



# Development of Regional Legal Frameworks for Intelligence and Information Sharing in the EU and ASEAN

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## Abstract

This paper studies the development of the institutional frameworks for cooperation in the fight against terrorism in two regional organisations: the European Union and the Association of South East Asian Nations. In particular, it will analyse the mechanism of intelligence and information sharing developed at the regional level. First, it will assess the different approaches and the mechanisms existing within the two regions and highlight obstacles to such sharing: the willingness and ability of Member States. Then, it will assess how these mechanisms fare in terms of human rights. The lack of real protection of personal data constitutes a serious concern in connection with these mechanisms of information sharing. Thus, the paper demonstrates that Member States have started a global rush for information. Yet there are still many challenges to overcome to improve the mechanisms of intelligence and information sharing themselves and to better protect human rights in doing so.

## Keywords

intelligence and information sharing – terrorism – comparative regional security frameworks – human rights – European Union – Association of South East Asian Nations

## 1 Introduction

During the last two decades the fight against terrorism has acquired a worldwide dimension. States have pooled their forces to coordinate their counter-terrorism policies in the framework of international or regional organisations

and have given top priority to prevention.<sup>1</sup> In this context, States have resorted to transnational mechanisms of cooperation, including intelligence and information sharing.<sup>2</sup>

States are the primary actors in the adoption of anti-terrorism legislation and policies.<sup>3</sup> They have developed their arsenal to respond proactively to terrorist threats, including by strengthening the powers of intelligence services to obtain more information and knowledge on groups or individuals involved in terrorism; boosting the wherewithal of law enforcement agencies in criminal investigations; and introducing preventive coercive criminal powers.<sup>4</sup>

As no country and no region is completely immune from terrorist threats, regional organisations have also attempted to create regional security frameworks approximating national laws and organising cooperation among States. Some organisations have gone further than others. To highlight the different levels of development, this article will consider two regional organisations as case studies: the European Union (EU) and the Association of Southeast Asian Nations (ASEAN). The choice of these two is motivated by, on the one hand, their desire to use this mechanism in their fight against terrorism and, on the other hand, the different levels of integration in security matters. If the EU can be seen as one of the most integrated organisations in the field, ASEAN is only at the starting point of establishing a security community. Thus, these two regional organisations, which have both experienced terrorist attacks very recently, have evolved at different rates.

Effective and coherent intelligence and information sharing is possible only if States agree on a common definition of terrorist offences. Remarkably, the EU implemented a legal framework for combating terrorism including a

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1 See eg United Nations Security Council (UNSC) Res 1368 (12 September 2001) UN Doc S/RES/1368; UNSC 'Counter-Terrorism Committee, Policy Guidance on International Cooperation' (14 June 2010) UN Doc S/AC.40/2010/PG.3.

2 Intelligence refers to secret material collected by intelligence services and increasingly by specific law enforcement agents to provide background information and advance warning about people who are thought to be a risk in the commission of terrorist acts or other threats to national security (see eg K Roach, 'Secret Evidence and Its Alternatives' in AM Domingo (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer 2012) 180. It is distinguished from information referring to the result of an official investigation carried out by law enforcement agencies after the commission of an offence or potentially during a proactive investigation.

3 See United Nations General Assembly (UNGA) Res 60/1 (24 October 2005) UN Doc S/RES/60/1.

4 MFH Hirsch Ballin, *Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States* (Springer 2012) 1.

definition of terrorist offences through the two Framework Decisions of 2002<sup>5</sup> and 2008<sup>6</sup> on the fight against terrorism. By contrast, after long unsuccessful attempts to agree on a definition of terrorism at the international level, some common - too general - characteristics were recently developed and highlighted, but no binding legal definition has yet appeared.<sup>7</sup> The unique instrument specific to terrorism is the ASEAN Convention on Counter Terrorism which is unfortunately only referring to international instruments with not further precision. However, it shall have an impact on the fight against terrorism in the region.<sup>8</sup>

In the EU, transnational crime including terrorism played the role of catalyst in developing cooperation among Member States.<sup>9</sup> This cooperation has been developing since the 1970s and the evolution of mechanisms of cooperation has been quite impressive. Cooperation has evolved from intergovernmental mechanisms towards supranational cooperation. In this regard, the abolition of checks at internal borders involved further integration of the States in a regional response to internal and external criminal threats. While opening the gates to travel within the EU, the 1985 Schengen Agreement also created the opportunity for free movement of criminals including terrorists. In addition, the technological innovations associated with globalisation have enabled terrorist organisations to improve their capabilities, security, mobility and coordination at the international level.<sup>10</sup>

In ASEAN, cooperation in criminal matters developed later, in the second half of the 1990s, but was also motivated by the increasing threat of transnational crime. This cooperation took the form of Declarations<sup>11</sup> or Plans of

5 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164.

6 Council Framework Decision 2008/919/JHA of 28 November 2008 amending FD 2002/475/JHA on combating terrorism [2008] OJ L330/21.

7 Special Tribunal for Lebanon, 'Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging' (STL-11-01/1/AC/R176bis, 16 February 2011). Also M Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Ashgate 2009); Anthony Aust, *Handbook of International Law* (CUP 2010) 265ff.

8 ASEAN Convention on Counter Terrorism (adopted 13 January 2007), entered into force 27 May 2011) Art. II.

9 A Weyembergh, 'La Coopération Pénale Européenne Face au Terrorisme: Rupture ou Continuité?' in K Bannelier and others (eds), *Le Droit International Face au Terrorisme* (Pedone 2002) 279.

10 Edgar Pang (representative of Singapore) qualified terrorism as the 'dark side of globalization', see UNGA Sixth Committee (4th Meeting) (7 October 2005) UN Doc GA/L/3276.

