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## **Towards an ASEAN counter-terrorism treaty**

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## Towards an ASEAN counter-terrorism treaty

### Abstract

The benefits for Association of Southeast Asian Nations (ASEAN) members of a regional treaty to combat terrorism include improved coordination in mutual legal assistance and harmonisation of best practice legal approaches. The conceptual framework for a common definition of terrorism is set out in this paper. Precedent regional and multilateral treaties are analysed into legal formulae and their components, such as obligations to indict or to extradite, to provide mutual legal assistance, and to build regional implementation capacity, are assessed as potential models for inclusion in an ASEAN regional treaty. The paper concludes by considering ASEAN progress in adopting cooperative mechanisms to combat terrorism thus far.

### Keywords

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### Disciplines

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## ASEAN FEATURES

### TOWARDS AN ASEAN COUNTER-TERRORISM TREATY

by GREGORY ROSE\* and DIANA NESTOROVSKA\*\*

The benefits for Association of Southeast Asian Nations (ASEAN) members of a regional treaty to combat terrorism include improved coordination in mutual legal assistance and harmonisation of best practice legal approaches. The conceptual framework for a common definition of terrorism is set out in this paper. Precedent regional and multilateral treaties are analysed into legal formulae and their components, such as obligations to indict or to extradite, to provide mutual legal assistance, and to build regional implementation capacity, are assessed as potential models for inclusion in an ASEAN regional treaty. The paper concludes by considering ASEAN progress in adopting cooperative mechanisms to combat terrorism thus far.

#### I. INTRODUCTION

What might be the benefit of a regional counter-terrorism treaty to ASEAN Member States? The answer lies in modern terrorism's transnational dimension.<sup>1</sup> It typically involves criminal actions across national borders that require international cooperation to combat them. Harmonisation of relevant national laws across those borders can facilitate enforcement cooperation and best national practice.

The objective of this paper is to consider the elements that should be included in an ASEAN regional treaty to combat terrorism. Examples of such elements are: national adoption of common terms and definitions, obligations to indict or to extradite, and reciprocal provisions governing mutual legal assistance and punishment. It examines ways a regional treaty might promote harmonised definition, application and enforcement of national counter-terrorism laws. Ideally, the treaty should promote its own implementation by building regional capacity to enforce national laws through cooperative intelligence gathering, prevention strategies, crisis management and investigation efforts.

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<sup>1</sup> Much has been written concerning ASEAN transnational aspects and the globalisation of terrorism. See, e.g., D.M. Jones & M. Smith, "Contemporary Political Violence—New Terrorism in the Global Village" in D.M. Jones, ed., *Globalisation and the New Terror: the Asia-Pacific Dimension* (Cheltenham (England); Northampton, (US): Edward Elgar, 2004) at 1-29; M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment" (2002) 43 Harv. Int'l L.J. 83 at 85-89; and J.A. Carberry, "Comment: Terrorism: A Global Phenomenon Mandating a Unified International Response" (1999) 6 Ind. J. Global Legal Stud. 685.

This study commences with an examination of the conceptual issues, focusing on the legal definition of terrorism. This is an essential first step to establishing a common legal framework. It then surveys concepts, standards and mechanisms utilised in other global and regional treaties. These are compared as model elements for adaptation into an ASEAN regional treaty. They are assessed according to whether they would function consistently with the adopted conceptual framework and are self-evidently clear and fair. The paper concludes with observations on current steps, as at June 2004, towards the possible development of an ASEAN regional counter-terrorism convention.<sup>2</sup>

## II. CONCEPTUAL FRAMEWORK

A definition of terrorism in international law is necessary to provide a clear reference point for triggering and limiting international obligations to cooperate across a broad range of relevant law enforcement, intelligence-gathering, incident prevention and emergency response measures. Yet, for decades, international efforts to formulate a global definition for terrorism have been mired in political and ideological controversy.<sup>3</sup> It is argued here that the mire is not deep and can be safely crossed.

The controversy often begins with the argument that the concept of terrorism is an arbitrary exercise in pejorative labelling of certain acts that are not essentially different from other acts of political violence, such as the conduct of war,<sup>4</sup> or of violent crimes such as kidnapping.<sup>5</sup> The cliché, that “one man’s terrorist is another man’s freedom fighter”,<sup>6</sup> takes as its premise that evaluations of the legality of political violence manifest subjective perspectives concerning its political motivation.<sup>7</sup> This position is used to provide impunity from judgement of all types of non-military acts of political violence, rendering them all, including atrocities, equally acceptable, irrespective of circumstance or manner of conduct. The criminality of non-military political violence becomes a matter of subjective and arbitrary opinion. In denying judgement of non-military political violence, this pluralistic relativism undermines the international and domestic legal orders that protect public security.

<sup>2</sup> As discussed in the text under the heading “ASEAN Counter-Terrorism Cooperation” below, item 6.2(e) of the Work Program to Implement the ASEAN Plan of Action to Combat Transnational Crime provides for ASEAN members to work towards a regional convention to combat terrorism, see ASEAN, online: <<http://www.aseansec.org/5616.htm>>.

<sup>3</sup> Legal histories of the controversy are set out in G. Guillaume, “Terrorism and International Law” (2004) 53 I.C.L.Q. 537 and R. Higgins, “The General International Law of Terrorism” in R. Higgins & M. Flory, eds., *Terrorism and International Law* (London/New York: Routledge, 1997) at 27. Higgins provides a useful description of how the United Nations General Assembly’s diffident efforts foundered on assertions of an unfettered right to use force in national liberation struggles (at pp. 14-19). Relevant discussions are set out in many works, e.g., W. Laqueur, *No End to War—Terrorism in the Twenty First Century* (New York: Continuum, 2003) at 232-239; B. Hoffman, *Inside Terrorism* (London: Indigo, 1998) and L.R. Beres, “The Meaning of Terrorism—Jurisprudential and Definitional Clarifications” (1995) 28 Vand. J. Transnat’l L. 239.

<sup>4</sup> E.g., N. Chomsky, *The Culture of Terrorism*, (Boston: South End, 1988) and E.S. Herman, *The Real Terror Network: Terrorism in Fact and Propaganda* (Boston: South End, 1982). An attempt to support this approach with legal argument was made by S. Zeidan, “Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism” (2004) 36 Cornell Int’l L. J. 491.

<sup>5</sup> For a critique of the necessity in Australia for special measures to address terrorism as compared to other violent crimes, see A. Ricketts, “Freedom of Association or Guilt by Association: Australia’s New Anti-Terrorism Laws and the Retreat of Political Liberty” (2002) 6 Southern Cross Univ. L. Rev. 133 at 145. Yet, we would argue that liberal democracies, built upon notions of freedom from excessive government regulation, do tend to lack, among their usual domestic regulatory tools, adequate measures to deal with the challenges of combating terrorism.

<sup>6</sup> See, e.g., B. Ganor, *Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?*, International Policy Institute for Counter-Terrorism, online: <<http://www.ict.org.il/articles/define.htm>>.

<sup>7</sup> Discussed in Laqueur, *supra* note 3 at 235; M. Crenshaw, ed., *Terrorism in Context*, (Pennsylvania: Pennsylvania State University Press, 1995) at 11.

Instead, we posit a definition of non-military political violence that presumes that the violence is motivated by a political, religious or ideological objective but eschews any evaluation of the objective itself.

#### A. Definition of Terrorist Acts

The international legal definition of terrorism proposed here avoids evaluation of any ideological purpose. Instead, it is concerned with the qualities of a “terrorist act”. The four qualities of the act are: (a) serious violence; (b) intended to influence a public or its institutions; (c) by intimidating civilians in that society; and (d) committed by non-State actors.

The basic element of a terrorist act is serious violence. Examples of the sorts of actions include murder, kidnapping, assault, grievous bodily harm, hostage taking, hijacking, malicious damage to property and major interference with communications. This basic element in the definition, *i.e.*, the deliberate perpetration of a violent action or part thereof, stands irrespective of whether the particular act has already been criminalised by the State under one of the above categories of violence. In fact, the acts listed above are usually already criminalised, although this is not the case with all related preparatory acts (*e.g.*, planning, intelligence and equipment gathering, recruiting, training, financing, threatening, *etc.*). Although the related preparations are essential aspects of the violent action, they often may not yet be criminalised, as many legislatures have not anticipated the organisational sophistication that frequently characterises conspiracies to commit terrorist violence.

The second conceptual element in the definition is strategic motivation. The violent action must be a step in an on-going campaign intended to achieve a political, ideological or religious objective. Thus, terrorism is distinct from ordinary violent crime committed by private persons because its motivation is societal change.<sup>8</sup> Rather than the private financial gain or emotional satisfaction that motivates violent crimes of a private nature, a terrorist act has a public motivation. The action is, therefore, distinguishable from common violent crimes, such as murder, robbery and vandalism, which are generally committed for private benefit.<sup>9</sup> This public quality, of attack on social and governmental institutions, gives terrorist acts some of the character of armed conflict. Military operations, revolutionary and guerrilla conflicts also involve violence as part of a strategic campaign. However, terrorist campaigns cannot be subsumed into the category of legitimate armed conflict. Because they target civilians, they will always remain outside the norms of legitimate armed conflict that seek to protect non-combatants.<sup>10</sup>

The third element of the definition is the intention to harm civilians. In the twenty-first century, grotesque violence targeted to maximise civilian deaths and injuries are deliberately publicised with the intention of terrorising the public.<sup>11</sup> The victims of terrorist acts not only include the dead and wounded but terrorised witnesses too. Widespread public terror is strategically intended to coerce governments, as indicated above. “Civilians” can be broadly interpreted to include all “non-combatants” although the latter term is vexed by questions

<sup>8</sup> The motivation component can be qualified so as to exclude from its ambit the activities of organisers of *bona fide* peaceful political demonstrations that nevertheless turn violent. See, *e.g.*, section 100.1(3) of Australia’s *Criminal Code Act 1995* (Cth) and section 83.01 of Canada’s *Criminal Code* amended by Canada’s *Anti-Terrorism Act 2001*.

<sup>9</sup> The exceptions ostensibly motivated by public objectives, such as the acts of policemen, security guards or lynching mobs taking the law into their own hands, lack an on-going strategic objective.

<sup>10</sup> See, *e.g.*, Art. 4 of the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, Art. 4, which describes as protected persons all persons who are not members of armed forces or prisoners of war and who find themselves in the hands of a party to the conflict.

<sup>11</sup> On the role of the mass media in terrorism, see generally, B. L. Nacos, *Mass-Mediated Terrorism: the Central Role of the Media in Terrorism and Counter-terrorism* (USA: Rowman & Littlefield Publishers Inc., 2002); D.L. Paletz & A.P. Schmid, eds., *Terrorism and the Media*, (California: Sage, 1992); A.O. Alali & K.K. Eke, eds., *Media Coverage of Terrorism: Methods of Diffusion* (California: Sage, 1991).

of interpretation of its scope in international law.<sup>12</sup> Therefore, for the sake of simplicity, the more limited term “civilians” is used here.

Exclusive applicability to persons that are non-State actors, or are not ostensibly acting in an official State capacity, forms the fourth element. State actors are already bound by applicable international laws that circumscribe the legitimate use of political violence and categorise its breach as war crimes or crimes against humanity or as breaches of State responsibility (these are dealt with in more detail below under “State actors”). Unfortunately, international laws do not currently specify objective or appropriate rules for comparable actions committed by non-State actors who flout accepted humanitarian norms.<sup>13</sup> It does not make sense to redesignate established categories of the State’s illegal use of political violence as terrorism while the current epidemic of political violence initiated and perpetrated by non-State actors continues to be neglected under international law. Therefore, a definition of terrorism that is legally useful must address political violence conducted by persons who are not State actors.

In summary, a terrorist act is different from both common violent crime and armed conflict because it embodies qualities of both and is exclusively neither. The violent crime cannot be subsumed into ordinary criminal categories because its objective is to subvert political processes and it cannot be subsumed into the category of armed conflict because it is entirely criminal in method.

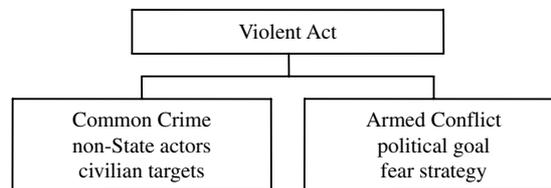


Fig. 1. Elements of a Terrorist Act.

### 1. *Non-State actors*

The dual character of terrorism, as violent crime and armed conflict, was recognised by the United Nations Security Council in its Resolution 1373.<sup>14</sup> It described the 11 September 2001 bombings in the USA as international terrorism and expressly connected them with both the right to self-defence (preamble) and with transnational organised crime (para. 4). Thus, it can be asserted that non-State actors can perpetrate international violence on a

<sup>12</sup> Are out-of-uniform, off-duty military reservists to be classified as civilians or as armed forces? The definition of enemies *hors de combat* in Art. 41 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, 12 August 1949, 1125 U.N.T.S. 3, Art. 41 (“Protocol I”) does not address this question. Distinctions between combatants and protected persons have become controversial in light of the reluctance of some to accord to terrorists the status of “prisoner of war” owed to legitimate combatants. The controversy entails interpretation of the Geneva Conventions 1949 (*Third Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S.135 and *Fourth Geneva Convention*, *supra* note 10) and their two 1977 Protocols (Protocol I, above, and *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 12 August 1949, 1125 U.N.T.S. 609 (“Protocol II”). For a recent analysis, see L. Vierucci, “Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled” (2003) 1 J. Int’l Criminal Justice 284.

<sup>13</sup> Higgins, *supra* note 3 at 27.

<sup>14</sup> UNSC Res. 1373, UN Doc. S/RES/1373 (2001).

scale sufficient to amount to an armed attack that triggers the target State's right of self-defence.<sup>15</sup> The Foreign Ministers of Security Council Member States made the connection once again in Resolution 1456, by describing terrorism both as criminal action and as a most serious threat to international peace and security.<sup>16</sup> Nevertheless, partly because the primary objects of the international legal system are States rather than non-State actors, there is no international law defining and criminalising terrorism. As demonstrated below, even international humanitarian laws that generate individual criminal responsibility do not define or criminalise terrorism.

Just as a regular State army can manage legitimate military operations or deviate into war crimes, a private non-State fighting organisation can discipline itself to conduct legitimate military operations or it can opt to commit crimes. Non-State guerrilla fighters are recognised as legitimate international combatants in certain circumstances under the 1949 Geneva Conventions and 1977 Protocol I.<sup>17</sup> Internal discipline to ensure their compliance with international humanitarian law is, arguably, a precondition to the fighting organisation being recognised as a legitimate armed force,<sup>18</sup> although breaches by its individual combatants need not negate the organisation's armed forces status.<sup>19</sup> The organisation's acts of international guerrilla warfare against proper military targets conducted in accordance with internationally allowed methods would, therefore, not breach international humanitarian law.

