be measured in terms of trees destroyed, but it is doubtful whether it made any significant contribution to the promotion of respect for human rights. It did, however, succeed in giving the appearance that all governments were making themselves accountable to the Commission, and it gave NGOs and UN specialized agencies an excuse to submit written comments.”

A third interesting comparison will be with existing peer review mechanisms used in UN specialised agencies and regional bodies. The International Labour Organisation, the Organisation for Economic Co-operation and Development and the World Trade Organisation all use peer review processes which are reported as being most successful when there is a high level of trust between the experts conducting the review and those being reviewed.<sup>107</sup> Some of these processes use either a dossier or questionnaire, instead of a state report, to trigger the review.<sup>108</sup> They have also developed resource-intensive and often complex procedures, such as communications and fact-finding visits to ensure that the process remains unbiased.<sup>109</sup>

## Conclusion

It is still early days in the UPR process, and many developments are no doubt yet to come. Preliminary assessments of the UPR mechanism vary. One commentator has noted that the mechanism is not the strongest of mechanisms, but neither is it the weakest.<sup>110</sup> Another notes that the mechanism “could potentially prove innovative” despite a number of shortcomings.<sup>111</sup> It remains to be seen how the UPR will settle down to operate in practice. In the long run, the key test will be whether the UPR develops into an intensive and results-oriented process or whether it ends up as just another formal bureaucratic procedure that offers nothing in terms of concrete, measurable improvements in human rights.

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<sup>106</sup> Philip Alston “Reconceiving the UN Human Rights Regime: challenges confronting the new UN Human Rights Council” (2006) 7 *Melbourne Journal of International Law* 185, 213.

<sup>107</sup> Felice D Gaer “A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System” (2007) 7 *Human Rights Law Review* 109, 112.

<sup>108</sup> Felice D Gaer “A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System” (2007) 7 *Human Rights Law Review* 109, 123-124.

<sup>109</sup> Felice D Gaer “Perspectives on the United Nations Human Rights Council: Scrutinising Countries: the Challenge of Universal Review” (2006) 13 *Human Rights Brief* 9, 9.

<sup>110</sup> Meghna Abraham “Building the New Human Rights Council: Outcome and analysis of the institution-building year” (Friedrich Ebert Stiftung, *Dialogue on Globalization* Occasional Paper No 33, August 2007), 41.

<sup>111</sup> Elvira Dominguez Redondo “The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session” (2008) 7 *Chinese Journal of International Law* 721, 722.

To return to the question posed by this paper – will the UPR make a difference in the Pacific? My optimistic, yet tentative, answer is now a “probably.” There are a number of strengths to the process which are particularly suited to the Pacific region. These include the participatory nature of the process, the focus on dialogue and cooperation rather than confrontation, and the ability to take into account the capacity limitations of small island states. The particular role for civil society is also important, and as experience with the process grows, will hopefully be taken full advantage of by local Pacific NGOs. A particular benefit, given the low levels of Pacific ratification of treaties, is that the basis for the review includes not just the treaties ratified by the state under review, but also the Universal Declaration.

The UPR is however by no means a universal remedy and has its own weaknesses and risks. One weakness is that it is very much a state-led process, with the agenda set by the state under review. There is no independent analysis of the human rights situation, and involvement by experts and OHCHR is limited. Questions of overlap and duplication with the periodic reporting system of the treaty bodies remain to be identified and worked through.

On balance though, the UPR delivers a set of concrete pledges by the state under review which can be used by the state itself, local and international NGOs, and by the international community to chart a course for making a real difference to human rights in the Pacific. In comparison with treaty bodies, it offers a short, sharp and concise process, with an immediate outcome. This may mean that momentum for change, both nationally and regionally, is easier to sustain.

