

NOTE

CONFISCATION OF TERRORIST FUNDS: Can the EU Be a Useful Model for ASEAN?

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The counter-terrorist financing regime has been developed and diffused rapidly since the 9/11 attacks. The two central components of the regime are criminalization of acts of financing and confiscation of terrorist funds. These measures, which duplicate US laws on terrorist financing, have been designed to impose liability on, and confiscate assets and property of, those who finance or associate with terrorism regardless of whether there is a link between their act of financing or associating and a terrorist act. In the absence of such connection between the offense of terrorist financing and its subsequent crime of terrorism, a question arises: What is the legal basis for imposing liability on suspected financiers and confiscating their assets and property? This ambiguity has never been properly addressed by the creators of the regime or by those who promote the regime. This paper explores whether and how this ambiguity has been addressed at the regional level among the Member States of the Association of South East Asian Nations (ASEAN) where the agenda of countering terrorism has been largely shaped by external actors, mainly the Western states and international organizations established and controlled by them. Considering the fact that counter-terrorism has entered the agenda in the political dialogue between the EU and ASEAN, it is worth examining whether EU laws and policies on terrorist financing offer themselves as a model for ASEAN to emulate. The paper concludes that the EU, a value-based community, has failed to deal with the issue of terrorist financing effectively. This has resulted in draconian and unjustified overreach of the forfeiture laws and policies which, in many ways, are inconsistent with the rule of law, human rights, democratic values and good governance.

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INTRODUCTION

The EU claims a genuine strategic interest in developing and strengthening its relationship with the Association of South East Asian Nations (ASEAN).¹ They both share the same goals for their citizens: fostering peace and stability, creating prosperity, and dealing with global and regional issues via a multilateral approach.² In order to reach these goals, they each emphasize adherence to a number of fundamental principles, such as respect for the rule of law, good governance, fundamental freedoms, the promotion and protection of human rights and social justice, the principles of democracy, and constitutional governance.³

They also have a number of ties. Economically, ASEAN has become one of the largest EU trading partners (EU's second-largest sales market and EU's third-largest trading partner outside Europe, after the US and China).⁴ The EU is also the second-largest investor in ASEAN as well as its third-largest trading partner (after Japan and China). Politically, since the EU became a member of the ASEAN Regional Forum, both parties have deepened and stretched their interregional cooperation in understanding and addressing international and regional security issues. The EU has made significant contributions to efforts towards "confidence-building" and "preventive diplomacy" in the ASEAN region, such as democratic government transitions in Cambodia and East Timor.⁵

Following the terrorist attacks on September 11, 2001 and subsequent terrorist attacks in Europe, regional security developments have become particularly important for European foreign policy and security. The EU has realised that despite the geographical distance between Europe and other regional conflicts, their political or economic stability can be affected by these conflicts.⁶ Consequently, counter-terrorism cooperation has become the EU's top priority in its political dialogues with other states. Europe is of the opinion that "by strengthening the capabilities of third states to combat terrorism before it reaches the EU's borders, the EU's internal security is in turn protected."⁷

1. *Council Conclusions on EU-ASEAN Relations*, COUNCIL OF THE EUR. UNION (June 22, 2015, 1:35 PM), <http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-asean-conclusions> [<https://perma.cc/X3JJ-HGSX>].

2. Treaty on European Union, Dec. 13, 2012, 2012 O.J. (C 326), art. 3. See Association of South East Asian Nations Charter, art. 1–2, August 8, 1967.

3. *Id.*

4. *Association of South East Asian Nations (ASEAN)*, EUROPEAN COMM'N (Apr. 29, 2016), <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean> [<https://perma.cc/X8C7-FXUP>].

5. FRANK UMBACH, *EU-ASEAN POLITICAL AND SECURITY DIALOGUE AT THE BEGINNING OF THE 21ST CENTURY: PROSPECTS FOR INTERREGIONAL COOPERATION ON INTERNATIONAL TERRORISM* (2004), http://www.ssoar.info/ssoar/bitstream/handle/document/13162/ssoar-panorama-2004-1-umbach-eu-asean_political_and_security_dialogue.pdf?sequence=1 [<https://perma.cc/3G4E-DS6L>].

6. *Id.*

7. Felix Heiduk, *In It Together Yet Worlds Apart? EU-ASEAN Counter-Terrorism Cooperation After the Bali Bombings*, 36 J. EUR. INTEGRATION 696, 698 (2014).

After the 2002 terrorist bombings in Bali and the Philippines, and the threat of piracy and terrorist attacks in the waterway connecting Asia to Europe and the Middle East known as the Straits of Malacca, regional cooperation against terrorism has been added to the agenda in EU dialogues with ASEAN. The EU and ASEAN signed the Joint Declaration on Co-operation to Combat Terrorism at the 14th ASEAN-EU Ministerial Meeting, calling for the enhancement of their cooperation to fight against terrorism. In doing so, they acknowledged the leading role of the United Nations in the fights against terrorism, and reaffirmed their strong commitment to the universal implementation of counter-terrorism conventions and resolutions. In its strategic documents, the EU has repeatedly listed “the fight against terrorism” as one of the strategic priorities of the EU towards ASEAN.⁸ The EU stresses that the two regions “find themselves more dependent on one another in addressing global challenges” and that it “therefore wishes to broaden its programme of cooperation with South-East Asia.”⁹ From the EU perspective, counter-terrorism strategies must include not only short-term measures such as security and public order measures, but also long-term measures which seek to address “the complex and manifold root causes of terrorism (poverty, low education, failing pluralism, and freedom of opinion etc.)”¹⁰ The EU encourages ASEAN to distinguish between “peaceful political opposition” and terrorism, and to respect human rights.¹¹ The EU also stresses that any cooperation or political dialogue with the ASEAN should contain an essential element clause, promoting human rights, rule of law, democratic principles and good governance.¹²

Despite the strong determination to broaden and deepen EU-ASEAN cooperation in the fight against terrorism, “[n]o legally binding cooperation agreements” in the relevant area have been made between the EU and ASEAN.¹³ Instead, the EU has engaged in a series of workshops and conferences, addressing a broad range of terrorism and terrorist-related issues. The EU has, on occasion, provided some limited assistance to individual ASEAN Member States in their counter-terrorism programmes, such as providing financial assistance to the Philippines for efforts on money laundering and border management.¹⁴

8. *See id*; *see also* European Commission, *A New Partnership with Southeast Asia* COM. (2003) 399/4 [hereinafter European Commission, *A New Partnership*]; European Commission, *Nuremberg Declaration on an EU-ASEAN Enhanced Partnership* (Mar. 15, 2007); European Commission, *Plan of Action to Implement the Nuremberg Declaration on an EUASEAN Enhanced Partnership* (2007); European Commission, *Bandar Seri Begawan Plan of Action to Strengthen the ASEAN-EU Enhanced Partnership* (Apr. 27, 2012).

9. European Commission, *A New Partnership*, *supra* note 8.

10. UMBACH, *supra* note 5, at 16.

11. European Commission, *A New Partnership*, *supra* note 8.

12. *Id.*

13. Heiduk, *supra* note 7, at 708.

14. THE EC-PHILIPPINES STRATEGY PAPER 2007–2013, EUR. UNION, http://www.eeas.europa.eu/philippines/csp/07_13_en.pdf [<https://perma.cc/JT8S-85YS>].

Similarly, cooperation in the field of counter-terrorist financing has not been significant. The EU seems to insist on the adoption and implementation of the current counter-terrorist financing regime, which was provided by the 1999 International Convention for the Suppression of the Financing of Terrorism (hereinafter Terrorist Financing Convention) and which has been promoted by international organizations such as the Financial Action Task Force (FATF). In this regard, the EU's support of counter-terrorist financing has not advanced beyond the provision of financial or technical assistance to some ASEAN Member States (for example, provision of assistance to Indonesia in fighting terrorist financing and building judicial capacity).¹⁵

At the ASEAN level, while there seems to be a strong commitment to establish a comprehensive counter-terrorism regime, not much work has been done to deal with issues of terrorist financing. Instead, individual ASEAN Member States have created and are developing their own counter-terrorist financing regime with the help and support, and under the guidance, direction and supervision, of international organizations such as FATF or the Asia/Pacific Group on Money Laundering, a FATF-style regional body for the Asia/Pacific region.¹⁶ These international organizations have made a significant attempt to diffuse and promote the existing counter-terrorist financing regime established by the Terrorist Financing Convention, FATF recommendations, and UN resolutions on freezing terrorist funds. This diffused regime, which mirrors US counter-terrorism law, provides a wide range of tools in the fight against terrorist financing. Criminalization and confiscation are two important legal tools which will be examined by this paper.

Criminalization of terrorist financing as an independent offense is considered by the regime as the first and the most important step in countering terrorist financing. However, this conceptualization (terrorist financing as an autonomous crime) suffers from a remarkable degree of ambiguity.¹⁷ Financing of terrorism, in its nature and under the general rules of criminal law, is a preparatory act which obtains its criminality from its connection with a terrorist act for which the financing is carried out. However, in order to establish an independent offense of terrorist financing, there is no need (for the prosecution) to connect the act of

15. *Indonesia—European Community Strategy Paper 2007–2013*, EUR. UNION, http://eeas.europa.eu/indonesia/csp/07_13_en.pdf [<https://perma.cc/P899-2SNE>].

16. Jason Sharman argues that anti-money laundering policies, which later were expanded to include terrorist financing, have been diffused in developing states “through the direct effects and indirect effects of power, rather than through rational learning, in response to brute material pressure, or to address local policy problems.” He argues that International organizations such FATF have directly or indirectly shaped the circumstances and fates of developing states in this area.” “[D]irect coercion, mimicry, and competition” are three mechanisms used to diffuse the measures. Jason Sharman, *Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States*, 52 INT’L STUD. Q. 635, 653 (2008).

17. See Hamed Tofangnaz, *Rethinking Terrorist Financing: Where Does All This Lead?*, 18 J. MONEY LAUNDERING CONTROL 112 (2015).

financing to any terrorist act. Otherwise, terrorist financing would come close to the concept of complicity or an inchoate crime. In the absence of such connection, the main difficulty is where the criminality of the offense originates? The offense, as formulated, relies heavily on its mental element to remedy this ambiguity—that is, a financer should intend or know that funds will be used for terrorist purposes. However, it is not clear what constitutes ‘terrorist purposes.’ This ambiguity is further complicated by the lack of agreement on a generic definition of terrorism. Thus, it is not clear what ‘terrorist purposes’ refer to, even though this is the main basis for the attribution of guilt to the accused.

Similarly, having terrorist purposes is the main basis for the seizure and confiscation of suspected funds; that is, the accused’s funds and property can be forfeited on the basis of an assumption that the funds may be used for terrorist purposes, and this is not necessarily an actual use of funds for a criminal act. The freezing of the assets of those listed by the UN Security Council or UN Member States as terrorists, terrorist organizations, terrorist associates or terrorist financers does not require proof of the terrorist purposes of the possessors or owners of these assets. As soon as a person is suspected, he or she is announced a terrorist, and all of his or her assets are frozen, without the right to be heard, right to be presumed innocent, or the right of appeal.

Under such a vague regime, it is uncertain how the existing counter-terrorist financing regime can maintain and promote those fundamental principles (human rights, rule of law, social justice, etc.) that the EU in its dialogues with ASEAN has laid particular stress on. My research aims to explore the approach of the EU, a value-based community, in adopting and implementing current counter-terrorist financing measures. I will also determine whether and how the EU has addressed the ambiguity and issues inherent in the counter-terrorist financing regime, and whether EU laws and policies on criminalization and confiscation of terrorist financing offer a regional model for ASEAN to emulate.

This paper is divided into three main parts. The first part will explore the history of the development of confiscation regulation. It will illustrate how the concept of confiscation has evolved and will discuss the influence of the US in the formation of the current freezing and confiscation regime. The second part will show how the regime has been implemented by individual ASEAN Member States (Singapore, Malaysia, Indonesia and Singapore). The regulatory problems and human rights issues arising from the implementation of the regime will be discussed. In the final and main part of this paper, EU’s law and policies on criminalization and confiscation will be assessed. I will examine thoroughly how the EU and its individual Member States have addressed those regulatory problems arising from the poor conceptualization of the offense of terrorist financing and from the implementation of the freezing and confiscation of terrorist funds. I will also show that the EU has adopted and implemented the terrorist financing measures without seriously

addressing these issues. This has resulted in the extreme overreach of the forfeiture laws and policies. I will conclude that the EU's and its Member States' approach in criminalizing terrorist offence and confiscating terrorist funds is in many respects in contradiction with their policy and emphasis on the protection and promotion of human rights, rule of law, democratic values and good governance. Therefore, the EU seems to be a poor model for ASEAN to follow.

I. A BRIEF HISTORY OF THE DEVELOPMENT OF FORFEITURE LEGISLATION

There is a lengthy history behind the States' power of seizure and forfeiture,¹⁸ which is beyond the scope of this paper. But in order to understand the complexity and function of modern forfeiture law, it is important to briefly introduce the historical concepts that it is based on. The history of English law in particular has had a significant influence on the current and increasingly globalized laws on confiscation. A closer look reveals that the basis of our current drug-forfeiture regime is an ugly reconstruction of ancient abolished concepts. As it will be illustrated, the expansion of this regime to include terrorist funds has created a draconian forfeiture regime.

A. *Ancient Concepts of Forfeiture*

Asset seizure and forfeiture have existed as legal hybrids of criminal and civil penalties for thousands of years.¹⁹ They were rooted in the ancient concepts of "corruption of blood" and "deodand." Until 1840, a person in England who was convicted of treason or a felony and who was sentenced to death was subject to "the automatic extinction of his civil rights . . . including the right to hold, inherit or dispose of property"²⁰ (forfeiture of estate). The confiscated objects did not need to be connected to an offense, but were confiscated simply because the crime was regarded as "a breach of the offender's fealty to his lord."²¹

18. Nowadays and in this paper, the terms confiscation and forfeiture are used interchangeably. But traditionally and literally, "the subject matter of forfeiture is generally specific property immediately connected with the commission of an offence. Confiscation is a more modern term often used, in contradiction to forfeiture, to denote deprivation of an offender of assets being the proceeds, or profits of crime." However, the difference between these terms is blurred as in many legal national and international legal laws, the term forfeiture includes confiscation of proceeds of crime. Brent Fisse, *Forfeiture, Confiscation and Sentencing*, in *THE MONEY TRAIL: CONFISCATION OF PROCEEDS OF CRIME, MONEY LAUNDERING AND CASH TRANSACTION REPORTING* 109 (Brent Fisse, David Fraser & Graeme Coss eds., 1992).

19. David Fraser, *Lawyers, Guns and Money; Economics and Ideology on the Money Trail*, in *THE MONEY TRAIL: CONFISCATION OF PROCEEDS OF CRIME, MONEY LAUNDERING AND CASH TRANSACTION REPORTING* 51 (Brent Fisse, David Fraser & Graeme Coss eds., 1992).

20. Arie Freiberg, *Criminal Confiscation, Profit and Liberty*, 25 *AUSTL. & N.Z. J. CRIMINOLOGY* 44, 46 (1992).

21. *Id.*

The concept of deodand, which meant a “thing forfeited, presumably to God for the good of community, but in reality to the English crown,”²² also permitted confiscation when an inanimate object was the cause of the death of any reasonable creature. The Biblical example of this is a “goring ox” sentenced to death by stoning for killing a man.²³ A similar notion formed the basis of confiscation in ancient Greece, where it was believed that “inanimate objects [which caused death] had personalities and could be possessed by *Erinys*, the Furies,” and had to be banished.²⁴ Confiscation in this form proceeded on the fiction that if the object was guilty, it should be held forfeit as a dangerous thing which had to be removed from circulation. The foundations of the modern confiscation law seem to be based on this notion, allowing governments to confiscate guns, cars with concealed compartments that are used for drug smuggling, or electronic devices used for child pornography even in the absence of a conviction.²⁵

Even by thirteenth century, when the law of deodands was transformed for more practical purposes into a revenue producing function, the same practice was followed. Thus “[an] animal that killed a person, the wheel of a water mill that crushed him, and the cart that ran over him” were all confiscated to the Crown as deodands (or an equivalent value in money was paid to the Crown), as the Crown was responsible for keeping the peace that was disturbed by the death.²⁶ Interestingly, a similar analogy was used by the US government when it sued the rifle used to assassinate President Kennedy, forfeiting the gun for public as compensation.²⁷

The law of deodands survived the Reformation by its justification as a deterrent against misfortunes. It was argued that accidental deaths “are in part owing to negligence of the owner, and therefore he is properly punished by such forfeiture.”²⁸ Deodands would presumably result in better care on the part of the owner.

However, in the nineteenth century, the increase in the frequency of deaths, which resulted from industrialization, urbanism and the development of the railroad, and which required the provision of a remedy to the victims’ survivors (instead of confiscation to God or the Crown), necessitated the consideration of an alternative to deodands.²⁹ The Crown also

22. LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 7 (1996).

23. Exodus 21:28: “If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten.”

24. LEVY, *supra* note 22 at 9.

25. Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 55 U.S. ATTYS’ BULL. 8. (2007).

26. LEVY, *supra* note 22, at 13.

27. *United States v. One 6.5 Mm. Mannlicher-Carcano Military Rifle*, 250 F. Supp. 410, 414 (N.D. Tex. 1966).

28. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 301 (1765).

29. LEVY, *supra* note 22, at 11–12.

lost interest in deodands “as it was increasingly ineffective as a source of revenue and the Crown found that it could more effectively raise revenue by taxation than forfeiture.”³⁰

Therefore, from 1870 to 1980, a series of statutory forfeitures were enacted that “paved the way for the reversion of wrongful death to the realm of civil tort law”³¹ but also restricted the scope of the law of deodands in a way that acknowledged the right of victim’s survivors to compensation and withdrew the Crown or King from “direct concern as an ‘injured’ party.”³² Even in cases of felonious homicide (the equivalent of intentional murder today), the confiscation of a convicted felon’s property to the Crown was replaced with other penalties, such as deprivation of life and liberty.³³

Although these statutory forfeitures sought to abolish the deodands and the corruption of blood, they had a clear bias for protecting Crown or state revenue, the health and safety of community, and the quality of its products.³⁴ Therefore, they were based on objective criminal liability, which “allowed little scope for distinguishing culpability on the basis of subjective states of mind.”³⁵ In other words, as Freiberg says, these

Statutory forfeitures proliferated together with regulatory offences to create and support the modern administrative state. As a general rule, the collective interest in conviction took precedence over the concept of personal guilt. It is this social defence of forfeiture law which partly explain[s] . . . the Draconian overreach of the modern forfeiture law.³⁶

This also proved to be a landmark, “opening up an entirely new realm of the criminal law, namely that which has come to be known as ‘Public Welfare Offences,’”³⁷ a type of offense that does not require any mental element.³⁸ So it was not surprising that after the abolition of the law of deodands and corruption of blood, the early statutory forfeitures such as admiralty (maritime) laws³⁹ included cases where, for example,

30. Freiberg, *supra* note 20, at 47.

31. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L. Q.* 169, 198 (1973).

32. In 1846, the Parliament in England enacted the Act for the Compensation the Families of Persons Killed by Accidents. *See id.* at 198.

33. With the enactment of Forfeiture Act 1870, 33 & 34 Vict. c. 23 (1870) in England, forfeiture for treason and felony was abolished. In the US, the Act of April 20, 1790, 1 St. 117, ch. 9, sec. 24, codified 18 U.S.C. § 3563, abolished forfeiture of estate and corruption of blood, including treason and felony cases.

34. *Regina v. Woodrow*, (1846) 15 M. & W. 403, 409–13.

35. Freiberg, *supra* note 20, at 47.

36. *Id.*

37. Finkelstein, *supra* note 31, at 198.

38. Finkelstein refers to decision of the court in the case *Regina v. Woodrow*, 15 M. & W. 403 (1846) as a landmark. The court ruled that “forfeiture may be incurred even in circumstances where there was no intention of fraud and the in the absence of the word “knowingly from the statute forfeiture.” *Id.* at 199.