The legal distinction between legitimate guerrilla warfare and terrorist acts by non-State actors is one of methods and targets. All political violence in the form of deliberate attacks on civilians by non-State actors would be criminalised under international humanitarian law, if the attackers were subject to it. Unfortunately, however, non-State actors are outside the obligations of international humanitarian law in a wide range of circumstances. For example, combatants who are not regular armed forces or assimilated therein<sup>20</sup> are not obligated under the Geneva Conventions. Similarly, liberation organisations are not "High Contracting Parties" to the Geneva Conventions and Protocols, and although they may expressly choose to abide by the norms of armed conflict, they need not do so.<sup>21</sup> Only within the relatively narrow range of "crimes against humanity", as described in customary international law and within the Statute of the International Criminal Court, are non-State actors criminalised under generally applicable international humanitarian law for deliberate attacks

<sup>15</sup> In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), International Court of Justice (ICJ), online: <<http://www.icj-cij.org/icjwww/idocket/imwp/imwframe.htm>>, the ICJ held that self-defence arises only in response to armed attack by a State (paras. 138-142). There was dissent on this point (separate opinions of Judges Higgins paras. 33-34 and Burgenthal paras. 5-6) and others who (described by Judge Guillaume (*supra* note 3) as the majority of authors) have argued that the right to self-defence arises in accordance with the scale of the attacks, irrespective of whether a foreign State perpetrates them (see, e.g., W.M. Reisman, "In Defense of World Public Order" (2001) 95 Am. J. Int'l. L. 833; T.M. Franck, "Terrorism and the Right of Self-Defense" (2001) 95 Am. J. Int'l L. 839; Y. Dinstein, *War, Aggression, and Self-Defence*, 3<sup>rd</sup> ed. (Cambridge: Cambridge University Press, 2001) at 213-221. But see, *contra*, F. Mégret, "War? Legal Semantics and the Move to Violence" (2002) 13 E.J. I. L. 361).

<sup>16</sup> UNSC Res. 1456, UN Doc. S/RES/1456 (2003).

<sup>17</sup> E.g., Third Geneva Convention and Protocol I, *supra* note 12. The Third Geneva Convention affords armed forces status to resistance groups that meet certain criteria (Art. 4.A.2) and Protocol I affords combatant status to fighters not in uniform and concealing weapons until visible deployment before an enemy (Art. 44.3).

<sup>18</sup> One of the four criteria to be met in order for resistance groups to have armed forces status under the Third Geneva Convention (*supra* note 12) is "conducting their operations in accordance with the laws and customs of war" (Art. 4.A.2(d)). Under Protocol I (*supra* note 12), that status is more widely available to groups merely under a "command responsible ... for the conduct of its subordinates" and that are "subject to an internal disciplinary system that shall, *inter alia*, enforce compliance with the rules of international law applicable in armed conflict" (Art. 43.1).

<sup>19</sup> Third Geneva Convention, *supra* note 12, Arts. 5 & 85 and Protocol I, *supra* note 12, Art. 44.2 indicate that captured armed forces members accused of crimes retain their prisoner of war status.

<sup>20</sup> Geneva Conventions, Common Art. 2, *supra* note 12.

<sup>21</sup> Protocol I, Art. 96.3, *supra* note 12.

on civilian targets.<sup>22</sup> The wider range of circumstances in which political violence against civilians is perpetrated by non-State actors to intimidate a public for political purposes is not addressed.

Under international humanitarian law, the cohorts of non-State fighters deliberately attacking civilians are not declared “*hostes humanis generis*”, but are instead afforded the conventional rights, including “prisoner of war” or “protected person” status.<sup>23</sup> This non-reciprocal approach to obligations in international conflict was designed during the early post-colonial era to benefit various ongoing struggles for self-determination.<sup>24</sup> Significant continuing international support for unconstrained political violence in pursuit (by “all available means”<sup>25</sup>) of undefined “peoples’ struggles” suggests that targeting civilians still remains politically acceptable to many States at the commencement of the 21<sup>st</sup> century.

The failure to agree on terms to criminalise terrorist activity under a generally applicable international law is one of the most regrettable derelictions of the United Nations General Assembly’s history and the Red Cross Movement has done no better.<sup>26</sup> International laws already identify a wide range of other crimes that can be committed by non-State actors, from drug trafficking to people smuggling, and customary law addresses crimes from piracy to crimes against humanity. The time has come to close the many gaps in international law concerning non-State acts of political violence against civilians.

A sophisticated terrorist act requires planning, intelligence, financing, equipment, technology, publicising, training, political support and a frontline. These are diverse roles distributed among actors who are precisely coordinated together. In most instances, therefore, sophisticated or on-going terrorist actions require a coordinating organisation and, often, support from benefactor States. A multi-faceted and complex organisation might engage in various acts, some bearing the characteristics of crime, others of armed conflict, others of a legitimate political nature. Thus, an organisation might engage in terror acts, while also being dedicated to a range of other social functions that serve, in part, as a cloak for foreign State support. The HAMAS organisation undertakes political and welfare activity but also perpetrates terrorist acts through its paramilitary forces, *i.e.*, the Izz-Al-Din-al-Qassam Brigades.<sup>27</sup> Drug trafficking by the FARC in Colombia might occur simply as violent crime rather than fundraising for a terrorist act. An organisation’s personality is every bit as complicated as a natural person’s. Thus, a terrorist organisation can also be a political, military or criminal one and the qualities are not mutually exclusive.

<sup>22</sup> See text at notes 33-35 below.

<sup>23</sup> See G.H. Aldrich, “The Taliban, Al Qaeda and the Determination of Illegal Combatants” (2002) 96 Am. J. Int’l L. 891; R.K. Goldman & B.D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law* (December 2002) at 16, American Society of International Law, online: <<http://www.asil.org/taskforce/goldman.pdf>>.

<sup>24</sup> This design is clearly reflected in Art. 1.4 of Protocol I, *supra* note 12, Art. 1.4, which provides that where “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination”, that they are entitled to the protections of the Geneva Conventions. Unfortunately, the Protocol does not deem reciprocal obligations as incumbent upon those fighters.

<sup>25</sup> The “legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, particularly armed struggle” was set out in the *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, GA Res. 34/44 (1979) at para. 2.

<sup>26</sup> As non-State militias are usually weaker than the armed forces of the State, and are at a disproportionately greater disadvantage in armed conflict when it is conducted according to humanitarian constraints binding upon State Parties, they tend to employ asymmetrical conflict strategies that do not conform to the norms of humanitarian law (see Jones and Smith, *supra* note 1). Holding them accountable in international humanitarian law would discourage their commission, within an asymmetrical conflict strategy, of atrocities against civilians.

<sup>27</sup> The fact that a single organisation under a unified command engages in legitimate activities does not negate its terrorist activities. Just as a person who commits a murder on only one day of the 20,000 days of his/her life is designated a murderer, the organisation is properly designated a terrorist one.

The involvement of States in the activities of terrorist organisations varies widely. Involvement may be directive or at arms' length and may provide support across logistical, intelligence, financial, procurement, training, communications, refuge, advocacy and other needs. In contrast, full State control over political violence against civilians entails direct responsibility and more severe legal consequences, as discussed below.

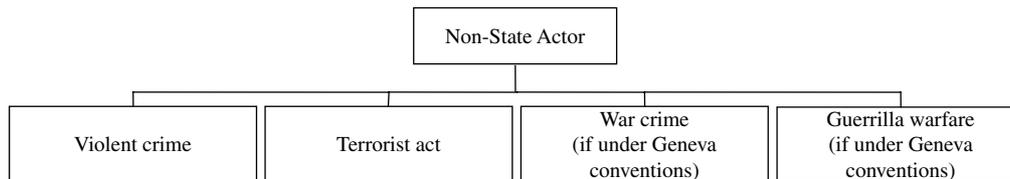


Fig. 2. Terror and other Functions of Non-State Actors.

## 2. State actors

Although some political commentators describe certain States as “terrorist States”,<sup>28</sup> this populist rhetoric obfuscates, rather than assists, legal analysis. Unfortunately, some senior legal commentators presume, by casual reference, the notion of “State terrorism” without any supporting legal argument at all.<sup>29</sup> The possibility of generating any criminal responsibility of States in international law has often been discussed,<sup>30</sup> but remains speculative.<sup>31</sup> International law has already formulated other legal categories to characterise political violence against civilians when perpetrated by individuals acting directly on behalf of States. These are characterised as war crimes, as crimes against humanity, or as breaches of State responsibility. Each of these is surveyed briefly below.

First, acts in armed conflict are subject to the international laws of armed conflict.<sup>32</sup> When an armed attack or civil war does take place, State parties to the conflict become subject to the applicable laws of armed conflict and breaches of those laws then constitute war crimes. Legal uncertainty persists over when foreign State intervention might amount to an illegal international armed attack.<sup>33</sup> Thus, a cross-border foray by an armed band of

<sup>28</sup> E.g., Chomsky and Herman so describe the U.S.A and Israel, *supra* note 4.

<sup>29</sup> E.g., Guillaume, *supra* note 3 at 538 and Higgins, *supra* note 3 at 26. An effort to come to grips with the topic that idiosyncratically focuses on counter-attacks and omits consideration of the *Rainbow Warrior* attack is presented by Y. Daudet, “International Action against State Terrorism” in Higgins & Flory, *supra* note 3 at 201-216.

<sup>30</sup> J. Dugard, “Criminal Responsibility of States” in M. Cherif Bassiouni, ed., *International Criminal Law*, 2<sup>nd</sup> ed. (New York: Transnational Publishers, 1999) at 239; Alain Pellet, “Can a State Commit a Crime? Definitely, Yes!” (1999) 10 E. J. I. L. 425.

<sup>31</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, (New York: Transnational Publishers, 2003) at 88. Brownlie opines that the assertion of criminality is useful only for morals and propaganda (I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 150); and it has been argued that the notion is now subsumed into the doctrine of State responsibility (E. Wyler, “From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations Under Peremptory Norms of General International Law’” (2002) 13 E.J.I.L. 1147). The Statute of the International Criminal Court (17 July 1998) recognises the possibility of a State breaching international criminal law by committing an act of aggression, but that crime is not yet defined in the Statute and may be re-examined in 2009 (see Arts. 5(2) & 121 of the Statute of the International Criminal Court, United Nations, online: <<http://www.un.org/law/icc/statute/romefra.htm>>).

<sup>32</sup> See generally Dieter Fleck, ed., in collaboration with Michael Bothe *et al.*, *Handbook of Humanitarian Law in Armed Conflicts* (New York; Oxford: Oxford University Press, 1995).

<sup>33</sup> Dinstein, *supra* note 15. The most recent ICJ pronouncements on the topic are set out in the final judgement in the *Oil Platforms Case (Iran v. USA)* (6 November 2003), International Court of Justice, online: <<http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>>.

irregular fighters can be considered an armed attack, but not the cross-border provision of weapons or logistical support to local rebels.<sup>34</sup> Domestic rioting that occurs on a scale large enough to be considered civil war is also subject to the laws of armed conflict but, again, there is no legal clarity as to when civil disturbance reaches the point of civil war.<sup>35</sup> Thus, the circumstantial point at which attacks by States on civilians can be categorised as war crimes, remains to be assessed in each instance.

Second, international laws concerning genocide and ‘crimes against humanity’ impose culpability upon State actors for widespread or systematic crimes committed against civilian populations, both within and outside of the bounds of an armed conflict.<sup>36</sup> The rules are designed to address acts of a State, such as against its own or foreign citizens.<sup>37</sup> State involvement—at least approval—is essential to this category of crime.<sup>38</sup> Thus, crimes against humanity include the actions of non-State actors if they act with the approval of the State.

Third, the international legal doctrine of State responsibility renders the State generally liable for acts in breach of its international obligations.<sup>39</sup> In the context of illegal use of force, the breach of international obligation attributed to the State can take the forms of overt armed State attack, or covert State attack, or attack conducted by non-State proxies. Examples in each respective case are the national responsibility of Iraq for its armed attack

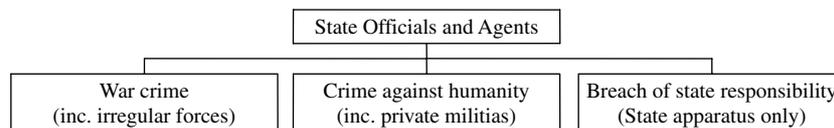


Fig. 3. Categories of State Attacks on Non-combatants that are Wrongful under International Law.

<sup>34</sup> The latter has been characterised as merely an illegal “use of force”: *Nicaragua Case (Merits) (Nicaragua v USA)* [1986] I.C.J. Rep. 14, para. 228. According to the ICJ’s somewhat strained analysis, infiltration by foreign personnel to train local terrorists in bomb-making would amount to an illegal use of force, rather than an armed attack.

<sup>35</sup> Article 1 of Protocol II, *supra* note 12, provides that it applies to conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. For an interpretation, see S. Junod, “Additional Protocol II: History and Scope” (1983) 33 Am. U. L. Rev. 29.

<sup>36</sup> Concerning crimes against humanity, see Art. 7 of the Statute of the International Criminal Court, *supra* note 31, and A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 64-95.

<sup>37</sup> Cassese, *ibid.*, at 83. Preliminary suggestions have been made that international terrorist acts perpetrated by non-State actors are better categorised as crimes against humanity; see C. Mallat, “The Original Sin: Terrorism or Crime Against Humanity?” (2002) 34 Case W. Res. J. Int’l L. 245 at 245-247. However, “crimes against humanity” cover only a subset of terrorist acts.

<sup>38</sup> Within the current framework of the evolving international law of “crimes against humanity”, private militias can be considered to commit crimes against humanity if they act independently but have State support to do so. In that case, there is overlap between “crimes against humanity” and terrorist acts of non-State actors. Nevertheless, present formulations of “crimes against humanity” address only a very inadequate subset of terrorist acts, *i.e.* those that are “widespread” and “systematic”. Other terrorist acts occur that might not meet both these criteria, including the 11 September 2001 bombings. As to holding such non-State actors accountable for crimes against humanity, see Cassese, *ibid.*, at 83; and as to the inadequacy of that crime to encompass the broader range of terrorist acts, see A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law” (2001) 12 E. J. I. L. 993.

