

ASEAN AND THE DEVELOPMENT OF COUNTER-TERRORISM LAW AND POLICY IN SOUTHEAST ASIA

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I INTRODUCTION

In July 2015, Indonesian authorities reportedly expressed concern over their apparent lack of legal tools to keep Islamists from spreading the extremist ideology of the so-called Islamic State of Iraq and Syria ('ISIS') or from staging terror attacks in the country.¹ As a nation whose leadership, until the Bali bombings in October 2002, had long denied the existence of the terrorist group Jemaah Islamiyah ('JI') within its territory,² Indonesia has continued to face ambivalence over constructing more robust national security legislation and its enforcement. Such ambivalence is a pattern common to most of Southeast Asia because of pre-existing internal strife that has been plaguing these countries for many decades.³ 'When [foreign extremists fighting for ISIS] return to their countries ... it is not easy to predict what actions they might conduct', as General Moeldoko, commanding general of the Indonesian military forces (Tentara Nasional Indonesia ('TNI')), told an audience in Singapore in October 2014.⁴ In the wake of the recent terrorist attacks in Jakarta on 14 January 2016, Indonesian authorities are reportedly planning to rectify the inadequacy of the current counter-terrorism legislation in the fight against ISIS on the domestic front.⁵

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1 Richard C Paddock and I-Made Sentana, 'Fears Grow over Islamic State's Influence in Southeast Asia', *The Wall Street Journal* (online), 17 July 2015 <<http://www.wsj.com/articles/fears-grow-over-islamic-states-influence-in-southeast-asia-1437106924>>.

2 Joseph Liow and Michael Leifer, *Dictionary of the Modern Politics of Southeast Asia* (Routledge, 4th ed, 2014) 364.

3 Hikmahanto Juwana, 'Anti-Terrorism Efforts in Indonesia' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 290, 299–300; Hikmahanto Juwana, 'Indonesia's Anti-Terrorism Law' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005) 295, 299–300.

4 Zakir Hussain, 'Returning ISIS Fighters "Pose Threat to Region"', *The Straits Times* (online), 1 November 2014 <<http://news.asiaone.com/news/asia/returning-isis-fighters-pose-threat-region>>.

5 Peter Alford and Amanda Hodge, 'Jakarta Push to Boost Law on Terror', *The Australian* (Sydney), 18 January 2016, 7.

At best, the counter-terrorism legal instruments adopted hitherto by the Association of Southeast Asian Nations ('ASEAN') can be largely characterised as 'soft law', whose purpose has been to provide an overarching framework through which the respective and varied counter-terrorism policies of the ASEAN member states could be coordinated, as well as to secure region-wide endorsement. Central to this overarching framework is the *ASEAN Convention on Counter-Terrorism* ('ACCT').⁶ ASEAN's relatively slow pace to adopt a regional treaty on counter-terrorism stands in marked contrast to other regions such as Africa, the Americas, Europe, South Asia, the Arab League, the Commonwealth of Independent States and Islamic countries, whose respective treaties were adopted prior to the 9/11 terrorist attacks.⁷ Indeed, the *ACCT* achieved full ratification only in 2013 – six years after it was signed – although it came into force in 2011 after the sixth ASEAN member state had ratified it.

In a region where the principle of non-interference governs the interstate relationship, the soft approach to regional co-operation on counter-terrorism comes as no surprise. Indeed, Andrew Chau observes that, while there is a rhetorical commitment to counter-terrorism among ASEAN leaders, 'their declarations, meetings, and process of extensive consultation and consensus building have resulted in little that is concrete'.⁸ Other critics similarly argue that ASEAN counter-terrorism co-operation on the whole has been ill-conceived, half-hearted and weak.⁹ The problem is compounded by the perception that the sources of militancy and terrorism stem from neighbouring territories – hence

6 Opened for signature 13 January 2007 (entered into force 27 May 2011); ASEAN, *ASEAN Convention on Counter-Terrorism Completes Ratification Process* (22 January 2013) <<http://asean.org/asean-convention-on-counter-terrorism-completes-ratification-process/>>.

7 See, eg, *Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance*, opened for signature 2 February 1971, 1438 UNTS 191 (entered into force 16 October 1973); *European Convention on the Suppression of Terrorism*, opened for signature 27 January 1977, 1137 UNTS 93 (entered into force 4 August 1978); *SAARC Regional Convention on Suppression of Terrorism*, opened for signature 4 November 1987 (entered into force 22 August 1988); *Arab Convention on the Suppression of Terrorism*, opened for signature 22 April 1998 (entered into force 7 May 1999) ('ACST'); *Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism* (signed and entered into force 4 June 1999); *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, opened for signature 1 July 1999 (entered into force 7 November 2002); *Organization of African Unity Convention on the Prevention and Combating of Terrorism*, opened for signature 1 July 1999, 2219 UNTS 179 (entered into force 6 December 2002).

8 Andrew Chau, 'Security Community and Southeast Asia: Australia, the US, and ASEAN's Counter-Terror Strategy' (2008) 48 *Asian Survey* 626, 648.

9 See, eg, Greg Fealy and Carlyle A Thayer, 'Problematising "Linkages" between Southeast Asian and International Terrorism' in William T Tow (ed), *Security Politics in the Asia-Pacific: A Regional-Global Nexus?* (Cambridge University Press, 2009) 211; Alfred Gerstl, 'The Depoliticisation and "ASEANisation" of Counter-Terrorism Policies in South-East Asia: A Weak Trigger for a Fragmented Version of Human Security' (2010) 3 *Austrian Journal of South-East Asian Studies* 48; Natasha Hamilton-Hart, 'Terrorism in Southeast Asia: Expert Analysis, Myopia and Fantasy' (2005) 18 *Pacific Review* 303; David Martin Jones, Michael L R Smith and Mark Weeding, 'Looking for the Pattern: Al Qaeda in Southeast Asia – The Genealogy of a Terror Network' (2003) 26 *Studies in Conflict & Terrorism* 443; Peter Kammerer, 'Anti-Terror Drive in Southeast Asia Is "Half-Hearted"', *South China Morning Post* (Hong Kong), 5 September 2003, 11.

potentially complicating, if not compromising, ASEAN-based efforts,¹⁰ which are underpinned by the fundamental principles of respect for state sovereignty and non-interference.¹¹ David Leheny considers this to be ‘emblematic of the problems that a seemingly uncontroversial goal – such as a world without terrorism – has when it confronts other domestic and regional priorities for Asia-Pacific governments’.¹²

However, the challenges that have been confronting ASEAN are due to the ambivalence on the part of its member states towards rigorous counter-terrorism measures because of domestic political reasons, as much as the legal and political constraints upon ASEAN. National counter-terrorism efforts in each country are enmeshed with their own political agenda of national harmony and combating dissidents.¹³ As a consequence, there is necessarily a challenge to regional initiatives absent harmonisation of national counter-terrorism measures. The relevant question is, therefore, to what extent ASEAN has contributed to the development and implementation of counter-terrorism law and policy through the exercise of its institutional competence to address a shared security interest, not whether ASEAN is effective in harmonising national responses to counter-terrorism in the region.

