

1-1-2008

Joining forces to combat crime in the maritime domain: cooperative maritime surveillance and enforcement in the South Pacific region

Robin M. Warner
University of Wollongong, rwarners@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lawpapers>



Part of the [Law Commons](#)

Recommended Citation

Warner, Robin M.: Joining forces to combat crime in the maritime domain: cooperative maritime surveillance and enforcement in the South Pacific region 2008, 1-20.
<https://ro.uow.edu.au/lawpapers/170>

Joining forces to combat crime in the maritime domain: cooperative maritime surveillance and enforcement in the South Pacific region

Abstract

The South Pacific as a region has far more ocean space than land territory. The majority of small island States in the South Pacific are heavily dependent on the sea for their resources and livelihoods. While militaries in our region have recently been focussed on resolving the civil disorder generated by political unrest on land, in locations such as Bougainville, Solomon Islands and Fiji, navies have also had prevalent maritime law enforcement roles in the region, both advisory and operational, for several decades. Threats to the security of the region from crime in the maritime domain will continue to arise in offshore areas requiring more effective and coordinated responses from navies, coastguards and other maritime law enforcement agencies. This article examines some examples of the actual and potential incidence of transnational crime in the maritime domain of the South Pacific region. It will review how well equipped the region is to combat these threats from an international law perspective analysing the adequacy of the current law of the sea framework for cooperative maritime surveillance and enforcement in the South Pacific region and other relevant bilateral and multilateral instruments. Finally it proposes areas for reform in the law of the sea framework and suggestions for more effective implementation of regional instruments such as the 1992 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific and its subsidiary agreements, regional fisheries and marine environmental protection arrangements.

Keywords

Joining, forces, combat, crime, maritime, domain, cooperative, maritime, surveillance, enforcement, South, Pacific, region

Disciplines

Law

Publication Details

Warner, R. M. (2008). Joining forces to combat crime in the maritime domain: cooperative maritime surveillance and enforcement in the South Pacific region. *New Zealand Armed Forces Law Review*, 8 1-20.

JOINING FORCES TO COMBAT CRIME IN THE MARITIME DOMAIN: COOPERATIVE MARITIME SURVEILLANCE AND ENFORCEMENT IN THE SOUTH PACIFIC REGION

Robin Warner*

I Introduction

The South Pacific as a region has far more ocean space than land territory.¹ The majority of small island States in the South Pacific are heavily dependent on the sea for their resources and livelihoods.² While militaries in our region have recently been focussed on resolving the civil disorder generated by political unrest on land, in locations such as Bougainville, Solomon Islands and Fiji, navies have also had prevalent maritime law enforcement roles in the region, both advisory and operational, for several decades. Threats to the security of the region from crime in the maritime domain will continue to arise in offshore areas requiring more effective and coordinated responses from navies, coastguards and other maritime law enforcement agencies. This article examines some examples of the actual and potential incidence of transnational crime in the maritime domain of the South Pacific region. It will review how well equipped the region is to combat these threats from an international law perspective analysing the adequacy of the current law of the sea framework for cooperative maritime surveillance and enforcement in the South Pacific region and other relevant bilateral and multilateral instruments. Finally it proposes areas for reform in the law of the sea framework and suggestions for more effective implementation of regional instruments such as the 1992 *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific*³ and its subsidiary agreements, regional fisheries and marine environmental protection arrangements.

II Incidence of Crime in the Maritime Domain of the South Pacific Region

Multiple sources including strategic analysts, academic commentators and the Pacific Islands Forum Secretariat have suggested that the South Pacific region is a fertile ground for transnational crime with many forms of it affecting the maritime domain.⁴

* Senior Research Fellow, Australian National Centre for Ocean Resources and Security, University of Wollongong, Australia.

¹ Transform Aqorau, 'Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience' (2000) 15(1) *The International Journal of Marine and Coastal Law* 38; Andrew Wright, Natasha Stacey and Paula Holland, 'The cooperative framework for ocean and coastal management in the Pacific Islands: Effectiveness, constraints and future direction' (2006) 49 *Ocean and Coastal Management* 740.

² Wright et al, above n.1, 740.

³ *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific* opened for signature 9 July 1992, [1993] ATS 31 (entered into force 20 May 1993) ('*Niue Treaty*').

⁴ 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) 1-2; Neil Boister, 'Regional Cooperation in the Suppression of Transnational Crime in the South Pacific' in G. Leane and B. von Tigerstrom (eds.), *International Law Issues in the South Pacific* (2005) 38-39; Pacific Islands Forum Secretariat, *Region faces pressure from organised crime*, Press Statement (10 June 2004) http://www.forumsec.org.fi/news/2004/June/Jun_06.htm at 21 July 2008.

Is there sufficient evidence of a significant presence of organised criminal networks and the commission of transnational crime to make this assertion? A 2006 study of Transnational Crime in the Pacific by Rob McCusker of the Australian Institute of Criminology identifies a number of characteristics which make the Pacific Islands region particularly vulnerable to some forms of transnational crime.⁵ A significant proportion of Pacific Island countries are typified in whole or in part by weak and underdeveloped governance structures, corruption and a lack of law enforcement capacity.⁶ The primitive nature of their economies, the poverty of their inhabitants and political instability increase the attractiveness of the islands to transnational crime networks.⁷ Their geographic characteristics, including the wide dispersal of the islands, the remote coastlines and the low population density lend themselves to covert criminal activity including illegal fishing, drug manufacture, transshipment and landing, wildlife trafficking, people smuggling and arms trafficking.⁸ Many of these crimes are either committed at sea or have a maritime element to them.