<sup>39</sup> The *International Law Commission Draft Articles on State Responsibility* (November 2001) codify customary international law on this topic. Articles 8, 9, 11 & 15 set out the responsibility of States for acts not taken by State officials in certain circumstances. See United Nations, online: <[http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm)>.

on Kuwait,<sup>40</sup> of France for its bombing of a vessel in New Zealand waters,<sup>41</sup> and of the USA for its support for insurgents in Nicaragua.<sup>42</sup>

State support for political violence by non-State actors against civilians is usually directed against a foreign public and undertaken at arms' length, using covert State agents or proxy organisations so as to avoid the grave consequences of overt armed conflict or of international responsibility. Examples of the use of covert agents against foreign civilian targets include the Lockerbie and *Rainbow Warrior* bombings. Examples of the use of proxy organisations to attack civilian targets include Syrian sponsorship of Palestinian terrorist organisations and Iran's sponsorship of Hizbullah.<sup>43</sup>

When the veil of deception is pierced to reveal that a State actively supports terrorist acts perpetrated by private individuals against another State, legal consequences arise.<sup>44</sup> The emerging practice is to hold responsible both the State, through international law, and the individual, through national criminal law. Most notoriously, the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, was categorised as both a private act and as an act of State, *i.e.*, as a transnational crime by a private individual under Scottish law and as a foreign State attack in breach of international law. Consequently, the Lockerbie bombing attracted both a criminal penalty for the individual Libyan officer convicted (a prison sentence served in The Hague by Mr. Meghrihi) and State responsibility (UN Security Council sanctions and compensation requirements imposed upon Libya).<sup>45</sup> Similarly, Taliban (and Al Qaeda) fighters were held responsible individually, together with Afghanistan, for the 11 September 2001 bombings in the USA.<sup>46</sup> In the case of the *Rainbow Warrior*, a settlement was reached that imposed penal sentences under New Zealand criminal law on the French perpetrators, Alain Mafart and Dominique Prieur, and US\$7 million compensation

<sup>40</sup> The UN Claims Commission was established by the UN Security Council to "process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait": see Commission, online: <<http://www.unog.ch/unccl/>>. Note also Dinstein, *supra* note 15 at 98.

<sup>41</sup> In 1985, two French DGSE officers were captured following their bombing in Auckland harbour, New Zealand, of a Dutch flagged civilian vessel (the Greenpeace *Rainbow Warrior*). The operation was clandestine, but on capture, the French government was held responsible for the activity of its officers. See I. Gidley & R. Shears, *The Rainbow Warrior Affair* (London: Unwin Paperbacks, 1986) at 1, 216-217.

<sup>42</sup> Where an internal conflict is internationalised by foreign support that actively provides equipment, intelligence, training, strategic direction or personnel, the meddling foreign State can be considered to have breached its international legal obligations not to intervene: Nicaragua Case, *supra* note 34, para. 228.

<sup>43</sup> Hizbullah is alleged to be responsible for the bombing of a Jewish community centre in Buenos Aires in 1994: "Argentina Jewish Bomb Trial Starts" *BBC World News* (24 September 2001), online: <<http://news.bbc.co.uk/1/hi/world/americas/1559913.stm>>.

<sup>44</sup> Although no reference was made to "terrorism", this principle was established in the *Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* [1980] I.C.J. Rep. 3. Ganor (*supra* note 6) distinguishes between terrorism that is State supported (*e.g.*, financed), operated (*e.g.*, directed) and perpetrated (*i.e.*, by official bodies). It is rare for a State to accept public responsibility for an identified terrorist act. Even Libya's recent declaration of responsibility for the Lockerbie bombing did not accept that its agent was acting under instructions (*e.g.*, M. McDonough, "Libya Denies Guilt in Lockerbie Bombing" *Cnews* (24 February 2004), online: <<http://cnews.canoe.ca/CNEWS/World/2004/02/24/358715-ap.html>>). Nor was the French acceptance of responsibility for the *Rainbow Warrior* incident in Auckland harbour made public (Shears and Gidley, *supra* note 41 at 213 and 217). Iran has not accepted responsibility for its alleged role in the Buenos Aires bombing ("Iran Denies Argentina Blast Role" *BBC World News* (9 March 2003), online: <<http://news.bbc.co.uk/2/hi/americas/2832169.stm>>).

<sup>45</sup> See SC Res. 731 (1992) and SC Res. 748 (1992) and the decisions of the Scottish High Court of Justiciary of 31 January 2001 and 14 March 2002, Scottish Courts, online: <<http://www.scotcourts.gov.uk/index1.asp>>.

<sup>46</sup> Al Qaeda forces had been well integrated with the Taliban forces, which implicitly adopted Al Qaeda actions, leading to both a political response coordinating national laws against Al Qaeda and a military coalition force against their joint forces in Afghanistan. On the relationship between the Taliban and Al Qaeda and the U.S. response to the attacks of 11 September 2001, see Nacos, *supra* note 11 at 110 and R. Crockett, *America Embattled: September 11, Anti-Americanism and the Global Order* (London: Routledge, 2003) at 72-73.

and apology obligations on France.<sup>47</sup> In each case, terrorism is properly treated as a crime committed by individuals to be punished under national laws, whereas State involvement in hostile acts is treated in international law as an illegal armed attack or as a breach of state responsibility. These dual approaches are consistent with the dual approach of the UN Security Council, described above.

Ultimately, where a State is involved in the commission of an international terrorist act, whether by its clandestine officials or through a sponsored organisation, the State's action is appropriately addressed under international laws of armed conflict, crimes against humanity or State responsibility. Conversely, the individual persons concerned are culpable under criminal law. The legal personality of the perpetrator is relevant to determine the legal system applicable to it. Both national judicial organs (*e.g.*, national tribunals exercising universal jurisdiction) and international judicial organs (*e.g.*, the International Criminal Court) can exercise enforcement jurisdiction over individual persons accused of committing internationally proscribed crimes such as genocide and "crimes against humanity". However, there are far more national tribunals and it is more usual that they will be mandated to exercise jurisdiction.

The legal definition of "terrorist acts" proposed here has not yet crystallised as an internationally proscribed crime and, as yet, there are no international tribunals mandated with jurisdiction over it. Its adoption in international law could serve two functions: to promote its wider incorporation into national laws; and, eventually, to form a basis for the exercise of criminal jurisdiction by an international judicial organ. At present, it can be readily applied in national laws because its objects are individual persons who are subject to national laws. The definition proposed for consideration in the ASEAN region is therefore the "use or threat of violence against civilians, not overtly perpetrated by an official arm of State, to intimidate a public or its institutions in order to achieve a political, religious or ideological objective".

### III. MODELS FOR AN ASEAN REGIONAL TERRORISM TREATY

In 2002-2003, operations were undertaken against terrorists operating in ASEAN countries including Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Thailand. Some of those arrested in Cambodia were Thai nationals, or in Thailand were Malaysian nationals, or in the Philippines and Singapore were Indonesian nationals.<sup>48</sup> Clearly, the ease of movement of people, finance and equipment makes terrorism a cross-border regional challenge.<sup>49</sup>

Nor has that challenge yet been met. While certainly making progress in developing counter-terrorism measures, ASEAN has no regional and few bilateral arrangements in place for mutual legal assistance. At the UN Security Council Counter-Terrorism Committee Special Meeting in March 2003, ASEAN acknowledged that there is still much to be done to meet the prescribed benchmarks under Security Council Resolution 1373.<sup>50</sup> Achievement of those benchmarks relating to legislative reform would be assisted by a

<sup>47</sup> See D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> ed. (London: Sweet & Maxwell, 1998) at 502.

<sup>48</sup> For surveys of transnational aspects of terrorism in Southeast Asia, see J. Cotton, "Southeast Asia after September 11"; and A. Tan, "The Persistence of Muslim Armed Rebellion in Southeast Asia: Implications after September 11" in Jones, *supra* note 1, 185-237.

<sup>49</sup> Failure to meet that challenge impacts negatively on the region's economy overall. See Australia, Department of Foreign Affairs and Trade Economic Analytical Unit, *Costs of Terrorism—and the Benefits of Working Together* (October 2003) at 23, Department of Foreign Affairs and Trade, online: <<http://www.dfat.gov.au/publications/costofterrorism/>>.

<sup>50</sup> Noted in S. Pushpanathan, *ASEAN Efforts to Combat Terrorism*, Second APEC Counter-Terrorism Task Force Meeting, Phuket, Thailand (20 August 2003), ASEAN, online: <<http://www.aseansec.org/15060.htm>>. See also the United National Security Council Counter-Terrorism Committee, *Compilation of Participants' Reports*, Special Meeting (6 March 2003), United Nations, online: <[http://www.un.org/Docs/sc/committees/1373/special\\_meeting.html](http://www.un.org/Docs/sc/committees/1373/special_meeting.html)>.

well-coordinated regional approach. A systematically coordinated regional approach has four benefits over ad-hoc mutual legal assistance. Two benefits related to cooperation are: (1) broader extension of mutual legal assistance; and (2) efficiency gains through shared expertise and experience. Two benefits related to harmonisation are: (3) more common transnational mechanisms to support cooperation; and (4) more opportunity to promote best practices in national laws and arrangements.

It is obvious that systematic collaboration could be strengthened by a regional framework agreement. It would facilitate mutual legal assistance and the sharing of resources through an on-going structure. A regional agreement may be the only way to promote rapid harmonisation of approaches to the development of counter-terrorism laws as, in the normal evolution of law, harmonisation accretes very slowly. A regular cycle of meetings would maintain and update cooperation procedures. Following an initial period of law reform to ensure compliance with the common regional approach adopted in the agreement, the Secretariat could identify and circulate information to treaty Parties that would promote the maintenance of best practice through periodic reform.

ASEAN is one of the few geo-political regional groupings not to have adopted a regional counter-terrorism legal framework. Regional treaties have been adopted for Africa, the Americas, Europe, South Asia, the Arab League, the Commonwealth of Independent States and Islamic countries.<sup>51</sup>

#### A. *Elements for a Regional Treaty*

Which of the many possible approaches might ASEAN Member countries take in developing a regional treaty to combat terrorism? Mutual legal assistance in prosecutions? Prevention of terrorist incidents through improved information exchange, financial controls, and migration controls? Should the focus be solely on cooperation to combat transnational terrorism or also address domestic terrorism? Should participation be open to non-ASEAN countries and if so, in what capacity? In essence, these are political questions to be considered in the light of national interests. To an extent, however, they are also legal questions, affected by technical issues of compatibility between national systems of law as well as the mechanics of institutional design.

The definition of terrorist acts set out above provides the conceptual framework for examining whether other regional treaties provide suitable models that might be adapted. A general consideration in considering model provisions for adaptation is that harmonisation of national laws will optimise transnational coordination and cooperation. Specific provisions should also be examined also to ensure that they are clear and fair. The following analysis considers whether the relevant provisions in treaties adopted in other regions meet these criteria.

#### B. *Formulae for International Cooperation Compared*

International agreements to combat terrorism have been formulated at the bilateral, plurilateral and multilateral levels.<sup>52</sup> A study is made here principally of plurilateral agreements, as these are regional and therefore provide the most relevant models for ASEAN Member countries to examine in order to develop their own regional treaty. However, some characteristics of multilateral agreement do inform the purposes of a regional agreement and are discussed as preliminary considerations.

<sup>51</sup> Counter-terrorism treaties adopted for each of these regions are set out in the text at note 63.

<sup>52</sup> For the purposes of this paper, a plurilateral agreement is one that is open to participation by only a subset of nation States, as compared a multilateral agreement that is open to participation by all.

### 1. *Multilateral formulae compared*

There are twelve multilateral treaties adopted under the auspices of the United Nations that pertain to combatting terrorism. Three mandate measures to prevent terrorist acts.<sup>53</sup> Nine were negotiated to respond to a particular type of violent act after the incidents took place. The types of violent acts that are responded to are: attacks on protected persons,<sup>54</sup> hostage taking,<sup>55</sup> hijacking of aircraft,<sup>56</sup> unlawful acts of violence against civil aircraft and airports and offences on aircraft,<sup>57</sup> unlawful acts of violence against ships and against platforms at sea,<sup>58</sup> and bombings of public places.<sup>59</sup> By narrowly addressing one particular type of violent action, those multilateral treaties are able to criminalise that specific action without needing to define or even refer to terrorism. Therefore they criminalise a specific act but not terrorism generally. Their purpose is simply to deter or punish perpetrators of specific crimes.

These multilateral conventions function according to a legal formula to facilitate international cooperation in prosecutions for acts that are, in some way, shared across States. A keystone in the formula is that there must be an identified transnational factor in the terrorist act that legally engages the jurisdiction of two or more contracting Parties. For example, a hijacked airplane might be registered in Party A, the perpetrator be a national of Party B and the landing take place in the territory of Party C, thus engaging the jurisdiction of three contracting Parties. Conversely, the multilateral treaties do not apply where the act involves no transnational jurisdictional element.

Once the transnational factor has been established, the treaty formula creates rights for, and imposes obligations on, States to establish criminal law jurisdiction over the incident. It requires them either to indict or to extradite the perpetrator. The formula also provides that the treaty may be used as a legal basis for extradition, as might be needed in cases where the Parties have no other extradition agreement between them. Finally, the formula requires States to provide mutual assistance to each other, such as through the exchange of information, to combat the specific category of crime.

In addition to those treaties dealing with particular types of terrorist acts, described above, there are the three first-mentioned multilateral treaties that require preventive action to combat terrorism more broadly. These require national measures that do not entail a transnational factor. Two treaties do not seek to address terrorism directly but to control the distribution of nuclear material<sup>60</sup> and plastic explosives,<sup>61</sup> thus being relevant to the prevention of terrorist acts. The *Convention for the Suppression of the Financing of Terrorism*

<sup>53</sup> *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, 1456 U.N.T.S. 124; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, U.S. Treaty Doc 103-8; and the *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 U.N.T.S. 229.

<sup>54</sup> *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, 1035 U.N.T.S. 167.

<sup>55</sup> *International Convention against the Taking of Hostages*, 17 December 1979, 1316 U.N.T.S. 205.

<sup>56</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105.

<sup>57</sup> *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, 704 U.N.T.S. 219, *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177 and *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 24 February 1988, 1589 U.N.T.S. 474.

<sup>58</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 U.N.T.S. 304.

<sup>59</sup> *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 U.N.T.S. 284.

<sup>60</sup> *Convention on the Physical Protection of Nuclear Material*, *supra* note 53.

<sup>61</sup> *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, *supra* note 53.

seeks to prevent the range of terrorist acts listed above.<sup>62</sup> These three multilateral treaties are discussed below in connection with preventive measures together with the regional treaties. A table at Annex 1 sets out ratifications of multilateral terrorism agreements by ASEAN countries.

In summary, the multilateral conventions provide two basic models: (1) obligations to cooperate to extradite or indict persons suspected of having committed specified acts of violence that are transnational and engage the contracting Parties; and (2) obligations to take national measures to prevent funds and certain dangerous goods from being unlawfully provided to terrorists. Each of these models might have a role in an ASEAN regional treaty.