To that end, this article examines ASEAN’s counter-terrorism efforts as a case study of ASEAN’s institutional evolution with a view to assessing how ASEAN has facilitated the development of legal and policy responses to terrorism in each member state in accordance with its foundational principles. Part II reviews ASEAN’s regional initiatives on counter-terrorism with reference to key legal instruments that form part of broader regional co-operation to combat transnational organised crimes in Southeast Asia. Part III focuses on the domestic implementation of those regional instruments with a close examination of how counter-terrorism law has been enacted in each member state. Part IV then considers what the gap between counter-terrorism initiatives at the regional and national levels means for: (1) the development of ASEAN’s institutional competence; and (2) the working method of ASEAN – based on the diplomatic convention characterised by consensus-building, consultation and informality,

10 Jonathan T Chow, ‘ASEAN Counterterrorism Cooperation since 9/11’ (2005) 45 *Asian Survey* 302; Neal Imperial, ‘Securitisation and the Challenge of ASEAN Counter-Terrorism Cooperation’ (Report, Centre of Asian Studies, University of Hong Kong, 2005). See also Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Hart Publishing, 2012).

11 *Treaty of Amity and Cooperation in Southeast Asia*, opened for signature 24 February 1976, 1025 UNTS 319 (entered into force 21 June 1976) arts 2(a), (c) (‘TAC’); *Charter of the Association of Southeast Asian Nations*, opened for signature 20 November 2007, 2624 UNTS 223 (entered into force 15 December 2008) arts 2(2)(a), (e)–(f) (‘ASEAN Charter’).

12 David Leheny, ‘The War on Terrorism in Asia and the Possibility of Secret Regionalism’ in T J Pempel (ed), *Remapping East Asia: The Construction of a Region* (Cornell University Press, 2005) 236, 250.

13 For detailed studies on each nation’s counter-terrorism measures, see, eg, Arabinda Acharya, *Whither Southeast Asia Terrorism?* (Imperial College Press, 2015) ch 5; Ralf Emmers, ‘Comprehensive Security and Resilience in Southeast Asia: ASEAN’s Approach to Terrorism’ (2009) 22 *Pacific Review* 159; Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) chs 11 (Singapore), 12 (Indonesia), 13 (Philippines); Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005) chs 13 (Singapore and Malaysia), 14 (Indonesia), 15 (Philippines).

known as the ‘ASEAN Way’¹⁴ – in exercising its legal authority to deal with a regional security issue. This article concludes with the finding that through regional counter-terrorism initiatives, ASEAN has exercised its institutional competence in a way that complements respective national efforts of its member states in building their legal and operational capacity to engage in international co-operation for counter-terrorism.

II ASEAN COUNTER-TERRORISM INITIATIVES

ASEAN as a whole has evolved in its response towards terrorism. Before 9/11, ‘transnational crime’ was the broad category or rubric under which declarations on and regional responses to terrorism were included. This approach highlighted the traditional perspective on terrorism as criminal act and internal subversion whose management was to be best left in the hands of law enforcement agencies. At the operational level, it was acknowledged that there were significant overlaps between terrorism and other areas of transnational criminal activity such as money laundering, the trafficking of drugs and people, and/or piracy.¹⁵ This understanding reflected the relevance to the Southeast Asian region of the principle of ‘comprehensive security’ espoused by ASEAN.¹⁶

Crucially, the foregoing approach did not necessarily imply that ASEAN governments viewed terrorism as insignificant relative to other security problems. Rather, their shared reluctance to fully securitise transnational crime and non-military issues more broadly ensured that the counter-terrorism policies within ASEAN member states by and large precluded the use of armed force as the exclusive means to combat terrorism. The then Philippine President Fidel Ramos urged ASEAN Interior and Home Affairs Ministers gathered at the First Conference to Address Transnational Crimes held in Manila on 20 December 1997 as follows:

The concept of regional security should extend beyond the mere absence of armed conflict among and within nations. Enduring regional security continues to be assaulted by transnational crime and from time to time international terrorism, which threaten the attainment of our peoples’ goals and aspirations. We cannot allow these criminals and terrorists to steal our future and that of our young people away from us.¹⁷

14 Rodolfo Severino, *Framing the ASEAN Charter: An ISEAS Perspective* (Institute of Southeast Asian Studies, 2005) 3–4. For details of its historical origin and development, see Jürgen Haacke, *ASEAN’s Diplomatic and Security Culture: Origins, Development and Prospects* (Routledge, 2003).

15 See generally, Arabinda Acharya, *Targeting Terrorist Financing: International Cooperation and New Regimes* (Routledge, 2009); Graham Gerard Ong-Webb (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS Publishing, 2006).

16 *Declaration of ASEAN Concord II (Bali Concord II)*, adopted 7 October 2003, art A para 2; *ASEAN Charter* art 1(8).

17 Fidel V Ramos, ‘Speech of His Excellency President Fidel V. Ramos’ (Speech delivered at the Meeting of ASEAN Ministers of Interior/Home Affairs and First Conference to Address Transnational Crimes, Manila, Philippines, 20 December 1997), quoted in Ralf Emmers, ‘The Securitization of Transnational Crime in ASEAN’ (Working Paper No 39, Institute of Defence and Strategic Studies, Nanyang Technological University, 2002) 10.

It was against this background that the *ASEAN Declaration on Transnational Crime* ('1997 Declaration on Transnational Crime') was signed in Manila on 20 December 1997. While the *1997 Declaration on Transnational Crime* arguably underscored the collective commitment of ASEAN member states to co-operate in their efforts against transnational criminal activity, it nonetheless adhered to the 'ASEAN Way' of decision-making by consensus and the reliance on non-binding rules.

The treatment of terrorism as a subset of transnational crime – or, from a conceptual perspective, a criminal justice approach rather than military response to terrorism – at the regional level persisted until the end of the 1990s with the adoption of two addenda to the *1997 Declaration on Transnational Crime*: namely, the *Manila Declaration on the Prevention and Control of Transnational Crime*,¹⁸ and the *ASEAN Plan of Action to Combat Transnational Crime*.¹⁹ However, despite their collective acknowledgement of terrorism as a transnational phenomenon and problem, little concrete progress was made until the game-changing impact of the 9/11 events brought terrorism to the forefront of national and regional security agendas. The *ASEAN Declaration on Joint Action to Counter Terrorism* ('*ADJACT*') was adopted in 2001,²⁰ two weeks after the release of the Asia-Pacific Economic Co-operation ('APEC') Leaders' Statement on Counter-Terrorism at their Shanghai Summit.²¹ In the view of Tatik Hafidz, who once coordinated ASEAN co-operation on combating transnational crime including terrorism at the ASEAN Secretariat, three points in the *ADJACT*'s preamble are especially noteworthy, not least for their purported riposte to the United States-led global 'War on Terror'. According to Hafidz:

Whilst it may sound normative to ASEAN outsiders, the declaration's preamble signifies a Southeast Asian united front on the issue of terrorism. The first point is indeed a universal principle, but it also underscores concerns over what some Southeast Asian Muslims perceived to be a camouflaged war on Islam. The second recognises that despite the fact that global war on terrorism is an American-led agenda, it is also a regional issue as it has significant ramifications for ASEAN. But the third clearly signifies a denunciation of the Bush Administration's unilateralism and its widely-criticised doctrine of pre-emptive strike. In this regard, ASEAN asserts that the fight against terrorism must be guided by [the] multilateralism principle as set forth in the *United Nations (UN) Charter*. This explains the centrality of the UN multilateral framework on counter-terrorism – known as the universal anti-terrorism instruments (UATIs) – as

18 *Manila Declaration on the Prevention and Control of Transnational Crime*, adopted 25 March 1998 <http://asean.org/?static_post=manila-declaration-on-the-prevention-and-control-of-transnational-crime-1998-introduction>.

19 *ASEAN Plan of Action to Combat Transnational Crime*, adopted 23 June 1999 <http://asean.org/?static_post=asean-plan-of-action-to-combat-transnational-crime>.