A. *Illegal Fishing and Trafficking in Endangered Species*

The extended reach of distant water commercial fishing vessels and the lack of maritime surveillance and enforcement of the vast coastal state fishing zones and smaller high seas enclaves of the South Pacific make them particularly susceptible to illegal, unreported and unregulated fishing.⁹ Some progress has been made in tackling IUU fishing particularly in the South West Pacific through strengthening coastal State control over exclusive economic zone areas but considerable challenges remain.¹⁰ The region's surveillance and enforcement capacity consists almost entirely of patrol boat assets and air surveillance from developed country donors within and outside the region.¹¹ The limited extent of surveillance and enforcement assets at sea is compounded by poor regulatory control on shore in a number of areas. Corruption in licensing and access to fisheries is a prominent feature in the South Pacific.¹² While some South Pacific States have implemented port State controls which prevent unloading and trade in illegally caught fish, a recent FAO Report on a Port State Control Workshop in the South Pacific concludes that port State enforcement mechanisms could be improved by better information management, training and monitoring, control and surveillance cooperation.¹³ In addition, although steps have

⁵ McCusker, above n.4, 1-2.

⁶ McCusker, above n.4, 1-2; Boister, above n.4, 46-47.

⁷ Boister, above n. 4, 46.

⁸ McCusker, above n.4, 2.

⁹ Transform Aqorau, 'Moving Towards a Rights-Based Fisheries Management Regime for the Tuna Fisheries in the Western and Central Pacific Ocean' (2007) 22(1) *The International Journal of Marine and Coastal Law* 128-129.

¹⁰ MRAG and Fisheries Ecosystems Restoration Research Fisheries Centre, University of British Columbia, *The Global Extent of Illegal Fishing*, April 2008 <http://www.illegal-fishing.info/uploads/MRAGxtentGlobalIllegalFishing.pdf> at 23 July 2008.

¹¹ FAO, *Report of the FAO/FFA Regional Workshop to Promote the Full and Effective Implementation of Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, 2007 8.

¹² IUCN, *Plundering the Pacific* <http://cms.iucn.org/what/issues/fisheries/index.cfm?uNewsID=1049> at 21 July 2008; Canberra Times, *Turf war hurting fisheries:report*, 29/01/08 <http://www.canberratimes.com.au/news/local/news/general/turf-war-hurting-fisheries-report/420045.aspx> at 21 July 2008; Kate Barclay and Ian Cartwright, 'Governance of Tuna Industries: The key to economic viability and sustainability in the Western and Central Pacific Ocean' (2007) 31(3) *Marine Policy* 351-353.

¹³ FAO, above n.11, 11.

been taken to introduce cooperative conservation and management of tuna stocks in the Western and Central Pacific through the establishment of the Western Central Pacific Fisheries Commission, a South Pacific regional fisheries management agreement is still being negotiated.

Illegal trade in endangered species is common in the Pacific Island countries which are both a source and conduit for that trade into and from Asia and developed countries including the US and Australia.¹⁴ Domestic legislation and multilateral cooperation in surveillance and enforcement in the Pacific Islands, however, has tended to focus on combating illegal fisheries rather than preventing the illegal trade in native birds or reptiles although there are some export controls in place for endangered species.¹⁵

B. *Drug Trafficking*

The extent of the maritime transport of illegal drugs in the Pacific remains unclear. Some analysts posit that drugs are transported via existing commercial sea transport routes and others by non commercial vessels such as yachts with the many uninhabited islands of the South Pacific being used for caches of illegal drugs.¹⁶ Some concrete evidence of drug trafficking by sea in the Pacific in recent years is cited by McCusker and Boister.¹⁷ In 2000 350 kg of heroin bound for Australia, NZ and Canada was seized in Suva.¹⁸ In 2001 90kg of cocaine was seized on transit through New Caledonia and 100kg of cocaine was seized in Tonga.¹⁹ In 2002, 74 kg of methamphetamine was found on a ship in Singapore bound for Fiji and Australia.²⁰ In 2004 5 kg of crystal methamphetamine, 700 litres of liquid methamphetamine and sufficient precursor chemicals to produce an additional 1000 kg of methamphetamine was seized from a warehouse in Suva.²¹ Illicit drug production in the Pacific Island is generally believed to be limited in scope and scale however there have been some exceptions to this revealed in the South Pacific. These include the methamphetamine related seizures in Suva, cannabis which has been observed growing in Fiji, PNG, Samoa and Tonga and the illicit commercial cultivation of marijuana in PNG, Samoa, Fiji and Tonga.²² A Tongan syndicate based in Hawaii has been connected to the trafficking of cocaine and there have been indications of the establishment of crystal methamphetamine laboratories in the region by Asian drug trafficking groups.²³

C. *People Smuggling*

¹⁴ McCusker, above n.4, 5; Neil Boister, 'New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific' (2005) 9(2) *Journal of South Pacific Law* 1; Pacific Islands Forum, *Forum Communiqué*, Thirty Fourth Pacific Islands Forum, Auckland New Zealand 14-16 August 2003, paras 21-25.

¹⁵ McCusker, above n.4, 5; Boister, above n. 4, 70.

¹⁶ McCusker, above n.4, 4; Boister, above n.4, 40.

¹⁷ McCusker, above n.4, 2; Boister, above n.4, 40-42.

¹⁸ Boister, above n.4, 41; McCusker, above n.4, 2.

¹⁹ Boister, above n.4, 41.

²⁰ Ibid.

²¹ Ibid.

²² Boister, above n.4, 42.

²³ Ibid, 41.

