# Part 1: The Association of Southeast Asian Nations (ASEAN)

The first portion of the study focuses on the Association of Southeast Asian Nations ("ASEAN") and the discussion shall mainly be divided into three main portions.

First, there is a discussion of the historical development of the Southeast Asian region as well as the development of the ASEAN regional organization, including the development of international cooperation in criminal matters such as mutual legal assistance, which is the crux of the entire study. Though it is admittedly easier to overlook the historical development of the Southeast Asian region (which may go as far back as the pre-colonial times of the ASEAN member states) and focus instead mainly on how the regional organization was created and thereafter the legal framework that subsequently existed, the historical development of the region is necessary for one to understand the underlying motivations, reasons, and background as to how the ASEAN was shaped and continuously shapes and defines itself in its decisions, policies, cooperation mechanisms, etc. Without the underlying current of the region's historical development, any further analysis would be incomplete and bereft of the grassroot understanding imperative to knowing the mechanism on how the organization works. In the same vein, a complete and deeper understanding of the historical development will help in assessing and discerning how the ASEAN could and would foster external relations, build and maintain effective international cooperation mechanisms that would work for it and its member states. Therefore, this first portion – without necessarily going through the minute and explicit details – looks through the different changes and influences the region undertook before the ASEAN was finally established.

The second part of the discussion involves the institutional and legal framework, incorporated therein are the salient features of the ASEAN as a regional organization, its organizational structure, and its fundamental principles, norms, and practices. This portion, together with the exploration of ASEAN historical development, is meant to be an exercise in knowing the regional organization well and acquainting oneself with the underpinnings of the different processes, including decision-making, in the regional organization.

Third, discussion shall focus on the cross-border movement of evidence. This portion of the study includes the historical development of mutual legal assistance in the ASEAN through the ASEAN Mutual Legal Assistance Treaty, which is a product of the ongoing cooperation occurring within the ASEAN as regards criminal matters. Afterwards, the different defining substantive and procedural provisions of mutual legal assistance shall be examined. Substantive provisions focus on (5) main points: the applicability of the assistance available through the ASEAN MLAT; types of mutual legal assistance available; compatibility with other arrangements; designation of central authorities; and the different principles, conditions, and exceptions, which is further subdivided into different topics. On the other hand, procedural provisions mainly focus on aspects involving the preparation and execution of MLA requests.

After centering on the regional level, it shall be followed by a discussion of the respective member state level frameworks of the Philippines and Malaysia. The discussion of these respective member states shall follow the same exercise as what was done in the examination of the regional level framework.

Thereafter, the frameworks of the regional level and member state level shall be compared and contrasted with each other.

## *I. Regional Framework*

### A. Historical Development

The discussion of the historical development of Southeast Asia as a region is necessary to understand the ASEAN as a regional organization. The historical development and the experiences that are included herein is imperative in having a more holistic understanding of how the ASEAN and its member states approach decision and policymaking, which is not mutually exclusive to how they approach international cooperation in criminal matters.

There is admitted difficulty in subsuming ASEAN and/or its member states in terms of an integral civilization.[62] At the onset, the southeast region of the Asian continent has been geographically defined, divided, and delineated as nowhere else in any of the other parts of Asia.[63] In fact,

62 *Benda*, p. 107.
63 *SarDesai*, p. 6.

there came a time when there was no single answer as to how "Southeast Asia" should properly be geographically defined and delineated:[64] there only came a clearer geographical delineation and/or definition during the Second World War through the invention of Europeans, when identification and definition of the region became politically (and militarily) important.[65] Such geographical division in the subject Asian segment has successfully fractionalized its countries into diverse social, cultural, and political units, which could have resulted in the multi-centric historical development that further complicates the understanding and consolidating the region's historical development.[66] Hence, a step back is necessitated to have a more meaningful understanding of ASEAN's historical development. Prior to a discussion of how the regional organization ASEAN was established, a brief walk through the historical beginnings and/or circumstances surrounding the Southeast Asian region and the countries in it (which eventually became the ASEAN member states) shall be made to better understand the underpinnings of ASEAN. Understanding its history may not provide a barometer for the region's or ASEAN's future development (this is not history's task),[67] but a review of the Southeast Asian region's history could "illuminate the present," making clear internal dynamics within the region, and in relation to the establishment of the ASEAN, understand how its development and decisions arguably emerge "from unique historical circumstances and will likely evolve in its own particular way."[68]