39. *See e.g.*, Navigation Acts of the mid-17th century in England remained in

ships should be forfeited without inquiry into the guilt of the owner for slave-trafficking, piracy and rum-running.⁴⁰ Similarly, customs and revenue statutes⁴¹ allowed the forfeiture of land used in the operation of illegal tax-delinquent distilleries.⁴²

B. *Forfeiture Laws in the War on Drugs: The US Approach*

Despite this repressive character, the power of statutory forfeitures began to appear “inadequate” in the fight against what were characterized as the two growing problems of the second half of the twentieth century—drugs and organized crime.⁴³ In the 1970s in the US, where the well-springs of both problems arose and where remedies crystalized into a model for other countries to follow, a loud call for an attack on (what Naylor calls the exaggerated and mythical)⁴⁴ wealth of drug-affiliated organized crime groups was issued. They were considered “as a particular danger” as they “threatened the governmental process, depleted the public purse and subverted and nullified the political process through graft and corruption.”⁴⁵ The fear was also instilled in the public that organized crime wealth could be used to take over legitimate business activities.⁴⁶ It was whispered that the existing confiscatory laws, which authorized only *in rem* actions against contraband or articles put to illegal use (in other words, the instrumentalities of a crime),⁴⁷ lacked deterrent efficiency because they were not able to put criminal organizations out of business. President Nixon said, “[a]s long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.”⁴⁸ Thus, a demand rose for new weapons and tools which could permit the government to strike at the mafia’s source of revenue.

place in England, requiring that any ships importing or exporting goods from England ports fly under the England flag. If the Acts were violated, the ships or the cargo could be seized and forfeited to the crown regardless of the guilt or innocence of the owner.

40. See *e.g.*, *United States v. Stowell*, 133 U.S. 1 (1890); *United States v. Brig Malek Adhel*, 43 U.S. 209, 233 (1844).

41. For example, Act of July 13, 1866, Chapter. 184, Section. 14 (14 U.S. stat.) did not limit the scope of seizure and forfeiture of the properties used for fraud to the guilty mind of the owner. So the property used for the commission of a crime could be forfeited in a civil action only if the lessee had the intention to commit the crime.

42. See *Coffey v. United States*, 116 U.S. 436 (1886).

43. Freiberg, *supra* note 20, at 47.

44. Naylor argues that “every rational assessment indicates that the sums of criminal money supposedly involved are grossly exaggerated.” See R.T. NAYLOR, *WAGES OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY* 18–19, 134 (2002).

45. Freiberg, *supra* note 20, at 48.

46. NAYLOR, *supra* note 44, at 34–35.

47. For example, the Contraband Seizer Act of 1939 and its amendment in 1950 restricted confiscation to instruments and properties used in drug trafficking. *Contraband Seizure Act*, 53 Stat. 1291 (1939).

48. See U.S. CONGRESS, *MEASURES RELATING TO ORGANIZED CRIME: HEARINGS, NINETY-FIRST CONGRESS, FIRST SESSION* 44–50 (U.S. Government Printing Office, 1969).

As a result, new legislation under Title IX of the Organized Crime Control Act 1970, known as RICO (Racketeer Influenced and Corrupt Organizations Act of 1970), was enacted to proscribe the use of dirty money acquired and maintained through racketeering for the legal acquisition or operation of a legitimate enterprise by organized groups. This legislation, as well as subsequent legislation⁴⁹ intended to be civil in nature, adopted the principles of antitrust laws and applied it to the problem of organized crime. In a radically innovative manner, it authorized civil actions against certain contraband or property used in the commission of a narcotic crime or acquired from it by imposing a lower standard of proof (balance of probabilities) as well as greater powers of investigations in criminal cases. However, forfeitures could not take place until after the conviction of an offender.

Within only a few years, these civil forfeiture laws were found to be unproductive because of their less extensive coverage and because they were “limited to persons convicted of participating in continuing criminal enterprises.”⁵⁰ Accordingly, the US Congress extended the reach of the forfeiture statutes to include the forfeiture of all proceeds traceable to the purchase of a controlled substance as well as any negotiable instrument or money intended to facilitate violations of the narcotics laws.⁵¹ It also “greatly expanded the potency and scope of forfeiture by authorizing *in rem* actions, which provide few of the constitutional guarantees that are attached to a criminal indictment.”⁵² This amendment, which included the relation-back doctrine, provided that all right, title and interest in property which is “used or intended to be used, in any manner or part, to commit or facilitate” the commission of a crime giving rise to forfeiture would vest in the government immediately when the crime is committed.⁵³ While the main purpose of this expansion was to close a potential loophole that would allow escape from forfeiture through the sham transfer of such a property to a third party,⁵⁴ it was criticized mainly

49. See e.g., the Comprehensive Drug Abuse and Prevention Act of 1970, PUB. L. No. 91-513, 84 Stat. 1236, or the Organized Crime Control Act of 1970, PUB. L. No. 91-452, 84 Stat. 922, which criminalized racketeering participation in commercial ventures and allowed the civil forfeiture of all interests held in violation of the law.

50. Scott Alexander Nelson, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug*, 26 ST. MARY'S L.J. 157, 159-60 (1994).

51. In 1978, this amendment added subsection (a)(6) to 21 U.S.C. § 881 (1988) to the Comprehensive Drug Abuse Prevention and Control Act of 1970.

52. Nelson, *supra* note 50, at 160.

53. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881(h) (1988).

54. Levy shows that while the drug forfeiture laws were aimed at starving the drug organized groups of the profits of their crime, as soon as they came into effect, they were mostly used against “the little people.” He also considers the forfeiture laws as a “failure,” pointing out that although they were aimed at preventing the criminal infiltration of organized groups into legitimate business, “very few . . . indictments involved the charge that the accused used the proceeds of a pattern of racketeering activity to acquire an interest in an enterprise.” LEVY, *supra* note 22, at 207.

for its harsh results of shifting the burden of proof to the accused,⁵⁵ and for allowing the forfeiture of property with scant regard to the innocence or guilt of the owner of the forfeited property, which closely resembled the long-abolished common law concept of deodand which allowed the forfeiture of property on the basis of the fiction of guilty property.⁵⁶

Despite criticisms, the unjust expansion of the scope of forfeiture laws continued. An amendment was added, which allowed seizure and forfeiture of the "substitute" assets of an offender (value confiscation), in case the offender could get rid of the property subject to forfeiture.⁵⁷ This amendment was criticized for violating the Eighth Amendment protection against excessive, cruel and unusual punishment,⁵⁸ and for violating

55. Under civil forfeiture, in order to confiscate a property, the government only needs to demonstrate that there is a probable cause to believe that a substantial connection exists between the property and the illegal activity. For example, in *United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5th Cir. 1977), the government claimed forfeiture of a truck by only showing probable cause that the truck was employed to facilitate concealment, possession, or transportation of cocaine. Probable cause may entirely be based on circumstantial evidence, hearsay or an anonymous informant's tip (without being tested in court), and it can be simply met by lodging a complaint by the government. If the accused fails to prove the innocence of his property, or fails to prove he did not know his property was involved in illegal action, he will lose it. In other words, as Levy discusses, in civil forfeiture, forfeiture proceedings are against property not a person, so "the property which has no rights is accused of crime and convicted on the basis of a showing of probable cause." LEVY, *supra* note 22, at 124. This turns upside down the presumption of innocence. Property is guilty until the owner proves otherwise. Levi further argues and illustrates that such lenient burden of proof on the government empowers the government with "draconian forfeiture weapons" to seize and confiscate a citizen's property without observing their constitutional rights and without insuring that "guilt and innocence is fairly determined." *Id.* at 117.

56. While the amendment recognized the "innocent owner defense" by allowing a party (owner) to plead that the crime took place "without the [his] knowledge or consent," in practice, the controversy arises on what constitutes an owner defense. Is there a defense when the owner knew about the illegal use of his property, but had not consented to it? Does a claimant need to demonstrate that the illegal use of his property took place without his willful blindness? See *US v. One Single Family Residence Located at 6960 Miraflores Avenue*, 995 F.2d 1558 (1993). Several courts ruled that the claimant must demonstrate both that he lacked actual knowledge and consent, and that he did everything reasonably possible to prevent misuse of the property. See *e.g.*, *United States v. One Single Family Residence*, 683 F. Supp. 783 (1988). Levy argues that this reading was not satisfactory as it unfairly resulted in the rejection of the innocent owner defense of, for example, a woman who forfeited her car because she permitted her son, who had a criminal record for drug dealing, to drive her car. LEVY, *supra* note 22 at 164-65. The son used the car for a drug transaction without his mom knowing or consenting to such an illegal use. Nevertheless, the car was forfeited.

57. Anti-Drug Abuse Act of 1986, 21 U.S.C. § 1153(a).

58. The forfeiture of substitute assets does not strike some as being fair as it could include the forfeiture of innocents. Levy warns that such an amendment may make an honest shopkeeper forfeit his entire business "if he got mixed up in a single fraudulent scheme." LEVY, *supra* note 22, at 116. In the case of money laundering, such a forfeiture law can have unfair and dramatic impact on, for example, "a securities lawyer who prepares a prospectus which his clients, investment promoters, use to raise

the constitutional provision against the doctrine of “forfeiture of estate.”⁵⁹ The establishment of money laundering offenses, which some argue “was shaped not by a rational request for an effective way to deal with a well-understood problem but by a mix of myth, hyperbole, and delirium,”⁶⁰ greatly expanded the policy and scope of forfeiture by authorizing *in rem* actions against any property involved in financial transactions that represented the proceeds of some form of unlawful activity, or that was involved in concealing and disguising the illegal origin of property.⁶¹ The most distinct feature of the anti-money laundering laws is their expansiveness; they include “over one hundred possible offenses including not only drug trafficking, but also such things as, fraud, espionage, and environmental crimes,”⁶² crimes that do not have provisions which permit forfeiture of proceeds of those crimes.⁶³

\$1.5 million from investors in 2004. Assume that the lawyer also allows his attorney trust account to be used to receive the funds and that he then transfers the funds to entities controlled by his clients. The government, claiming that the lawyer knew that the prospectus contained material omissions and misstatements, brings money-laundering charges, and a count seeking criminal forfeiture of \$1.5 million, based on the lawyer’s transfers of funds he knew were obtained by securities fraud. Assume that most of the lawyer’s own assets are represented by his home, worth \$2.0 million, which he purchased in 1995 with funds he earned through years of honest toil well before he ever met the clients alleged to have conducted the 2004 fraud. Nevertheless, because the lawyer transferred the \$1.5 million in alleged tainted money to third parties—his clients’ entities—the government can list the lawyer’s home in the indictment as a ‘substitute asset’ subject to forfeiture up to \$1.5 million and can, in the event of the lawyer’s conviction, seek the forfeiture of that home if the tainted \$1.5 million is unavailable.” Richard F. Albert & Amy Tully, *A Bad Fit—Criminal Forfeiture of Substitute Assets, the Lis Pendens*, 234 N.Y. L.J. (2005).

59. Traditionally, there is a constitutional requirement of a connection or nexus between the crime and the property forfeited. Some are of the opinion that “the forfeiture of an equivalent value of substitute assets resembles ‘forfeiture of estate,’ particularly in the common case of the criminal whose property is traceable to illegal activity and whose illegal gains over time exceed the value of his current assets.” See e.g., *United States v. Ginsburg*, 773 F.2d 798, 806 (7th Cir. 1986) (Ripple, J., dissenting), cert. denied, 475 U.S. 10, 11 (1986) (cited by David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 344–45 (1988)).

60. See R.T. NAYLOR, COUNTERFEIT CRIME: CRIMINAL PROFITS, TERROR DOLLARS, AND NONSENSE 98 (2014). Naylor argues that anti-money laundering regime in the US was shaped on the basis of some “erroneous or exaggerated beliefs” about amount of money generated by organized groups, the durable nature and hierarchical structure of these groups, the purposes of these group to infiltrate into legitimate businesses and corrupt them, the financial motivation of these groups (as only motivation), and bankers’ desire to be “the devil’s apprentices” (“an opinion reinforced by widely repeated stories about the misdeeds of Swiss bankers in particular.”) See R.T. Naylor, *Criminal Profits, Terror Dollars and Nonsense*, 23 CRIME AND JUST. INT’L 27–29 (2007).

61. Money Laundering Control Act of 1986, 18 U.S.C. § 1956 (1986).

62. Scott Saltzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L.R. 143, 161 (1995).

63. Money Laundering Control Act of 1986, *supra* note 61, § 1956(c)(7).

C. *Forfeiture of Terrorist Funds: A Reversion to Primitive Conceptions*

Prior to 2001, some steps were taken to reform US civil forfeiture laws due to their constitutional challenges and unfair consequences.⁶⁴ But the terrorist attacks of 2001 created incentives for the US to push forward the globalization of the assumption that there is a nexus between organized crime and terrorism.⁶⁵ Consequently the US expanded its forfeiture strategy to include the so-called financial war on terror⁶⁶ without regard for the differences between terrorist money, which normally has legal origin, and dirty money (proceeds), which is connected to an actual crime committed. As a result, the USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001)⁶⁷ was adopted (or in the view of Naylor, “sold to the public as the necessary response”).⁶⁸ The Act

64. The Civil Asset Forfeiture Reform Act was enacted in 2000 in order to make a number of changes to the US forfeiture laws. For example, the prosecution is required to establish, by a preponderance of the evidence, “that the property is subject to forfeiture” (18 U.S.C. § 983(b)(2)(A) (2000)). Prior to this amendment, the government could freeze a property on only probable cause (*See supra*, note 55). The amendment also allows the courts to “reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment” if “the forfeiture is grossly disproportional to the offense” (18 U.S.C. § 983(g)(4)(2000)). Prior to this amendment, there was no balance between forfeiture and gravity of an offense (*See supra*, note 58). However, as Johnson argues, these amendments failed to fully solve the problems that arose from the prior the forfeiture laws. “[T]he Act fails to completely equalize the burdens of proof required by the government and innocent owners.” Also, “the amendment failed to adopt the proper inquiry under the Excessive Fines Clause and instead only uses a proportionality inquiry.” *See* Barclay Thomas Johnson, *Restoring Civility the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 INDIAN L. REV. 1045, 1084 (2002).

65. While the International Convention for the Suppression of the Financing of Terrorism (G.A. Res. 54/109 U.N. Doc. A/Res 54/109 (Dec. 9, 1999)), which was initiated and drafted by the G8, was made to instill the idea that terrorism and organized crime are similar in terms of making and moving money, so similar tools to anti-money laundering regime can be used to counter it, before the 9/11 attacks, only four countries, not including the United States, signed the Convention. The UN Security Council (obviously by a US push) adopted Resolution 1373 (S.C. Res. 1373, U.N. Doc S/Res/1325 (Sept. 28, 2001)) which calls upon all countries to ratify the Convention and requires seizure of any funds directly or indirectly related to terrorism and terrorist groups.

66. Naylor argues that the idea of war on terror “heartily endorsed both by media pundits and by the growing army of post-9/11 ‘national security experts,’ did not emerge suddenly from the fevered mind of some Republican Party spinmeister. It had been gaining converts for decades before it crystallized in the legislative and military aftermath of 9/11. The anti-Mafia hysteria that had gripped the United States during the late nineteenth and much of the twentieth centuries provided the images, the vocabulary, and even some of the important legal weaponry deployed in the anti-Islamic Terror campaign of the late twentieth and early twenty-first.” *See* R.T. NAYLOR, *SATANIC PURSES: MONEY, MYTH, AND MISINFORMATION IN THE WAR ON TERROR* 46 (2006).

67. 18 USC § 1 (2001).

68. Naylor, *supra* note 66, at 11.

was the result of the combination of two earlier strategies: the forfeiture strategy, which had been employed in the war on drugs, and a second strategy, which developed from the experience of economic warfare during and after World War I.⁶⁹ The latter gives the government (specifically the President) authority to seize any property or transaction by declaring those who control the property or engage in the transaction to be an “enemy” of the State.⁷⁰

The combination of these two strategies in the fight against terrorist financing resulted in the expansion of the scope of the forfeiture regime in an unprecedented manner. The Act allows the seizure and forfeiture of “all assets” of people who, on a balance of probability, are shown to be connected, in any way, to terrorism; that is, the government can forfeit “all assets,” foreign or domestic, of any individual or organization engaged in planning or preparing a terrorist act, all assets “affording any person a source of influence over any such entity or organization,” all assets “acquired or maintained with the intent and for the purpose of supporting, planning, conducting, or concealing” a terrorist act, and all assets “derived from, involved in, or used or intended to be used to commit any [act] of terrorism.”⁷¹ The US forfeiture law also permits the forfeiture of any property collected or provided for terrorism without a need to prove any connection between the property and an actual terrorist act.⁷²

Unlike the provisions on illegal drugs and money laundering, in which the forfeiture is limited to the forfeiture of assets derived from crime (in other words, the proceeds of crimes) or assets used or intended to be used for commission or facilitation of crime, the terrorist forfeiture provisions of the Patriot Act do not require “any substantial connection between the property and terrorist activity nor any sense that particular

69. Naylor argues that this strategy began to be used to counter terrorist financing in the 1990s when “the Clinton administration started to apply the logic of asset freezes to designated groups rather than to countries.” *Id.* at 10.

70. The Trading with the enemy Act of 1917, codified at 12 U.S.C. § 95a–95b, gave the President the power to control over and impose restriction on trade between the U.S and foreign countries and/or nationals declared “enemies.” In other words, this law allowed the seizure of the assets and property of blacklisted individuals or entities, domestic and foreign, controlled by or involved in trade or financial relations with the ‘enemy.’ The power of the President was extended by the enactment of the Emergency Banking Relief Act of 1933. By the enactment of the 1977 International Emergency Economic Powers Act, such power remains in force in times of war. Two decades later, under the Antiterrorism and Effective Death Penalty Act of 1996 (*amended* in 28 U.S.C. § 1605(A)), two lists of entities, designated foreign terrorist organizations and state sponsors of terrorism, were created. This law imposed restrictions on financial transactions with these entities. For a review of the history, see LAURA K. DONOHUE, *THE COST OF COUNTER-TERRORISM: POWER, POLITICS, AND LIBERTY* 147–48 (2008); see R.T. NAYLOR, *PATRIOTS AND PROFITEERS: ON ECONOMIC WARFARE, EMBARGO BUSTING, AND STATE-SPONSORED CRIME* (1999); see also R.T. NAYLOR *ECONOMIC WARFARE: SANCTIONS, EMBARGO BUSTING, AND THEIR HUMAN COST* (2001).

71. Patriot Act, 18 USC § 981(a)(1)(g).

72. *Id.* at 18 USC § 981(a)(1)(h).

property be linked to any crime at all.”⁷³ So, if the government shows, by a preponderance of the evidence, that a person or a group of persons are terrorists, all of their assets become forfeitable. Similarly, if it shows that assets are collected for a terrorist purpose, whatever that means, they are liable to seizure and ultimately forfeitable.

In other words, what makes an asset forfeitable is not its use for the commission of a crime or its illegal origin, but its attachment to the terrorist-labelled identity or terrorist intent of the owner or holder. According to this approach, it is the identity or intention of an accused which taints all of his assets and consequently make them liable to seizure and forfeiture. This is the draconian reconstruction of the abolished ancient concepts of “deodand” (guilty objects) and “corruption of blood” under which the forfeited objects did not need to be connected to an offense, but simply were confiscated because the crime was regarded “as a breach of the offender’s fealty to his lord.”⁷⁴ Similarly, in anti-terrorist laws such as the Patriot Act, terrorism in any form (even a thought) seems to be considered under US law as a breach of the offender’s allegiance to the state which expresses zero tolerance for the presence of people suspected of being terrorists or thoughts labelled as terrorism. But unlike the forfeiture of the corruption of blood, which required an actual conviction, and unlike the forfeiture of deodand which required the occurrence of some type of concrete wrongdoing, this terrorist forfeiture law allows the forfeiture of “all assets” of a person or a group of persons who are demonstrated on merely a balance of probabilities to be terrorists or to have a terrorist intent. These identity-based and intent-based confiscation rules have established one of the most repressive forfeiture regimes in the history of liberal democracies.

