

One Treaty to Apply Them All? The Impact of Cumulative Reservations on Defining Maritime Terrorism

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1 Introduction

As the continual work of the Comité Maritime International (CMI) recognises, states must cooperate on legislative and enforcement measures responding to a range of maritime crimes.¹ Effective measures are essential to maintain maritime security and protect the maritime community. When an explicit and shared definition of a maritime crime exists, including piracy,² or armed robbery at sea,³ then uniformity in domestic legislation and international cooperation may readily proceed.⁴

Concerning maritime terrorism there is no agreed terrorism definition, let alone maritime terrorism.⁵ Instead, maritime terrorism is an “umbrella term”,⁶ referring to the piecemeal approach of numerous treaties that create offences for identified acts at-sea. Further global and regional treaties then cross-reference the offences in these global instruments to create related offences, such as financing ‘terrorism’, or regional offences, such as regional maritime ‘terrorism’.⁷ Many acts within CMI’s *Maritime Criminal Acts: draft guidelines for national legislation* fall under the maritime terrorism umbrella.⁸ While states

¹ IMO, ‘Maritime Criminal Acts – Draft Guidelines for National Legislation (Submitted by the Comité Maritime International (CMI))’ (2007) LEG 93/12/1.

² United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art. 101; Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, opened for signature 11 November 2004, 2398 UNTS 199 (entered into force, 4 September 2006) art. 1(1).

³ IMO, ‘Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships’ (2010) Resolution A1025(26) para 2.2; ReCAAP art. 1(2).

⁴ IMO (n 1) 1 ‘The key to effective prosecution’.

⁵ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation), Preliminary Objections Judgment of 8 November 2019, Declaration of Judge Robinson* [2019] ICJ 166 [9–14].

⁶ UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (UN 2019) 132.

⁷ See summary, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* [2011] Special Tribunal for Lebanon STL-11-01/1 [89].

⁸ IMO (n 1) art. 2(a)(ii)-(x) and 2(b) .

are encouraged to become party to all relevant international conventions and protocols there is no obligation to do so.⁹

Therefore, for the purposes of determining a state's obligations, the domestic legislation necessary, the "shaping and sharing of norms",¹⁰ or the availability of cooperative mechanisms, one must identify which acts at-sea are accepted by that state as offences under the umbrella of maritime terrorism. At the global level, the offences accepted by a state are found by analyzing which of the 19 counterterrorism instruments that state joined.¹¹ At the regional level, including in the *ASEAN Convention on Counter Terrorism* (hereinafter, ACCT), this task is supposedly simplified by creating a regional definition of offences that cross-references the offences found in a long list of global counterterrorism instruments.¹² As seen below (2), many instruments apply in a maritime context to define maritime terrorism.

Importantly, all cross-referenced instruments shall apply to the definition of ACCT offences *unless* a state excludes, by reservation, a cross-referenced instrument to which it is not a party.¹³ As the entire treaty framework of obligations and cooperation is built upon a shared definition of offences, a simplified and comprehensive definition is clearly a useful starting point.

However, as this paper demonstrates, good intentions do not always lead to good results. The simpler and pragmatic approach of defining regional offences by cross-referencing the definition of offences in global instruments has led to a series of illogical and unfortunate results when the impact of reservations is considered. This is particularly apparent when analyzing the cumulative impact of a state's reservations to the definition of offences under concurrently applicable global and regional counterterrorism instruments. To demonstrate this, this paper provides a case study on the result of reservations to ACCT and the *Convention for the Suppression of the Financing of Terrorism* (hereinafter, 'ICSFT')¹⁴ for defining maritime terrorism. Eight impacts of varying concern to operationalizing international cooperation are identified (3). The conclusion reflects on the way forward in defining and combatting maritime terrorism (4).

Finally, other regional counterterrorism conventions define offences by cross-referencing global instruments.¹⁵ Incoherencies and difficulties in defining maritime terrorism identified here may therefore have wider application.

2 Defining Maritime Terrorism

Globally, maritime terrorism remains undefined. Of the 19 global instruments defining terrorist offences, 17 explicitly apply to maritime offences because parties are obliged to

⁹ UNSC, 'Resolution 1566' (2004) S/RES/1566 para 4; ASEAN Convention on Counter Terrorism, adopted 11 January 2007, UNTS No. 54629 (entered into force 27 May 2011) preamble[11].

¹⁰ ACCT preamble[5].

¹¹ 'International Legal Instruments' (*United Nations Security Council Counter-Terrorism Committee*, 20 May 2020) <<https://www.un.org/sc/ctc/resources/international-legal-instruments/>>.

¹² ACCT art. 2(1).

¹³ *ibid* art. 2(2).

¹⁴ International Convention for the Suppression of the Financing of Terrorism, 9 December 2000, 2178 UNTS 197 (entered into force 10 April 2002).

