

# REGIONAL RESPONSES TO DRUG TRAFFICKING THROUGH THE SOUTH PACIFIC

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## INTRODUCTION

For the last 40 years the principal drug-trafficking route in the Pacific has usually been identified as the traffic of opiates in an easterly direction across the northern Pacific from the Golden Triangle (the mountainous area lying between Thailand Laos and Burma) and the United States, a route usually used by couriers on commercial airline flights to Hawaii and California.<sup>1</sup> A south-easterly route also supplies opiates and to markets in Australia and New Zealand either down the West or East coasts of Australia. The drug trafficking route in a south-westerly direction across the South Pacific basin from the Americas to Australia and New Zealand is a relatively more recent development. This route transits through the islands in the South Pacific, and the main drugs involved are cocaine and methamphetamine. There has been mounting concern since the 2000s about this route in the Islands as well as in Australia and New Zealand. This growing anxiety has been accompanied by a lack of clarity about the extent of trans-shipment through the region and the method of transfer - whether through existing commercial sea routes, air transportation routes or on non-commercial vessels.<sup>2</sup>

According to an assessment of transnational organised crime threats carried out by the United Nations Office on Drugs and Crime (UNODC) in consultation with the Pacific Islands Forum (PIF), drug trafficking is a 'major' threat to the South Pacific region, particularly because the region operates as a transit zone between drug producers and drug markets.<sup>3</sup> It outlines the specific vulnerability of the region as follows:<sup>4</sup>

In the context of limited funding and resources, outdated legislation, increasing tourism, and a substantial geographical area to police, trafficking of such substances via sea, air and postal mechanisms presents significant law enforcement challenges for Pacific nations in general.

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<sup>1</sup> Lau Yuk-Kuen, 'The Evolution of Drug Trafficking in the Pacific Rim', at 1, available at <[https://www.unafei.or.jp/publications/pdf/RS\\_No54/No54\\_08VE\\_Kuen2.pdf](https://www.unafei.or.jp/publications/pdf/RS_No54/No54_08VE_Kuen2.pdf)> (accessed 16 December 2019).

<sup>2</sup> See Rob McCusker, 'Transnational Crime in the Pacific Islands: real or apparent danger?' Paper No. 308, *Trends and Issues in Criminal Justice*, Australian Institute of Criminology, March, 2006), 2, and sources cited there.

<sup>3</sup> United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in the Pacific: A Threat Assessment September 2016* (UNODC Regional Office for South East Asia and the Pacific, Bangkok, 2016) [UNODC] at iii.

<sup>4</sup> UNODC, above n 3, iii.

This article sets out what we know about the trans-Pacific route and how the region has responded at a legal and practical level, comparing it to other regional problems of this kind. It proceeds in two main parts. Part one surveys the publicly available information about the problem and its causes, before trying to distil what makes a transit zone vulnerable to drug traffickers and examining current analysis of the impact on the South Pacific. Part two maps the current legal measures adopted at a regional level to try to provide a harmonised normative barrier among Pacific Island Countries and Territories (PICTs) to penetration by drug-trafficking organisations, and the practical law enforcement measures taken at a regional level to try to interdict drug-trafficking through the region. To conclude, the article reflects on the situation and speculates about what regional measures might be taken in the future to strengthen resistance to penetration by drug-trafficking organisations.

## **PART ONE: THE NATURE OF THE PROBLEM**

### **A growing problem**

Gordon notes that '[c]rime, like business, is essentially neutral in international politics: it will go where demand takes it and enforcement allows it.'<sup>5</sup> And that is what appears to be happening in the South Pacific. A recent article by Lyons writing in *The Guardian* labelled the Pacific 'The New Drug Highway'.<sup>6</sup> A follow up article by Sousa –Santos argues that the region was in growing danger of becoming a 'semi-narco region'.<sup>7</sup>

The label 'semi-narco region' suggests that the problem of drug-trafficking has potential to threaten the integrity and security of Pacific Island states in a fundamental fashion. 'Narco-region' is a regional analogue to the now common term 'narco-state', a vague identifier used to characterise states in order to stimulate external intervention. As Chouvy points out, 'narco-state' makes the 'ideal menace or threat' because it provides rhetorical leverage to provoke a response from external political actors.<sup>8</sup> The label is itself a securitising speech act – it serves to construct drug trafficking as a threat to the security and national sovereignty of states in and on the borders of the region.<sup>9</sup>

In the South Pacific, 'semi-narco-region' is being used to try to provoke a response from regional actors, particularly Australia and New Zealand, to get them to increase resources for law enforcement in the region and their level of international cooperation. But is there really a basis in the prevailing objective conditions in the South Pacific for applying this label? This calls for some investigation of how the label is justified.

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<sup>5</sup> Sandy Gordon, 'Regionalism and Cross Border cooperation against crime and Terrorism in the Asia Pacific' (2009) 5(4) *Security Challenges* 75 at 79.

<sup>6</sup> Kate Lyons, 'The New Drug Highway: Pacific Islands at Centre of Cocaine Trafficking Boom', *The Guardian online*, 24 June 2019, available at <<https://www.theguardian.com/world/2019/jun/24/the-new-drug-highway-pacific-islands-at-centre-of-cocaine-trafficking-boom>> (accessed 25 June 2019).

<sup>7</sup> Jose de Sousa Santos, 'The Pacific is in danger of becoming a semi-narco region', *The Guardian online*, 26 June 2019, available at <<https://www.theguardian.com/world/commentisfree/2019/jun/26/the-pacific-is-in-danger-of-becoming-a-semi-narco-region>> (accessed 16 December 2019).

<sup>8</sup> See Pierre-Arnaud Chouvy, 'The Myth of the Narco-State' 20 *Space and Polity* (2016) 26 available at <<https://doi.org/10.1080/13562576.2015.1052348>> (accessed 20 December 2019).

<sup>9</sup> On securitization as a form of extreme politicisation justifying an exceptional response see Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework of Analysis* (1998), 23

Application of the label ‘narco-state’ is the result of a taxonomic exercise based on an estimation of the degree of penetration of the state in question by drug-trafficking. Relevant criteria for making this estimation include the level of drug-traffickers’ political and territorial control in the state, the depth of drug-trafficking organisation penetration of the state’s institutions, and the relative size of the drug-trafficking economy to the legal economy in the state.<sup>10</sup> These political, territorial, institutional, and economic indicators are also useful in setting a threshold for making a similar judgment about a region – that it is a “semi-narco-region”.

Sousa-Santos’s suggestion that the South Pacific has the potential to be a ‘semi-narco region’ is based inter alia on evidence that large-scale drug trafficking operations involving cocaine and methamphetamine packed into the holds of sailing boats are using the islands as a transit point between the United States and the Latin America on the one hand and Australia and New Zealand on the other.<sup>11</sup> Part of the substantiation for this conclusion comes from the fact that hundreds of kilograms of cocaine has washed up on remote Pacific beaches, ships carrying drugs have run aground on coral reefs in the region, and local fisherman have discovered huge quantities of drugs stored in underwater nets attached to GPS beacons.<sup>12</sup> It is claimed that the bulk of the cocaine entering Australia is channelled through the PICTs, passing through hubs in New Caledonia, Tonga, Vanuatu and Fiji.<sup>13</sup> Australian Federal police have seized 7 ½ tons of cocaine in small vessels in the region.<sup>14</sup> Individual drug seizures include more than 700 kg of cocaine in Vanuatu in 2013, six major seizures of drugs in French Polynesia since 2016, and in 2017 a seizure of a yacht off New Caledonia with an Australian record seizure of nearly 1 ½ tons of cocaine hidden on board and a similar sized haul just off Australia’s East Coast in a yacht (allegedly loaded with drugs from a mothership it rendezvoused with in the South Pacific weeks earlier).<sup>15</sup> As early as 2012 the concern was expressed that criminal groups use the South Pacific as a staging post transferring legal goods from other ships to smaller vessels that are harder to detect or appear innocent.<sup>16</sup> More recently, in 2019, evidence has come to light of links between Australian biker gangs and Mexican drug cartels, using the Pacific as a trans-shipment region.<sup>17</sup> Fiji and PNG are cited as specific risks because they are significant shipping

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<sup>10</sup> Chouvy, above n 8, 35 primarily focuses on the latter.

<sup>11</sup> Lyons, above n 6, 1. See generally UNODC, above n 3, 17.

<sup>12</sup> Lyons, above n 6, 2. See Daniel Bandolino and Anthea McCarthy-Jones, ‘The Mexican Drug Trade and Australia’, *Australia Outlook*, Australian Institute of International Affairs, 21 September 2016, 1, available at <<https://www.internationalaffairs.org.au/australianoutlook/the-mexican-drug-trade-and-australia/>> (accessed 16 December 2019).