11 ASEAN Declaration on Transnational Crime (adopted 20 December 1997); ASEAN Manila Declaration on the Prevention and Control of Transnational Crime (Manila Declaration)

action.<sup>12</sup> In the 2000s, treaties and conventions were adopted in the fields of terrorism<sup>13</sup> and of mutual legal assistance in criminal matters.<sup>14</sup> From the point of view of both their legal nature and their content, these instruments remain of quite a traditional nature, very much representative of ASEAN's intergovernmental form.

The tendency to extend the powers of both intelligence services and law enforcement agencies with regard to the sharing of intelligence and information raises problems, especially regarding the protection of human rights. Despite general statements about the need to improve intelligence and information sharing, there is as yet little agreement on the nature of data shared or on the level of protection of personal data that should apply.

On the one hand, it seems clear to all actors involved in the prevention and investigation phases that intelligence and information are key elements in preventing serious crimes from happening.<sup>15</sup> The intensification and acceleration in sharing this intelligence and information are considered to be the most effective means of acquiring knowledge.<sup>16</sup> In fact, States are taking part to a global rush for ever more information, using all technical and technological means at their disposal. On the other hand, this sharing may be dangerous when it is not associated with a strong protection of human rights. It may infringe rights, including the right to privacy, and may be used for purposes other than the prevention and investigation of serious crime.

The EU is already involved in a variety of intelligence and information sharing mechanisms, whereas ASEAN is still at an early stage of such development, even despite the fact that the United States considers Southeast Asia to be the 'second front' in the 'global war on terrorism'.<sup>17</sup> In parallel, the EU also has a

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(adopted 25 March 1998); ASEAN Declaration on Joint Action to Counter Terrorism (adopted on 5 November 2001).

12 ASEAN Plan of Action to Combat Transnational Crime (adopted 23 June 1999); ASEAN Comprehensive Plan of Action on Counter Terrorism (adopted 30 June 2009).

13 See (n 8).

14 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (adopted 29 November 2004).

15 ER Hertzberger, *Counter-terrorism Intelligence Cooperation in the European Union* (UNICRI 2007) 27.

16 UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, Art. 3(a).

17 J Gershman, 'Is Southeast Asia the Second Front?' (2002) 81 *Foreign Affairs* 60; Woodrow Wilson International Center for Scholars, 'Asia Program Special Report: Fighting Terrorism on the Southeast Asian Front' (No 112, June 2003); DK Mauzy and BL Job, 'U.S. Policy in Southeast Asia: Limited Re-engagement After Years of Benign Neglect', (2007) 47 *Asian Survey* 622; ATH Tan, 'Terrorism and Insurgency in Southeast Asia' in ATH Tan (ed), *A Handbook of Terrorism and Insurgency in Southeast Asia* (Edward Elgar Pub 2007) 3, 5.

regional framework protecting human rights binding its Member States, whereas ASEAN has only very recently promulgated a declaration on human rights. Thus, the sharing of intelligence and information should be possible only when accompanied by a strong transnational protection of human rights.

This paper aims to highlight the gradual development of means by which States share intelligence and information through the two regional organisations, and most importantly the different obstacles to this development. It demonstrates in what way this mechanism of cooperation is a real challenge as to its adoption and implementation but also its compliance with the concrete protection of human rights, including the right to privacy. Primarily, the willingness (section 2) and the ability (section 3) of Member States of the regional organisations may be either the driving force or the first obstacle to the sharing of intelligence and information through regional mechanisms. It is nevertheless certain that implementing these mechanisms has raised human rights concerns, which may hinder balanced cooperation to combat terrorism (section 4).

## 2 Building up a Trustful Environment to Share: Internal and External Factors

Facing terrorist threats, States have together been at the forefront of the increase in regional competences. The development of best practices, cooperation networks and mechanisms certainly leads to a regional legal framework, or at least to common positions.<sup>18</sup> However, if there was little difficulty in securing consensus on the desirability of tackling serious transnational crime, decisions to implement particular measures to reach this objective were often controversial.

The willingness of the States to share intelligence and information is influenced by two elements: intra-regional and extra-regional. As regards the intra-regional elements, differences may not be a very important obstacle in the EU, where Member States mainly share cultural, religious and historical common lines. By contrast, they are dominant in ASEAN, where almost all States have been colonised by Western States and have different cultures and traditions. In the extra-regional elements, their external relations are certainly different one from another.

In both the EU and ASEAN, serious crime, including terrorism, has a clear catalysing effect on the adoption of new methods of cooperation used by intelligence services and law enforcement agencies for prevention and investigation

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18 P Craig and G de Burca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 946.

purposes. Intelligence and information sharing is one of these methods.<sup>19</sup> It tends to be a prerequisite for States to ensure security in their countries and within the region.<sup>20</sup> At first sight, such an approach should lead to the strengthening of the regional legal framework<sup>21</sup> fighting against terrorism. However, the willingness of States to share information at the regional level varies significantly between the EU and ASEAN.

In the EU, there have been a number of internal factors which have over the years influenced common action in criminal matters. One of these factors has traditionally been the emergence of region-wide terrorist acts.<sup>22</sup> A key element of this recent development has been the establishment of mechanisms facilitating the gathering, exchange and analysis of personal data. Steps in this direction have taken the form of initiatives aiming both at eliminating obstacles to the sharing of personal data among national authorities, and at creating EU-wide structures and databases.