¹⁵ Numerous examples; *STL-11-01/1* (n 7) n 140.

establish jurisdiction over offences at-sea.¹⁶ The *Protection of Diplomats Convention*,¹⁷ *Hostages Convention*,¹⁸ *Nuclear Material Convention*,¹⁹ *2005 Amendment to Nuclear Material Convention*,²⁰ *SUA Convention 1988*,²¹ *SUA Convention 2005*,²² *Terrorist Bombings Convention*,²³ *ICSFT*²⁴ and *Nuclear Terrorism Convention*²⁵ require the flag state and state of registration to establish jurisdiction over offence aboard, or in respect of, vessels or aircraft at-sea. The *SUA Platforms 1988*²⁶ and *SUA Platforms 2005*²⁷ require coastal states to establish jurisdiction over offences aboard, or in respect of, fixed platforms at-sea. The *Tokyo Convention*,²⁸ *Hijacking Convention*,²⁹ *Montreal Convention 1971*,³⁰ *Beijing Convention 2010*,³¹ *Beijing Protocol 2010*³² and *Montréal Protocol 2014*³³ require the state of registration to establish jurisdiction over offences aboard, or in respect of, aircraft exercising maritime overflight. Only offences under the *Montreal Supplementary Protocol*³⁴ and *Explosives*

¹⁶ See maritime zones including/excluding the seabed and subsoil, water column and/or airspace, UNCLOS arts. 1(1), 2, 49, 55, 76 and 86.

¹⁷ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted 14 December 1973, 1035 UNTS 167 (entered into force, 20 February 1977) arts. 2, 3(1)(a).

¹⁸ International Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) arts. 1, 5(1)(a).

¹⁹ Convention on the Physical Protection of Nuclear Material, 26 October 1979, 1456 UNTS 246 (entered into force 8 February 1987) arts. 7, 8(1)(a).

²⁰ Amendment to the Convention on the Physical Protection of Nuclear Material, 8 July 2005, IAEA Doc. INF/CIRC/274/Rev.1/Mod.1 (entered into force 8 May 2016) art. 7.

²¹ Flag state; Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, adopted 10 March 1988, 1678 UNTS 221 (entered into force, 1 March 1992) arts. 3, 6(1)(a).

²² Flag state; Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 14 October 2005, IMO Doc. LEG/CONF.15/21 (entered into force 28 July 2017) arts. 3bis, 3ter and 3quarter.

²³ International Convention for the Suppression of Terrorist Bombings, 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001) arts. 2, 6(1)(b).

²⁴ ICSFT arts. 2, 7(1)(b).

²⁵ International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, 2445 UNTS 89 (entered into force 7 July 2007) arts. 2, 9(1)(b).

²⁶ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992) arts. 2, 3(1)(a).

²⁷ Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 14 October 2005, IMO Doc. LEG/CONF.15/22 (entered into force 28 July 2010) arts. 2bis, 2ter.

²⁸ Convention on Offences and Certain Acts Committed on Board Aircraft, 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969) arts. 1(2) and 3(2).

²⁹ Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971) arts. 1, 4(1)(a).

³⁰ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973) arts. 1, 5(1)(b).

³¹ Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, 10 September 2010, ICAO Doc. 9960 (entered into force 1 July 2018) arts. 1, 8(1)(b).

³² Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, 10 September 2010, ICAO Doc. 9959 (entered into force 1 January 2018) arts. 1, 4(1)(b).

³³ Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 4 April 2014, ICAO Doc. 10034 (entered into force 1 January 2020) art. 3(2).

³⁴ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 February 1988, 1589 UNTS 474 (entered into force 6 August 1989) art. 1bis.

Convention,³⁵ which could occur at-sea, do not include specific maritime provisions. Within all conventions other jurisdictional basis may require regulating maritime offences, such as territorial³⁶ or nationality-based jurisdiction.³⁷

Regionally, maritime terrorism remains undefined by ASEAN. Nevertheless, the threat of maritime terrorism³⁸ and benefits of regional cooperation result in counterterrorism being a mainstay of ASEAN's agenda.³⁹ ACCT was concluded in record time, in part because it avoids defining terrorism.⁴⁰

Instead, Article 2 of ACCT defines 'offences' for the purposes of ACCT as "offences within the scope of and as defined in" a list of 14 global counterterrorism instruments (see, Annex).⁴¹ Concerning maritime terrorism, flag states and the state of registration are obliged to establish jurisdiction over ACCT offences aboard, or in respect of, vessels or aircraft at-sea.⁴² Regardless of if the ACCT party is a party to the cross-referenced instruments, all 14 instruments apply to defining ACCT offences *unless* a reservation is submitted to exclude an instrument to which a state is not party:

"On depositing its instrument of ratification or approval, a Party which is not a Party to a treaty listed in paragraph 1 of this Article may declare that, in the application of this Convention to that Party, that treaty shall be deemed not to be included in paragraph 1 of this Article."⁴³

Such 'declaration' is a reservation as it "purports to exclude or to modify the legal effect of certain provisions of the treaty [ACCT] in their application to that State".⁴⁴ The declaration (or lack thereof) defines offences for that party, modifying the scope of all ACCT rights and obligations tied to this definition.⁴⁵ These reservations are expressly authorized by ACCT and therefore do not require acceptance by other parties before affecting a state's relations with all other parties.⁴⁶ All ten declarations (3) are largely effective as they meet the substantive and procedural requirements of a reservation, such as in writing and confirmed upon formal acceptance of the treaty (*contra*, 3.5).⁴⁷

³⁵ Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991, 2122 UNTS 359 (entered into force on 21 June 1998) art. 3(1).