<sup>13</sup> Bandolino and McCarthy-Jones, above n 12, 1.

<sup>14</sup> Lyons, above n 6, 2.

<sup>15</sup> Lyons, above n 6, 2.

<sup>16</sup> ONE News ‘Concern Pacific Being Used as Illegal Activity Highway’ (29 August 2012) TVNZ cited in James Headley, ‘Near Abroads and Arc of Instability: Conceptualising the Region in the South Pacific and Eurasia’ (2012) 18 *Canterbury Law Review* 15, 38.

<sup>17</sup> Agence France-Presse, ‘US drug bust exposes ties between Mexican drug cartels, Aussie biker gangs’, *Straits Times*, 10 February 2019, <<https://www.straitstimes.com/asia/australianz/us-drug-bust-exposes-ties-between-mexican-cartels-aussie-biker-gangs>> (accessed 16 December 2019).

hubs<sup>18</sup> but the whole region is said to be exposed to trafficking involving foreign fishing vessels and the yacht traffic.<sup>19</sup>

These conclusions are inferred from individual examples of seizures and discoveries. There is no clear information as to the size of this transit traffic, nor of the traffic into the PICTs themselves. This was pointed out by Warner in 2008<sup>20</sup> and is still true. Sophisticated analysis of drug volumes such as that done in regard to the traffic from South America into the United States, has not been done in regard to the South America – PICTs – Australia/NZ route.<sup>21</sup> Nor is it well understood how the geographical nature of the region - in this case the actual dispersal of islands across the South Pacific, relative proximity of the West Coast of South America and the eastern coast of East Southeast Asia, and commercial transport routes between the islands and externally - impacts upon and channels this cross-regional traffic through specific island way-stations.<sup>22</sup> And while the threat of transnational organised crime has been identified, no comprehensive information is available in the public space identifying the level of external and internal (in the PICTs themselves) involvement in these networks. Nor is there much available analysis of the role and impact of facilitating factors such as corruption, document fraud, identity theft and money laundering.<sup>23</sup> This dearth of data makes it difficult to analyse whether the threat is trivial or nontrivial, to identify which island states are most vulnerable and how vulnerable they are, and finally to make a judgment about the potential for the region to subside politically, territorially, institutionally and economically into the hands of drug traffickers.

However, a useful comparative way of evaluating what we do know is to examine the experience of other transit-states and what that experience reveals about how drug transshipment begins to impact on vulnerable transit states.

### **Characteristics and experience of transit states that become so-called “narco-states”: the West African experience**

West Africa is an example of a transit region whose geographic proximity between source and market has led to substantial penetration by drug-trafficking organisations over the last three decades.<sup>24</sup> The West African route emerged because of the highly effective interdiction of

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<sup>18</sup> Blair Ensor and Tony Wall, ‘Corruption in Paradise: International crime groups target vulnerable Pacific countries’, *Stuff*, 22 November 2016, 1, available at <<https://www.stuff.co.nz/world/south-pacific/85785437/corruption-in-paradise-international-crime-groups-target-vulnerable-pacific-countries>> (accessed 16 December 2019).

<sup>19</sup> Karen McVeigh, ‘Drug Trafficking at Sea is Devastating Island States, Ministers Say’, *The Guardian*, 16 October 2018, 1, available at <<https://www.theguardian.com/environment/2018/oct/16/drug-trafficking-at-sea-is-devastating-island-states-ministers-say>> (accessed 16 December 2019).

<sup>20</sup> See Robin Warner, ‘Joining Forces to Combat Crime in the Maritime Domain: Cooperative Maritime Surveillance and Enforcement in the South Pacific Region’ (2008) 8 *New Zealand Armed forces Law Review* 1, 3; McCusker, above n 2, 4.

<sup>21</sup> See, e.g., Michael P Atkinson, Morshe Kress and Roberto Szechtman, ‘Maritime Transportation of Illegal Drugs from South America’ (2017) 39 *International Journal of Drug Policy* 43-51.

<sup>22</sup> See Gordon, above n 5, 75 at 76.

<sup>23</sup> McCusker, above n 2, 5.

<sup>24</sup> See Anotonio Mazzitelli, ‘Transnational Organised Crime in West Africa: The Additional Challenge’ (2007) 83(6) *International Affairs* 1075-1084; Ashley Neese Bybee, ‘The Twenty-first Century Expansion of the Transnational Drug trade in Africa’ (2012) 66(1) *Journal of International Affairs* 69, 70.

drugs trafficked between Central and South America and the United States by the maritime shield thrown across the Caribbean and stronger US border customs control, which diverted the cocaine traffic to Europe.<sup>25</sup> In typical push-down pop-up fashion, the traffic re-emerged routed through vulnerable states in West Africa. A key factor in this rerouting was as Bybee notes ‘simple geography’, the ideal positioning of West Africa between points of production in Latin and South America (cocaine) and of consumption in Europe.<sup>26</sup> But there were other conducive characteristics intrinsic to the governance and economics of these West African states, mostly related to their incapacity to engage in enforcement of the law and interdiction. Bybee elaborates:

This low-risk environment is also a low-cost one, where the cost of bribing local officials and authorities is relatively cheap due to extreme poverty, unemployment, and perpetual salary arrears, rendering almost everyone vulnerable to corruption.<sup>27</sup>

In some West African countries such as Guinea-Bissau (sparsely populated, with an archipelago of islands reasonably proximate to South America, and among the poorest countries in the World), the relative absence of the rule of law meant that very little had to be done by drug traffickers in order to construct a platform for onward trans-shipment to Europe.<sup>28</sup> The poverty driven diaspora of mainly Nigerians and Ghanaians provided ideal ground for establishing local and global networks in West Africa. Poverty also made for a ready supply of individuals willing to work as couriers, an activity further facilitated by direct flights to European capitals. The alleged willingness of West Africans to work in illicit markets to feed resources into their own personal networks is a more contentious factor.<sup>29</sup>

The drug traffic has had a destabilising impact in West Africa. It has displayed a potential to finance insurgencies and a potential to expand into other illicit markets, and has undermined governance, anticorruption and public accountability programmes.<sup>30</sup> While it is not true that drug trafficking organisations actually exercise territorial or political control over West African states, some of these states have been heavily penetrated by drug-trafficking organisations. In Resolution 1876 (2009), for example, the UN Security Council, which had been monitoring the situation in Guinea Bissau for some time, noted that<sup>31</sup>

...the situation in Guinea-Bissau continues to be extremely fragile in particular as a result of increased drug trafficking and organized crime that could pose a threat to regional stability, and should also be addressed by an approach of shared responsibility.

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<sup>25</sup> Bybee, above n 24, 70.

<sup>26</sup> Bybee, above n 24, 71.

<sup>27</sup> Bybee, above n 24, 72.

<sup>28</sup> Guinea Bissau, for example, had seven Prime Ministers between 2015 and 2019.

<sup>29</sup> Bybee, above n 24, 72.

<sup>30</sup> Bybee, above n 24, 70.

<sup>31</sup> S/RES/2404 (2018), 28 February 2018, preambular para 11.

Two years previously a report by the UN Secretary General which had raised concern about Guinea-Bissau's use as a transit point for cocaine, had noted a number of different incidents involving drugs and then stated:<sup>32</sup>

There is no reliable data available on drug seizures, the volume of drugs in transit through Guinea-Bissau or the local consumption of narcotics. However, there is a growing consensus that Guinea-Bissau is a major drug trafficking transit point in the subregion.

In 2019, in Resolution 2458 the Security Council reiterated its concerns about 'the threat posed by drug trafficking' to peace and stability in the sub-region but noted 'the need to tackle the problem of drug trafficking in the countries of origin, transit and final destination on the basis of common and shared responsibility.'<sup>33</sup> Drug trafficking penetration of West Africa in a territorial, political, institutional and economic sense appears to justify the label 'semi-narco region'.

### **The South Pacific is not a 'semi narco-region' but is vulnerable**

In comparison it is fairly clear that the South Pacific is not currently a 'semi narco-region'. The situation in the region would have to deteriorate considerably for it to fall into such a category. However, that is not to say that the South Pacific region is not vulnerable to these externally generated criminal flows or is not feeling the impact of those flows.

