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**International Responses To Terrorism:  
The Limits And Possibilities Of Legal Control  
Of Terrorism By Regional Arrangement  
With Particular Reference To Asean**

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## ABSTRACT

The international community has yet to reach an international agreement on the suppression of terrorism. The problems of definition is recognised as a main factor for this failure. The definition of terrorism depends on one's political orientation. Thus, the oft-heard cliché 'one man's terrorism is another man's freedom fighter'. As the threat of terrorism is a real one and without an effective international convention, a regional convention offers a viable solution. This working paper analyses the issues surrounding international terrorism, in particular, the international legal response to terrorism, and the limits and possibilities of legal control of terrorism by regional arrangements such as those by the OAS, ECST and most recently the OAU. The paper proposes that the Association of South East Asian Nations (ASEAN) should have a regional convention to suppress terrorism, in view of the ever-present threat of terrorism and the absence of an effective international convention.

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# **INTERNATIONAL RESPONSES TO TERRORISM: THE LIMITS AND POSSIBILITIES OF LEGAL CONTROL OF TERRORISM BY REGIONAL ARRANGEMENT WITH PARTICULAR REFERENCE TO ASEAN**

## **Introduction**

Terrorism is not an end in itself, but a means to an end. In spite of the threats of terrorism, the international community fails to define terrorism. This failure is the main contributing factor to the absence of a specific international convention to suppress terrorism. In the absence of an international convention, the paper proposes that like the Organisation of American States (OAS), the Council of Europe and the Organisation of African Unity (OAU), the Association of South East Asian Nations (ASEAN) has a regional convention to suppress terrorism. Nevertheless, taking into consideration the limitations of legal control of terrorism, a regional convention may not be the best solution to the suppression of terrorism. However, it is worthwhile as a deterrent and an exhibition of states' desire to cooperate against the problems created by terrorism.

In this paper, the various definitions of terrorism will be considered. The problems of definition arise as the definition of terrorism depends on one's political orientation, among other factors. Hence the oft-heard cliché 'one man's terrorist is another man's freedom fighter'. The absence of a definition has led to a failure to reach an international agreement on the suppression of terrorism.

The nature of terrorism, what exactly makes an act terrorist, what constitutes terrorism, will also be considered. The nature of terrorism is such that it is '*violence for effect*'. *Acts of terrorism include attacks on the facilities of a state, assassinations, hijackings, hostage-taking, kidnappings and mass disruption and destruction.* It must be emphasised that what distinguishes terrorist acts from normal criminal acts is that the former always demand some sort of political concessions.

*This* paper analyses the international legal response to terrorism by regional arrangements. First, *it* will examine the 1971 OAS Convention to Prevent and Punish Acts of Terrorism. The strengths and weaknesses of the convention will be considered. Second, the 1971 European Convention on the Suppression of Terrorism (ECST) will be

examined. Then the 1999 OAU Convention on the Prevention and Combating of Terrorism will be considered. Fourth, the paper will highlight two legal issues – *extradition* and *jurisdiction* that affect conventions on terrorism. Fifth, there are problems with the legal responses to terrorism. They range from insufficient states signing the conventions; the lack of enforcement mechanism; the ambiguity of conventions; the lack of specific obligations; the lack of political will of states to deal with terrorism; to different political objectives of each state. These two legal issues and the problems together put limits on [the](#) legal control of terrorism.

Having seen the limits of legal control of terrorism, the paper then explores the feasibility of an *ASEAN Convention to suppress terrorism*. The achievements of ASEAN to date in combating international terrorism will be highlighted. The pointers for an ASEAN convention, drawing on the strengths of the OAS Convention, ECST and the OAU Convention and avoiding the ‘pitfalls’ of these conventions, are provided.

The paper throws up the idea of forming a regional convention to suppress terrorism in [the](#) South East Asia region. Last but not least, the threat of terrorism is a real one and without the international community agreeing on a definition of terrorism, there will not be an effective international convention to suppress [the problem](#).

Post-911 has not changed the need for an international convention, merely pushed it to the fore. It has become more pressing than before that states have to co-operate to fight terrorism, particularly in view of the extensive networks of terrorist [organisations](#). Terrorism is a very real, global problem and its highly unpredictable nature only makes things worse. It can happen anywhere and at anytime, making everyone and every state a vulnerable target of terrorism. Terrorists do not restrict themselves within national boundaries. A number of terrorist organisations such as the notorious Al-Qaeda go about their ‘business’ across borders.

### **Problems of Definition**

It has been recognised that it is almost impossible for one to give a definition of the term ‘terrorism’. The international community has yet to reach a unanimous agreement on a definition of terrorism. This has not changed in post-[911](#), and a definition of terrorism is

still the heart of the dispute for an international convention to fight terrorism. One reason for this failure to reach a definition is that different states have different perspectives on what constitutes terrorist acts. One's perspective depends very much on one's political orientation. Hence the cliché '*one man's terrorist is another man's freedom fighter*'. Moreover, some states are actually 'sponsors' of terrorist activities, particularly in the form of financial aid and offers of 'safe haven'. A case in point is the former Taliban regime in Afghanistan. Thus, the difficulties faced by the international community to define terrorism and thereby reach an agreement on the suppression of terrorism. The UN general Assembly actually wound up after five days of debate after 911, only reaching a consensus on condemning terrorism but was not able to resolve the deadlock on the definition of terrorism and who constitutes a terrorist.<sup>1</sup> Even the Organisation of Islamic States (OIC) failed in this regard.

There are only specific conventions dealing with specific acts of terrorism. The Draft of Rome Statute to International Criminal Court debated about 'crimes of terrorism', but this was not included in the finalized Rome Statute. In the Draft convention, 'crimes of terrorism' means '[U]nderstanding, organising, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them'.<sup>2</sup> In addition, the Draft defined any offences under international conventions against terrorist activities as 'crimes of terrorism'.<sup>3</sup> It also included any offences "involving use of firearms ...as a means to perpetrate indiscriminate violence ..."<sup>4</sup>

According to Antonio Cassese, "if we see terrorist acts or any acts of violence committed against innocent people for the purpose of coercing states in some way it immediately becomes apparent that terrorism may be committed in war as easily as it may

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<sup>1</sup> The Straits Times, 7 Oct 2001.

<sup>2</sup> See *Draft of Rome Statute to International Criminal Court*, <http://www.un.org/law/icc/n9810105.pdf>

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

be committed in the context of peaceful relations”.<sup>5</sup> He also believed that international conventions like the 1907 Hague Regulations, four 1949 Geneva Conventions and two 1977 Additional Geneva Protocols that contain provisions protecting civilians and banning terrorist attacks “apply not only to international wars, but also ... to wars of national liberation, civil wars and other ‘internal’ wars”.<sup>6</sup>

The question surrounding the definition of terrorism is ‘where does one draw the line?’ Is a definition required, since [a terrorist act is such that when you see it, you would recognise it?](#) The political motive of a terrorist act distinguishes it from a criminal act. An example is the Abu Sayyaf demands for a separate state in islands in Southern Philippines after taking some hostages (including foreigners) on 27 May 2001.<sup>7</sup>

### ***Various Definitions of Terrorism***

Security Council Resolution 731 (1992) considers acts of international terrorism as those that ‘constitute threats to international peace and security’. However, this definition is too vague. It failed to specify what exactly are the threats to international peace and security. Besides, the term ‘threats’ is very broad.