20 Adopted 5 November 2001 <http://asean.org/?static_post=2001-asean-declaration-on-joint-action-to-counter-terrorism>.

21 *APEC Leaders' Statement on Counter-Terrorism at their Shanghai Summit*, adopted 21 October 2001 <http://www.apec.org/Meeting-Papers/Leaders-Declarations/2001/2001_aelm/statement_on_counter-terrorism.aspx>.

primary reference for intra as well as extra-regional cooperation on counter terrorism.²²

On that basis, ASEAN member states adopted practical measures including, most relevantly, reviewing and strengthening their national mechanisms to combat terrorism, studying relevant international conventions on terrorism with a view to integrating them with ASEAN mechanisms, enhancing intelligence sharing on terrorists and terrorist organisations, and developing regional capacity-building programmes.²³ The Joint Communiqué of the Third ASEAN Ministerial Meeting on Transnational Crime, issued on 11 October 2001, detailed efforts to eradicate regional security challenges such as terrorism.²⁴ This was followed by a ‘special’ ASEAN ministerial meeting dedicated specifically to terrorism on 17 May 2002, which adopted a *Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime* (‘*Work Programme*’) (originally signed in June 1999).²⁵ The *Work Programme* detailed a six-pronged strategy including the establishment of legal facilities and institutional capacities within the ASEAN member states.²⁶

Following the Bali bombing in October 2002, a standalone declaration on terrorism was adopted at the ASEAN Summit in Phnom Penh on 3 November 2002, a week after the APEC Leaders issued the *Statement on Fighting Terrorism and Promoting Growth*.²⁷ The *ASEAN Declaration on Terrorism* urged member states

to continue to intensify their cooperation in combating terrorism and, in particular, in expeditiously carrying out the [*Work Programme*] adopted by the Special ASEAN Ministerial Meeting on Terrorism in Kuala Lumpur in May 2002, raising the level of cooperation, coordination and the sharing of information in the fight against terrorism.²⁸

APEC, on the other hand, has developed Counter-Terrorism Action Plans providing a space where member economies can record their APEC commitments to various counter-terrorism measures – such as securing cargoes, protecting people in transit, international shipping and aviation, and promoting cyber security.

ASEAN has since then signed a number of joint declarations with its external dialogue partners – the United States (‘US’), the European Union (‘EU’),

22 Tatik S Hafidz, ‘A Long Row to Hoe: A Critical Assessment of ASEAN Cooperation on Counter-Terrorism’ [2009] (11) *Kyoto Review of Southeast Asia* <<http://kyotoreview.org/issue-11/a-long-row-to-hoe-a-critical-assessment-of-asean-cooperation-on-counter-terrorism/>>.

23 *ADJACT* paras 1, 4–5, 7.

24 Association of Southeast Asian Nations, ‘Joint Communiqué of the Third ASEAN Ministerial Meeting on Transnational Crime’ (Joint Communiqué, 11 October 2001) <http://asean.org/?static_post=joint-communique-of-the-third-asean-ministerial-meeting-on-transnational-crime-ammtc-singapore-11-october-2001>.

25 Adopted 17 May 2002 <http://asean.org/?static_post=work-programme-to-implement-the-asean-plan-of-action-to-combat-transnational-crime-kuala-lumpur-17-may-2002>.

26 *Ibid* [6].

27 Asia-Pacific Economic Cooperation, ‘APEC Leaders’ Statement on Fighting Terrorism and Promoting Growth’ (Statement, 26 October 2002) <http://www.apec.org/Meeting-Papers/Leaders-Declarations/2002/2002_aelm/statement_on_fighting.aspx>.

28 *Declaration on Terrorism by the 8th ASEAN Summit*, adopted 3 November 2002, para 4 <<http://www.mofa.go.jp/region/asia-paci/asean/pmv0211/terro.html>>.

Australia, India, Russia, Japan, the Republic of Korea, New Zealand, Pakistan and Canada – before, interestingly so, it adopted its own counter-terrorism treaty.²⁹ While ASEAN has no joint declaration with the People's Republic of China on counter-terrorism as such, it forms part of a priority issue in the *Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues*.³⁰

ASEAN member states have also sought to enhance counter-terrorism co-operation with one another. In May 2002, Indonesia, Malaysia and the Philippines (joined later by Cambodia and Thailand) signed a counter-terrorism agreement to strengthen border controls, share airline passenger information, establish hotlines, share intelligence and adopt standard procedures for search and rescue.³¹ Several other nations in the region also signed similar cooperative agreements, and co-operation between governments – in particular law enforcement and intelligence agencies – increased in 2002 and 2003.³² Such intramural collaboration, particularly with the assistance of external partners such as Australia and the US, has led to some successes despite many difficulties and sensitivities involved due to the political and economic constraints in Southeast Asian nations.³³

Another ASEAN agreement relevant to its counter-terrorism efforts is the *Treaty on Mutual Legal Assistance in Criminal Matters*, adopted on 29 November 2004 and also referred to as the *Mutual Legal Assistance Treaty* ('MLAT'). The aim of the MLAT is to enhance the effectiveness of the law

29 The text of these joint declarations is reproduced in Political-Security Department Security Cooperation Division, Association of Southeast Asian Nations, 'ASEAN Documents on Combating Transnational Crime and Terrorism: A Compilation of ASEAN Declarations, Joint Declarations, and Statements on Combating Transnational Crime and Terrorism' (Publication, April 2012) 27–60 <http://asean.org/?static_post=asean-documents-on-combating-transnational-crime-and-terrorism> ('*ASEAN Documents on Combating Transnational Crime and Terrorism*'). For more information, see Mushahid Ali and Kumar Ramakrishna, 'ASEAN-US Cooperation to Combat International Terrorism: A More Nuanced Approach Needed' (Commentary No 10/2002, Institute of Defence and Strategic Studies, 29 August 2002) <<https://www.rsis.edu.sg/wp-content/uploads/2014/07/CO02010.pdf>>; Felix Heiduk, 'In It Together Yet Worlds Apart? EU-ASEAN Counter-Terrorism Cooperation after the Bali Bombings' (2014) 36 *Journal of European Integration* 697; Ted Osius and C Raja Mohan, 'Enhancing India-ASEAN Connectivity' (Report, Centre for Strategic & International Studies, June 2013); Sarah Teo, Bhubhindar Singh and See Seng Tan, 'Southeast Asian Perspectives on South Korea's Middle Power Engagement Initiatives' (2016) 56 *Asian Survey* 555.

30 Adopted 4 November 2002 <http://asean.org/?static_post=joint-declaration-of-asean-and-china-on-cooperation-in-the-field-of-non-traditional-security-issues-6th-asean-china-summit-phnom-penh-4-november-2002-2>.

31 S Pushpanathan, *ASEAN Efforts to Combat Terrorism* (20 August 2003) ASEAN <http://asean.org/?static_post=asean-efforts-to-combat-terrorism-by-spshpanathan>.

32 See David Capie, 'Trading the Tools of Terror: Armed Groups and Light Weapons Proliferation in Southeast Asia' in Paul J Smith (ed), *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability: Transnational Challenges to States and Regional Stability* (Routledge, 2015) 188, 209 n 98.

