

Submission to the Joint Standing Committee on Foreign Affairs,
Defence and Trade — Foreign Affairs and Aid Subcommittee
Inquiry into Matters Related to Supporting Democracy in Our Region

Towards a Pacific Charter of Democracy: Democracy Through Law,
Practice and Research in the Region

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Introduction

This submission responds to the terms of reference for the Foreign Affairs and Aid Subcommittee inquiry into supporting democracy in our region in a legal context. Its focus is how international and regional law can inform Australia's partnerships with countries in our region to promote democracy and the international rules-based order. It surveys legal principles as well as democratic practice and raises questions for future research. It proposes the development and adoption of a Pacific Charter of Democracy. The submission interprets the committee's terms of reference by posing two questions addressing legal issues—namely:

- How can Australia partner with our neighbours in promoting our shared democratic values and protecting democratic institutions through international and transnational law?
- How can Australia partner with countries to achieve stability, democracy and good governance for the wellbeing of all the people of our region?

Legal Questions and Answers

How can Australia partner with our neighbours in promoting our shared democratic values and protecting democratic institutions through international and transnational law?

Australia could partner with our neighbours to further promote shared democratic values and protect democratic institutions through a treaty or convention. A convention is an agreement, ratified between parties,¹ which may be made by two or more states or under the auspices of the United Nations (UN).

UN treaties provide only limited opportunities for partnerships to promote and protect democracy whereas transnational law has already established a partnership between Australia and countries in our region, through the Pacific Islands Forum.

International law

The legal definition of democracy in international law has been most developed in relation to human rights. Its origin can be traced to Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights. Each treaty establishes rights to ‘take part in government’; accountability through periodic, genuine and free elections; and ‘equal access to the public service’. But this does not establish a right to democracy. As Gregory Fox notes, these treaties guarantee ‘rights that many viewed as constituent elements of democracy but not a right to democracy itself’.² This is significant because, as Henry Steiner explains, the limited rights in Article 25 permitted each side in the Cold War to

¹ Australian Law Dictionary, ‘International Treaty’, Oxford Reference (Excerpt from eBook) <
<https://www.oxfordreference.com/display/10.1093/acref/9780195557558.001.0001/acref-9780195557558-e-1788>>.

² G.H. Fox, ‘Democracy, Right to, International Protection’ in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008) [1].

claim that their political system complied with their treaty obligations.³

Despite earnest efforts by the United Nations to promote democratisation, with several reports on the subject by the Secretary-General, it has not established an express right to democratic government. Moreover, membership of the United Nations is not based on the status of countries as democracies, but ‘is open to all ... peace-loving states which accept the obligations contained in the present Charter’.⁴ The possibility of the United Nations developing a norm of democratic governance has also been hindered by the deterioration in relations between the Communist Chinese Government and democratic states. Many UN member states are not democratic, so it is not in their interest to develop a human right to democracy.⁵

Transnational Law

By contrast, an express right or entitlement⁶ to a democratic government does exist in regional treaties. Several regional organisations have committed their member states to introducing and maintaining a democratic system of government,⁷ including the African Union,⁸ the European Union⁹ and the Pacific Islands Forum.¹⁰

³ H.J. Steiner, ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Journal* 77.

⁴ *Charter of the United Nations* art 4(1).

⁵ Economist Intelligence Unit, *Democracy Index 2022: Frontline Democracy and the Battle for Ukraine* (Report, 2022) 3.

⁶ A right is variously defined as a: ‘Legal entitlement or justifiable claim (on legal or moral grounds) to have or obtain something, or to act in a certain way; the advantage or profit deriving from this.’ *Oxford English Dictionary* (online, 14 July 2023) ‘right’ (n 8). ‘A legal, equitable, or moral title or claim to the possession of property or authority, the enjoyment of privileges or immunities, etc.; (by extension) an entitlement considered to arise through natural justice (whether or not enshrined in legislation) and which is applicable to all members of a particular group.’ *English Dictionary* (online, 14 July 2023) ‘right’ (n 9a). ‘Generally, a benefit or claim entitling a person to be treated in a certain way.’ *Encyclopaedic Australian Legal Dictionary* (online, 14 July 2023) ‘right’.

⁷ S. Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press, 2005) 132; A. Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge University Press, 2011).