According to the 1971 OAS Convention to Prevent and Punish Acts of Terrorism, it considered acts of terrorism ‘common crimes of international significance, regardless of motive’.<sup>8</sup>

The Council of Europe’s European Convention on the Suppression of Terrorism (ECST) disregarded ‘motives’ in its articles. Article 1 contains no definition but explains that it is for the purposes of extradition, and regards certain offences like those found in the Hague Convention, Montreal Convention, among others, as non-political offences.<sup>9</sup> In short, Article 1 de-links the political motive.

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<sup>5</sup> Antonio Cassese, “The International Community’s ‘Legal’ Responses to Terrorism”, *International Comparative Law Quarterly*, Vol. 38, 1989, p. 592.

<sup>6</sup> *Ibid.*, p. 592.

<sup>7</sup> See ‘Manila rejects Abu Sayyaf demands for separate state’ in *The Straits Times*, at <http://www.straitstimes.asia1.com.sg/breakingnews/story/0,1895,49100,00.html>

<sup>8</sup> See Organisation of American States: Convention to Prevent and Punish Acts of Terrorism, *I.L.M.*, Vol. 10, Nos. 1-3, 1971, p. 256.

<sup>9</sup> See Council of Europe: European Convention on the Suppression of Terrorism 1977, *I.L.M.*, Vol. 15, Nos. 4-6, 1976, p. 1272, at art. 1.

The US Draft Convention on the Punishment and Prevention of Terrorism Acts tried to define in its Article 1 what constitutes terrorist acts. The most important clause is Article 1(d), which stated that the act is an international offence if it is ‘intended to damage the interests of or obtain concessions from a State or an international organisation’.<sup>10</sup> This is the distinguishing factor between an ordinary criminal act (such as kidnapping a tycoon and demanding ransom money) and a terrorist act (kidnapping an ambassador to demand the release of say terrorists kept prisoners in a state).

The 1999 OAU Convention on the Prevention and Combating of Terrorism gives a detailed definition of ‘terrorist act’ under Article 1(3). It means ‘any act which is a violation of the criminal laws of a State Party ...’ with an intent to ‘intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles ...’<sup>11</sup>

Terrorism can be seen [in normative terms](#). It carries a pejorative connotation which is often applied to foes than friends.<sup>12</sup> Terrorism is “used as a synonym for rebellion, street battles, civil strife, insurrection, rural guerrilla war, coup d’etat, and a dozen other things”.<sup>13</sup> Therefore, it is believed that there is no single definition of terrorism that can “possibly cover all the varieties of terrorism that have appeared throughout history”.<sup>14</sup> AP Schmid said “[T]errorism is the calculated causing of extreme anxiety of becoming a victim of arbitrary violence and the exploitation of this emotional reaction for manipulative purposes”.<sup>15</sup>

Among the numerous attempts to define terrorism, this paper will adopt a definition given by Brian Jenkins. He defined terrorism as “violence or the threat of violence calculated to create an atmosphere of fear and alarm – in a word, to terrorise –

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<sup>10</sup> See US Draft Convention for Prevention and Punishment of Terrorism Acts 1972, *I.L.M.*, Vol. 11, Nos. 4-6, 1972, p. 1383.

<sup>11</sup> See ‘OAU Convention on the Prevention and Combating of Terrorism’, *African Journal of International and Comparative Law*, Vol. 11, No. 4, 1999, p. 778, at art.1(3).

<sup>12</sup> Charles W. Kegley Jr. (ed.), *International Terrorism: Characteristics, Causes, Controls* (Macmillan Education Ltd, 1990), p. 12.

<sup>13</sup> *Ibid.*, p. 12.

<sup>14</sup> *Ibid.*, p. 12.

<sup>15</sup> AP Schmid, *Op Cit.*, p. 11.



and thereby bring about some social or political change”.<sup>16</sup> That is, terrorism is an act that is “executed with the deliberate intention of causing panic, disorder, and terror within an organised society”.<sup>17</sup>

### ***International Terrorism - A Definition***

International terrorism first became frequent in the 1960s. The US Department of State’s Office of Counter-Terrorism, defined international terrorism as “any premeditated activity using force against noncombatants for political means involving the citizens or territory of more than one country”.<sup>18</sup>

M. Cherif Bassiouni defined international terrorism as “a strategy of terror-inspiring violence containing an international element and committed by an individual to produce power outcomes”.<sup>19</sup> International terrorism is said to occur “when an unlawful act of violence is directed against an internationally protected target or person or when a crime of violence defined by municipal law is committed in a manner that affects the interests of more than one state”.<sup>20</sup>

Brian Jenkins on international terrorism: “what is called international terrorism may refer broadly to any terrorist violence that has international repercussions, or to acts of violence which are outside the accepted norms of international diplomacy and rules of war”.<sup>21</sup>

In the context of this paper, international terrorism simply refers to any terrorist acts which involves a foreign element, for instance, the act is carried out by a non-national in another State, or it involves or targets foreign nationals.

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<sup>16</sup> Ibid., p. 28.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., p. 14.

<sup>19</sup> Alona E. Evans and John F. Murphy (eds.), *Op Cit.*, p. 485.

<sup>20</sup> Ibid.

<sup>21</sup> Charles W. Kegley Jr. (ed.), *Op Cit.*, p. 4.

## *Nature of Terrorism*

The nature of terrorism is such that it is violent (“violence for effect”) and involves the use of fear/terror as a means to achieve political ends. Terrorism is random, it can happen anywhere, anytime. Terrorist acts are intended to produce psychological effects, but differ from ordinary crimes in its political purpose and primary goal. They also tend to be international in character, through the choice of location and victim.

International terrorism has a tendency to use third states as targets, regardless of whether the third party is directly or indirectly involved in its cause or completely ‘innocent’. An example is the Abu Sayyaf hostage taking in Malaysia in 2000 to demand ransom money to finance its [separatist movement](#) in the Philippines. Terrorist acts usually harm innocent victims. It aims to gain the attention of the media so as to broadcast its political cause.

According to Irwin Cotler, the features and dynamics of contemporary terrorism include “the increasing lethal face of terrorism; the increasing targeting of civilians in public places; the increasing incidence of terrorism associated or underpinned by religious fanaticism; the strategic importance of atrocity propaganda; the potential use of weapons of mass destruction”.<sup>22</sup> Besides the aforementioned, there are several other dynamics of terrorism.<sup>23</sup>

The main importance of defining terrorism lies in its impact on the formulation of international [agreements](#) against terrorism. Terrorism is not a local problem but an international one, its playground is the international arena. It can happen anywhere, anytime and its target(s) can be anyone. A definition of terrorism is required for purposes of legislation and punishment of terrorism actors; for international cooperation and to ensure effectiveness of such cooperation; and to counter states sponsoring terrorism. This brings us to the next section on the international legal response to terrorism by global conventions.