## 2. *Regional formulae compared*

There are seven plurilateral treaties adopted at regional levels to combat terrorism. In chronological order, they are the:

1. *Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance* 1971 (OAS Convention);
2. *European Convention on the Suppression of Terrorism* 1977 (European Convention);
3. *South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism* 1987 (SAARC Convention);
4. *Arab Convention on the Suppression of Terrorism* 1998;
5. *Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism* 1999 (CIS Treaty);
6. *Convention of the Organization of the Islamic Conference on Combating International Terrorism* 1999 (OIC Convention); and
7. *Organization of African Unity Convention on the Prevention and Combating of Terrorism* 1999 (OAU Convention).<sup>63</sup>

The 1998 Arab Convention informs the 1999 OIC Convention and the two are virtually identical. Only the OIC Convention is examined here, as it is the later of the two and the parties to the Arab Convention are also parties to the OIC Convention, which has double the membership of the Arab League.

The six regional terrorism treaties examined do not follow a single formula to facilitate international cooperation. Most regional treaties define and set in place a framework for cooperation in the prosecution of terrorists. Unlike the multilateral treaties, they do not necessarily identify and focus on a particular kind of illegal action. Nor do they need a transnational factor in order to trigger international rights and obligations, as most of the multilateral treaties do. They are more diverse in their approaches than the multilateral treaties, indicating the diversity of political perspectives on terrorism amongst the regions in which each was adopted.

<sup>62</sup> *International Convention for the Suppression of the Financing of Terrorism*, *supra* note 53. In addition, it contains, in comparison to other multilateral treaties, an exceptionally broad, clear and appropriate definition of its subject matter. That is examined in the context of regional treaties: see text at note 75 below.

<sup>63</sup> *OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance*, 2 February 1971, 1438 U.N.T.S. 195; *European Convention on the Suppression of Terrorism*, 27 January 1977, 1137 U.N.T.S. 94; *Arab Convention on the Suppression of Terrorism* (April 1998), Arab League, online: <<http://www.al-bab.com/arab/docs/league/terrorism98.htm>>. The *SAARC Regional Convention on Suppression of Terrorism* (4 November 1987), *Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism* (4 June 1999), *Convention of the Organization of the Islamic Conference on Combating International Terrorism* (1999) and *OAU Convention on the Prevention and Combating of Terrorism* (14 July 1999) are available at the United Nations, online: <<http://untreaty.un.org/English/Terrorism.asp>>.

The regional terrorism treaties are compared below according to their component functions. The categories of component functions are to: define terrorism (including exceptions); establish national criminal jurisdiction; promote terrorism prevention measures (including intelligence sharing and the exchange of information) as well as mutual assistance in investigations and extradition; and to set in place implementation machinery.

(a) *Definitions of terrorism:* The two main difficulties arising in the regional treaties' various definitions of terrorism are that they cover an inadequate range of violent acts, or that those violent acts defined are not linked to the motivation to influence government. Thus, five of the six treaties do not consistently satisfy the definition of terrorism adopted in this paper that addresses violence against non-combatants and distinguishes common crimes of violence by reason of public motivation.

The OAS Convention refers to terrorism but sidesteps any definition. It provides that crimes of kidnapping, murder and assault on protected persons are considered common crimes of international significance, regardless of motive (Art. 2). Protected persons are domestic and foreign heads of government, senior representatives and diplomats. While the OAS formulation might seem to be a way to sidestep the troublesome question of political motive, it does not meet the wider challenges of regional cooperation to combat terrorist acts against non-combatants because its application is confined to internationally protected persons. The OAS Convention provides that it is up to each individual State to "determine the nature of the acts and decide whether the standards of this Convention are applicable" when determining whether or not to extradite for the commission of a particular offence (Art. 3). Although it is always a State's task to interpret its obligations (until such time as a dispute is arbitrated), that task is at its most subjective when such vague language renders the obligations uncertain. The OAS Convention leaves it open to Parties not to cooperate simply where they are in sympathy with political motives behind the crime.

The European Convention also avoids grappling with the question of political motive. It does this by listing offences that shall not be regarded as political offences for the purposes of granting asylum (Art. 1). The list is confined to violent acts, some of which are already the subject of cooperation under multilateral instruments, and some that are more general. Acts covered under the United Nations treaties on unlawful acts of violence against civil aircraft<sup>64</sup> and on aircraft hijacking,<sup>65</sup> physical attacks on internationally protected persons<sup>66</sup> and hostage taking<sup>67</sup> are listed. Beyond the multilateral treaties already in place in 1977, the year of adoption of the European Convention, bombing and explosives offences are listed. The European Convention has the limited but useful feature of ensuring that the listed multilateral treaties apply to all regional Parties. However, because the multilateral treaties cross-referred to are set out in the body of the text of the European Convention, rather than in annexes for which simplified amendment procedures might be adopted, it has not kept up to date with the multilateral treaties. For example, the bombing and explosives offences listed, although extending beyond the scope of multilateral treaty definitions of terrorist offences as set out in 1977, have been overtaken by the more extensive provisions of the *International Convention for the Suppression of Terrorist Bombings* in 1997.<sup>68</sup> This anachronism demonstrates the shortcomings of a definition based on other extant treaties that do not themselves define terrorism in general terms.

Article I of the SAARC Convention provides a list of conduct which shall be regarded as "terroristic" and which shall not be regarded as a political offence for the purposes of

<sup>64</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, *supra* note 57.

<sup>65</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, *supra* note 56.

<sup>66</sup> *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, *supra* note 54.

<sup>67</sup> *International Convention against the Taking of Hostages*, *supra* note 55.

<sup>68</sup> *International Convention for the Suppression of Terrorist Bombings*, *supra* note 59, and *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, *supra* note 53.

granting asylum. These include offences under listed multilateral treaties.<sup>69</sup> This part of the provision generalises the application of the listed multilateral treaties throughout the SAARC Member States. In addition, any treaty to which particular SAARC Member States concerned are already Parties and that obliges them to prosecute or grant extradition is covered.<sup>70</sup> Other offences which are deemed to be “terroristic” include murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used to perpetrate *indiscriminate* violence involving death or serious bodily damage to persons or serious damage to property. Conspiracies to commit the above are also included within the scope of the Convention. This latter part of the provision avoids the question of motive by addressing ordinary violent crime rather than terrorism. The qualifying descriptor, requiring that the violence be *indiscriminate*, creates an unsatisfactory ambiguity, allowing for a subjective interpretation that political violence is not indiscriminate. Thus, this aspect of the legal definition for terrorism is unclear and does not address the need for a public motivation.

The CIS Treaty defines terrorism in Article 1 as an illegal act punishable under criminal law,<sup>71</sup> committed for the purposes of undermining public safety, influencing decision-making by authorities, or terrorising the population. The kinds of illegal acts listed as the threat of or actual violence are: violence against natural or juridical persons; destruction or damage to property so as to endanger peoples’ lives; causing substantial harm to property; action against the life of a statesman or public figure for the purpose of putting an end to either his State or a public activity or for revenge for such activity; and attack against representatives, premises or vehicles of a foreign State or international organisation. Other acts classified as terrorism are those recognised under universally recognised international legal instruments on counter-terrorism. Oddly, any acts defined as terrorism under the national legislation of CIS Parties are included by reference. This introduces an unknowable factor in the treaty definition and creates an uncertainty that is inherently unsatisfactory. Article 1 also defines the term “technical terrorism”. This refers to the use or threat to use nuclear, radiological, chemical or biological weapons, if the acts are for the purpose of undermining public safety, terrorising the population or influencing the decisions of the authorities in order to achieve political, mercenary or other ends. Although aspects of the CIS definition, as set out in Article 1 conform to the definition proposed in this paper, it introduces limitations and wide uncertainties inconsistent with the proposed definition, such as by its referential inclusion of multilateral conventions and national legislation. The definition’s structure is confusing and repetitive. The definition of “technical terrorism” does not seem to add any new conceptual or legal elements.

Article 1(2) of the OIC Convention defines “terrorism” as any act or threat of violence, notwithstanding its motives, perpetrated to carry out a criminal plan to terrorise people, threaten to harm them or endanger their lives. It goes on to extend the elements of such a plan to include also harming people’s honour, freedoms, security or rights, exposing the environment or any public or private property to hazards, occupying or seizing property, endangering national resources or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of any State. These latter acts are extensive but inadequately defined. For example, the notions of harm to people’s rights or of exposure of the environment to hazards are extraordinarily vague and do not adequately describe acts of violence. The inclusion of threats to the political unity of a State would encompass

<sup>69</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, *supra* note 56; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, *supra* note 57, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, *supra* note 54.

<sup>70</sup> SAARC Convention, Art. 1(d), *supra* note 63.

<sup>71</sup> In relation to whether, as a prerequisite to being defined as terrorism, the violence should be subject to national penal laws, see text under sub-heading “Criminalisation under national jurisdiction” below.

separatist movements regardless of their peaceful means, pre-judging the legitimacy of political motivation. Thus, in addition to being vague, the OIC definition has a steep political slant and is not objective. Article 1 goes on to distinguish between “terrorism” and “terrorist crimes”. Article 1(4) lists crimes stipulated in various multilateral conventions and deems those acts to be “terrorist crimes”, but only if the conventions were ratified by the Party concerned. The utility of the cross-reference to multilateral conventions is undercut by excluding application to non-Parties to those conventions.

Article 1(3) of the OIC Convention defines “terrorist crimes” more broadly as any crime perpetrated, commenced or participated in to realise a terrorist objective in any Contracting State or against its nationals, assets, interests or foreign facilities, punishable by its national laws.<sup>72</sup> The prerequisite of criminality under the national legislation of the OIC Parties renders the definition subjective. Article 2(d) stipulates that all “international crimes” aimed at financing terrorist objectives shall themselves be classed as terrorist crimes. This part of the definition extends the meaning of “terrorist crimes” to include other criminal activities, such as trafficking in narcotics and human beings, that are intended to finance terrorist plans. The meaning of “international crimes” is not clear and does not address the financing by simple donation of funds by supporters,<sup>73</sup> perhaps the most ubiquitous form of financing. It casts “terrorism”, “terrorist crimes”, “international crimes”, as well as ordinary and political crimes, together into one conceptual swamp. The vague sweep of this definition is unsatisfactory.

The most recent of the regional treaties is the OAU Convention. Article 1(3) of the OAU Convention defines a “terrorist act” as any act which violates the criminal law of a State Party<sup>74</sup> and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to any person or a group of people. It includes acts that cause damage to public or private property, natural resources, and environmental or cultural heritage. The acts must be intended either to intimidate any government into doing or abstaining from doing something, disrupt any public service, or to create general insurrection in a State. Thus, consistent with the proposed definition, the violence is distinguished from common crime by its political motive. Promoting, sponsoring, organising or in any other way contributing to a terrorist act, as defined in Article 1(3)(a), is itself part of a terrorist act (Art. 1(3)(b)). The confined range of preliminary acts is too narrow to pick up financing of terrorist acts prior to a plan being finalised or of terrorist organisations as such. However, with the exception of its precondition of violation of national criminal laws, it is similar to that proposed in Section 1 of this paper and is the clearest and most usefully applicable definition adopted among the regional treaties.

Overall, the language used in the regional treaties to define terrorism is often ambiguous, qualified and unsatisfactory, leaving much room for non-cooperation. A common theme is the limited coverage of violent acts in the list of prohibited acts. Often the list of acts is extremely limited and constrains the opportunities for international cooperation. In several instances, however, the acts listed are broad and vague, covering ordinary transnational crime without regard to the contextual elements of armed conflict, or else, covering political opposition irrespective of violence against civilians intended to induce a state of fear. There is a chronological trend away from limited listed acts and towards general principles to create a definition. The latest treaty, the OAU Convention, provides a useable definition,

<sup>72</sup> *Ibid.*

<sup>73</sup> See the *Convention for the Suppression of the Financing of Terrorism*, *supra* note 53, which is discussed in more detail in text under sub-heading “Preventative measures” below. As will be noted, the definition of “funds” in Art. 1.1 of the Financing of Terrorism Convention together with the breadth of Art. 2 means that the donation of private funds to an organisation may constitute a terrorist offence, regardless of whether the funds were used to commit an act specified in Art. 2.1 and provided that the requisite *mens rea* requirements are fulfilled.

<sup>74</sup> See text under sub-heading “Criminalisation under national jurisdiction” below.

the main weakness of which is that the particular criminal act must already be defined as a crime under national law. The circularity of this prerequisite is discussed below.

Finally, the *Convention for the Suppression of the Financing of Terrorism*,<sup>75</sup> exceptionally among the multilateral conventions, employs a general definition of terrorism, in order to supplement the violent acts defined in other multilateral conventions to which it cross-refers. Article 2.1(b) defines an offence within the scope of the Convention as being:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The Financing of Terrorism Convention provides a model definition that sets in place a robust conceptual framework.<sup>76</sup> That definition parallels the one proposed in this paper. The congruity and minor departures and elaborations are: (1) it defines serious violence as requisite but limits the acts of violence to those intended to cause death or bodily injury, thereby excluding attacks on public infrastructure and threats; (2) in addition to civilians, the violence is directed at non-combatants; (3) the intention to coerce a social institution in the form of government is required, but also specified is coercion of an international organisation or intimidation of a population; and (4) the character of the perpetrator is identified as that of an individual person, *i.e.*, a non-State actor. The Convention has been ratified by all ASEAN Member States, except Malaysia and Laos. Its definition is, therefore, likely to be acceptable for adaptation and adoption into an ASEAN regional treaty.

(b) *Exceptions for certain political motives*: The definitions of terrorism formulated in each of the six regional treaties avoid evaluation of political motive.<sup>77</sup> They specify that the offences described shall not be considered political offences, thereby excluding the possibility of offenders being granted political asylum.<sup>78</sup> On the other hand, some of the treaties exclude from the scope of their definition violence for certain political purposes.

Thus, Article 2(a) of the OIC Convention provides that a peoples' struggle

including armed struggle against foreign occupation, aggression colonialism, and hegemony, aimed at liberation and self-determination in accordance with principles of international law shall not be considered a terrorist crime.

This exception contemplates that acts that would otherwise be considered terrorist are condoned for a wide range of purposes. The purposes are broad and imprecise. Although crafted primarily to condone acts of terror against Israeli interests, in the new millennium, the exception could also work against the interests of those OIC States, such as Algeria,

<sup>75</sup> *Supra* note 53.

<sup>76</sup> Guillaume has described this definition as "unhappily inconclusive" but failed to provide any supporting analysis: *supra* note 3 at 539.