⁸ The Constitutive Act of the African Union provides as an objective the promotion of ‘democratic principles and institutions, popular participation and good governance’, and ‘Governments which shall come to power through unconstitutional

These commitments are variously expressed as objectives, rights and obligations, values and principles. For example, the Treaty on European Union provides that the ‘Union is founded on the values of respect for ... democracy ... [and] the rule of law’, and that sanctions may be imposed for ‘serious and persistent breaches’¹¹ of these values, such as suspension of voting rights in the European Council.¹²

Nevertheless, none of these instruments adequately addresses the current challenges that democracies face. The absence of a standard legal definition of ‘democracy’ in domestic and international agreements (compared with the clearly enunciated human rights) has hampered a more nuanced analysis of the protection of civil and political rights.¹³ Recently there has been a decline in political rights and civil liberties in democracies around the world.¹⁴ Most democratisation projects occur in the non-Western world and are

means shall not be allowed to participate in the activities of the Union’. *Constitutive Act of the African Union*, opened for signature 11 July 2000 (entered into force 26 May 2001) arts 3(g), 29, 30. See also *African Charter on Democracy, Elections and Governance*, opened for signature 30 January 2007 (entered into force 15 February 2012) arts 23–6.

⁹ In the Organization of American States’ Inter-American Democratic Charter, ‘[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it’, and member states may be suspended for ‘an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order’. *Organization of Inter-American States, Inter-American Democratic Charter* (11 September 2001) arts 1, 19–21. See also the *Charter of the Organization of American States*, opened for signature 30 April 1948, 119 UNTS 39 arts 2(b), 3(d), 4–9.

¹⁰ Pacific Islands Forum, *Biketawa Declaration* (28 October 2000). ‘[T]he Biketawa Declaration was invoked in 2009 to prevent Fiji’s participation in the Pacific Islands Forum’: H. Charlesworth, ‘Democracy and International Law’ (2015) 371 *Collected Courses of the Hague Academy of International Law* 43, 104, <[i.org/wp-content/uploads/2014/07/Biketawa-Declaration.pdf](https://www.hagueinstitute.org/wp-content/uploads/2014/07/Biketawa-Declaration.pdf)>.

¹¹ *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) arts 2, 7, 49.

¹² *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) arts 2, 7, 49.

¹³ T. Landman, ‘Democracy and Human Rights: Concepts, Measures, and Relationships’ (2018) 6(1) *Politics and Governance* 48, 56.

¹⁴ According to Freedom House, the decline in democracy began in 2005, representing a decline in freedom around the world. Freedom House, *Freedom in the World 2023: Marking 50 Years in the Struggle for Democracy* (Report, 2023) 3. According to the Economist Intelligence Unit’s measures of democracy, as of 2022, slightly less than one half (45.3 per cent) of the world’s population live in a democracy of some sort, although only 8 per cent reside in a ‘full democracy’—a drop from 8.9 per cent in 2015. Economist Intelligence Unit, *Democracy Index 2022: Frontline Democracy and the Battle for Ukraine* (Report, 2022) 3.

criticised by scholars for being overly technical and lacking nuance regarding the local context.¹⁵

Regional treaties and instruments promoting democracy have other limitations. Even the European Union, which has strong legal commitments,¹⁶ has been in protracted negotiations with these states to endeavour to restore them as fully democratic and compliant with rule of law principles.¹⁷

In the Australasian region, the Pacific Islands Forum similarly promotes democracy but faces significant challenges and is subject to important limitations. The Pacific Islands Forum is an international organisation of 18 Pacific countries, which adopted the Biketawa Declaration in 2000, committing its members to guiding principles, including: ‘Upholding democratic processes and institutions which reflect national and local circumstances, including the peaceful transfer of power, the rule of law and the independence of the judiciary, [and] just and honest government.’¹⁸

The Biketawa Declaration also maintained that:

Forum Leaders recognised the need in time of crisis or in response to members’ request for assistance, for action to be

¹⁵ H. Charlesworth, ‘Democracy and International Law’ (2015) 371 *Collected Courses of the Hague Academy of International Law* 43, 115–16; T. Berger & M. Lake, ‘Human Rights, the Rule of Law, and Democracy’ in A. Draude, T.A. Börzel & T. Risse, *The Oxford Handbook of Governance and Limited Statehood* (2018) 416.

¹⁶ H. Charlesworth, ‘Democracy and International Law’ (2015) 371 *Collected Courses of the Hague Academy of International Law* 43, 101.