## 1. From Early Southeast Asia to Modern Southeast Asia

### a. Early Southeast Asia

Albeit interest in Southeast Asian history arguably started during its colonization by different European imperial powers, the history of Southeast Asia or the region's cultural, political, and social development could be traced earlier on and surely did not begin with the Europeans' arrival.[69]

64 *Benda,* p. 108.
65 *Beeson*, p. 18; *Hemmer/Katzenstein*, p. 575; *Tilman*, p. 16.
66 *Benda,* p. 108; *SarDesai,* p. 6; *Severino,* ASEAN, p. 4; *Wolters*, p. 39.
67 *Osborne,* p. 17.
68 See *Acharya,* p. 327; *Benda,* p. 111; *Evans,* p. 303; *Osborne,* p. 17.
69 *See Tilman, pp. 16-17.*

Southeast Asia as a region is highly diversified, created not only through human settlement by geographical fractionalization,[70] or successive migrations to the area, but also obstacles such as jungles, mountains, bodies of water, and the like, which later enabled the diversification of the peoples of Southeast Asia over time: "cutting them off from one another over time and promoting their distinctiveness in different parts of the region."[71] Amidst this diversification and differentiation however, Southeast Asian groupings, settlements and/or kingdoms interacted with another and subsequently developed amongst themselves common experiences, attitudes, and beliefs.

On a cultural and socio-political context, early Southeast Asia had an indigenous cultural and socio-political development which was not necessarily homogenous but could be described by common characteristics linking those in mainland and insular Southeast Asia.[72] Learning instead to reap the benefits and share the problems brought by the uniqueness of the region (for example, biological diversity and large bodies of water separating each country), countries progressively developed societies and organizations based on agriculture or irrigated cultivation and then maritime trade.[73] Agriculture and maritime trade contributed highly to such state formation and in turn, the development of various principalities and kingdoms across various parts of the Southeast Asian region.[74] There was a direct relationship between agricultural prosperity and rise of states; and there was more strength in those areas where there is equal access to both agricultural prosperity and sea (maritime trade).[75]

Furthermore, agriculture and maritime trade facilitated the ebb and flow of ideas, beliefs, customs, and traditions from one country to anoth-

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70 Southeast Asia extends throughout an area bounded by Myanmar (formerly, Burma) in the northwest corner to Indonesia (formerly, West Irian) in the southeast. Within these boundaries, one could identify a mainland portion, which makes Southeast Asia penetrable through land from the northern direction. Mainland Southeast Asia is composed of Myanmar, Thailand, Laos, Cambodia, and Vietnam. One could also identify an insular portion of Southeast Asia, which generally makes Southeast Asia accessible through sea from all directions. Philippines, Brunei, Indonesia, East Timor, Malaysia, and Singapore composed this insular portion of the Southeast Asian region.*SarDesai,* p. 6; *Tarling*, p. 3; *Tilman*, pp. 16-17.

71 *SarDesai*, p. 6; *Tarling,* p. 3.

72 *Reid*, p. 8; *SarDesai*, p. 14.

73 *Reid*, p. 8; *SarDesai*, p. 14.

74 *Reid*, pp. 6-8; *SarDesai*, p. 22.

75 *SarDesai*, p. 22. 44.

er.[76] This resulted in cultural and socio-political transmission and assimilation in various states in the Southeast Asian region, with Arabic, Persian, Indian, and Chinese cultures being identified as key influences.[77] In the end, either culture or both were integrated in the culture and socio-political systems of many countries, more especially those in insular Southeast Asia, which received great influence from other countries' cultures, without necessarily discarding the indigenous ethnicity each country already had.[78] In particular, Myanmar and Vietnam (which was a former Chinese territory) were said to be vital conduits to the spread of Indian culture and Chinese socio-political systems, respectively.[79]

Religions likewise played an integral role. Various religions from external origins spread throughout the region, which subsequently influenced society's values and established manners in which Southeast Asians would identify themselves as members of universal cultures.[80] Early Southeast Asia witnessed the rise and proliferation of Islam in Malaysia, Indonesia, Brunei, and Southern Philippines, Theravada Buddhism in Myanmar, Laos, Cambodia, and Thailand (these countries have more cultural borrowings from India), and Mahayana Buddhism in Vietnam (which was highly Chinese-oriented).[81] Northern and central Philippines, on the other hand, lacked a strong "sacerdotal hierarchy".[82] Instead, there was a prominent belief in an indigenous "Southeast Asian religion," as others would otherwise refer to animism or shamanism, which believed more in animistic spirits and the importance of the spiritual realm.[83]