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<sup>22</sup> I Cotler, ‘Towards a Counter-Terrorist Law and Policy’, *Terrorism and Political Violence*, Vol. 10, No. 2, 1998, p. 2.

<sup>23</sup> Ibid.

## **International Legal Response to Terrorism: Global Conventions**

The occurrence of a single terrorist attack often attracts the attention of the media, and this is part of the game plan of the terrorists. With the help of the media, the terrorists gain the attention of the world, thereby spreading their cause **and** pressuring the target government to respond. In this way, governments are challenged. A “[F]ailure to respond effectively may be a signal to the terrorist organisation, other political opponents, and the citizens as a whole that government lacks the power or will to maintain order”.<sup>24</sup>

The choice of response by a government depends on several factors such as the existence of international convention, bilateral and multilateral agreements like an extradition treaty, humanitarian considerations such as the safety of the hostages, among others. Considerations such as sympathy for the terrorist group, the need to deter the occurrence of similar acts, among others, also influence the choice of response.<sup>25</sup> States may adopt various responses to acts of terrorism, such as the resort to force, that is, the use of military force to fight terrorism. A case in point is the **on-going US ‘War against Terrorism’**.

In the following paragraphs, the historical background to international efforts to suppress terrorism will be recounted. There is no single comprehensive convention that covers all acts of terrorism and suppresses terrorism. Only specific conventions that deal with the manifestations of terrorism exist.

### ***Historical Background***

The first international attempt at international legal control of terrorism was the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism after World War I. It was a response to the assassination at Marseilles in 1934, of King Alexander I of Yugoslavia and Louis Barthou, Foreign Minister of the French Republic.<sup>26</sup> The Convention was signed by 24 states but only one ratified it; thus, it never came into

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<sup>24</sup> William L. Waugh, *International Terrorism: How Nations Respond to Terrorists* (Documentary Publications, USA, 1982), p. 3.

<sup>25</sup> *Ibid.*, p. 4.

<sup>26</sup> Thomas Franck and Bert B. Lockwood Jr., “Preliminary Thoughts Towards an International Convention on Terrorism”, *American Journal of International Law*, Vol. 68, 1974, p. 69.

force.<sup>27</sup> Its failure was attributed to its “breadth of the definition of terrorism” and provisions such as “offence to forge travel documents” (Article 14); making the Convention unacceptable to states.<sup>28</sup> The 1937 Convention was “intended to suppress acts of terrorism having an ‘international character’ only, and most of its provisions are devoted to a definition of the international element”.<sup>29</sup> It established the unlawfulness of support for terrorist activities and obliged states to “enact legislation to punish incitement to commit terrorism”.<sup>30</sup>

Subsequently, international conventions emerged only in the 1960s when international terrorism became frequent. The first being the 1963 Tokyo Convention on Hijacking. Before we proceed, one should take note that an ad hoc committee was also set up but failed to achieve a compromise between opposing states views on the approach to international terrorism. In the 1972 debates in the General Assembly and the Sixth Committee, the Western powers “favoured the adoption of a convention to prevent and punish terrorism”<sup>31</sup> while the Afro-Arab and East European states “expressed more concern for the underlying causes of terrorism and refused to support any measures which might interfere with the activities of liberation movements or which failed to condemn organised state terror on the part of ‘colonial, racist and alien regimes’”.<sup>32</sup>

### ***Legal Framework: International Conventions***

There are generally two types of response to international terrorism – peaceful and coercive responses. The focus is on international responses within the legal framework, i.e. what does the legal framework offer and what are the requirements for a legal framework to function?

Over the years, international conventions, UN resolutions and regional conventions were made and these “provide a legitimate basis for the fight against terrorism, while

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<sup>27</sup> Ibid., p. 70.

<sup>28</sup> John Dugard, “International Terrorism: Problems of Definition”, *International Affairs*, Vol. 67, 1974, p. 69.

<sup>29</sup> Ibid., p. 69.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., p. 74.

<sup>32</sup> Ibid.

waiting for more concerted action by the international community”.<sup>33</sup> These constitute a type of peaceful response undertaken by states to deal with terrorism.

The requirements for a legal framework include a definition of what constitutes an act of terrorism; provisions that ‘criminalised’ terrorist acts, for arrest, prosecution and trial or extradition of terrorists.<sup>34</sup> However, in general, there is a failure to obtain a consensus on the definition of terrorism. This in turn leads to a failure to establish an international mechanism to suppress international terrorism. The danger lies in the use of coercive responses by states to deal with international terrorism.

Nevertheless, there is no comprehensive convention that covers all acts of terrorism. There are only specific conventions directed against specific terrorist activities, such as the conventions on hijacking and hostage taking and the recent *International Convention for the Suppression of Terrorist Financing*, among numerous others. The UN resolutions merely denounced but did not resolve the problems of terrorism directly. Despite the strong condemnation of terrorism, still, the General Assembly and Security Council resolutions never define what constitutes terrorism.<sup>35</sup> They merely condemn acts of terrorism and reaffirms the suppression of such acts, emphasise cooperation and call upon states to fight terrorism from time to time. Thus far, there are three regional conventions that deal with terrorism directly.

### **International Legal Response to Terrorism: Regional Arrangements**

This section analyses the international legal response to terrorism by regional arrangements. First, the paper will examine the 1971 OAS Convention, followed by the 1977 European Convention and then the 1999 OAU Convention. Second, the issues of *extradition* and *jurisdiction* over the alleged terrorists that affect both regional and international conventions on terrorism merit a discussion. Third, the problems associated with legal responses to terrorism are highlighted. Together, the legal issues and the problems place limits on legal control of terrorism.

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<sup>33</sup> Ibid., p. 35.

<sup>34</sup> M Flory and R Higgins (eds.), *Terrorism and International Law* (London: Routledge, 1997), p. 31.

<sup>35</sup> Ibid., p. 44.

### ***1971 OAS Convention to Prevent and Punish Acts of Terrorism***

The 1971 OAS Convention to Prevent and Punish Acts of Terrorism marked the first regional arrangement that dealt specifically with the suppression of terrorism. Under Article 1, the Convention urges states to ‘cooperate among themselves ... to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes’.<sup>36</sup> Article 1 tried to define acts of terrorism.

Article 2 of the Convention considers the abovementioned acts of terrorism as ‘common crimes of international significance, *regardless of motive*’.<sup>37</sup> Thus, the motive is irrelevant to determine whether a terrorist act has been committed.

The Convention also provides for extradition and jurisdiction (Articles 3 and 5), based on the principle of *aut dedere aut judicare*.