33 See Seng Tan and Kumar Ramakrishna, 'Interstate and Intrastate Dynamics in Southeast Asia's War on Terror' (2004) 24 *SAIS Review of International Affairs* 91; Simon Tay and Tan Hsien Li, 'Southeast Asian Cooperation on Anti-Terrorism: The Dynamics and Limits of Regional Responses' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005) 399.

enforcement agencies of ASEAN member states in the investigation and prosecution of offences through co-operation and mutual legal assistance in criminal matters. In 2015, the *MLAT* came into the spotlight when Indonesian authorities decided to execute eight convicted drug smugglers, which led Australia to recall its Ambassador to Indonesia in protest over the executions of two Australians. By contrast, an eleventh-hour reprieve was given to a Filipina, Mary Jane Veloso, which ostensibly came as a consequence of Manila's appeal to Jakarta by way of the *MLAT*.³⁴

All these efforts helped lay the groundwork for the adoption of the *ACCT* in 2007. The late arrival of the *ACCT* in contrast to the earlier adoption of counter-terrorism treaties in other regions has already been mentioned.³⁵ The *ACCT* simply refers to all the relevant counter-terrorism treaties to define 'offence' for the purpose of the *ACCT*, while allowing variation for those member states that are not party to some of those treaties.³⁶ The primary obligation imposed upon the member states under the *ACCT* is summarised in the General Provisions under article IX(1), which provides:

The Parties shall adopt such measures as may be necessary, including, where appropriate, national legislation, to ensure that offences covered in Article II of this Convention, especially when it is intended to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The legal significance of this provision is twofold. First, it introduces an element of intent as commonly found in the definition of terrorism adopted in many countries,³⁷ though whether states are required to include it in domestic counter-terrorism legislation is subject to interpretation. Second, it establishes a shared understanding to exclude the nature of the motive behind the act, such as a political, religious or ideological motivation on the part of terrorists from criminalisation of terrorism within the region.³⁸ The latter aspect is particularly important given the political, religious, racial, ethnic, and ideological diversity that exists in Southeast Asia where criminal investigations and trials can easily be politicised on those grounds.

Other provisions of the *ACCT* are largely facilitative in nature, rather than prescriptive of new obligations – reaffirming obligations under the relevant

34 Mark Merueñas, 'De Lima: *ASEAN Mutual Legal Assistance Treaty* Saved Veloso', *GMA News* (online), 29 April 2015 <<http://www.gmanetwork.com/news/story/478474/news/nation/de-lima-asean-mutual-legal-assistance-treaty-saved-veloso>>.

35 See above n 7 and accompanying text.

36 *ACCT* art II.

37 See, eg, Christian Walter, 'Defining Terrorism in National and International Law' in Christian Walter et al (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2004) 23, 28–30.

38 For controversies on the inclusion of motives in the definition of terrorism, see especially Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 28; Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 40–5.

counter-terrorism treaties for national implementation,³⁹ and identifying areas of co-operation ‘in conformity with their respective domestic laws’.⁴⁰ Nevertheless, as a legally binding instrument,⁴¹ the *ACCT* has been described as ‘a significant milestone in ASEAN counter-terrorism co-operation with much potential in the areas of information-sharing and capacity-building’.⁴² In a statement released a few days after the 10th and final ratification by Malaysia on 11 January 2013, the ASEAN Secretariat noted that ‘[t]he *ACCT* is a significant achievement of ASEAN’s counter-terrorism efforts as it serves as [a] framework for regional cooperation to counter, prevent, and suppress terrorism and deepen counter-terrorism cooperation’.⁴³

The adoption of this Convention was soon followed by the development of the 2009 *ASEAN Comprehensive Plan of Action on Counter Terrorism*.⁴⁴ Meant as the ‘meat’ to the *ACCT* ‘skeleton’, the comprehensive action plan furnished the following embellishment: ‘to counter, prevent and suppress terrorism, terrorist organisations and their associations, to disrupt their support networks and impede their plan of terror acts, and to bring them to justice’.⁴⁵ This was to be accomplished through, among others:

- adherence to relevant United Nations (‘UN’) Security Council resolutions and international counter-terrorism instruments;
- the implementation of the relevant existing regional legal frameworks, instruments and agreements;
- the establishment of institutionalised mechanisms for the exchange of information and intelligence for surveillance, tracking and interdiction of suspected terrorist groups and their activities; and
- the efforts to address the root causes of terrorism through various societal changes.⁴⁶

Regional counter-terrorism co-operation through ASEAN can thus be characterised, at the fundamental level, as multilateral initiatives that complement respective national efforts, which are based on the traditional strategies and structures that remain as the legacies of their fight against communist insurgency and dissidence. These regional initiatives have attempted

39 *ACCT* arts VII, X, XIII–XIV.

40 *ACCT* arts VI, XII.

41 Ong Keng Yong, ‘ASEAN’s Contribution to Regional Efforts in Counter-Terrorism’ (Speech delivered at the National Security Australia Conference, Sydney, 21 February 2005) <http://asean.org/?static_post=asean-s-contribution-to-regional-efforts-in-counter-terrorism>.

42 It is so acknowledged by the Singaporean Senior Minister of State for Home Affairs and Foreign Affairs: Masagos Zulkifli, ‘2nd ASEAN Counter-Terrorism Workshop on Joint Incident Management at Orchard Hotel’ (Speech delivered at the 2nd ASEAN Counter-Terrorism Workshop on Joint Incident Management, Singapore, 16 July 2014) <<https://www.mha.gov.sg/Newsroom/speeches/Pages/2nd-ASEAN-CounterTerrorism-Workshop-on-Joint-Incident-Management-at-Orchard-Hotel--Speech-by-Senior-Minister-of-State-f.aspx>>.

43 Association of Southeast Asian Nations, *Convention Completes Ratification Process*, above n 6.

44 Adopted 30 June 2009, reproduced in *ASEAN Documents on Combating Transnational Crime and Terrorism*, above n 29, 69–75.

45 *Ibid* 69 [1.1].

46 *Ibid* 69–73 [3]–[5], [10].

to overcome the limits of national efforts against transnational threats posed by modern terrorist activities.⁴⁷

III COUNTER-TERRORISM LAW AND POLICY IN ASEAN MEMBER STATES

ASEAN member states have sought to deal with terrorism through varying combinations of approaches: military measures; socio-economic, ideological, and educational policies; as well as the enactment and enforcement of counter-terrorism laws. They have also sought to enhance counter-terrorism co-operation among themselves and with external partners such as Australia and the US.⁴⁸

Despite the regional initiatives as examined above to enhance counter-terrorism co-operation, Southeast Asian governments have not handled terrorism in the same way. For example, Indonesia and Singapore have tended to adopt a non-militaristic, law enforcement approach to tackling the challenge, whereas Malaysia and Thailand have relied on more coercive, militaristic responses. History clearly plays a role in the strategic choice of these countries. The experiences Malaysia has had in dealing with armed communist rebellions and the manner in which Thailand has responded to the separatist insurgency in its southern Malay-Muslim provinces have likely shaped their preferences for a militarised approach to their respective terrorism challenges.⁴⁹ On the other hand, with the end of the military's prominent role in Indonesian politics after 1998, internal threats of terrorism, communal violence and separatist activities became the primary responsibility of the Indonesian National Police. Having been dissatisfied with the ineffective response of the Indonesian National Police to terrorist attacks, the Indonesian military launched a new counter-terrorism squad called the TNI Joint Special Operations Command (*Koopsusgab*) in June 2015, which immediately reignited concerns about the military's role in the country's domestic affairs.⁵⁰

Critical for the purpose of this article, however, are the differences in legal approaches to counter-terrorism in terms of the ratification and implementation of relevant rules of international law – particularly the 1997 *International Convention for the Suppression of Terrorist Bombings* ('*Terrorist Bombing Convention*'),⁵¹ 1999 *International Convention for the Suppression*

47 See Acharya, *Targeting Terrorist Financing*, above n 15, 216–19.

48 See the table of bilateral agreements and memorandums of understanding in Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, 2nd ed, 2009) 247.

