LEGAL FRAMEWORKS TO COMBAT ORGANISED CRIME IN THE PACIFIC ISLANDS

ANDREAS SCHLOENHARDT*

INTRODUCTION

The Pacific Islands are frequently singled out and criticised for being unprepared to prevent and combat organised crime effectively. A 'threat assessment' of *Transnational Organized Crime in the Pacific*, published by the United Nations Office on Drugs and Crime (UNODC) in September 2016 noted that

> transnational organized crime-related legislation across several of the Pacific Island countries and territories is outdated and inconsistent with international standards and norms, which limits the capacity of national and regional authorities to effectively deal with these challenges.[1]

Reliable information, institutional knowledge, academic research, and meaningful statistics about the level and characteristics of organised crime in Pacific Islands States is very fragmentary and, for the most part, limited to specific locations, times, and crime types. Comprehensive analysis and rigorous, continuing research are, for the most part, non-existent. Yet, most Pacific Islands States have introduced offences relating to criminal organisations along with other measures aimed at preventing and combatting transnational organised crime in the region. This development is mostly the result of external pressures by regional powers and initiatives by international organisations rather than a reflection of the needs and desires expressed by Pacific Islands States. The practical impact and application of these laws, insofar as these are documented, are rather limited. Despite a plethora of legislative activities, it remains questionable whether legal frameworks in the Pacific Islands are adequate to meet the challenges involved in preventing and suppressing organised crime.

The purpose of this article is to document and analyse international, regional, and national laws designed to combat organised crime in Pacific Islands States. The main focus here is on criminal offences concerning the participation in organised criminal groups. After a short overview of manifestations of transnational organised in the region Part II, Part III outlines global legal frameworks against organised crime, chiefly the United Nations *Convention against Transnational Organised Crime*,[2] and their uptake by Pacific Islands States. In Part IV, the article then turns to various regional initiatives taken to combat transnational organised crime under the auspices of the Pacific Islands Forum. Part V looks at national anti-organised crime offences adopted by Pacific Islands States that are Parties to the Convention; Part VI

* PhD (Adel); Professor of Criminal Law, The University of Queensland, Australia; Honorary Professor of Foreign and International Criminal Law, The University of Vienna, Austria; a.schloenhardt@uq.edu.au.
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1 UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 77.

2 Opened for signature 15 November 2000, 2225 UNTS 209 (entry into force 29 September 2003).

turns to the non-party States in the region. Challenges and conclusions are set out in Part VII of this article.

BACKGROUND

Organised Crime in the Pacific Islands

While the available literature frequently warns about the potential of criminal organisations spreading their reach and activities across the Pacific, influencing national authorities, and infiltrating local communities and businesses,[3] there is little substantial open-source evidence to support the view that organised crime presently poses a major problem in the Pacific Islands.[4]

Much of the available research on organised crime in Pacific Islands States focuses on manifestations of specific crime types, such as seizures of illicit drugs[5] or trafficked wildlife,[6] instances of trafficking in persons,[7] reports of smuggling of migrants,[8] levels of firearms trafficking,[9] or other crimes such as illegal, unreported and undocumented fishing,[10] cybercrime,[11] tobacco smuggling,[12] counterfeit goods,[13] and counterfeit medicines.[14] Many of these reports refer to individual cases or anecdotal incidents; some make sweeping and sensationalist statements that are not backed up by reliable evidence.

Most open-source material contains next to no information about the structure and sophistication of criminal organisations and networks operating in the region and very little research has been conducted about general concepts and characteristics of organised crime in

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3 See, for example, Roderic Broadhurst et al, 'Transnational Organized Crime in Oceania', in Jay Albanese (ed), *Transnational Organized Crime* (2014) 141, 151–152.

4 See also, Samuel Molloy, 'The Politics of Transnational Crime in the South Pacific' (Honours Thesis, The University of Sydney, 2013) 29–30.

5 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 17–31; PIF Secretariat, *Transnational Crime Strategic Assessment* (2006) 19–24; Sue Windybank, 'The Illegal Pacific, Part 1: Organised Crime' (2008) 24(2) *Policy* 32, 33–34.

6 Anthony van Fosse, *International Crime and the Pacific Islands* (undated) 4.

7 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 35–39

8 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 40–41; PIF Secretariat, *Transnational Crime Strategic Assessment* (2006) 25–28; Anthony van Fosse, *International Crime and the Pacific Islands* (undated) 5–6; Sue Windybank, 'The Illegal Pacific, Part 1: Organised Crime' (2008) 24(2) *Policy* 32, 34–35.

9 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 63–67; Anthony van Fosse, *International Crime and the Pacific Islands* (undated) 4–5.

10 See, for example, Joe McNulty, 'Western and Central Pacific Ocean fisheries and the opportunities for transnational organised crime: Monitoring, Control and Surveillance (MCS) Operation Kurukuru' (2013) 5(1) *Australian Journal of Maritime and Ocean Affairs* 145–152; UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 47–55.

11 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 72

12 See, for example, PIF Secretariat, *Transnational Crime Strategic Assessment* (2006) 33–34.

13 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 71

14 See, for example, UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 71–72

the Pacific Islands.[15] Information about the existence, nature, structure, and operation of criminal organisations in the region is extremely scarce. In 2006, the Pacific Islands Forum Secretariat issued a report that noted 'rapid growth in penetration of the region by […] Chinese organised crime',[16] but there are no more recent studies confirming this trend. In conversations held for the purpose of this study with regional and national law enforcement entities in Apia, Samoa and Suva, Fiji in November 2019, Chinese organised crime was not identified as a major threat to the region.

More recently, there have been occasional reports about the presence and activities of outlaw motorcycle gangs (OMCGs) in the Pacific Islands, chiefly in Fiji.[17] In conversations held for the purpose of this study, it was revealed that OMCGs have held regional meetings in Denarau and may have set up several chapters around Fiji's main island Viti Levu. OMCGs are believed to be involved in a range of criminal activities, such as drug trafficking and trafficking in persons, though there are no in-depth reports or other research providing further insight into this matter.

The same conversations further revealed that organised crime is widely viewed as an external, foreign phenomenon that has been brought to the Pacific Islands by various migrant groups or by nationals who have spent extended periods of time abroad. It was mentioned repeatedly that crime types typically associated with organised crime, especially drug-related offences, are on the rise in the Pacific Islands. This trend has been attributed to moves by Australia, New Zealand, and the United States to deport sentenced persons who are of Pacific Islands origin in larger numbers. Often, these individuals have served gaol sentences abroad and have become 'hardened criminals' during that time. Sometimes, they have gang affiliations related to their offending; sometimes they develop these affiliations during their time in prison. Since many of these expats have little ties to and no support in the receiving countries, some deportees become involved in (organised) criminal activity.[18]

Legislative developments

The lack of better data and reporting are among the reasons why international legal frameworks to combat organised crime were initially met by little enthusiasm and slow uptake by Pacific Islands States. The technical requirements of international law against transnational organised crime, combined with a lack of expertise how to implement the myriad of obligations arising from relevant treaties are further deterrents for small island States with limited financial and human resources. A study on organised crime laws in the Asia Pacific region published in 2010 found that:

> Domestic laws in the Pacific Islands have often been ill-equipped to deal with new and emerging organised crime issues. Many nations have outdated laws containing criminal offences that have largely been left unchanged since their introduction following

15 See, for example, Roderic Broadhurst et al, 'Transnational Organized Crime in Oceania', in Jay Albanese (ed), *Transnational Organized Crime* (2014) 141, 144, 146–147.