Under Article 8, for the purpose of co-operation in preventing and punishing the ‘crimes’, states have to undertake certain obligations.<sup>38</sup>

The strength of the OAS Convention lies in its listing of the offences under Article 2 and removing the political offence exception, which previously offers alleged terrorists protection. The classification of terrorism as a political offence is seen as a major hindrance to the extradition of terrorists.<sup>39</sup> Article 2 serves to “remove the shelter of political asylum”.<sup>40</sup> However, it is “restricted both in respect of the acts it seeks to punish and the persons it seeks to protect” (as in Article 1).<sup>41</sup>

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<sup>36</sup> See Organisation of American States Convention, *supra* note 23, at art. 1.

<sup>37</sup> *Ibid.*, art. 2.

<sup>38</sup> *Ibid.*, art. 8.

<sup>39</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 53.

<sup>40</sup> John Dugard, *Op Cit.*, p. 72.

<sup>41</sup> *Ibid.*, p. 71.

### *1977 European Convention on the Suppression of Terrorism (ECST)*

Originated within the Council of Europe, the 1977 European Convention on the Suppression of Terrorism (ECST) (under Article 1, for extradition purpose) disregards certain ‘terrorist offences’ as political offences and the political motives of these offences.<sup>42</sup> By doing so, like the OAS Convention, the ECST has denied offenders the “opportunity of using the political offence exception to extradition”.<sup>43</sup>

The Convention also contains the *aut dedere aut judicare* principle (Article 7). The Convention “classifies political terrorism as an ordinary criminal act for the purpose of extradition – and it is this technique which is generally preferred to local prosecution”.<sup>44</sup> However, the same convention which “reduce terrorism to a crime also include protection clauses and sufficiently ambiguous language to allow states to resort conveniently to protection clauses when they see fit”.<sup>45</sup> This is because states have “retained a good measure of discretion which often results in the non-application of the rule” (*aut dedere aut judicare* principle) which they ‘pretend to support’.<sup>46</sup>

The main weakness of the Convention is Article 5, which allows a State to refuse extradition on grounds of political asylum.<sup>47</sup> Furthermore, Article 13 “permits parties to enter a reservation permitting them to reject a request for extradition on the grounds that it is a political offence, notwithstanding that it is a listed offence”.<sup>48</sup> However, the right of reservation is subject to future provisions.<sup>49</sup> Related to this was a further declaration made under Article 3 of the Dublin Agreement.<sup>50</sup>

In sum, the main shortcoming of the Convention is that it is too general and ambiguous, leaving the application and interpretation to states’ discretion. Thus, states are “bound by vague or differing obligations and offenders are not guaranteed equal treatment

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<sup>42</sup> See European Convention, *supra* note 24, at art. 1.

<sup>43</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 54.

<sup>44</sup> *Ibid.*, p. 32.

<sup>45</sup> *Ibid.*, p. 33.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, p. 55.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Meliton Cardona, ‘The European Response to Terrorism’, *Terrorism and Political Violence*, Vol. 4, No. 4, 1992, p. 251.

by this instrument of the Convention”.<sup>51</sup> The ECST is “plagued by the lack of distinction between a ‘criminal offence’ and a ‘political offence’”.<sup>52</sup>

### ***1999 OAU Convention on the Prevention and Combating of Terrorism***

The OAU Convention marked the most recent regional convention on the suppression of terrorism. This Convention defines what terrorist act means under Article 1(3).<sup>53</sup> Thus, the OAU convention is commendable on this aspect. However, its Article 3 should not be modelled. Article 3 does not consider movements of national liberation and self-determination as ‘terrorist acts’. It also specifies political, racial, religious motives, among others, as unjustifiable reasons for defence against a terrorist act. As the African States have been supporters of liberation movement, it is not surprising that they have Article 3 in the Convention.

### ***Legal Issues Affecting International Convention on Terrorism***

There are several legal issues surrounding an international convention on terrorism. Such convention on terrorism often has to deal with the issue of extradition and jurisdiction in its provisions. Hence these two legal aspects of international law merit some discussion.

#### ***Extradition***

Extradition is “the formal surrender of a fugitive criminal to a requesting State – usually under the terms of a bilateral or multilateral treaty”.<sup>54</sup> Thus, the system of extradition often depends on the ‘ad hoc’ network of bilateral or multilateral treaties. It was believed that an extradition treaty should be “interpreted ‘liberally’ to give effect to the purpose of the states to achieve the surrender of fugitive criminals for trial in the requesting state”.<sup>55</sup> The extradition act contained in the political offence exception was based on the 1870 Extradition Act. In the case of international terrorism, the issue is how

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<sup>51</sup> Noemi Gal-Or, *International Cooperation to Suppress Terrorism* (UK, 1985), p. 281.

<sup>52</sup> AP Schmid, *Op Cit.*, p.13.

<sup>53</sup> See OAU Convention, *supra* note 26, at art. 1(3).

<sup>54</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 45.

<sup>55</sup> Colin Warbrick, ‘Extradition’, *ICLQ*, Vol. 38, 1989, p. 425.



the alleged terrorist who is found in one country may be brought and tried in another country.

Different countries have different approaches to extradition, depending on whether the domestic law is based on civil or common law system.<sup>56</sup> This difference needs to be addressed and harmonised so that an international convention can adopt a common practice with regard to extradition provisions in their Convention. The *Pinochet Case* is a good illustration.<sup>57</sup> Spain sought the extradition of Pinochet for crimes against humanity when he was in the UK for medical treatment. The UK is obliged to extradite Pinochet to Spain under the European Convention on Extradition (ECE).<sup>58</sup> Under United Kingdom law, “the only extraditable offences referred to in the Spanish request are offences after Dec 8, 1998”.<sup>59</sup>

There are two broad exceptions to the extradition process, namely that relating to national and political offenders. Civil law countries reject extraditing nationals on the basis of “extensive extra-territorial jurisdiction on the nationality principle”.<sup>60</sup> An example is Libyan law, which has no obligation to extradite its nationals (as in the *Lockerbie Case*).

In the ECST, the exclusion of political offenders from extradition allows “the option of refusing extradition for a ‘political offence’ or ‘an offence connected with a political offence’”,<sup>61</sup> if “the requesting state has substantial grounds for believing that a request for extradition for an ordinary criminal has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person’s position will be prejudiced for any of these reasons”.<sup>62</sup>

These exceptions to the extradition process may become an obstacle to the suppression of terrorism. One has to establish terrorism as an extraditable offence, in

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<sup>56</sup> See M Flory and R Higgins (eds.), *Op Cit.*, pp. 45-6, for a discussion of the extradition process.

<sup>57</sup> See ‘House of Lords’ Judgment In Re Pinochet’, at <http://www.parliament.the-stationary-office.co.uk/pa/ld199899/ldjudgmt/jd990115/>.

<sup>58</sup> See ‘Letter of Jack Straw about the Extradition of Pinochet’, at <http://www.derechos.org/nizkor/chile/juicio/straw.html>.

<sup>59</sup> Ibid.

<sup>60</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 46.

<sup>61</sup> Ibid., p. 47.