Furthermore, the Patriot Act also provides an alternative means to confiscate terrorist property. It greatly increases presidential authority to freeze and confiscate the assets and property of blacklisted individuals or organizations by declaring them foreign terrorists (similar to the concept of “enemy”), without granting judicial review of the forfeiture.⁷⁵ While the owner of property may file a lawsuit if he seeks the return of his property, the burden is on him to demonstrate, by a preponderance of the evidence, that the confiscated property is not the property of suspected terrorists.⁷⁶

D. *Internationalization of the US Intent-Based and Identity-Based Approach*

The US identity-based and intention-based confiscation approach has become not only a model for much of what is commonly described

73. MARY MICHELLE GALLANT, *MONEY LAUNDERING AND THE PROCEEDS OF CRIME: ECONOMIC CRIME AND CIVIL REMEDIES* 106 (Edward Elgar 2005).

74. Freiberg, *supra* note 20, at 46.

75. Patriot Act § 106.

76. *Id.* § 316(a)(2).

as the Western world,⁷⁷ but has also crept into international and regional conventions and agreements. The Terrorist Financing Convention, in its Article 8, requires “the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in Article 2.” The offenses set forth in Article 2 include terrorist financing offenses (collection and provision of funds) as well as terrorist offenses. Emphasizing the criminalization of terrorist financing as an independent offense, which is by its nature a preparatory offense,⁷⁸ the Convention in Article 2(3) does not require any connection between the funds collected or provided and any terrorist act; instead, the terrorist financing offenses also rely heavily on the intent of the accused. Reading these provisions together implies that the Convention obliges confiscation of any assets and funds that can be attributed to an imaginary terrorist act, as well as confiscation of assets used or intended to be used for the collection or provision of funds for terrorist purposes.

In dealing with the issue of terrorism financing, the UN Security Council also adopted an identity-based approach, which has been said to “operate based on diplomacy and not due process.”⁷⁹ Resolution 1267 set up a committee called the “Al-Qaida Sanctions Committee” and gave it a mandate to create and update (without proper judicial process) a list of individuals, groups, undertakings and entities associated with al-Qaida and Taliban (“Al-Qaida Sanctions List”).⁸⁰ When faced with information provided by the UN Member States and regional organizations,⁸¹ the committee, which consists of the Security Council Member States, is obliged to make a decision by “consensus of its members” on whether a proposed individual or organization is eligible to be included in the

77. See, e.g., Terrorism Act 2000, ch. 11, § 23 (U.K.) which allows forfeiture of any assets, collected, received possessed to be used for the “purpose of terrorism.” The Anti-Terrorism, Crime and Security Act 2001, ch. 24 § 1 (U.K.), permits civil forfeiture of cash and property intended for use for the purposes of terrorism, or property that represents the property of a proscribed organization, or cash or property that has been found by a court as “terrorist cash,” without a need for criminal prosecution. The Criminal Code of Canada, R.S.C. 1985, C-46 § 83.14, allows a court to order, on a balance of probabilities, forfeiture of “property owned or controlled by or on behalf of a terrorist group,” and property that has been used or will be used for the facilitation or commission of a terrorist activity, with no need for connection between the property and an actual terrorist act. The *Charter of the United Nations Act 1945* (Cth) pt. IV s. (Austl.), gives the Minister for Foreign Affairs authority to proscribe a person or an entity as terrorist, and to order seizure of the asset owned or controlled by the proscribed a person or a group. Section 20 of this Act creates offenses for dealing in such a “freezable asset,” offenses such as holding the asset, using the asset, allowing the asset to be used and facilitating its use.

78. See Tofangaz, *supra* note 17.

79. CIAN C. MURPHY, *EU COUNTER-TERRORISM LAW: PRE-EMPTION AND THE RULE OF LAW, MODERN STUDIES IN EUROPEAN LAW* 120 (2012).

80. S.C. Res. 1267, ¶ 6 (1999), amended by S.C. Res. 1452 (Dec. 20, 2012) S.C. Res. 1455 (Jan. 17, 2003), S.C. Res. 1526 (Jan. 30, 2004), S.C. Res. 1617 (Jul. 29, 2005), S.C. Res. 1735 (Dec. 22, 2006), S.C. Res. 1822 (Jun. 30, 2008), S.C. Res. 1989 (Jun. 17, 2011).

81. S.C. Res. 1390, ¶ 5(a) (Jan. 16, 2002).

List or delisted.⁸² It is clearly stated that “a criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature.”⁸³ The Resolution, along with subsequent resolutions, requires all countries to freeze all financial assets of Bin Laden, Al-Qaida and Taliban.⁸⁴

Following the attacks of 11 September 2001, this approach became universal with Security Council Resolution 1373, which addresses financing of terrorists and terrorist groups in a general way without adopting a list.⁸⁵ While there is no agreement on the definition of terrorism, the UN Security Council asked all countries to adopt necessary measures, inter alia, to

[f]reeze without delay funds and other financial assets or economic resources of persons [not limited to assets of Al-Qaida and Taliban] who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.⁸⁶

The Resolution left it to Member States to draw up and establish a terrorist list other than the designated list created by Al-Qaida Sanctions Committee. It set up the Counter-Terrorism Committee to monitor states' compliance with this Resolution.⁸⁷ This was subsequently endorsed and enforced by the EU, which will be discussed later.

Similarly, the FATF recommends the adoption and implementation of measures to freeze funds or other assets of terrorists, terrorist organizations and those who finance them in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.⁸⁸ It also recommends confiscation of “property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations,” “without

82. Sec. Council Comm. Pursuant to Resolutions 1267 (1999), 1989 (2011), and 2353 (2015), *Concerning ISIL (Da'esh), Al-Qaida and Assoc. Individuals, Groups, Undertakings and Entities, Guidelines of the Committee for the Conduct of its Work*. ¶ 4(a) (Dec. 23, 2016).

83. *Id.* § 6(d).

84. S.C. Res. 1267, ¶ 4(b) (Oct. 15, 1999); S.C. Res. 1333 (Dec. 19, 2000); S.C. Res. 1390 (Jan. 28, 2002); S.C. Res. 1455 (Jan. 17, 2001).

85. S.C. Res. 1373 (Sept. 28, 2001).

86. *Id.* ¶ 1.

87. *Id.* ¶ 6.

88. Financial Action Task Force, *International standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, the FATF Recommendations*, FATF (Feb. 2012, updated Oct. 2016) http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf [<https://perma.cc/Q86U-ND4U>].

requiring a criminal conviction,” and “even in the absence of a link to a specific terrorist act or acts.”⁸⁹ It also recommends that

[c]ountries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.⁹⁰

II. ASEAN’S RESPONSE TO TERRORISM

Terrorism has received special attention from ASEAN since the 1970s when a series of terrorist attacks occurred in ASEAN Countries.⁹¹ In 1997, the ASEAN Declaration on Transnational Crime called for the establishment of “clear and effective regional modalities” to combat transnational crimes such as piracy, money laundering, drug tracking and terrorism, “especially on the aspect of information exchange and policy coordination.”⁹² In 1999, ASEAN Plan of Action to Combat Transnational Crime was adopted to establish an institutional framework for ASEAN cooperation and coordination on transnational crimes.⁹³ With regard to terrorism, the 2002 Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime set out steps to be taken and measures to be implemented in order to enhance regional cooperation and coordination in the fields of information exchange, legal matters, law enforcement, training, institutional capacity-building and extra-regional cooperation.⁹⁴ The measures set out by the Work Pro-

89. *Id.*

90. *Id.* at 12.

91. For example, the attack on the Shell facility in Singapore in 1974 by The Japanese Red Army, or the takeover of Israeli embassy in Bangkok in 1972 by an armed Palestinian group called “Black September,” or the takeover of the US embassy in Malaysia in 1975.

92. Ass’n of Southeast Asian Nations [ASEAN], ASEAN Declaration on Transnational Crime, (Dec. 20, 1997).

93. Ass’n of Southeast Asian Nations [ASEAN], ASEAN Plan of Action to Combat Transnational Crime, (23 June 23, 1999).

94. With regard to “information exchange,” a database of national laws and regulations on terrorism and international treaties and agreements was to be established by the ASEAN Secretariat. The Secretariat was called upon to “explore ways for ASEAN to cooperate with ASEANAPOL [ASEAN Association of Heads of Police] and relevant international organizations concerned with terrorism matters to further facilitate sharing of information and analysis of critical intelligence information such as ‘modus operandi’ and offences involving terrorist activities.” Ass’n of Southeast Asian Nations [ASEAN], Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, (May 17, 2002). ASEAN Member States were required to exchange information on security practices, on technologies to detect and deter terrorist attacks, and on terrorists and terrorist organizations, their movements and funding. With regard to legal matters, the Member States were called on to work towards the criminalization of terrorism and to “provide information among each other and to the ASEAN Secretariat on the progress of their efforts to enact domestic

gramme have become the main framework for almost all of ASEAN's responses to terrorism.

In 2001, ASEAN adopted the ASEAN Declaration on Joint Action to Counter Terrorism in reaction to the 9/11 terrorist attacks.⁹⁵ The Declaration cited terrorism as "a direct challenge to the attainment of peace, progress and prosperity of ASEAN," which must be addressed through regional and international cooperation.⁹⁶ The Member States agreed, under the Declaration, to undertake the following practical measures: strengthening their national laws and legislation on terrorism, calling for signing and ratification of all anti-terrorist conventions, enhancing "information/intelligence exchange," strengthening "cooperation at bilateral, regional and international levels in combating terrorism"; and deepening cooperation among their law enforcement agencies.⁹⁷ In July 2002, the ASEAN Regional Forum also endorsed a statement on a set of financial measures to counter terrorist financing.⁹⁸ The Statement committed Member States to enhance cooperation on the international exchange of information.⁹⁹ They also agreed to implement relevant UN Security Council resolutions, particularly Security Council Resolution 1373, which involves making lists of terrorists and freezing all their assets and their associates' assets.¹⁰⁰

legal instruments." *Id.* The goal was to establish whether or not there was a possibility of developing "multilateral or bilateral legal arrangements to facilitate apprehension, investigation, prosecution, extradition exchange of witness, sharing of evidence, inquiry and seizure in order to enhance mutual legal and administrative assistance among ASEAN Member States." *Id.* The ASEAN Secretariat was required to work and study "a regional operational convention or agreement on terrorism" and "a bilateral or multilateral mutual legal assistance agreement or arrangement to enhance cooperation in combating terrorist acts and deliberating on various aspects of the issue in a comprehensive manner including its definition and root causes." *Id.* With regard to law enforcement matters, the ASEAN Secretariat was made responsible for providing coordination and cooperation "in law enforcement and intelligence sharing on terrorism on terrorism" affecting Member States. Member States were encouraged to make proposals" on training programs or conferences. *Id.* The ASEAN Secretariat was required to assist Member States in strengthening their national mechanism to combat terrorism. With regard to extra-regional cooperation, the "ASEAN Secretariat was made responsible for conducting "a study on how ASEAN programmes/projects could complement/support UN resolutions." *Id.* The ASEAN Secretariat was made responsible for looking into "the possibility of inviting [and involving] the Plus Three Countries—China, Japan and the Republic of Korea—and other dialogue partners" in the war against terrorism. *Id.*

95. Ass'n of Southeast Asian Nations [ASEAN], 2001 ASEAN Declaration on Joint Action to Counter Terrorism, (Nov. 5, 2001).

96. *Id.*

97. *Id.*

98. Ass'n of Southeast Asian Nations [ASEAN], ARF Statement on Measures against Terrorist Financing, (July 30, 2002), http://asean.org/?static_post=arf-statement-on-measures-against-terrorist-financing-30-july-2002-3 [<https://perma.cc/2HQS-KK8U>].

99. *Id.*

100. *Id.*

In response to the Bali attacks, the 8th ASEAN Summit Phnom Penh issued the 2002 ASEAN Declaration on Terrorism, in which the Member States reiterated their determination and commitment to adopt measures outlined in the Declaration on Joint Action to Counter Terrorism.¹⁰¹ At the 2004 Bali Regional Ministerial Meeting on Counter-Terrorism, Member States were asked to take more practical measures to counter terrorism.¹⁰² These measures included “the development of appropriate skills among prosecutors and juries to ensure sufficient legal expertise exists to deal with terrorism,” “a sufficiently broad range of offences in national law to prosecute and punish those responsible for committing or supporting terrorist acts, while respecting democratic values, human rights and due process of law,” sufficient legal tools “to confiscate the proceeds of crime, obtained through illicit activities being used to fund terrorist activities,” and ratification of UN anti-terrorism conventions and resolutions.¹⁰³

In January 2007, ASEAN adopted the ASEAN Convention on Counter-terrorism.¹⁰⁴ The Convention does not provide a generic definition of terrorism or terrorist group, but it does make provision for a number of criminal offenses prohibited under the anti-terrorist convention, such as hijacking, hostage taking and bombing, which Member States agreed to treat as terrorist acts.¹⁰⁵ The Convention requires the ASEAN Member States to ensure that these offenses, especially when they are “intended to intimidate a population, or to compel a government or an international organization 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.”¹⁰⁶ The Convention also requires Member States to cooperate to prevent the commission, facilitation, and financing of terrorist acts, and also to prevent the movements of terrorist and terrorist groups.¹⁰⁷ Fair treatment and conformity with international human right law are also required.¹⁰⁸

Besides these regional efforts, a significant number of bilateral and multilateral agreements and declarations have been agreed or made between ASEAN and other regional institutions or states,¹⁰⁹ among

101. Ass’n of Southeast Asian Nations [ASEAN], Declaration on Terrorism by the 8th ASEAN Summit, Phnom Penh, (Nov. 3, 2002).

102. Ass’n of Southeast Asian Nations [ASEAN], Bali Regional Ministerial Meeting on Counter-Terrorism, Bali, Indonesia, (Feb. 5, 2004).

103. *Id.*

104. Ass’n of Southeast Asian Nations [ASEAN], ASEAN Convention on Counter-Terrorism, Cebu, Philippines (Jan. 13, 2007).

105. *See id.* art. II.

106. *Id.* art. IX.

107. *Id.* art. VI.

108. *Id.* art. VIII.

109. *See e.g.*, Ass’n of Southeast Asian Nations [ASEAN], 14th ASEAN-EU Ministerial Meeting Brussels 27–28 January 2003 Joint Declaration on Co-operation to Combat Terrorism, (27–28 Jan., 2003), http://asean.org/?static_post=14th-asean-eu-ministerial-meeting-brussels-27-28-january-2003-joint-declaration-on-co-oper

ASEAN Member States,¹¹⁰ and between ASEAN Members States and other countries, such as the EU, the US, Japan, and Australia. Following the same pattern as the ASEAN counter-terrorism cooperation, these agreements re-affirm the importance of a framework for cooperation to prevent, disturb and combat international terrorism and terrorist financing through exchange of information, relationships amongst their law enforcement forces, training and consultations, and strengthening of border control.

A. *Individual ASEAN Member State Approaches to Counter-Terrorism Financing*

ASEAN appears to have made a strong commitment to establish a comprehensive counter-terrorism regime. However, there is not much work done at the ASEAN level to deal with the issue of terrorist financing, except for some provisions in the ASEAN Convention on Counter-Terrorism, which emphasize cooperation in the suppression of terrorist financing.¹¹¹ Instead, individual ASEAN Member States have created and developed, and in fact are still developing, their counter-terrorist financing regime with the help (or perhaps under the pressure)¹¹² of international organizations such as FATF or the Asia/Pacific Group on Money Laundering (a FATF-style regional body for the Asia/Pacific region).¹¹³ These international organizations are making a significant attempt to diffuse and promote the existing counter-terrorist financing regime established by the Terrorist Financing Convention, FATF recommendations and UN resolutions. However, such diffusion seems to be problematic as the concept of terrorist financing is being touted while still ambiguous.

ation-to-combat-terrorism-2 [https://perma.cc/YCF7-5W9Z]; Ass'n of Southeast Asian Nations [ASEAN] ASEAN-Australia Joint Declaration for Cooperation to Combat International Terrorism (July 1, 2004); ASEAN-US Joint Declaration for Cooperation to Combat International Terrorism, (Aug. 1, 2002), http://asean.org/?static_post=asean-united-states-of-america-joint-declaration-for-cooperation-to-combat-international-terrorism-bandar-seri-begawan-1-august-2002 [https://perma.cc/T7W3-U8BK].

110. See e.g., Ass'n of Southeast Asian Nations [ASEAN], Agreement on Information Exchange and Establishment of Communication Procedures, Indon.-Malay-Phil., May 7, 2002, <http://www.asean.org/storage/images/archive/17346.pdf> [https://perma.cc/RGZ3-24WZ].

111. ASEAN Convention on Counter-Terrorism, *supra* note 104, art. 6.

112. See, e.g., Chat Le Nguyen, *The International Anti-Money Laundering Regime and Its Adoption by Vietnam*, 4 ASIAN J. INT'L L. 197 (2014).

113. Sharman, *supra* note 16, at 653. Jason Sharman argues that anti-money laundering policies, which later was expanded to include terrorist financing, have been diffused in developing states “through the direct effects and indirect effects of power, rather than through rational learning, in response to brute material pressures, or to address local policy problems.” He argues that International organizations such FATF have directly or indirectly shaped the circumstances and fates of developing states in this area.” “Direct coercion, mimicry, and competition” are three mechanism used to diffuse the measures.

A key component of the regime is to establish terrorist financing as an independent offense without regard for the fact that financing of terrorism, which includes financing of a terrorist act, a terrorist or a terrorist group, is in its nature and according to general rules of criminal law a preparatory act which obtains its criminality from its connection with a terrorist act for which the financing is carried out. However, no such connection is required in order to charge the autonomous offense of terrorist financing. The troubling question raised by the new definition of terrorist financing, which supporters and promoters of the regime overlook, is that, if there is no need to link the act of financing to a terrorist act, what else can form the basis for imposing liability on those accused of terrorist financing? The offense, as formulated, relies heavily on its mental element to remedy this ambiguity—that is, a financier should intend or know that funds will be used for terrorist purposes. However, what constitutes “terrorist purposes” is also unclear. This ambiguity is further complicated by the lack of agreement among countries on a generic definition of terrorism. So it is not clear what “terrorist purposes” refer to even though it is the main basis for the attribution of guilt to the accused.

Similarly, having terrorist purposes is the main basis for the seizure and confiscation of suspected funds; that is, the accused’s funds and property can be forfeited based on the assumption that the funds may be used for terrorist purposes, without the actual use of funds for a criminal act. The freezing of the assets of those listed by the UN Security Council or UN Member States as terrorists or terrorist organizations or their associates or financiers does not even require proof of the terrorist purposes of the possessors or owners of these assets. As soon as a person is suspected, he or she is declared a terrorist, and all of his or her assets are frozen without the right to be heard, right to be presumed innocent, or right to access an effective remedy.

The following section briefly assesses the laws of four ASEAN Member States (Singapore, Malaysia, Indonesia and the Philippines) on terrorist financing in order to discover how these states have conceptualized terrorist financing as an offense, and, in the absence of any requirement to link funds with an actual terrorist act, on what other basis they impose liability on the accused and freeze and confiscate their funds and property. It also examines whether they provide any definition of “terrorist purposes.” It examines their approach to freezing the assets of those listed as terrorists in accordance with the UN Security Council resolutions to determine whether they afford the listed persons and entities with their fundamental rights and due process protected by international human rights laws under the ASEAN Human Rights Declaration. It should be noted that the varied motives of individual ASEAN Member States in adopting, implementing, or resisting implementation of these measures are beyond the scope of this paper and will not be discussed here.¹¹⁴

114. See Shahar Hameiri and Lee Jones, *Regulatory Regionalism and Anti-Money*

1. Singapore

There is a strong will in Singapore to fight terrorism and terrorist financing. While Singapore has not been the victim of any violent attacks in recent years, it is situated in a region where several separatist movements, guerrilla warfare and insurgency have been taking place.¹¹⁵ To prevent any possible threat that may endanger its citizens, sovereignty, and infrastructures, Singapore seems to have adopted a very broad definition of terrorism and terrorist financing. Under Singaporean law, “terrorist act” means “the use or threat of action” where the action involves serious violence against citizens, endangers a person’s life, involves damage to property, involves the use of explosives, involves environmental damage, poses a serious risk to health and safety of the public, or disturbs any public infrastructures ranging from public computer systems, public transportation, and financial services to public security or national defense.¹¹⁶ Although this definition does not include all the acts criminalized under the counter-terrorism conventions (such as hostage taking), similar to the definition provided by Terrorist Financing Convention, such use or threat of action should be carried out with the intention to coerce a government or international organization to do or refrain from doing any act, or to intimidate a population.