<sup>77</sup> Nevertheless, some treaty definitions include, irrespective of the nature of the violence, all acts of insurrection or revolution. See Art. 1.3(a)(iii) of the OAU Convention, *supra* note 63 ("create general insurrection") and Art. 1.2 of the OIC Convention, *supra* note 63 ("...threatening the stability, territorial integrity, political unity or sovereignty of independent States"). As these are essentially political categories, they would be better addressed by domestic laws concerning treason and are otherwise covered by humanitarian laws concerning armed conflict.

<sup>78</sup> Art. 1 of the European Convention, *supra* note 63; Art. II of the SAARC Convention, *supra* note 63 and Art. 2(b) of the OIC Convention, *supra* note 63. Art. 2 of the OAS Convention, *supra* note 63, states that the listed acts "shall be considered common crimes of international significance, regardless of motive". Art. 3.2 of the OAU Convention, *supra* note 63, states that political or other motives "shall not be a justifiable defence against a terrorist act". Art. 4(1) of the CIS Treaty, *supra* note 63, states that when cooperating in combating acts of terrorism, the Parties shall not regard the acts involved as other than criminal.

Egypt, Indonesia, Morocco, Saudi Arabia and Uganda, that are threatened by rebels that engage in terrorist acts.

Article 3(a) of the OAU Convention similarly states that “the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts” (sic). For those terrorist acts not excepted, it provides that there is no “justifiable defence” for political, philosophical, ideological, racial, ethnic or religious motives (Art. 3(b)). The difference between violent actions engaged in for self-determination, as compared to acts for political or ideological motives, is too obscure to be applied other than subjectively.

Clearly, these exceptions allow terrorist acts for certain political and ideological purposes because they fail to distinguish them from legitimately conducted armed conflict under international law. The exceptions are ambiguous and open to subjective interpretations that could arbitrarily exclude almost all violent political conflicts. In the ASEAN region, some might consider that they provide exceptions for organisations including the Moro Islamic Liberation Front, Abu Sayyaf Group, New Peoples Army, Pattani United Liberation Organization, Kumpulan Mujahidin Malaysia, Gerakan Aceh Merdeka, Laskar Jihad, Islamic Jihad, *etc.* Thus, the exceptions formulated give ample scope for Parties to avoid cooperation under a treaty and are unacceptable model provisions.

(c) *Criminalisation under national jurisdiction*: The multilateral terrorism treaties require an identified transnational factor in a terrorist act that connects and legally establishes a State’s jurisdiction, creating rights and obligations for the State concerning the incident. For example, a Party might be required to establish procedures and penalties in its criminal law for the defined act and to indict or extradite the perpetrator.<sup>79</sup> In contrast, in regional terrorism treaties a variety of conditions may predicate criminal jurisdiction. Some require a transnational factor, particularly when the regional treaty’s definition of a terrorist act cross-refers to multilateral treaties. Other regional treaties may create obligations to establish jurisdiction for terrorist acts that are entirely domestic but, in deference to sovereign independence, premise their definitions of terrorist acts on the breach of a previously established national criminal law. Although most regional treaties impose an obligation to establish new prohibitions, procedures and penalties at criminal law, they all defer to national sensitivities by creating only soft, obtuse obligations.

Under Article 8(d) of the OAS Convention, the Parties are to cooperate in endeavouring to ensure that the listed acts are included in each Party’s penal code. European Convention Parties are cryptically required to establish criminal jurisdiction over the offences listed in Article 1 where the offender is present in its territory (Art. 6.1). Parties perform their obligations under the SAARC Convention only to the extent permitted by their national laws, as is apparent in Arts. V, VI and VIII. Article 6 of the CIS Treaty requires the Parties, through consultations, jointly to draw up mere recommendations for “achieving concerted approaches” to the legal regulation of issues relating to combating terrorism. The shortcomings in these obligations are manifest. The OAS commitment is a “soft” or voluntary obligation, and the European requirement is to assert procedural jurisdiction rather than to criminalise an act. Under the SAARC and CIS treaties, there is no obligation at all to adopt laws criminalising terrorist acts. Indeed, Article 9(2) of the CIS Treaty states that mutual assistance may be denied where the act in relation to which the request was made is not a crime under the legislation of the requested Party.

Under the OIC Convention, Article 3(II) provides that Parties are committed to preventing and combating terrorist crimes in accordance with the provisions of the Convention and their respective national rules. But, as noted above, “terrorist crimes” in the OIC Convention is

<sup>79</sup> For *e.g.*, hijacking is covered under Art. 1(a) of the European Convention (*supra* note 63) and Parties are required to criminalise that act under Art. 6.1.

defined under Article 1(3) as any crime perpetrated, commenced or participated in to realise a terrorist objective *already punishable by national laws*. Due to this circular formulation, there is no obligation in the Convention on Parties to adopt applicable national laws.

Parties to the OAU Convention undertake in Article 2 to review their national laws and establish criminal offences for terrorist acts as defined by the Convention. Part III of the Convention outlines State jurisdiction over terrorist acts and provides that, upon receiving information that a person who has committed a terrorist act may be present in its territory or is one of its nationals, then the Party must take measures under its national law to investigate and prosecute the person. Parties have the option of establishing jurisdiction if the terrorist act is committed against a national, stateless resident, property or against the security of the State (Arts. 7(1) and 7(2)). It is apparent that the OAU Convention affords the broadest agreed base for establishing national laws and that it imposes the most significant rights and obligations in relation to criminal law enforcement. However, although there is an apparent requirement to establish criminal offences for terrorist acts, a particular action only falls within the definition of terrorist acts if it is already a violation of the criminal laws of the Party (Art. 1(3)(a)). Thus, the requirement to establish criminal jurisdiction is circular. Consequently, there is no clear requirement to enact legislation to cover actions that are peculiar to terrorism and not normally covered by ordinary criminal law. Such actions not normally covered might include, for example, bombings, extraterritorial violence, surreptitious funding, membership in terrorist organisations, espionage, and threats and hoaxes.

An ASEAN regional treaty could build on the particular strengths of the OAU Convention provisions, while avoiding its circularity. Its confusion concerning the criminalisation of terrorist acts under national law works against the adoption of a common definition and the harmonisation of national laws. This could be resolved by formulating obligations that require treaty Parties to enact legislation to criminalise terrorist acts as set out in the treaty definition. That definition should not include a prerequisite that an action first be a violation of criminal law in order for it then to be a “terrorist act”. A template for the offences to be criminalised could include appropriate preliminary and accessory acts. Clear, specific obligations to adopt mandatory procedures to establish criminal jurisdiction are then needed to indict or extradite perpetrators.

(d) *Prevention measures:* Measures to prevent terrorist acts can entail a wide range of governmental activities, including inter-agency coordination, immigration controls, customs controls, financial flow controls and the securing of public places. The regional treaties address both domestic and international prevention measures, with emphasis on international cooperation. The range of areas for prevention addressed varies widely across the treaties, demonstrating a roughly chronological progression towards more elaborate prevention measures, with the OAU Convention having the most extensive coverage. Nevertheless, most treaty measures are couched in the language of soft obligations and, often, in vague terms.

The OAS Convention provides that the Parties are to “cooperate among themselves” to “prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults...” (Art. 1). Article 8(a) loosely provides that the Parties accept the obligation to take measures to prevent and impede the preparation in their territories of the crimes mentioned in Article 2. The European and SAARC treaties impose no dedicated prevention obligations.

Part II of the OIC Convention sets out extensive areas for cooperation to combat and prevent terrorist crimes. Article 3.I calls upon the Parties not to support terrorist acts and Article 3.II(A) lists the preventative measures that each Party “shall see to”. These include barring their territories from being used as arenas for planning, organising and executing terrorist crimes; developing and strengthening border control and surveillance on transfer

or stockpiling of weapons; and strengthening security of protected persons, international organisations, vital installations and public transport facilities.

Part II of the OAU Convention also specifies areas of counter-terrorism cooperation. Parties undertake to refrain from acting in such a way as to support the commission of terrorist acts, including the issuing of visas and travel documents (Art. 4(1)). All Parties must adopt “legitimate measures” to prevent and combat terrorism in accordance with their national structure, including the development and strengthening of monitoring for activities such as arms stockpiling, strengthening the protection and security of diplomatic and consular missions and international persons and promoting the exchange of information and expertise on terrorist acts (Art. 4(2)).

Article 2 of the CIS Treaty provides that the Parties shall cooperate in preventing, uncovering, halting and investigating acts of terrorism, in accordance with the Treaty, their national legislation and any international obligations. The inclusion of national legislation seems to qualify the provision and render it indeterminate. Article 5(1)(c) briefly elaborates that the Parties shall assist one another by developing and adopting agreed measures for preventing, uncovering, halting or investigating acts of terrorism, and informing one another about such measures and Article 5(1)(d) goes on to provide that they shall adopt measures to prevent and halt preparations in their territory for the commission of acts of terrorism in the territory of another Party.

The OIC and OAU Conventions usefully identify common areas for cooperation in preventive measures, being the stockpiling of weapons, border controls over dangerous goods and suspect persons, and security for protected persons. None of the regional treaties address the prevention of terrorist financing and none provide strong models for the implementation of preventive measures. An original approach to border controls would be to insert a commitment between Parties to an ASEAN treaty to develop a protocol for cooperation in border measures that requires the development of immigration, customs and financial controls. These could include the sharing of alert lists and the designation of national coordination and communication points to facilitate international cooperation in preventive measures.<sup>80</sup> In relation to protected persons, the treaty might require that the Parties hold periodic consultations to identify security measures needed for particular protected persons. Joint crisis management plans could also be required to be formulated. In connection with the stockpiling of weapons and the financing of terrorists, three multilateral conventions concern prevention measures that provide useful models.

The *Convention on the Marking of Plastic Explosives for the Purpose of Detection* obliges each Party “to take the necessary and effective measures to prohibit and prevent the manufacture in its territory of unmarked explosives” (Art. II) as well as “the movement into or out of its territory of unmarked explosives” (Art. III).<sup>81</sup> Explosives must be marked by adding a detection agent to them during the manufacturing process (Art. I.3). The terms “explosives” and “detection agent” are defined in the Technical Annex to the Convention (Arts. I(1) and I(2)). Article IV obliges the contracting Parties to destroy unmarked explosives in their territory other than those explosives in the possession of the police or the military (Art. IV(4)).<sup>82</sup>

<sup>80</sup> The International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO), which are both United Nations bodies, have developed binding codes requiring their members to adopt preventive security measures for shipping and aviation. The IMO International Shipping and Port Facility Security Code (ISPS Code) (See Chapter XI-2 of the *Convention for Safety of Life at Sea* (1<sup>st</sup> November 1974), IMO, online: <[http://www.imo.org/home.asp?topic\\_id=161](http://www.imo.org/home.asp?topic_id=161)>) and the ICAO Standards and Recommended Practices (located in Annex 17 of the *Convention of Civil Aviation (Chicago Convention)*, 7 December 1944, 15 U.N.T.S. 295) could be cross-referred to as baselines for regional transport security plans. The ICAO also has a voluntary *Aviation Security Plan of Action* (14 June 2002), ICAO, online: <[http://www.icao.int/cgi/goto\\_atb.pl?icao/en/atb/avsec/overview.htm;avsec](http://www.icao.int/cgi/goto_atb.pl?icao/en/atb/avsec/overview.htm;avsec)>.

<sup>81</sup> *Supra* note 53.

<sup>82</sup> The Plastic Explosives Convention (*supra* note 53) establishes a Commission appointed by the Council of the International Civil Aviation Organization (Art. V(1)) to make recommendations to the Council for amending

The Plastic Explosives Convention is the multilateral convention least ratified by ASEAN Member States.<sup>83</sup> All six regional conventions contain provisions relating to cooperation between contracting Parties, which vary in detail.<sup>84</sup> An ASEAN regional treaty might elaborate on the regional conventions and provide a more comprehensive system of cooperation and education. Articles in four regional conventions contain relevant provisions that extend beyond the obligations in the Plastic Explosives Convention, concerning the stockpiling of explosives, weapons and ammunition.<sup>85</sup> Only the OIC Convention specifically states that a contravention of the Plastic Explosives Convention is a terrorist crime, provided that the contracting State is a party to that multilateral convention (Art. 1.4(l)).

The *Convention on the Physical Protection of Nuclear Materials*<sup>86</sup> obliges States to control access to nuclear material and equipment. Article 3 imposes the general obligation on Parties to take steps to ensure that, during international transportation, nuclear materials (defined in Annex II) within their territory or on board a registered ship or aircraft travelling to or from that State are protected. The effect of the Convention is that Parties may not import from non-contracting Parties, or export to Parties or non-contracting Parties, unless the nuclear material is protected according to the standards set out in Annex I (Art. 4). Article 5 specifies how Parties are to cooperate in the event that nuclear material is unlawfully taken. In general, they are obliged to criminalise within their national laws the unlawful taking of, or any threat to use nuclear material to kill or cause serious injury or damage (Art. 7), to establish jurisdiction over the offences (Art. 8), and to prosecute or extradite offenders (Art. 10). The Parties are to cooperate concerning criminal proceedings brought in respect of the offences (Art. 13.1).

The only regional treaty to deal specifically with nuclear technology, although to little effect, is the CIS Treaty.<sup>87</sup> The OIC Convention also provides that offences under the Nuclear Materials Convention are terrorist acts, provided that the latter instrument has been ratified by the relevant Parties.<sup>88</sup> Although the regional conventions embrace, in general terms, the definition of an offence as set out in the Nuclear Materials Convention,<sup>89</sup> they do not cover its preventive measures for the protection of nuclear materials. Therefore, there would be advantage in importing the Nuclear Materials Convention obligations into an ASEAN regional treaty by cross-references to it.

The broadest in application of the multilateral conventions on prevention is the *Convention for the Suppression of the Financing of Terrorism*. It aims to deprive terrorists of their sources of “funds”,<sup>90</sup> which are any type of asset, regardless of how acquired (Art. 1.1.). A person commits an offence within the meaning of the Convention if he or she “by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the

the Technical Annex (Art. VI(3)). While it imposes relatively straightforward obligations on the contracting Parties, it does not establish a cooperative framework between them to assist in identifying unmarked explosives that flow across borders and to share expertise in the production of marked explosives.

<sup>83</sup> See Annex 1 to this article below.

<sup>84</sup> See text under sub-headings “Intelligence information exchange” and “Mutual assistance for investigations” below.

<sup>85</sup> See Art. 4(2)(b) of the OAU Convention, *supra* note 63; Art. 3(ii)(A)(1) of the OIC Convention, *supra* note 63; Art. 11(c) of the CIS Treaty, *supra* note 63 and Art. 8(a) of the OAS Convention, *supra* note 63.

<sup>86</sup> *Supra* note 53.

<sup>87</sup> *Supra* note 63. Article 1 defines technological terrorism to include the threat or use of nuclear weapons or their components while Art. 11(c) provides that Parties must exchange information of instances of the illegal circulation of nuclear materials. However, its definition does not add significantly to its definition of terrorism.