¹⁷ Significantly, the European Union has imposed sanctions on states under art 7 that derogate from their respect for democracy, like Hungary and Poland. See Jennifer Rankin, ‘European Commission Takes Poland to Court over “Legal Polexit”’, *The Guardian* (online, 16 February 2023); Jan Strupczewski, ‘EU Approves Hungary’s Recovery Plan, but Withholds Cash, Moves to Freeze Other Funds’, *Reuters* (online, 1 December 2022) <<https://www.reuters.com/markets/europe/eu-approves-hungarys-recovery-plan-holds-cash-moves-freeze-other-funds-2022-11-30/>>; Zoltan Simon, ‘How EU is Withholding Funding to Try to Rein in Hungary, Poland’, *The Washington Post* (online, 2 January 2023) <https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef_story.html>.

¹⁸ Pacific Islands Forum, *Biketawa Declaration* (28 October 2000) cl 1.

taken on the basis of all members of the Forum being part of the Pacific Islands extended family. The Forum must constructively address difficult and sensitive issues including underlying causes of tensions and conflict (ethnic tensions, socio-economic disparities, lack of good governance, land disputes and erosion of cultural values).¹⁹

The declaration has authorised two remedies in response to a crisis or a request for assistance by a member of the Pacific Islands Forum.

First, it empowers Pacific states to intervene into other member states with their consent, such as occurred with the Regional Assistance Mission to Solomon Islands (RAMSI) (2003–17). RAMSI was ‘a partnership between the people and Government of Solomon Islands and fifteen contributing countries of the Pacific region’. The purpose of the mission was to assist ‘Solomon Islands to lay the foundations for long-term stability, security and prosperity—through support for improved law, justice and security; for more effective, accountable and democratic government; for stronger, broad-based economic growth; and for enhanced service delivery’.²⁰

Second, where there is no consent, the declaration authorises a member state to be suspended or partially suspended from membership if it seriously lacks good governance. In 2006 there was a coup d’état in Fiji. ‘The Pacific Islands Forum relied on its 2000 Biketawa Declaration to prevent Fiji’s participation in its deliberations in 2009.’²¹

In sum, intervention in a member state with consent or suspension from the forum without consent provide two remedies. More is needed to protect and promote democracy and the rule of law in the region.

¹⁹ Pacific Islands Forum, *Biketawa Declaration* (28 October 2000) cl 2.

²⁰ See Regional Assistance Mission to Solomon Islands, ‘What is RAMSI?’, <<http://www.ramsi.org/about/what-is-ramsi.html>> cited in Charlesworth (n 10) 104.

²¹ H. Charlesworth, ‘Democracy and International Law’ (2015) 371 *Collected Courses of the Hague Academy of International Law* 43, 104. <[i.org/wp-content/uploads/2014/07/Biketawa-Declaration.pdf](http://www.hagueinstitute.org/wp-content/uploads/2014/07/Biketawa-Declaration.pdf)>, p 46. See Pacific Islands Forum, *Biketawa Declaration* (28 October 2000), cl 2(iv), which refers to targeted measures.

In the *2050 Strategy for the Blue Pacific Continent*, Pacific Islands Forum leaders recently re-emphasised their commitment to its guiding values, which embrace ‘good governance, the full observance of democratic principles and values, the rule of law, the defence and promotion of all human rights, gender equality, and commitment to just societies’.²² The 2023 Forum Principles also include a commitment to respect for democratic processes and the rule of law.²³

It is noteworthy that the Pacific Islands Forum’s commitments, as expressed in the Biketawa Declaration, *2050 Strategy for the Blue Pacific Continent*, and Forum Principles of Good Leadership do not spell out ‘the full observance of democratic principles and values’. This means that the forum’s explanation of these rules and ideals is relatively underdeveloped compared with other regional organisations that commit their members to maintaining a democratic system of government.

Towards a Pacific Charter of Democracy

In accordance with the terms of reference of the Foreign Affairs and Aid Subcommittee, the legal commitments of the Pacific Islands Forum could be further developed through the adoption of a Pacific

²² Pacific Islands Forum, *2050 Strategy for the Blue Pacific Continent* (Suva: Pacific Islands Forum, 2022) 7.

²³ 'Letter dated 21 August 2003 from the Permanent Representative of New Zealand to the United Nations addressed to the Secretary-General', Pacific Islands Forum, 'Forum Principles of Good Leadership', Communiqué of the Thirty-fourth Pacific Islands Forum, Annex 1 GA UN Doc A/58/304 (22 August 2003).

<https://digitallibrary.un.org/record/502968/files/A_58_304-EN.pdf>. See principle

(i):

- i) Respect for and upholding of democratic processes and institutions, the rule of law and the independence of the judiciary and the legislature to: -
 - a) Allow for the peaceful and lawful transfer of power; and
 - b) Respect and promote the separation of powers by ensuring the financial autonomy of the judiciary and Parliament, and ensure that the judiciary and Parliament are free from unlawful interference by the executive.