³⁶ E.g., SUA Convention 1988 art. 6(1)(b).

³⁷ E.g., SUA Platforms 1988 art. 3(1)(b).

³⁸ CTED, 'Global Survey of the Implementation by Member States of Security Council Resolution 1373 (2001)' (2016) UN Doc S/2016/49 para 194.

³⁹ Space limits discussing ACCT in general, but see: Abdul Razak Ahmad, 'The ASEAN Convention On Counter-Terrorism 2007' (2013) 14 Asia-Pacific Journal on Human Rights and the Law 93.

⁴⁰ Tatik S Hafidz, 'A Long Row to Hoe: A Critical Assessment of ASEAN Cooperation on Counter-Terrorism' [2009] Kyoto Review of Southeast Asia; Rohan Gunaratna, 'ASEAN's Greatest Counter-Terrorism Challenge: The Shift from "Need to Know" to Smart to Share' in Christian Echle and others (eds), *Combatting Violent Extremism and Terrorism in Asia and Europe: From Cooperation to Collaboration* (KAS/RSIS 2018).

⁴¹ ACCT art. 2(1).

⁴² *ibid* art. 7(1)(b).

⁴³ *ibid* art. 2(2).

⁴⁴ Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) art. 2(1)(d).

⁴⁵ ACCT arts. 6-14.

⁴⁶ VCLT arts. 20(1), 21(1).

⁴⁷ *ibid* arts. 19, 23.

Structuring maritime offences to include cross-referencing all 14 instruments, unless a reservation is made, will promote the widest regional cooperation available.⁴⁸ Including instruments to which ASEAN states are not party also holds potential for greater regional cooperation than currently available at the global level.

However, the ACCT cross-references two treaties which do not themselves define offences but rather employ the same cross-referencing/reservation technique, namely ICSFT and *SUA Convention 2005*.⁴⁹ Any reservation limiting offences under ICSFT or *SUA Convention 2005* will also limit the relevant offence under ACCT. Maritime terrorism offences may therefore only be defined by analysing ACCT's wider context and the cumulative impact of reservations, if any, submitted under ACCT, ICSFT and *SUA Convention 2005*. The relationship between reservations is best demonstrated by comparing ASEAN states' reservations to the ACCT and ICSFT because all ASEAN states are parties to both conventions. ICSFT offences are also ACCT offences by way of Article 2(1)(j) of ACCT.

Regardless of if an ICSFT party is a party to the instruments cross-referenced by ICSFT,⁵⁰ all 9 instruments apply in defining ICSFT offences *unless* an exclusionary reservation is made.⁵¹ All 9 ICSFT cross-referenced instruments are also in the list of 14 ACCT cross-referenced instruments. Therefore, any inconsistencies in a state's reservations to ICSFT and ACCT can, as seen below, have profound impacts on the definition of maritime terrorism. If ICSFT was amended to expand the instruments cross-referenced,⁵² any further overlap with ACCT will require careful consideration by ASEAN states to avoid further divergent reservations and definitional difficulties for maritime terrorism.

3 The Impact of Reservations on Defining Maritime Terrorism

Reservations play an important role in allowing states to exclude any cross-referenced treaty to which they are not party and are currently unwilling or unable to implement.⁵³ Table 1 summarizes the relevant reservations to ACCT and ICSFT⁵⁴:

Table 1 Reservations On The Definition of Offences by ASEAN States

State	ACCT Reservation	ICSFT Reservation
Brunei	04 May 2011	4 December 2002

⁴⁸ ACCT art. 1.

⁴⁹ ICSFT art. 2(1)(a); *SUA Convention 2005* art. 3ter.

⁵⁰ ICSFT annex.

⁵¹ *ibid* art. 2(2)(a).

⁵² *ibid* art. 23. Precedent, see: Council of Europe, 'Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism' (2005) CETS No 196 para 50.

⁵³ E.g. due to the legislative or financial impact. See New Zealand's assessment for *SUA Convention 2005* and *SUA Platforms 2005*: Ministry of Foreign Affairs and Trade and Ministry of Justice, 'National Interest Analysis' (2009) International Treaty Examinations – Safety Of Maritime Navigation and Fixed Platforms (Appendix B) paras 18–43 <<https://www.parliament.nz/resource/0000082905>> accessed 25 May 2020.