<sup>88</sup> *Supra* note 63, Art. 1.4(g).

<sup>89</sup> See text under sub-heading “Definitions of terrorism” above. Art. 1(e) of the European Convention, *supra* note 63, defines terrorist offence to include the use of a bomb. The SAARC Convention, *supra* note 63, defines a terrorist offence to include any act involving weapons when used indiscriminately to cause death or serious damage to persons or property (Art. 1(e)).

<sup>90</sup> *Supra* note 53.

intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” the defined terrorist offences (Art. 2.1).

Regional provisions to suppress the financing of terrorism are found in the OAU Convention, where Parties undertake to refrain from financing terrorist acts (Art. 4.1). A terrorist act is defined to include “sponsoring” (Art. 3(b)). The OIC Convention also contains relevant provisions but merges money laundering with terrorist acts where it states that money laundering aimed at financing terrorism is itself to be considered a terrorist crime (Art. 2(d)). It would seem a better approach to prosecute perpetrators of money laundering activities intended to finance terrorist acts under the two separate charges of money laundering and of terrorist financing so as to maintain the conceptual distinctions between money laundering and terrorist financing. The OIC Parties also agree that their State organs will not “execute, initiate or participate in any form in organizing or financing or committing or instigating or supporting terrorist acts whether directly or indirectly” (Art. 3(1)). However, the OIC Convention does not address private fund raising for terrorist acts and it would seem that the Financing of Terrorism Convention, both in its definition of “funds” and in proscribing the offence of “financing”, is broad enough to encompass even small donations by individuals where they indirectly lead to the commission of a listed offence (Art. 2.1), provided that the person intended or knew that such money would be so used.<sup>91</sup> Further, an individual’s donation need not be actually used in the commission of a terrorist offence if such money was contributed to the organisation’s pool of assets with the intention that it be used for the purposes of terrorism (Art. 2.3).

Presuming that Malaysia and Lao will ratify the Financing of Terrorism Convention,<sup>92</sup> its provisions are sufficient to serve the purpose of regional suppression of terrorist financing. Although ASEAN Member States could usefully apply as between them the Plastic Explosives and Nuclear Materials Conventions, incorporating the obligations by reference into a regional treaty annex, these should be supplemented to develop and apply border controls on the flows of weapons and dangerous goods. Clearer obligations and procedures in relation to the extradition of offenders and capacity building are discussed below.<sup>93</sup>

(e) *Intelligence information exchange*: Intelligence is taken here to mean information gathered about terrorist acts in advance of their commission. The gathering and exchange of intelligence is a part of the set of preventive measures needed to combat terrorism but is considered separately because of its central importance in international cooperative efforts. The sharing of intelligence is explicitly provided for in most regional terrorism treaties. However, the agencies, methods and protocols used in intelligence gathering and analysis are not specified, consequent upon the sensitivity of this governmental activity.

Under Article 8(b) of the OAS Convention, Parties agree to cooperate in preventing and punishing the listed crimes, including through the exchange of information. SAARC Parties are obliged to cooperate amongst themselves in relation to the exchange of information with a view to preventing terrorist activities (Art. VIII(2)). The OIC Convention Parties must cooperate amongst themselves in exchange of information, as well as investigation, exchange of expertise and education (Arts. 3.II(A)7-8 & Art. 4). Under Article 5 of the OAU Convention, Parties undertake to strengthen the exchange of information amongst themselves regarding acts and crimes committed by terrorist groups and the communication methods used by such groups (Art. 5(1)). Both the OIC and OAU Conventions oblige the Parties to respect the confidentiality of any information passed to them.

These minimalist obligations stand in contrast to those of the CIS Treaty. Article 5(1)(a) of the CIS Treaty provides that Parties shall cooperate and assist one another by exchanging

<sup>91</sup> See text under sub-heading “Definitions of terrorism” above.

<sup>92</sup> If the delay in ratification is technical, this can be safely presumed, but not if the reason is political objection to the Convention’s definition of terrorist act.

<sup>93</sup> See text under sub-headings “Extradition” and “Measures to improve compliance” below.

information. Article 5(1)(h) provides for the exchanging of legislative texts and materials. Article 11 provides that the Parties shall exchange information on issues of mutual interest. These include: materials distributed in their territories containing information on terrorist threats; acts of terrorism in the course of preparation; illegal circulation of nuclear, chemical or biological weapons and the like; terrorist organisations or individuals that present a threat to the national security of one of the Parties; illegal armed formations employing terrorist methods; ways, means and methods of terrorist action they have identified; supplies and equipment that may be provided by one Party to another Party; practice with respect to the legal issues that are the subject of the Convention; identified and presumed channels of terrorist financing and suppliers; and terrorist encroachments aimed at violating the sovereignty and terrorist integrity of Parties. The relatively high degree of specificity might be attributable to the historic character of the CIS as the USSR, being one polity under the influence of Russian security institutions, and the common nature of their contemporary threat environment.

The diversity of conditions—political, cultural, economic, and religious—between ASEAN members suggests that intelligence sharing will be approached cautiously and that highly specific and mandatory provisions would not be appropriate. Ultimately, States exercise full control over the intelligence that they gather and will choose to share it at their discretion. As the information can be classified at various levels of secrecy, State implementation of treaty obligations will not be transparent. Nevertheless, explicit obligations to set up international contact points for “24/7” coordination of information and to treat that shared information as confidential are, at least, useful to flag the conditions that encourage intelligence sharing.

(f) *Mutual assistance for investigations*: Investigations concern information gathering (*e.g.*, documents, communications intercepts, exhibits) and rendering of persons (*e.g.*, witnesses and suspects) for the purpose of law enforcement in response to criminal acts already committed. In relation to investigations, the focus of the regional treaties is on mutual assistance. Their relevant provisions are of a highly general nature, except in relation to extradition, which is dealt with in more detail below.

The OAS Convention makes no provision at all for investigations. Article 8 of the European Convention obliges States to “afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought” in respect of terrorist offences. SAARC Convention Parties are required to afford one another mutual assistance in connection with proceedings brought in respect of terrorist offences, including supplying evidence where necessary (Art. VIII(2)). Under Article 5(1)(b) of the CIS Treaty, Parties shall cooperate by responding to inquiries on the conduct of investigations. Article 9(1) provides that the rendering of assistance shall be wholly or partially denied if the requested Party believes that cooperation may impair its sovereignty, security, social order or other vital interests or may contravene its legislation or international obligations.

Article 3.II(B) of the OIC Convention lists “combating measures” as an area for cooperation that includes arresting perpetrators of terrorist crimes, ensuring protection of witnesses and investigators to terrorist crimes, and establishing effective cooperation between the concerned government agencies and the citizens for combating terrorism. Article 4 requires Parties to promote cooperation with each other in the field of investigation procedures, and particularly in relation to arresting escaped suspects or those convicted of terrorist crimes. Article 14 provides that each Party shall extend to the others every possible assistance for investigation or trial proceedings related to terrorist crimes. OAU Convention Parties undertake to exchange information leading either to the arrest of any person charged with a terrorist act against the interests of a Party, or to the seizure of arms (Art. 5(2)). Part V of the Convention outlines procedures in relation to extra-territorial investigations and mutual legal assistance. Article 14(1) provides that any Party may request another Party to carry

out, with its assistance and cooperation, on the latter's territory, criminal investigations related to judicial proceedings concerning alleged terrorist acts.

Apart from some minor mentions in the OIC and OAU Conventions, the regional treaties do not specifically address procedures for inter-jurisdictional taking of evidence, transfer of foreign persons to give evidence or to assist in investigations, service of judicial documents, or execution of search and seizure.<sup>94</sup> Although some of these matters may already be addressed adequately under other international arrangements for cooperation in combating crime, there is no cross-reference in the regional treaties to such arrangements.<sup>95</sup>

A regional terrorism treaty is an inappropriately narrow base for a framework for mutual assistance that would be required in a wide range of other criminal investigations. Mutual assistance procedures tend to be detailed and technical, too much to be incorporated into the text of a framework treaty narrowly addressing regional terrorism. Therefore, broad-ranging, detailed technical arrangements for mutual assistance are better developed outside regional terrorism treaties. However, where no regional mutual assistance arrangements have been established, the regional terrorism treaty could impose an obligation on Parties to develop them. At the very least, Parties should undertake to review their mutual assistance arrangements to ensure that they are coordinated with and complement counter-terrorism treaty obligations.

No regional mutual assistance legal framework currently exists for the ASEAN region.<sup>96</sup> A Malaysian proposal to develop a framework is currently in the early stages of development.<sup>97</sup> Ideally, an ASEAN regional terrorism treaty should be coordinated within a broader ASEAN regional mutual assistance framework. In the event that ASEAN countries do not adopt a regional framework for mutual assistance, the terrorism treaty should require that they develop bilateral arrangements for mutual assistance to investigate terrorist acts.

(g) *Extradition*: The historic focus of multilateral legal cooperation to combat terrorism has been on the obligation to indict perpetrators or to extradite them to jurisdictions that will do so.<sup>98</sup> The obligation to indict, as set out in regional treaties, was discussed above

<sup>94</sup> Art. 8.1 of the European Convention *supra* note 63, provides that the laws of the requested State concerning mutual assistance in criminal matters apply. Art. 14 of the OAU Convention, *supra* note 63, provides that a Party may request another Party to carry out (on the latter's territory) criminal investigations and in particular: "the examination of witnesses and transcripts of statements made as evidence; the opening of judicial information; the initiation of investigation processes; the collection of documents and recordings or authenticated copies; conducting inspections and tracing assets for evidentiary purposes; executing searches and seizures; and service of judicial documents". Article 16 states that the extra-territorial investigation (rogatory commission) must be executed in compliance with the laws of the requested State. The OIC Convention, *supra* note 63, also has provisions relating to establishing a rogatory commission upon another Party's request (Art. 9). It provides that trials and investigations are to be conducted according to the laws of the holding country (Art. 15.2) and that any evidence collected by a holding country is to be "examined by competent organs" (Art. 21). Further, there are provisions for summoning witnesses and experts, with requesting states required to specify compensation, travel expenses, accommodation and commitment to make these payments in the summons or request (Art. 34). The SAARC Convention, *supra* note 63, states that Parties must afford each other mutual assistance including the supply of all evidence required for proceedings under Arts. I and II (Art. VIII(1)).

<sup>95</sup> Well-developed, regionally applicable mutual assistance in arrangements for criminal investigations are in place for Europe and, to a lesser extent the Americas, but not for other regions. However, the OAU Convention, *supra* note 63, Art. 18, provides that Parties undertake to develop "mutual legal assistance procedures" while the CIS Treaty, *supra* note 63, Art. 20.1 provides that Parties may conclude more detailed agreements on issues which are the subject of the Treaty.

<sup>96</sup> There is also a paucity of bilateral mutual assistance arrangements between ASEAN Member States. Australia has more bilateral assistance arrangements in place with ASEAN Members than they do with each other.

<sup>97</sup> Communication of the Malaysian Delegation at the ASEAN Government Legal Officers' Programme on Anti-Terrorism, Bali, August 2003.

<sup>98</sup> Extradition provisions can be found in the following multilateral *Conventions on terrorism*: *International Convention for the Suppression of the Financing of Terrorism*, *supra* note 53, Arts. 9-15; *International Convention for the Suppression of Terrorist Bombings*, *supra* note 59, Arts. 7-13; *Convention for the Suppression*

under the heading of “Criminalisation Under National Jurisdiction”. Legal issues that arise in relation to extradition concern whether to classify an offence as essentially political, in which case obligations to extradite do not apply. If the request is considered to be persecution for political activity, the State with custody over the accused has the right not to extradite, and may instead be obliged to grant asylum.

The OAS Convention provides that persons charged or convicted with the listed crimes shall be subject to extradition under the provisions of extradition treaties in force between the Parties (Art. 3). The Parties undertake to include these crimes among the punishable acts giving rise to extradition in any treaty to which the Parties may agree in the future (Art. 7). Where extradition is not possible, Parties are obliged to submit the offender to its competent authorities for prosecution (Art. 5). These provisions are qualified in that the OAS Convention provides that it is not to be interpreted so as to impair the right to asylum (Art. 6). Because there is no general definition for terrorist offences in the OAS Convention, this asylum qualification is wide open to subjective interpretation that the alleged offences are merely political. It undermines the extradition obligation and much of the Convention.

The European Convention Parties are required either to extradite persons accused or to prosecute them (Art. 7). Extradition may be refused on the grounds of granting political asylum (Art. 5). This exception is also drafted in broad terms that render it indeterminate and open to abuse. Further to the listed terrorist offences, Parties are free to decide that a ‘serious act of violence against the life, physical integrity or liberty of a person’ should not be classed as a political offence for the purposes of extradition (Art. 2). That decision is, of course, a choice that they would have independent of the Convention.

SAARC Convention Parties are required to extradite, subject to their national laws (Art. VI). This subjection to national laws undermines the obligation, which is, anyway, subject to a range of further broad qualifications for triviality, inexpediency, injustice and bad faith (Art. VI). Unusually, the CIS Treaty makes no independent provision for extradition. Article 5(2) simply states that extradition procedures shall be determined by the international agreements to which the States concerned are Parties. Article 4(2) provides that the nationality of the person accused for an act of terrorism shall be deemed to be his nationality at the time of the commission of the act.

Under the OIC Convention, Parties undertake to extradite those indicted or convicted of terrorist crimes (Art. 5). Extradition may be refused if the crime for which extradition is requested is deemed, under the laws in the requested State, to be one of a political nature (Art. 6.1). However, Article 2(b) declares that terrorist crimes shall not be classed as political crimes.<sup>99</sup> Despite this broad basis for extradition, it should be remembered that the OIC Convention exception from its definition of terrorism is wide open. Article 23 provides that any request for extradition must be accompanied by the original or an authenticated copy of the indictment or arrest order issued in accordance with the conditions stipulated in the requesting State’s legislation. Parties must also provide a statement of the acts for which extradition is sought, which specifies details such as dates and places, and a description of the subject wanted for extradition. These procedural requirements are specific, which is advantageous in the absence of other extradition arrangements.

*of Unlawful Acts against the Safety of Maritime Navigation*, *supra* note 58, Arts. 7, 11, 15; *International Convention against the Taking of Hostages*, *supra* note 55, Arts. 6, 9-10; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, *supra* note 56, Arts. 6, 8; *Convention for the Suppression of Unlawful Seizure of Aircraft*, *supra* note 54, Arts. 6, 8, 11; and *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, *supra* note 57, Arts. 13, 15-16.