The Trevi group is one of the first efforts, among a limited number of States, to develop police cooperation in terrorist matters, including in sharing information.<sup>23</sup> Then, after some progress in gaining trust among States, a regional security agency, Europol, was created. It aims at facilitating intelligence and information sharing<sup>24</sup> among EU Member States.<sup>25</sup> This regional system is the

19 ASEAN Declaration on Transnational Crime (n 11); ASEAN Plan of Action to Combat Transnational Crime (n 12); ASEAN-US Joint Declaration for Cooperation to Combat Terrorism (adopted 1 August 2002).

20 See UNGA International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002); UN Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) UNGA Res A/RES/55/25; UN International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007); ASEAN Convention on Counter Terrorism (n 8); ASEAN Comprehensive Plan of Action on Counter Terrorism (n 12).

21 'International law' refers to international instruments, including UN instruments, concerning more than just the regional Member States, whereas 'regional regulations/framework' relates to EU law and ASEAN regulations.

22 Weyembergh (n 9); V Mitsilegas and others, *The European Union and Internal Security* (Palgrave Macmillan 2003) 19–22.

23 First Trevi group meeting, 31 May 1977; see also G Renault, *Schengen un Modèle pour l'Europe Pénale?* (Dossiers du Journal des Tribunaux no 6, Maison Larcier 1995) 28.

24 Europol has no control over the qualification of 'information'. It may receive intelligence considered as such in some States and not in others. The expression 'exchange of information' by Europol should thus be understood broadly.

25 EC Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention) (adopted 27 November 1995) OJ C316,

concrete manifestation of a common European project, and so of the willingness of Member States to share intelligence and information about crimes qualified as serious and transnational. Yet, there is still reluctances in several EU Member States to share information considered sensitive in some countries and which cannot be used in their national courts whereas it can be in others.<sup>26</sup>

By contrast, the ASEAN territory is characterised by strong historical, political and legal diversity and is still the scene of tensions and other security issues. Sharing intelligence and information as a method of cooperation is so difficult to establish and to make effective. This can mainly be explained by the limited commitment of ASEAN Member States depending on conceptions of sovereignty.<sup>27</sup> While ASEAN has become an important regional grouping in political and economical affairs, Member States retain independent legal systems and legislation, and the sovereign right to determine internal and external affairs, except in connection with mutually agreed cooperation programmes. This is especially true in the field of counter-terrorism, as States differ very much in their susceptibility to and experience of terrorism, and hence it is extremely difficult to obtain an effective ASEAN-wide response to it.<sup>28</sup>

No particular institutionalized regional actor helps ASEAN Member States in their fight against terrorism. Unlike Europol, the Aseanapol is only a forum for discussion which, through regular meetings between the ASEAN chiefs of Police, aims at harmonising and standardising coordination and communication mechanisms among police institutions.

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Art. 3(1), 2; It is now based on Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) (adopted 15 May 2009) OJ L121, Art. 5.

26 L Block, 'EU Joint Investigation Teams: Political Ambitions and Police Practices' in S Hufnagel and others (eds), *Cross-Border Law Enforcement. Regional Law Enforcement Cooperation: European, Australian and Asia-Pacific Perspectives* (Routledge 2011) 94.

27 See SSC Tay and TH Li, 'Southeast Asian Cooperation on Anti-terrorism: The Dynamics and Limits of Regional Responses' in VV Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (CUP 2009) 400.

28 The IISS Asia Security Summit 'Shangri-La Dialogue 2003' (30 May – 1 June 2003) R. O'Neill's speech, Ong Keng Yong, National Security Australia Conference 2005, Sydney, 21 February 2005 <<http://www.asean.org/resources/2012-02-10-08-47-56/speeches-state-ments-of-the-former-secretaries-general-of-asean/item/asean-s-contribution-to-regional-efforts-in-counter-terrorism>> accessed 4 September 2014. See also, LC Sebastian, "The ASEAN response to terrorism" Institute of Defence and Strategic Studies, UNISCI Discussion Papers, May 2003; T Pimoljinda "Ethno-Cultural Diversity: A Challenging Parameter for ASEAN Regional Integration" ICPM-2013, Atlantis Press, May 2013.

Member States of both regions seem to agree on the idea of cooperating together to combat terrorism, especially by increasing the sharing of intelligence and information.<sup>29</sup> However, the willingness of EU Member States to adopt binding instruments influences the degree of information sharing. Because, in ASEAN, the protection of national sovereignty remains dominant and the trust between Member States is still limited, the institutionalisation of common cooperation has not yet reached a regional level.<sup>30</sup>

Both regional security frameworks have also evolved in relation to external influences. Besides the UN, collaboration with actors such as Interpol and between the EU and ASEAN themselves is increasing and may impact on the development of regional cooperation.

Firstly, States share information, and potentially intelligence, within the framework of an international organisation such as Interpol providing channels and databases.<sup>31</sup> Interpol has developed a cutting-edge research and development facility for the identification of crimes and criminals, innovative training, operational support and partnerships. In particular, the Interpol Office in Bangkok and the Global Complex being built in Singapore to increase the Organisation's presence in Asia are likely to allow closer collaboration between Interpol and ASEAN, including Aseanapol.<sup>32</sup>