While the key global monitoring agency, the UNODC and the 2007 US Trafficking in Persons Report do not disclose evidence of trafficking in persons in the South Pacific, people smuggling or migrant trafficking by sea between countries in the South Pacific has occurred.²⁴ Schloenhardt's 2002 analysis of migrant trafficking in the Asia Pacific highlights Papua New Guinea as a transit country with the main nationalities of trafficked migrants being Chinese, Sri Lankan and Iraqi on their way to Australia and New Zealand.²⁵ Other transit and destination points in the South Pacific have included New Caledonia and Fiji.²⁶ The potential for the illegal smuggling of groups of people left homeless by the effects of climate change especially sea level rise is also a prospective risk for the South Pacific region.

D. *Arms Trafficking and Terrorist Activity*

Opinions differ on the extent of the illegal arms trade in the Pacific with the PNG/West Papua border being pinpointed by some analysts as a critical centre of gravity for this criminal activity.²⁷ There is also evidence of arms trafficking between Bougainville and the Solomon Islands.²⁸ The susceptibility of Pacific Island countries to terrorism is a matter for debate but there have been indications of indirect terrorist activity in the maritime domain through the use of flags of convenience.²⁹ In October 2002, Croatian police seized a Tongan registered vessel carrying explosives to Iraq. In September 2002, Italian authorities intercepted another Tongan registered vessel claiming it had landed 15 Pakistani Al Qaeda members said to be planning strikes in Europe. In 2002, Israeli authorities captured 50 tonnes of Iranian source weapons destined for the Palestinian Authority from a Tongan registered ship in the Red Sea.³⁰

III International and Regional Law Framework for Combating Crime in the Maritime Domain of the South Pacific

In the South Pacific region, navies and coastguards, together with their counterparts in police and customs organisations have traditionally been involved in fisheries, customs, quarantine and immigration law enforcement in marine areas within national jurisdiction. The rising incidence of transnational criminal activity at sea calls for an increasing focus on strengthening the legal and institutional framework for cooperative maritime surveillance and enforcement across boundaries and on the high seas. There have been limited experiments in cooperative maritime surveillance and enforcement in the transboundary context through the *Niue Treaty* and its subsidiary agreements and embryonic efforts to establish regulatory frameworks for cooperative maritime surveillance and enforcement on the high seas for highly migratory,

²⁴ UNODC, *Annual Report 2007*, http://www.unodc.org/pdf/annual_report_2007/AR06_fullreport.pdf at 24 July 2008; US Department of State, *Trafficking in Persons Report 2008*, <<http://www.state.gov/documents/organization/105501.pdf>> at 24 July 2008.

²⁵ Andreas Schloenhardt, *Organised Crime and Migrant Trafficking- Australia and the Asia-Pacific* (Research and Public Policy Series No.44, Australian Institute of Criminology, 2002) 59.

²⁶ *Ibid.*

²⁷ Philip Alpers and Conor Twyford, 'Small Arms in the Pacific', *Small Arms Survey Occasional Paper No. 8*, March 2003, 17, http://www.smallarmssurvey.org/files/sas/publications/o_papers_pdf/2003-op08-pacific.pdf at 24 July 2008

²⁸ *Ibid.*

²⁹ McCusker, above n.4, 5.

³⁰ *Ibid.*

straddling and discrete high seas fish stocks.³¹ This section examines the adequacy of the international and national law framework to support maritime surveillance and enforcement firstly in marine areas within national jurisdiction, then in the context of transboundary and high seas maritime surveillance and enforcement.

A. *Legal Framework for Maritime Surveillance and Enforcement in Areas within National Jurisdiction in the South Pacific*

Parts V and XII of the 1982 *United Nations Law of the Sea Convention* ('*LOSC*')³² provide a strong foundation for the enforcement of coastal State laws on living and non living resource exploitation and the protection and preservation of the marine environment within an exclusive economic zone out to 200 nautical miles from a coastal State's baselines. The majority of States in the South Pacific have implemented these provisions of the *LOSC* through national laws on fisheries exploitation and in some cases marine pollution laws and marine protected areas within their exclusive economic zones.³³ A coastal State also has special policing rights in relation to its customs, fiscal sanitary and immigration law in a further 12 nautical mile zone adjacent to its 12 nautical mile territorial sea under Article 33 of the *LOSC*. This article has been implemented in some of the national laws of South Pacific States although other States have only legislated to establish territorial seas and exclusive economic zones.³⁴ These fundamental jurisdictional rights are supplemented by a right of hot pursuit under customary international law and Article 111 of the *LOSC* which entitles the coastal State to extend its law enforcement powers into marine areas beyond national jurisdiction provided a range of conditions are met including valid initiation of the pursuit in the relevant zone of coastal State jurisdiction, the conduct of the pursuit by warships, military aircraft or other ships or aircraft clearly marked or identifiable as being on government service and the continuity of the pursuit. Under Article 111(3) the right of hot pursuit ceases when the pursued vessel enters the territorial sea of its own or a third State. The right of hot pursuit provides an international law foundation for extending maritime surveillance and enforcement beyond marine areas within national jurisdiction but it is subject to some constraints such as the safe haven provision for the pursued vessel in Article 111(3) of the *LOSC* and it is framed in terms of an individual coastal State right rather than as a basis for cooperative maritime surveillance and enforcement exercised by multiple States within a particular oceanic region.³⁵ A coastal State is also entitled to

³¹ The first international meeting to discuss the establishment of a South Pacific RFMO took place in Wellington on 14-17 February 2006. Meetings have been held twice yearly since then with the most recent held in Ecuador 10-14 March 2008 and the sixth meeting to be held in Canberra 6-10 October 2008. The South Pacific RFMO negotiations website at <<http://www.southpacificrfmo.org/meetings/>> provides more detail on the small working group discussions which are contributing to the development of a draft agreement.