⁵⁴ Reservations available: ASEAN Secretariat, *Instruments of Ratification: ASEAN Convention on Counter Terrorism* <<http://agreement.asean.org/agreement/detail/49.html>> accessed 25 May 2020; UN, *Status (23/03/2020): International Convention for the Suppression of the Financing of Terrorism (2020)* <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-11.en.pdf>> accessed 25 May 2020.

	<i>Nuclear Material Convention; Nuclear Terrorism Convention; 2005 Amendment to the Nuclear Material Convention; SUA Convention 2005; SUA Platforms 2005.</i>	-
Cambodia	28 June 2010 -	12 December 2005 -
Indonesia	28 June 2012 -	26 June 2006 <i>Protection of Diplomats Convention; Hostages Convention; Montreal Supplementary Protocol; SUA Convention 1988; SUA Platforms 1988.</i>
Laos	28 November 2012 -	29 September 2008 -
Malaysia	11 January 2013 <i>Nuclear Material Convention; SUA Convention 1988; SUA Platforms 1988; Nuclear Terrorism Convention; 2005 Amendment to the Nuclear Material Convention*; SUA Convention 2005; SUA Platforms 2005.</i>	29 May 2007 -
Myanmar	21 February 2012 <i>Nuclear Material Convention[^]; Montreal Supplementary Protocol[†]; Nuclear Terrorism Convention; 2005 Amendment to the Nuclear Material Convention[^]; SUA Convention 2005; SUA Platforms 2005.</i>	16 August 2006 <i>Nuclear Material Convention[^].</i>
Philippines	27 April 2010 -	7 January 2004 <i>Montreal Supplementary Protocol[^]; SUA Convention 1988[^]; SUA Platforms 1988[^]; Terrorist Bombings Convention[^].</i>
Singapore	31 October 2007 All NCP Treaties. <i>(Protection of Diplomats Convention[^]; Hostages Convention[^]; Nuclear Material Convention[^]; SUA Platforms 1988[^]; Terrorist Bombings Convention[^]; Nuclear Terrorism Convention[^];</i>	30 December 2002 All NCP Treaties. <i>(Protection of Diplomats Convention[^]; Hostages Convention[^]; Nuclear Material Convention[^]; SUA Convention 1988[^]; SUA Platforms 1988[^]; Terrorist Bombings Convention[^]).</i>

	<i>2005 Amendment to the Nuclear Material Convention[^]; SUA Convention 2005; SUA Platforms 2005).</i>	
Thailand	<i>21 February 2008 Nuclear Material Convention[^]; SUA Convention 1988; SUA Platforms 1988; Nuclear Terrorism Convention[^]; 2005 Amendment to the Nuclear Material Convention[^]; SUA Convention 2005; SUA Platforms 2005.</i>	<i>29 September 2004 Protection of Diplomats Convention[^]; Hostages Convention[^]; Nuclear Material Convention[^]; SUA Convention 1988[^]; SUA Platforms 1988[^]; Terrorist Bombings Convention[^].</i>
Vietnam	<i>25 February 2011 Hostages Convention[^]; Nuclear Material Convention[^]; Terrorist Bombings Convention[^]; Nuclear Terrorism Convention[^]; 2005 Amendment to the Nuclear Material Convention[^]; SUA Convention 2005; SUA Platforms 2005.</i>	<i>25 September 2002 (Revised 14 February 2014) Hostages Convention[^]; Nuclear Material Convention[^]; Terrorist Bombings Convention[^].</i>
[^] Since became party - reservation is extinguished. [†] Incompatible reservation without effect. [*] Typographical error in reservation referring to Article 1(1)(i) of ACCT.		

Table 1 is the basis of the following analysis.

3.1 Minimum Application of the Treaties' Definitions of Maritime Offences

States may join ACCT to purely deepen regional cooperation on offences defined in global instruments to which they are party. Likewise, states may join ICSFT to purely introduce financing offences that supplement instruments to which they are party. These states will include a reservation that excludes cross-referencing any treaty to which they are a non-contracting party. To do otherwise would expand the definition of offences binding upon that state.

Singapore's, Thailand's and Vietnam's practice are illustrative of this approach. Thailand's and Vietnam's declarations clearly follow ACCT and ICSFT by explicitly listing the treaties excluded from their definition of offences. Singapore simply submits "a treaty to which the Republic of Singapore is not a party shall be deemed not to be included".⁵⁵ Singapore's reservation is less transparent but compatible. For instance, North Korea, Egypt, Israel and Moldova adopted similar all-encompassing ICSFT reservations without objection.

The "declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depository of this fact".⁵⁶ No ACCT notifications are

⁵⁵ ASEAN Secretariat (n 54).

⁵⁶ ACCT art. 2(2); ICSFT art. 2(2)(a).

visible. For ICSFT, only Vietnam has refined its reservation, removing the *Hostages Convention* and *Terrorist Bombings Convention* in 2014 after their entry into force for Vietnam. Curiously, Vietnam's revised reservation still includes the *Nuclear Material Convention* despite Vietnam becoming party in 2012. Nonetheless, a reservation's legal effect is removed upon a convention's entry into force and not the procedural obligation to notify the depository.