McCusker identifies the following characteristics as rendering the PICTs particularly vulnerable to transnational crime:<sup>34</sup> weak and underdeveloped governance; corruption; a lack of law enforcement capacity; weak economies; and geographic characteristics including the wide dispersal of islands, remote coastlines and low population density. Power et al identify the following contextual factors in the Pacific as influencing drug use patterns: governmental stability, exposure to foreign visitors, migration patterns, culture and religion.<sup>35</sup> Poverty, potential for corruptibility (officials' salaries are poor and often not paid), diasporas, relatively wealthy expatriate permanent and transitory populations based on tourism may also play a role. It is difficult to know to what extent cultural and legal diversity both generally and in respect of drug legislation facilitates the transshipment of drugs across the region.<sup>36</sup> On the other hand, strong local morality and the influence of churches may serve as a countervailing tendency. In regard to all of these characteristics, however, McCusker warns against regionalising judgments about penetration from examples in particular islands:

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<sup>32</sup> *Report of the Secretary-General on developments in Guinea-Bissau and on the activities of the United Nations Peacebuilding Support Office in that country*, UN DOC S/2007/576, 28 September 2007, para 22, available at <[https://www.un.org/ga/search/view\\_doc.asp?symbol=S/2007/576](https://www.un.org/ga/search/view_doc.asp?symbol=S/2007/576)> (accessed 23 December 2019).

<sup>33</sup> S/RES/2458 (2019), 24 February 2019, preambular paras 24 and 25.

<sup>34</sup> McCusker, above n 2, 2.

<sup>35</sup> Robert Power, Lucinda Schmich and Vili Nosa, 'A Response for Substance and Harm Reduction in Pacific Island Countries and Territories' (2015) 12 *Harm Reduction Journal* 3 available at <<https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/s12954-015-0080-z>> (accessed 16 December 2019).

<sup>36</sup> McCusker, above n 2, 4.

It is arguable that in terms of political economic and social development, the Pacific Islands are not homogenous in nature ... And that accordingly the nature and degree of transnational crime infiltration is likely to be heterogeneous.<sup>37</sup>

Vulnerability does not in itself mean actual penetration, only an increased potential for such penetration should it come. However, there is an increasing traffic through the region, at a volume sufficient to generate interest from Australian and New Zealand law enforcement agencies and international organisations such as the UNODC.

### **Whose problem?**

The production and consumption of cocaine and methamphetamine has historically not been intrinsic to the South Pacific. The principal consumers are found largely in Australia and New Zealand; per capita consumption of cocaine in Australia is the highest in the world in these countries while the cost per gram is higher than anywhere else in the world.<sup>38</sup> The Antipodean appetite for cocaine and methamphetamine determines the flow of the drug across the Pacific, and the PICTs are considered to be ‘victims’ of this transshipment.<sup>39</sup>

Drug use patterns in the South Pacific are changing, however. While drugs like cannabis have a longer more endogenous history in the region,<sup>40</sup> reports suggests that the growth in external supply of methamphetamine in particular has been accompanied by the growth in addiction in Pacific Island communities as well as associated gang violence, crime and police corruption.<sup>41</sup> Local drug markets appear to be burgeoning and are being fed by payment in drugs for local assistance in the traffic.<sup>42</sup> Other negative effects include increased crime and increased instances of the exchange of sex for drugs.<sup>43</sup> The growth of local use is heavily associated with external influence. Islanders returning from abroad have been identified as agents of increases in drug use.<sup>44</sup> Deportation of individuals with criminal convictions from Australia, New Zealand and the US to Pacific countries is said to have increased recruitment into criminal activities in the region.<sup>45</sup> Chapters of Australian Biker gangs commonly associated with the traffic have also been set up in the islands.<sup>46</sup> Fishermen are vulnerable to inducement because

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<sup>37</sup> McCusker, above n 2, 2.

<sup>38</sup> Lyons, above n 6, 2.

<sup>39</sup> See Kate Lyons, ‘Pacific Nations are “Victims” of Australian and New Zealand Appetite for Drugs, Experts say’, *The Guardian*, 26 June 2019, available at <<https://www.theguardian.com/world/2019/jun/26/australia-and-new-zealand-urged-to-step-up-fight-against-pacific-drug-trade>> (accessed 16 December 2019).

<sup>40</sup> See Lucinda Schmich and Robert Power, *Situational Analysis of Drug and Alcohol Issues and Responses in the Pacific* (2010).

<sup>41</sup> Lyons, above n 39, 2; Barbara Dreaver, ‘Tonga Steps up War on Meth Trade with Multiple Arrests, over 30kg of drug Seized’ *One News*, 22 July 2019 at <<https://www.tvnz.co.nz/one-news/world/tonga-steps-up-war-meth-trade-multiple-arrests-over-30kg-drug-seized>> (accessed 1 June 2020); Giff Johnson, ‘Hard drug use widespread in Marshall Islands capital’, RNZ (online edition, New Zealand, 19 May 2020) available at <<https://www.rnz.co.nz/international/pacific-news/416996/hard-drug-use-widespread-in-marshall-islands-capital>> (accessed 25 June 2020).

<sup>42</sup> Lyons, above n 39, 2.

<sup>43</sup> de Sousa Santos, above n 7, 1.

<sup>44</sup> See Power, Schmich and Nosa, above n 35, 3.

<sup>45</sup> de Sousa-Santos, above n 7, 1.

<sup>46</sup> Ensor and Wall, above n 18, 1.

of low fishing stocks.<sup>47</sup> Experts suggest that transnational crime groups are factoring in the cost of bribing local officials as they use Pacific Island countries as gateways for smuggling drugs.<sup>48</sup>

The full extent of the domestic penetration of drugs in PICTs is not well understood and nor is its knock-on relationship with corruption, the quality of governance and impact on achievement of development goals in the PICTs. There is a clear sense, however, that PICT law enforcement authorities are facing a problem that is beyond their capacity. Fiji, for example, is identified as the heart of the trafficking across the Pacific, and Fijian police complain of having only one patrol boat to patrol 330 islands in a 194000sqkm archipelago.<sup>49</sup>

### **Criticism of Australia and New Zealand's response**

Commentators consider the law enforcement response to drug-trafficking through the South Pacific region unsatisfactory. Sousa Santos, for example, argues that regional indigenous criminal syndicates capitalising on this emerging local market have moved faster than regional responses.<sup>50</sup> Authorities in the islands feel that Australia and New Zealand are dedicating insufficient resources to resolving this problem, and that Australian and New Zealand authorities are not fully acknowledging their responsibility.<sup>51</sup> Sousa Santos believes that Australia and New Zealand are driven to secure their borders 'and to utilise the Pacific almost as a shield'.<sup>52</sup> The idea that Australia and New Zealand are using the Pacific as a shield only relates to the trans-Pacific trade from South America. To some extent the Pacific appears to be a new drugs market created in part by the Australia's dumping of criminals with experience with methamphetamine back 'home'. But Sousa Santos's general point about responsibility is still apt:<sup>53</sup>

If we are to succeed, Australia and New Zealand need to take responsibility and partner with Pacific island states to take decisive strategic action, including improved intelligence sharing; a review of Australian, New Zealand and United States domestic policy settings around deportees; supporting the development (but not taking the lead) of inter-Pacific island law enforcement and customs operations and responses; stronger engagement by Australian and New Zealand intelligence and law enforcement agencies with their counterparts at the point of origin for drug trafficking; and greater understanding of the role traditional power structures have in creating and sustaining resilience.

Although a number of aspects of this problem lie totally beyond Pacific Island control, they do (at least in theory) lie within Australian and New Zealand control: demand for drugs in Australia and New Zealand, deportation of criminals back into the Pacific and customs control

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<sup>47</sup> McVeigh, above n 19, 1.

<sup>48</sup> UNODC official Jeremy Douglas as cited in Ensor and Wall, above n 18, 1.

<sup>49</sup> Kate Lyons, 'Cocaine used as Washing Powder: Police struggle with Pacific Drug Influx', *The Guardian*, 23 June 2019, 1, available at <[https://www.theguardian.com/world/2019/jun/24/cocaine-police-on-the-frontline-of-the-pacific-drug-influx-fiji-fsm->](https://www.theguardian.com/world/2019/jun/24/cocaine-police-on-the-frontline-of-the-pacific-drug-influx-fiji-fsm-) (accessed 17 December 2019).

<sup>50</sup> de Sousa-Santos, above n 7, 1.

<sup>51</sup> Lyons, above n 39, 2.

<sup>52</sup> Lyons, above n 39, 2.

<sup>53</sup> de Sousa Santos, above n 7, 1.

of vessels and aircraft leaving Australia and New Zealand for the PICTs. The PICTs can try to improve their own legal infrastructures and their practical law enforcement capacity to cope with the problems in their own jurisdictions, and in this regard Australia and New Zealand can play a supportive role. What has been done at a regional level and what more could be done?

## **PART TWO: REGIONAL MEASURES AGAINST DRUG TRAFFICKING**

### **Introduction**

Differences in the scope and currency of drugs and related legislation in the PICTs are potentially conducive to penetration by drug trafficking because absence of certain offences (such as drug money laundering) and certain substances from drug schedules (such as methamphetamine precursors) may impact on the ability of police to search for and seize drugs and the freeze and confiscate the proceeds of drug crime, and to go on and prosecute. This makes for impunity gaps and difficulties in cooperating with states that do have these legal powers. Legal capacity in the region depends on a number of interlocking factors, including (i) the level of legal development of a state at a national level, and (ii) the existence of regional measures to enhance a state's own level of legal development and to enhance its legal capacity to cooperate at an international level. Legal adequacy is not in itself enough, however; (iii) institutional arrangements need to be made to enable cooperation at a general and tactical level.