³² *United Nations Convention on the Law of the Sea* opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*LOSC*').

³³ Relevant national laws on fisheries conservation and management and protection of the marine environment in marine areas within national jurisdiction can be found at <http://www.paclii.org/>.

³⁴ Examples of national legislation establishing contiguous zones include Samoa's *Maritime Zones Act* 1999, s.18; Tuvalu's *Maritime Zones Declaration Act* 1983, s.9 and Vanuatu's *Maritime Zones Act* 1988, s.7.

³⁵ There is also state practice from the Australian sub Antarctic Heard and McDonald Islands area in the Southern Ocean involving warships and other ships authorised by the Australian Government which has resulted in some spectacular instances of hot pursuit covering vast distances across the Southern and Indian Oceans and producing some ad hoc arrangements for cooperative maritime

exercise enforcement powers against mother ships outside the relevant zone of coastal State jurisdiction that are working in conjunction with smaller boats suspected of breaching the laws applicable in those zones of jurisdiction under the doctrine of constructive presence.³⁶ This is an established customary international law doctrine, however, it has not been fully implemented in national legislation or State practice in maritime zones of the South Pacific.³⁷

B. *Legal Framework for Cooperative Maritime Surveillance and Enforcement across National Boundaries in the South Pacific*

While the international law foundation for maritime surveillance and enforcement in marine areas within national jurisdiction is a strong one supported by a wealth of state practice in the South Pacific and other regions, the international law basis for cooperative maritime surveillance and enforcement across national boundaries and on the high seas is still developing. The *Niue Treaty* was a prescient model for collaboration in maritime law enforcement when it was negotiated in 1992, however, it is only a framework agreement which depends on the conclusion of subsidiary agreements between its Parties for implementation.³⁸ The development of the underpinning network of subsidiary agreements required to operationalise practical cooperation between the Parties to the *Niue Treaty* has been slow. An ad hoc agreement to cooperate in fisheries surveillance and law enforcement was signed between Tonga and Tuvalu in 1993 when only Tonga was a party to the *Niue Treaty*. but it is only in recent years that the negotiation of subsidiary agreements has gathered pace with the first subsidiary agreement between the Federated States of Micronesia, Palau and the Marshall Islands being signed in Feb 2002 and the second between Samoa and the Cook Islands in June 2005.³⁹

The subsidiary agreements envisaged in the *Niue Treaty* were designed to contain clauses facilitating closer cooperation in more concrete ways such as the physical sharing of surveillance and enforcement equipment, the empowerment of each others officers to perform enforcement duties and the enhancement of extradition procedures and evidentiary procedures.⁴⁰ Article VI (1) of the Treaty forms the basis for cooperation in fisheries surveillance and enforcement providing that a Party may in a

enforcement between the Australian authorities and the South African and Royal Navies. Eric J. Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*' (2004) 19(1) *International Journal of Marine and Coastal Law* 31-32 argues that multilateral hot pursuits such as those conducted by an Australian authorised pursuit vessel with the assistance of other States' authorised pursuit vessels in the Southern Ocean against the *Viarsa I* and the *South Tomi* are not inconsistent with the LOSC provided the other conditions prescribed in Article 111 are fulfilled.

³⁶ This form of jurisdiction is recognised in Article 111 (4) of the LOSC.

³⁷ The Australian *Customs Act 1901* (Cth) contains a mother ship apprehension provision in s.184A (5) and the Australian *Fisheries Management Act 1991* (Cth) has a similar provision in s.101B. Warwick Gullett and Clive Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22(4) *The International Journal of Marine and Coastal Law* 570, n.126 comment that there has been considerable state practice evidencing the doctrine of constructive presence but the examples given relate to northern hemisphere cases.

³⁸ *Niue Treaty*, Article II (1).

³⁹ Aqorau, above n.1, 58; Forum Fisheries Agency (FFA), *MCS Newsletter*, Vol. 7 Issue 3 2005, http://www.ffa.int/system/files/MCS_Newsletter_Sep_05.pdf at 27 July 2008.

⁴⁰ FFA, above n.39.

subsidiary agreement permit another Party to extend its fisheries surveillance and enforcement activities to the territorial sea and archipelagic waters of that Party. Aqorau identifies a number of ambiguities in the provisions of Article VI(1) of the Niue Treaty.⁴¹ In his view it is not clear whether the phrase “extend its fisheries surveillance and enforcement activities” refers to the enforcement of the laws and regulations of the enforcing State or to those of the consenting State in whose territorial waters or archipelagic waters the surveillance and enforcement activities take place although it seems on a plain reading of Article VI(1) that the former interpretation would be the most logical. He also points out that the requisite location of a fisheries violation is not specified in Article VI(1) and that it does not appear to cover fisheries violations in the exclusive economic zones of Parties to the *Niue Treaty*.⁴²