<sup>62</sup> Ibid.

order to facilitate extradition between states with different legal systems. It is insufficient to establish terrorism as a non-political offence.

### ***Jurisdiction***

The nature of jurisdiction is such that it may be concurrent. There are two forms of jurisdiction, legislative and enforcement jurisdiction. Legislative jurisdiction refers to the “powers to legislate in respect of the persons, property or events in question”.<sup>63</sup> That is, the state’s ability to define its own laws in respect of any matters it chooses. Enforcement jurisdiction refers to the “powers of physical interference exercised by the executive, such as the arrest of persons, seizure of property”.<sup>64</sup> Sovereign equality of States means that a State may not exercise its enforcement jurisdiction “in the territory of another State without the latter’s consent”.<sup>65</sup>

The principles regarding jurisdiction include territorial principle - states have jurisdiction over all persons and activities within their territories, may extend jurisdiction beyond their borders; and “extend jurisdiction and control through international agreements and treaties in which they undertake to regulate international terrorism”.<sup>66</sup>

There are rules in international law regulating jurisdiction over individuals and activities. States have extended their jurisdiction beyond their territories, known as extra-territorial jurisdiction, under the territorial principle. There are five bases for jurisdiction. One of which is *territorial principle* whereby states exercise jurisdiction over everyone on its territory, regardless of nationality<sup>67</sup> (with the exceptions of sovereign and diplomatic immunity). *Nationality principle* allows states to exercise jurisdiction over individual because that individual is a national of the state, regardless of where the individual is.<sup>68</sup> *Protective principle* allows states to exercise jurisdiction over the national of another country if that individual poses a threat to the security of a State.<sup>69</sup> States can claim

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<sup>63</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (London: Routledge, 1997) (7<sup>th</sup> edition), p. 109.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Henry H. Han (ed.), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (London: Oceana, 1993), p. 204.

<sup>67</sup> Peter Malanczuk, *Op Cit.*, pp. 110-111.

<sup>68</sup> *Ibid.*, p. 111.

<sup>69</sup> *Ibid.*, pp. 111-112.

jurisdiction over all crimes, including all crimes committed by foreigners, under the *universality principle*.<sup>70</sup> Under the *passive personality principle*, states can claim national will suffer damage, extending the nationality principle to apply to any crime committed against a national of a State, wherever that national may be.<sup>71</sup> The last two principles - the passive personality principle and universal principle are relevant to terrorism.

The passive personality principle grants states “jurisdiction over persons causing harm to one’s nationals abroad”.<sup>72</sup> Applied in the context of terrorism, states may claim “jurisdiction over persons harming their nationals abroad through acts of terrorism”.<sup>73</sup>

The universal principle allows jurisdiction over “offences universally considered to be *erga omnes* – harming not only those against whom they are directed, but the international community generally”.<sup>74</sup> That is, regardless of the nationality of the alleged offender and location of the offence. Offences such as genocide, war crimes and piracy fall within this classification. However, there is no general acceptance of terrorism being subjected to universal jurisdiction, “some degree of connection with the event is required”.<sup>75</sup> Thus, the jurisdictional problems associated with terrorism are the locations of a terrorist act<sup>76</sup> and the lack of political will to assert jurisdiction.<sup>77</sup> Nevertheless, “[U]niversal jurisdiction is increasingly accepted for certain acts of terrorism, such as assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large”.<sup>78</sup> Agreements on terrorism should declare “specific acts of individual and organisation groups to be subject to criminal prosecution in the contracting states”.<sup>79</sup>

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<sup>70</sup> Ibid., pp. 112-113.

<sup>71</sup> Martin A Dixon and Robert McCorquodale, *Cases and Materials on International Law* (London: Blackstone Press, 2000) (3<sup>rd</sup> edition), pp. 294-295.

<sup>72</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 24.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> For example, a bomb could be planted on a plane in State A but went off when it was in the territory of State B. Thus making jurisdiction complicated. A case in point is the *Lockerbie Case*.

<sup>77</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 24.

<sup>78</sup> Martin A Dixon and Robert McCorquodale, *Op Cit.*, p. 304.

<sup>79</sup> Henry H. Han (ed.), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (London: Oceana, 1993), p. 206.

For example, the Tokyo Convention requires the state of registration of the aircraft to ‘exercise jurisdiction over offences and acts committed on board’ aircraft.<sup>80</sup> In addition, the Convention provides that “offences committed on board aircraft shall be treated, for the purposes of extradition, as if they were committed not only in the place where they occurred but also in the territory of the registering state”.<sup>81</sup>

The representational principle, derived from international arrangements, “refers to cases in which a state may exercise extraterritorial jurisdiction where it is deemed to be acting for another State which is more directly involved, provided certain conditions are met”.<sup>82</sup> Thus, here, the decision to “prosecute is taken in the context of an international agreement or other arrangement”.<sup>83</sup> Nevertheless, government should establish a balance between taking “effective measures to combat terrorism on the one hand, and respecting individual rights on the other”.<sup>84</sup>

### ***Limits of Legal Control***

The international conventions concluded reflect some common features and shortcomings. Before we proceed to the problems of these conventions, the common features will be briefly mentioned. One common feature is that they contained common provisions such as an obligation of the *aut dedere aut judicare* principle, that “all offenders who are not extradited by the State Party in whose territory they are found must, ‘without exception whatsoever’, be submitted to the appropriate authorities for the purpose of prosecution”.<sup>85</sup> States are also required to “establish their jurisdiction over the offences in certain circumstances”.<sup>86</sup>

Another common feature is that these conventions “rely solely on the municipal law of each State for the prevention and punishment of the target crimes”.<sup>87</sup> These conventions presumed that States have “pre-existing laws which prohibit such activity as

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<sup>80</sup> See Tokyo Convention, *supra* note 54, at art. 3(1).

<sup>81</sup> Joseph J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge: Grotius, 1990), p. 51.

<sup>82</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 44.

<sup>83</sup> *Ibid.*

<sup>84</sup> Martin A Dixon and Robert McCorquodale, *Op Cit.*, p. 226.

<sup>85</sup> Joseph J. Lambert, *Op Cit.*, p. 54.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, p. 55.

hostage-taking (e.g. kidnapping)”.<sup>88</sup> The most important feature of these conventions is the establishment of an international framework for cooperation among States to suppress, prevent and punish terrorist acts.<sup>89</sup>

The problems of the conventions on terrorism, together with the issues of extradition and jurisdiction, create limitations of legal control of terrorism.