Following numerous ratifications by all three states, their reservations have considerably narrowed in scope. Thailand's, Vietnam's and Singapore's failure to notify the depositories is immaterial to including these subsequently binding treaties in the definition of ACCT and ICSFT maritime offences. For ICSFT, the only remaining reservation is Thailand's exclusion of funding *SUA Convention 1988* offences and funding *SUA Platforms 1988* offences. All three states exclude *SUA Convention 2005* and *SUA Platforms 2005* from ACCT offences.

3.2 Full Application of the Treaties' Definitions of Maritime Offences

Likewise, states may become party to ICSFT and ACCT without depositing any reservation on defining maritime offences. Cambodia's and Laos's practice are illustrative of this approach.

Offences under all 14 ACCT cross-referenced treaties are ACCT offences for the purpose of these states' ACCT rights and obligations. For Cambodia and Laos, this includes establishing jurisdiction over ACCT maritime offences within the scope of four instruments to which they are non-contracting parties, namely *SUA Convention 2005*, *SUA Platforms 2005*, *Nuclear Terrorism Convention* and the *2005 Amendment to the Nuclear Material Convention*.

Equally, ICSFT offences would have included all 9 ICSFT cross-referenced treaties for the purpose of these states' ICSFT rights and obligations. Cambodia and Laos have since joined all treaties cross-reference by ICSFT. However, upon become an ICSFT party, Cambodia would have accepted cross-referencing of the *Protection of Diplomats Convention*, *Hostages Convention*, *Nuclear Material Convention*, *SUA Convention 1988*, *SUA Platforms 1988* and the *Terrorist Bombings Convention*, despite not being a party thereof. Obligations to establish jurisdiction over the actual terrorist acts in these conventions only occurred later in 2006 following Cambodia joining said conventions. Laos was not a party to the *Nuclear Material Convention*, *SUA Convention 1988* and *SUA Platforms 1988* when joining ICSFT, resulting in similar breadth and disparities in Laotian obligations under international law.

This practice challenges whether attempts to broadly and comprehensively define terrorist acts by cross-referencing a long list of treaties, unless a reservation is made, has had its intended effect beyond obligations on paper. One expects criminalization and cooperation on maritime terrorism to be deepest between the most affected states, namely Indonesia, Malaysia, Singapore and the Philippines.⁵⁷ Cambodia and Laos are understandably not at the forefront of interests, efforts or dedicating resources to combat maritime terrorism. Laos is a landlocked state.

While this requires further research, it is doubtful that Laos or Cambodia have adopted legislation criminalising maritime terrorist acts as defined in all 14 treaties cross-referenced by ACCT, not put in place the administrative frameworks necessary to fulfil obligations on investigating reported incidents and possible prosecution or extradition. The same can be said of ICSFT and its even broader obligations.⁵⁸ Including offences under treaties to which a state

⁵⁷ CTED (n 38) para 181 and para. 183 on the maritime context (Philippines/Indonesia as archipelagic states).

⁵⁸ ICSFT arts. 4-19.

is not a party will only have the intended benefits if states consciously choose to extend their definition of offences thereof. States may be unaware of the consequences of ratifying ACCT and ICSFT without a reservation, let alone implementing their resulting obligations.

3.3 Broader Terrorist Funding Offences than Terrorist Act Offences

Defining maritime offences becomes further complicated – or confusing – when a state’s policy has changed between joining ICSFT and joining ACCT. Brunei and Malaysia include no relevant reservation to ICSFT yet take a more nuanced approach to ACCT by excluding treaties to which they are not party. Alone, each appear reasonable. Combined, the result is illogical.

Take Brunei, which due to a lack of reservation is bound by ICSFT and ACCT to establish jurisdiction over ‘funding’ a terrorist act in the *Nuclear Material Convention*. However, Brunei’s clear policy, reiterated in its ACCT reservation, is to exclude obligations concerning terrorist acts under the *Nuclear Material Convention* because it is not party.

For Malaysia, funding acts under the *Nuclear Material Convention*, *SUA Convention 1988* and *SUA Platforms 1988* are binding offences under ICSFT and ACCT. But terrorist acts constituting actual offences under the *Nuclear Material Convention*, *SUA Convention 1988* and *SUA Platforms 1988* remain excluded from Malaysia’s treaty obligations.

Reasoning for a policy that selects the broadest definition of ‘funding’ offences, followed by the narrowest definition of ‘act’ offences, remains elusive. ACCT offences include both act and funding offences, with any reservation to ICSFT being brought forward into its ACCT definition.⁵⁹ Is it conceivable that coastal states with considerable maritime security vulnerabilities, such as Malaysia, would purposefully craft their obligations to include addressing the funding of *SUA Convention 1988* and *SUA Platforms 1988* offences while simultaneously excluding acts constituting *SUA Convention 1988* and *SUA Platforms 1988* offences? Legally, this is the cumulative impact of Malaysia’s reservations. Practically, it suggests states must carefully analyze their global and regional treaty practice to ensure the appropriate design of mutually supportive reservations. This is especially so if a reservation in one treaty is authoritative in another.