16 PIF Secretariat, *Transnational Crime Strategic Assessment* (2006) 13.

17 See also, Pacific Islands Forum Secretariat, *Boe Declaration Action Plan* (c 2018) 17.

18 Pacific Islands Forum Secretariat, *Boe Declaration Action Plan* (c 2018) 17.

independence in the 1970s and 80s. Moreover, few countries in the region have signed enforceable international treaties relating to transnational organized crime.[19]

In 2010, only five Pacific Islands States were Parties to the United Nations *Convention against Transnational Organised Crime* (*UNTOC*)*:* Cook Islands, Kiribati, Federated States of Micronesia, and Vanuatu. At that time, Nauru had signed but not ratified the Convention. The ratification of *UNTOC* by France in 2002 also extends to French Polynesia, New Caledonia, and Wallis and Futuna.[20]

Since that time, seven more States have acceded to *UNTOC*, including Fiji, Marshall Islands, Niue, Samoa, Tonga, and, most recently, Palau. As on 1 January 2020, Papua New Guinea, Solomon Islands, Tokelau, and Tuvalu remain the four non-Party States in the region, though Tuvalu enacted legislation in 2009 that adopts many provisions under *UNTOC*.

The following parts of this article take a fresh look at the evolution and operation of legal frameworks against organised crime in Pacific Islands States. This includes accession to and implementation of *UNTOC*, the emergence and adoption of regional initiatives to combat organised crime, and the development of national anti-organised crime offences. Through this analysis, gaps and weaknesses in regional and national systems will become apparent and the final part of this article sets out some observations and recommendations that pave the way toward comprehensive and more uniform criminalisation of organised crime across the region.

GLOBAL FRAMEWORKS

United Nations Convention against Transnational Organized Crime

Labelled 'one of the most important developments in international criminal law',[21] *UNTOC* marks a significant milestone in the global fight against organised crime, 'closing the gap that existed in international cooperation in an area generally regarded as one of the top priorities of the international community in the 21st century.'[22] The Convention was opened for signature at a high-level conference in Palermo, Italy on 12–15 December 2000. 132 of the then 191 UN Member States signed the Convention in Palermo. The Convention entered into force on 29 September 2003. As on 1 January 2020, *UNTOC* has 190 States Parties, 147 States have also ratified the Convention.[23]

UNTOC is supplemented by three protocols: the *Protocol against the Smuggling of Migrants by Land, Air, and Sea*,[24] the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons,*

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19 Andreas Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (2010) 284.

20 Law No 2002-1040 of 6 Aug 2002.

21 Gerhard Kemp, 'The United Nations Convention against Transnational Organized Crime: A milestone in international criminal law' (2001) 14 *South African Journal of Criminal Justice*, 152, 166.

22 Dimitri Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols: A New Era in International Cooperation', in *The Changing Face of International Criminal Law* (2002) 75.

23 United Nations Treaty Collection, *United Nations Convention against Transnational Organized Crime* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en> (1 January 2020).

24 Opened for signature 15 November 2000, 2241 UNTS 507 (entry into force 25 December 2003).

especially Women and Children,[25] and the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition*.[26] *UNTOC* is often referred to as the 'parent convention' because it sets out general rules concerning the criminalisation, suppression, and prevention of organised crime which also apply to the three protocols, a 'system which can easily be supplemented by additional protocols in the future which then may focus on other specific, maybe new, upcoming areas of transnational organised crime.'[27]

The Convention has two main goals:[28] One is to eliminate differences among national legal systems. The second is to set standards for domestic laws so that they can effectively combat transnational organised crime. *UNTOC* is intended to encourage States that do not have provisions against organised crime to adopt comprehensive countermeasures, and to provide them with guidance in approaching the legislative and policy questions involved. The Convention also seeks to eliminate safe havens for criminal organisations by providing greater standardisation and coordination of national legislative, administrative, and enforcement measures relating to transnational organised crime, and to ensure a more efficient and effective global effort to prevent and suppress it.

The provisions under *UNTOC* cover four main areas: criminalisation, international cooperation, prevention, and implementation. *UNTOC* sets out four offences: participation in an organised criminal group (Article 5), money laundering (Article 6), corruption (Article 8), and obstruction of justice (Article 23). The *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime* notes that:

> The activities covered by these offences are vital to the success of sophisticated criminal operations and to the ability of offenders to operate efficiently, generate substantial profits, and protect themselves as well as their illicit gains from law enforcement authorities. These offences constitute, therefore, the cornerstone of a global and coordinated effort to counter serious and well-organized criminal markets, enterprises and activities.[29]

The offence of participation in an organised criminal group under Article 5 plays a central role in global efforts to combat organised crime as it sets out a novel provision aimed specifically at criminalising persons who take up various roles in support of criminal organisations. The offence seeks to strike at the very core of organised crime by criminalising acts that involve participation in or contributions to organised criminal groups. Article 5 is designed to be prophylactic by creating liability distinct from the attempt or completion of the criminal activity. It seeks to prevent and pre-empt organised crime activity by holding those criminally

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25 Opened for signature 15 November 2000, 2237 UNTS 319 (entry into force 28 January 2004).

26 Opened for signature 31 May 2001, 2326 UNTS 208 (entry into force 3 July 2005).

27 Michael Kilchling, 'Substantive Aspects of the UN Convention against Transnational Organised Crime', in Hans Jörg Albrecht and Cyrille Fijnaut (eds), *The Containment of Transnational Organised Crime: Comments on the UN Convention of December 2000* (2002) 83, 87.

28 See further, Andreas Schloenhardt, 'Transnational Organised Crime and International Law: The Palermo Convention' (2005) 29 *Criminal Law Journal* 350; Andreas Schloenhardt, 'Transnational Organized Crime and International Criminal Law (2008) 10 *Waseda Proceedings of Comparative Law* 311.

29 UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (2nd ed, 2015) [57].

liable who associate for the purpose of criminal offending, even if they have not yet committed any offence.[30]

Articles 12 to 14 set out a range of measures pertaining to confiscation and seizure of assets and international cooperation for purposes of confiscation. In Articles 16 to 21 and 27, *UNTOC* contains a broad range of other international cooperation measures, including extradition, transfer of sentenced persons, mutual legal assistance, joint investigations, the use of special investigative techniques, transfer of criminal proceedings, and law enforcement cooperation. The protection of witnesses, a crucial feature of organised crime prosecutions, is addressed by Articles 24 and 25. In addition, Article 26 sets out a range of measure to encourage former participants of criminal organisations to cooperate with law enforcement. The remaining substantive provisions of the Convention, Articles 28–31, deal with information exchange, training and technical assistance, economic development, and prevention.

Uptake by Pacific Islands States

The initial uptake of *UNTOC* by Pacific Islands States was rather slow. Of the 15 sovereign States covered in this article (not including the French Pacific territories), none signed the Convention at the Palermo conference. Nauru was the first Pacific Islands State to sign *UNTOC* on 12 November 2001. The Cook Islands were next to accede in March 2004. In the first ten years since its inception, five Pacific Islands States became Parties to *UNTOC*, a further six followed over the next decade. France's ratification of the Convention also extends to French Polynesia, New Caledonia, and Wallis and Futuna. New Zealand's signature to the Convention does not extend to Tokelau.[31] Figure 1 below shows the current status of the Convention as on 1 January 2020.

Figure 1: Status of Ratification United Nations Convention against Transnational Organized Crime[32]

State	Date of accession/signature/ratification
Cook Islands	4 March 2004 accession
Fiji	19 September 2017 accession

30 UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group of Government Experts on Technical Assistance, *Criminalization of participation in an organized criminal group (article 5 of the United Nations Convention against Transnational Organized Crime)*, UN Doc CTOC/COP/WG.2/2014/2 (23 May 2014) 2 [4].

31 New Zealand made the following territorial exclusion: 'consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory […]': UNODC, *United Nations Convention against Transnational Organized Crime* <https://www.unodc.org/unodc/en/treaties/CTOC/countrylist.html> (6 October 2008).

32 United Nations Treaty Collection, *United Nations Convention against Transnational Organized Crime* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en> (12 August 2019).