49 See, eg, Donald Mackay, *The Malayan Emergency 1948–60: The Domino That Stood* (Brassey's, 1997); Zachary Abuza, *Conspiracy of Silence: The Insurgency in Southern Thailand* (United States Institute of Peace, 2009).

50 Prashanth Parameswaran, *The Trouble with Indonesia's New Counterterrorism Command* (11 June 2015) The Diplomat <<http://thediplomat.com/2015/06/the-trouble-with-indonesias-new-counterterrorism-command/>>.

51 Opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001).

of the *Financing of Terrorism* ('*Terrorist Financing Convention*'),⁵² relevant UN Security Council resolutions,⁵³ as well as the 2007 *ACCT* – through the enactment of relevant legislation.

For Indonesia, the bomb attacks in Bali in 2002 and in Jakarta in 2003 furnished ample reasons to establish a legislative and law enforcement scheme conducive to fighting terrorism, despite the fact that Jakarta had denied JI's existence within its territory until then.⁵⁴ Nevertheless, Indonesia's legislative response to terrorism has been slow due to, among other factors, public resistance to the introduction of a new anti-terrorism law. There is fear among the public of the use of draconian laws to suppress dissidents as was the case under the Suharto regime.⁵⁵ Since 2003, Indonesia has been advocating for an ASEAN-wide extradition treaty 'that would help speed up the investigation process especially with terrorism', according to an official from the Indonesian foreign ministry.⁵⁶ For the Indonesians, the problem standing in the way of establishing a region-wide extradition agreement is Singapore, which has sought to link its bilateral extradition treaty with Indonesia to a defence agreement the two countries had signed in 2007.⁵⁷ However, Indonesia has yet to ratify this defence agreement because of the perception – fair or otherwise – that Singapore is seeking to avoid the forced repatriation of Indonesians suspected of corruption who had allegedly fled to Singapore.⁵⁸ Indonesia ratified the *ACCT* on 20 March 2012 with the expectation that it would provide a foundation for mutual legal assistance and extradition in combating terrorism.⁵⁹

Upon acceding to the *Terrorist Bombing Convention* in 2003, Malaysia amended its penal code to insert offences relating to terrorism defining a terrorist act in a manner that closely mirrors the UK definition.⁶⁰ In July 2003, Malaysia

52 Opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002).

53 For example, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) ('*Resolution 1373*'); SC Res 1624, UN SCOR, 60th sess, 5261st mtg, UN Doc S/RES/1624 (14 September 2005) ('*Resolution 1624*').

54 The Indonesian government, 'which had continued to deny that there was a terrorist network in Indonesia, now had to openly admit its existence': Leo Suryadinata, 'Indonesia: Continuing Challenges and Fragile Stability' in Daljit Singh and Chin Kin Wah (eds), *Southeast Asian Affairs 2004* (Institute of Southeast Asian Studies, 2004) 89, 89.

55 See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 145–53.

56 Gary Jusuf, quoted in 'Indonesia Pushes ASEAN Extradition Agreement', *Manila Standard* (Manila), 23 January 2003, 5A.

57 Ministry of Defence (Singapore), 'Defence Cooperation Agreement' (Official Release, 27 April 2007) <http://www.mindef.gov.sg/imindef/press_room/official_releases/nr/2007/apr/27apr07_nr.html#.V3tbQfN-9aQ>.

58 Saifulbahri Ismail, 'Indonesia VP's Comments on Extradition "Misleading": Singapore', *Channel News Asia* (online), 23 April 2016, <<http://www.channelnewsasia.com/news/singapore/indonesia-vp-s-comments/2723920.html>>.

59 Ministry of Foreign Affairs (Indonesia), 'The House of Representatives and Government of Indonesia Reached a Mutual Agreement on the Ratification of *ASEAN Convention on Counter Terrorism*' (Media Release, 8 March 2012) <<http://www.kemlu.go.id/en/berita/Pages/The-House-of-Representatives-and-Government-of-Indonesia-Reached-a-Mutual-Agreement-on-the-Ratificat.aspx>>.

60 *Penal Code 1936* (Malaysia) s 130B, as inserted by *Penal Code (Amendment) Act 2003* (Malaysia). See also Kent Roach, 'Comparative Counter-Terrorism Law Comes of Age' in Kent Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press, 2015) 1, 25.

established a Southeast Asia Regional Centre for Counterterrorism tasked with regional training, information sharing and public awareness campaigns. Even though Malaysia repealed its *Internal Security Act 1960* (Malaysia) ('*Internal Security Act*') in 2012 as part of the political campaign led by Prime Minister Datuk Seri Najib Tun Razak, the executive power to detain for an extended period without a court order remained in matters concerning terrorism, with the enactment of the *Security Offences (Special Measures) Act 2012* (Malaysia) which was modelled upon counter-terrorism legislation in various Western countries.⁶¹

In 2013, Malaysia re-arrested Yazid Sufaat, a former Malaysian army captain, who had been detained without trial for more than seven years under the *Internal Security Act* until his release in 2008 and was the first to be charged under the 2012 Act.⁶² Kumar Ramakrishna observes that '[t]he fact that [Yazid] has to be re-arrested shows the learning process that the Malaysian police and courts have to go through under the new legal regime'.⁶³ Malaysia continued its law reform efforts with the re-introduction of preventative detention through the 2013 amendments to the *Prevention of Crime Act 1959* (Malaysia) and the enactment of the *Prevention of Terrorism Act 2015* (Malaysia), as well as the *Special Measures against Terrorism in Foreign Countries Act 2015* (Malaysia) to confront the ISIS threat.

The Philippines has seen its fair share of contemporary security challenges in the form of the Abu Sayyaf Group and the New People's Army – the armed wing of the Communist Party of the Philippines. In the immediate aftermath of 9/11, then President Gloria Macapagal-Arroyo labelled the Abu Sayyaf Group as an international terrorist movement and accepted from the US a significant military aid package and direct military assistance to counter Abu Sayyaf Group fighters on Basilan Island.⁶⁴ Its focus on internal armed conflicts under the guise of a counter-terrorism agenda is also clearly reflected in the broad definition of terrorism adopted in the *Human Security Act of 2007* (Philippines), which encompasses 'sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand'.⁶⁵ Similarly, Thailand's counter-terrorism approach was

61 Roach, above n 60, 27.

62 See Mathilde Tarif, 'Malaysia Keeps Ruling under Controversial Security Laws in Secret' (Florence Carré trans), *Le Journal International* (online), 4 August 2013 <http://www.lejournalinternational.fr/Malaysia-keeps-ruling-under-controversial-security-laws-in-secret_a1131.html>.

63 Quoted in Abhrajit Gangopadhyay and Celine Fernandez, 'Malaysian Police Re-arrest High-Profile Terror Suspect', *The Wall Street Journal* (online), 28 May 2013 <<http://blogs.wsj.com/indonesiarealtime/2013/05/28/malaysian-police-re-arrest-high-profile-terror-suspect/>>.

64 For details, see, eg, Larry Niksch, 'Abu Sayyaf: Target of Philippine-US Anti-Terrorism Cooperation' (Congress Research Service, United States Congress, 24 January 2007) <<https://www.fas.org/sgp/crs/terror/RL31265.pdf>>.