Charter of Democracy. This could spell out legal principles and values to:

- express shared values and common assumptions of democracy; and
- define democracy to provide more nuanced protection of civil and political rights and the rule of law.

The Pacific Charter of Democracy could be relied on for guidance when there are disagreements about or derogations from democratic principles within Pacific Islands Forum member states, as occurred recently.

In 2022, the Solomon Islands Parliament extended its term from four to five years, delaying the National General Election until after the Pacific Games 2023, which it is hosting.²⁴ In 2022 and 2023, there were disagreements between the Kiribati Government and its judiciary regarding the separation of powers, which resulted in the government suspending five superior court judges.²⁵

How, then, could a Pacific Charter of Democracy be relied on to respond to fundamental challenges to democratic government and the rule of law in the region? The charter could provide guidance for elected representatives and government officials to act in accordance with democratic principles and practice, social movements and nongovernmental organisations in their public contentions, and as a source of law for domestic courts interpreting their constitutions or legislation. Thus, a Pacific Charter of Democracy would assist in

²⁴ *Constitution (Amendment) Act 2022* (Solomon Islands); *Solomon Times*, ‘Solomon Islands Cabinet Defends Proposed Extension of Parliament’ (Press Release, 16 March 2022) <<https://pina.com.fj/2022/03/16/solomon-islands-cabinet-defends-proposed-extension-of-parliament/>>.

²⁵ Anna Dziedzic, ‘The President vs the Judge: How Kiribati Came to a Constitutional Standoff’, *The Interpreter* (online, 27 September 2022) <<https://www.lowyinstitute.org/the-interpreter/president-vs-judge-how-kiribati-came-constitutional-standoff>>; Radio New Zealand, ‘Kiribati Government Hits out Again at Judiciary’ (Press Release, 16 September 2022) <<https://www.rnz.co.nz/international/pacific-news/474831/kiribati-government-hits-out-again-at-judiciary>>.

promoting the objectives of democracy and the rule of law in our region.

A Pacific Charter of Democracy must be developed in partnership with our neighbours. The Australasian region comprises numerous democratic states, including Australia, Kiribati, Fiji, Micronesia, Aotearoa New Zealand, Papua New Guinea, Solomon Islands, Tuvalu and Vanuatu.²⁶ Democratic governance is already established in these countries, providing fertile ground for developing principles of democracy.

After all, the norm of democratic governance rests on common assumptions, commitments and practices among the leaders and peoples of the democratic states. Many states within this region are well placed to ensure that regional principles have resonance with local communities,²⁷ because their democracies have evolved within diverse and localised histories and religions, and legal, political and economic systems.

The development of a statement elaborating on the guiding principles of the Biketawa Declaration and *2050 Strategy for the Blue Pacific Continent* must, of course, be developed in accordance with the principles of the sovereign equality of all nations, non-interference in internal affairs without consent and the international prohibition of the use of force.²⁸ Thus, the adoption and application of a Pacific Charter of Democracy in a member state of the Pacific Islands Forum would be subject to the express wording of its constitution or legislation.

²⁶ Freedom House, 'Country and Territory Ratings and Statuses, 1973–2023', *About the Report* (Excel Spread Sheet, 2023) <<https://freedomhouse.org/report/freedom-world#Data>>.

²⁷ P. Levitt & S. Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 441, 447.

²⁸ *Charter of the United Nations* art 2.

How can Australia partner with countries to achieve stability, democracy and good governance for the wellbeing of all the people of our region?

A Pacific Charter of Democracy to promote democracy within the region would be attractive for several reasons.²⁹ First, democracies are associated with peaceful international relations, which international relations scholars have backed up with evidence.³⁰ This does not mean that democracies do not engage in war;³¹ rather, it means that democratic states are not likely to fight interstate wars against each other.³² More generally, ‘democracy has an important pacifying impact on international politics’.³³ Various arguments have been advanced for the existence of the democratic peace. Both within and among democratic states, there is an assumption shared by political leaders that conflicts are to be resolved through a peaceful rule-based order. Democratic leaders also run the risk of losing the confidence of their party, interest groups and electorates if they engage in a war. They are likely to be suspicious of autocratic leaders who do not share their commitment to peaceful rule-based relations and need only convince a relatively small number of loyal supporters to undertake hostilities.³⁴ Of course, some non-democratic states may well adhere to the rules-based settlement of disputes and democratic leaders can start wars to maintain or enhance their popularity. However, in general, the aforementioned considerations make democracies

²⁹ S. Marks & A. Clapham, *International Human Rights Lexicon* (Oxford University Press, 2005) 68.