State	Date of accession/signature/ratification
Kiribati	15 September 2005 accession
Marshall Islands	15 June 2011 accession
Federated States of Micronesia	24 May 2004 accession
Nauru	12 November 2001 signed, 12 July 2012 ratified
Niue	16 July 2012 accession
Palau	13 May 2019 accession
Papua New Guinea	Non-Party
Samoa	17 December 2014 accession
Solomon Islands	Non-Party
Tokelau	Non-Party
Tonga	3 October 2014 accession
Tuvalu	Non-Party
Vanuatu	4 January 2006 accession
French Polynesia, New Caledonia, Wallis and Futuna (France)	12 October 2002 signed, 29 October 2002 ratified

Of the 11 Pacific Islands State Parties (not including France), only Fiji and the Federated States of Micronesia filed reservations. Both States noted that they do not consider themselves bound by Article 35(2) of *UNTOC* concerning dispute settlement through the International Court of Justice.[33]

REGIONAL INITIATIVES

Pacific Islands Forum

The Pacific Islands Forum (PIF) is the main regional organisation in the Pacific. It was established in 1971 and currently counts 18 Member States, which includes 14 small island states, Australia, New Zealand, as well as French Polynesia and New Caledonia. Tokelau and Wallis and Futuna are not members. The Forum addresses a range of issues ranging from social, economic, and educational matters to security and political cooperation. The *Framework for Pacific Regionalism*, endorsed by the Leaders of PIF Member States in July 2014, sets out the strategic vision, values, objectives and approaches of the Forum's work.[34]

[33] United Nations Treaty Collection, *United Nations Convention against Transnational Organized Crime* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en> (1 January 2019).

[34] Pacific Islands Forum Secretariat, *Framework for Pacific Regionalism* (2014).

Policies and other initiatives of the Forum are coordinated by the Pacific Islands Forum Secretariat based in Suva, Fiji. The Secretariat's *Strategic Framework 2017–2021* articulates the main priorities for the coming years which include, inter alia, 'supporting members to collectively address regional security threats to law, order, security and peace arising from political stability and transnational crime'.[35] This document notes 'an increase in transnational crime, with organised criminal groups using the Pacific as both a transfer point and, increasingly, as a base.'[36] To that end, the document promotes the development of (unspecified) measures to 'control transnational crime and terrorism threats' by 2022.[37]

Regional security frameworks

While the Pacific Islands Forum does not have a designated, separate framework to monitor and respond to organised crime in the region, several declarations and committees on regional security involve mechanisms that, directly or indirectly, serve to combat organised crime and coordinate regional responses.

In 1992, the Forum (then known as the South Pacific Forum) concluded the *Declaration on Law Enforcement Cooperation*, commonly known as the *Honiara Declaration*.[38] This Declaration was a response to concerns over possible threats to the region from criminal activities. It mandated the Forum Regional Security Committee (FRSC) with the coordination and dissemination of relevant information and cooperation between the main contacts in Member States. This Committee meets annually to review priorities and the resource needs for law enforcement cooperation and information exchange. The *Honiara Declaration* makes no express mention of organised crime, but calls for enhanced cooperation on related matters such as customs, police, 'drug issues', and joint training on mutual assistance in criminal matters, forfeiture of proceeds of crime, extradition, and money laundering.

Other declarations by the PIF concerning regional security, including the *Aitutaki Declaration on Regional Security Cooperation* of 18 September 1997 and the *Biketawa Declaration* of 28 October 2000 on regional crisis management and conflict resolution, make no express reference to criminal justice matters. The *Nasonini Declaration on Regional Security* of 17 August 2002 includes a call on Member States to introduce

> legislation and developing national strategies to combat serious crime including money laundering, drug trafficking, terrorism and terrorist financing, people smuggling, and people trafficking in accordance with international requirements in these areas, taking into account work undertaken by other bodies including the UN and the Commonwealth Secretariat.[39]

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35 Pacific Islands Forum Secretariat, *Strategic Framework 2017 – 2021* (2017) 11.
36 Pacific Islands Forum Secretariat, *Strategic Framework 2017 – 2021* (2017) 11.
37 Pacific Islands Forum Secretariat, *Strategic Framework 2017 – 2021* (2017) 12.
38 Pacific Islands Forum, *Declaration by the South Pacific Forum on Law Enforcement to Cooperation* (1992) <http://www.forumsec.org/wp-content/uploads/2017/11/HONIARA-Declaration.pdf> (accessed 18 August 2019).
39 *Nasonini Declaration on Regional Security* [8].

In 2018, Leaders of PIF Member States produced the *Boe Declaration on Regional Security* that provides a broader approach than its predecessors and builds on an 'expanded concept of security'. According to Article 7 of the *Boe Declaration*, this expanded concept of security 'addresses the wide range of security issues in the region, both traditional and non-traditional', with an increasing emphasis on, amongst other things, 'transnational crime'. An *Action Plan* to implement the *Boe Declaration*, identifies transnational crime as a focus area and sets out a list of nine 'proposed actions' in order to 'concertedly and comprehensively address the threat of transnational crime'.[40] These actions include, inter alia, measures to enhance law enforcement cooperation, improve mechanisms to trace and seize proceeds of crime s, better controls and cooperation at borders, disrupt flows of and reduce demand for illicit drugs, combat corruption, and enhance information sharing on criminal deportees and OMCGs. The *Action Plan* makes no specific mention of enhancing legislation against organised crime.

In addition to these declarations, in 2015 the PIF developed a guidebook to combat transnational organised crime on the national level, but this document is not publicly accessible. A regional transnational crime disruption strategy covering both legislative and operational measures was under development at the time of writing.

Pacific Islands Chiefs of Police

The Pacific Islands Chief of Police, or PICP for short, is an organisation that brings together police forces from 21 jurisdictions in the Pacific. This includes the 18 members of the Pacific Islands Forum in addition to American Samoa, Guam, and the Commonwealth of Northern Marianas. The work of the PICP, who meet at an annual forum, focusses on selected policing issues ranging from cyber security and forensics to road safety and crime prevention. The PICP has addressed the topic of organised crime on numerous occasions and in August 2018 agreed on the establish a joint taskforce to combat organised crime. In February 2019, four nations including Australia, Fiji, New Zealand, and Tonga, with other States expected to follow, entered into agreement establishing a Transnational, Serious and Organised Crime (TOSC) Pacific Taskforce.[41] This initiative has been set up primarily as a response to a rising methamphetamine problem in the region for which Fiji and Tonga are transit points en route to Australia and New Zealand.

In 2002, the Pacific Transnational Crime Network (PTCN) was established to create a 'police-led proactive and investigative capability to combat transnational crime in the Pacific through a multi-agency and regional approach.'[42] The Network comprises 'Transnational Crime Units' in 20 Pacific Islands States. These units are centrally coordinated by the Pacific Transnational Crime Coordination Centre (PTCCC) based in Apia, Samoa. The PTCCC mostly serves to facilitate information sharing through person-to-person and agency-to-agency contacts and

40 Pacific Islands Forum Secretariat, *Boe Declaration Action Plan* (c 2018) 17–18.

41 Australian Federal Police, 'New agreement tackles transnational, serious and organised crime in Pacific', medial release (13 February 2019) <https://www.afp.gov.au/news-media/media-releases/new-agreement-tackles-transnational-serious-and-organised-crime-pacific> (accessed 11 February 2019).

42 Pacific Islands Chiefs of Police, *Pacific Transnational Crime Network* (2019) <https://picp.co.nz/our-work/pacific-transnational-crime-network-ptcn/> (accessed 21 August 2019).

through a secure database. Its main purpose is to build partnerships between law enforcement agencies in the Pacific and for capacity development. In conversations held with PTCCC staff for the purpose of this research, it was revealed that the Centre has little to no involvement in individual investigations and no formal role in facilitating mutual legal assistance and judicial cooperation between Pacific Islands States.

The PTCCC also produces the *PTCN Transnational Crime Assessment*, an annual intelligence report on cross-border criminal activities in the region. The report comprises broad operational-level information as well as strategic intelligence-informed forecasts or preeminent transnational crime trends impacting the region. It is not available to the public.