65 *Human Security Act of 2007* (Philippines) s 3. Compare with the definition of terrorism adopted for the purpose of *Terrorism Financing Prevention and Suppression Act of 2012* (Philippines) s 3(j)(2): 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 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.

aimed at suppressing separatist movements in the southern Malay-Muslim provinces. This has become more institutionalised with the enactment of the *Internal Security Act 2008* (Thailand).⁶⁶

Unlike the founding members of ASEAN, the development of anti-terror security apparatuses and legal instruments has not been such a vital priority for newer member states. For Cambodia, while the policy emphasis has been on transnational crime, it has looked to Australia and the US for help to develop its counter-terrorism capability.⁶⁷ In 2003, Cambodia established the National Counter-Terrorism Committee, a policy level decision-making body chaired by the Prime Minister that directly addresses the government's domestic and international counter-terrorism responsibilities. This decision was made in light of grave concerns that JI leader Hambali had reportedly travelled freely through Cambodia.⁶⁸ After ratifying or acceding to all major counter-terrorism treaties, Cambodia enacted the *Law on Counter Terrorism 2007* (Cambodia) and the *Law on Anti-Money Laundering and Combating the Financing of Terrorism 2007* (Cambodia) to provide mechanisms for domestic counter-terrorism measures and international legal co-operation in counter-terrorism. However, as noted in its 2006 *Defence Policy*, the real challenges in enhancing its counter-terrorism capabilities for Cambodia have been the lack of communication infrastructure, equipment, specialised skills, training and resources.⁶⁹

Many Southeast Asian states attempted to address terrorism financing as part of their anti-money laundering policy, which was consistent with ASEAN's approach to regional co-operation against transnational crime. Malaysia enacted the *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001* (Malaysia), and Myanmar introduced the *Control of Money Laundering Law 2002* (Myanmar),⁷⁰ with a view to implementing obligations under the relevant UN Security Council resolutions. While maintaining the official position that the existing criminal law provides a comprehensive and effective legal framework to combat terrorism,⁷¹ Vietnam

For a critical analysis, see H Harry L Roque Jr, 'The *Human Security Act* and the IHL Law of the Philippines: Of Security and Insecurity' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 310, 316–25.

66 For details, see Peter Chalk et al, *The Evolving Terrorist Threat to Southeast Asia: A Net Assessment* (RAND Corporation, 2009) ch 6.

67 Vannarith Chheang, 'Cambodian Security and Defence Policy' in *Security Outlook of the Asia Pacific Countries and Its Implications for the Defense Sector* (National Institute of Defense Studies, 2013) 3, 9–10.

68 Julie Masis, 'Hearts, Minds and Tongues in Cambodia', *Asia Times* (online), 18 April 2012 <http://www.atimes.com/atimes/Southeast_Asia/ND18Ae01.html>.

69 Kingdom of Cambodia, 'Defense Policy of the Kingdom of Cambodia 2006: Security, Development and International Cooperation' (White Paper, 2006) 18 <<http://aseanregionalforum.asean.org/files/library/ARF%20Defense%20White%20Papers/Cambodia-2006.pdf>>.

70 For an official explanation of its operation, see *Letter Dated 16 November 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council*, UN Doc S/2006/902 (17 November 2006) annex ('*Letter Dated 14 November 2006 from the Permanent Representative of Myanmar to the United Nations Addressed to the Chairman of the Counter-Terrorism Committee*').

71 *Letter Dated 10 July 2007 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security*

also responded by issuing the *Decree on Prevention and Combat of Money-Laundering 2005* (Vietnam). On the other hand, the anti-money laundering legislation in Indonesia, the Philippines and Thailand was deemed inadequate by the Financial Action Task Force – a Paris-based global standard-setting body for anti-money laundering and the combating of the financing of terrorism – and was replaced by a new, specific counter-terrorist financing law in 2012–13 to avoid possible financial sanctions.⁷²

Both Brunei and Singapore enacted legislation to combat financing of terrorism upon their accession to or ratification of the *Terrorist Financing Convention* in 2002.⁷³ However, no further counter-terrorism measure was adopted until they ratified the *ACCT* in 2011 and 2007 respectively. Singapore acceded to the 1997 *Terrorist Bombing Convention* only in 2007 and in the same year enacted the *Terrorism (Suppression of Bombings) Act 2007* (Singapore, cap 324A, 2008 rev ed) in order to give effect to the 1997 Convention.⁷⁴ Brunei enacted its comprehensive counter-terrorism legislation on 1 August 2011 soon after its ratification of the *ACCT* on 28 April 2011, even though it acceded to the 1997 Convention much earlier in 2002. In a similar vein, Vietnam commenced the process of developing programs to implement the provisions of the *ACCT* upon ratification in 2010, including the enactment of counter-terrorism specific legislation.⁷⁵

Although it has not had to deal with terrorism in any significant way, Lao People's Democratic Republic established a National Ad Hoc Committee for implementing Security Council *Resolution 1373*, and amended its penal law in 2005 to criminalise various acts of terrorism.⁷⁶ Recently, the *Law on Anti-Money*

Council, UN Doc S/2007/425 (12 July 2007) annex, enclosure ('*Report Submitted to the Counter-Terrorism Committee on Implementation by Viet Nam of Security Council Resolution 1624 (2005) on Additional Measures to Combat Terrorism*').

- 72 Ben Otto, 'Indonesia Takes Aim at Financing of Terrorism', *The Wall Street Journal* (online), 13 February 2013 <<http://www.wsj.com/articles/SB10001424127887323511804578299911897063222>>; 'FATF Upgrades Philippines for Move against Money Laundering, Terrorist Financing', *Global Times* (online), 23 June 2012 <<http://www.globaltimes.cn/content/716615.shtml>>; Ministry of Foreign Affairs of the Kingdom of Thailand, 'FATF Removes Thailand from Public Statement on Money Laundering/Financing of Terrorism' (Press Release, 1 May 2013) <<http://www.mfa.go.th/main/en/media-center/14/34910-FATF-removes-Thailand-from-Public-Statement-on-Mon.html>>.
- 73 *Anti-Terrorism (Financial and Other Measures) Order 2002* (Brunei); *Terrorism (Suppression of Financing) Act* (Singapore, cap 325, 2003 rev ed). Earlier, Singapore enacted the *United Nations (Anti-Terrorism Measures) Regulations* (Singapore, cap 339, 2001 rev ed) following the adoption of *Resolution 1373*, UN Doc S/RES/1373.
- 74 For analysis of specific provisions, see, eg, Michael Hor, 'Singapore's Anti-Terrorism Laws: Reality and Rhetoric' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 271, 284–5.
- 75 See Pham Vinh Quang, 'Statement by Mr Pham Vinh Quang Deputy Permanent Representative of the Socialist Republic of Viet Nam at the United Nations Secretary-General's Symposium on International Counter-Terrorism Cooperation' (Speech delivered at United Nations Secretary-General's Symposium on International Counter-Terrorism Cooperation, New York, 19 September 2011) <<http://www.un.org/en/terrorism/ctitf/pdfs/vietnam.pdf>>.
- 76 See *Letter Dated 12 March 2007 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council*, UN Doc S/2007/141 (13 March 2007) annex, enclosure ('*Report of the Government of*

Laundering and Counter-Financing of Terrorism 2015 was promulgated, defining terrorism broadly to include acts that ‘affect lives, health, freedom, or [pose] physical and psychological intimidation’.⁷⁷ Likewise, Myanmar has been working with the International Monetary Fund and the UN Office on Drugs and Crime in drafting its counter-terrorism and anti-money laundering laws pursuant to Security Council *Resolution 1373* and *Resolution 1624*,⁷⁸ while seeking assistance from the US and international organisations for the capacity building of its Financial Intelligence Unit that oversees terrorist financing issues.⁷⁹

IV ASSESSING ASEAN’S ROLE IN COUNTER-TERRORISM LAW AND POLICY

Assessing ASEAN’s efforts in regional counter-terrorism co-operation for the development and implementation of the supporting national laws and policies can be a rather perplexing exercise. On the one hand, the historical record suggests that ASEAN member states have collaborated among themselves successfully in so many instances on the issue of counter-terrorism both before and after the horrific events of 9/11 and more specifically to Southeast Asia, the bomb attacks perpetrated by JI in Bali on 12 October 2002.⁸⁰ On the other hand, as examined above, Southeast Asian governments have not handled terrorism in the same way. Brunei, Cambodia, Indonesia, and Singapore, for example, adopted a comprehensive legislative approach to tackling the challenge, whereas Malaysia and Thailand have relied more on coercive, militaristic responses. What does this gap between their commitment at the regional level and action at the national level mean for ASEAN’s role and competence in dealing with regional security issues such as counter-terrorism? In order to answer this question, ASEAN’s counter-terrorism efforts must be understood in the wider context of ASEAN community development.