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- 29 Concerning the EU, see S Braum, 'Are We Heading Towards a European Form of "Enemy Criminal Law"? On the Compatibility of Jakob's Conception of "An Enemy Criminal Law" and European Criminal Law', in F Galli and A Weyembergh (eds), *EU Counter-terrorism Offences: What Impact on National Legislation and Case Law?* (IEE, Editions de l'Université de Bruxelles 2012) 238; Concerning ASEAN, see R Emmers, 'The Securitization of Transnational Crime in ASEAN' (Institute of Defence and Strategic Studies Working Paper No 39, 2002).
- 30 Eg between Singapore and Malaysia, disputes exist relating to the delivery of fresh water to Singapore, the access of Singapore armed forces to Malaysian airspace, the sovereignty of Pedra Branca and the relocation of Tanjong Pagar railway station; between Malaysia and Indonesia, the dispute concerns the border on the island of Borneo as well as the maritime boundaries along the length of the Strait of Malacca, in the South China Sea and in the Celebes Sea.
- 31 'INTERPOL Red Notice Subject Arrested in Security Operation During Southeast Asia Games' (INTERPOL Press Release, Lyon, 23 December 2013) <<http://www.interpol.int/News-and-media/News/2013/PR157>> accessed 14 January 2014.
- 32 'ASEANAPOL Partnership with INTERPOL Boosts Regional Security, INTERPOL Chiefs Tells Laos Meeting' (INTERPOL Press Release, Vientiane, 31 May 2011) <<http://www.interpol.int/News-and-media/News-media-releases/2011/PR047>> accessed 14 September 2013; 'International Cooperation with ASEANAPOL Bolsters Security Landscape, INTERPOL Chief Tells Police Meeting' (INTERPOL Press Release, Pattaya, 20 February 2013) <<http://www.interpol.int/News-and-media/News-media-releases/2013/PR019>> accessed 14 September 2013.



Secondly, partnerships have been created between the two regional organisations. Commercial affairs and business have long dominated Asian-European relations but “Asian and European policymakers are also steadily stepping up their engagement on security issues.”<sup>33</sup> ASEAN bodies look at the European Union’s experience in ensuring peace and easing tensions. Thus, in the increasingly close relationship between the EU and ASEAN on security issues, the EU is seen not as a model of organisation to achieve but as a source of inspiration for ASEAN.<sup>34</sup>

However, external influences cannot be summed up by common and mutual influences. ASEAN, and its Member States, and the EU, and its Member States, do not have the same relationships with, for example, China and the United States. In fact, external States can adopt different policies towards these regions and their Member States. In that respect, the EU and ASEAN have experimented with different external relations.<sup>35</sup> Their international relations may also have a role in the building up of regional confidence, especially if Member States have different external policies dealing with intelligence and information sharing.<sup>36</sup>

### 3 Different Degrees of Regional Integration: Factor of (in)Efficient Cooperation?

The development of a regional framework of cooperation depends on regional integration and the ability of the Member States and of the regional organisation to drive, implement and make compulsory mechanisms of cooperation.

33 S Islam, ‘Asia-Europe Increase Focus on Security’ (ASEM Infoboard 2013) <<http://www.aseminfoboard.org/featured-category/item/1262-asia-europe-increase-focus-on-security.html>> accessed 31 July 2013; EU European External Action Service, ‘Co-chairs’ Statement of the 20<sup>th</sup> EU-ASEAN Ministerial Meeting’ (Brussels, 23 July 2014) 140723/03.

34 Interview with V Muntabhorn (Commissioner on the Independent International Commission of Inquiry on Syria), Brussels, 22 May 2013.

35 Regarding the EU, see RS Ross and others (eds), *US-China-EU Relations. Managing the New World Order* (Routledge 2010); regarding ASEAN, see M Caballero-Anthony, ‘Regional Institutions and Regional Crisis in East Asia: Moving Away from the Comfort Zone?’ in B Fort and D Webber (eds), *Regional Integration in East Asia and Europe: Convergence Or Divergence?* (Routledge 2006) 265, and ‘Major Milestone in ASEAN-China Relations’ in S Siddique and S Kumar (eds), *The 2nd ASEAN Reader* (Institute of Southeast Asian Studies 2003) 427–429.

36 See eg C Cocq ‘Snowden’s Impact on ASEAN Relations’ (Perspectives Internationales, May 2014), <<http://perspectivesinternationales.com/?p=1092>> accessed 27 August 2014.

Efforts to increase the sharing have produced some positive results but have also shown that, in many instances, national and international legal frameworks are inadequate.<sup>37</sup>

Close cooperation in the sharing of intelligence and information among competent authorities is encouraged by the United Nations to prevent terrorist acts.<sup>38</sup> For this purpose, States are to take effective measures, on the one hand, to 'enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by [the UN Convention against Transnational Organized Crime]' and, on the other hand, to facilitate effective coordination and to promote the exchange of personnel and experts, including the posting of liaison officers.<sup>39</sup>

Regional organisations may provide a convenient framework for effectively combatting terrorism.<sup>40</sup> The EU and, more recently, ASEAN have increasingly focused on intelligence and information sharing. However, there is a striking contrast between the advanced action achieved in the EU - comprising detailed regulations and institutions devoted to the effectiveness of the security area - and the use of mostly soft law instruments in ASEAN. Political and historical reasons may explain why European nations are likely to trust each other - notwithstanding existing reluctances<sup>41</sup> - and why ASEAN nations jealously maintain their national sovereignty.

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37 United Nations Office on Drugs and Crime (UNODC), *Handbook on Criminal Justice Responses to Terrorism* (Criminal Justice Handbook Series, UN publication 2009) 52.

38 UN Convention against Transnational Organized Crime (n 19). EU and ASEAN Member States are parties to the Convention (Thailand signed the Convention on 17 October 2013).

39 Ibid, Art. 27(1).

40 UN Counter-Terrorism Centre, 'Summary of Discussion' (International Conference on National and Regional Counter-Terrorism Strategies, Bogota, Colombia, 31 January – 1 February 2013).