Transnational Organised Crime Model Provisions

In the early 2000s, the PIF in cooperation with UNODC developed several model laws and best practice guidelines on a range of issues relating to organised crime, terrorism, illicit drugs, sexual offences, and firearms trafficking. These initiatives include the *Counter Terrorism and Transnational Organised Crime Model Provisions 2003*, the *Illicit Drugs Control Bill 2002*, the *Weapons Control Bill 2003*, and the *Sex Offences Model Provisions 2005*. The Pacific Islands Forum Secretariat designed these provisions as a template for adoption by Member States. A first draft of the Transnational Organised Crime Model Provisions was presented in 2003. This draft was then amended and extended to also include provisions against terrorism. A new set of *Counter Terrorism and Transnational Organised Crime Model Provisions* was released on 10 July 2007. Minor changes followed in 2008.

These *Counter Terrorism and Transnational Organised Crime Model Provisions* are based on the counter-terrorism and anti-organised crime laws of New Zealand and contain elements of the United Nations' counter-terrorism and organised crime conventions and related UN Security Council resolutions.[43] Relevantly, Parts 7, 8, and 9 of the Model Provisions reflect relevant offences and other provisions of *UNTOC* (Part 7 Counter Terrorism and Transnational Organised Crime Model Provisions 2007), the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children* (Part 8), and the *Protocol against the Smuggling of Migrants by Land, Air, and Sea* (Part 9).

Using earlier drafts and existing provisions from New Zealand as a template, Nauru became the first Pacific Island nation to implement the Model Provisions into domestic law by enacting the *Counter Terrorism and Transnational Organised Crime Act 2004*.[44] A year later, Vanuatu followed with the *Counter Terrorism and Transnational Organised Crime Act 2005*.[45] In the same year, Kiribati passed the *Measures to Combat Terrorism and Transnational Organised Crime Act 2005* into law. In 2006, the *Terrorism Suppression and Transnational Crimes Act 2006* became law in Niue.[46] In 2008, a bill for a Federated States of Micronesia Anti-Terrorism and Transnational Organized Crime Act was presented to Congress, which, if passed, would have implemented the Model Provisions into a new chapter 13, §§ 1301–1392 of Title 11

43 Section 1(a) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF)
44 No 14 of 2004.
45 No 29 of 2005.
46 Act No 280.

('Crimes') of the Code of the Federated States of Micronesia.[47] This bill was, however, not passed into law at the time. In 2013, Tonga enacted the *Counter Terrorism and Transnational Organised Crime Act 2013*.[48]

These national laws, which are examined in more depth in the next part of this article, follow a common design: After an extensive list of definitions, the initial parts set out offences relating to terrorist activities and terrorist organisations, law enforcement powers in relation to these offences, as well as provisions to implement the international anti-terrorism conventions into domestic law. Later parts then turn to transnational organised crime and the offence of participating in an organised criminal group, followed by offences and other provisions concerning trafficking in persons and smuggling of migrants.

NATIONAL IMPLEMENTATION BY UNTOC STATES PARTIES

While it is beyond the scope of this article to provide a detailed analysis of the of the domestic anti-organised crime law of each Pacific Island State, the following sections serve to identify relevant statutes under national law and, where applicable, outline the implementation of UNTOC and examine the offences used to prosecute involvement in criminal organisations. Unique features and variations from the UNTOC requirements are highlighted where relevant. The jurisdictions are presented in alphabetical order.

Cook Islands

Since 1965, the Cook Islands is a parliamentary, self-governing territory in free association with New Zealand. The Cook Islands is fully responsible for internal affairs, including criminal justice. New Zealand retains responsibility for external affairs and defence and exercises theses powers in consultation with the Cook Islands (s 5 *Cook Islands Constitution Act 1964*). New Zealand can, however, not sign treaties for or on behalf of the Cook Islands and the Cook Islands must use its self-governing powers to give effect to international obligations.

The Cook Islands acceded to UNTOC on 4 March 2004. Domestic provisions reflecting the obligations under UNTOC are scattered across multiple statutes; there is no single law implementing UNTOC holistically and no designated anti-organised crime statute.

In 2003, the Cook Islands became the first jurisdiction in the Pacific Islands to legislate a specific organised crime offence. The *Crimes Amendment Act 2003* insert a new offence and a definition into s 109A of the *Crimes Act 1969* entitled 'participating in organised criminal group'. Under subs 109A(1) it is an offence punishable by imprisonment for up to five years to

> participate (whether as a member or an associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group; and

47 A bill for an act to amend title 11 of the Code of the Federated States of Micronesia, as amended, by enacting a new chapter 13 to establish a Counter Terrorism and Transnational Organized Crime Law for the Federated States of Micronesia, and for related purposes, 15th Congress, CB No 15–132.

48 No 23 of 2013.

(a) knowing that his or her participation contributes to the occurrence of criminal activity; or

(b) reckless as to whether his or her participation may contribute to the occurrence of criminal activity.

This offence closely reflects Article 5(1)(a)(ii) of *UNTOC*. It follows the same template as the model provision used by several other Pacific Islands States. The term 'organised criminal group' is further defined in subs 109A(2) to mean

a group of 3 or more people who have as their objective or one of their objectives -

(a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

(b) obtaining material benefits from conduct outside the Cook Islands that, if it occurred in the Cook Islands, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

(c) the commission in the Cook Islands of offences that are punishable by imprisonment for 10 years or more; or

(d) conduct outside the Cook Islands that, if it occurred in the Cook Islands would constitute the commission of an offence punishable by imprisonment for a term of 10 years or more.

Subsection 109A(3) further notes that:

A group of people is capable of being an organised criminal group for the purposes of this Act whether or not -

(a) some of them are subordinates or employees of others; or

(b) only some of the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or

(c) its membership changes from time to time.

While the language of this definition is more extensive than, and differs somewhat from, that in Article 2(a) of UNTOC, it does contain all the constituent elements of the Convention definition. The introduction of the organised crime offence into Cook Islands law was part of a suite of amendments relating to organised crime, corruption, and money laundering. This amendment was followed by the *Crimes Amendment Act 2004* which introduced new offences relating to smuggling of migrants and trafficking in persons.[49]

In 2017, the then Deputy Prime Minister, the Hon. Heather Teariki, presented the Crimes Bill 2017 to Parliament. This Bill draws on Australia's Model Criminal Code that formed the basis of Australia's *Criminal Code* (Cth),[50] which was enacted in 1995 and entered into force in December 2001. Nearly identical Codes were later enacted in the Australian Capital Territory and the Northern Territory. At the time of writing, the Crimes Bill 2017 was at second reading

[49] No 5 of 2004; ss 109B–109Q Crimes Act 1969 (Cook Islands).

[50] Parliament of the Cook Islands, Explanatory Note, Crimes Bill, 1.

stage in Parliament. If passed, the Crimes Bill 2017 will substantially change and modernise criminal law in the Cook Islands and introduce provisions closely reflecting the criminalisation requirements of UNTOC. Proposed s 283(1) sets out an elaborate definition of 'organised criminal group', followed by the offence of 'participating in organised criminal group' in proposed s 284. The offence of conspiracy appears in revised form in proposed s 51. Proposed s 19 provides for extraterritorial jurisdiction over 'transnational crime' including, inter alia, participation in organised criminal group, money laundering, corruption, 'people smuggling', and 'human trafficking'.[51]

Fiji

Fiji acceded to UNTOC and to the *Smuggling of Migrants* and *Trafficking in Persons Protocols* on 19 September 2017. It is difficult to trace the implementation of the Convention into domestic law and to say with certainty which, if any, specific amendments to Fijian criminal law and procedure were made following accession to UNTOC or if any such amendments are still in the pipeline. Based on information collected by UNODC, several obligations arising from UNTOC can be found in national laws that pre-date Fiji's accession to UNTOC. Matters relating to international cooperation are legislated in the *Extradition Act 2003* and the *Mutual Assistance in Criminal Matters Act 1997*. Measures to combat money laundering appear in the *Proceeds of Crimes Act 1997*.