Singapore’s Terrorism (Suppression of Financing) Act (2003) also defines “terrorist” as a person who “commits, or attempts to commit,” or participates in or facilitates the commission of, any of these acts.¹¹⁷ “Terrorist group” means “any entity owned or controlled by any terrorist or group of terrorists and includes an association of such entities” as well as any entity designated by the UN or the government as a terrorist group.¹¹⁸

In defining terrorist financing, the Singaporean laws on terrorist financing do not require connection between the act of financing and an actual terrorist act. In vague language, the law criminalizes a broad range of acts as terrorist financing offenses with a heavy (but particularly vague) reliance on the mental state of these offenses. Under the Terrorism (Suppression of Financing) Act, a person is criminally liable if he or

Laundering Governance in Asia, 69 AUSTRALIAN J. INT’L AFFAIRS 144, 155 (2015). Countries may have different motives and reasons to adopt and implement international conventions or to comply with their international obligations. For example, it has been discovered that the key motive behind Myanmar’s adoption and implementation of anti-financial crime measures is to weaken the position of opposition groups and strengthen the power of the central government “over potentially disloyal groups.”

115. There is an Islamic militant group, called the Jemaah Islamiyah, in the region whose objective is to establish an Islamic state which comprises Malaysia Singapore and Indonesia, Brunei and the southern Philippines. The group was accused of planning to bomb the United States and local targets in Singapore. See Ministry of Home Affairs, *White Paper; The Jemaah Islamiyah Arrests and the Threat of Terrorism*, (Jan. 1, 2003).

116. Terrorism (Suppression of Financing) Act, § 2(1) (2003), (Sing.).

117. *Id.*

118. *Id.*

she directly or indirectly collects or provides “property” or “financial and other related services,”

intending that they be used, or knowing or having reasonable grounds to believe that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist act, or for benefiting any person who is facilitating or carrying out such an activity; or knowing or having reasonable grounds to believe that, in whole or in part, they will be used by or will benefit any terrorist or terrorist entity.¹¹⁹

Similarly, use and possession of property “for the purpose of facilitating or carrying out a terrorist act” also triggers liability.¹²⁰ Dealing in or entering into any financial transaction related to property of terrorists constitutes a terrorist financing offense if the financier or facilitator “knows or has reasonable grounds to believe [that the property] is owned or controlled by or on behalf of any terrorist or terrorist entity.”¹²¹ A person will be punished by a maximum of five years imprisonment for failing to disclose information about any of these terrorist financing offenses.¹²²

The provision is worded broadly enough that there is no need that the financier intend or know of any specific terrorist act. It is thus not clear exactly what a financier of a terrorist act should know or intend to be criminally liable. How can a person finance a terrorist act when he does not know about or intend a terrorist act? What is the definition and scope of “terrorist purposes”? With regard to the financing of terrorist groups and terrorists, although the laws aim at cutting off all possible financial resources of terrorists and terrorist groups, they do not distinguish between guilty and non-guilty mental states. What if a person, who knows the recipient is a terrorist group, engages in financing for lawful or humanitarian purposes, such as furthering the lawful activity of a group? Does knowledge of the identity of a person or a group justify criminalization of any association with such a person or group?

With regard to forfeiture measures, based on this vague mental state, property can be seized and consequently confiscated. That is, in Singapore, property is forfeitable if a court is satisfied, on a balance of probabilities, that the “property [is] owned or controlled by or on behalf of any terrorist or terrorist entity, or [the] property . . . has been or will be used, in whole or in part, to facilitate or carry out a terrorist act.”¹²³ Under this provision, property which belongs to, or is control by, the person who finances terrorism or a terrorist organization can be forfeited if it is intended to be used for terrorist purposes. In the absence of an actual terrorist act, the main concern is how a court may order forfeiture of property when it is not clear whether (and how much of) the property forfeited would or could be used for the commission or preparation of a

119. *Id.* § 4.

120. *Id.* § 5.

121. *Id.* § 6.

122. *Id.* §§ 8–9.

123. *Id.* § 21.

terrorist act. The issue is also raised: whether such forfeiture is fair and precise enough to distinguish a guilty mind from a non-guilty mind?

With regard to the implementation of the UN Resolutions, Singapore's law provides that all assets of persons or groups who become designated as terrorists by the UN Sanction Committee are frozen immediately by Singaporean authorities for an indefinite time until they are delisted by the Sanction Committee.¹²⁴ Although Singapore has not yet established an independent terrorist list pursuant to UN Resolution 1373, Singapore has empowered itself to list a person or a group designated by other UN Member States and freeze all their assets.¹²⁵ No judicial review would be required. Instead, Singapore's Ministry of Home Affairs, which is not a judicial body, would assess whether the information provided by a designating state supports the suspicion that the designated person or group is involved in terrorism. However, in the absence of intentional agreement on the definition of terrorism, and given differences in the perception of terrorist threats, it is not clear based on what standard or definition the information provided would be assessed. What is obvious is that such an assessment is not carried out in a way to comply with the fundamental rights respected and protected by the international human rights laws and ASEAN Human Rights declaration, such as the right to be heard, right to be presumed innocent, right of access to judicial review, and right to property.

2. Malaysia

Similarly to Singapore, Malaysia has criminalized terrorist financing in accordance with the Terrorist Financing Convention and the FATF recommendations. Any provision or collection of property and funds for terrorist purposes is illegal.¹²⁶ Any involvement with the property of terrorists and terrorist groups attracts criminal liability. No definition of terrorist purposes is provided, but the definition of "terrorist act" includes broad classes of acts. In addition to those acts regarded by Singaporean Law as terrorist acts, the Malaysian definition of terrorist act includes aviation offenses such as hijacking.¹²⁷ Compared to the Singaporean definition, it also has an additional mental state requirement. Such terrorist acts should be carried out "with the intention of advancing a political, religious or ideological cause" and of intimidating the public or coercing a government or intentional organizations to do or prevent from doing an act.¹²⁸ However, there is no need for an act of financing to be linked to

124. Monetary Authority of Singapore (Anti-Terrorism Measures) Regulation 2002, §§ 7–8 (2003), (Sing.).

125. The United Nations (Anti-Terrorism Measures) Regulation, §§ 7–8 (Jan. 31, 2003), (Sing.).

126. The Penal Code of Malaysia, §§ 130N, 130O, 130P and 130Q (2015).

127. *Id.* § 130B(1).

128. *Id.* § 130B(2).

any of terrorist acts, so the offense relies heavily on the mental element of the offense (terrorist purpose).¹²⁹

In terms of forfeiture, any property which proved to be “terrorist property” is subject to forfeiture. “Terrorist property” is defined very broadly and includes

proceeds from the commission of a terrorist act; property that has been, is being, or is likely to be used to commit a terrorist act; property that has been, is being, or is likely to be used by a terrorist, terrorist entity or terrorist group; property owned or controlled by or on behalf of a terrorist, terrorist entity or terrorist group, including funds derived or generated from such property; or property that has been collected for the purpose of providing support to a terrorist, terrorist entity or terrorist group or funding a terrorist act.¹³⁰

It is not clear, when there is no terrorist act, how a court may determine that the suspected property “is likely to be used to commit a terrorist act.” What if the property owned or controlled by a terrorist suspect or a financier is not intended to be used for terrorist purposes (such as personal matters for a house where the terrorist’s family lives)? The law expands the scope of forfeiture, seemingly allowing civil forfeiture of suspected property. That is, when “there is no prosecution or conviction . . . for terrorism financing offence,” a court can order forfeiture of the property if it is satisfied, on the balance of probability, that the property is “the subject matter of or was used in the commission of . . . a terrorism financing offence.”¹³¹ In the case of a *bona fide* third party’s (claimant’s) having interest in the forfeited property, a court should be satisfied that the claimant did not participate or engage in the offense with regard to which the property is forfeited; the claimant should also lack, at the time of the commission of the offense, “knowledge[,] and was not intentionally ignorant . . . of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use”; in addition he should have done “all that could reasonably be expected to prevent the illegal use of the property.”¹³² Under such requirements, a person’s house which is used, for example, by one of his family members for terrorist purposes is at risk of being confiscated if he fails to prove that he was diligent enough to take necessary steps in accordance to this law.

In the same repressive manner as the Singaporean approach, Malaysian law empowers the Ministry of Home Affairs to blacklist, and to order the freezing of assets of, those who are suspected of being terrorists or terrorist groups or terrorist financiers, without undergoing judicial procedure and without respecting fundamental human rights.¹³³ In other words, the Minister of Home Affairs may declare a person or a group

129. *Id.*

130. *Id.*

131. Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, § 56(1) (2001) (Sing.).

132. *Id.* § 61.

133. *Id.* § 66B.

to be a terrorist or terrorist group merely on the basis of information he receives “from a police officer.”¹³⁴ As soon as he declares a person or a group as terrorist, all their assets are frozen, and provision of “any financial or other related service” to it is prohibited.¹³⁵ Although the listed persons are allowed to ask the minister to delist them, it is unclear how they may defend themselves when they do not know why and on what grounds they have been listed in the first place. With regard to the UN Sanction list, the law allows the Ministry of Home Affairs to order persons and groups listed by the UN Sanction Committee to be designated as terrorists, and their assets to be frozen.¹³⁶ It has been alleged that Malaysia has deployed these executive measures against the political opponents of the government.¹³⁷

3. Indonesia

Until 2013, Indonesian law prohibited only the financing of terrorist acts.¹³⁸ By the enactment of new legislation in accordance with the Terrorist Financing Convention and FATF recommendations, the scope of the terrorist financing offense was expanded. According to current legislation, financing of terrorism is an act of providing, collecting, and loaning funds with the intention, or in the knowledge, that they will be used for a terrorist act, or by a terrorist individual or a terrorist organization.¹³⁹ While no definition of “terrorist organization” or “terrorist” is given, Indonesian law provides a very broad definition of “terrorist act” using ambiguous terms. A person commits a terrorist act when the person

intentionally uses violence or the threat of violence to create a widespread atmosphere of terror or fear in the general population or to create mass casualties, by forcibly taking the freedom, life or property of others or causes damage or destruction to vital strategic installations or the environment or public facilities or international facilities.¹⁴⁰

134. *Id.*

135. *Id.*

136. *Id.* § 66C.

137. For example, the designation of “Kumpulan Mujahidin Malaysia” as a terrorist organization was construed “as a bid by Mahathir[’s government] to crack down on Muslim oppositions.” The government claimed that the group had been plotting a number of attacks in Malaysia. However, no charges were pressed against them. See J.N. Mak, *Malaysian Defense and Security Cooperation: Coming Out of the Closet*, in 149 ASIA-PACIFIC SECURITY COOPERATION: NATIONAL INTERESTS AND REGIONAL ORDER (Seng Tan & Amitav Acharya eds., 2004); see also James Cotton, *Southeast Asia After September 11*, in GLOBALIZATION AND THE NEW TERROR: THE ASIAN PACIFIC DIMENSION 192 (David Martine Jones ed., 2004).

138. Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law, art. 11 (2003) (Indon.).

139. Law No 9 of 2013 on Prevention and Eradication of Terrorism Funding, art. 4 (2003) (Indon.).

140. Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law, art. 6 (2003) (Indon.).

This definition is also expanded to include offenses related to aviation security, explosives and firearms, and biological weapons.¹⁴¹ Unlike Singaporean law in which a terrorist act does not include activities undertaken by military forces of a State in the exercise of their official duties,¹⁴² any act which meets the criteria of the Indonesian definition of “terrorist act” is punishable even if it is carried out by “military or police.”¹⁴³ However, the law does not define critical terms such as “widespread atmosphere of terror or fear” or “mass casualties.” The law also does not clarify that what constitutes the mental element of a terrorist financing offense in the absence of commission or preparation of an actual terrorist act.

In terms of seizure and forfeiture, the law also uses vague language. To freeze suspicious funds, it provides two parallel and competing mechanisms. According to the first mechanism, a national authority (a prosecutor, a judge, or an investigator) may order the seizure of funds when it is known, or it ought to have been known, that they are used for the crime of terrorism.¹⁴⁴ Under the second mechanism, an authority may seek a freezing order from the Central Jakarta District Court.¹⁴⁵ However, it is not clear if authorities can directly order the seizure of suspended funds, why they need to resort to the second mechanism and seek a court order. While the suspected funds remain frozen only for 30 days, it is not clear how and under what circumstances the freezing would turn into confiscation and whether confiscation of suspected funds should be followed by a conviction for a specific offense (criminal codification), or whether it can be granted in the absence of any conviction (civil confiscation).

In terms of issuing a list of terrorist suspects and ordering the freezing of their assets in accordance with the UN Resolutions 1267 and 1373, the law empowers the Chief of the Indonesian National Police to submit an application to the Central Jakarta District Court, requesting the inclusion of those identified by the Police as terrorist suspects.¹⁴⁶ The Court then decides on each case within 30 days on the basis of the information and evidence provided by the Police. In the case of the court’s permission to include the suspects in the list, all assets of the listed suspects will be frozen. The listed suspects have a right to object to the decision by providing reasons for the objection to the Police. In case the Police deny their objection, the persons can bring civil lawsuits in the Central Jakarta District Court.¹⁴⁷ This procedure of listing and freezing was criticized by FATF as it did not result in immediate listing and freezing of assets of

141. *Id.* art. 8–10.

142. Terrorism (Suppression of Financing) Act, § 2(3) (2003) (Sing.).

143. Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law, art. 6–7 (2003) (Indon.).

144. Law No 15 of 2003 on the Stipulation of Interim Law No 1 of 2002 on the Eradication of Terrorism as a Law, arts. 22 and 23(1) (2003) (Indon.).

145. *Id.* art. 23(2).

146. *Id.* art. 27.

147. *Id.* art. 29.

those listed by the UN Sanction Committee.¹⁴⁸ After five years of being in the FATF's list of "high-risk and non-cooperative jurisdictions," in 2015, Indonesia adopted an "inter-ministerial joint regulation," which allows the authorities to freeze the assets of those listed by the UN Sanction Committee within three days after they are listed by the Committee.¹⁴⁹ The assets remain frozen as long as the persons are in the UN Sanction list.¹⁵⁰ In practice, the joint regulation deprives the listed persons of their right, given by the law, to object to their freezing sanctions.

4. The Philippines

Until 2011, the Philippines applied the general principles of criminal law in criminalization and confiscation of terrorist financing;¹⁵¹ that is, terrorist financing was regarded as complicity to a terrorist offense or an inchoate offense. Thus, not only was there a requirement to link the act of financing to a specific terrorist act, but also, financing of an individual or a terrorist group would not be regarded as an offense if it was not carried out for the commission or preparation of a terrorist act. Confiscation was also limited to the funds and property proven to be used, or intended to be used, for the commission of an actual terrorist act. However, by the enactment of the Terrorist Financing Suppression Act of 2011, the Philippines established an independent offense of terrorist financing in exact accordance with the FATF recommendations and the Terrorist Financing Convention.¹⁵²

In addition, the Philippines provide a very broad definition of 'terrorist act.' In addition to adoption of the generic definition of terrorism provided by the Terrorist Financing Convention, classes of acts, such as piracy, rebellion and insurgency, coup d'état and hijacking are also considered terrorist acts when they are "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."¹⁵³ Unlike the definition offered by the Terrorist Financing Convention

148. Financial Action Task Force, *Public Statement*, FATF (Oct. 24, 2014), <http://www.fatf-gafi.org/documents/documents/public-statement-oct2014.html#indonesia> [<https://perma.cc/77ZX-M9AN>].

149. U.S. Dep't of State, *Countries/Jurisdictions of Primary Concern—Indonesia; Bureau of International Narcotics and Law Enforcement Affairs; 2016 International Narcotics Control Strategy Report (INCSR) Report*, (2016), <http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253406.htm> [<https://perma.cc/3LDF-NTL>]. See also Haeril Halim, *PPATK Freezes Extremist-Related Accounts*, JAKARTA POST (Apr. 21, 2015).

150. For example, in April 2015, Indonesia froze 20 bank accounts claimed to belong to "Al-Qaeda and Taliban-affiliated terrorist groups operating in Indonesia." See Halim, *supra*, note 149.

151. See Human Security Act of 2007, Republic Act No. 9372, § 5 (2007), http://www.lawphil.net/statutes/repacts/ra2007/ra_9372_2007.html [<https://perma.cc/D93X-3AX3>] (Phil.).

152. The Terrorist Financing Suppression Act of 2012, Republic Act No. 10168, § 4 (2012) <http://www.gov.ph/2012/06/18/republic-act-no-10168> [<https://perma.cc/APE6-CGXB>] (Phil.).

153. *Id.* § 3(J).

based on which a terrorist act should be aimed at intimidating a population or compelling a government or an international organization, under the Philippine definition, the cause of fear should be the consequence of an act, and it should be intended to coerce the government “to give in to an unlawful demand” (whether it is a personal, material, financial, or political demand). However, there is no need to connect the funds collected or provided to any terrorist act,¹⁵⁴ nor is the definition of ‘terrorist purposes’ provided.

Despite this ambiguity, freezing and forfeiture can be granted not on the basis of the link between the suspected funds and an actual terrorist act, but based on a fictitious assumption that they may be used for terrorism. The law permits the civil forfeiture of funds and property that

are in any way related to financing of terrorism or acts of terrorism; or (b) property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or conspiring to commit, or participating in or facilitating the commission of financing of terrorism or acts of terrorism.¹⁵⁵

This low standard of proof (probable cause) seems to allow the prosecution to request the seizure and forfeiture of the funds and property based on circumstantial evidence (and even legal fiction) such as hearsay or an anonymous informant’s tip,¹⁵⁶ or based on a mere listing by the UN Sanction Committee,¹⁵⁷ without a need to prove the actual guilt of the accused or the actual criminal use of the funds and property. This also shifts the burden of proof to the accused to prove that the suspected funds or property were not intended to be used for a terrorist act, which is not proven or planned at all.

In implementing the UN resolutions, executive authorities are empowered to issue freezing orders with regard to the property and funds of persons and entities listed by the UN Sanction Committee or by other UN Member States in accordance with the Resolution 1373.¹⁵⁸ The funds remain frozen “until the basis for the issuance thereof shall have been lifted.”¹⁵⁹ However, if the frozen funds are “related to financing of

154. *Id.* § 4.

155. *Id.* § 11.

156. *Id.*

157. *Id.* Property or funds frozen in accordance with the UN resolutions can be forfeited, in a form of *in rem* civil forfeiture if they are “found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines.” The Philippine authorities emphasize that “a mere listing by the UNSC would likely be sufficient to establish preponderance of evidence and this to forfeit proceeds of listed individuals/entities.” See also The Asia/Pacific Group on Money Laundering, *Anti-Money Laundering and Combating the Financing of Terrorism; Republic of the Philippines*, ¶ 275 (June 30, 2009).

158. The Terrorist Financing Suppression Act of 2012, *supra* note 152, § 11.

159. The Asia/Pacific Group on Money Laundering, *supra* note 157. The assets of the Rajah Solaiman Movement were frozen after being listed by the UN Sanctions Committee. It should be noted that the designation of this group was the result of a

terrorism or acts of terrorism committed within the jurisdiction of the Philippines,” the funds will be the subject of civil forfeiture.¹⁶⁰

The listed persons are allowed to “file with the Court of Appeals a petition to determine to the basis of the freeze order.”¹⁶¹ However, it is not clear, even if a person or entity listed by the UN Sanction Committee succeeds in obtaining their delisting, whether the government would delist the persons or entities and unfreezes their assets at the cost of violating its international obligations.