The primacy of the territorial jurisdiction of the State in whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity is carried out is preserved in Article VI (1) which mandates that the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels shall be governed by that State’s national laws and regulations. This provision will necessitate discussion between the Parties to subsidiary agreements on harmonising their enforcement procedures. Another area of ambiguity which is not addressed in Article VI of the *Niue Treaty* is the extension of a hot pursuit from one Party’s relevant zone of jurisdiction into another Party’s territorial waters and its consistency with Article 111(3) of the *LOSC*... Notwithstanding this potential inconsistency with the cessation of hot pursuit provision in Article 111(3) and under customary international law, there are countervailing trends in State practice where States have agreed to the extension of hot pursuits by other States in their territorial waters to deny safe haven to fleeing illegal fishers and other vessels suspected of crime such as drug trafficking.⁴³ The 2007 Agreement between the Governments of Australia and France on Cooperative Enforcement of Fisheries Laws in the maritime areas adjacent to their sub Antarctic territories formalizes cooperative enforcement of the two States fisheries laws allowing each parties enforcement officers to apprehend alleged FFVs in each others adjacent fisheries zones. The treaty authorises cooperative enforcement activities on the high seas in circumstances of hot pursuit or where a vessel is acting as a mother ship for another vessel working inside the Parties fisheries zones. The treaty also declares that authorised enforcement vessels may engage in the use of unspecified disruptive measures consistent with international law as a means of hindering the activities of suspected illegal fishing vessels. As posited by Aqorau, Gullett and Schofield, explicit or implied consent by the Parties to a cooperative maritime surveillance and enforcement agreement to the extension of a hot pursuit into each others territorial waters creates the potential for a challenge by a third State’s vessel which has been apprehended that its right of innocent passage in the territorial sea has been breached.

C. *Legal Framework for Cooperative Surveillance and Enforcement in High Seas Areas of the South Pacific*

⁴¹ Aqorau, above n.1, 55-56.

⁴² *Ibid*, 55.

⁴³ Aqorau, above n.1, 56 ns. 89,90 and 91cites examples from the Bahamas and Europe in counter drug trafficking agreements and the *Convention between Denmark and Sweden for the Common Supervision in order to prevent the Smuggling of Alcoholic Liquors* 1935, 166 LNTS 299 at 307.

The status of cooperative maritime surveillance and enforcement in high seas areas of the South Pacific is even more developmental in nature than the transboundary situation. Fisheries is the only sector in which South Pacific States have begun to establish cooperative maritime surveillance and enforcement frameworks on the high seas. The *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC Convention)* established the first comprehensive conservation and management regime for highly migratory fish stocks in waters beyond national jurisdiction in the Pacific Ocean in 2004.⁴⁴ The regulatory area covered by the *WCPFC Convention* is estimated to have 60% of the world's tuna stocks and includes a large proportion of South Pacific waters situated outside and between the exclusive economic zones of the Parties.⁴⁵ The objective of the *WCPFC Convention* is to ensure, through effective management, the long term conservation and sustainable use of all the highly migratory fish stocks listed in Annex I to the *LOSC*, including tuna, swordfish, marlin, sailfish, mackerel and sharks, in the western and central Pacific Ocean in accordance with the *LOSC* and the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement)*.⁴⁶

The Western Central Pacific Fisheries Commission is empowered to adopt principles and measures for the conservation and management of the highly migratory fish stocks in its area of competence which reflect the key environmental protection principles in the *UN Fish Stocks Agreement*. These include measures based on the best scientific evidence available to ensure the long term sustainability of the highly migratory fish stocks in the Convention's regulatory area and the promotion of their optimum utilisation.⁴⁷ The Commission must apply the precautionary principle, in accordance with Annex II of the *UN Fish Stocks Agreement*, determine the impact of fishing activities on non target and associated or dependent species and their environment and adopt plans to ensure the conservation of species and to protect habitats of special concern.⁴⁸ Under Article 24 of the *WCPFC Convention*, flag States must ensure that their fishing vessels do not engage in unauthorised fishing for highly migratory fish stocks beyond national jurisdiction and that, as flag States, they are able to effectively exercise their responsibilities for fishing vessels operating under their flag.⁴⁹ Flag States of Parties must maintain a record of fishing vessels authorised to fish beyond national jurisdiction and require such vessels to use real time satellite

⁴⁴ *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, opened for signature 5 September 2000, 40(2) ILM 277 (entered into force 19 June 2004) (*WCPFC Convention*).

⁴⁵ Transform Aqorau, 'Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its Implications for the Pacific Island States' (2001) 16(3) *The International Journal of Marine and Coastal Law* 382.

⁴⁶ *WCPFC Convention*, Arts. 2 and 3; *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001) (*UN Fish Stocks Agreement*).

⁴⁷ *WCPFC Convention*, Art. 5(a) and (b).

⁴⁸ *Ibid*, Arts. 5(c) and 6.

⁴⁹ *Ibid*, Art. 24(1) and (2).

position fixing transmitters so that they can participate in the vessel monitoring system established by the Commission.⁵⁰ The Commission has adopted measures for Contracting Parties to board and inspect each others fishing vessels on the high seas in accordance with the *UN Fish Stocks Agreement* model but the Commission's Technical and Compliance Committee is still developing operational elements required for practical implementation of the measures such as a WCPFC high seas boarding and inspection flag, an identity card for authorised inspectors, a standardised multi-lingual questionnaire and a high seas boarding and inspection register.⁵¹ Negotiations are continuing to establish a South Pacific RFMO which will cover the conservation and management of non highly migratory fisheries and protection of biodiversity in high seas areas of the South Pacific Ocean.⁵²

The development of cooperative maritime surveillance and enforcement agreements outside the fisheries sphere in the South Pacific region, either in the transboundary context or on the high seas, is still largely in prospect. A potential basis for further development in cooperative protection of the marine environment and counter drug trafficking can be found in other international law instruments such as the *Convention for the Protection of the Natural Resources and the Environment of the South Pacific Region (Noumea Convention)*⁵³ and the *Convention on the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Drugs Convention)* to negotiate cooperative high seas boarding agreements amongst themselves.⁵⁴ An environmental protection plan for the South Pacific region has been evolving since the establishment of the South Pacific Environment Programme (SPREP) in 1978.⁵⁵ The framework *Noumea Convention* commits its Parties to prevent reduce and control pollution of the Convention Area from any source and to ensure sound environmental management of natural resources.⁵⁶ The Convention Area is defined as the 200 nautical mile zones established off the coasts of its 21 regional Parties as well as those areas of high seas which are enclosed from all sides by these 200 nautical mile zones.⁵⁷ The majority of small islands in the South Pacific region have land areas under 700 square kilometres and are heavily dependent on a healthy marine environment for their survival.⁵⁸ The region has one of the highest quotients of biodiversity in the world with a large population of rare and endangered species such

⁵⁰ Ibid, Art 24(4) and (8).