### ***Problems of Conventions***

Despite all their aims, these conventions have their shortcomings. The most fundamental is that not enough states are parties to the multilateral treaties. This gives rise to problems when terrorist acts involve states which are not parties to the treaties. For example, the hijackers of a Kuwaiti aircraft escaped prosecution because Algeria was not a party to the Hijacking Convention and any extradition treaty, and therefore “could not be compelled to ‘extradite or punish’ the offenders”.<sup>90</sup>

The second problem lies in the lack of enforcement mechanism in most conventions (with the exception of the 1978 Bonn Declaration<sup>91</sup>) to secure the compliance of the parties to the treaties.<sup>92</sup> If a state fails to live up to their obligations, for instance, refuses to hand over a terrorist, other than using the dispute resolution procedures, the other State parties could not do more to seek compliance. For example, in the *1982 Achille Lauro Case*, non-complying states were not punished. Egypt did not comply with the 1979 Hostage Convention and Italy did not carry out its obligations under the 1983 bilateral extradition treaty with the USA.<sup>93</sup>

The third problem with the conventions is the ambiguous provisions of the conventions that left much to states’ discretion (in terms of interpretation and application), which has an impact on extradition.<sup>94</sup> It is at the state’s discretion whether the offence is

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Antonio Cassese, Op Cit., p. 593.

<sup>91</sup> As mentioned earlier, the Bonn Declaration was first invoked against Afghanistan which violated the principles of the Bonn Declaration. See James Busuttill, ‘Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking’, *JCLQ*, Vol. 31, 1982, pp. 474-487.

<sup>92</sup> Antonio Cassese, Op Cit., p. 593.

<sup>93</sup> Ibid.

<sup>94</sup> Joseph J. Lambert, Op Cit., p. 56.

an extraditable offence, and if not extradited, will the offender stand trial before the national court. States may decline extradition. As states have the right to grant asylum to political offenders,<sup>95</sup> they have the discretion to decide if the alleged offender is a political offender and may be granted asylum.

The fourth problem is that “the obligations of the States parties to search for, and arrest, suspects are treated in an insufficiently rigorous way”.<sup>96</sup> The treaties do not impose specific obligations on the state parties to search for alleged offenders who might be present in the territory of a State party.

The lack of a definition of terrorism has created an obstacle and distraction to reaching international agreements on terrorism.<sup>97</sup> The mobilisation of terrorists, communication, advanced travel, progressive weaponry, and global publicity served as tools for modern terrorists.

Another category of the problems associated with the conventions includes a lack of assertive or political will of the states/institutions to deal with terrorism. This led to states sometimes unilaterally [responding](#) to the problem, such as the Israelis’ use of force to rescue its nationals held hostage in Entebbe.<sup>98</sup>

The differing political objectives marked another problem that hinders the suppression, prevention and punishment of terrorist acts.<sup>99</sup> Firstly, different political objectives led to no consensus on the definition of what is terrorism. This is also in view that some states are sponsors of terrorist activities, which they perceived as ‘wars of liberation’. A GA Resolution in the 1970s “showed more concern for the legitimisation of wars of national liberation than for the suppression of terrorism. In its third paragraph it reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of

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<sup>95</sup> John Dugard, Op Cit., p. 75.

<sup>96</sup> Antonio Cassese, Op Cit., p.595.

<sup>97</sup> A Carberry, ‘Terrorism: A Global Phenomenon Mandating a Unified International Response’, *Indiana Journal of Global Legal Studies*, Vol. 6, No. 2, 1999, pp. 710-713.

<sup>98</sup> Peter Malanczuk, Op Cit., p. 315.

the organs of the United Nations”.<sup>100</sup> Therefore, the cliché ‘one man’s terrorist is another man’s freedom fighter’. Besides, states could not agree on the standards to be applied and enforced over terrorism.<sup>101</sup> Some states may also offer ‘safe havens’ for terrorists. Thus, efforts should be made “to remove the territorial sanctuaries that current political and ideological controversies allow”.<sup>102</sup>

### ***Possibility of Legal Control by Regional Arrangement - An ASEAN Convention***

Despite the limits of legal control of terrorism, the paper next explores the feasibility of an *ASEAN Convention to suppress terrorism*. The “justifications” for an ASEAN Convention include: (1) the lack of an effective international convention to suppress terrorism; (2) the existence of active terrorist groups in ASEAN member countries; (3) the fear of an Asian connection to international terrorist organisations and the not unfounded worries that suspected terrorists can easily pass themselves off and reside in Southeast Asia; and (4) terrorism poses a threat to the region’s stability and economic growth. The achievements of ASEAN to date in combating international terrorism will be highlighted. Then the pointers for an ASEAN convention, drawing on the strengths of the OAS, European and OAU Conventions and avoiding the ‘pitfalls’ of these conventions are provided. In a nutshell, ASEAN is capable of having a regional convention to suppress terrorism.

### ***Why an ASEAN Convention***

One may ask, why an ASEAN Convention? First, prior to 911, terrorism probably has not posed such a big problem in ASEAN as it did in other parts of the world. In the 1970s, ASEAN countries had their ‘fair share’ of terrorism. These included attack on fuel tanks in Singapore in Jan 1974 by PFLP and Japanese Red Army (JRA),<sup>103</sup> five Japanese terrorists took over the American embassy in Malaysia in 1975,<sup>104</sup> takeover of Israeli

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<sup>99</sup> Henry H. Han (ed.), *Op Cit.*, p. 200.

<sup>100</sup> John Dugard, *Op Cit.*, p. 73.

<sup>101</sup> Henry H. Han (ed.), *Op Cit.*, p. 201.

<sup>102</sup> Alona E. Evans and John F. Murphy (eds.), *Op Cit.*, p. 536.

<sup>103</sup> Brian Jenkins, ‘Terrorism-Prone Countries and Conditions’, in Ariel Merari, ed., *On Terrorism and Combating Terrorism* (University Publication of America, 1985), p. 138.

<sup>104</sup> *Ibid.*

embassy in Bangkok in 1972,<sup>105</sup> to name but a few. In 2000, ASEAN member countries had a total of seven cases out of 144 significant incidents of terrorism worldwide.<sup>106</sup> However, after 911, one sees a 'heightened state of security' in most countries in the world.

Following the arrest of Islamic militants in Malaysia and Singapore in end 2001, there is no room for complacency. Countries in this region are looking into closer cooperation such as exchange of information, joint training, among others. For example, Malaysia has stepped up military readiness against militants and it is exchanging information with several countries.<sup>107</sup> The ASEAN military intelligence chiefs also met in Jan 2002 in Malaysia to discuss intelligence sharing in cooperation to curb terrorism. Singapore has also signed the UN convention against financing terrorist activities and taken steps to implement the measures against financing terrorism.<sup>108</sup> More importantly, following 911, Al-Qaeda's links with several Southeast Asian countries were unravelled. These links range from Parti Islam Se Malaysia (PAS) and Kumpulan Mujahideen Malaysia (KMM) in Malaysia, to ASG and MILF in the Philippines, and JI with several bases in Southeast Asia.<sup>109</sup> KMM also operates in Indonesia. The absence of an effective international convention to suppress terrorism should encourage an ASEAN convention in view that regional arrangement is easier to reach as fewer states are involved. Besides, states have similar interests by geographical proximity. Thus, it is easier to compromise and reach an agreement. Last but not least, with the spotlight on terrorism now and the pressure by the US on states to support its war against terrorism, several countries are under immense pressure to *do something*. On 7 May 2002, Indonesia, Malaysia and The Philippines signed a trilateral agreement to facilitate cooperation to fight transnational crime, including terrorism.<sup>110</sup> As the terrorist groups in the region operate in not just one country, it is recommended that countries enter multilateral agreement rather than bilateral or trilateral agreements. This will enhance cooperation and improve efficiency (such as legal arrangements to facilitate extradition) in combating terrorism.