III. THE EU’S APPROACH TOWARDS THE CONFISCATION OF TERRORIST FUNDS

As a regional organization, the EU has incorporated the current terrorist financing measures introduced by Terrorist Financing Convention and the FATF’s recommendations into its counter terrorist financing strategy, but in a piecemeal way. While the initial EU definition of terrorist financing is in line with the definition provided by the Terrorist Financing Convention,¹⁶² there are constant amendments pushed forward to bring the EU laws in line with the FATF revised recommendations and UN Security Council resolutions. For instance, the latest proposal for a directive on combating terrorism has pushed through provisions which requires EU Member States “to criminalize the provision of funds that are used to commit terrorist offences and offences related to terrorist groups or terrorist activities,” including the new terrorist financing offense (financing of travelling abroad for terrorist purposes)¹⁶³ introduced by the FATF’s revised Interpretive Note to Recommendation 5 on the criminal offense of terrorist financing¹⁶⁴ and by UN Security Council Resolution 2178 (2014).¹⁶⁵

Regarding the relationship between terrorist financing offenses and its subsequent terrorist offenses, the EU laws on terrorism have also

request by the Philippine government.

160. The Terrorist Financing Suppression Act of 2012, *supra* note 152, § 11. Following the UN designation of the Philippine Branch of the International Islamic Relief Organization, the Philippine authorities submitted an application to the Court of Appeals requesting the freezing of the funds of the designated organization. The Court within a day issued a freezing order. The frozen funds were forfeited after few months. *See* The Asia/Pacific Group on Money Laundering, *supra* note 157, ¶ 275.

161. The Terrorist Financing Suppression Act of 2012, *supra* note 152, § 11.

162. Article 1(5) of “EU Directive 2015/849 of the European Parliament and of the Council” defines ‘terrorist financing’ as “the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.” Council Directive 2015/849, art. 1(5) (L 141/73) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=EN> [<https://perma.cc/6S86-4YQG>].

163. *Id.* art. 11.

164. Financial Action Task Force, *supra* note 88, at 37.

165. S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

provided similar provisions to those adopted by the Terrorist Financing Convention and the FATF. It has been repeatedly emphasized that “it shall not be necessary that a terrorist offence is actually committed.”¹⁶⁶ There is also emphasis that in dealing with terrorist financing offenses, “it is sufficient that there is knowledge about the use of the funds for purposes furthering the terrorist activities in general without there being a need to be linked to for instance a specific already envisaged travel abroad.”¹⁶⁷ Nevertheless, none of these EU legislative acts and proposals defines what constitutes “terrorist purposes.” This not only results in different interpretations, but also fails to satisfy the principle of legality.

It is worth noting that the EU’s definition of terrorism is very broad, including many criminal offenses, and it has hard-to-infer mental elements. Terrorism according to Articles 1 to 4 of the Framework Decision 2002/475/JHA covers a list of violent acts¹⁶⁸ which

may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

However, the EU has provided a narrower definition of terrorist groups. Unlike the Terrorist Financing Convention which does not provide any definition of terrorist groups, and unlike the very broad definition of terrorist groups recommended by the FATF,¹⁶⁹ the EU has defined a ‘terrorist group’ as

166. EU Council Framework Decision 2008/919/JHA, art. 3(3), 2008.

167. Article 15 of Proposal for a EU Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism, COM/2015/0625, 2015.

168. According to the Framework Decision 2002/475/JHA on Combating Terrorism, art. 1(1), terrorist offenses can include “attacks upon a person’s life which may cause death,” attacks upon the physical integrity of a person,” “kidnapping or hostage taking,” causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility,” “seizure of aircraft, ships or other means of public or goods transport,” “manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons,” “release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life,” “interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life,” “threatening to commit” any of the acts mentioned above. EU Council Framework Decision 2002/475/JHA, 2002.

169. According to the FATF, the term terrorist group refers to “any group of terrorists that: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully; (ii) participates as an accomplice in terrorist acts; (iii) organises or directs others to commit terrorist acts; or (iv) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.” See Financial Action Task Force, *supra* note 88, at 122.

a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.¹⁷⁰

The EU Member States also do not share a common understanding of what (or what not) precisely constitutes terrorism as a crime. For example, while the German Criminal Code only criminalizes financing of serious violent acts “endangering the state” (meaning commission of a criminal offense against life within the meaning of Section 211 or 212 of the Code or against personal freedom within the meaning of Section 239a or 239b of the Code),¹⁷¹ the United Kingdom’s definition also covers violent acts “designed seriously to interfere with or seriously to disrupt an electronic system.”¹⁷² There are also noticeable differences in the definitions of a terrorist group provided by EU Member States. According to the Spanish Criminal Code, for example, a terrorist group is construed to be a stable group formed by one or more persons, for an indefinite time, in collusion and co-ordination to distribute diverse tasks or duties in order to commit felonies, as well as to carry out reiterated commission of misdemeanours.¹⁷³ Compare this with Greece’s definition of terrorist groups according to which funding “a terrorist group is not a crime unless that group consists of three or more people acting jointly in order to commit” a terrorist act.¹⁷⁴

When it comes to the confiscation of terrorist funds, following the US approach and the FATF Recommendations, the EU uses its anti-money laundering confiscation provisions to counter terrorist financing, without regard to differences between the proceeds of organized crime and terrorist funds. It requires its Member States to confiscate “either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for” criminal offenses, including terrorist offenses covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.¹⁷⁵ Reading this provision in conjunction with the provisions on the criminalization of terrorist offenses, which do not require a connection between terrorist offenses and an actual terrorist act, there appears to be an intent-based confiscatory regime in which people’s assets may be confiscated merely on the basis of what they (are

170. EU Framework Decision 2002/475/JHA, *supra* note 168, art. 2(1).

171. STRAFGESETZBUCH [SGB] [PENAL CODE] § 89a(2) No. 4 (Ger.).

172. Terrorism Act 2000 ch.11 § 1(1)(2) (UK).

173. CODIGO PENAL (Criminal Code) art. 571 and Sub-Section 2 of § 1 of art. 570 bis. (Spain).

174. FATF, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Greece*, (June 29, 2007), ¶ 135.

175. Council Directive 2014/42/EU, art. 4 (L 127/39). See a similar provision in Article 3(1)(b) of Council Framework Decision 2005/212/JHA, 2005.

assumed to) intend to do, rather than what they actually commit or plan to do. But there is a noticeable difference between the EU laws and the US confiscation model. While in the US, “all assets” of a person engaged in terrorism can be confiscated regardless of whether they have been used or intended to be used for terrorism, the EU laws seems to imply the confiscation of the assets (assumed to be) linked to terrorism or terrorist purposes; that is, it appears that there should at least be some kind of connection, even if fictional, between the confiscated assets and terrorism or terrorist purposes.

A. *Confiscation of Terrorist Funds at the National Level Within the EU*

Although the application of the EU laws and regulations on terrorism offenses at the national level differs in many respects among EU Member States, especially with regard to the definition of the elements the terrorism offenses, some EU Member States appear to have adopted approaches similar to the US confiscation model of countering terrorist funds (the intent-based model).

For example, in the UK where a number of terrorism offenses are set out,¹⁷⁶ the collection or provision, possession and use of money or any property can be regarded as an offense if a person involved in any of these actions intends that the money or property should be used for the “purposes of terrorism,” or has reasonable cause to suspect that it may be used for such purposes.¹⁷⁷ Where a conviction for any of these offenses is secured, the court may order the forfeiture of any money or other property which, at the time of the offense, the convict “had in their possession or under their control, and which had been used for the purposes of terrorism, or [which] they intended should be used, or had reasonable cause to suspect might be used, for those purposes.”¹⁷⁸ Similarly, entering into or becoming involved in an arrangement which facilitates another’s retention or control of terrorist property is an offense; but, unlike above-mentioned offenses, the burden is on the accused to prove that he “did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.”¹⁷⁹ If the accused fails to do so and is convicted of such an offense, the court may order the forfeiture of the money or other property to which the arrangement in question is related.¹⁸⁰ Departing from the conviction-based approach, the forfeiture order may be extended to any money or other property “which, at the time of the offense, [the accused] knew or had reasonable cause to suspect would or might be used for the purposes of terrorism,” or was, at that time, intended by them to be used for those purposes.”¹⁸¹ Basically, what the prosecution needs to prove is that the accused had terrorist purposes

176. Terrorism Act 2000 (UK), *supra* note 172, §§ 11–13, 55–58.

177. *Id.* §§ 15–16.

178. *Id.* § 23(1)(2)(3).

179. *Id.* § 18.

180. *Id.* § 23(5).

181. *Id.* § 23(4).

when he became involved in those financing activities. If they can, not only is the property involved in those activities subject to forfeiture, but in addition, other property of the financier, which can be assumed to be used for terrorist purposes, can be unfairly in danger of forfeiture. This is despite the lack of relevance if the prosecution alleges that those properties could be used, or were intended to be used, for terrorism purposes. One example would be the forfeiture of property house belonging to a person who used his shop for supporting terrorism, simply because the house also might be used, or there is reasonable cause to suspect it might be used, for terrorist purposes. In other words, by proving that the financier had a terrorist purpose when he was using his shop for fund-raising, the prosecution could ask for the forfeiture of the financier's other property as it could be used for terrorist purposes.¹⁸²

English law also allows courts to order the forfeiture of a property not intended or suspected for use in terrorism when that property was "wholly or partly, and directly or indirectly . . . received by any person as a payment or other reward" in connection with any offense mentioned above.¹⁸³ Thus, for example, the payment made to an accountant for preparing accounts on behalf of a proscribed organization is forfeitable whether or not the money was intended or suspected for use in terrorism.¹⁸⁴

Forfeiture can be also issued in English law on conviction for specified offenses, such as weapon training, possessing things and collecting information for the purposes of terrorism, training for terrorism, or any ancillary offense to these offenses, or for offenses where a "terrorist connection" exists.¹⁸⁵ Such a forfeiture order may be made against "any money or other property that was, at the time of the offense, in the possession or under control of the convict where it had been used for the purposes of terrorism, or . . . was intended for such use."¹⁸⁶ In the same manner, property under the control or in the possession of a person convicted of supporting (this is not limited to the provision of money) a proscribed group can be forfeited if, on a balance of probability, it is shown that it has been used in connection with the activities of the group

182. In spite of such a law, in *Regina. v. Farooqi & Others*, [2013] EWCA Crim 1649 (U.K.), the first attempt to forfeit the residential property of Farooqi (an Islamic bookstall owner) failed. He received four life sentences for soliciting to murder, for dissemination of terrorist publications, and for engaging in conduct in preparation for acts of terrorism. Although the judge (Sir Richard Henriques QC) pointed out that the law allows the court to forfeit the house, he rejected to order the forfeiture of the convict's home on the grounds that "it would make Farooqi's 'wholly innocent' family homeless." Martin Evans, *Terrorist Is Allowed to Keep His Home as Bid to Seize Property Fails*, TELEGRAPH (May 23, 2014), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10852503/Terrorist-is-allowed-to-keep-his-home-as-bid-to-seize-property-fails.html> [<https://perma.cc/J8G4-5EZF>].

183. Terrorism Act 2000 (UK), *supra* note 172, § 23(7).

184. *Id.* at Explanatory Notes ¶ 33.

185. *Id.* § 23A.

186. *Id.*

or “the court believes that it may be used in that connection.”¹⁸⁷ Therefore, for example, a rented flat in which the convict collected information (which according to the language of this provision, can include watching video) on making bombs for terrorist purposes can be put in jeopardy of confiscation through its use as a venue for these activities in spite of the landlord’s lack of knowledge or consent about such activities.¹⁸⁸

Modeled on the drug trafficking cash seizure scheme, English law also authorizes the seizure and forfeiture of “terrorist cash” (such as coins, postal orders, bankers’ drafts etc.) in a form of *in rem* civil forfeiture (without a criminal conviction).¹⁸⁹ Thus, cash can be seized if law enforcement has “reasonable grounds for suspecting” that it is terrorist cash.¹⁹⁰ However, this approach, in practice, can be problematic because unlike drug-derived cash which has a criminal background, terrorist funds have a criminal destination; so suspicious grounds for the seizure of such cash seem to rely more on fiction than on reasonableness. These suspicious grounds can be anything which may possibly raise suspicion that the cash can be used for terrorist purposes, such as “the country of destination,” “material on the person’s computer’s hard drive, . . . combat clothing in the luggage of the courier,”¹⁹¹ the failure to convince the law enforcement officials of the purpose and reasons for carrying the cash, having links with terrorists or terrorist groups, or a previous conviction of the owner. A court can order forfeiture of any cash, no matter how small the amount, when the court is satisfied, on the balance of probabilities, that it “is intended to be used for the purposes of terrorism,”¹⁹² without a requirement to identify a terrorist act which gives rise to the cash forfeiture. However, from a classic criminal law perspective, it is totally unacceptable to forfeit cash only on the basis of the evidence which points to the status of a person (whom he knows or is connected to, or where he travels to), instead of a wrongdoing he might do or he already has done.

Similarly, in Italy, terrorist financing is no longer limited to the act of “financing associations.”¹⁹³ It can cover any financing activity carried out for “purposes of terrorism” or “democratic order subversion.”¹⁹⁴ While

187. *Id.* § 111.

188. CLIVE WALKER, *BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION* 87 (2009).

189. Anti-terrorism, Crime and Security Act 2001, pt. 1(2) of sched. 1 (U.K.). See also R. E. Bell, *The Seizure, Detention and Forfeiture of Cash in the UK*, 2004 11 J. FIN. CRIME 134.

190. Anti-terrorism, Crime and Security Act 2001, *supra* note 189, at pt. 2(1) of sched. 1.

191. Bell, *supra* note 189, at 144.

192. Anti-terrorism, Crime and Security Act 2001, *supra* note 189, at pt. 1(1) of sched. 1.

193. The concept of “financing associations” is not defined by Italian law; so, it is unclear whether it includes acts of collection, receipt or provision.

194. By adopting the LD N.109/2007 of June 22, 2007, Italy has broadened the scope of terrorist financing offences to include financing of terrorist activities.

the terms “purpose of terrorism” and “democratic order subversion” are not defined, it is not required that the funds involved in such financing are used or allocated for an actual terrorist act or an act aimed at subverting democratic order.¹⁹⁵ Therefore, a person who possesses, receives or provides assets or property to another person or an organization can be prosecuted and convicted for what may be assumed (understood) to be terrorist purposes or subversion. In terms of confiscation, it seems that Italy has expanded its preventive system of seizure and confiscation of mafia-type assets to counter terrorist funds, without considering the fact that mafia assets may be derived from illegal sources while terrorist funds have an illegal destination. A confiscation order can “target the assets of persons who (i) are linked to organized and non-organized crime; (ii) “habitually” conduct criminal activities . . . ; or (iii) are suspected of funding terror.”¹⁹⁶ Such confiscation is not limited to the property or funds proven to be “price,” “product,” “profit,” or instrumentalities of a criminal act; as the FATF’s report indicates, it can also include “assets or other property” of which the offender or the third party cannot justify its legal origin,¹⁹⁷ and which, in the case of terrorist of terrorist financing, are assumed to be intended to be used by another person or an organization for terrorist purposes or subversion of democratic order. Therefore, the burden would be on the accused or the third party to prove otherwise.

In a similar fashion, the Austrian Penal Code allows confiscation of any property that is at the disposal of a terrorist organization as well as confiscation of all property within the possession of a person who is convicted of being member of a terrorist group.¹⁹⁸ A person is considered a member of a terrorist group even when the person participates in the group’s activities merely by collecting or providing assets for the group with the knowledge that he promotes the association or its offenses.¹⁹⁹ The definition of a terrorist group has been expanded to include not only a group that engages or aims at terrorist act, but also a group established for the purpose of terrorist financing.²⁰⁰ Although this law has been rarely applied as the prosecution needs to prove the elements of the terrorist organization,²⁰¹ all property of a person who receives or collects or pro-

Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures; Italy*, FATF 136 (2016).

195. While the Italian Penal Code is silent on this matter, Italian authorities point out to the FATF assessors that the offense of terrorist financing “refers to the alleged risk in order to prevent the result of financing, and anticipates punishability at a prodromal time. Moreover, the Italian Court of Cassation has stated that the [terrorist financing] offense . . . is committed, without it being necessary that material execution of the terrorist act be actually set up.” *Id.*

196. *Id.* at 59.

197. *Id.* at 133.

198. Financial Action Task Force, *Mutual Evaluation Report; Anti-Money Laundering and Combating the Financing of Terrorism; Austria*, FATF ¶ 209 (June 26, 2009).

199. *Id.* ¶ 186.

200. STRAFGESETZBUCH [StGB] [PENAL CODE], § 278(3) (Austria).

201. According to § 278b(3) of the Austrian Penal Code, a group is considered a

vides funds for another group would be in jeopardy if the convict fails to prove that his property and assets do not have illegal sources (“membership benefits”) or an illegal destination.

On the other hand, some EU Member States allow confiscation of terrorist funds in a restrictive manner. For instance, in Germany, financing (collecting, receiving or providing of assets) of serious violent acts endangering the state²⁰² does not constitute an offense if there is no explicit connection between the act of financing and a serious violent act.²⁰³ This seems to restrict the scope of the offence to an act of complicity or an inchoate offence, which is different from what the Terrorist Financing Convention requires or the FATF recommends. Under the German law, for an act to be regarded as an offense, assets involved also need to be substantial in the sense that they need to make “a greater than merely insubstantial contribution to the preparation of a serious violent act endangering the state.”²⁰⁴ Even when these requirements are met and a conviction is obtained, a confiscation order can be made only against the assets generated by, used, or intended for use in the commission or preparation of the terrorist financing offense or the terrorist act.²⁰⁵ The forfeiture cannot be directed at such assets if they, at the time of the commission of the offense, were owned or controlled by the third party who did not provide his assets for the support of the offense “with knowledge of the circumstances of the act.”²⁰⁶ On the other hand, the mere collection of funds for a terrorist organization²⁰⁷ is regarded as support of a terrorist organization.²⁰⁸ Unlike the offense of financing of vio-

terrorist group when the group is designed as an “union planned for a longer time of more than two persons aiming at the commitment of terrorist offences or financing of terrorism.” *Id.*

202. A serious violent act endangering the state is defined as a criminal offense “against life . . . or against personal freedom” which is intended and able to impair “the existence or security of a state or of an international organization, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany.” STRAFGESETZBUCH [SGB][PENAL CODE], § 89a(1) (Ger.).

203. *Id.* § 89a(2)(4). See also Financial Action Task Force, *3rd Follow-Up Report: Mutual Evaluation of Germany* 14 (2014).

204. Financial Action Task Force, *Mutual Evaluation Report; Anti-Money Laundering and Combating the Financing of Terrorism; Germany* para. 209 (2010).

205. STRAFGESETZBUCH [SGB] [PENAL CODE], § 73–74 (Ger.).

206. *Id.* § 73(3).

207. A criminal group in German law is defined as an organizational combination of at least three persons, designed to exist for a certain period of time, where—with subordination of the will of the individual to the will of the group as a whole—the members pursue common goals, while standing in such relation to one another that they feel themselves to be a uniform cluster. According to Section 129a(1), a criminal group is considered a terrorist group when such a group’s aims and activities are directed at the commission of specific offences such as murder, genocide, crimes against humanity, war crimes or crimes against personal liberty. Terrorist organizations are, according to Section 129a(2), those whose purpose it is or whose activities are aimed, for example, at causing serious physical or psychological harm to another person, computer sabotage, destruction of structures and so on. *Id.* § 129a(2).

208. *Id.* § 129a(5).

lent acts, it is not necessary for the financial means to be used for the commission or preparation of a criminal act. The collection or provision of funds only needs to be made “for an objective purpose for the terrorist organization and must be useful for it.”²⁰⁹ But since only intentional conduct attracts criminal liability according to German law, the prosecution needs to prove that the accused had the intention that the funds be used for support of a group whose aims or activities were directed towards the commission of violent acts.²¹⁰ Consequently, forfeiture may be made against the assets proved to be intended for use of the purposes of the group, whether they are legal or illegal. This can include support for humanitarian purposes. A similar approach has been taken by some other jurisdictions such as Denmark.²¹¹

However, in Finland, contribution to a terrorist group may give rise to forfeiture only if the contributor is aware that his contribution could promote the “criminal activity” of the group.²¹² Similarly, in Switzerland, financing of a group does not constitute an offense and, as a result, the money involved is not subject to forfeiture if the financing is not made to support the group “in its criminal activities,”²¹³ or if the financing is carried out “with a view to establishing or re-establishing a democratic regime or a state governed by the rule of law or with a view to exercising or safeguarding human rights.”²¹⁴ But the question arises as to how a person may know or have control over the end use of provided or collected funds by others (recipients of funds).