⁵¹ Ibid, Art.26; WCPFC, *Summary Report of the Third Regular Session of the Technical and Compliance Committee, 27 September-2 October 2007*, Attachment F <http://www.wcpfc.int/tcc3/pdf/TCC3%20Summary%20Report%20and%20Attachments.pdf> at 27 July 2008.

⁵² See note 30 above.

⁵³ *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, opened for signature 24 November 1986, (1987) 26 ILM 41 (entered into force 22 August 1990) (*Noumea Convention*).

⁵⁴ *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1989 28 ILM 493 (entered into force 11 November 1990) (*Vienna Drugs Convention*).

⁵⁵ Ben Boer, Ross Ramsay and Donald Rothwell, *International Environmental Law in the Asia Pacific* (1998) 41.

⁵⁶ *Noumea Convention*, Art. 5(1).

⁵⁷ Ibid, Art. 2(a)(i) and (ii); Wright et al, above n.1, 740 notes that the Pacific Islands region includes 8 million square kilometres of high seas – some of which is fully enclosed by the EEZs of several island countries..

⁵⁸ Tamari'I Tutangata and Mary Power, 'The Regional Scale of Ocean Governance: Regional Cooperation in the Pacific Islands' (2002) 45(11) *Ocean and Coastal Management* 873.; Wright et al, above n.1, 740

as dugongs, sea turtles and whales.⁵⁹ The South Pacific also contains a variety of vulnerable marine habitats such as hydrothermal vents, some of the world's deepest ocean trenches and seamount environments rich in biodiversity, many of which are in waters beyond national jurisdiction.⁶⁰ This cornucopia of biodiversity is subject to multiple stress factors including population growth, natural disasters, unsustainable fisheries practices and alien species invasion.⁶¹ The region's high seas areas have been used for nuclear testing and toxic waste disposal in the past although these activities have diminished in recent years.⁶² The region also faces the externally imposed threat of sea level rise associated with global warming.⁶³

Many of the small island nations in the South Pacific are still in dependent associations with other States or have only attained independence in recent decades.⁶⁴ Their capacity to manage environmental protection programmes is severely limited and much of the funding and technical expertise for SPREP projects is provided by the developed countries in the region and other sources of international aid.⁶⁵ Nonetheless, the *Noumea Convention* anticipates the collaboration of its parties in protecting the marine environment of the whole Convention Area, including its high seas enclaves. Article 4 of the Convention provides that the parties shall endeavour to conclude bilateral or multilateral agreements for the protection, development and management of the marine and coastal environment of the Convention Area. Of particular relevance to the high seas areas within the Convention's regulatory scope, are articles urging the Parties to take all appropriate measures to prevent, reduce and control pollution from vessels, seabed activities and the testing of nuclear devices.⁶⁶ Article 14 of the Convention reflects some of the key concepts associated with an integrated and ecosystem based approach to oceans management in providing that Parties shall take all appropriate measures to protect and preserve rare and fragile ecosystems and depleted, threatened or endangered flora and fauna as well as their habitat in the Convention Area. Parties are recommended to establish protected areas and prohibit or regulate any activities likely to have adverse effects on the species, ecosystems or biological processes of such areas provided that the establishment of such areas is not to affect the rights of other parties to the *Noumea Convention* or third States under international law.

In the policy arena, 13 *Noumea Convention* Parties took steps to protect waters in the Convention Area both within and beyond national jurisdiction with the conclusion of a Strategic Action Programme (SAP) for the international waters of the Pacific Islands in 1997.⁶⁷ The term "international waters" in the SAP context is intended to apply to all of the waters encompassed within the Pacific Island region rather than just the high

⁵⁹ SPREP, *Biodiversity in the Pacific Islands*, <http://www.sprep.org/topic/Biodiv.htm> at 28 July 2008

⁶⁰ Richard Herr, 'Environmental Protection in the South Pacific: The Effectiveness of SPREP and its Conventions' in Olav Stokke and O.B. Thommessen (eds.), *Yearbook of International Cooperation on Environment and Development 2002/3* (2002) 43; SPREP, above n.59.

⁶¹ Tutangata et al, above n.58, 875; SPREP, above n.59.

⁶² Herr, above n.60, 43

⁶³ Herr, above n.60, 43; Tutangata et al, above n.58, 880.

⁶⁴ Herr, above n.60, 43.

⁶⁵ Herr, above n.61, 43-44; Tutangata et al, above n.58, 879-880; Wright et al, above n.1, 757.

⁶⁶ *Noumea Convention*, Arts. 6,8 and 12.