### **National criminal laws**

Any analysis of legal adequacy begins with assessment of legal adequacy at a national level. Any intervention developing legislative capacity in regard to suppression of drug-trafficking in the PICTs has to confront a very low level of general legal development. Fully developed national legal frameworks for responding to drug trafficking have a potentially tremendous scope: they include legislation criminalising the traffic itself; associated legislation criminalising money-laundering and removing bank secrecy; legislation permitting search for and seizure of drugs and tracing and seizing/freezing of assets; legislation permitting extradition of drug traffickers and formal legal assistance in regard to drug-trafficking in the gathering of evidence in the tracing, freezing and seizing of bank accounts; legislation permitting assistance between law enforcement in the gathering of intelligence about drug-trafficking and assistance of an operational kind; and legislation permitting law enforcement at sea.

It all turns, however, on the crimes themselves, the focus of this article. In this regard, the region is not keeping up to date. The UNODC study, which dates to 2016, notes that only four of the PICTs are party to all three of the drug conventions and that as a result drug related legislation in some PICTs is 'outdated and ill-equipped to address emerging and pertinent drug issues'.<sup>54</sup> In 2019, for example, only Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Marshall Islands, Nauru, New Zealand, Palau, Samoa, Tonga and Vanuatu were party to the UN Drug Trafficking Convention (although French Polynesia is a party

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<sup>54</sup> UNODC, above n 3, 17,

through France).<sup>55</sup> The most notable exception is Papua New Guinea, which has not signed the 1988 Drug Trafficking Convention<sup>56</sup> apparently because it has not legislated against certain synthetic drugs.<sup>57</sup> The 1961<sup>58</sup> and 1971<sup>59</sup> conventions also show poor uptake. This lack of engagement is reflected in the fact that only Australia, New Zealand and Papua New Guinea attended the 1988 Diplomatic Conference which adopted the Drug Trafficking Convention. PICTs have been slow to make formal commitments to these international drug control treaties because of the combination of a perceived absence of local impact of drug-trafficking (up until now that is), a lack of resources, and other more pressing priorities. Lack of engagement has led in turn to a concern in Australia and New Zealand that the PICTs form a potential haven for regional drug trafficking affecting them directly.<sup>60</sup>

### **Regional cooperation: the law**

Regionalism can serve as a way of increasing cooperation against criminality affecting the region by streamlining and operationalising the international response. It can do so through formal law-making that frames national law-making and it can do so through agreements that frame law enforcement activity including sharing of information and intelligence, joint investigations and hardening of boundaries around the region. I will deal with each of these aspects in turn.

There are no binding regional treaties in regard to the suppression of drug trafficking in the South Pacific. The principal regional organisation, the Pacific Islands Forum,<sup>61</sup> has responded through regional soft law in the form of declarations by the annual PIF leaders meeting.

In the Honiara Declaration, made by the PIF in 1992, the PIF expressed concern about threats to security of its members, drew attention to the continued necessity for focusing on law enforcement cooperation in the region, and acknowledged drug trafficking as an issue for the

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<sup>55</sup> UN Treaty Section, Status of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, available at <<https://treaties.un.org>> (accessed 2 June 2020).

<sup>56</sup> Vienna, 20 December 1988, 1582 UNTS 95, in force 11 November 1990

<sup>57</sup> UNODC, above n 3, 17.

<sup>58</sup> New York, 30 March 1961, 520 UNTS 151, in force 13 December 1964. East Timor, Kiribati, Nauru, Samoa, Tuvalu and Vanuatu are not party to the 1961 Single Convention on Narcotic Drugs – see United Nations Treaty Series, Status of Ratification of the Single Convention on Narcotic Drugs, see <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-15&chapter=6&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-15&chapter=6&clang=_en)> (accessed 2 June 2020).

<sup>59</sup> Vienna, 21 February 1971, 1019 UNTS 175, in force 16 August 1976. East Timor, Kiribati, Nauru, Samoa, the Solomon Islands, Tuvalu and Vanuatu are not party to the 1971 Convention on Psychotropic Substances - see United Nations Treaty Series, Status of Ratification of the Convention on Psychotropic Substances, see <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=VI-16&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-16&chapter=6&clang=_en)> (accessed 2 June 2020).

<sup>60</sup> See, for example, the comments by New Zealand MP Shane Jones – EA Roy, ‘MP Blames Pacific “failed states” for New Zealand’s drug problems’ in *The Guardian*, 21 May 2018, <<https://www.theguardian.com/world/2018/may/21/new-zealand-drugs-mp-blames-pacific-failed-states-drug-problems>> (accessed 6 October 2018). See more generally Ciara Henshaw, ‘Strengthening the Rule of Law in the Pacific through International Crime Cooperation’ (2008) 15 *Australian International Law Journal* 109 at 115.

<sup>61</sup> On the PIF see Neil Boister, ‘New Zealand and the Pacific’ in Alberto Costi (ed), *International Law – A New Zealand Perspective* (2020), chp 7 at 7.4.1.

region.<sup>62</sup> At the level of legal development, the PIF recognised the necessity for further legislation in some areas concerning drug issues. The PIF noted in paragraph 13:

The Forum expressed its continuing concerns over the grave social consequences of drug abuse and the illegal traffic in narcotic drugs. It recognised the need for cooperation in international efforts to address the problems, and observed that the recommendations adopted in the area of mutual criminal assistance would go some considerable way to assist. The Forum felt that the primary role in cooperation at the operational level to combat the drug problem lay with other organisations, in particular Customs and Police, and directed the Forum Secretariat to assist the efforts of other bodies to the fullest possible extent. Forum members agreed to accord priority to ratifying and implementing the 1988 UN Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances.’

The Honiara Declaration thus serves as a political undertaking that relies (a) for legal structure on the international drug conventions and on national criminal laws, and relies (b) for the enforcement of jurisdiction of its member countries on existing national law enforcement agencies.

Drug trafficking has not been an explicit focus since the Honiara Declaration. The PIF’s 1992 Nasonini Declaration on Regional Security<sup>63</sup> simply calls for members to introduce legislation and develop national strategies to combat drug trafficking and money laundering,<sup>64</sup> while the 2018 Boe Declaration<sup>65</sup> characterises transnational crime generally as a security threat.<sup>66</sup> Instead of the formal regional legislation of the kind undertaken by the European Union, for example, the PIF has relied on assisting reform of domestic law in member states and countries to improve the overall legal response in the region.

The PIF made a strong effort in the period following the adoption of the Honiara Declaration into the upgrading of the domestic drug-trafficking legislation of Forum Island States. Some PICTs responded speedily, as they began to realise their own vulnerability left them exposed to exploitation. Amending its Dangerous Drugs Act in 1995, Kiribati noted that:<sup>67</sup>

The recent prosecution and conviction by the Court for importation and possession of drugs has unfortunately highlighted the fact that Kiribati is now and in the future no longer immune as commonly believed for a long time from drug-trafficking and other associated evils relating to drug dealings which other pacific countries and the world at large had suffered and still suffered up to now. Consequently Kiribati will now need to

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<sup>62</sup> South Pacific Forum, *Declaration by the South Pacific Forum on Law Enforcement Cooperation*, attachment to the *Forum Communiqué* of the 23rd South Pacific Forum, Honiara, Solomon Islands (8–9 July 1992) <[www.forumsec.org](http://www.forumsec.org)> at [2]. See Boister, above n 61, at 7.4.2 on the Honiara Declaration generally.

<sup>63</sup> Annexed to the Forum Communiqué, Thirty Third Pacific Islands Forum, Suva, Fiji Islands, 15–17 August, 2002.

<sup>64</sup> Nasonini Declaration, above n 63, [8].

<sup>65</sup> Annexed to the Forum communiqué, Forty-Ninth Pacific Islands Forum, Yaren, Nauru 3–6 September, 2018, PIFS(18)(10).

<sup>66</sup> Boe Declaration, above n 65, [7].

<sup>67</sup> Dangerous Drugs (Amendment) Act 1995, Explanatory Memorandum, [2], available at <[http://www.paclii.org/ki/legis/num\\_act/dda1995260/](http://www.paclii.org/ki/legis/num_act/dda1995260/)> (accessed 24 June 2020).

broaden its horizon and vision as to future drug problems which are likely to invade our shores in the future.