B. *Ambiguity About the Mental Element and the Question of Liability*

Although there are noticeable differences among EU Member States in the criminalization and confiscation of terrorist funds, there is a growing trend towards utilizing an intention-based criminalization and confiscation approach—an approach to targeting assumed terrorist funds based on the intention of the financer without linking them to an actual terrorist act (whether completed or only attempted). As mentioned above, at the EU level, this approach has been adopted to impose

209. Financial Action Task Force, *supra* note 204, ¶ 223.

210. *Id.* ¶ 223.

211. Danish Criminal Code, § 114a. The FATF’s report points out that “Explanatory notes to Section 114a, which provide details not contained in legislation and are considered by the courts to carry a high degree of legal weight, make clear that it is a punishable act to provide funds or financial services to both the legal and illegal activities of a terrorist group. Intent is required in relation to the fact terrorist acts are part of the activities or aims of the group. Participation in or support to an organization that has both humanitarian and terrorist aims are covered.” Financial Action Task Force, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism; Kingdom of Denmark* para. 222 (2006).

212. Criminal Code of Finland (39/1889, amendments up to 927/2012 included), Chapter 34a, § 4.

213. SCHWEIZERISCHES STRAFGESTZBUCH, CODE PENAL SUISSE, CODICE PENALE SVIZZERO (Criminal Code) art. 260 (Switz.).

214. *Id.* at 260.

a criminal penalty in two ways. In the more restricted way, practiced by states such as Germany and Finland, confiscation is limited to the funds and property intended to be used for terrorist purposes. The broader manner, adopted by the UK, allows the expansion of confiscation to the convict's other property which is not involved in financing but which is suspected to be possibly used for terrorist purposes.

Both these approaches depend on a mental element to impose confiscation. However, reliance on the guilty mind of offenders raises questions in terms of the justifiability of this approach, and the scope and formulation of the mental element. With respect to the justifiability of the approach, it should be noted that from a classic criminal law perspective, it is controversial to impose guilt on a person (and consequently confiscation sanctions on his property) merely on the basis of what the person intends without a link to any criminal conduct. As the principle of *mens rea* implies, people "should be held criminally liable only for events or consequences which they intended or knowingly risked,"²¹⁵ or punished for the commission or facilitation of actual criminal conduct rather than criminal thoughts or state of being (as principle of legality requires).

As far as the structure of the offense is concerned, there is confusion over the formulation of the mental element of the terrorist financing offense. In fact, according to the Terrorist Financing Convention, in order to establish an independent offense of terrorist financing, there is no requirement for any connection between the preparatory act of financing and the subsequent terrorist offense for which the financing occurs. Such a requirement would limit the crime of financing to the equivalent of an act of complicity in the terrorism itself or alternatively make it an attempt by the financier themselves to commit terrorism. But, according to the Convention, all that is required is the financier's intention that funds should be used for terrorist purposes, or his knowledge that the funds will be used for such purposes. This is enough to make his act of financing a criminal act and his property forfeitable.

However, what exactly should a financier of terrorist activity have known or intended to be criminally liable and be subject to confiscation sanctions? Unfortunately, both the Terrorist Financing Convention and EU legislation and directives have failed to set out a clear definition of what constitutes the fault element of the offense. In spite of this ambiguity, the adaptation and implementation of this approach are required because it is assumed that terrorist financing is as serious an offense as terrorism and needs to be tackled (criminalized) independently,²¹⁶ with heavy reliance on the offense's mental element. This ambiguity has left

215. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 75 (6th ed, 2009).

216. This notion is based on the assumption reflected in the preamble of the Convention: "the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain." International Convention for the Suppression of the Financing of Terrorism, Preamble, G.A. Res. 54/109, UN. Doc. A/Res/54/109 (Dec. 9, 1999).

the fault element of the offense of terrorist financing open to different interpretations. The possible mental elements which different jurisdictions read into the definition of the terrorist financing offense will be discussed in the next section.

C. *Terrorist Intent and the Challenge of Human Rights*

Before examining those mental elements interpreted into the definition of the terrorist financing offense, it is necessary to note that, as the Convention requires, adoption of any state of mind as a fault element of the offense and as a basis for the imposition of criminal liability needs to be consistent with the relevant fundamental rights laid down in domestic and international human rights.²¹⁷ Generally speaking, the validity of any confiscation measure depends on its compatibility with the laws safeguarding an individual's right to the peaceful enjoyment of property under the human rights law.²¹⁸ The European Convention on Human Rights²¹⁹ and the Charter of Fundamental Rights of the European Union,²²⁰ for example, rigorously protect the right to own, use, dispose of and bequeath lawfully acquired possessions. The main purpose of these laws, according to the European Court of Human Rights, is "to prevent the arbitrary seizures, confiscations, . . . or other capricious interferences with peaceful possession that many governments are—or frequently have been—all too prone to resort to."²²¹ However, the right to property is not absolute. Both the Convention and Charter give states the right to interfere with one's property under two circumstances: where it is precisely provided by law, and where it is necessary for the general interest.²²² These two requirements are well explained by the European Court of Human Rights.

With regard to the former, which flows from the criminal law principle of legality (no punishment without law), the European Court of

217. *Id.* art. 17: "Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law."

218. PETER ALLDRIDGE, *MONEY LAUNDERING LAW: FORFEITURE, CONFISCATION, CIVIL RECOVERY, CRIMINAL LAUNDERING AND TAXATION OF THE PROCEEDS OF CRIME* 113 (2003).

219. *See* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, May 18, 1954, 213 U.N.T.S. 262.

220. Charter of Fundamental Rights of the European Union art. 17, Dec. 18, 2000, 2000/C 364/1.

221. *Marckx v. Belgium*, EUR. CT. H.R., App. No. 6833/74, ¶ 20 (1979).

222. At the time of emergency "threatening the life of the nation," states are also allowed to take measures derogating from their obligation to value the right to property, "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." *See* the European Convention on Human Rights, art. 15.

Human Rights has set two requirements: accessibility and foreseeability. The court ruled that:

the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.²²³

As for necessary interference for the general interest, the question is whether and when in exercising their right to control the use of private property, states are acting in accordance with the general interest of its society. In order to manage disputes involving the property right of individuals and public interest, the European Court of Human Rights has commonly applied the proportionality principle.²²⁴ According to this principle, there should be a reasonable relationship of proportionality between the means employed in the deprivation of property and the legitimate objectives to be realized by the deprivation.²²⁵ In other words, legislation must strike “a fair balance between the demands of the general interest of the community, which in the case of terrorist financing, is the prevention of the use of funds and property for terrorist activity, and the requirements of the protection of the individual defendant’s fundamental rights.”²²⁶

In determining whether such a balance is held, the principle implies three tests: “Whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right [reasonableness test]; (ii) the measures designed to meet the legislative objective are rationally connected to it [appropriateness test]; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective [proportionality test].”²²⁷

In applying these tests to counter terrorist financing measures, one must ask the following questions: (i) is financing of terrorism really “a matter of grave concern to the international community,” with regard to which regulatory measures limiting fundamental rights need to be

223. *The Sunday Times v. The United Kingdom*, EUR. CT. H.R., App. No. 6538/74, ¶ 49 (1979).

224. Article 52(1) of the Charter of Fundamental Rights of the European Union allows limitations on the exercise of the rights and freedoms recognised by this Charter on the conditions that they are “provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

225. *Pressos Compania Naviera SA & Others v. Belgium*, EUR. CT. H.R., App. No. 17849/91 ¶ 38 (1995).

226. *Jahn & Others v. Germany*, EUR. CT. H.R., Applications Nos. 46720/99, 72203/01, and 72552/01 ¶ 93 (2005).

227. *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, 1 AC 69, 80, (1998) (alteration in original) <http://www.bailii.org/uk/cases/UKPC/1998/30.html> [<https://perma.cc/MQJ9-7ZQU>].

adopted to prevent movements of funds intended for terrorist purposes²²⁸ (reasonableness test)?; (ii) is the criminalization of terrorist financing as an independent offense, although preparatory in its nature, suitable or appropriate to achieve the given goal (appropriateness test)?; and (iii) would the imposition of liability and confiscation sanctions on the basis of guilty mind of the accused result in an excessive burden on the individual (proportionality test)?

Regardless of whether the counter-terrorist financing regime can survive the first two tests (reasonableness and appropriateness test), the proportionality of its measures depends heavily on the mental element to the definition of terrorist financing offense. As mentioned above, this mental element would be the main basis for imposing criminal liability and sanctions in the absence of a requirement to link financing to an actual terrorist act. In order for any mental element to pass the test of proportionality, its consistency with the protected human rights needs to be tested. In fact, any formulation of the offense should not be upheld as being consistent with protected right to the peaceful enjoyment of possession if it, although necessary and suitable, does not precisely indicate the scope of confiscation which might be imposed to those involved in financing.

A *mens rea* requirement cannot also be justified as being proportionate if it fails, due to its broadness, to make a distinction between the innocent and the guilty. In other words, legislation which purports an aim in the general interest of merely preventing those funds and property from being used for terrorist activity will be in violation of the protected right to property if it results in depriving individuals of funds and property which are not proved to be used or intended to be used for such activity. Such legislation cannot proportionally and reasonably enhance the purported aim and thus fails the proportionality test.

In the absence of a requirement to link the preparatory act of financing to the actual terrorist act, three possible forms of *mens rea* could be determined for the offense of terrorist financing: awareness of circumstances, general knowledge of a terrorist act, and knowledge of the identity of the recipient(s) of funds. I have chosen these mental elements read by courts outside the EU and ASEAN into the definition of the offence because the matter, to the best of my knowledge, has never been discussed by any court or authority in EU or ASEAN jurisdictions. As will be illustrated below, none of these fault elements, however, seem to meet the requirements of the proportionality principle for two reasons: either they are imprecise about what should be confiscated due to the fact that there is no actual terrorist act with regard to which a confiscation sanction is imposed, or they impose liability and penalty without any kind of guilty mental element on the part of the accused (financing of a person or an organization).

228. International Convention for the Suppression of the Financing of Terrorism, *supra* note 65.

1. Confiscation on the Basis of Awareness of Circumstances

In the absence of a requirement to link a preparatory terrorism offense to an actual terrorist act, a court in Australia ruled that awareness of a circumstance can be a sufficient ground for imposing liability. The court explained in *Regina v. Lodhi* that the fault element of such offenses can be demonstrated with respect to the act of preparation or facilitation without a need to prove that the accused intended to facilitate or contribute to either a specific act or a general terrorist act.²²⁹ In this case, the accused collected maps of the Sydney electrical supply system, sought information about a price list of chemicals, and possessed materials containing general information about making explosives. The court found that the accused was aware of circumstances in which these acts occurred.²³⁰ The court regarded the accused's conduct as a series of linked actions and concluded that the accused knew all three acts would lead to "one continuing uninterrupted course of conduct centring upon and enterprise to blow up a building or infrastructure."²³¹

The *Lodhi* court's reading of the fault element (awareness of circumstance) attracted criticism for stretching the boundaries of criminal liability beyond the principles of criminal law.²³² It would undoubtedly also provoke criticism if it had been used as a basis for confiscation. In other words, if a person is convicted of a preparatory terrorism offense when there is no actual terrorist act or when the gravity, nature and the scale of a terrorist act is not clear even to the accused, what exactly should be confiscated?

In a case like *Lodhi*, the convict's involvement in any terrorist act need not to be proven, yet any of his property could be in danger of confiscation if the prosecution can link it to any (unproven) terrorist act assumed by the prosecution to be the target of the convict. Even if the law contains a defense (as the English law does)²³³ which allows the accused to prove, by providing evidence, that the seized or confiscated property was not intended or could be used for terrorism, it is still problematic with regard to what terrorist act the accused should provide such evidence for in order to prevent the confiscation. That is, the imposed liability under this mental element is too vague to allow for any sort of meaningful rebuttal. A confiscation order can be issued in cases where the accused may deny (as *Lodhi* did, although unsuccessfully)²³⁴

229. *Regina v. Lodhi*, (2006), 199 NSWLR 364 (Austl.).

230. *Id.* ¶ 44.

231. *Id.*

232. See BERNADETTE McSHERRY ET AL., REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW 141–64 (Bernadette McSherry et al. eds., 2008).

233. International Convention for the Suppression of the Financing of Terrorism, *supra* note 65, art. 18(2). It is a defense for a person charged with an offense under subsection (1) to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

234. See *Regina v. Lodhi*, *supra* note 229, ¶¶ 15, 19, 22. *Lodhi*, although he denied

his involvement in preparation for a terrorist act, where the prosecution is exempted from proving that terrorist act at all, and where such an act is not planned or even clear to the accused.

This *mens rea* seems too ambiguous in its scope to meet the accessibility and foreseeability requirements of the right to property provisions and to provide sufficient safeguards against the unjust confiscations or capricious interferences with peaceful possession. However, its use has been justified on the basis that it is an efficient tool for ensuring security and prevention of (fictional) subsequent harm.²³⁵ But at what price?

2. Confiscation Based on General Knowledge of a Terrorist Act

Where the actual knowledge or intention of a financier need not be linked to a specific terrorist act,²³⁶ ‘general knowledge of a terrorist act’ has been regarded by a Canadian court as a sufficient fault element to trigger criminal liability for the facilitation of or contribution to terrorist activity.²³⁷ The court ruled in *R. v. Khawaja* that “it is unnecessary that an accused be shown to have knowledge of the specific nature of terrorist activity he intends to aid, support, enhance or facilitate, as long as he knows it is terrorist activity in a general way.”²³⁸ According to its ruling, the accused need not know the specific details of the subsequent terrorist act as long as he or she knows that an act of terrorism is coming.²³⁹ This fault element as a basis for imposing criminal liability is justified as an efficient tool to include cases where a terrorist cell may not know the specific nature of the terrorist act which the actual perpetrator is going to carry out until the last moment.²⁴⁰ This reading of the fault requirement is

the charges, received 30 years imprisonment.

235. ANDREW LYNCH & GEORGE WILLIAMS, *WHAT PRICE SECURITY?: TAKING STOCK OF AUSTRALIA’S ANTI-TERROR LAW 19* (2006). The Australian Minister for Justice and customs justified the structure of terrorism offences as it is as follows as

In the security environment that we are dealing with, you may well have a situation where a number of people are doing things but you do not yet have the information which would lead you to identify a particular act . . . When you are dealing with security, you have to keep an eye on prevention of the act itself as well as bringing those who are guilty of the act to justice . . . [T]he original intention of the legislation [is] to remove any doubt that a person can be prosecuted for a terrorist act and acts preparatory to a terrorist act, and that our agencies can investigate such acts even if a specific target has not been identified.

Id.

236. Canada Criminal Code, R.S.C. 1985, c C-46 § 83.02 (Can.).

237. *See Regina v. Khawaja*, 2006 CanLII 63685 (ON SC).

238. *Id.* ¶ 39.

239. *Id.* ¶ 32.

240. *Id.* ¶ 31. The court referred to a transcript of a videotape of Bin Laden who said:

The Brothers, who conducted the operation, all they knew was that they have a martyrdom operation and we asked each of them to go to America but they didn’t know anything about the operation, not even one letter. But they were trained and we did not reveal the operation to them until they are there and just before they boarded the planes . . . those who

similar to the reading upheld by some EU Member States. For example in Sweden, “there is a need to show that funds were provided with intent that a particular serious crime sooner or later will be carried out.”²⁴¹

While it seems this formulation of the fault requirement satisfies minimum standards of knowledge since it requires some type of material or actual connection between the act of preparation or facilitation and the subsequent crime, there are three sources of uncertainty as to the breadth of such a fault requirement. First, although this fault requirement is broad enough to secure the conviction of those who facilitate the commission of a terrorist act without knowing the specific details of that terrorist act until the last moment, it imputes guilt to those who are remotely and indirectly linked to a terrorist act and who do not have any intention to finance or facilitate any terrorist act or do not know how their conduct will serve terrorism. Under the construction of this requirement, the property of whoever engages closely or remotely, directly or indirectly, in the preparatory act can be confiscated in the same manner. For example, a restaurant owner who knows that certain customers are using his restaurant to plan a terrorist act can be held criminally liable for financing a terrorist act the same as those who are directly involved in the facilitation of that terrorist act.²⁴² The court may decide not to accept the accused’s protest that he did not have any particular intention to finance the terrorist act and that his main purpose was to gain money from his business. The court may find that whatever his purpose was, he knowingly made his restaurant available to be used for planning a terrorist act.²⁴³ Consequently, similar to the property of those directly involved in planning for the terrorist act (if any property involved at all), the restaurant is also forfeitable.

In addition, it appears that this mental requirement suggests a *mens rea* element closer to recklessness or negligence than a knowledge requirement. That is, if an accused does need to have knowledge of the specific nature of an upcoming terrorist act, he cannot be absolutely or at least virtually certain that his funds or donation will be used for the commission of the terrorist act. This “runs the risk of blurring the distinction between punishing a person as a terrorist for their subjective fault or for their negligence in not taking reasonable steps to avoid assisting terrorists.”²⁴⁴ Notably, any understanding that negligent engagement in

were trained to fly didn’t know the others. One group of people did not know the other group.

Id.

241. Financial Action Task Force, *The Third Mutual Evaluation/Detailed Assessment Report; Anti-Money Laundering and Combating the Financing of Terrorism; Sweden*, FATF ¶ 134 (Feb. 17, 2006).

242. Kevin E. Davis, *Cutting Off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA’S ANTI-TERRORISM BILL 305* (Ronald J. Daniels, Patrick Macklem & Kent Roach eds., 2001).

243. *Id.*

244. Kent Roach, *Terrorism Offences and the Charter: A Comment on R. v.*

the facilitation or financing of a terrorist act would suffice for the offense is inconsistent with the Terrorist Financing Convention and with EU law which excludes references to negligence and recklessness.²⁴⁵

The breadth of the mental element is also worrying as it may impose liability on innocent conduct not carried out for the commission of any terrorist act unless otherwise proven. For example, suppose A and B decide to commit a terrorist act about which C knows, but disagrees. If C engages in fund-raising with A and B for non-criminal purposes, but a portion of the funds collected ends up being used by A and B for the preparation or facilitation of the terrorist act without C's knowledge, C seems to be criminally liable because all elements of the offense exist: C knowingly engaged in collecting funds that were used or were intended by A and B to be used for the preparation of the terrorist act, and C had a general knowledge that a terrorist act may occur through A and B. This can consequently result in unfair and unsound confiscation of C's property involved in the fund-raising. His other property and assets assumed that they could be used for terrorist activity is also forfeitable if C fails to prove—in the sense of providing some evidence to disturb the inference of his knowledge—that his property or assets were not intended to be used or could be used for the preparation or commission of the terrorism act.

3. Identity-Based Confiscation

Cutting off the financial resources of terrorists and terrorist organizations is another method of addressing terrorist financing which has become widely used lately. According to this method, hereinafter referred to as 'identity-based confiscation,' the knowledge that the recipient of the funds collected or provided is a terrorist or terrorist organization triggers criminal liability and makes the funds and property involved forfeitable. The identity-based approach is adopted by the UN Security Council resolutions²⁴⁶ and recommended by the FATF.²⁴⁷ Accordingly, UN Member States and FATF members are required to criminalize and punish the financing of a terrorist act, individual terrorists, and terrorist organizations. As mentioned above, this approach is clearly reflected in the legislation of some EU Member States such as Germany and Denmark.

Khawaja, 11 CAN. CRIM. L. REV. 271, 286 (2007).

245. Council Directive 2015/849, *supra* note 162.

246. *See, e.g.*, paragraph 1(d) of Resolution 1373 (S.C. Res. 1373, U.N. Doc S/Res/1325 (Sept. 28, 2001)) which requires all Member States to "[p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons."

247. Financial Action Task Force, *supra* note 88, at 82.

This formulation obviously does not require any additional requirement that there should be knowledge (or a specific intent) on the side of the financier that, for example, the funds are substantial enough in its value or its effect to enhance the ability of the group to commit a terrorist act. Imposition of such an additional requirement is considered to be too great a burden for the prosecution since it must prove that the financier knew that the contribution would further the criminal aims of the group.²⁴⁸ It is also reasoned that contribution to a group or a person may contain “dual use” and fungible resources, “which could be used for different purposes including illicit ones.”²⁴⁹ However, multiple legal and human rights challenges result from such a fault element.