41 Because of the sensitivity of data, States did not succeed in reaching an agreement on the Framework Decision on the exchange of information under the principle of availability, see Commission, 'Proposal for a Council Framework Decision on the exchange of information under the principle of availability' COM (2005) 490 final, initially proposed and defined in the 'Hague Programme' on 5 November 2004. It means that information available to law enforcement agencies in one Member State should be made accessible to the equivalent authorities in other Member States. On the principle of availability and lack of trust, see T Bunyan, "The "Principle of availability"" (*Statewatch* December 2006) <<http://www.statewatch.org/analyses/no-59-p-of-a-art.pdf>> accessed on 30 August 2014, and V Mitsilegas, *eu Criminal Law* (Hart publishing 2009) 257ff.

Technologies and techniques are key elements in improving the exchange and storage of data gathered. Their developments must be more effectively shared. If technologies and techniques are developed and are made available to States and regional organisations, their use depends on the level of regional integration. The EU is clearly different from ASEAN, and so is the level of cooperation achieved in the two regions. Some examples from each region highlight these differences.

The EU has been developing a legal arsenal to allow and encourage States to share intelligence and information.<sup>42</sup> The idea of establishing some form of cooperation among EU Member States to tackle transnational crime including terrorism predates the 2000s attacks in the United States and Europe. As previously mentioned, the first move towards cooperation was taken in the 1970s, with the Trevi group gathering together the European Community's interior and justice ministers who shared information.<sup>43</sup> Trevi's initial concern was to address the transnational terrorism in Europe, also called "euroterrorism". States' differences at first made transnational cooperation more complicated. This is particularly noteworthy because even in a region where similarities attempt to overcome differences, this process has taken time to reach the

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42 See eg Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences [2005] OJ L253/22; Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89; Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2007] OJ L205/63; Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1; Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences [2008] OJ L218/129; Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information [2009] OJ L325/6.

43 First Trevi group meeting, 31 May 1977; after terrorist attacks in France, Karachi and Istanbul, an emergency meeting of Trevi/Interior Ministers took place in London on 25–26 September 1986. It was decided to set up a secure fax system to provide an immediate system of gathering and sharing information among the 12 Member States police forces; see T Bunyan, 'Trevi, Europol and the European State' in T Bunyan (ed), *Statewatching the New Europe* (Statewatch 1993) 1.

R Genson, 'How Far Do the New EU Counter-terrorism Offences Facilitate Police Cooperation?' in Galli and Weyembergh (n 29) 219–223.

current level of cooperation. Knowing that in ASEAN Member States' histories have been very different, it is logical that this same process should take even more time. Hitherto, despite this obstacle, EU Member States' services have managed to cooperate and share information on the basis of their respective national laws.<sup>44</sup>

Systems of cooperation were initially developed in Europe by sub-regional agreements such as the Nordic Police Cooperation of 1972 and the Germany-France Agreement of 1977. Then, the EU encouraged the States to enlarge their cooperation to the regional level. In this respect, the Schengen Agreement was first developed by and for a limited number of States and then integrated throughout the EU through the Amsterdam Treaty. Thus, what is now called the Schengen *acquis*<sup>45</sup> has been the driving force for the development of the SIS (Schengen Information System) and then SIS II. Moreover, the so-called Swedish Framework Decision<sup>46</sup> and the Prüm Convention<sup>47</sup> strengthened the tools of police cooperation and are fully applicable to terrorist offences. To simplify these exchanges between competent national authorities, the Swedish Framework Decision lays down the basic principles for the effective and expeditious exchange of intelligence and information for the purpose of conducting criminal investigations or criminal intelligence operations. The Prüm Treaty was the first convention, outside the EU legal order, to go further and implement the availability of certain data.<sup>48</sup> Like the Schengen *acquis*, the Prüm Treaty has been included in the EU legal framework. It has been integrated into Title VI of the EU Treaty, the "Third Pillar" devoted to police and

44 See eg D Casale, 'Institutional and Legal Aspects of EU Counter-Terrorism' in Centre of Excellence Defence Against Terrorism (ed), *Legal Aspects of Combating Terrorism* (Nato Science for Peace and Security Series E: Human and Societal Dynamics, IOS Press 2008) 115; Weyembergh (n 9), 279–295.

45 The Schengen Acquis Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, On the Gradual Abolition of Checks at Their Common Borders (adopted 19 June 1990) OJ L239, Art. 9.

46 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89.

47 EC Prüm Convention (adopted 7 July 2005), Council Document no 10900/05 then incorporated into the EU legal order by the Council Decision 2008/616/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/12, 1.

48 Ibid EC Prüm Convention, Arts. 2, 8. It did not mention the 'principle of availability' but introduced the principles of the Convention with 'the contracting Parties intend to step up cross-border cooperation, particularly mutual *exchange of information*' (emphasis added).

judicial cooperation in criminal matters, which means that it now applies to all Member States. It aims to improve the sharing of information for preventing and combating crimes including terrorist offences at the regional level.<sup>49</sup>

In parallel with these inter-state cooperation mechanisms, the role and function of Europol have improved by the development of intelligence and information sharing relating to terrorist offences with both Member States and Eurojust.<sup>50</sup> Member States have the obligation to transmit data contained in a certain number of criminal databases to both Europol and Eurojust. Because of the development of these databases, of mechanisms of cooperation and of the improvement of trust among Member States and between Member States and Europol, the flow of information has been expanded.<sup>51</sup>

In ASEAN, because security issues have undermined confidence and affected the economy, tourism and investments,<sup>52</sup> regional bodies recently also decided to develop a set of instruments dealing with security issues. If the 9/11 terrorist attacks had an impact on national security developments, Indonesia's attacks including the 2002 and 2005 suicide attacks in Bali and the 2009 bombings in Jakarta have been the catalyst leading towards a regional security framework. Since then, ASEAN has attempted to develop a regional cooperation system but, since it remains a regional intergovernmental organisation, relations among Member States are still governed by conventional international law.