3.4 Broader Terrorist Act Offences than Terrorist Funding Offences

Alternatively, an exclusionary ICSFT reservation may be followed by joining ACCT without reservation. ACCT terrorist acts are then defined by all 14 cross-referenced treaties, while funding offences are limited to the 9 ICSFT cross-referenced treaties, as further refined by the ICSFT reservation. Indonesia and the Philippines chose this course of action.

For ICSFT, the Philippines reservation excluded the *Montreal Supplementary Protocol*, *SUA Convention 1988*, *SUA Platforms 1988* and *Terrorist Bombings Convention*. All four were already ratified, but awaiting entry into force.⁶⁰ This careful and temporary reservation stands in stark contrast to the Philippines’s silence on joining ACCT, despite ACCT’s cross-referencing four further conventions to which the Philippines is not party.⁶¹ These four conventions, namely *Nuclear Terrorism Convention*, *2005 Amendment to the Nuclear Material Convention*,

⁵⁹ The reservation refines a states ‘offences within the scope of and as defined in’ ICSFT, ACCT art. 2(1)(j).

⁶⁰ *ibid* art 2(2), extinguishing the reservation.

⁶¹ *Nuclear Terrorism Convention* was signed in 2005 but without any further progress.

SUA Convention 2005 and *SUA Platforms 2005* include far more reaching maritime offences and related obligations for non-contracting parties who join ACCT without reservation.

Indonesian practice is similar, whereby it continues to not be party to numerous conventions excluded from defining ICSFT ‘funding’ offences but included in defining ACCT ‘act’ offences. Exceptionally, the *Terrorist Bombings Convention* was not excluded from ICSFT. However, Indonesia acceded to the *Terrorist Bombings Convention* 3 days later and so this was largely inconsequential. *Protection of Diplomats Convention*, *Hostages Convention*, *Montreal Supplementary Protocol*, *SUA Convention 1988* and *SUA Platforms 1988* continue to be excluded from funding offences but do define act offences. In addition, ACCT offences include cross-referencing the *Nuclear Terrorism Convention* (since ratified), *2005 Amendment to the Nuclear Material Convention* (since ratified), *SUA Convention 2005* and *SUA Platforms 2005*. Many obligations within these global instruments would be fulfilled if Indonesia is fully implementing its ACCT obligations. Tellingly, no ratifications have followed in the 8 years since ACCT’s entry into force for Indonesia.

Defining broader ‘act’ offences than ‘funding’ offences is intuitively more acceptable and rational than *vice versa* (3.3). This could be a matter of concentrating resources on addressing maritime terrorists directly, extending responses to those supporting terrorism when ready and necessary to do so.

However, ACCT’s inclusion of *SUA Convention 2005* offences – and the lack of any Indonesian or Filipino reservation – raises doubts for this rationale. *SUA Convention 2005*, and ACCT’s cross-reference,⁶² require states to criminalize and exercise jurisdiction over a supporting offence:

“unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, *3bis* or *3quater* or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution”.⁶³

In addressing supporters of maritime terrorism, preventative measures to remove the financiers should take priority over responsive measures to those knowingly providing offenders with subsequent transportation to evade prosecution. Indonesia’s reservations result in the exact opposite for the funding/transport offenders related to acts in the *Protection of Diplomats Convention*, *Hostages Convention*, *Montreal Supplementary Protocol*, *SUA Convention 2005* and *SUA Platforms 1988*.

3.5 Incompatible Reservations

Myanmar’s practice first appears comparable to Malaysia and Brunei (3.3), excluding the *Montreal Supplementary Protocol* for ACCT ‘act’ offences but not ICSFT ‘funding’ offences. However, the *Montreal Supplementary Protocol*’s depositories record Myanmar as party since 1996. In purporting to exclude a convention to which Myanmar is party, this element of Myanmar’s reservation is unsanctioned by ACCT and incompatible with its object and

⁶² ACCT art. 2(1)(m).

⁶³ SUA 2005, art. 3*ter*.

purpose.⁶⁴ It is therefore without legal effect,⁶⁵ and the *Montreal Supplementary Protocol* is included in defining ACCT offences and Myanmar's rights and obligations. Support for this argument is found in the numerous states objecting to North Korea's attempt to exclude conventions it was party to from defining ICSFT offences.⁶⁶ Myanmar's true position is comparable to Singapore, Thailand and Vietnam (3.1).