Nevertheless, a stock-take 10 years later by the Forum Secretariat Forum Regional Security Committee (FRSC) meeting held in Fiji in 2002, revealed serious legislative gaps in PIF member states and countries.<sup>68</sup> The Forum Secretariat recorded that in 1997 FRSC members had agreed to provide information on steps to implementation<sup>69</sup> and in 1998 the FRSC had adopted an action plan to enable members to enact the relevant legislation by 2000, and specific funds had been put aside for this purpose.<sup>70</sup> It also pointed out that at several Forum leaders' meetings the lack of progress had been noted and while capacity had been identified as a problem, calls for greater political commitment to legislative reform had been made.<sup>71</sup> The Forum Secretariat explained this slow progress by PIF member states as the result of 'competing priorities, lack of personnel to review the drafting assistance provided, changes in government or senior legal offices, and social unrest.'<sup>72</sup> The survey of legislation compiled by the Forum in 2001<sup>73</sup> revealed that the Cook Islands was considering a Misuse of Drugs Bill,<sup>74</sup> in the Federated States of Micronesia a Controlled Substances Act 2000 was pending,<sup>75</sup> in Kiribati the relevant law was a Dangerous Drugs Ordinance 1977,<sup>76</sup> Nauru had no relevant legislation,<sup>77</sup> Palau was waiting while a general review of its criminal laws was being undertaken,<sup>78</sup> Samoa was seeking instructions on details of policy and penalties,<sup>79</sup> and Tonga had no current legislation.<sup>80</sup>

The 2002 FRSC meeting observed that in spite of the Honiara Declaration appropriate legislative change was not occurring in the Forum island states:<sup>81</sup>

2. The inability of current drug legislation within the region to provide a common base for law enforcement agencies to operate from both a national and regional basis was noted with concern at the 2000 Forum Regional Security Meeting (FRC) in Vanuatu. Legislation is not keeping pace with advances in technology, such as access to computers and financial records, the Internet, adequate maximum penalties, internal concealment, destruction of evidence, and the issue of controlled deliveries.

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<sup>68</sup> Forum Secretariat, Forum Regional Security Committee Meeting, Tanoa Hotel, Nadi, 12-13 June 2002, Meeting Papers pt 1, File (02) MP 23 pt 1, which contains a paper by the Forum Secretariat under Agenda Item 3(a): Implementation of the Honiara Declaration on Law Enforcement Cooperation, PIFS(02)FRSC.3.

<sup>69</sup> Forum Secretariat, Implementation of the Honiara Declaration, above n 68, [9].

<sup>70</sup> Forum Secretariat, Implementation of the Honiara Declaration, above n 68, [7].

<sup>71</sup> Forum Secretariat, Implementation of the Honiara Declaration, above n 68, [8].

<sup>72</sup> Forum Secretariat, Implementation of the Honiara Declaration, above n 68, [13].

<sup>73</sup> Forum Secretariat, above n 68, annex 1, 2001 Forum Secretariat Survey on the Implementation of the Legislative Priorities of the Honiara Declaration on Law Enforcement Cooperation.

<sup>74</sup> Forum Secretariat, above n 73, at 7.

<sup>75</sup> Forum Secretariat, above n 73, at 10.

<sup>76</sup> Forum Secretariat, above n 73, 15.

<sup>77</sup> Forum Secretariat, above n 73, 16.

<sup>78</sup> Forum Secretariat, above n 73, 23.

<sup>79</sup> Forum Secretariat, above n 73, 29.

<sup>80</sup> Forum Secretariat, above n 73, 32.

<sup>81</sup> Forum Secretariat, Forum Regional Security Committee Meeting, Tanoa Hotel, Nadi, 12-13 June 2002, Meeting Papers pt 1, File (02) MP 23 pt 1, which contains a paper by the Forum Secretariat under Agenda Item 5: Drug Issues – Regional Illicit Drug Control, PIFS(02)FRSC.7, at 1.

3. To assess this problem and to provide a common regional approach to illicit drug control legislation, the FRSC requested that a joint working group from the Oceania Customs Organisation (OCO), the South Pacific Chiefs of Police Conference (SPCPC) and the Pacific Islands Forum Secretariat be convened. The working group would assess current legislation and look at providing a common framework for the possible production of model legislation that the region could consider adopting.

The Joint Working Group was subsequently convened and produced an Illicit Drug Control Bill 2002 that set out a reasonably comprehensive list of offences and investigatory powers together with an Explanatory Note.<sup>82</sup> This wave of regional activity subsequently led to some national law reform. Tonga, for example, enacted the Illicit Drug Control Act 2003 in response, Fiji adapted the model Bill to produce the Illicit Drugs Control Act 2004, Nauru enacted the Illicit Drugs Control Act 2004 in response, the Cook Islands the Misuse of Drugs Act 2004 and Niue the Misuse of Drugs Act 2007. Nevertheless, more than fifteen years later the legislative situation still remains undeveloped with many Forum members still relying on pre-1988 legislation. Table A sets out current legislation of PICTS as far as can be ascertained:

**Table A: PICT Drug Trafficking Legislation**

<b>Country</b>	<b>Legislation</b>	<b>Main offence provision(s) and amendments</b>
Cook Islands	Narcotics and Misuse of Drugs Act 2004	Sections 6-13 Amended 2009.
Federated States of Micronesia	Trust Territory Controlled Substances Act	See § 1141 which creates an offence of drug trafficking.
Fiji	Illicit Drugs Control Act 2004	See ss 4-6. Amended by the Revised Edition of the Laws (Consequential Amendments) Act 2016 (No 31 of 2016).
Kiribati	Dangerous Drugs Ordinance 1948	See particularly Part V, s 31. Amended in 1995 and 2001.
Marshall Islands	Narcotic Drugs (Prohibition and Control) Act 1987	Particularly §903.
Nauru	Illicit Drugs Control Act 2004	See Part 2.
Niue	Misuse of Drugs Act 2007	Particularly section 4.
Palau	Palau National Code, Title 34	See Chapter 33, particularly § 3301 -Trafficking.
Samoa	Narcotics Act 1967	Amended in 2006, which adjusted the sentence for drug related offences.

<sup>82</sup> Forum Secretariat, Forum Regional Security Committee Meeting, Tanoa Hotel, Nadi, 12-13 June 2002, Meeting Papers pt 1, File (02) MP 23 pt 1, which contains a paper by the Forum Secretariat under Agenda Item 3(a): Implementation of the Honiara Declaration on Law Enforcement Cooperation, PIFS(02)FRSC.3, Annex A and Annex B respectively.

Solomon Islands	Dangerous Drugs Act 1941	See sections 4-7.
Tokelau	Customs Rules 1991	See section 25.
Tonga	Illicit Drug Controls Act 2003	See Part 2 for offences.
Tuvalu	Dangerous Drugs Act 1948	See sections 7 and 8.
Vanuatu	Dangerous Drugs Act 1939	Section 2 read with section 11.
Papua New Guinea	Dangerous Drugs Act 1952	Amended by: Dangerous Drugs Act 1960 (No. 58 of 1960) Dangerous Drugs Act 1962 (No. 19 of 1962) Dangerous Drugs (Extension of Definition) Act 1968 (No. 39 of 1968) Dangerous Drugs (Possession) Act 1970 (No. 82 of 1970) Dangerous Drugs (Amendment of Section 9) Act 1973 (No. 34 of 1973).
	Customs Act 1951	See section 151 for an offence for smuggling narcotics.

The PICTs themselves recognise that reform has been haphazard and has not developed to meet the growing problem they face. The Vanuatu Law Commission noted in 2013 that while Fiji, Tonga and Niue had updated their drug laws, Vanuatu had not, and was still applying pre-Second World war legislation.<sup>83</sup> Among other weaknesses, it had a single offence for the importation, sale, supply and possession of drugs, omitted a range of modern drugs currently in listed in the schedules to the drug conventions, only provided for a limited power of search and seizure and made no provision for surveillance to allow for covert operations and detection methods such as phone tapping or tracking devices, and only provided for a single penalty without differentiating between different quantities and types of drugs.<sup>84</sup> In similar vein, in its Review of the Narcotics Act 1967, the Samoan Law Reform Commission noted in 2017:<sup>85</sup>

Since its enactment in 1967, Samoa’s Narcotics Act has only been amended twice in 2006 and 2009 respectively. Amendments to the law were inadequate to address the prevalence of drug-related issues in Samoa and the new developments in the evolving drug environment. For example, the rise of methamphetamine cases, the use of illegal drugs for medicinal purposes as well as the consideration of rehabilitation as a sentencing option.

<sup>83</sup> Vanuatu Law Commission, *Review of the Dangerous Drugs Act [cap 12] and the Penal Code [cap135]* (Issue Paper No 1 of 2013, March 2013), 5, available at <[https://lawcommission.gov.vu/images/pdf/dangerous\\_drugs.pdf](https://lawcommission.gov.vu/images/pdf/dangerous_drugs.pdf)> (accessed 25 June 2020).