⁶⁷ Philomene A. Verlaan and Gerard Miles, 'South Pacific: New Developments in Marine Resource Management for Pacific Islands' (1998) 13(2) *The International Journal of Marine and Coastal Law* 237; Wright et al, above n.1, 749.

seas areas which are beyond national jurisdiction.⁶⁸ The SAP is designed to provide a blueprint for the integrated management of all the waters within the SPREP region and to achieve cooperation towards that objective between SPREP and sectorally based management regimes.⁶⁹ The transition to integrated management of the “international waters” under the SPREP SAP comprised two strands of activity, Integrated Coastal and Watershed Management (ICWM) and Oceanic Fisheries Management (OFM).⁷⁰ Protection of biodiversity is one of the key objectives under both strands of activity.⁷¹ Under the OFM, which has the primary relevance for high seas areas, SPREP has forged links with regional fisheries communities, the Forum Fisheries Agency and the Western and Central Pacific Fisheries Commission and is monitoring their management of the extensive tuna fisheries which straddle the SPREP region.⁷² One of the objectives of the OFM component of the SPREP international waters project is to assess the impact of tuna fishing on the pelagic ecosystem of the region.⁷³ There is currently no surveillance and enforcement dimension to non fisheries related environmental protection measures devised by SPREP for high seas areas but this is a potential area for further development of cooperative maritime surveillance and enforcement regimes in the South Pacific region.

The *Vienna Drugs Convention* provides a more established framework in international law for the extension of cooperative maritime surveillance and enforcement to waters in which high seas freedoms of navigation apply to combat drug trafficking. Under Article 17(3) of the Convention, a Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag of another Party is engaged in illicit drug trafficking may notify the flag State, request confirmation of registry and authorization from the flag State to take appropriate measures in regard to the vessel. Such measures may include boarding and searching the vessel and if illicit traffic is found, taking appropriate action with respect to the vessel, persons and cargo on board.⁷⁴ Article 17(9) of the Convention envisages Parties concluding bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of the article. There is substantial state practice implementing this article in the northern hemisphere particularly by US Coastguard and Drug Enforcement Agency vessels and aircraft in the Caribbean region and UK and European warships and government vessels in European waters.⁷⁵ Many of these States have entered into bilateral and multilateral agreements on counter drug enforcement operations beyond their territorial waters which typically provide warships or government vessels of parties with authority to stop, board and search the flag vessels of other parties beyond their territorial waters

⁶⁸ Verlaan et al, above n.67, 237, n.4.

⁶⁹ Ibid, 241.

⁷⁰ SPREP, *International Waters Projects*, <http://www.sprep.org/iwp/index.asp> at 30 July 2008

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ *Vienna Drugs Convention*, Article 17(4).

⁷⁵ Colin Warbrick and Dominic McGoldrick (eds.), ‘Drug Trafficking at Sea: The Case of R. v. Charrington and Others’ (2000) 49 *International and Comparative Law Quarterly* 477-489; William Gilmore, ‘Counter Drug Operations at Sea: Developments and Prospects’ (1999) 25 *Commonwealth Law Bulletin* 609-616; William Gilmore, ‘Narcotics Interdiction at Sea. UK-US Cooperation’ (1989) 13(3) *Marine Policy* 218-230; William Gilmore, ‘Narcotics Interdiction at Sea. The 1995 Council of Europe Agreement (1996) 20(1) *Marine Policy* 3-14.

and to enforce their counter drug laws. In some cases the agreements also include powers to pursue fleeing vessels or aircraft into the waters or airspace of the other party and to fly into such airspace in support of counter drug operations. Similar cooperative maritime surveillance and enforcement initiatives to combat drug trafficking beyond the territorial waters of States in the South Pacific region have not transpired. This can be explained by a range of factors including the fact that not all South Pacific States are Parties to the *Vienna Drugs 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.⁷⁶

IV Enhancing Legal Frameworks for Cooperative Maritime Surveillance and Enforcement in the South Pacific

Enhancement of cooperative maritime surveillance and enforcement regimes to combat the multiple forms of transnational crime found in the South Pacific will require a staged approach which recognises the limited capacity available for such operations in the region and directs pooled resources to the most imminent threats. The *Niue Treaty* and its subsidiary agreements have provided a leading edge template for cooperative maritime surveillance and enforcement in the fisheries sector. The geographic coverage of the region through subsidiary agreements under the *Niue Treaty* is not yet complete and as discussed above, the language of Article VI could benefit from further clarification however such clarification is perhaps best achieved by means of subsidiary agreements. The issue of consent by parties to cooperative maritime surveillance and enforcement agreements to continue hot pursuit into their territorial waters and the consequent liability of challenge to the validity of the hot pursuit by the representatives of the pursued vessel in subsequent litigation is a broader law of the sea question which is unlikely to be resolved in the near future as there seems to be no political appetite on the part of States Parties to the *LOSC* for a Review Conference.⁷⁷ From a positive perspective, however, there is now a significant and long standing trend in State practice in both the fisheries and counter drug operations sectors where States have agreed to allow hot pursuit to continue into their territorial seas to deny safe haven to offending vessels.