3.6 Partial Reservations

Establishing offences within treaties cross-referenced by ICSFT is straightforward as all 9 include explicit definitions. ACCT and *SUA Convention 2005* are complicated by cross-referencing a cross-referencing treaty, i.e. ICSFT itself. At all stages in this chain of cross-references a reservation may refine the definition of offences. For example, a state could hypothetically be party to all three treaties, submitting a relevant reservation to all. An ACCT 'offence' would then include a cross-reference to a *SUA Convention 2005* offence (ACCT, art. 2(1)(m)), which in turn includes a cross-reference to an ICSFT offence (*SUA Convention 2005*, Annex para. 9), which in turn includes a cross-reference to a *Hostages Convention* offence (ICSFT, art. 2(1)(a), Annex para. 4). While convoluted, this approach could balance the aims of promoting a comprehensive framework while respecting the foundation of state consent.⁶⁷

However, if a state is not party to any of the treaties in this chain of cross-references, flexibility and consent is less readily apparent. ACCT, ICSFT and *SUA Convention 2005* only provide for reservations on 'that' or 'the' treaty to which a state is not party. This binary acceptance or rejection of a treaty is well suited to cross-referencing treaties that directly define offences. It is ill-suited to cross-referencing a cross-referencing treaty where a more nuanced application might be merited. A non-contracting party to *SUA Convention 2005* or ICSFT might be willing to accept its partial application in ACCT in so far as it defines offences related to treaties to which it is party, e.g. include funding of a *Hostages Convention* offence but not a *SUA Platforms 1988* offence. This would require broadly interpreting Article 2(2) of ACCT to allow partial reservations that allow selective cross-referencing of a treaty to which a state is not party.

Partial reservations are not explicitly prohibited. While not visible in state practice, they could promote a more comprehensive framework that still respects consent. Offences defined in ICSFT and *SUA Convention 2005* are not package deals and therefore partial application by non-contracting parties within ACCT should be legally valid.

3.7 Withdrawal from a Cross-Referenced Treaty

When a state is party to a cross-referenced treaty it shall, without exception, be included in defining maritime offences.⁶⁸ Any exclusionary reservation ceases to have effect. *Contra*, when a state withdraws from a cross-referenced treaty this does not automatically impact the definition of offences. The definition of offences will only change if the state *also* exercises

⁶⁴ VCLT art. 19(b)-(c).

⁶⁵ *ibid* art. 21.

⁶⁶ See statements by the Netherlands, France, Norway, Spain, Sweden, UK, Moldova, Germany and Argentina.

⁶⁷ The infamous, "rules of law binding upon States therefore emanate from their own free will" *The Case of the SS Lotus (France v Turkey)*, *Judgment* [1927] PCIJ 9, PCIJ Series A No 10 18.

⁶⁸ ACCT art 2(2); ICSFT art. 2(2)(a); *SUA Convention 2005* art. 21(1).

its discretionary to make a reservation “with respect to that treaty” when withdrawing from a cross-referenced treaty.⁶⁹

Neither treaty withdrawals nor a corresponding reservation have occurred in practice. Nonetheless, the discretion to submit additional reservations revives many of the issues discussed (3.1, 3.3, 3.4 and 3.6). The only case apparently excluded is, having accepted application of a treaty to ACCT or ICSFT, any attempt to submit a claw-back reservation. Reservations are only possible on two occasions: when “depositing its instrument of ratification or approval” or “when a Party ceases to be a party to a treaty listed”.⁷⁰ Whether any other party would object to subsequent claw-back practice is however debatable, especially if no implementation has occurred.

3.8 Amending the Definition of Maritime Offences

The ACCT definition of offences may be expanded by amending the list of cross-referenced treaties. Amendments occur through the mutual written consent of parties.⁷¹ The number of ASEAN states party to existing instruments cross-referenced by ACCT varies wildly (Annex). One cannot reasonably predict which instruments, if any, would therefore be added.

For maritime offences, the 4 global instruments not currently cross-referenced could be added (2).⁷² Including *Tokyo Convention* offences would present little difficulties as all ASEAN states are already parties. However, ASEAN clearly decided not to cross-reference the *Tokyo Convention*.⁷³ This leave post-ACCT instruments. There is limited ASEAN enthusiasm for the *Beijing Convention 2010* (Myanmar party; Indonesia signatory), *Beijing Protocol 2010* (Myanmar party; Indonesia signatory), or *Montréal Protocol 2014* (Malaysia and Singapore parties; Cambodia signatory).

Amendments would enter into force at an agreed date.⁷⁴ ACCT is silent on the matter, but this arguably includes the right to submit a reservation excluding any instrument added to which a state is not party. Reservations to the amended definition of maritime terrorism should only be acceptable if submitted upon the amendment’s entry into force.

4 Conclusion

Multilaterally defining terrorist acts, and then promoting their universal adoption, was posited as a working solution to the international community’s deadlock in defining terrorism. Subsequent reservations play a fundamental role in defining those acts accepted as offences by each state.

This paper demonstrates that divergence or convergence between a state’s global and regional reservations to counterterrorism instruments can have profound impacts on the definition of maritime crimes. The results range from carefully considered positions, to

⁶⁹ ACCT art. 2(3); ICSFT art. 2(2)(b); SUA Convention 2005 art. 21(2).

⁷⁰ ACCT art. 2(2)-(3).