<sup>84</sup> Vanuatu Law Commission, *Dangerous Drugs Act Legislative Review* (No 2 of 2013, September 2013), 6, 12, available at [https://lawcommission.gov.vu/images/final-reports/Dangerous\\_Drugs\\_Final\\_Report.pdf](https://lawcommission.gov.vu/images/final-reports/Dangerous_Drugs_Final_Report.pdf) (accessed 25 June 2020).

<sup>85</sup> Samoa Law Reform Commission, *Review of the Narcotics Act 1967 (Drugs Reform)* (Final Report 21/17, December 2017), [1.9], available at <<https://www.samoalawreform.gov.ws/wp-content/uploads/2018/12/Drugs-Final-Report-English.pdf>> (accessed 21 June 2020)..

Turning to New South Wales legislation as a model, it recommended new offences of supplying drugs on an ongoing basis and a standalone offence of drug trafficking.<sup>86</sup>

The lack of urgency by the PICTs in the reform of drug legislation may be explained by the fact that the wave of law reform post 1990 was initially driven by the assessment of legal inadequacy made by technical experts, and not through direct criminal activity posing an unmet threat. That situation may now be changing as greater actual penetration of PICTs by drug traffickers occurs. For example, a recent public call in Fiji for an enquiry into the drug trafficking problem was met with the claim that the government had the matter in hand.<sup>87</sup> The need to constantly update legislation, however, presents a challenge to the resource strapped PICTs.

Legislative activity in regard to money laundering legislation followed the Nasonini Declaration on Regional Security of 2002.<sup>88</sup> In 2002 model legislation targeted at transnational organised crime but also addressing a range of aspects of money laundering was developed by the Forum Secretariat, and was updated in 2016.<sup>89</sup> Strong support from donor states for money laundering law reform based on model legislation has led to a wave of law-making in the PICTs,<sup>90</sup> as set out in Table B.

**Table B: PICT Money Laundering Legislation**

<b>Country</b>	<b>Legislation</b>	<b>Main offence provisions and amendments</b>
Cook Islands	Proceeds of Crimes Act 2003	Amended in 2003, 2004, 2017.
	Financial Transaction Reporting Act 2004	Amended in 2007, 2013.
	Financial Intelligence Unit Act 2015	Amended in 2017.
	Crimes Act 1969	Offence of money laundering established in s280A by the Crimes Amendment Act 2004.
Federated States of Micronesia	Revised Code 2014, Crimes [Title 11]	See § 912 - § 928 for sections related to Money Laundering.
Fiji	Financial Transactions Reporting Act 2004	Note Section 2: “‘money laundering offence’ means an offence against section 69 of the Proceeds of Crimes Act 1997.’
	Proceeds of Crime Act 1997	See section 69. Section 69 was partially amended in 2004.
Kiribati	Proceeds of Crime Act 2003	See particularly section 12. Amended in 2005.

<sup>86</sup> Ibid, Recommendations 20 and 21.

<sup>87</sup> “No need for drugs inquiry: Fiji govt” *RNZ* (online ed, New Zealand, 14 August 2019) available at <<https://www.rnz.co.nz/international/pacific-news/396619/no-need-for-drugs-inquiry-fiji-govt>> (accessed on 25 June 2020).

<sup>88</sup> See above, n 63.

<sup>89</sup> ‘Pacific Money-laundering Laws under Revision’, *RNZ Dateline Pacific*, 23 May 2016, available at <<https://www.rnz.co.nz/international/programmes/datelinepacific/audio/201801725/pacific-money-laundering-laws-under-revision>> (accessed 17 May 2020).

<sup>90</sup> See generally Henshaw, above n 60.

Marshall Islands	Banking Act	See §166 - §182 for provisions relating to Money Laundering. Section 166 sets out Money Laundering Offence. Section 181 of the Banking Act, 17 MIRC, Chapter 1: Allowed the creation of the Anti-Money Laundering Regulations. Section 166 and 181 amended in 2009 and 2011.
Nauru	Anti-Money Laundering Act 2008	See Part 2 which provides for offences. Amended 2019.
	Proceeds of Crime Act 2004	
Niue	Proceeds of Crime Act 1998	See section 64 which provides an offence for money laundering.
	Financial Transactions Reporting Act 2006	Established a financial investigation unit.
Palau	Money Laundering and Proceeds of Crimes Act	Section 3 read with section 4(n).
Samoa	Crimes Act 2013	See offences ss 102A – 102C. Money Laundering carries a penalty of up to 15 years imprisonment
	Proceeds of Crimes Act 2007	See ss 11-13. Similar wording to Crimes Act 2013 but maximum penalty of 7 years.
	Money Laundering Prevention Act 2007	
Solomon Islands	Money Laundering and Proceeds of Crime Act 2002	Sections 17 and 18. Amendments in 2004 and 2010.
Tokelau	No domestic money laundering legislation.	
Tonga	Money Laundering and Proceeds of Crimes Act 2001	Section 17 and 18.
Tuvalu	Proceeds of Crime Act 2004	See particularly section 16.
Vanuatu	Proceeds of Crimes Act 2002	Section 11.  Amended in 2005, 2012, 2014, and 2017.
	Anti-Money Laundering and Counter Terrorism Financing Act 2014	Amended in 2015 and 2017.
Papua New Guinea	Anti-Money Laundering and Counter Terrorist Financing Act 2015	Note section 5 ““money laundering” means conduct which constitutes an offence under Section 508B or Section 508C of the <i>Criminal Code Act 1974.</i> ’
	Criminal Code Act 1974	Amended in the 2015 and 2016. The Criminal Code Amendment Act 2015 was an important amendment which created new offences for money laundering (this replaced those in the Proceeds of Crime Act 2005).

	Proceeds of Crime Act 2005	Amended in 2015 which removed the specific provision relating to money laundering. However, the Act still generally applies to dealing with proceeds of these crimes.
	United Nations Financial Sanctions Act 2015	

Nevertheless, the PICTs continued to have poor financial infrastructural controls which makes anti-money laundering legislation difficult to enforce (while simultaneously making things more difficult for individuals to engage in financial transactions in the Pacific).<sup>91</sup> Asia Pacific Money Laundering Group (APGML) evaluations consistently expose shortcomings in PICT's legislation in this regard. Some PICTs, like Samoa, have developed the legislative basis for prosecuting money laundering and engaging in asset confiscation but have not followed through and used these laws, with no prosecutions for money laundering offences and only low-level confiscation of drug trafficking proceeds.<sup>92</sup> Similar comments have been made about other PICTS like the Cook Islands in recent evaluations.<sup>93</sup> Donors like New Zealand, have followed through by putting even more money into the APGML in order to inter alia upgrade PICT money laundering legislation.<sup>94</sup>

Reform of extradition and legal assistance legislation is not only driven by drug trafficking. Yet, as illustrated in Tables C and D, in regard to these forms of transnational cooperation, reform has been fairly haphazard.

**Table C: PICT Extradition Legislation**

Country	Legislation	Notes
Cook Islands	Extradition Act 2003	
Federated States of Micronesia	Revised Code 2014, Crimes [Title 12]	See chapters 14 and 15 for Extradition.
Fiji	Extradition Act 2003	
Kiribati	Extradition Act 2003	
Marshall Islands	Criminal Extradition Act 1966	
Nauru	Extradition Act 1973	

<sup>91</sup> Rebecca L Stanley and Ross P Buckley, 'Protecting the west, excluding the rest: The impact of the AML/CTF regime on financial inclusion in the pacific and potential responses' (2016) 17(1) *Melb J Int Law* 83.

<sup>92</sup> See APGML, *Anti-Money laundering and counter Terrorism Financing Measures*, Samoa, Mutual Evaluation Report, September 2016, Executive Summary, [1], [11] available at <file:///file/UsersN\$/nbo17/Home/Downloads/Samoa%20MER%202015%20-%20published%20version.pdf> (accessed 17 May 2020).

<sup>93</sup> See APGML, *Anti-Money laundering and counter Terrorism Financing Measures*, Cook Islands, Mutual Evaluation Report, September 2018, Executive Summary, [23], available at <file:///file/UsersN\$/nbo17/Home/Downloads/Cook%20Islands%20MER%202018%20-%20published%20version.pdf> (accessed 24 May 2020).

<sup>94</sup> 'NZ to help Pacific Combat Money Laundering', *National Party Press Release*, 21 June 2017, <[https://www.national.org.nz/nz\\_to\\_help\\_pacific\\_combat\\_money\\_laundering](https://www.national.org.nz/nz_to_help_pacific_combat_money_laundering)> (accessed 17 May 2020).