The corpus of instruments dealing with terrorism in ASEAN predominantly consists of non-binding instruments such as declarations and action plans, but recently there has been the increasing adoption of binding instruments. Since the 2001 ASEAN Declaration on Joint Action to Counter Terrorism, terrorism has become a challenge "to the attainment of peace, progress and prosperity of ASEAN and the realisation of ASEAN vision 2020".<sup>53</sup> Research into sustainable cooperation in combating terrorism<sup>54</sup> resulted in the adoption in 2007 of a first binding instrument specific to terrorism: the ASEAN Convention on Counter Terrorism (ACCT). However, unlike the EU, which has adopted a common

49 Hertzberger (n 15) 27.

50 Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences [2005] OJ L253/22.

51 See eg Europol, 'Anniversary Publication: 10 Years of Europol 1999–2009' (Europol publications, The Hague 2009) <<https://www.europol.europa.eu/sites/default/files/publications/anniversary-publication.pdf>> accessed 17 July 2014; Mitsilegas (n 41) 165.

52 'Southeast Asia: Challenges in Creating an 'ASEAN Political-Security Community' in National Institute for Defense Studies (NIDS), *East Asian Strategic Review 2012* (The Japan Times 2012) 218.

53 ASEAN Declaration on Joint Action to Counter Terrorism (n 11).

54 Ibid; ASEAN Declaration on Transnational Crime (n 11) Art. 1.

definition of terrorist offences, this Convention did not define what constitutes a terrorist offence, but referred to international instruments.<sup>55</sup> This Convention has been into force since 11 January 2013, which means that it will take time to be implemented by its Member States.

In parallel with the emergence of a legal framework against terrorism, ASEAN Member States had already agreed on methods of facing, more generally, criminal activities in a coherent and cooperative way.<sup>56</sup> In particular, the 2004 Treaty on Mutual Legal Assistance in Criminal Matters signed by the ASEAN States<sup>57</sup> aims at improving the effectiveness of cooperation and mutual legal assistance among competent authorities in the prevention, investigation and prosecution of offences.

In order to improve the effectiveness of such cooperation, ASEAN has primarily focused on intelligence sharing, coordinated policies and law enforcement agencies' exchange through multilateral partnership.<sup>58</sup> At the regional level, Member States are working on the establishment of databases to improve cooperation between States.<sup>59</sup> For instance, it would be interesting to observe what would be the long-term outcome of the meetings of ASEAN Chiefs of police. They are currently working on the development of a common database.<sup>60</sup> Aseanapol is not a regional agency like Europol, but the development of such a common database may be seen as a first step towards regional action.

Even if an agreement on a regional database - or at least a common database between all Member States - has not yet been reached, some States have agreed on a sub-regional mechanism of information sharing, *i.e.* the Agreement on Information Exchange and Establishment of Communication Procedures (2002) between the governments of the Philippines, Indonesia and Malaysia.<sup>61</sup>

55 ASEAN Convention on Counter Terrorism (n 8) Art. II.

56 ASEAN, *ASEAN Political Security Community Blueprint*, ASEAN Secretariat 2009; ASEAN Comprehensive Plan of Action on Counter Terrorism (n 12); Joint Declaration of the ASEAN Defence Ministers Strengthening Defence Cooperation of ASEAN to Face New Challenges (5th ASEAN Defence Ministers' Meeting in Jakarta, Indonesia 19 May 2011).

57 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (n 14).

58 ASEAN Declaration on Transnational Crime (n 11) para 4; it referred to the Naples Political Declaration and Global Plan of Action of 23 November 1994.

59 ASEAN Convention on Counter Terrorism (n 8); Comprehensive Action Plan of Action on Counter Terrorism (n 12); S Pushpanathan, 'ASEAN Efforts to Combat Terrorism' (*ASEAN publications*, 20 August 2003) <<http://www.asean.org/resources/item/asean-efforts-to-combat-terrorism-by-spushmanathan>> accessed 29 August 2014.

60 ASEAN Plan of Action to Combat Transnational Crime (n 12).

61 ASEAN Agreement on Information Exchange and Establishment of Communication Procedures (adopted 7 May 2002) Art. III.

This is another aspect in which similarities with the EU developments in cooperation in criminal matters can be highlighted (*e.g.* with the Trevi group).

States are working through fora or institutional frameworks to improve cooperation in criminal matters, including terrorism. They mainly focus, when regulating, on the development of the means at the disposal of States and regional bodies to allow more and more sharing of intelligence and information. However, thinking about implementation is not possible if States are not willing to share with others especially sensitive information. In this regard, internal diversities and relationships certainly have an impact on the development of the respective regional security frameworks, but so are the international influences, some of which are similar or mutual, whereas others differ.

#### 4 Necessary Transnational Protection of Human Rights: Challenges and Perspectives

Intelligence and information sharing raises a number of concerns with regard to the protection of human rights, including the right to privacy. As it is the right most endangered by this mechanism of cooperation, this article focuses on the protection of the right to privacy. In this respect, effective protection of personal data is to be associated with intelligence and information sharing. This protection, depending primarily on States, varies from one to another.

At the international level, it is only recently that the General Assembly of the UN adopted a resolution on 'The right to privacy in the digital age'.<sup>62</sup> It condemns unlawful and arbitrary surveillance and/or interception of communications and other acts violating the right to privacy. However, it does not provide for specific measures or obligations to States that are "called" to respect and take measures to ensure the effective protection of this right. This declaration of intent leaves a broad margin of appreciation, which is quite problematic when States are increasingly sharing intelligence and information. The absence of international consensus is an important gap that should be filled in order to develop a sharing of intelligence and information that is consistent with the protection of the right to privacy.