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<sup>105</sup> Ibid., p. 169.

<sup>106</sup> See Patterns of Global Terrorism 2000 at <http://www.usis.usemb.se/terror/rpt2000/appendixc.html>.

<sup>107</sup> See *The Straits Times*, 6 October 2001.

<sup>108</sup> Ibid.

<sup>109</sup> See Rohan Gunaratna, "Al-Qaeda: The Asian Connection", in *The Straits Times*, 4 Jan 2002.

<sup>110</sup> See <http://www.aseansec.org/newdata/sammter.htm>.



The Abu Sayyaf Group (ASG), an Islamic ‘liberation group’ based in Southern Philippines, is considered one of the 29 Foreign Terrorist Organisations by the US Government. The ASG and Moro Islamic Liberation Front (MILF) links with Osama was established in the early 1990s.<sup>111</sup> It conducted operations outside the Philippines for the first time when it abducted 21 people from a Malaysian resort in Apr 2000. The ASG is no longer restricting its acts within the Philippines, which will be a ‘domestic problem’ for the Philippines government to deal with. But it has gone international, went across the border, and kidnapped foreigners in a tourist resort of Malaysia (Sipadan). Furthermore, during the negotiations for hostage release, on 10 Sep, they kidnapped another three from a resort on Pandanan Island in eastern Malaysia. This marked the most serious international terrorism in South East Asia in the last two years. And this should be a wake-up call for regional cooperation to combat terrorism.

Taking the abovementioned case as an example, the ASG poses a threat to the region’s stability and economic growth. First, Malaysia’s tourist industry was affected. Second, following another kidnapping spree by ASG in the Philippines on 27 May 2001, a press report indicated that it cost the Filipino government about US\$160,000 a week to deal with the problems pose by ASG.<sup>112</sup> With its link to international terrorist organisation such as Osama bin Laden’s Al-Qaeda and Ramzi Yousef (who was convicted of the 1993 bombing of the World Trade Centre in New York<sup>113</sup>), it may act on orders from or collaborate with the international terrorist organisation to undertake a series of destructive terrorist activities. Thus destabilising the region and challenging the governments.

The recent arrest of members of the Jemaah Islamiah (JI) Group in Singapore, which has bases in the Philippines, Malaysia and Indonesia, also raised significant concern. JI reportedly planned to launch simultaneous attacks on US embassies in Singapore, Malaysia and Indonesia.<sup>114</sup> Security agencies of the countries in the region are co-operating and sharing intelligence in a bid to fight terrorism. The Al-Qaeda Asian connection is unravelling as days go by, more Islamic militant groups in the region are found to be linked to the Al-Qaeda, either through training or financing their activities.

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<sup>111</sup> See *The Straits Times*, 4 Jan 2002.

<sup>112</sup> See *The Straits Times*, 20 Jun 2001.

<sup>113</sup> See <http://www.usis.usemb.se/terror/rpt2000/>, on Terrorist Organisations.

In other words, terrorism is now everyone's problem and since there is no international agreement to suppress terrorism, why not form a regional convention, like the ECST and OAS. The problems of a convention aside (as pointed out earlier), ASEAN now has the *benefit of hindsight*. It can learn from the weaknesses and adopt the strong points of earlier regional convention on terrorism.

### ***ASEAN on Terrorism***

Following 911, ASEAN has hastened its pace to cooperate on terrorism. The actions taken include a Ministerial Statement on International Terrorism in Hanoi on 12 Sep,<sup>115</sup> Joint Communique at Third ASEAN Ministers Meeting on Transnational Crime (AMMTC) on 11 Oct in Singapore, in particular para 18 on terrorism,<sup>116</sup> and the 2001 ASEAN Declaration on Joint Action to Counter Terrorism on 5 Nov in Brunei. The ASEAN Declaration stated that its focus is on terrorism and it endorsed the convening of an Ad Hoc Experts Group Meeting and Special sessions of the Senior Officers Meeting on Transnational Crime (SOMTC) and AMMTC.<sup>117</sup> In the recent Special AMMTC in Malaysia from 20-21 May 2002, a Joint Communique was reached and called for a "cohesive and united" approach towards terrorism.<sup>118</sup> It also de-linked terrorism with religion, race, culture and nationality.<sup>119</sup> The initiatives include exchange of information, enhancement of cooperation in intelligence sharing and law enforcement, among numerous others.<sup>120</sup> Of significance is the ASEAN Ministers' belief that the lack of a common definition of terrorism will not impede regional efforts to fight terrorism.<sup>121</sup>

Prior to 911, ASEAN's efforts on terrorism included the press release of the 15<sup>th</sup> ASEAN-Japan Forum in Tokyo, 27-28 May 1997, which said that discussions were underway between Japan and ASEAN to establish a network for an exchange of information and opinions in tackling international terrorism.<sup>122</sup> Subsequently, ASEAN

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<sup>114</sup> See *The Straits Times*, 11 Feb 2002.

<sup>115</sup> See [http://www.aseansec.org/politics/inter\\_terror.htm](http://www.aseansec.org/politics/inter_terror.htm).

<sup>116</sup> See <http://www.aseansec.org/newdata/jctc2001.htm>.

<sup>117</sup> See [http://www.aseansec.org/newdata/2001\\_asean\\_declaration.htm](http://www.aseansec.org/newdata/2001_asean_declaration.htm).

<sup>118</sup> See <http://www.aseansec.org/newdata/sammter.htm>.

<sup>119</sup> Ibid.

<sup>120</sup> For details, see <http://www.aseansec.org/newdata/sammter.htm>.

<sup>121</sup> See *The Straits Times*, 21 May 2002.

<sup>122</sup> See <http://www.aseansec.org/dialog/prjap15.htm>.

had a conference with Japan in Oct 1997 to discuss measures to combat terrorism.<sup>123</sup> Following this was the 1997 ASEAN Declaration on Transnational Crime.<sup>124</sup> This is a broad declaration, following the Baguio Communique adopted during the first International Conference on Terrorism held in Baguio City, the Philippines, in 1996. The latter endeavoured to enhance international cooperation against all forms of terrorism through such modalities as intelligence-sharing, coordinated policies and law enforcement training. The Declaration aimed to study the possibility of regional cooperation on criminal matters, including extradition.

At the Asia Regional Ministerial Meeting in 1998, the Manila Declaration on the Prevention and Control of Transnational Crime was made.<sup>125</sup> In a Joint Communique of the 2<sup>nd</sup> ASEAN Ministerial Meeting on Transnational Crime on 23 Jun 1999 in Yangon, Myanmar, it seeks to establish an ASEAN Centre for Combating Transnational Crime.<sup>126</sup> The 3<sup>rd</sup> ASEAN Ministerial Meeting on Transnational Crime was held on 11 Oct 2001 in Singapore. Thus, ASEAN is capable of setting up a committee to explore regional cooperation on the suppression and prevention of terrorism.