<sup>99</sup> In addition to terrorist crimes, Art. 2(c) lists other crimes that shall not be considered political crimes, even when politically motivated (*supra* note 63). They include aggression against royalty, heads of State and government ministers of the OIC Parties, murder, robbery, sabotage as well as arms dealing where the latter is for terrorist acts. Although not terrorist crimes, these politically motivated crimes are given parallel treatment for the purposes of extradition.

Part IV of the OAU Convention deals with extradition. Article 8(1) provides that Parties shall extradite a person charged with or convicted of a terrorist act defined in Article 1 and carried out within the territory of another Party. However, the definition of terrorism is again subject to broad exception. The extradition must be requested by one of the Parties in conformity with the rules outlined in the Convention, which set out procedural matters and do not allow for subjective exceptions (Arts. 9-13). It is apparent that the OAU Convention provides the most clear and objective standards for extradition.

Distinguishing legitimate political acts and armed struggle from terrorist acts is the path through the thicket of confusion between extradition and asylum obligations. Political violence that meets the criteria in the definition of terrorism is neither legitimate political activity nor legitimate armed conflict. Thus, once a regional treaty has adopted a clear definition for terrorist acts, that definition provides the path for extradition obligations. Legitimate exceptions based on asylum to the obligation to comply with requests for extradition of alleged terrorists should be permitted only in cases of *mala fides* on the part of the requesting State, as determined by an international tribunal should one have jurisdiction.

The regional treaties offer several approaches to building a procedural basis for extradition. The OAS Convention and CIS Treaty cross-refer to extradition treaties between their Parties, whereas the OIC and OAU Conventions introduce their own procedural formalities. The European and SAARC Conventions are silent as to procedure. It would seem appropriate to cross-refer to procedures in extradition treaties already in place, as these will set out processes specifically tailored to serve the parties' particular needs. However, as extradition treaties are mostly bilateral, it can be expected that there will gaps in regional coverage. A regional terrorism treaty might, in fact, be the only extradition instrument in place between some countries and it should therefore also provide simple default procedural formalities for extradition processes.

(h) *Measures to improve compliance*: Efforts to gather and analyse relevant intelligence, to take effective preventative measures, and to investigate successfully and to prosecute criminal acts require sophisticated prevention and enforcement capacities. Around the world these capacities are under development, often in the early stages.

Under the European Convention, the Council of Europe's Committee on Crime Problems is to be kept informed on the implementation of the Convention (Art. 9(1)). SAARC Parties are obliged to exchange intelligence and expertise (Art. VIII(2)). The OIC Convention provides for the exchange of expertise and for Parties to cooperate with each other to undertake and exchange studies and research on combating terrorist crimes. They are also to provide each other with technical assistance within the scope of their capabilities (Art. 4). The OAU Convention calls for cooperation in relation to the provision of technical assistance between the Parties (Art. 5(6)).

These provisions compare poorly with those on regional capacity building found in the CIS Treaty. Article 5(1)(f) makes provision for the joint financing and conduct of research and development work on systems and facilities posing technological and environmental danger. Articles 5(1)(g) and 12 allow for special anti-terrorist units to give practical assistance in preventing terrorism and dealing with its consequences, by agreement between interested Parties. Article 5(1)(h) allows for exchanging experience on the prevention and combating of terrorist acts through training courses, seminars and workshops. Article 5(1)(i) calls for the cooperation of the Parties through training and further specialised training of personnel. Article 7 provides that cooperation under the CIS Treaty shall be conducted on the basis of requests by an interested Party for assistance to be rendered, or on the initiative of a Party that believes that such assistance would be of interest to another Party. Article 8(1) provides that the requested Party shall take all necessary measures to ensure the prompt and fullest possible fulfillment of the request. These latter provisions are the most specific and mandatory found in the regional treaties. These reflect, once again, the preponderance of

Russian interest and capacity in regional counter-terrorism efforts. In practice, of course, their implementation relies on mutual good will and the measures outlined serve primarily as expressions of good will and encouragement.

International agreements can employ more sophisticated measures to facilitate capacity development by setting reporting obligations and performance benchmarks for Parties. While exchanges of expertise are encouraged, or expressed in almost mandatory terms in the CIS Treaty, only the European Convention contains obligations to report on implementation. None of the treaties establish institutions or refer to coordination with other institutions to promote capacity building in the field of counter-terrorism. For example, conferences of Parties or their relevant sub-committees could be mandated with responsibilities to receive and review prescribed reports on treaty implementation. They could recommend development or amendment of procedures for enhancing national implementation and international cooperation. In particular, they could be mandated to develop, adopt and oversee the implementation of detailed action plans for technical capacity development, such as legislative and administrative reforms, so as to give political impetus to a coordinated regional program of prevention and enforcement capacity building. Therefore, the initiation of institutional mechanisms to provide oversight of regional capacity building should be a feature of an ASEAN regional treaty.

Another issue related to the integrity of the implementation of a treaty is the design of its procedures for dispute resolution, if any. These may prove necessary to resolve questions of implementation, for instance, where an extradition request is refused. Acute political sensitivity will pervade such refusals, as terrorist acts seek to undermine the public institutions in the victim State. Accordingly, Parties to regional treaties have not chosen to subject disputes between them to formal and binding dispute resolution procedures.<sup>100</sup> ASEAN Member States are also most unlikely to opt for formal and binding dispute resolution.

Finally, it should be noted that two of the most recent regional treaties do not allow Parties to make reservations to their obligations.<sup>101</sup> This is a desirable trend for ASEAN Members to adopt as it protects the function of the agreement.

### 3. *Outstanding issues*

There are many matters pertinent to efforts to combat terrorism that are not covered in the above examination, which is limited to matters arising within the four corners of the regional treaties. But two questions that would confront future drafters of an ASEAN regional treaty that remain outstanding are briefly noted here. They concern safeguards for civil and political rights and legal relationships with non-Parties.

The safeguards issue is raised in the OAS Convention, which gives any person deprived of his or her freedom through application of the Convention the right to enjoy legal guarantees of due process (Art. 4). Article 8(c) gives every offender the right to defend himself or herself. The OIC Convention outlines measures for protecting witnesses and experts, although its design may work against the administration of justice as penalties are not to be inflicted upon

<sup>100</sup> However, Art. 9.2 of the European Convention, *supra* note 63, provides that the European Committee on Crime Problems of Council of Europe “shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution”. Art. 10 provides for a formal arbitration process where the measures in Art. 9 fail. Art. 22.2 of the OAU Convention, *supra* note 63, provides that any disagreements regarding interpretation and application of the Convention must be “amicably settled by direct agreement between them.” Failing that, Parties may refer the dispute to the ICJ or submit themselves to arbitration by other Parties (Art. 22.2). Art. 21 of the CIS Treaty, *supra* note 63, stipulates that disputes arising out of the interpretation or application of the Treaty are to be resolved through consultation and negotiation.

<sup>101</sup> Art. 41 of the OIC Convention, *supra* note 63, and Art. 19.4 of the OAU Convention, *supra* note 63.

witnesses or experts who do not comply with a summons.<sup>102</sup> These two treaties demonstrate no coherent approach to the safeguarding of civil rights. Better safeguards that could be considered include a saving, in the intention component of the definition of terrorist act, to protect the innocent organisers of *bona fide* political demonstrations that nevertheless turn violent. Appropriate guarantees of humane treatment, due process and legal representation for suspects could also be included. Another issue related to the fair administration of justice is that of sentencing. Regionally accepted national sentencing guidelines may prove useful in facilitating cooperation where a Party is reluctant to extradite because it considers applicable penalties in the requesting State to be too harsh (or too light).<sup>103</sup> Sentencing is not addressed in any of the regional terrorism treaties, although the seizure of terrorist assets is dealt with in the OIC and OAU Conventions.<sup>104</sup>

The second question, concerning legal relationships with non-Parties, has several aspects. These include whether an ASEAN treaty should oblige its Parties to observe the terms of the multilateral counter-terrorism treaties and whether an ASEAN treaty should be open to participation by non-ASEAN States. The ratification of the multilateral conventions by ASEAN member states form an inconsistent patchwork, as indicated in Annex 1. It is possible, by cross-reference, to import into an ASEAN regional treaty the commitments set out in all the multilateral treaties.<sup>105</sup> Of the few regional treaties that import obligations, only one imposes upon all its Parties the obligations set out in multilateral treaties.<sup>106</sup> The device of importing obligations has been sub-optimal in practice, however, as most regional treaties lack efficient amendment procedures essential to keep them current with multilateral developments.<sup>107</sup> Where obligations from listed multilateral treaties are imported, they have been applied only *inter partes*, avoiding the creation of third-party rights.<sup>108</sup> If non-ASEAN Member States were enabled to participate in an ASEAN treaty, this might be facilitated through a non-Member's protocol that limited participation to priority matters for extra-regional cooperation, such as capacity building and intelligence cooperation.<sup>109</sup>

<sup>102</sup> Part III, Chapter III. Article 35(1) specifically states that no penalty or coercive measure may be inflicted upon a witness or expert who does not comply with a summons, even if the writ provides for such a penalty, *supra* note 63.

<sup>103</sup> Related to the issue of common sentencing is the question of the acceptability of the death penalty. It should be noted that ASEAN Member States allow the death penalty, but that other countries might refuse extradition requests from States where an extradited offender may be subjected to the death penalty.

<sup>104</sup> Art. 19 of the OIC Convention, *supra* note 63, states that if an offender is to be extradited, the requested State must hand over all assets and proceeds seized, used or related to the terrorist act that are found in the offender's possession or in the possession of a third party. Art. 5.2(b) of the OAU Convention, *supra* note 63, provides that Parties must exchange information that leads to the seizure and confiscation of arms. Article 13.2 provides that upon agreeing to extradite an offender, the Parties "shall seize and transmit all funds and related materials purportedly used in the commission of the terrorist act." Provision is made for search and seizure through a rogatory commission, if one is established (Art.14.1(f)).

<sup>105</sup> Cross-referencing occurs in Art. 1(a)-(c) of the European Convention, *supra* note 63, Art. 1.1 of the OIC Convention, *supra* note 63, and Art. I(a)-(d) of the SAARC Convention, *supra* note 63.

<sup>106</sup> As noted in text under sub-heading "Definition of terrorism" above, only the European Convention, *supra* note 63, Art. 1(a)-(c) impose multilateral convention obligations on all Parties.

<sup>107</sup> Only the OAU provides for amendments: *supra* note 63. State Parties must make a written request to the Secretary General of the OAU. The Assembly of Heads of State and Government may only consider the proposed amendment after all the State Parties have been informed of the amendment at least three months in advance (Art. 21.2). The amendment must be approved by a simple majority (Art. 21.3).

<sup>108</sup> As discussed in the text under sub-heading "Definition of terrorism" above, the OIC Convention, *supra* note 63, Art. 4 states that the crimes stipulated in the listed multilateral "conventions are also considered terrorist crimes with the exception of those excluded by the legislation of the contracting States or those who have not ratified them." The SAARC Convention, *supra* note 63, Art. I similarly provides that the conduct in the listed conventions shall be regarded as "terroristic" according to the law of the contracting State. Further, Art. I(d) provides that any offence within the scope of any Convention to which SAARC members are parties and which obliges the parties to prosecute or extradite is a terrorist offence.

<sup>109</sup> *E.g.*, Art. 24 of the CIS Treaty, *supra* note 63, provides that States which are not members of the CIS can accede to the Treaty. Art. 9 of the OAS Convention, *supra* note 63, states that it is open for signature by

In conclusion, the regional treaties to combat terrorism provide poor models. They are typically couched in vague language and contain many uncertain obligations. Their various definitions of terrorist acts and approaches to the criminalisation of those acts are conceptually flawed or inadequate. Most of their measures for prevention and intelligence cooperation are insubstantial. Their main strengths are in providing procedures for mutual assistance in investigations and in extradition arrangements. Nevertheless, the regional treaties do provide a framework for developing deeper intra-regional cooperation. Their aspirational goals address not only cooperation but also the building of national capacity to combat terrorism and those goals could be strengthened by measures to improve implementation. Therefore, despite the various inadequacies, they offer many lessons for the drafters of an ASEAN regional treaty.

#### IV. ASEAN COUNTER-TERRORISM COOPERATION

How likely is it that ASEAN Members might actually adopt a regional treaty to combat terrorism? In recent years, ASEAN cooperation on counter-terrorism measures has moved rapidly forward at both the region-wide level and at sub-regional levels.

The issue of terrorism was highlighted at the International Conference on Terrorism in Baguio City in the Philippines in 1996. Since then, an ASEAN-Japan Forum in Tokyo was held in May 1997 to establish a network for information exchange on combatting terrorism.<sup>110</sup> The *ASEAN Declaration on Transnational Crime* was promulgated at the first ASEAN Conference on Transnational Crime in Manila in 1997. The Declaration aimed at examining the possibility of regional cooperation on criminal matters such as terrorism, drug trafficking and sea piracy, and included discussions on extradition.<sup>111</sup> Following the Declaration, ASEAN countries established the ASEAN Ministerial Meeting on Transnational Crime (AMMTC), which gathers on a biennial basis and brings together ASEAN bodies such as the ASEAN Senior Officials on Drug Matters and the ASEAN Chiefs of National Police.<sup>112</sup> The possibility of establishing an ASEAN Centre on Transnational Crime was entertained at the first AMMTC.<sup>113</sup> The second AMMTC in 1999 produced a *Plan of Action to Combat Transnational Crime*.<sup>114</sup> The third AMMTC in 2001 endorsed the convening of an “Ad Hoc Experts Group on the Work Programme to implement the ASEAN Plan of Action to Combat Transnational Crime.”<sup>115</sup> These developments set the basis for regional cooperation in combatting transnational crime.

Following the terrorist attacks on the USA on September 11, 2001, ASEAN cooperative efforts to combat transnational crime began to focus strongly on terrorism. The seventh

members of the OAS and the United Nations. ASEAN Members have previously utilised the device of a non-Member’s Protocol in the *Treaty on the Southeast Asia Nuclear Weapon-Free Zone* (15 December 1995), ASEAN, online: <<http://www.aseansec.org/3636.htm>>. The Protocol provides that non-Member Parties undertake to respect the Treaty and to refrain from either breaching the Treaty (Art. 1) or threatening another Party with nuclear weapons (Art. 2). Article 3 provides that the Protocol is open for signature by China, Russia, the UK, the USA and France. See Malaysian Institute for Nuclear Technology Research, online: <[http://www.mint.gov.my/policy/treaty\\_nuclear/seanwzfz95\\_protocol.htm](http://www.mint.gov.my/policy/treaty_nuclear/seanwzfz95_protocol.htm)>.

<sup>110</sup> O.Y. Nee, *International Responses to Terrorism: The Limits and Possibilities of Legal Control of Terrorism by Regional Arrangement with Particular Reference to ASEAN*, Institute of Defence and Strategic Studies, Singapore (July 2002) at 23, online: <<http://www.911investigations.net/source119.html>>.