Firstly, if the knowledge of the identity of the recipient alone suffices for the intent, the offense of financing terrorist groups seems to impose punishment on an act based only on the connection of that act with others’ state of being, not with their criminal conduct. In other words, the physical element of collecting or providing funds is innocuous enough; it is (the knowledge of) the status of the person or the group with whom people associate that criminalizes these acts. Consequently, the intent of financiers is irrelevant. This is in clear contrast with rule of law standards such as the principle of legality which seeks to punish criminal conduct or participation in a criminal act, “not criminal types,”²⁵⁰ and the principle of *mens rea* which emphasizes that people “should be held criminally liable only for events or consequences which they intended or knowingly risked.”²⁵¹

Practically, this knowledge requirement—convicting a person for the provision of funds to a group on the ground that he or she knows the group is a designated terrorist group or that it is involved in criminal activities—causes some concerns in terms of sweeping up both guilty and non-guilty mental states. For instance, a taxi driver could be liable for giving a ride to a member of a terrorist group if the driver knows that he or she is a member of the group. Similarly, a hotel owner could be held liable for providing lodging to a member of a terrorist group. As a result of the imposition of liability under this knowledge requirement, the car and the hotel is forfeitable without the existence of any malicious intent or knowledge that the provision of the services could contribute to the preparation or contribution of a terrorist act and where the provision of these services may not be sufficiently substantial in the preparation or contribution of any criminal act.²⁵² A US court has held that this knowledge requirement does not satisfy the requirement of personal guilt because knowledge of the identity of the recipient or of the

248. David Henrik Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 805 (2007).

249. *Id.* at 804.

250. MCSHERRY ET AL., *supra* note 232, at 157.

251. ASHWORTH, *supra* note 215, at 74.

252. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1300 (M.D. Fla 2004).

unlawful activities of a group is not strong enough to impute guilt to the donor's conduct; that is, "when criminality and punishment are justified by a relationship to others' conduct, that relationship must be sufficiently substantial to constitutionally support criminal liability."²⁵³

Concern also arises that this knowledge requirement imposes liability on well-intentioned financiers who know the recipient is a terrorist group, but intend to further the lawful purposes of the group, or to provide humanitarian aid to the disaster and war zones controlled by a terrorist group.²⁵⁴ If a financier is guilty even when he does not intend his or her funds to be used for terrorist activities or for the terrorist functions of a group, then no humanitarian support can be sent to any designated terrorist group.²⁵⁵ This seems to conflict with the words of the Terrorist Financing Convention, which requires Member States to criminalize only financing cases that are carried out "unlawfully."²⁵⁶ The qualifier "unlawfully" was included to the definition of the offense to add "an element of flexibility by, for example, excluding from the ambit of application of the draft convention legitimate activities, such as those of humanitarian organizations and ransom payments."²⁵⁷ While the EU has excluded this qualifier from its definition of terrorist financing, a few individual EU Member States such as Switzerland have included such a qualifier to the definition of terrorist financing offense in order to exempt financing of certain kinds from the definition of the offense.²⁵⁸

Finally, not only does this intent requirement have a chilling effect, violating the right to freedom of expression for those who seek to provide material resources to "the non-violent humanitarian and political activities" of designated groups,²⁵⁹ but it may also result in the imposition of confiscation without the existence of a guilty mind on the financier's part. Such a sanction violates the right to property as it does not meet the proportionality test. That test requires that the measure limit the fundamental right to property in accordance with the general interest only if it proportionally and reasonably enhances the aim of the measure. In

253. *Id.*

254. Sandi Halimuddin, *U.S. Counterterrorism Laws Block International Humanitarian Aid*, WORLD POLICY BLOG (Dec. 19, 2013), <http://www.worldpolicy.org/blog/2013/12/19/us-counterterrorism-laws-block-international-humanitarian-aid> [<https://perma.cc/3L6F-7U87>].

255. Pendle, *supra* note 248, at 785.

256. International Convention for the Suppression of the Financing of Terrorism, *supra* note 65, art. 2(1).

257. General Assembly, Working Group of the Sixth Committee, *Measures to Eliminate International Terrorism, Report of the Working Group*, Doc. A/C.6/54/L.2 at 67.

258. *Id.* at 260 quinquies (3). Financing of a group does not constitute an offense and as a result the money involved is not subject to forfeiture if the financing is not made to support the group "in its criminal activities," or if the financing is carried out "with a view to establishing or re-establishing a democratic regime or a state governed by the rule of law or with a view to exercising or safeguarding human rights."

259. Humanitarian Law Project v. United States DOJ, 352 F.3d 382, 385 (2003).

this case, it is solely the prevention of funds and property from use in the commission or preparation of terrorist activity, and not the prevention of use for humanitarian purposes.

D. *The EU Response to the Security Council Resolutions: Suspension of Criminal Law*

1. Adoption of the UN Resolutions

The identity-based asset freezing approach—the freezing of assets of a person or a group on the basis of a suspicion (not conviction or charges) that they engage in terrorist activities or associate with terrorists—has become the common practice of many jurisdictions due to the binding nature of the UN Security Council’s resolutions. It is not clear whether the Security Council found it necessary to create a freezing regime that imposes freezing sanctions for an indefinite time on such a flimsy basis because the confiscation measures established under the counter-terrorism laws have proved insufficient or impractical. Regardless,²⁶⁰ it seems that the Security Council has shifted the focus of the fight against terrorist financing from a preventive approach, which seeks to counter terrorism within the sphere of criminal law by criminalizing all preparatory acts. This may result in facilitation and contribution to terrorism, and an outdated, identity-based approach which seeks to incapacitate persons or groups suspected of involvement in terrorism by freezing all of their assets without needing to find them guilty. The diffusion of this politically motivated method of dealing with the criminal issue of terrorist funds has been pushed through at national and regional levels at the cost of the complete suspension of criminal law.

The EU has adopted a mix of legal instruments to oblige its Member States to implement the Security Council’s (identity-based) freezing measures.²⁶¹ The EU responded to Security Council Resolutions 1267 (1999) and 1333 (2000), which require States to freeze the assets of Bin Laden and Al-Qaida and other designated and listed individuals and entities associated with them, by incorporating the Security Council list into its own framework through the Regulation 881/2002.²⁶² The incor-

260. The English Judge, Lord Rodger, commented that the measures adopted by these Security Council resolutions can be found in the Terrorist Financing Convention. But the reason that the Security Council adopted such resolutions is that by September 2001, only few states had adopted and ratified the Convention. Indeed, the resolutions “imposed on all states the selected obligations which would otherwise have bound them only if they had eventually decided to ratify the Convention.” *See R (Al-Jedda) v. Secretary of State for Defence* [2008], AC 332, ¶ 161.

261. Freezing of funds according to Article 1(2) the Council Regulation (EC) No. 2580/2001 means “the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management.”

262. Regulation 881/2002 was amended several times by the Council Regulation (EU) No. 1286/2009 of December 22, 2009, and by the Council Regulation (EU) No.

poration of a person or entity into the implemented UN list does not need to be accompanied by the imposition of any charges or conviction. In fact, while the EU Commission seems to have power to make independent decisions on listing and delisting,²⁶³ the EU Commission has faithfully adopted and updated its list in accordance with the UN list. Article 2 of Regulation 881/2002 requires the freezing of “all funds and economic resources belonging to, or owned or held by”; the listed persons and entities.²⁶⁴ “No funds” and “no economic resources” should be made available, directly or indirectly, to these people and entities.²⁶⁵ These provisions are directly applicable in European national systems without the need to transpose them into domestic legislation.²⁶⁶

In responding to Resolution 1373 (2001), which requires states to adopt independent measures against those whom states consider to be terrorists, the EU has taken an approach similar to its implementation of the Al-Qaida Sanction list. It has adopted Common Position 2001/931, leading to the establishment of an autonomous EU list which incorporates groups and persons suspected of being “involved in terrorist acts.”²⁶⁷ ‘Involvement in terrorist acts’ has a broad meaning and includes mere association with terrorists. According to Article 2 (1) of the Common Position, ‘persons and entities involved in terrorist acts’ means

persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist act[.]; groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

The list of person and entities involved in terrorist acts should be drawn up and reviewed

on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a [national] competent authority, [denoting a judicial authority or an equivalent competent authority]²⁶⁸, . . . irrespective of whether [the list]

754/2011 of August 1, 2011, and by Commission Implementation Regulation (EU) 2016/13 of January 6, 2016.

263. The latest amendment to the listing procedure of the UN designation list requires the EU Commission to take a decision to list a person or entity designated by the UN Sanction Committee on the basis of a statement of reasons provided by the UN Sanction Committee. The Commission, then, communicates the decision to the listed person or entity and provide them a chance to “express his, her or its views on the matter.” If any observations are submitted, the Commission may review its decision. Those observations shall be forwarded to the UN Sanction committee. See Council Regulation (EU) 1286/2009, art. 7(a), 2009 (L 346/42).

264. Council Regulation (EC) 881/2002, art. 2(1), 2002 (L 139/9).

265. *Id.* art. 2, (2)–(3).

266. *Id.*

267. Council Common Position, On the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, art. 1 (L 344/93).

268. A “competent authority” here does not mean an appeal or review body. It is

concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act[,] based on serious and credible evidence or clues, or condemnation for such deeds.²⁶⁹

While it seems that such a procedure would involve some form of “judicial check,” “there is no certainty of this.”²⁷⁰ What is certain is that there is a need for a decision to be made by a national authority. In practice, a person or entity can be listed merely on the basis of information or clues obtained from “the sphere of intelligence or investigation.”²⁷¹ In addition, the basis on which an investigation is instigated or suspicion is raised seems to vary from one state to another due to differences in the national perceptions of terrorist threats, and differences with regard to the definition of a ‘terrorist act’ or ‘terrorist group.’²⁷² Consequently the Common Position requires “the freezing of the funds and other financial assets or economic resources of the persons, groups and entities listed.”²⁷³ Under the Regulation 2580/2001, the EU Council, “acting by unanimity,” has also designated a list of individuals and groups suspected of committing or attempting to commit, participating in, or facilitating the commission of any act of terrorism; legal persons or entities owned or controlled by such designated persons, groups or entities; or persons or entities acting on behalf of or at the direction of such person and entities.²⁷⁴ Article 2 of the Regulation allows the freezing of all funds, other financial assets and economic resources owned or held by listed person or entities.

an investigative body authorized by a state to investigate on suspected individuals or groups. “An investigation may well be authorized by a court or an investigative judge, but depending on how a state’s system is constructed. It can also be envisaged that investigations are ordered by a prosecutor. It is even possible that the investigation is an intelligence operation ordered by a senior security official which is not designed to result in the collection of evidence or prosecution.” See Iain Cameron, *European Union Anti-Terrorist Blacklisting*, 3 HUM. RTS. L. REV. 225, 235 (2003).

269. Council Common Position of December 27, 2001, *supra* note 267, art. 1(4). A “clearing house” and “Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism,” composed of the representatives of the ministries of justice and internal affairs of the EU Member States, has been established and charged with evaluating the information provided by states (national competent authority) to decide whether a suspected person or organization is involved in terrorism. After the examination, the Council adopts the list through a unanimous Council decision.

270. Imelda Tappeiner, *The Fight Against Terrorism. The Lists and the Gaps*, 1 UTRECHT L. REV. 97, 106 (2005).

271. *Id.*

272. The EU, in the Framework Decision on Combating Terrorism (Articles 1 and 2), has defined ‘terrorist act’ and ‘terrorist group.’ But, the EU Member States have not transposed the definition into their national law. As illustrated above, this has resulted in a disparity in their definition of terrorism, and probably the standard against which terrorist suspects’ actions are judged. Framework Decision on Combating Terrorism 2002/475/JHA, arts. 1–2, 2002 (L 164/3).

273. *Id.* art. 2.

274. Council Regulation (EC) 2580/2001, art. 2(3), 2001 (L 344/70) established a list of persons and entities with regard to Article 2(3) of Regulation 2580/2001.

2. Human Rights Challenges and Introduction of Amendments: Is It Enough?

Although reaching an agreement to establish a regional asset-freezing system may be regarded as a notable achievement in the fight against terrorism, in practice, the implementation of the measures, with regard to both the implemented UN list and the autonomous EU lists, poses serious questions of human rights compatibility. In spite of the operation of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of the Fundamental Rights of the European Union which established the principles of due process within the EU, the asset-freezing regimes (that is, the autonomous EU list and the implemented UN list) did not provide the right for listed persons or groups to be heard, a right to access effective judicial review or a right to enjoy the possession or use of their property. As soon as a person or group was placed into one of the designated lists, states could freeze all of the assets of the listed person for an indefinite time, without imposing any charges or conviction of involvement in terrorist activity, association with terrorists, or the use or intended use of his assets for criminal activity. The EU's General Court, in early cases, did not find these asset freezing sanctions "an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned."²⁷⁵ They repeatedly held that "freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."²⁷⁶ In addition, they refused to review the legality of the sanctions imposed against persons and entities listed in the implemented UN list because they found themselves incompetent to review or challenge the UN Security Council resolutions.²⁷⁷ However, the severity of the sanctions—the freezing of all the assets of listed persons for an indefinite period—led the courts to acknowledge (and scholars to argue) that these sanctions are quasi-criminal in nature, and need to be regarded as "either judicial or subject to judicial review."²⁷⁸

275. Case T-315/01, *Kadi v. Council of the European Union and Comm'n*, 2005, E.C.R. II-3659 ¶ 251.

276. *Id.* See also Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat Int'l Found. v. Council and Comm'n*, 2005 E.C.R. II-3542; Case T-47/03, *Sison v. Council*, 2007, E.C.R. II-2049; Case T-49/07, *Fahas v. Council*, 2010, E.C.R. II-5581.

277. See *Kadi v. Council and Comm'n*, *supra* note 275, ¶ 215. With regard to the question of whether EU courts are competent to review the listing and freezing measures adopted against persons and groups listed in the EU autonomous list, the Court of First Instance had found itself competent to assess the lawfulness of the measures as they were adopted in compliance with the UN Security Council Resolution 1373 which calls for the adoption of necessary measures to combat terrorist financing without specifying persons or entities who should be subject to the measures. See *e.g.*, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 2006, E.C.R. II-4706.

278. Case T-85/09, *Kadi v. Comm'n*, 2010, E.C.R. II-5234 (referring to the opinion of the United Nations High Commissioner for Human Rights). For scholars'

Eventually, the European Court of Justice, in its decision on *Kadi*, the leading case,²⁷⁹ noted that the EU “is based on the rule of law.”²⁸⁰ It held that “respect for human rights is a condition of the lawfulness . . . [of EU laws] . . . and that measures incompatible with respect for human rights are not acceptable in the Community.”²⁸¹ It continued that

the obligations imposed by an international agreement [UN resolutions] cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.²⁸²

Although it ruled that EU courts are competent to review the lawfulness of asset freezing measures, no court has upheld a challenge or examined the nature of the assets freezing regime against the accepted principles of criminal law which are applied in criminalization and confiscation proceedings. In this regard, the European Court of Justice, in *Kadi*, recognized that in fulfilling their international obligations, legislatures at the domestic or EU level enjoy “a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question.”²⁸³

Nonetheless, the European Court of Justice, in *Kadi*, found the procedure deployed to list and freeze the assets of the targeted persons concerned in this case to be in violation of due process rights because it lacked a mechanism whereby the targeted persons could be informed of the reasons or the basis of which they had been listed and their assets had been frozen.²⁸⁴ The court also held that the deployed procedure was in breach of the right to effective judicial protection as “it was adopted without furnishing any guarantee enabling the listed persons concerned to put his case to competent authorities.”²⁸⁵

The court, therefore, set an administrative guideline which has been incorporated into the EU laws.²⁸⁶ This guideline consists of two parts: listed persons must be informed of the reasons adduced against them; and

views, see also CHRISTINA ECKES, EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS: THE CASE OF INDIVIDUAL SANCTIONS (2009); Cameron, *supra* note 268; or Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKLEY J. INT'L L. 203 (2007).

279. See MURPHY, *supra* note 79, at 132.

280. Joined cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council, 2008, E.C.R. I-6490.

281. *Id.* ¶ 284.

282. *Id.* ¶ 285.

283. *Id.* ¶ 360.

284. *Id.*

285. *Id.* ¶ 369.

286. See Council Regulation (EU) No. 1286/2009 of Dec. 22, 2009 Amending Regulation (EC) No. 881/2002, 2009 O. J. (L 346) 42.

listed persons must be able to express their view to the EU Commission on those reasons.²⁸⁷ However, the court (as well as the new amendment to the EU laws) emphasized that there is no need to communicate those reasons to listed persons, or to hear the listed persons' views on the reasons, before they are entered in the list and before the freezing sanctions are imposed against them.²⁸⁸

Unlike the UN listing and freezing procedures which do not provide for a mechanism for judicial or impartial review of the sanctions,²⁸⁹ to retain the right to judicial review, EU courts have found themselves competent to "review of the conformity of the system of sanctions . . . with the system of judicial protection of fundamental rights laid down by the EC Treaty."²⁹⁰ But in another case, the General Court held that this does not mean that courts can "substitute their assessment of the facts and circumstances justifying the adoption of such measures for that of the Council."²⁹¹ In fact, it has made plain that a review for conformity, which seems to be an administrative review, should be limited to "checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power."²⁹²

287. Joined cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council, 2008, E.C.R. I-6504. With regard to listing and freezing procedure used to establish and update the EU autonomous list, the Court of First Instance in the Case T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council, 2006, E.C.R. II-04665, ruled that "a statement of reasons" on the basis of which a person or entity is listed must be communicated to the listed persons or entities.

288. See Council Regulation No. 1286/2009 of Dec. 22, 2009, art. 7a(2), 2009 O.J. (L 346) 42.

289. In 2009, the Security Council authorized the establishment of an Office of the Ombudsperson to assist the Security Council in delisting requests. The Ombudsperson can intervene on behalf of the listed persons but her/his decision does not override the Security Council's decisions on listing or de-listing. The Ombudsperson provides judicial review of listing decisions.

290. Kadi v. Comm'n, 2010, E.C.R. II-5222, *supra* note 279, ¶ 117.

291. Case T-228/02, Modjahedines du peuple d'Iran v. Council, *supra* note 287, ¶ 159. In terms of reviewing measures adopted against persons listed by the UN Security Council, the European Court of Justice, in Kadi v. Commission, ruled that "in the event that the [listed] person concerned challenges the lawfulness of the decision to list or maintain the listing of his name, . . . the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed." This means that courts need to determine whether the decision to list a person "is taken on a sufficiently solid factual basis," and whether the reason for adoption of that decision in itself is "substantiated." Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, Kadi v. Comm'n, 2013, published electronically, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135223&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5243> [https://perma.cc/55YK-L3K2].

292. *Id.*

3. Is It Legally Justifiable?

While the attempts of the EU courts to change the procedural rules for listing and imposing freezing sanctions should not be understated, it is naive to believe that such changes would remove all barriers to the establishment of a well-funded, human rights-consistent regime. In this section, I will argue that the existing regime is a gross violation of due process and human rights values.

a. Ambiguity in the Nature of the Regime and Challenge of Presumption of Innocence

Firstly, the regime offends a key principle of criminal law, the presumption of innocence. Targeted persons or entities are suspected of (not charged with or convicted of) being involved in terrorism on the basis of information and evidence obtained from the instigation of investigations or intelligence. These persons or entities must be listed (in other words, labelled and announced) as terrorists, and all their assets are to be frozen. Although the evidence adduced to enable the listing of persons is not tested in any independent, impartial judicial court, any listed persons or entities seeking delisting must submit evidence to the body (the Security Council, national authorities or the EU council) which listed them to prove that they are not terrorists or terrorist supporters.