### **Pointers for an ASEAN Convention**

1. Defining Acts of Terrorism. All the member countries of ASEAN must agree on a working definition of terrorism, which should encompass all forms of terrorism.<sup>127</sup> It should not be too broad or imprecise, and should not “embrace[s] any form of extra-constitutional conduct and thereby transforms a political opponent into a ‘terrorist’”.<sup>128</sup> Thus, the definition should be simple and yet practical. Like the OAS, ECST and OAU, ASEAN can define what constitutes acts of terrorism, along the lines of those adopted under Article 1 and 2 of the European Convention and Article 1(3) of the OAU. Most important of all is to de-link the terrorist acts and political offence, that is, **exclude** under *all* circumstances those defined terrorist acts as political offences. Because as political offences, the alleged offender can seek asylum and the requested state can refuse

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<sup>123</sup> Ibid.

<sup>124</sup> See <http://www.aseansec.org/politics/adtc97.htm>.

<sup>125</sup> See <http://www.aseansec.org/mancrm98.htm>.

<sup>126</sup> See [http://www.aseansec.org/politics/jc\\_cri02.htm](http://www.aseansec.org/politics/jc_cri02.htm).

<sup>127</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 37.

<sup>128</sup> John Dugard, *Op Cit.*, pp. 74-5.

extradition request. More importantly is to state clearly that motive is irrelevant in determining whether an act of terrorism is committed.

2. No Provisions for Asylum and Refugees. There is no room for any provision on the right of asylum in terrorism convention. In the case of ASEAN, which had Indochinese refugees (boat people) problems, the provision should exclude any obligations for refugees.<sup>129</sup> This sounds really radical, but one has to bear in mind that with the introduction of an asylum provision comes the discretion granted to States to evaluate whether the alleged offender may seek asylum as he may be discriminated, and a host of other problems such as abuse of the power of discretion, among others. To put an end to the chain of problems, I propose leaving out Article 5 of the ECST on asylum.

3. No Provisions for Reservation. Why should states have reservations to signing a convention aimed at dealing with terrorism, if they are not sponsors of terrorism and are sincere about dealing with the issue? The weakness of the European Convention is that it permits reservation under Article 13, leaving much to State's discretion. A State 'reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence...'<sup>130</sup> Thus, there should be no provisions for reservation.

4. Extradition: Principle of *aut dedere aut judicare*. Article 7 should be retained and its principle of *aut dedere aut judicare* on jurisdiction should hold. Along with this principle is the related issue of extradition. If a bilateral extradition treaty has not already existed, then a multilateral treaty on extradition should be formulated and signed along with the terrorism convention. This is because the issue of extradition often arises when the alleged terrorist is caught in a third State, and the requested State may refuse extradition on grounds such as absence of bilateral extradition treaty. Of course, even with such a treaty in force, parties to the treaty may still renege, but then that would be a problem for international law. At least with a treaty in force, the requested state cannot reject extradition on grounds of an absence of a treaty. Thus an extradition treaty will

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<sup>129</sup> See <http://www.aseansec.org/politics/stvbp90.htm>. The implementation of involuntary repatriation will serve as effective deterrent to the exodus of boat people.

<sup>130</sup> See European Convention, *supra* note 24, at art. 1.

facilitate extradition when such a need arises. In sum, the failing of the principle of the *aut dedere aut judicare* has to be properly reviewed so as to strengthen its application.<sup>131</sup>

Besides the above pointers, in order for States to cooperate and reach a convention to deal with terrorism, the most important factor is that “States must show a political willingness to react, and overcome the tendency to excessive caution caused by diplomatic calculation and speculation as to the future”.<sup>132</sup> Basically, a very strong political will is required when combating terrorism. The lack of such will would render any convention useless and one can formulate grandiose plans but things will still not work.

### **An Ideal Convention?**

John Dugard proposed that certain matters be covered in an ideal convention for combating international terrorism.<sup>133</sup> The significant points include:

1. It is every State’s duty to “refrain in all circumstances from encouraging guerrilla activities in another State”.<sup>134</sup> This is also in line with the UN General Assembly Resolution 2131 (XX) which provides that: ‘No State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in the civil strife in another State’.
2. “The convention should prohibit acts of terrorism which strike at the stability of the international order and not those acts which merely undermine the political order in any particular country”.<sup>135</sup>
3. It is important that the convention “expressly state that motive is irrelevant in determining whether an act of terrorism has been committed”.<sup>136</sup> This is important so that a terrorist could not justify his act on grounds of religion, self-determination and liberation

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<sup>131</sup> M Flory and R Higgins (eds.), *Op Cit.*, p. 37.

<sup>132</sup> *Ibid.*, p. 37.

<sup>133</sup> John Dugard, *Op Cit.*, pp. 74-5.

<sup>134</sup> *Ibid.*, p. 74.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*, p. 75.

movements. Most terrorist groups in South East Asia like PULO and ASG, fall into this category, i.e., justifying their acts on grounds of liberation movements.

To rely solely on international conventions to suppress terrorism is insufficient, given the evolving nature of the problems terrorism poses. Terrorism is getting more advanced in terms of technology and communications, mode of operations, among others. Therefore, several methods of cooperation should be adopted in addition to the convention.<sup>137</sup>

## **Conclusion**

International terrorism has three essential elements – politically motivated, criminal, and transcends national boundaries through “the choice of a foreign victim or target, commission of the terrorist acts in a foreign country, or efforts to influence the policies of a foreign government”.<sup>138</sup> The absence of an agreed definition on terrorism has led to a failure to reach an international convention on suppressing terrorism. Nevertheless, ASEAN Ministers said in a recent meeting that the absence of a definition would not hinder regional cooperation to combat terrorism.

The threats pose by international terrorism is real, as seen by the 911 incidents and the extensive global networks established by the Al-Qaeda organisation. Thus, the global community is in need of an international convention to suppress terrorism. However, an international convention is lacking due to the problems of definition of the term terrorism. As long as the problems of definition is not resolved, States will not be able to agree on a definition of terrorism; and there can be no effective international convention to suppress terrorism. Compared to having an international convention by UN regime, a regional convention for the suppression of terrorism offers a more promising prospect, in view that the “interests of the various participating parties are more likely to coincide”.<sup>139</sup> Hence, despite the limits of legal control of terrorism by regional arrangements, the feasibility of an ASEAN convention should be actively explored. Post-911 should give ASEAN added impetus to reach its own convention.

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<sup>137</sup> See Alona E. Evans and John F. Murphy (eds.), *Op Cit.*, p. 486.

<sup>138</sup> Thomas Moodie Kuhn, *Terrorism in International Law* (1980), p. 61.

<sup>139</sup> *Ibid.*, p. 145.

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