³⁰ J.L. Ray, ‘Democratic Peace’ in B. Badie, D. Berg-Schlosser & L. Morlino (eds), *International Encyclopedia of Political Science* (2011).

³¹ N. Bobbio, *The Future of Democracy* (1987) p 41.

³² N. Bobbio, *The Future of Democracy* (1987) 41; J.L. Ray, ‘Democratic Peace’ in B. Badie, D. Berg-Schlosser & L. Morlino (eds), *International Encyclopedia of Political Science* (2011).

³³ J.L. Ray, ‘Democratic Peace’ in B. Badie, D. Berg-Schlosser & L. Morlino (eds), *International Encyclopedia of Political Science* (2011); see also J.L. Ray & A. Dafoe, ‘Democratic Peace versus Contractualism’ (2018) 35(2) *Conflict Management and Peace Science* 193. Ray reviews the literature and empirical data on the correlation between democracy and peace.

³⁴ J.L. Ray, ‘Democratic Peace’ in B. Badie, D. Berg-Schlosser & L. Morlino (eds), *International Encyclopedia of Political Science* (2011).

cautious about entering militarised conflicts, particularly against other democracies.³⁵

Second, democracy is a form of governance protective of human rights. Andrew Clapham and Susan Marks describe the relationship as one of ‘mutual dependence’.³⁶ Hillary Charlesworth explains it as symbiotic: ‘[H]uman rights form central components of democracy and in turn democracy is critical to the protection of human rights.’³⁷ Scholars have provided evidence that democracy has demonstrably positive effects on civil and political rights.³⁸ Of course, autocratic governments can protect and enhance economic and social rights; China, for example, has been successful over the past three decades in lifting people out of poverty and meeting its Millennium Development Goals. But liberal democratic states such as Australia, Japan and South Korea are similarly successful in protecting economic, cultural and social rights,³⁹ and authoritarian states such as China offer little protection of the freedoms of speech, association and rights to participate in free and fair elections.⁴⁰ In sum, democracy encourages respect for peaceful relations among states, as well as human rights, thereby enhancing the wellbeing of all people within the region.

Recommendation

This submission proposes that the subcommittee recommend to the Australian Government the development of a Pacific Charter of Democracy, with a view to its adoption by members of the Pacific

³⁵ J.L. Ray, ‘Democratic Peace’ in B. Badie, D. Berg-Schlosser & L. Morlino (eds), *International Encyclopedia of Political Science* (2011).

³⁶ S. Marks & A. Clapham, *International Human Rights Lexicon* (Oxford University Press, 2005) 71.

³⁷ H. Charlesworth, ‘Democracy and International Law’ (2015) 371 *Collected Courses of the Hague Academy of International Law* 43, 87.

³⁸ Empirical studies have demonstrated the relationship. See, for example, T. Landman, ‘Democracy and Human Rights: Concepts, Measures, and Relationships’ (2018) 6(1) *Politics and Governance* 48, 56.

³⁹ For each country’s recent ICESCR reports, see Australia: Periodic Report, UN Doc E/C.12/AUS/5 (16 February 2016); Republic of Korea: Periodic Report, UN Doc E/C.12/KOR/4 (21 July 2016); Japan: Periodic Report, UN Doc E/C.12/JPN/3 (16 May 2011).

⁴⁰ Freedom House, ‘China’, *Freedom House* (Report, 17 March 2023) <<https://freedomhouse.org/country/china/freedom-world/2023>>.

Islands Forum. Such a charter could enhance partnerships with countries in our region to promote democracy and the international rules-based order in accordance with the principles of the Biketawa Declaration and *2050 Strategy for the Blue Pacific Continent*. The development of a Pacific Charter of Democracy would require further legal and political research as well as the engagement of the states of Australasia.

Acknowledgement

In answering the questions posed in this submission, I have drawn on my research for, and text of, a prepublication copy of ‘Developing a Right to Democracy in International Law: Protection by the Rule of Law?’. The published version appeared as a book chapter: G. Patmore, ‘Developing a Right to Democracy in International Law: Protection by the Rule of Law?’, in Brian Christopher Jones (ed.), *Democracy and the Rule of Law in China’s Shadow* (Hart Publishing, 2021). This submission has greatly benefited from my reading of D. Futaiasi and J. Wallis, ‘Law and Democracy in the Pacific Islands: Custom, Convention, and Courts’, in G. Patmore, *The Edward Elgar Research Handbook on Law and Democracy* (forthcoming).