In this loose international framework, general concerns may be highlighted before we go in depth into each region.

A first concern is related to the sharing, access and use of intelligence by other Member States. National security aspects are particularly important in the debates about the creation, implementation and development of

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62 UNGA Res 68/167 (21 January 2014) UN Doc A/RES/68/167.

databases or of channels of transfer of intelligence and information. There is no debate on the usefulness of intelligence services in protecting democracies against internal and external threats.<sup>63</sup> However, full transparency, public scrutiny and normal democratic or judicial examination are sensitive issues because of the high level of secrecy intrinsic to intelligence services to avoid endangering current operations, revealing methods or putting at risk the lives of agents.<sup>64</sup>

Thus, there is an increasing gap between the significant cooperation between States, on the one hand, and the oversight capacities limited to the national level, on the other, which results in insufficient or ineffective democratic scrutiny.<sup>65</sup> In fact, the degree of control and of effective oversight by some Member States over their intelligence services is far too reduced in the face of the mass surveillance often used for reasons other than national security or the fight against terrorism (*e.g.* economic and industrial espionage or profiling on political grounds). National legislations do not always have a Data Protection Act and/or the same level of protection applicable to intelligence and information sharing. This is also part of the diversity existing in the different regions.

A second concern, closely related to the first one, deals with the purpose of access to intelligence. It is true that the increasing of executive powers in criminal investigations belongs to the logic of prevention.<sup>66</sup> The prevention of crime is dominated by executive powers that have the right to conduct secret investigations. In the end, they can decide on the disclosure of intelligence to other States,<sup>67</sup> which depends on several political and legal factors. Firstly, political trust among States must be reached. Disputes between two States would certainly not lead to the disclosure of intelligence. This mistrust characterised by an unwillingness to share intelligence is likely to happen more often

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63 Not all ASEAN Member States are defined as democratic. This issue is thus particularly important in this region.

64 See D Cole and others (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (E. Edgar publishing 2013).

65 European Parliament (Committee on Civil Liberties (LIBE Committee), Justice and Home Affairs), Draft Report on the US NSA Surveillance Programme, Surveillance Bodies in Various Member States and Their Impact on EU Citizens' Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs (2013/2188 (INI) 8 January 2014).

66 Eg about the United Kingdom, GS Goodwin-Gill, 'Everyone and the Citizen: The Evaluation of Principles and Protection' in J Hocking and C Lewis (eds), *Counterterrorism and the Post-Democratic State* (Monash Studies in Global Movements, Edward Elgar 2007) 101ff; about Germany, see P-A Albrecht, *Kriminologie* (3th edn, Beck 2010) 69ff.

67 Braum (n 29) 241.



in ASEAN than in the EU, even if it can be happening in the EU. Secondly, some States legally prohibit the disclosure of intelligence in their own courts. Therefore, the use of intelligence by the recipient State can also be forbidden by the law of the sending State that first gathered the data or would be really problematic, for instance, for investigation on-going in the sending State.

Like the development of mechanisms of intelligence and information sharing, human rights protection is more developed in the EU than in ASEAN. In the EU, all counter-terrorism and human rights instruments are binding, while only the counter-terrorism Convention is binding on ASEAN Member States. This Convention affirms in the preamble that States are committed to protect human rights, and then in article XVIII states that international agreements recognised by the States should be respected; this includes international human rights instruments. In addition, the ASEAN Human Rights Declaration provides for principles which are politically but not legally binding on States.

More specifically, the EU is basically driven by the spirit and principles of democracy, liberty, justice and solidarity.<sup>68</sup> This does not prevent it from facing problems when implementing the mechanism of intelligence and information sharing.

This mechanism endangers rights and freedom protected at the regional level. In particular, the right to privacy is promoted in several European and international instruments, such as article 8 of the ECHR and more fundamentally article 7 of the Charter of Fundamental rights of the European Union.<sup>69</sup> The Charter is strictly an EU instrument leading to the justiciability of the Member States before the Court of Justice of the European Union.<sup>70</sup> By contrast, the ECHR is an independent convention and is binding on Member States as States Parties. Despite this important difference, strong links between the ECHR and the EU exist. In this regard, one may note in particular the project of accession of the EU to the ECHR.<sup>71</sup> EU Member States have a common standard to respect in sharing intelligence and information.

68 See (n 65) 7.

69 See eg National Research Council of the National Academies, *Protecting Individual Privacy in the Struggle Against Terrorist: A Framework for Program Assessment* (National Academy Press 2008); C Cocq and F Galli, 'Comparative Law Paper on Data Retention Regulation in a Sample of EU Member States' (SURVEILLE Project D4.3, 30 April 2013).

70 See Charter of Fundamental Rights of the European Union (2010) OJ C83/389, Art. 51; Declaration concerning the Charter of Fundamental Rights of the European Union (annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed 13 December 2007).