Niue	Extradition Act 2007	
Palau	Palau National Code, Title 18	See Chapter 10 and 10.1 for extradition provisions.
Samoa	Extradition Act 1974	Amended in 1994.
	Money Laundering Prevention Act 2007	See section 39: 'Money Laundering an Offence for Extradition Purposes - For the purposes of any law relating to extradition or the rendition of fugitive offenders, money laundering is an offence for which extradition or rendition may be granted.'
Solomon Islands	Extradition Act 2010	
Tokelau	Extradition Rules 2005	
Tonga	The Extradition Act 1972	
Tuvalu	Extradition Act 2004	
Vanuatu	Extradition Act 2002	Amended in 2017.
Papua New Guinea	Extradition Act 2005	

**Table D: PICT Mutual Legal Assistance Legislation**

<b>Country</b>	<b>Legislation</b>	<b>Notes</b>
Cook Islands	Mutual Assistance in Criminal Matters Act 2003	Amended in 2003, 2004, and 2017.
Federated States of Micronesia	Revised Code 2014, Crimes [Title 12]	See chapter 17 for Mutual Assistance in Criminal Matters.
Fiji	Mutual Assistance in Criminal Matters Act 1997	Amended in 2005.
Kiribati	Mutual Assistance in Criminal Matters Act (6 of 2003)	
Marshall Islands	Mutual Assistance in Criminal Matters Act 2002	
Nauru	Anti-Money Laundering Act 2008	See Part 8.
	Mutual Assistance in Crime Matters Act 2004	
Niue	Mutual Assistance in Criminal Matters Act 1998	
Palau	Palau National Code, Title 18	See Chapter 13 for Mutual Assistance in Criminal Matters.

Samoa	Mutual Assistance in Criminal Matters Act 2007	
Solomon Islands	Mutual Assistance in Criminal Matters Act 2002	
Tokelau		Cannot locate.
Tonga	Mutual Assistance and Criminal Matters Act 2000	
Tuvalu	Mutual Assistance in Criminal Matters Act 2004	
Vanuatu	Mutual assistance in Criminal Matters Act 2002	Amended in 2005, 2012, 2014, and 2017.
Papua New Guinea	Mutual Assistance in Criminal Matters Act 2002	Amended in 2015.

Again, however, this legislation appears largely untested in many of the PICTs.<sup>95</sup>

An area of law of critical relevance to suppression of the drug traffic through the islands is law enforcement at sea. In terms of formal powers relating to enforcement at sea, while all Pacific Island states enjoy the surveillance and enforcement powers over activities such as drug trafficking in their own waters as spelled-out in the UN Convention on the Law of the Sea<sup>96</sup> and their own national legislation, they have much more limited powers on the high seas.<sup>97</sup> In particular, they have not made use of article 17(3) and (4) of the 1988 UN Drug Trafficking Convention. These provisions relate to a vessel exercising freedom of navigation in accordance with international law and flying the flag of another party. They entitle parties to the 1988 Convention that have reasonable grounds to suspect such a vessel is engaged in drug-trafficking to do a number of things. They may notify the flag state, request confirmation of the suspect vessel's registration, and request authorisation from the flag state for the taking of appropriate measures in regard to the vessel such as stop and search of the vessel and, if drugs are found, authorisation to take further appropriate action with regard to the vessel the persons and its illicit cargo.<sup>98</sup> In other maritime regions external enforcement powers have entered into agreements with regional island states to formalise this process even further. However, cooperative arrangements such as those between the United States and Caribbean States extending the powers in article 17 to include so-called 'ship riders' from Caribbean islands who join the crew of interdicting vessels from the United States and authorise the stop and

<sup>95</sup> See, e.g., APGML, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Niue, July 2012, [834] available at <file:///file/UsersNS/nbo17/Home/Downloads/Niue%20MER%202012.pdf> (accessed 23 May 2020)

<sup>96</sup> 10 December 1982, 1833 UNTS 397; in force 16 November 1994.

<sup>97</sup> Warner, above n 20, 5-6.

<sup>98</sup> Warner, above n 20, 11.

search of suspect vessels flying flags of the island states,<sup>99</sup> are unheard of in the Pacific. Warner gives a number of reasons for the absence of ‘ship rider’ agreements in the Pacific: not all PICTS are parties to the 1988 Convention, the lack of resources and capacity within the region to conduct such operations and a preference for onshore investigation and enforcement of such offences.<sup>100</sup> It may well be that a maritime shield of the kind constructed in Caribbean is simply not sustainable in the South Pacific by countries like Australia and New Zealand because of lack of resources.

### **Regional measures: law enforcement**

The regional legal measures taken by the PIF, insubstantial though they may appear, have served to frame systems for cooperation and coordination between PIF members’ law enforcement agencies. At an institutional level drug trafficking is constantly on the agenda of the Forum Regional Security Committee, which draws representatives from PIF countries, regional law enforcement organisations, Council of Regional Organisations in the Pacific (CROP) agencies, as well as International Governmental Organisations (IGOs). Regional legal and law enforcement organisations like the Pacific Islands Law Officer’s Network (PILON) and<sup>101</sup> Pacific Islands Chiefs of Police (PICTP)<sup>102</sup> also meet annually to discuss legal issues such as drug control. In many ways they are the most significant regional organisations in regard to regional efforts at drug-trafficking control. The Pacific Center for Law Enforcement Cooperation (PCLEC) is an initiative of the PICTP designed to actively engage Pacific police organisations in the development of their own capability, built around regional hubs.<sup>103</sup>

Where regional cooperation has perhaps been weakest is in developing law enforcement capacity at the national level.<sup>104</sup> Capacity is low. The Samoa Law Reform Commission highlighted the following enforcement issues in its review of Samoa’s drug laws:<sup>105</sup>

- Poor monitoring of drug offences and drug offender reoffending.
- Poor communication systems nationally to keep the relevant agencies connected and informed on drug related crimes.
- Underreporting by the public of drug-related offences that take place in the workplace, villages and communities.
- Lack of training to effectively handle drug-related matters.
- Limited resources to detect, monitor and assist law enforcement agencies.

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<sup>99</sup> See, for example, Agreement between the Government of the United States of America and the Government of Jamaica concerning cooperation in suppressing illicit maritime drug trafficking, signed at Kingston May 6, 1997; entered into force March 10, 1998. TIAS, 1997 UST LEXIS 21; amended by Protocol signed at Kingston February 6, 2004; entered into force 6 February 2004. TIAS, 2004 UST LEXIS 1.

<sup>100</sup> See Warner, above n 20, 12.

<sup>101</sup> The senior law officers of Pacific Island countries, see <<http://www.pilonsec.org/about>> (accessed 6 June 2020).

<sup>102</sup> See <<https://PICTp.co.nz/>> (accessed 3 March 2020).

<sup>103</sup> DFAT, ‘Shared Security in the Pacific’, available at <<https://dfat.gov.au/geo/pacific/Pages/shared-security-in-the-pacific.aspx>> (accessed 19 December 2019).

<sup>104</sup> Henshaw, above n 60, 119-121.

<sup>105</sup> Samoa Law Reform Commission, above n 83, [2.7].

Speaking at a recent session of the UN Commission on Narcotic Drugs in Vienna, Leonito Bacalando Jr, an Assistant Attorney General from the Federated States of Micronesia emphasised<sup>106</sup>

the urgent need of small countries, such as Micronesia, for technical assistance and support to be able to detect and identify illegal drugs, enhance cooperation among border control authorities, and be able to comply with rigorous reporting requirements under the relevant conventions.

Technical assistance can involve the direct provision of hardware and training. A particular operational problem is the provision of patrol boats to cover huge maritime jurisdictions.<sup>107</sup> Australia has responded directly by providing 19 new patrol boats as part of its Pacific Maritime Security program.<sup>108</sup> In June 2019 New Zealand announced that it was planning to invest \$9 million to support Tongan policing and justice including support against illegal drugs, and New Zealand police and customs recorded that they were going to deliver dog-detector programs to the Cook Islands, Samoa, Tonga and Fiji.<sup>109</sup>

Technical assistance can also take an institution-building form. At a sub-regional level, innovations include the Micronesian Transnational Crime Unit, which provides a platform for cooperation among law enforcement agencies against drug-trafficking in the FSM, Palau, Marshall Islands, Nauru and Kiribati.<sup>110</sup> At a broader level, the Pacific Transnational Crime Network (PTCN) is a law enforcement intelligence network coordinated by the Pacific Transnational Crime Coordination Centre (PTCCC) based in Apia, Samoa funded by Australia and New Zealand. It consists in twenty-five Transnational Crime Units located in seventeen PICTs, which identify emerging trends in the illicit traffic in the Pacific.<sup>111</sup> Pacific agencies have also reached out to international organisations. In 2019 the Oceania Customs Organisation signed an MOU with the International Narcotics Control Board to facilitate cooperation in countering drug traffic.<sup>112</sup>

At a more operational level, the PICTP meeting in Nauru in 2018 agreed to establish a joint task force combating organised crime the Pacific. As a result of this agreement, in early 2019 a memorandum of understanding was signed by the Australian Federal Police (AFP), New Zealand police, Fiji police force and Tonga police, establishing the Transnational and

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<sup>106</sup> Leonito Bacalando, Jr., Assistant Attorney General “Statement of the Federated States of Micronesia Commission on Narcotic Drugs, Sixty-Second Session” (Vienna, 14–15 March 2019), at [7], available at <[https://www.unodc.org/documents/commissions/CND/2019/2019\\_MINISTERIAL\\_SEGMENT/15March/Micronesia.pdf](https://www.unodc.org/documents/commissions/CND/2019/2019_MINISTERIAL_SEGMENT/15March/Micronesia.pdf)> (accessed 25 June 2020).