Substantive criminal law provisions are set out in the *Crimes Act 2009*,[52] which repealed and replaced the *Penal Code* of Fiji. The *Crimes Act 2009* contains offences reflecting the provisions under the *Trafficking in Persons Protocol* in ss 111–121 and the *Smuggling of Migrants Protocol* in ss 122–124, which were part of the 2009 reform of criminal law and already existed when Fiji acceded to the Protocols in 2017.

The laws of Fiji contain no offence criminalising participation in an organised criminal group as required by art 5 UNTOC. Section 49 of the *Crimes Decree 2009* contains a generic conspiracy offence that makes no reference to organized criminal groups and to the purpose of obtaining a financial or other material benefit. Under subs 49(2), liability for conspiracy requires

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

Several qualifications and limitations to liability for conspiracy follow in subss 49(3)–(10).

51 Parliament of the Cook Islands, Explanatory Note, Crimes Bill, 2.

52 No 44 of 2009.

Kiribati

Kiribati acceded to *UNTOC* on 15 September 2005 and passed the *Measures to Combat Terrorism and Transnational Organised Crime Act* in the same year. This Act follows the same template of anti-terrorism and anti-organised crime statutes enacted between 2004 and 2013 by several other Pacific Island nations. It contains offences, enforcement measures and references to the international anti-terrorism conventions in Parts III to VI. Part VII deals specifically with transnational organised crime, followed by offences and other provisions relating to trafficking in persons and smuggling of migrants in Part VIII, ss 42–52. General provisions relating to jurisdiction, corporate criminal liability, and international cooperation are set out in Part IX, ss 53–59 of the Act. The latter complement provisions under the *Extradition Act 2003* and the *Mutual Assistance in Criminal Matters Act 2003*.

Part VII on transnational organised crime only comprises two sections: the offence of participation in organised criminal group (s 40) and corruption (s 41). The term 'organised criminal group' is defined in s 1 using similar, somewhat simpler language as the definition under Article 2(a) of *UNTOC*:

> 'organised criminal group' means a group of at least three persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least four years' imprisonment.

Section 40(1) makes it an offence, punishable upon conviction for up to 15 years imprisonment, for any person to 'participate' (whether as a member, associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group'. Subsection 40(2) makes clear that:

> A group of people is capable of being an organised criminal group for the purposes of this section whether or not—
>
> (a) some of them are subordinates or employees of others; or
>
> (b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity or transaction; or
>
> (c) its membership changes from time to time.

The offence reflects the spirit of Article 5(1)(a)(ii) of *UNTOC* but is somewhat broader in application since liability is not limited to active participation in criminal activities or in other activities, knowing that the participation contributes to the achievement of criminal aims.

Marshall Islands

The Marshall Islands acceded to *UNTOC* on 15 June 2011. In the same year, a new *Criminal Code,* Title 31, Chapter I of the *Marshall Islands Code,* was enacted, which incorporates some of the provisions relating to criminal offences and criminal liability under UNTOC. It is not clear whether the accession to UNTOC informed or altered the drafting of the *Criminal Code*

2011 in any way. The Code makes no express references to organised criminal groups or other *UNTOC*-related terms.

Under Article 5.03(1) of the Code,

> A person is guilty of conspiracy with another person or persons to commit a crime if with the intent to promote or facilitate its commission:
>
> (a) he or she agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; and
>
> (b) he or she or another person with whom he or she conspired commits an overt act in pursuance of the conspiracy.

This provision only marginally reflects the elements of the offence under Article 5(1)(a)(i) of UNTOC. Importantly, it makes no reference to organised criminal groups (a term not used in the criminal law of the Marshall Islands) an does include the purpose of obtaining a financial or other material benefit as an element. The conspiracy provision under Article 5.03 is much broader in application and does capture the spirit of *UNTOC* and the nature of organised crime.

Federated States of Micronesia

The Federated States of Micronesia (FSM) acceded to *UNTOC* on 24 May 2004. The accession was not immediately followed by any specific legislation implementing the obligations into domestic law. Principles of criminal liability, specific offences, and criminal procedure are set out in Titles 11 and 12 of the *Code of the Federated States of Micronesia* (last consolidated in 2014).

In 2008, a bill was presented to Congress to add a new chapter 13 to Title 11 (Crimes) of the *FSM Code*. A new chapter, referred to as the 'FSM Anti-Terrorism and Transnational Organized Crime Act'[53] sought to implement 'a comprehensive legal framework criminalizing all forms of terrorism, the financing of terrorism and transnational organized crime whether domestic or international in nature, consistent with this nation's commitments under international conventions'.[54] If passed, the bill would have introduced the type of anti-organised crime and anti-terrorism law enacted by several other Pacific Islands States around the same time. The bill proposed, inter alia, to legislate a definition of organised criminal group to mean 'means a group of at least 3 persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment'.[55] This reflects the definition of the same term under Article 2(a) of *UNTOC*. Proposed § 1366 of the bill,

53 Section 1, proposed § 1301 Bill to establish a Counter Terrorism and Transnational Organized Crime Law for the Federated States of Micronesia.

54 Section 2, proposed § 1302 Bill to establish a Counter Terrorism and Transnational Organized Crime Law for the Federated States of Micronesia.

55 Section 2, proposed § 1303(42) Bill to establish a Counter Terrorism and Transnational Organized Crime Law for the Federated States of Micronesia.

mirroring Article 5(1)(a)(ii) of *UNTOC*, made it an offence to participate in an organised criminal group:

> (1) A person must not participate 1 (whether as a member, associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group:
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
>
> (b) reckless as to whether his or her participation contributes to the occurrence of criminal activity.
>
> Maximum penalty: imprisonment for 20 years.
>
> (2) A group of people is capable of being an organised criminal group for the purposes of this section whether or not:
>
> (a) some of them are subordinates or employees of 15 others; or
>
> (b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction; or
>
> (c) its membership changes from time to time.

Based on the available open source information, it appears that this bill never passed into law and none of the consolidated versions of the Code published in 2014 contain any of the provisions proposed by this bill.

In the absence of more specific provisions, Title 11 of the *FSM Code* in its present version lacks specific offences and other provisions dealing with organised crime. § 203(1) of the *FSM Code* contains a very generic conspiracy provision:

> A person commits the crime of conspiracy if he or she agrees with one or more persons to:
>
> (a) commit any crime; and
>
> (b) any party to the conspiracy commits an overt act in furtherance of the conspiracy.

This provision does not contain all of the elements of the offence envisaged by Article 5(1)(a)(i) of *UNTOC.* In particular, it lacks any reference to the purpose of obtaining a financial or other material benefit and the involvement of an organised criminal group.

Nauru

Nauru was the first Pacific Islands State to sign UNTOC. It signed the Convention on 12 December 2001 and ratified it on 12 July 2012. Many of the obligations under UNTOC were implemented into domestic law with the *Counter-Terrorism and Organised Crime Act 2004*[56] which follows the same model of anti-organised crime and anti-terrorism law adopted in

[56] No 14 of 2004.

several other Pacific Islands States. Part 1 of the Act sets out its principal objects and relevant definitions. Part 2 concerns specified entities; Part 3 contains offences relating to terrorism. Forfeiture and other enforcement powers are the subjects of Parts 4 and 5. Part 6 implements a range of anti-terrorism conventions into Nauruan law. In 2008, the *Counter-Terrorism and Transnational Organised Crime (Amendment) Act*[57] added several provisions and a new Part 9A concerning nuclear material.

Parts 7 to 9 of the Act deal specifically with obligations arising from UNTOC and the *Trafficking in Persons* and *Smuggling of Migrants Protocol*. Under s 55(1) it is an offence to participate (whether as a member, associate member, or prospective member) in an organised criminal group

> knowing that it is an organised criminal group:
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
>
> (b) reckless as to whether his or her participation contributes to the occurrence of criminal activity.
>
> Maximum penalty: imprisonment for 20 years.

The tern 'organised criminal group' is defined in s 2 of the Act to mean

> a group of at least 3 persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment.