<sup>111</sup> See ASEAN, online: <<http://www.aseansec.org/13844.htm>>.

<sup>112</sup> P. Vermonte, *Regional Responses to Global Terrorism*, Thirteenth Meeting of CSCAP Working Group on Transnational Crime (27-28 June 2003) at 3.

<sup>113</sup> D. Mahadzir, “ASEAN Anti-Terrorism Makes Slow Progress” (2003) 29 *Asia Pacific Defence Reporter* 19.

<sup>114</sup> *Joint Communiqué of the Second ASEAN Ministerial Meeting on Transnational Crime*, Yangon, Myanmar (23 June 1999), ASEAN, online: <<http://www.aseansec.org/5632.htm>>.

<sup>115</sup> *Joint Communiqué of the Third ASEAN Ministerial Meeting on Transnational Crime*, Singapore (11 October 2001), ASEAN online: <<http://www.aseansec.org/5621.htm>>. The Work Programme is available at <<http://www.aseansec.org/5621.htm>>.

ASEAN Summit in Brunei in 2001 produced the *ASEAN Declaration on Joint Action to Counter Terrorism*.<sup>116</sup> In May 2002 ASEAN organised the Special ASEAN Ministerial Meeting on Terrorism in Kuala Lumpur, which launched the *ASEAN Work Programme to Implement the ASEAN Plan to Combat Transnational Crime*.<sup>117</sup> Concerning terrorism, the Work Programme includes information exchange, harmonisation of laws, intelligence sharing, coordinating law enforcement, training programs and the development of multilateral or bilateral legal agreements to facilitate arrest, prosecution, extradition and the like.<sup>118</sup> It also provides for ASEAN members to work towards a regional convention to combat terrorism (item 6.2(e)). A few months later in July 2002, the ASEAN Regional Forum issued a Statement on Measures Against Terrorist Financing, addressing such issues as freezing assets, implementing international standards, exchange of information, outreach, technical assistance and compliance and reporting.<sup>119</sup> In June 2003 the Senior Official Meetings on Transnational Crime (SOMTC) endorsed a proposal to form Joint Terrorism Task Forces when an affected Member country seeks assistance in investigating terror incidents.<sup>120</sup> In August 2003, the ASEAN Government Legal Officers' Programme conducted a meeting on counter-terrorism that discussed regional harmonisation of national laws and the prospects for a regional treaty. On October 7, 2003, ASEAN Members declared in their Bali Concord II, the intention to form an ASEAN Security Community that, amongst other things, seeks to promote regional solidarity and cooperation in matters of security.<sup>121</sup>

However, there have been difficulties in implementing many of the intentions and commitments under the above declarations and plans at the region-wide level. The meetings did not address institutional capacity building or produce mechanisms to coordinate ASEAN bodies, such as the AMMTC and the SOMTC.<sup>122</sup> For some ASEAN countries, the lack of intra-state coordination and issues of state sovereignty also inhibit implementation.<sup>123</sup> As noted by ASEAN at the UN Security Council Counter-Terrorism Committee Special Meeting in March 2003, there is still much work to do at the regional level.<sup>124</sup>

Due to ASEAN regional obstacles in counter-terrorism cooperation, the current pattern seems to be to cooperate at the sub-regional level within the ASEAN framework.<sup>125</sup> For example, the *Agreement on Information Exchange and Establishment of Communication Procedures* was signed in 2002 in Kuala Lumpur between Indonesia, Malaysia and the Philippines, and later by Thailand (during the eighth ASEAN Summit in Phnom Penh) in 2002 in a Declaration on Terrorism.<sup>126</sup>

The suggestion that a regional counter-terrorism treaty be developed was put forward by Indonesia at the ASEAN Government Legal Officers' Programme meeting in August 2003. Despite the suggestion having already been adopted in 2002 by ASEAN ministers in their *Work Programme to Implement the ASEAN Plan to Combat Transnational Crime*, the suggestion received a mixed reception. It seems likely to proceed at the sub-regional

<sup>116</sup> See ASEAN, online: <<http://www.aseansec.org/5620.htm>>.

<sup>117</sup> *Joint Communique of the Special ASEAN Ministerial Meeting on Terrorism*, Kuala Lumpur, Malaysia (20-21 May 2002), ASEAN, online: <<http://www.aseansec.org/5618.htm>>.

<sup>118</sup> The Work Program is available at ASEAN, online: <<http://www.aseansec.org/5616.htm>>.

<sup>119</sup> See ASEAN, online: <<http://www.aseansec.org/12001.htm>>.

<sup>120</sup> Pushpanathan, *supra* note 50.

<sup>121</sup> *Declaration of ASEAN Concord II (Bali Concord II)* (7 October 2003), ASEAN, online: <<http://www.aseansec.org/15159.htm>>.

<sup>122</sup> Vermonte, *supra* note 112 at 4, for comment on the earlier meetings. Concerning the lack of common ASEAN interests, see D. Mahadzir, "Lack of Cooperation Hinders ASEAN Anti-Terrorism Efforts" (2002/3) 28 Asia Pacific Defence Reporter 28.

<sup>123</sup> Vermonte, *ibid.*

<sup>124</sup> Pushpanathan, *supra* note 50.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Declaration on Terrorism by the 8<sup>th</sup> ASEAN Summit*, Phnom Penh, Cambodia, (3 November 2002), ASEAN, online: <<http://www.aseansec.org/13154.htm>>.

level.<sup>127</sup> As the counter-terrorism capacities of ASEAN member States improve, a regional framework for related legal cooperation becomes necessary. The first ASEAN legal cooperation agreement was signed in late 2004 and will operate between those Member countries that ratify it. However, it does not articulate a common definition of terrorist activities and its obligations are subject to national laws.<sup>128</sup>

ASEAN members are, in fact, currently strengthening their capacities to combat terrorism through partnerships with other countries. For example, the *ASEAN-United States of America Joint Declaration for Cooperation to Combat International Terrorism* was procured in 2002.<sup>129</sup> The sixth ASEAN-China Summit in 2002 produced the *Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues*, which has recently been developed into a Memorandum of Understanding between ASEAN and China.<sup>130</sup> The fourteenth ASEAN-EU Ministerial Meeting produced a *Joint Declaration to Combat Terrorism* on January 23, 2003.<sup>131</sup> In January 2004 the AMMTC met with Japan, the Republic of Korea and China to discuss cooperation between them against transnational crime.<sup>132</sup> The Regional Ministerial Meeting on Counter-Terrorism held in Bali in February 2004 was attended by ASEAN Foreign Ministers as well as those from Australia, Canada, China, Fiji, France, Germany, India, Japan, New Zealand, Papua New Guinea, South Korea, Russia, Timor-Leste, the UK, USA and EU. It agreed to establish an ad hoc working group of senior legal officials to report on the adequacy of regional legal frameworks for counter-terrorism cooperation and to identify areas for improvement of cooperation and assistance.<sup>133</sup> At national level, a Memorandum of Understanding on counter-terrorism cooperation between Australia and the Philippines was signed in March 2003<sup>134</sup> and another between Australia and Cambodia on June 18, 2003.<sup>135</sup>

<sup>127</sup> Personal observation by first-named author at the ASEAN Government Legal Officers' Programme on Anti-Terrorism, Bali, Indonesia, August 2003.

<sup>128</sup> The *Treaty on Mutual Assistance on Mutual Legal Matters* was signed in Kuala Lumpur on 29 November 2004 by all ASEAN States except Myanmar and Thailand. The parties will cooperate on matters such as investigations, taking of evidence, service of documents and recovery of proceeds of crime. The agreement will apply to 187 listed crimes, such as murder, kidnapping, fraud and counterfeiting. The agreement exempts a party from obligations to cooperate if that party grants political asylum to the suspect or if the party's domestic laws do not facilitate the requested cooperation. Singapore Ministry of Law Press Release on Signing of Mutual Legal Assistance Treaty 2004, 29 November 2004, online: <[http://notesapp.internet.gov.sg/\\_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-677EJL?OpenDocument](http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-677EJL?OpenDocument)>.

<sup>129</sup> See ASEAN, online: <<http://www.aseansec.org/7424.htm>>.

<sup>130</sup> *Memorandum of Understanding Between the Governments of the Member Countries of ASEAN and the Government of the People's Republic of China on Cooperation in the Field of Non-Traditional Security Issues* (10 January 2004), ASEAN, online: <<http://www.aseansec.org/15647.htm>>.

<sup>131</sup> See ASEAN online: <<http://www.aseansec.org/13185.htm>> and <<http://www.aseansec.org/14030.htm>> respectively.

<sup>132</sup> *Joint Communiqué of the First ASEAN plus 3 Ministerial Meeting on Transnational Crime*, Bangkok, Thailand (10 January 2004), ASEAN, online: <<http://www.aseansec.org/15645.htm>>.

<sup>133</sup> *Co Chairs' Statement Concluding the Regional Ministerial Meeting On Counter-Terrorism*, Bali, Indonesia (4-5 February 2004), para. 27, ASEAN, online: <<http://www.aseansec.org/16000.htm>>. An ad hoc working group of law enforcement practitioners was also established to share operational experiences, formulate best practice models, develop an information base and facilitate a more effective flow of criminal intelligence.

<sup>134</sup> It relates to assistance that the Australian Federal Police will give to its Filipino counterparts following the Davao terrorist bombings earlier in 2003. Accordingly, on 14 July 2003, the Australian Prime Minister, John Howard, announced a \$5 million package in counter-terrorism assistance to the Philippines Government for policing, immigration, port security and regional cooperation. See, Prime Minister of Australia, John Howard, Media Release, "Philippines Counter-Terrorism Assistance Initiative" (14 July 2003), Prime Minister of Australia, online: <[http://www.pm.gov.au/news/media\\_releases/media\\_Release357.html](http://www.pm.gov.au/news/media_releases/media_Release357.html)>.

<sup>135</sup> The document provides a framework for increased security, intelligence, law enforcement and defence cooperation between the two countries. See Minister for Foreign Affairs, Australia, Alexander Downer, MP, *Australia and Cambodia Sign Counter-Terrorism Agreement* (18 June 2003), Minister of Foreign Affairs and Trade, online: <[http://www.foreignminister.gov.au/releases/2003/fa069\\_03.html](http://www.foreignminister.gov.au/releases/2003/fa069_03.html)>.

The intense current activity in counter-terrorism partnerships is likely to produce some results. The institutional weakness of ASEAN and the particular political sensitivities posed by Islamic terrorism in the region suggest that a legal formula for regional counter-terrorism cooperation will not mature in the short term, however.<sup>136</sup> Yet we anticipate that within the medium term (5 years) a regional or sub-regional treaty on terrorism is likely to be adopted.

## V. CONCLUSION

An ASEAN regional treaty could promote counter-terrorism measures by putting in place institutional structures and decision making processes to promote cooperation, coordination, shared expertise and common legal approaches. An objective common legal definition of terrorism is readily available. At its barest it is simply "serious violence committed by non-State actors, directed at civilians, and intended to coerce a society". It can be criminalised in national legislation without reference to pre-existing national crimes or a transnational component in the act. These are the pared down essentials of the 1999 treaties on terrorist financing and of the CIS and OAU. Elaborations might address preparations for and threats of violence, violence directed at social infrastructure, international institutions and at non-combatants.

Due to the transnational nature of much terrorist activity in the ASEAN region, prevention cooperation and mutual assistance in enforcement measures at the international level are essential. They include prevention, cooperation by establishing controls and information exchange at customs and immigration barriers, consultations on security measures for protected persons, strengthened regulation of stockpiling of weapons and dangerous goods, and intelligence coordination and contact points. Mutual assistance can be enhanced by extending measures for the collection of evidence, extradition of suspects, transfer of witnesses and the like.

The earlier regional treaties on counter-terrorism are of limited use as models in these matters. They tend to have a tightly constrained application and to focus on extradition, while also being framed in soft, vague language that is subjective in application. However, the latest regional treaty examined, the *1999 Convention on the Prevention and Combating of Terrorism of the Organization of African Unity*, does provide many useful articulations of counter-terrorism cooperative measures that are useful as models.

ASEAN Members could take the opportunity to build a better framework for regional cooperation and coordination to combat terrorism than exists in other regional treaties by learning from the weaknesses in those treaties. For example, obligations to enact offences should not be circular but should harmonise legislative reforms. Procedures to extradite alleged perpetrators should not allow for exception based on asylum. An ASEAN Conferences of Parties could be mandated to review prescribed reports on treaty implementation and to oversee the implementation of detailed action plans for technical capacity development, so as to give political impetus to a coordinated regional programme of capacity building. Other issues that could be addressed in the framework include the provision of safeguards for the exercise of civil and political rights and relationships with other regimes and non-Parties.

There is within ASEAN a great deal of opportunity to build capacity for national action and for international cooperation. There are strengths, resources and precedents within its Member States and many resources and willing partners beyond. As these coalesce in the medium term, the region will produce the clear and just legal framework for counter-terrorism cooperation that it needs.

<sup>136</sup> D. Wright-Neville, "Prospects Dim: Counter-Terrorism Cooperation in South East Asia", Woodrow Wilson International Centre for Scholars, Asia Program, [Asia Program Special Report, No. 112 (2003) 5 at 8-9]; see also Cotton, *supra* note 48 and Tan, *supra* note 48.

## ANNEX A

## ASEAN PARTIES TO MULTILATERAL TERRORISM AGREEMENTS

	BRUNEI DARUSSALAM	CAMBODIA	INDONESIA	LAOS	MALAYSIA	MYANMAR	PHILIPPINES	SINGAPORE	THAILAND	VIETNAM
1. CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL—VIENNA 1980			X				X			
2. CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT—TOKYO CONVENTION 1963	X	X	X	X	X	X	X	X	X	X
3. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT—THE HAGUE CONVENTION 1970	X	X	X	X	X	X	X	X	X	X
4. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION—SIGNED AT MONTREAL 1971	X	X	X	X	X	X	X	X	X	X
5. CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS—NEW YORK 1973	X				X		X			X
6. INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES—NEW YORK 1979	X			X			X			
7. PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION—1998	X	X	X		X	X	X	X	X	X
8. CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION	X					X	X	X		X
9. PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF	X					X	X			X
10. CONVENTION ON THE MAKING OF PLASTIC EXPLOSIVES FOR THE PURPOSE OF IDENTIFICATION—MONTREAL 1991							X	X		
11. INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBING—NEW YORK 1998	X			X	X	X	X			
12. INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM 1999	X	X	X			X	X	X	X	X

Data verified on 14 June 2004 from open source websites at: <<http://www.undcp.org>>, <<http://www.icao.int>>, <<http://www.untreaty.un.org>>, <<http://www.imo.org>> and <<http://www.iaea.org>>.