<sup>107</sup> Ibid, [5].

<sup>108</sup> DFAT, above n 103.

<sup>109</sup> Matthew Rosenberg, ‘NZ’s cocaine and meth habit takes toll on Pacific Islands’, *Stuff* (online ed, New Zealand, 30 June 2019), available at <<https://www.stuff.co.nz/national/crime/113845363/nzs-cocaine-and-meth-habit-takes-toll-on-pacific-islands>> (accessed 25 June 2020).

<sup>110</sup> Balcanado, above n 106, at [6].

<sup>111</sup> See Pacific Transnational Crime Network <<https://PICTp.co.nz/our-work/pacific-transnational-crime-network-ptcn/>> (accessed 23 September 2019). The PTCN is funded by Australia and the Secretariat is located in Canberra.

<sup>112</sup> INCB, *Report of the International Narcotics Control Board for 2019*, UN Doc E/INCB/2019/1, February 2020), at [758]-[763].

Organised Crime (TSOC) Pacific Taskforce.<sup>113</sup> The task force has a number of specific goals: information sharing; the investigation and disruption of transnational serious and organised crime operating through or impacting upon participating countries; targeting organised crime entities or syndicates using small craft to move illicit drugs and facilitate other organised criminal activity; demonstrating commitment to multinational cooperation to effectively combat of transnational organised crime; and strengthening cooperation in the conduct of expanded investigations into transnational organised crime groups operating within and between multiple countries. Investigations undertaken under the auspices of the task force have already yielded results. For example, a multi-jurisdictional police investigation involving Australian, Fijian and New Zealand police resulted in the arrest of a man in Sydney in 2019 for trafficking in 2 kg of cocaine intercepted in Fiji, with the AFB Acting Commander for investigations Penelope Spies commenting that ‘the exchange of information and level of cooperation between our agencies has never been better’.<sup>114</sup> Further arrests have occurred in connection to this operation and to others.<sup>115</sup>

At a practical level, specialist law enforcement appears to be heavily reliant on external participation and aid. Regional efforts into which Island police are fully integrated appear likely to yield the best results as levels of trust and familiarity with different systems builds.

## CONCLUSION

The long-term potential for state capture by drug traffickers and the Pacific is unknown, although the occurrence of such an extreme situation appears unlikely.<sup>116</sup> On a cautionary note, we do know from examples in other regions that it is difficult to assess the deepening impact of drug traffickers at a political, territorial, institutional, and economic level as this process occurs. However, a number of indicators would all serve as flags to a deepening level of penetration. These include widespread drug-trafficking, the general understanding that criminals enjoy impunity from law enforcement, the growing sense that trafficking is impacting on governance such as in the electoral process, and a perceptible loss of public trust in government.

Whose task is it to raise these red flags? Commentators pointed out some time ago that the security concerns of small island states are social, political and economic matters rather than

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<sup>113</sup> AFP Press Release, ‘New Agreement tackles Transnational, Serious and Organised Crime in Pacific’, 13 February 2019, available at <<https://www.afp.gov.au/news-media/media-releases/new-agreement-tackles-transnational-serious-and-organised-crime-pacific>> (accessed 17 December 2019).

<sup>114</sup> AFP Press Release, ‘Sydney Man arrested in International Drug Smuggling Investigation’, 2 December 2019, available at <<https://www.afp.gov.au/news-media/media-releases/sydney-man-arrested-international-drug-smuggling-investigation>> (accessed 17 December 2019).

<sup>115</sup> See Lucy Cormack, ‘Sydney Man arrested as Net closes on South Pacific Drug-smuggling Ring’, *The Sydney Morning Herald*, 3 December 2019, available at <<https://www.smh.com.au/national/nsw/sydney-man-arrested-as-net-closes-on-south-pacific-drug-smuggling-ring-20191203-p53gee.html>> (accessed 19 December 2019).

<sup>116</sup> It will temporarily be hampered by the Covid-19 shutdown – see UNODC, ‘COVID-19 is changing the route of illicit drug flows, says UNODC report’ (press release, 7 May 2020) available at <<https://www.unodc.org/unodc/press/releases/2020/May/covid-19-is-changing-the-route-of-illicit-drug-flows--says-unodc-report.html>> (accessed 25 June 2020).

simply matters of policing.<sup>117</sup> These states are not in a good position to police their territory, particularly from extraterritorial transitory threats. To extrapolate from Fauriol's statement that 'small states do not have a foreign policy; they merely have a policy of existence',<sup>118</sup> it could be said that small states do not have a foreign law enforcement policy; they merely have a policy of continued existence in the face of foreign criminal threats.

Only when there is a possibility they may acquiesce to a foreign criminal threat to the extent that it manifests itself in some form of domestic insecurity, do influential outside powers begin to take an interest. Or more bluntly, only when its 'Pacific patch' begins to play up, does Australia begin to pay attention.<sup>119</sup> Raising the spectre that the region is in danger of becoming 'a semi-narco region' is an attempt to spur regional powers such as Australia and New Zealand to act more pre-emptively, and it appears to be starting to generate a response.

Promoting regionalism is one way in which these external powers can involve themselves in the affairs of island states.<sup>120</sup> But the region itself can only lift just so much institutional and operational anti-drug trafficking weight. In stark contrast to advanced regional organisations such as the EU, where heavily formalised regional cooperation has emerged as a valuable way of dealing with cross-border drug trafficking and in particular with the consequences of drug use, in the Pacific that level of regional cooperation is unavailable. The 'Pacific way' demands a consensus designed to shield national difficulties. It prevents the main regional organisation, the PIF, from taking a too-active role in law enforcement at a national level. Multilateral activity is of the most informal kind with its content kept at the lowest common denominator.

Australian and New Zealand intervention is thus more direct. In the area of law reform, we are more likely to see the continuation of programmes of legislative reform in selected island states because of their use as staging posts, paid for by aid grants. The main external effort is going into fostering cooperation at a technical level amongst law enforcement experts, where that external intervention is least likely to cause any political waves. It is unclear how far this slow ramping up of law enforcement cooperation will develop. It seems unlikely that we shall see things develop so far that naval assets from Australia and New Zealand patrol the region carrying 'ship riders' of the kind now common in the Caribbean. It's more likely we shall see ever closer cooperation between Australian, New Zealand and PICT law enforcement authorities both at the level of general information exchange and in regard to specific operations.

There is a fine line to be walked between directly responding appropriately to calls for assistance in a situation that is showing signs of worsening, and over-responding in a fashion that does not respect local sovereignty and reveals latent hegemonic tendencies. The political limits of this kind of regional cooperation against drug trafficking in the South Pacific are really

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<sup>117</sup> Paul Sutton and Anthony Payne (eds), *Size and Survival: The Politics of Security in the Caribbean and the Pacific* (1993), 193.

<sup>118</sup> Georges A Fauriol, *Foreign Policy Behaviour of Caribbean States: Guyana, Haiti and Jamaica* (Lanham, Md: University Press of America, 1984).

<sup>119</sup> Paraphrasing PM John Howard's reference to the Solomon Islands as falling within Australia's 'patch'- see Diana Thorburn, 'The 'Patch' and the 'Backyard': Caribbean and Pacific Small Islands and their Regional Hegemons', (2007) 56(1/2) *Social and Economic Studies* 240, 248.

<sup>120</sup> Thorburn, above n 119, 251.

the limits of a securitisation response to drug-trafficking in the Pacific. If that response should grow highly intrusive, it will foster the view that Australia and New Zealand are engaged in keeping law and order in the Pacific. Intrusive action is bound eventually to be perceived negatively by Pacific island states jealous of relatively recently acquired sovereignty.<sup>121</sup> Moreover, some attempt to control domestic markets in Australia and New Zealand and to stop dumping seasoned criminals in the PICTs is necessary to show good faith in this situation, for these actions are driving the trans-Pacific traffic of drugs and drug-trafficking into the PICTs themselves.

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<sup>121</sup> See the discussion in Headley, above n 16, 34.