In relation to this definition, s 55(2) further notes that:

> A group of people is capable of being an organised criminal group for the purposes of this section whether or not:
>
> (a) some of them are subordinates or employees of others; or
>
> (b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction; or
>
> (c) its membership changes from time to time.

These definitions and the offence in s 55 closely mirror the equivalent provisions under UNTOC.

Niue

Niue acceded to UNTOC on 16 July 2012, but legislated some of the provisions stemming from the Convention and its Protocols as early as 2006. The *Terrorism Suppression and Transnational Crimes Act 2006* introduced a range of offences to terrorism and organised crime

[57] No 12 of 2008.

into Niuean law, adopting the same model and much of the same language as similar statutes in Kiribati, Nauru, Tonga, Tuvalu, and Vanuatu.

Section 3 of the *Terrorism Suppression and Transnational Crimes Act 2006* defines 'organised criminal group' to mean 'a group of at least 3 persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment. This definition adopts the language of Article 2(a) of UNTOC almost verbatim.

Under s 35 of the Act, it is an offence, punishable by imprisonment for up to seven years, to

> participate (whether as a member, associate member, or prospective member) in an organised criminal group, knowing that it is an organised criminal group, and
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity, or
>
> (b) reckless as to whether his or her participation contributes to the occurrence of criminal activity.

The *Terrorism Suppression and Transnational Crimes Act 2006* further contains provisions reflecting the jurisdictional requirements under Article 15 of UNTOC and extends criminal liability to legal persons (Art. 10). For offences involving terrorism and transnational crime, additional provisions can be found in ss 50 and 51 of the *Terrorism Suppression and Transnational Crimes Act 2006.*

Palau

Palau is one of the newest Parties to UNTOC, having acceded to the Convention on 13 May 2019. At the time of writing, there was no information about when and how obligations arising from the Convention, including offences relating to participation in an organised criminal group, will be implemented into domestic law.

Given the similarities in their legal systems, it may be likely that the implementation of UNTOC in Palau follows the same model as was intended in the Federated States of Micronesia, resulting in amendments to the *Code 1966* of the Republic of Palau. Title 17 of the Code sets out general principles of criminal law and specific offences but presently contains no offences or other special provisions relating to organised crime.

Samoa

Samoa acceded to UNTOC on 17 December 2014. At that time, Samoan law already contained many provisions reflecting the requirements arising from the Convention. Relevant offences, for instance, were included in Part 12, entitled 'Organised Crime, Corruption and Transnational Offending' of the new *Crimes Act* that was enacted in 2013.[58]

Subsection 146(2) of the *Crimes Act 2013* defines 'organised criminal group' to mean

[58] No 10 of 2013.

a group of 3 or more people who have as their objective or one of their objectives:

(a) obtaining material benefits from the commission of offences that are punishable by imprisonment; or

(b) obtaining material benefits from conduct outside Samoa that, if it occurred in Samoa, would constitute the commission of offences that are punishable by imprisonment; or

(c) the commission of offences punishable by imprisonment of a term of 5 years or more; or

(d) conduct outside Samoa that, if it occurred in Samoa, would constitute the commission of offences that are punishable by imprisonment of a term of 5 years or more.

Subsection (3) broadens this definition by noting that:

A group of people is capable of being an organised criminal group for the purposes of this Act whether or not:

(a) some of them are subordinates or employees of others; or

(b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or

(c) its membership changes from time to time.

This definition is largely the same as the definition of organised criminal group found in the law of several other Pacific Islands States. Under subs 146(1) is an offence, punishable by imprisonment for up to ten years, to participate in an organised criminal group,

(a) knowing that 3 or more people share any 1 or more of the objectives (the particular objective or particular objectives) described in subsection (2) (a) to (d) (whether or not the person himself or herself shares the particular objective or particular objectives); and

(b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and

(c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.

The mental elements set out in paras 146(a) to (c) reflect those found in other jurisdictions but set a slightly higher threshold by requiring that the accused knows that the persons constituting the organised criminal group share the particular objectives that define the group.

Under s 38 of the *Crimes Act 2013* it is a separate offence to conspire with any person to commit an offence

Tonga

Tonga acceded to UNTOC on 3 October 2014. A year earlier, the *Counter Terrorism and Transnational Organised Crime Act 2013* was passed,[59] which uses the same model of laws enacted in several other Pacific Islands States and reflects closely the UNTOC requirements. Structure, content, and language of this Act are mostly the same as in Kiribati, Nauru, und Niue. The Act repealed the *Transnational Crimes Act 2005* which contained some similar provisions.

Section 2 of the *Counter Terrorism and Transnational Organised Crime Act 2013* defines 'organised criminal group' to mean

> a group of at least 3 persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment.

The offence of 'participation in organised criminal group' along with the offence of corruption is set out in Part 7 of the Act, entitled 'Transnational Organised Crime'. Under subs 66(1) it is an offence, punishable by imprisonment for up to 25 years,[60] to

> participate (whether as a member, associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group -
>
> (a) knowing that his participation contributes to the occurrence of criminal activity; or
>
> (b) reckless as to whether his participation contributes to the occurrence of criminal activity.

Subsection 66(2) further states that

> A group of people is capable of being an organised criminal group for the purposes of this section whether or not -
>
> (a) some of them are subordinates or employees of others;
>
> (b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction; or
>
> (c) its membership changes from time to time.

The *Counter Terrorism and Transnational Organised Crime Act 2013* further contains provisions relating to jurisdiction, extensions to criminal liability, corporate criminal liability, and extradition that reflect relevant obligations arising from UNTOC. A separate, generic offence of conspiracy can be found in s 15 of the *Criminal Offences Act*.

Vanuatu

Vanuatu acceded to UNTOC on 4 January 2006 and legislated some of the obligations arising from the Convention a year earlier with the *Counter Terrorism and Transnational Organised*

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59 No 23 of 2013.

60 Subsection 66(3) *Counter Terrorism and Transnational Organised Crime Act 2013* (Tonga).

Crime Act 2005.[61] As the name suggests, this Act follows the same model and adopts some of the same structure found in statutes with the same name in several other Pacific Islands States.

The term 'organised criminal group' is defined in s 2(1) of the Act to mean:

> a group of persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment.

Section 28(1) of the Act makes it an offence, punishable by imprisonment for up to 20 years or a fine of up to VUV 100 million or both, to participate in an organised criminal group:

> A person must not participate (whether as a member, associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group:
>
> (a) knowing that his or her participation contributes to the occurrence of transnational criminal activity; or
>
> (b) reckless as to whether his or her participation contributes to the occurrence of transnational criminal activity.

A group of people is capable of being an organised criminal group for the purposes of this offence regardless whether or not:

> (a) some of them are subordinates or employees of others; or
>
> (b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction; or
>
> (c) its membership changes from time to time.[62]

Section 29 of the *Penal Code* of Vanuatu contains a separate offence of conspiracy, which is defined as 'an agreement, express or implied, between two or more persons to an act which, if done, even by one person, would constitute a criminal offence.' Conspiracies are punishable only where expressly provided by law.[63]

Section 51 of the *Counter Terrorism and Transnational Organised Crime Act 2005* as well as s 18 of Vanuatu's *Penal Code* extend liability for offences under the Act to legal persons. Section 48 of the *Counter Terrorism and Transnational Organised Crime Act 2005* on jurisdiction and s 46 on controlled delivery reflect further requirements arising from UNTOC.

The *Counter Terrorism and Transnational Organised Crime Act 2005* was amended in 2008,[64] 2012,[65] and again in 2017.[66] These amendments only affected provisions relating to terrorism but not those concerning organised crime and the implementation of UNTOC.

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61 No 29 of 2005.
62 Subsection 28(3) *Counter Terrorism and Transnational Organised Crime Act 2005* (Tonga).
63 Subsection 29(4) *Penal Code* (Vanuatu).
64 *Counter Terrorism and Transnational Organised Crime Amendment Act 2008* (Vanuatu), No 18 of 2008.
65 *Counter Terrorism and Transnational Organised Crime Amendment Act 2012* (Vanuatu), No 9 of 2012.
66 *Counter Terrorism and Transnational Organised Crime Amendment Act 2015* (Vanuatu), No 15 of 2017.