## **Annex One (extracted from A/HRC/8/48)**

### **UPR recommendations accepted by Tonga**

1. To continue the democratization process on which it has embarked so courageously (Holy See);
2. To continue with determination and speed up the reform process it has begun (Switzerland);
3. To favourably consider ratifying the core international human rights treaties within a reasonable period of time and participating more fully with international human rights mechanisms, especially special procedures of the Human Rights Council (Mexico);
4. To consider the implementation of recommendations by special procedures so that there are institutional safeguards against harsh treatment by police and security forces (Canada);
5. To ratify ICCPR and ICESCR (Brazil, Czech Republic, Italy, Switzerland, Turkey, Netherlands); CEDAW (Brazil, Czech Republic, New Zealand, Turkey, United Kingdom, Switzerland), the Optional Protocol to CEDAW (Brazil); the Optional Protocol to CRC on the sale of children, child prostitution and child pornography (Brazil); and CAT (Switzerland, Czech Republic, Canada, Turkey);
6. To consider signing and ratifying CEDAW and consider especially article 15 and 16 thereof which relate to the equal right of women to administer property and the equal rights of both spouses in respect of the ownership, acquisition, management, enjoyment and disposition of property (Israel);
7. To continue to proceed with the work of reviewing and making necessary adjustments to relevant domestic laws and regulations for the prompt ratification of CEDAW (Japan);
8. To submit regularly its reports to the treaty bodies of the conventions it is party to, like the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination (Czech Republic);
9. To enact laws to protect women in employment free from any form of discrimination (Algeria);
10. To continue to promote its ambitious goals in education and improve the ratio of women in leading positions in the country (Algeria);
11. To pursue its efforts in order to curb the violence against women (Turkey);
12. To systematically and continuously integrate a gender perspective in the follow-up process to the review (Slovenia);
13. To advise potential donor agencies of the type of technical assistance that would help to meet its treaty body reporting obligations (New Zealand);
14. To strengthen its efforts in the area of human rights education, training of public officials and on the participation of civil society in the promotion and protection of human rights, including through international and regional cooperation (Mexico);
15. To share its experiences of the UPR with other Pacific Island States (Philippines);
16. To officially seek to renew its request for assistance to the OHCHR in this respect and also through the UPR Trust Fund established specifically to assist in the implementation of recommendations emanating from the UPR (Egypt);
17. To submit its initial report on CRC (Japan);
18. To Tonga and to relevant actors to attentively follow-up on the requests for capacity-building and technical assistance on human rights (Mexico);
19. To continue to step up its efforts in the promotion and protection of human rights with the full support of the international community, as requested in the report submitted by Tonga to the UPR (Morocco);
20. To continue to request technical assistance and financial support to improve education services, to redraft the Kingdom's Constitution, and its activities in the promotion of human rights (Bangladesh);
21. To adopt measures to strengthen the protection of freedom of expression, information and the press (France, Canada);

22. To develop the practical steps to enhance freedom of speech and freedom of the press (Republic of Korea);
23. To pursue its efforts to create a national human rights institution under the Pacific Plan (Canada);
24. To establish a national human rights institution in accordance with the Paris Principles (France);
25. To create, if not a national human rights institution, at least one at the level of the group of Islands it belongs to, so that they may more effectively improve their human rights performance and implement their human rights obligations (Algeria);
26. To continue to uphold the core values that are in the Tongan constitutional and customary history, in its work to ensure full compliance with human rights and fundamental freedoms for all Tongans (Algeria);
27. To continue its endeavours towards better serving its people by securing a higher standard of human rights (Turkey);
28. To pay increased attention to persons with disabilities and their related needs (Slovenia);
29. To take all the possible anti-corruption measures (Republic of Korea);
30. To continue cooperating with civil society in the implementation of the outcome process (United Kingdom);
31. To promote the human rights education programmes for police, security and penal personnel (Canada).

#### **UPR recommendations rejected by Tonga**

1. (Italy): To ratify the Rome Statute of the International Criminal Court.
2. (Italy) To consider a complete abolition of the death penalty.
3. (United States): To launch a credible investigation into reports that surfaced following the riots and prosecute offenders.
4. (Netherlands): To amend legal provisions that criminalize some forms of sexual activity between consenting adults and decriminalize sexual activity between consenting adults.
5. (Netherlands): To facilitate extended access to prisons for NGOs and that it implements the recommendations contained in the report of the Community Para-Legal Taskforce on Human Rights with regard to persons detained by the security forces.
6. (Canada): To amend its criminal laws so that sexual activity between consenting adults is not a criminal offence. It noted a joint appeal by three special procedures on the treatment of detainees and prisoners by security forces and enquired about steps taken to implement their recommendations.
7. (Canada): To take steps to eliminate graft within the public sector so that the enjoyment of human rights is not imperilled by rent-seeking within Government.
8. (Switzerland): To consider repealing the discriminatory practice in the inheritance Laws.
9. (Czech Republic): To amend legislation discriminating against women in the fields of inheritance, ownership to land and child support.
10. (Czech Republic): Recommended the decriminalization of consensual same-sex activity between adults
11. (Bangladesh): To continue to criminalize consensual same sex, which is outside the purview of universally accepted human rights norms, according to Tonga's national legislation.