⁷¹ *ibid* art. 21(4).

⁷² Explosives Convention is excluded as inapplicable.

⁷³ *Contra*: The Arab Convention on the Suppression of Terrorism, 22 April 1998 (entered into force 7 May 1999) art. 1(3)(a); Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999, Annex to Resolution No: 59/26-P (entered into force 7 November 2002) art. 1(4)(a).

⁷⁴ ACCT art. 21(4).

illogical, unworkable, unimplemented and probably unforeseen definitions of maritime terrorism. With the ASEAN framework continuing to call upon its members to implement their global and regional obligations on maritime terrorism, these definitional difficulties are not going away anytime soon.⁷⁵

ACCT is not alone in defining offences by cross-reference, suggesting a systemic fault in the current drafting of counterterrorism conventions could arise. Shared definitions are the foundation of counterterrorism cooperation at-sea. Concerns raised here may therefore require stepping back and re-evaluating the current definition of maritime terrorism in ASEAN and beyond.

Moving forward, this fault could be addressed in future treaties by requiring purposive statements for including non-binding treaties in a state's definition of offences, or a more reserved approach.⁷⁶ For existing treaties that employ cross-referencing to define offences, states must be reminded of the cumulative impact of their reservations – or lack thereof – when ratifying counterterrorism instruments. CMI and other international bodies could assist in conducting such national impact assessments, if necessary, crafting an appropriate reservation. To do otherwise looks great on paper, but actual implementation – if any – suffers.

Finally, for ACCT's future any dispute on its definition of offences is only subject to consultation and negotiation.⁷⁷ It will largely be upon the 'relevant ASEAN sectorial bodies' to proactively take up their responsibilities to monitor and review implementation of ACCT, including the maritime terrorism definitions adopted by each party.⁷⁸

⁷⁵ 'ASEAN Comprehensive Plan of Action on Counter Terrorism' (2017) Adopted by 11th AMMTC paras 3.1, 4.1.

⁷⁶ ACST art. 1(3); OIC Terrorism Convention art. 1(4) both limit defining offences by cross-reference to treaties ratified by a state.

⁷⁷ ACCT art. 19.

⁷⁸ *ibid* art. 16.

Annex

Entry into Force of Instruments Cross-Referenced by ACCT

Instrument	Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<i>Hijacking Convention.</i>	16/05/1986	08/12/1996	26/09/1976	06/05/1989	03/06/1985	21/06/1996	25/04/1973	12/05/1978	15/06/1978	17/10/1979
<i>Montreal Convention 1971.</i>	16/05/1986	08/12/1996	26/09/1976	06/05/1989	03/06/1985	21/06/1996	25/04/1973	12/05/1978	15/06/1978	17/10/1979
<i>Protection of Diplomats Convention.</i>	13/12/1997	26/08/2006	-	21/09/2002	24/10/2003	04/07/2004	20/02/1977	01/06/2008	25/03/2007	01/06/2002
<i>Hostages Convention.</i>	17/11/1988	26/08/2006	-	21/09/2002	28/06/2007	04/07/2004	03/06/1983	21/11/2010	01/11/2007	08/02/2014
<i>Nuclear Material Convention.</i>	-	03/09/2006	08/02/1987	29/10/2010	-	05/01/2017	08/02/1987	22/10/2014	19/07/2018	03/11/2012
<i>Montreal Supplementary Protocol.</i>	19/01/2001	08/12/1996	- Signatory 24/02/1988	06/11/2002	08/10/2006	21/06/1996	16/01/2004	22/12/1996	13/06/1996	24/09/1999
<i>SUA Convention 1988.</i>	03/03/2004	16/11/2006	-	18/06/2012	-	18/12/2003	05/04/2004	03/05/2004	-	10/10/2002
<i>SUA Platforms 1988.</i>	03/03/2004	16/11/2006	-	18/06/2012	-	18/12/2003	05/04/2004	10/11/2015	-	10/10/2002
<i>Terrorist Bombings Convention.</i>	13/04/2002	30/08/2006	29/07/2006	21/09/2002	24/10/2003	12/12/2001	06/02/2004	30/01/2008	12/07/2007	08/02/2014
<i>ICSFT.</i>	03/01/2003	11/01/2006	26/07/2006	29/10/2008	28/06/2007	15/09/2006	06/02/2004	29/01/2003	29/10/2004	25/10/2002

<i>Nuclear Terrorism Convention.</i>	-	- Signatory 07/12/2006	30/10/2014	-	- Signatory 16/09/2005	-	- Signatory 15/09/2005	01/09/2017	01/06/2019	23/10/2016
<i>2005 Amendment to Nuclear Material Convention.</i>	-	-	08/05/2016	-	-	05/01/2017	-	08/05/2016	19/07/2018	08/05/2016
<i>SUA Convention 2005.</i>	-	-	-	-	-	-	-	-	-	-
<i>SUA Platforms 2005.</i>	-	-	-	-	-	-	-	-	-	-