71 See Convention for the Protection of Human Rights and Fundamental

Thus, the EU is subject to compliance with supranational human rights standards. However major concerns have been raised especially about the PNR agreements with the United States, requiring the transfer of European passenger data.<sup>72</sup> This agreement means that the EU shares in a one-way direction personal data relating to travel dates, travel itineraries, ticket information, contact details, travel agents through which flights were booked, means of payment used, seat numbers and baggage information to companies for commercial purposes and the United States for security purposes.<sup>73</sup>

It is certainly not part of intra-regional cooperation but it has an impact on the level of protection the EU and its Member States are willing to apply in sharing information with external States. It may be quite problematic if data gathered in the EU are shared with such a low level of protection of the right to privacy. The European Parliament recently condemned this agreement. It particularly stressed that privacy is the “foundation stone of a free and democratic society” and that mass surveillance appears potentially to entail illegal actions by intelligence services. Therefore, it invited national parliaments to adopt effective oversights of intelligence activities by parliamentarians or expert bodies with powers to investigate.<sup>74</sup>

For the same reasons, the European Commission’s proposal for an EU PNR Directive<sup>75</sup> was rejected by the European Parliament on 29 April 2013. The objective would have been to transfer the PNR data of passengers on extra-EU flights to and from Member States’ territories for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. These data would have been shared between Member States.<sup>76</sup> Despite this rejection,

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Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 59(2); Treaty on the European Union (Maastricht Treaty) Art. 6(2). See also Council of Europe, ‘Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the Convention on Human Rights’ (Final report, 47+1(2013)008, 3–5 April 2013).

72 Council Decision 2012/471/EU of 13 December 2011 on the signing, on behalf of the Union, of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United Department of Homeland Security [2011] OJ L215/1.

73 Annex to the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security [2012] OJ L215/5.

74 See (n 65) 25.

75 Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime’ COM (2011) 32 final.

76 *Ibid.*, Art. 7.

the LIBE Committee asked that the proposal be reconsidered.<sup>77</sup> New negotiations are in train and there are expectations of more protection of privacy.

In ASEAN, maintaining a harmonious balance between security and the protection of human rights is a real challenge. No instrument dealing with security issues also pays attention to the protection of human rights. Only the ACCT specifies that terrorism should not be associated with any religion, nationality, civilisation and ethnic group, protecting people from coercive discriminatory measures.<sup>78</sup> Moreover, ASEAN does not have supranational instruments of human rights protection analogous to those existing in the EU.

A noteworthy step was the establishment in 2009 of an ASEAN Intergovernmental Commission on Human Rights (AICHR). This was followed by the recent adoption in 2013 of the Declaration on Human Rights.<sup>79</sup> However, if security involves the adoption of binding acts, human rights seem to require only principles. States reach an agreement on security issues more easily than on standards of protection of human rights.<sup>80</sup> In addition, the AICHR uses soft methods, in organising series of consultations to assess its work and to gather inputs from stakeholders. For now, human rights protection and counter-terrorism activities seem to be developing in parallel without real interaction. It remains to be seen whether developments in the area of regional human rights protection in ASEAN will work as constraints on intelligence and information sharing.

In conclusion, the lack of adequate national, regional and international binding frameworks to protect the privacy of individuals involved while supporting lawful and effective data sharing is very worrying and, to remedy this issue, transnational standards of protection of human rights must accompany the transnational sharing of intelligence and information.<sup>81</sup> If national security seems to outweigh concern for human rights, a tack in the opposite

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77 Statewatch, 'Observatory EU-PNR(Passenger Name Record: 2011 ongoing' <<http://www.statewatch.org/Targeted-issues/eu-pnr/eu-pnr-observatory.htm>> accessed 27 March 2014.

78 See (n 8) Preamble.

79 ASEAN Human Rights Declaration and the Phnom Penh Statement on the adoption of the ASEAN Human Rights Declaration (adopted 18 November 2012); See also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 21.

80 A Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Politics in Asia, 2nd edn, Routledge 2009).

81 UNODC (n 37) 66. See also K Lachmayer, 'Rethinking Privacy Across Borders: Developing Transnational Rights on Data Privacy' in this Special Issue.

direction seems to have begun, thanks notably to the European Parliament and the ECJ.<sup>82</sup>

## 5 Conclusion

Intelligence and information sharing is a significant mechanism used by States and increasingly framed at the regional level, or at least through intra-regional cooperation. This article aimed nevertheless to highlight the challenges still to be overcome in developing this mechanism.

First, potential lack of trust between Member States can lead to an unwillingness by States to share information and, even more so, intelligence, and so to the mechanism's lack of efficacy. Even if this aspect seems to be resolved in the EU, discussions are still current especially at the regional level between Europol and Eurojust. Facing these strong concerns, Member States and even the EU agencies are working together to share not only intelligence and information but also best practices.<sup>83</sup>

Second, the institutional developments making this mechanism effective are more noteworthy in ASEAN. Yet EU Member States are also discussing more effective techniques and technologies.

Third, and probably most important, the imbalance between security and the protection of human rights is going to dominate future discussions on the development of techniques and technologies for sharing intelligence and information for security purposes (in the broad meaning of the term).

Finally, it is important for States to establish and agree on the final purpose of this exponential intelligence and information sharing to answer these concerns. Do States really want to share both intelligence and information only for prevention and investigation purposes or do they want them to be used as evidence? The answer will lead to different regional developments of this mechanism.

82 See the very recent decision of the European Court of Justice (Grand Chamber), Joined Cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238. The Court declared the Data Retention Directive to be invalid. It entails a wide-ranging and serious interference by the directive with fundamental rights which is not sufficiently circumscribed to ensure that that interference is limited to what is strictly necessary. See also A Vendaschi and V Lubello, 'Data Retention and Its Implications for the Fundamental Right to Privacy: A European Perspective' in this Special Issue.

83 B De Buck, 'Cooperation and information exchange between Europol and Eurojust' and V Jamin, 'Operational aspect of the relation between Europol and Eurojust: day-to-day concrete cooperation and shortcomings' (ECLAN Conference on the Relationship between Europol and Eurojust: State of the Art and Future Prospects in Brussels, 12 February 2014).