The European Convention on Human Rights and the EU's Charter of Fundamental Rights state that "everyone charged with a criminal offense should be presumed innocent until proved guilty according to law."²⁹³ Since the establishment of the regime, there has been a continuing debate as to whether the sanctioning measures imply an accusation of a criminal kind under human rights laws. The measures have been designed in such a way so as not to be indicative of criminal sanctions; that is, they are not classified as a criminal offense or criminal charge in any jurisdiction; instead they are designed as precautionary, temporary measures which pursue preventive purposes and do not impose any punishment in the criminal sense of the word.²⁹⁴ However, in practice, they have the effect of a criminal sanction: they impose the stigma of being a worst type of criminal (a terrorist) on targeted persons; they deprive the targeted persons of access to all of his assets and property for indefinite time (in some cases longer than the punishment provided for the commission of terrorist offenses);²⁹⁵ they have a profound impact on the

293. European Convention on Human Rights, *supra* note 222, art. 6(2). Charter of Fundamental Rights of the European Union, *supra* note 220, art. 48.

294. To determine whether a measure has a criminal nature, the European Court of Human Rights looks into the domestic classification of the measure, the nature of the offense, and severity of punishment that may be imposed. See *Engel & Others v. The Netherlands*, EUR. CT. H.R. (1976), <http://hudoc.echr.coe.int/eng?i=001-57479> [<https://perma.cc/4AGZ-57N5>]. It seems the freezing sanction cannot meet any of these criteria. See Melissa van den Broek, Monique Hazelhorst and Wouter de Zanger, *Asset Freezing: Smart Sanction or Criminal Charge?*, 27 *UTRECHT J. INT'L & EUR. L.* 18 (2010).

295. Kadi was listed and his assets were frozen for 10 years. See *Kadi v. Comm'n* (2013), *supra* note 291.

social and financial lives of not only the target persons, but also those who have relationships with them.²⁹⁶

One may ask that, if this stigmatization and loss of livelihood is not a criminal matter and does not have a punitive nature, then what kind of character does it have? Is it possible to argue that a certain group of citizens are excluded from the protection of human rights? Can the human rights laws be read to mean that everyone suspected of being a terrorist or a terrorist supporter should remain, and be announced as, a criminal suspect until authorities decide otherwise? Irrespective of how these questions are dealt with, the fact remains that the sanctioning regime “strips the individual of protections that are key to the safeguarding of the rule of law.”²⁹⁷

b. Principle of Legality

Under the principle of legality, a person’s rights can be restricted only under clear statutory language. But the asset-freezing regime violates this principle. The main challenge that the regime (or any counter-terrorism regime which aims at setting up universal measures against terrorism) faces is, in the absence of a universal agreement on the nature, definition and scope of the offense of terrorism, what evidence may be used to raise a suspicion that a person or an entity is a terrorist or a terrorist supporter? On the basis of what definition should a person’s actions be judged? And what should the listed persons do, or how should he or she behave, to dispel the suspicion that he or she is not a terrorist or a terrorist supporter?

While these questions have been left unanswered, the UN Security Council has ruled that a person or entity can be targeted as a terrorist suspect if they are suspected of

participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.²⁹⁸

296. In *Chafiq Ayadi v. Council*, 2006 E.C.R. II-2180, the sanctioning measures had “the effect of denying an individual all income or public assistance and, ultimately, any means of subsistence for him and his family.” He was refused by the Irish authorities a taxi-driver’s license as it would have been regarded as provision of financial services to him. In *Ahmed Ali Yusuf and Al Barakaat Int’l Found. v. Council and Comm’n*, *supra* note 276, Yusef, a Swedish citizen, was listed by the UN Sanction Committee, and all of his assets were frozen by the Swedish government. The family was rendered destitute. His social assistance was frozen. No one was allowed to help them, and he was removed by Kista employment office from the list of job seekers. The Swedish authorities raised doubt that the payments made to the applicants by the Swedish authorities might be unlawful. It took a while for the authorities to find a way to give them some social benefits to survive.

297. MURPHY, *supra* note 79, at 144.

298. S.C. Res. 1882, U.N. Doc S/RES/1882 (June 30, 2008). See also S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005).

No definition of ‘terrorist act’ and ‘terrorist group’ is provided. There is no need to link a person’s action to an actual terrorist act. It is also not clear what level of association with a terrorist group may give rise to the suspicion that the targeted person is criminal-minded. Association with such a terrorist group for humanitarian purposes may not prevent a person or entity from being blacklisted. So, in this situation, it is not clear on what basis a state may regard a person or entity as a terrorist and propose their listing in the UN designated list, and it is also unclear on what basis the UN’s Sanctions Committee may list, or refuse to list, that person. For example, in *Yusef*, three Swedish citizens were placed on the UN Sanction list on the basis of the information that the US provided and all of their assets were frozen.²⁹⁹ There was argument between the US and Sweden as to whether the listed persons did meet the requirements of being regarded as terrorist supporters.³⁰⁰ While the US authorities and the Sanction Committee thought there was sufficient evidence to suspect them of being a terrorist, Sweden’s intelligence agency was not convinced.³⁰¹ Two of the targeted persons were eventually delisted after a long diplomatic struggle between the US and Sweden.

A similar approach has been taken in establishing and updating the autonomous EU list. A person may be listed not only for being suspected of committing, or attempting terrorist acts, but also for having a connection with or being in association with a terrorist or a terrorist group. While the EU has provided definitions of ‘terrorist act’ and ‘terrorist group,’ the definitions have not been transposed by the Member States into domestic law, likely due to differences in national perceptions of terrorist threat. Therefore, it is reasonable to conclude that a person or entity is placed (by the request of a Member State and a unanimous decision of the Council) on the autonomous EU list in accordance with national authorities’ perception of a terrorist threat, rather than with regard to the definition of terrorism provided.³⁰² A good example is the insistence on keeping the Kurdish militant group, the PKK, in the autonomous EU list.³⁰³ The group renounced its military struggle against Turkey in 2013 and has been lawfully operating for a few years.³⁰⁴ Its armed wing in Syria is receiving recognition and help from the US and

299. Ahmed Ali Yusuf and Al Barakaat Int’l Found. v. Council and Comm’n, *supra* note 276.

300. Serge Schmemmann, *A Nation Challenged: Sanctions and Fallout; Swedes Take Up the Cause of 3 on US Terror List*, N.Y. TIMES (Jan. 26, 2006) <http://www.nytimes.com/2002/01/26/world/nation-challenged-sanctions-fallout-swedes-take-up-cause-3-us-terror-list.html> [<https://perma.cc/QM9Q-RFVT>].

301. CHRISTINA ECKES, EU COUNTER-TERRORIST POLICIES AND FUNDAMENTAL RIGHTS: THE CASE OF INDIVIDUAL SANCTIONS 33–34 (2009).

302. MURPHY, *supra* note 79, at 140.

303. Deniz Serinci, *European Decision to Keep PKK on Terrorism List ‘Unwise,’ Politicians Say*, RUDAW MEDIA NETWORK (June, 12, 2015), <http://rudaw.net/english/middleeast/12062015> [<https://perma.cc/VF9Y-WKLC>].

304. *Id.*

other Western help in its fight against the Islamic State (ISIS). Nevertheless, it is still on the EU list.

The obvious conclusion, as Murphy says, is that

even if the sanctions system is viewed as an extraordinary preventive counter-measure, it still breaches key rule of law principles. First, the absence of any clear rules on why any particular individuals or entities are targeted by either the UN or EU sanction list is a breach of the principle of legality. The presence of multiple [and vague] definitions of terrorism, and the apparent application of non them is a clear breach of this cornerstone of the constitutive aspect of the rule of law. Problems with the constitutive aspect of the rule of law have consequential effects for the rule of law's safeguarding aspect. If the relevant rules are vague and are not applied then the individual cannot know what rules they are subject to.³⁰⁵

c. Due Process

Article 6 of the European Convention on Human Rights requires that "in the determination of his civil rights and obligations or of any criminal charge against him," everyone is entitled to be treated fairly, efficiently and effectively by, inter alia, being heard and having access to an independent and impartial tribunal. The rights to due process also place limitations on laws and legal proceedings to safeguard these rights. In the case of almost all anti-transnational crime measures, the rule of due process requires the freezing procedure to be limited by two conditions: the freezing of assets should be connected to a criminal investigation, and the investigation should be related to the commission, preparation, or proceeds of, of crime.³⁰⁶ This procedure is justifiable "prior to bringing of criminal proceedings against an individual, the state may wish to freeze their assets to prevent their dispersal or use for criminal activities."³⁰⁷ However, the terrorist asset-freezing regime is remarkably inconsistent with this procedure. In other words, by being classified as a temporary, precautionary, and administrative system of sanctions, notwithstanding its criminal effects, the asset-freezing regime grossly violates all standards of due process rights, even civil due process standards.

Firstly, the person can be listed and subject to freezing sanctions on the basis of information (not necessarily a criminal investigation) which raises a suspicion that the person is involved in terrorism or in association with terrorists (suspicion by association). There is no need for a link between the person's activity and any terrorist act. There is either no mechanism to turn the freezing sanctions into confiscation or no time-frame to lift the sanctions.

According to the new amendments to the EU laws, the listed person should be informed of the reasons for which he is listed and his assets frozen. He is entitled to communicate his views on these reasons to the

305. MURPHY, *supra* note 79, at 140.

306. *Id.* at 139.

307. *Id.*

body (national authorities, the EU Council, the UN Sanction Committee) which blacklisted him. Assuming that there was an agreed set of rules and standards on the definitions and determination of 'terrorist involvement' and 'terrorist association,' can this be regarded as the 'right to be heard'? While it is inaccurate to say that after hearing the persons' view on the reasons, these bodies (national authorities, the EU Council, the UN Sanction Committee) would not be able to reach a fair and impartial decision, it is unfair and in violation of due process not to allow the targeted person to be heard by an impartial and independent judicial body where the rules of evidence and procedure are applied.³⁰⁸

One may argue that by recognizing that national or EU courts are competent to review the legality of the listing and restrictive measures, the listed persons and entities are given the right to fair hearing and right to access to an effective remedy. However, it should be noted that such a review is administrative and limited to checking whether the listing and the imposition of freezing measures have complied with the procedural safeguards set out, and whether such a decision "is taken on a sufficiently solid factual basis."³⁰⁹ This means that the court merely reviews whether the reasons for listing and freezing are convincing enough to continue suspecting that the targeted person is a terrorist or terrorist associate or that they may use their assets for terrorist purposes. This is far from a determination of whether the listed person has actually committed, or attempted to commit, terrorist activity. It also does not require the court to determine whether or how much of the assets of the targeted persons were involved in, or intended to be used for, terrorist activity.

Finally, what is the point of seeking judicial review if such a review is ineffective? That is, if a national or EU court annuls the restrictive measures adopted by the UN Sanction Committee, the targeted person will remain on the UN terrorist list because such annulment is not binding on the Security Council (the Sanction Committee). While the court may order the unfreezing of the assets, a state may issue an executive order overruling the court's decision,³¹⁰ which it must do to avoid breaching its international obligations. In addition, judicial review does not seem to offer effective and permanent protection, as there is always a possibility of being re-listed on the basis of a new investigation or allegation made against the person who has obtained through judicial review the annulment of listing and sanctions. For example, in the Case of *People's Mojahedin Organization of Iran*, despite three successive annulments, the targeted entity was re-listed three times on the basis of new allegations

308. Jeans-Francois Thony and Cheong-Ann Png, *FATF Recommendations and UN Resolutions on the Financing of Terrorism; a Review of the Status of Implementation and Legal Challenges Faced by Countries*, 14 J. FIN. CRIME 150, 160 (2007).

309. *Kadi v. Comm'n* (2013), *supra* note 291, ¶ 119.

310. Sidney Yankson, *Starving Terrorist of Their Financial Oxygen—At All Costs?*, 13 J. MONEY LAUNDERING CONTROL 282, 290 (2010).

provided by different states (France and the UK).³¹¹ It took over ten years for the entity at issue to be removed from the autonomous EU list.

d. Right to Property

The legality of the asset-freezing regime can also be challenged in relation to the right to property. As far as human rights laws are concerned, the validity of any measure interfering with one's property depends on its compatibility with the law protecting human right to property. As mentioned before, the individual right to property can be limited in accordance to the general interest of a society under restricted circumstances. But in order to be lawful, such a measure must strike a balance between the pursuit of a general interest and the limitations that it imposes on the rights of an individual. Where the lawfulness of a measure is examined, under the principle of proportionality, the answer to each of the following questions should be in the affirmative: Is the purpose of the measure sufficiently important to justify its imposition? Is the measure adopted in pursuit of the "public interest" rationally connected to it? Are the measures used to impair individuals' rights no more than is necessary to accomplish the objective?

In the context of the suppression of terrorist funds, there is no doubt that allocation or use of funds or property for the preparation or commission of terrorist acts is blameworthy and should be subject to limitation. However, the asset-freezing regime, which is pre-emptive in nature and focuses, focusing on minimizing or eliminating the risk that terrorist suspects or supporters may use their assets for terrorist activity, hardly survives the second and third tests. The question that needs to be tested is this: if the dangerous nature of a person poses such a risk, does the freezing of all of his assets "rationally" and appropriately eradicate the risk of his assets being used for terrorist acts? In defining what counts as "rationally," EU courts, with regard to another system of restrictive measures of an economic nature, held that

measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation . . . when there is a choice between several appropriate measures recourse must be had to the least onerous, (whether the measure is the least intrusive in the circumstances and that struck a fair and appropriate balance between all affected interests), and the disadvantages caused must not be disproportionate to the aims pursued.³¹²

The main controversy here is whether the freezing of all assets of a person suspected of (not convicted of, or charged with) being involved in terrorism or connected with terrorists for an indefinite time is the only

311. Case T-228/02, *People's Mojahedin Org. of Iran v. Council of the European Union*, 2006 E.C.R. II-0466; Case T-248/08, *People's Mojahedin Org. of Iran v. Council of the European Union*, 2008 Published Electronically; Case T-256/07, *People's Mojahedin Org. of Iran v. Council of the European Union*, 2008 E.C.R. II-03019.

312. Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa & Others*, 1990 E.C.R. I-04023. See also, *Haung v. Secretary of State for the Home Department* (2007), 2 AC, 167, 187, ¶ 19.

and the “least onerous” and restrictive measure that could be deployed to eliminate the risk. It is simply too difficult to believe that this measure is the only and the least intrusive means of protecting the public interest. Finding the alternative tools to deal with the problem is beyond the scope of this research. However, the freezing regime as it currently exists seems to be a reversion to the primitive freezing and confiscation measures deployed by former fascist totalitarian regimes against groups of people suspected by the regime of posing risk to the economic and political stability of the regime.³¹³

Lastly, there is no guarantee that the regime could pass the third test (proportionality) at all times. As mentioned before, the main purpose of the establishment of the right to property is to prevent the arbitrary and capricious interference with peaceful possession “that many governments—frequently have been—all too prone to resort to.”³¹⁴ The right to property can be limited in the general interest of the society. However, there is a serious concern as to whether there will be guarantees that the asset-freezing measures will not be used unlawfully and cruelly against a specific (non-guilty) group of people. In the absence of an agreed and clear definition of ‘terrorism,’ ‘terrorist involvement’ and ‘terrorist association,’ giving so much power to the executive authorities (the UN Sanction Committee, states, intelligent agencies, etc.) to determine who are terrorists or terrorist supporters, without any proper supervision, is quite dangerous. There is potential for some unscrupulous executive authority to turn the measures into weapons against those whom it wishes to suppress simply by labelling them as terrorists and freezing all of their assets.

CONCLUSION

In this paper, I have identified the issues arising from the implementation of the criminalization and confiscation provisions introduced by the Terrorist Financing Convention and diffused by Western-backed international organizations. I have illustrated how these provisions stretch the boundaries of criminal law beyond its traditional principles and consequently violate the fundamental rights of individuals. Regardless of these characteristics, all states, including ASEAN Member States, have been encouraged and pushed to incorporate these provisions into their law. While ASEAN lacks a cohesive counter-terrorist financing regime, individual ASEAN Member States have developed, and are still developing, their counter-terrorist financing regime in accordance

313. For example, the Nazi regime in Germany regarded the Jews as the followers of an abhorrent religious, economic and political doctrine, who seek to dominate the non-Jewish world. The regime considered the Jews’ dominance harmful based on the assumption that their dominance on financial system caused the German defeat in World War One. The regime used various tools including, *inter alia*, freezing and confiscation sanctions on all Jews to eliminate their risk. See MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945* (2010).

314. *Marckx v. Belgium*, EUR. Ct. H.R., App. No. 6833/74, ¶ 20 (1979).

with the Terrorist Financing Convention and the FATF's recommendations. The laws and policies of four ASEAN Member States (Singapore, Malaysia, Indonesia and the Philippines) on criminalization of terrorist financing and confiscation of terrorist funds have been examined by this paper. The regulatory problems that arise from the implementation of these laws and policies in these ASEAN Member States have been discussed. Wondering whether EU, a value-based community with a strong commitment in preservation and promotion of democratic values and human rights, can provide a good model for the ASEAN, I have thoroughly examined EU's and its Member States' laws and policies on terrorist financing. The following are the summary and results of this research.

The adoption and implementation of the existing counter-terrorism measures by both EU and ASEAN Member States seem to face similar problems. First and foremost, it is not clear what exactly constitutes (or does not constitute) terrorism, a terrorist act or a terrorist group. The Member States of both the EU and ASEAN have different understanding and definitions of terrorism. Their definitions are so vague and broad. As far as the principle of legality is concerned, this raises a concern that in determining terrorist financing offenses, there are multiple possible definitions of terrorism that can be used as grounds to impose liability or forfeiture sanctions.

In terms of the conceptualization of terrorist financing as an offense, both ASEAN and EU Member States have incorporated into their law the vague definition provided and promoted by the Terrorist Financing Convention, and FATF's recommendations. That is, financing of terrorism, which includes financing of terrorist acts, terrorists, and terrorist organizations, is an independent offense without a requirement to link the act of financing to an actual criminal act for which the financing acts may be carried out. This means that the offense relies heavily on the mental element of the terrorist financing offense. A financier's intention or knowledge alone can make the financier criminally liable and taint the funds or property collected, provided or possessed by the financier. But the question is what that intention or knowledge refers to. In the absence of any connection between an act of financing and a subsequent criminal act, a financier must have "terrorist purposes" to be liable and subject to forfeiture sanctions. In other words, the financier should intend or know that the funds, collected, provided or possessed by him or her, will be used for terrorist purposes. However, both EU and ASEAN and their Member States did not define this term. In the absence of an effort by the ASEAN and EU Member States to clarify what exactly constitutes the mental element of the offence, I have examined three possible forms of *mens rea* (awareness of circumstances, general knowledge of a terrorist act, or knowledge of the identity of the recipient(s) of funds) determined by courts outside the EU and ASEAN jurisdictions. My purpose in examining these mental elements was to find out whether there is any interpretation of the mental element of the offence that can resolve

the ambiguity inherent in the definition of the offence. As the analyses in this paper have shown, these mental elements are too vague and broad to be used as a mental element of the offense. They have detrimental consequences in a way that would result in the imposition of liability on the innocent or well-intentioned accused (financers such as donors or humanitarian activists), and consequently result in the violation of rights to property by depriving the accused of his or her funds and property even when it is not proved to be used, or intended to be used, for commission or preparation of any criminal activity.

With regard to the implementation of the UN Security Council resolutions on freezing the assets of those listed as terrorists by the Sanction Committee, the ASEAN Member States seem to comply with the obligations imposed by the Security Council resolutions. However, their compliance has resulted in the violation of the fundamental rights and due process protected by international human rights laws under the ASEAN Human Rights Declaration. The approach of the EU in adopting and implementing freezing measures in accordance with the Security Council resolutions has also resulted in the suspension of criminal law. Even the introduction of amendments to the EU policies, followed by EU court decisions, has not, for the reasons provided, alleviated the harsh and unjustified impact of these measures.

Regarding the analyses provided by this paper, it is fair to conclude that the EU's and its Member States' approach in adopting and implementing international counter-terrorist financing measures and in addressing the issues and ambiguities inherent in the ill-defined concept of terrorist financing is unpromising and in contradiction with their policies and emphasis on the protection and promotion of human rights, rule of law, democratic values and good governance; so the EU seems to be a poor model for ASEAN to follow.