French overseas territories

UNTOC applies to the French territories in the Pacific, including New Caledonia, French Polynesia, and Wallis and Futuna by virtue of France's signature of UNTOC. France signed the Convention on 12 December 2000 and implemented it into domestic law on 6 August 2000.[67]

Offences relating to organized crime in French criminal law pre-date the development of UNTOC and can be traced back to Articles 265–268 of the *Penal Code* of 1810 which first established offences for the association de malfeiteurs (or 'association of wrongdoers'). In the 1980s, the notion of organised crime gang (bande organisée) was introduced into French criminal law. Beginning in 2000, the French Parliament discussed a bill to amend money laundering laws which, in 2001, was adopted as part of the *Loi relative aux nouvelles regulations économique* (*NRE Act*).[68] This coincided with the launch of UNTOC in December 2000. During the debates of the NRE bill, the idea of criminalising membership in a criminal organisation resurfaced, but initially lacked sufficient support. Eventually, a political compromise was reached and a new criminal offence relating to membership in a criminal organisation was added to the French *Penal Code*.[69]

Current French law sets out offences relating to participation in a criminal organisation in Title V of Book IV of the *Penal Code* – Felonies and Misdemeanours against the Nation, the State and the Public Peace. The *Penal Code* also applies to the New Caledonia, French Polynesia, and Wallis and Futuna.[70] Article 450-1 contains a definition of criminal association:

> [1] A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.[71]

The definition of criminal association in Article 450-1[1] only applies to groups that contemplate criminal offences which attract a penalty of at least five years imprisonment.[72] There is no minimum number of participants and no requirement that the organisation plans to commit more than one offence.[73] Also absent from the definition in Article 450-1 is any requirement concerning the structure of the criminal organisation. The application of the definition, and the offences that flow from it, is thus not dependent on the existence of any

67 Law No 2002-1040 of 6 August 2002

68 Act No 420 of 15 May 2001.

69 Thierry Godefoy, 'The Control of Organised Crime in France: A Fuzzy Concept but a Handy Reference', in Cyrille Fijnaut & Letizia Paoli (eds), *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (Springer, 2004) 763 at 767.

70 Article 711–1 *Penal Code* (France).

71 'Tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits materials, d'un ou plusieurs crimes d'un pu plusieurs délits punis d'au moins cinq ans d'emprisonment.'

72 Jean Cédras, 'France: Les systèmes pénaux à l'epreuve du crime organisé' (1998) 69 *Internatonal Review of Penal Law* 341, 348.

73 Jean Cédras, 'France: Les systèmes pénaux à l'epreuve du crime organisé' (1998) 69 *Internatonal Review of Penal Law* 341, 348.

form of hierarchy between the members of the group or any Mafia or cartel-like structure of the criminal organisation.[74]

The definition in Article 450-1 has been criticised for not containing an element relating to the duration or 'existence for some time' of the organisation, and French legal scholars have noted that the definition is capable of capturing organisations that intend to commit no more than a single criminal offence.[75] There is also no specification of a purpose of the organisation which is explained by the lack of any proper definition of organised crime itself.[76]

Paragraphs [2] and [3] or Article 450-1 set out two separate criminal offences relating to the definition of criminal association under paragraph [1].

> [2] Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of EUR 150,000.
>
> [3] Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of EUR 75,000.

Both paragraphs criminalise the participation in a criminal association. The term 'participation' is not further defined in this Article and is open to judicial interpretation. Participation is the only element of these offences, in addition to the requirement of a criminal association. The difference between the two variations of the participation offence lies in the penalty. A higher penalty of ten years imprisonment and a fine of EUR 150,000 applies if the criminal offences intended, planned, or otherwise envisaged by the group are punishable by ten years imprisonment. If the criminal group contemplates offences punishable by five years or more, the penalty for participants in that group is reduced accordingly. Criminal associations planning or preparing criminal offences that do not attract a minimum penalty of five years do not meet the threshold of this paragraph; accordingly, participation in such groups is not an offence under Article 450-1.

If the criminal offences envisaged by the criminal group materialise, a person may be held liable under Article 450-1 and simultaneously for the offence in which he or she engaged or that were executed by other participants.[77] Separately from Article 450-1, the French *Penal Code* also recognises a number of aggravating circumstances if a specific offence is committed in connection with a criminal organisation or by several people acting together as offenders or accomplices.[78]

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74 Pascal Lemoine, 'Le délit d'association de malfeiteurs et la circonstance de bande organisée' [2007] 2 *Revue pénitentiare et de droit pénal* 277 at 279.

75 Pascal Lemoine, 'Le délit d'association de malfeiteurs et la circonstance de bande organisée' [2007] 2 *Revue pénitentiare et de droit pénal* 277 at 279; Jean Cédras, 'France: Les systèmes pénaux à l'epreuve du crime organisé' (1998) 69 *Internatonal Review of Penal Law* 341, 348.

76 Carole Girault, 'L'élargissement des forms de preparation et de participation, Raport National: France' (2207) 78 (3-4; cd-rom annexe) *International Review of Penal Law*, 117, 127.

77 Carole Girault, 'L'élargissement des forms de preparation et de participation, Raport National: France' (2207) 78 (3-4; cd-rom annexe) *International Review of Penal Law*, 117, 128.

78 Francesco Calderoni, *Organized Crime Legislation in the European Union* (Springer, 2010) 60.

Article 450-2-1 of the *Penal Code* (France) contains a separate offence which criminalises persons benefitting from the activities of criminal organisations. Specifically, this provision creates criminal liability for unexplained wealth:

> The inability by a person to justify an income corresponding to his way of life, while being habitually in contact with persons engaged in activities set out under article 450-1, is punished by five years' imprisonment and a fine of EUR 75,000.

Article 450-2 allows for special concessions to be made for persons who renounce their membership in a criminal organisation and collaborate with law enforcement agencies. Article 450-4 extends liability for the offence of participating in a criminal association under Article 450-1 to corporations. Article 450-5 provides the legal basis for the confiscation of assets and proceeds of crime, including those acquired by corporations.

In addition to the provisions relating to participation in a criminal organisation under Article 450–1, French criminal law contains a separate provision relating to criminal organisations in Article 132–71 of the *Penal Code* which sets out an aggravating circumstance that can be applied after a criminal offence has been committed by an organised criminal group (referred to as 'bande organisée').[79] Under Article 132-71 '[a]n organised crime gang within the meaning the meaning of this law is any group formed or association established with a view to the preparation marked by one or more material fact of one or several offences'. Unlike Article 450–1, the aggravation in Article 132–71 applies to all offences not just to those attracting a minimum penalty of five years imprisonment.[80]

NATIONAL LAWS IN NON-PARTY STATES

Papua New Guinea

Papua New Guinea (PNG) is not a Party to *UNTOC* and very few provisions under PNG law reflect the spirit of the Convention. Papua New Guinea's criminal law derives from that of neighbouring Queensland and many substantive and procedural provisions under the *Criminal Code* remain unchanged since the Code was first enacted in the early 1900s and (again) following PNG's independence in 1975. Section 515-517 of the *Criminal Code* (PNG) contain broad provisions relating to conspiracy, but make no specific reference to organised crime and do not reflect the requirements under *UNTOC*.

Solomon Islands

The Solomon Islands is not a Party to *UNTOC* and very few provisions under its law reflect the spirit of, and obligations under, the Convention.

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79 Jean Cédras, 'France: Les systèmes pénaux à l'epreuve du crime organisé' (1998) 69 *Internatonal Review of Penal Law* 341, 347.

80 Jean Cédras, 'France: Les systèmes pénaux à l'epreuve du crime organisé' (1998) 69 *Internatonal Review of Penal Law* 341, 348.