A ASEAN’s Institutional Competence versus State Sovereignty

ASEAN was initially built as an informal diplomatic arrangement. The legal principles that guide the operation of ASEAN were enshrined in the 1976 *Treaty of Amity and Cooperation in Southeast Asia* (‘TAC’), with clear emphasis on the principles of respect for state sovereignty and non-interference. As Acharya has observed, the security arrangement that has been put in place under the TAC is as much for the stability of the entire region from external interference as is for

the Lao People’s Democratic Republic to the Security Council on the Implementation of Resolution 1624 (2005)’).

77 *Law on Anti-Money Laundering and Counter-Financing of Terrorism 2015* (Laos) art 7(2).

78 *Resolution 1373*, UN Doc S/RES/1373; *Resolution 1624*, UN Doc S/RES/1624.

79 Myanmar, ‘National Experience of Myanmar’ (Paper presented at the Special Meeting of the Counter-Terrorism Committee on Preventing and Suppressing Terrorist Financing, New York, 20 November 2012) <http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/Myanmar_statement.pdf>.

80 See generally Kumar Ramakrishna and See Seng Tan (eds), *After Bali: The Threat of Terrorism in Southeast Asia* (Institute of Defence and Strategic Studies and World Scientific Publishing, 2003).

the protection of the national polity of each member state.⁸¹ ASEAN's legal framework has been recently buttressed with the adoption of the 2007 *ASEAN Charter*. While upholding the traditional principles of respect for state sovereignty and non-interference,⁸² the *ASEAN Charter* also sets out the principle of 'shared commitment and collective responsibility in enhancing regional peace, security and prosperity'.⁸³ The adoption of the *ACCT* earlier in the same year can be seen as a step towards such shared commitment in the specific context of counter-terrorism.

However, the *ASEAN Charter* elicited a flurry of reactions over the wisdom of its design and contents and its relevance to conflict resolution in Southeast Asia. Some commentators have compared it with supranational regional bodies such as the EU and criticised the *ASEAN Charter* for its evident lack of enforcement mechanisms.⁸⁴ Those critics, including former officials of ASEAN member states who helped build and promote ASEAN, took the Association to task for lacking the courage to adopt recommendations – or diluting those it did adopt – proposed by its Eminent Persons Group aimed at further institutionalising ASEAN.⁸⁵ Calling the *ASEAN Charter* 'a disappointment', an eminent pundit criticised the *ASEAN Charter*'s codification of existing ASEAN norms that preserve the Association's inter-governmental character, arguing that 'ASEAN had even gone backwards' with such a conservative document.⁸⁶

It is wrong to assume that ASEAN should or is designed to achieve regional integration modelled upon the EU in order to be an effective regional institution. Nevertheless, the facts on the ground persistently underscore the wide gap between aspiration and reality. As is the case with most – if not all – forms of ASEAN regionalism, the protection of the political regime against the threat of subversive movements has often been given primacy at the expense of the broader regional interest.⁸⁷ For example, with the emergence of the ISIS threat,

81 Acharya, *Constructing a Security Community in Southeast Asia*, above n 48, 63–6.

82 *ASEAN Charter* arts 2(2)(a), (e)–(f).

83 *ASEAN Charter* art 2(2)(b).

84 See, eg, Diane A Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New *ASEAN Charter*' (2011) 49 *Columbia Journal of Transnational Law* 268, 295–305; Lee Leviter, 'The *ASEAN Charter*: ASEAN Failure or Member Failure?' (2010) 43 *New York University Journal of International Law and Politics* 159; Lin Chun Hung, 'ASEAN Charter: Deeper Regional Integration under International Law?' (2010) 9 *Chinese Journal of International Law* 821, 829–36.

85 See Eminent Persons Group of the ASEAN Charter, 'Report of the Eminent Persons Group of the *ASEAN Charter*' (Report, December 2006) <<http://www.asean.org/storage/images/archive/19247.pdf>>. The report was adopted in Cebu, Philippines on 13 January 2007.

86 Barry Desker, 'Is the *ASEAN Charter* Necessary?' (Commentary No 77/2008, S Rajaratnam School of International Studies, 17 July 2008) <<https://www.rsis.edu.sg/wp-content/uploads/2014/07/CO08077.pdf>>; see also Barry Desker, 'ASEAN Integration Remains an Illusion', *The Straits Times* (online), 4 March 2015 <<http://www.straitstimes.com/opinion/asean-integration-remains-an-illusion>>.

87 As the former Secretary-General of ASEAN Ong Keng Yong once noted:

When we [in ASEAN] talk about human rights, don't get the impression that the only guy who objects to whatever provisions we want in the *ASEAN Charter* is Myanmar ... In our discussion on drafting the human rights provision, it was not Burma ... that caused all the trouble. There were four other countries that had reservations about how this paragraph was drafted and two of them were most vocal and they did not include Burma.

Indonesia's counter-terrorism efforts have hitherto dovetailed with obligations outlined in UN Security Council *Resolution 2170* and *Resolution 2178*.⁸⁸ Yet, as Indonesian concerns over the relative weakness of the country's counter-terrorism laws against ISIS noted at the outset suggest,⁸⁹ there remains room to strengthen its legal regime against terrorism. If anything, the challenges Indonesian authorities previously faced in apprehending Abu Bakar Bashir, the spiritual leader and co-founder of JI now serving a 15 year prison sentence, are a reminder of the legal and political complexities Indonesian law enforcement authorities have to negotiate.⁹⁰ On the other hand, John Sidel, a noted scholar of Indonesian society and politics, has concluded that recent manifestations of extremist violence in Indonesia reflect, not growing support for Islamism but its opposite, namely, the post-1998 decline of Islam as a banner for unifying and mobilising Muslims in Indonesian politics and society.⁹¹ The primacy of regime security against the threats of subversive movements is equally evident in the case of the Philippines' overt reliance on the defence co-operation with the US to deal with its internal counter-terrorism operations as noted above.⁹²

These internal political and legal constraints mean that ASEAN has limited capacity to harmonise national responses to counter-terrorism in Southeast Asia. However, this does not necessarily mean that ASEAN is in any way restrained in exercising its institutional competence to facilitate the development and domestic implementation of legal responses to terrorism through regional co-operation. ASEAN's institutional competence has arguably been exercised in accordance with the Association's longstanding principles of respect for state sovereignty and non-interference, serving merely to complement national and sub-regional efforts. The regional counter-terrorism co-operation through ASEAN is designed, as discussed above, to be complementary to respective national efforts to counter modern transnational terrorist threats by providing opportunities to overcome the limits of national efforts.