At the level of subsidiary agreements there are numerous practical matters which need to be addressed for the most effective operation of cooperative maritime surveillance and enforcement schemes by navies, coastguards and other law enforcement agencies. While some diversity is inevitable in enforcement procedures conducted by different navies and law enforcement agencies, parties to subsidiary agreements should strive for consistency and clarity in provisions on boarding modalities, levels of force and the delivery of apprehended vessels to port. The use of force in maritime law enforcement operations, even in waters within national jurisdiction, has been a controversial issue for navies and other law enforcement agencies. Although use of force is viewed as a necessary element in constabulary operations at sea, the level of force which should be employed has been contentious. In cases where fleeing vessels

⁷⁶ The *Vienna Drugs Convention* has 183 parties. Within the South Pacific region, Australia, the Cook Islands, Fiji, New Zealand, Samoa and Tonga are parties. UNODC, *Status of Treaty Adherence* http://www.unodc.org/documents/treaties/treaty_adherence_convention_1988.pdf at 30 July 2008

⁷⁷ David Freestone and Alex Oude-Elferink, 'Flexibility and Innovation in the Law of the Sea: Will the Law of the Sea Convention Amendment Procedures ever be used?' in Alex Oude-Elferink, *Stability and Change in the Law of the Sea : The Role of the Law of the Sea Convention* (2005) 173-183.

have consistently refused to stop, the normal procedure has been to employ graduated use of force until the vessel submits to boarding. The area in which controversy has arisen is whether direct fire at or into a fleeing vessel can be employed in the last resort to stop the vessel. Case law from the Prohibition era in the US and the UK/Iceland Cod wars in the 1960s criticised the use of direct fire in fisheries enforcement operations.⁷⁸ In an attempt to forestall the need to use direct fire in maritime law enforcement operations, navies have developed a battery of non lethal alternatives such as water cannon and propeller entrapment devices together with the usual escalatory warning signals using visual and auditory devices and culminating with warning shots across the bows. The efficacy of some non lethal forms of force such as propeller entrapment devices is questionable in remote locations at sea where the disabling of vessels may jeopardise the safety of the master and crew on board the fleeing vessel. Likewise the sinking of fleeing vessels in a maritime law enforcement operation in a high seas location with the potential loss of life involved is likely to be viewed as a disproportionate use of force under international law principles. Subsidiary agreements and underlying instructions to navies and law enforcement agencies should incorporate detailed provisions on the appropriate levels of force for particular law enforcement operations at sea.

Where a fleeing vessel is apprehended on the high seas, the enforcement vessel must then deliver the pursued vessel and its crew to a responsible prosecution authority. In the case of apprehensions in remote locations, this may entail a lengthy voyage through high seas areas and possibly through the offshore zones of third States. Subsidiary agreements for cooperative maritime surveillance and enforcement should specify who controls the vessel during transit, measures which can be taken against a belligerent master and crew and the basis of liability for personal injury and property damage to the vessel and its equipment during the transit. Depending on the location of the apprehension, a subsidiary agreement may also contain provision for parties other than the apprehending party to receive and prosecute the offender in their respective jurisdictions.

The *Niue Treaty* and its subsidiary agreements provide an excellent model for similar cooperative agreements in other sectors. The political will to extend and diversify cooperative maritime surveillance and enforcement regimes in the South Pacific was demonstrated recently in a Statement by the Pacific Islands Forum in the Communique from its 38th meeting in October 2007 that it is examining the potential for new multilateral Pacific regional arrangements patterned on the *Niue Treaty* subsidiary agreement model for exchange of fisheries law enforcement data, cross vesting of enforcement powers and use of fisheries data for other law enforcement activities and endorsed the Forum Secretariat and Forum Fisheries Agency (FFA)

⁷⁸ D. P. O'Connell, *The Influence of Law on Sea Power* (1975) 66-67 comments on the *I'm Alone* case which concerned a US Coast Guard pursuit of a Canadian registered vessel engaged in liquor smuggling during the Prohibition era. Although the tribunal authorised the use of necessary and reasonable force in visit and search, the facts of the case were held not justify the sinking of the *I'm Alone*. O'Connell also comments on the *Red Crusader* case which concerned a dispute between the UK and Denmark over the fishing limits of the Faroe Islands. An international commission of inquiry in that case found that the captain of the Danish fishery protection vessel, Neils Ebbesen, had exceeded the legitimate use of armed force by firing without warning of solid gunshot and creating a danger to human life by firing at the *Red Crusader*.

working on modalities to take the issue forward.⁷⁹ This is a positive step in combating a wider range of transnational crime threats in the South Pacific. In the long term, the concept of an overarching Oceans Council for the South Pacific region, foreshadowed in the framework for Integrated Strategic Action discussed at a Pacific Islands Regional Oceans Forum in February 2004, together with an integrated and cross sectoral maritime surveillance and enforcement arm would be a valuable addition to the regional security and marine environmental management apparatus.⁸⁰

V Conclusions

Effective combating of the burgeoning forms of transnational crime in the maritime domain of the South Pacific will require extension and development of existing frameworks for cooperative maritime surveillance and enforcement in both the transboundary and high seas contexts. While fisheries enforcement and surveillance has been the initial priority for the South Pacific, the practical experience obtained in implementing subsidiary agreements under the *Niue Treaty* could also prove beneficial in tackling other forms of crime in the maritime domain. The efficiencies to be gained from applying regional pooling of surveillance and enforcement resources already occurring in the fisheries sphere to other law enforcement activities such as counter drug operations at sea merit further exploration. Moreover the establishment of a comprehensive and versatile network of cooperative maritime surveillance and enforcement arrangements in the South Pacific for transboundary purposes has current and prospective value for the long term conservation and sustainable use of high seas resources and biodiversity in the South Pacific region. Navies, coastguards and other maritime law enforcement agencies of the South Pacific region will continue to be called on in all of these endeavours to protect and preserve transboundary and high seas resources and biodiversity for current and future generations.

⁷⁹Pacific Islands Forum, *Final Communique, Pacific Islands Forum Thirty Eighth Meeting Nuku'alofa Tonga, 16-17 October 2007*, Annex A Security <http://www.forumsec.org/pages.cfm/docs/other/final-2007-communique.html> at 30 July 2008.

⁸⁰Wright et al, above n.1, 762.