General principles of criminal law and substantive offences are set out in the *Penal Code* that entered into force with the country's independence in 1978 and that has been amended and updated very rarely since the enactment. As a result, the Code contains no specific provisions relating to organised crime and no provisions reflecting the main provisions under *UNTOC*. Sections 383 of the *Penal Code* criminalise conspiracies to commit felonies and misdemeanours under the laws of Solomon Islands or crimes under the laws of another place. These offences make no reference to the purpose of obtaining a financial or other material benefit as set out in Article 5(1)(a)(i) of *UNTOC*.

Tokelau

Tokelau is not a Party to *UNTOC* and based on the available information appears to have no specific legal provisions concerning organized crime. General matters relating to criminal justice are set out in the *Crimes, Procedure and Evidence Rules 2003*. Section 79 of these Rules contains the offence of conspiracy, which is cast is the widest possible terms and does not require the same elements of the conspiracy-style provision under Article 5(1)(a)(i) of *UNTOC*.

Tuvalu

Tuvalu is not a Party to *UNTOC* but has nevertheless introduced legislation that reflects most aspects of the Convention. Like other Pacific Islands States, Tuvalu has adopted model provisions on organised crime and terrorism and enacted a *Counter Terrorism and Transnational Organised Crime Act* in 2009.[81] This Act shares very many similarities with legislation of the same name found elsewhere in the region.

Consistent with Article 2(a) of *UNTOC*, the term 'organised criminal group' is defined in s 3 of the *Counter Terrorism and Transnational Organised Crime Act 2009* to mean

> a group of at least 3 persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment.

Under s 66(1) of the Act, it is an offence to

> participate (whether as a member, associate member or prospective member) in an organized criminal group, knowing that it is an organised criminal group [and]
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
>
> (b) [being] reckless as to whether his or her participation contributes to the occurrence of criminal activity.

For the purpose of this offence, a group of people is capable of being an organized criminal group regardless whether or not:

> (a) some of them are subordinates or employees of others; or

81 No 9 of 2009.

(b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction; or

(c) its membership changes from time to time.[82]

Part 10, ss 80–87 of the Act contains 'general provisions' relating to jurisdiction, extensions to criminal liability, corporate liability, extradition, and mutual legal assistance that reflect relevant provisions under *UNTOC*.

CHALLENGES AND CONCLUSIONS

As *UNTOC* approaches its 20th birthday, it is fair to say that the Convention has reached remarkable maturity. As on 1 January 2020, the Convention counts 190 Parties and may reach universal ratification in the foreseeable future. If accession to *UNTOC* is used as a measure, this 'success' of *UNTOC* is well reflected in the Pacific Islands, where many States have acceded to the Convention in recent years, with more expected to follow.

As recently as 2016, an assessment of 'transnational organised crime threats' noted that many Pacific Islands States

> still need to ratify and implement the UNTOC and other related international legal tools. As a result, transnational organized crime-related legislation across several [States] is outdated and inconsistent with international standards and norms, which limits the capacity of national and regional authorities to effectively deal with these challenges.[83]

The analysis in this article comes to a different conclusion and has shown that many Pacific Islands States have implemented national laws that reflect the spirit and obligations of *UNTOC*. The Convention has played an important role in encouraging a degree of harmonisation in domestic criminal laws in the region, notes Tom Obokata.[84] Several States base their legislation on the same model provisions and have introduced almost identical legislation thus facilitating communication and cooperation between States. *UNTOC* provides the vocabulary and design for national laws and the legal framework for international cooperation in cases involving organised crime. If organised crime offences and their serious nature are understood consistently, adds Obokata, 'this would naturally lead to smoother inter-state cooperation in investigation, prosecution, and punishment, thereby reducing safe havens for criminals.'[85] Consistent laws and terminology also make it easier to collect and analyse data about investigations and prosecution and to get a more accurate (rather than anecdotal) picture of the levels and characteristics of transnational organized crime in the region.

Based on conversations held for the purpose of this research, there is reason to believe that some of the remaining non-Party States in the region may soon accede to UNTOC. Concerns about the resources needed to develop and implement national laws can be addressed by

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82 Subsection 66(3) *Counter Terrorism and Transnational Organised Crime Act 2009* (Tuvalu).

83 UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 77.

84 Tom Obokata, 'The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific' (2017) 7 *Asian Journal of International Law* 39, 41

85 Tom Obokata, 'The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific' (2017) 7 *Asian Journal of International Law* 39, 41.

technical assistance and the Pacific Islands Forum and other international organisations have a role to play in identifying and removing the obstacles that prevent wider ratification of the Convention.

Accession and adherence to treaties are, however, not definitive indicators regarding the effectiveness of national laws and other measures to combat transnational organized crime.[86] Raising awareness about these laws among law enforcement, prosecutors, and judges and furnishing investigative and prosecution authorities with the relevant mandates and powers are the necessary next steps to translate the new offences into actual outcomes. The measures taken by Pacific Islands States to put the new laws into action and train relevant officials on their purpose and operation, along with an analysis of actual cases, are outside the scope of this article but should be the subject of further research in this area.

Coupled with practical matters, such as enforcement and use of relevant laws, are questions about where transnational organised crime features in national and regional politics in the South Pacific. Given the paucity of comprehensive, reliable, and up-to-date information on the scale and patterns of organised crime in the region, it is not surprising that some States do not see organised crime as a significant problem and may be reluctant to invest effort and resources into a matter that is not ranked high on the political agenda. In this context, it is worth noting that accession to UNTOC and the development of national law to combat transnational organised crime in the Pacific Islands were, for the most part, the result of external pressure by other, more influential States and not triggered by domestic events or pressure by the electorate. There is a question whether sophisticated offences and other laws against organised crime, and the expenses associated with their implementation and enforcement, are warranted if and so long as evidence of organised crime remains so limited. A 2016 publication points to the fact that evidence of mafias, biker gangs, and other criminal organisations operating in the Pacific Islands is very scant. Instead the most significant organised crime issue is the nexus between political elites and 'seemingly licit actors'.[87] The authors point to collusion and corruption in the logging and fisheries sectors and in relation to money laundering. They view the greatest vulnerability to organised crime not in traditional crime types but in the vulnerability of political elites to infiltration by organised crime, especially in the larger Melanesian countries.[88] For these reasons, offences and other new laws against organised crime may remain merely symbolic and may be looked at with reluctance and suspicion by those charged with enforcing them.

It is encouraging that the PIF not only serves as a forum to exchange information and share experiences, but that its Secretariat is starting to take on a more active role to develop model legal provisions along with practical tools to prevent and combat organised crime, along with other crime types. 'Instead of trying to build an EU-style Pacific community,' notes Obokata, 'the Pacific Islands Forum should emphasise practical cooperation by coordinating a common

86 UNODC, *Transnational Organized Crime in the Pacific: A Threat Assessment* (2016) 77.

87 Sinclair Dinnen & Grant Walton, *Politics, Organised Crime, and Corruption in the Pacific*, State Sovereignty & Governance in Melanesia, In Brief 2016/24 (2016) 1.

88 Sinclair Dinnen & Grant Walton, *Politics, Organised Crime, and Corruption in the Pacific*, State Sovereignty & Governance in Melanesia, In Brief 2016/24 (2016) 1.

regional stance on illegality of all kinds.'[89] The creation of new model laws against money laundering is a welcome development in this context. International cooperation against organised crime is still in its infancy in the Pacific Islands and most cooperation is done through informal channels.

A further question outside the scope of this article relates to application of the organised crime offences in practice. There is very little evidence to show that the offences are used by investigators and prosecutors and that they made any real difference in combating organised crime in the region. No reported case applying the offences to actual cases could be found during the course of this research and there appears to be no jurisprudence and next to no literature interpreting and analysing these offences. It may well be, that the introduction of anti-organised crime laws across the Pacific Islands States serves merely a symbolic function to satisfy the international community and donor countries but that there is little desire and capacity to give meaning to these laws and use the actively in the fight against organised crime. It is, however, never too late to change this.

89 Sue Windybank, 'The Illegal Pacific, Part 1: Organised Crime' (2008) 24(2) *Policy* 32, 37.