B The 'ASEAN Way'

The fundamental tension between the allure of a regional community and the reality of state sovereignty also animates the maintenance of the 'ASEAN Way' within the framework of the *ASEAN Charter*. Needless to say, ASEAN has its fair share of supporters who have hailed the *ASEAN Charter*'s passage and defended its express reliance on the 'ASEAN Way'. Nevertheless, six years after

Quoted in Alice D Ba, 'The Association of Southeast Asian Nations: Between Internal and External Legitimacy' in Dominik Zaum (ed), *Legitimizing International Organizations* (Oxford University Press, 2013) 132, 158.

88 SC Res 2170, UN SCOR, 69th sess, 7242nd mtg, UN Doc S/RES/2170 (15 August 2014); SC Res 2178, UN SCOR, 69th sess, 7272nd mtg, UN Doc S/RES/2178 (24 September 2014).

89 See above nn 1–4 and accompanying text.

90 'Jailed Indonesian Terrorist Abu Bakar Bashir Has Been Funding ISIS: Anti-Terrorism Chief', *The Straits Times* (online), 15 July 2014 <<http://www.straitstimes.com/asia/se-asia/jailed-indonesian-terrorist-abu-bakar-bashir-has-been-funding-isis-anti-terrorism-chief>>.

91 John T Sidel, *Riots, Pogroms, Jihad: Religious Violence in Indonesia* (Cornell University Press, 2006) 197–8.

92 See above n 64 and accompanying text.

the *ASEAN Charter's* entry into force, ASEAN's ongoing difficulties in building an ASEAN Community underscore the Association's apparent difficulty to reconcile the tension between regional community and state sovereignty.⁹³ Indeed, the evident readiness of many ASEAN member states to prioritise respect for state sovereignty, often at the expense of their regional community interest, implies that, so far as the ASEAN Way is maintained as the preferred modus operandi, ASEAN law – in conjunction with its regionalism – is likely to remain weak in the foreseeable future.⁹⁴

Ambiguous and vague language is ubiquitous in most – if not all – regional treaties on counter-terrorism. As Gregory Rose and Diana Nestorovska have observed in their comparative assessment of regional counter-terrorism treaties:

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.⁹⁵

Although ASEAN clearly lacks a strong legal regime comparable to the EU, its member states have nevertheless relied on informal codes of interstate conduct – such as consultation and consensus-building – to guide their relations with one another as well as their relations with external powers. In that respect, a realistic appraisal and acknowledgement of what ASEAN can and cannot accomplish is needed. Indeed, as Rodolfo Severino, the former Secretary-General of ASEAN, has observed:

ASEAN's supreme achievements have been in the political and security areas. By building confidence and dispelling mutual suspicion between members through frequent meetings and other cooperative activities, ASEAN has made Southeast Asia's impressive economic growth possible. ... Some observers may be disappointed by ASEAN's failure to 'resolve' legal sovereignty and jurisdictional disputes involving member states, but they forget that ASEAN is not an adjudicating body and was never meant to function as such.⁹⁶

The same qualifications hold for ASEAN's approach to counter-terrorism. Furthermore, it should be noted that even the centralised approach, adopted by

93 Singapore Institute of International Affairs, 'Reviewing the *ASEAN Charter*: An Opportunity to Reform ASEAN Processes' (Policy Brief, September 2014) 3.

94 Leviter, above n 84, 160–3; cf Kao Kim Hourn, 'A Personal Reflection' in Tommy Koh, Rosario G Manalo and Walter Woon (eds), *The Making of the ASEAN Charter* (World Scientific Publishing, 2009) 151, 155–6.

95 Gregory Rose and Diana Nestorovska, 'Towards an ASEAN Counter-Terrorism Treaty' (2005) 9 *Singapore Year Book of International Law* 157, 185. Rose and Nestorovska also note at 172:

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.

96 Rodolfo C Severino, 'Let's Be Honest about What ASEAN Can and Cannot Do' on *East Asia Forum* (31 January 2014) <<http://www.eastasiaforum.org/2014/01/31/lets-be-honest-about-what-asean-can-and-cannot-do/>>.

the EU through Europol (the EU's law enforcement agency) and Frontex (the EU's external borders management agency), has been criticised for a range of issues such as a lack of commitment and co-operation from member states⁹⁷ – flaws exposed by, among other things, the ISIS-linked attacks in Brussels and Paris and the refugee flows from Syria.⁹⁸

Both the *ACCT* and *MLAT* constitute examples of the 'ASEAN minus X' and 'flexible consensus' principles that ostensibly guide intramural co-operation within ASEAN.⁹⁹ Past practice among ASEAN economic ministers allowed for member states to agree on economic liberalisation on the basis of 'ten minus X' and/or 'two plus X' principles.¹⁰⁰ This ensured that member states wishing to embark on co-operative initiatives at a pace faster than the rest could still proceed. It has been argued that the ASEAN minus X formula should only be applied as a measure of last resort when it would not be possible for all ASEAN member states to ratify an agreement for its entry into force within a reasonable period of time. Another possibility would have been to delimit a maximum or threshold number of ASEAN member states that would comprise the 'X' to which ASEAN treaties are to apply.¹⁰¹ In enabling the entry into force of the *ACCT* after six member states have ratified it, ASEAN has clearly elected to avoid such alternatives.

V CONCLUSION

The history of political struggles and armed violence that continues to confront many Southeast Asian nations has been causing ambivalence towards rigorous counter-terrorism measures in this region. ASEAN's counter-terrorism initiatives must be understood in this wider political context where national counter-terrorism efforts in each country are enmeshed with their own political agenda of national harmony and combating dissidents. ASEAN may well be seen as taking a slow and soft approach to counter-terrorism with the adoption of a series of 'soft law' instruments before the *ACCT* finally came into force in 2013. Nevertheless, as this article has demonstrated, there is sufficient evidence to suggest that ASEAN's gradual development of a regional counter-terrorism framework has assisted its member states, particularly those with less experience

97 See, eg. Oldrich Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Ashgate, 2011); Davide Casale, 'EU Institutional and Legal Counter-Terrorism Framework' (2008) 1 *Defence Against Terrorism Review* 49.

98 See Didier Bigo et al, 'The EU and Its Counter-Terrorism Policies after the Paris Attacks' (Paper in Liberty and Security in Europe No 84, Centre for European Policy Studies, November 2015) <http://www.sciencespo.fr/ceri/sites/sciencespo.fr/ceri/files/no84_0.pdf>.

99 Paul J Davidson, 'The Role of International Law in the Governance of International Economic Relations in ASEAN' (2008) 12 *Singapore Year Book of International Law* 213.

100 Thitapha Wattanaputtipaisan, 'A Brief on ASEAN Economic Integration' (Paper No 07/2006, Bureau for Economic Integration and Finance Studies Unit, June 2006) 8.

101 Pieter Jan Kuijper, James H Mathis and Natalie Y Morris-Sharma, *From Treaty-Making to Treaty-Breaking: Models for ASEAN External Trade Agreements* (Cambridge University Press, 2015) 114.

in dealing with the issue, in building their legal and operational capacity to engage in international co-operation for counter-terrorism.

There is no denying that the political and legal constraints within each member state necessarily limit ASEAN's capacity to facilitate regional co-operation in Southeast Asia. However, those constraints should not be understood as obstacles to what ASEAN aims to achieve, but rather as socio-political structures in which ASEAN can engage in mutual social persuasion and forge deeper intra-regional co-operation in a manner that complements respective national efforts to develop their own legal and policy responses to terrorist threats, in tandem with evolving international co-operation on counter-terrorism. The regional counter-terrorism initiatives through ASEAN are thus seen as a process of 'norm internalisation', rather than imposition of legal obligation, in an attempt to overcome the limits of national efforts against transnational threats posed by modern terrorist activities, which are based on the traditional strategies and structures that remain as the legacies of their fight against communist insurgency and dissidence.