The foregoing notwithstanding, the history of early Southeast Asia also witnessed many political changes and interstate rivalries. As mentioned, there were different principalities and kingdoms that existed in the region. In both mainland Southeast Asia and insular Southeast Asia arose different kingdoms and/or empires such as, but not limited to, the Funan, Champa, the Khmers, Srivijaya, and Majapahit.[84] Understandably, political differences, power struggles, and territorial disputes ensued which led to conflicts and subsequent changes. Particularly, mainland Southeast Asia

76 See *Reid,* p. 96.
77 See *Reid,* pp. 130-133; *SarDesai,* pp. 14-18.
78 *Reid,* p. 26; *SarDesai,* pp. 16, 43.
79 *SarDesai,* pp. 32, 36.
80 *Christie*, p. 7; *Reid,* p. 96.
81 *SarDesai,* pp. 18-21. See also *Reid,* pp. 96-119; *Solidum*, pp. 4-5.
82 *SarDesai,* p. 71.
83 *Reid,* pp. 97-98.
84 *SarDesai,* pp. 22-62; *Tarling,* pp. 10-17.

underwent strong changes when there were movements for consolidation in Myanmar, Thailand, and Vietnam.[85] Interstate tensions ensued thereafter after disagreements as to territory and political control.[86]This soon after became ingrained in the socio-political development of cultures and determinant of their respective decisions and policymaking. Nonetheless, it did not take long before mainland Southeast Asian countries by themselves boasted of a "strong administration, well-recognized hierarchical social order, territorial divisions, a bureaucratic system, and a self-sufficient economy."[87]

### b. Building empires and colonies: East-West Relationship

The shift to modern times in Southeast Asia arguably began with the colonization of the Asian countries.[88] Colonization brought significant changes during this period. Asia has long attracted the attention of Westerners, particularly the Europeans, through the lure of trade, economic gain, or establishing a power stronghold.[89] By the dawn of the 15th century, Southeast Asia has entered an "Age of Commerce" and strong economic, social, political intra-state exchanges were ongoing.[90] Commercial trade links existed between Southeast Asia and across Asia and between Southeast Asia and Europe through the Middle East, and by the time of 15th century, Asia and Europe found themselves in a new phase of economic expansion following recovery from the Black Death, the great plagues of the 14th century, and partially the effect of Chinese initiatives during the Ming Dynasty in so-called discovery voyages.[91] At the same time, Europe was broken down into nation-states with admittedly limited space for expansion that sought security and domination over each other, driving them to seek power and wealth overseas.[92] Colonizers were thus either motivated through trade competition, great wealth accumulation, cultural expression, or the need to secure and extend political power.[93]

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85 *Christie,* p. 7; *Reid,* p. 175; *SarDesai,* pp. 74-81, 84.
86 *SarDesai,* p. 84.
87 *SarDesai,* p. 84.
88 *Cotterell*, p. 239; *Tilman,* p. 17.
89 *Cotterell,* pp. 240-268; *Ricklefs/Lockhart/Lau, et al.*, pp. 165-166; *Solidum,* p. 4.
90 *Reid,* pp. 74-95; *Solidum,* p. 5.
91 *Reid,* pp. 57-95; *Tarling,* p. 21.
92 *Healy/Dal Lago*, p. 4; *Sèbe*, p. 125; *Tarling,* p. 22. See also *Christie,* pp. 3-8.
93 *Christie,* p. 6; *Cotterell,* pp. 240-268; *SarDesai,* pp. 140-141; *Tarling,* pp. 22, 40-41.

It was the Portuguese who first colonized in the Southeast Asian region when they captured Malacca in 1511.[94] The former was followed by the Dutch and the Spaniards which later on superseded the Portuguese as strong European powers in the region. The Spaniards began to colonize the Philippines in 1559.[95] The Dutch followed in around 1606-1609 through the "Vereenigde Oostindische Compagnie" (VOC) or the so-called Dutch East India Company.[96] Then it was around the onset of the 19th century when the British, French, and Americans landed in Southeast Asian shores and colonized most of the territories.[97] By 1913 or shortly before the First World War began, the French colonized Indochina; the British, the Malay states and Brunei; and the Dutch, Indonesia.[98] Thailand, through good diplomatic strategies and geographical location, was the only Southeast Asian country that escaped imperialism and remained independent, albeit by paying the price of losing some of its territories to the British and French.[99]

By this same time period, the Philippines found itself, after declaring in 1868 independence from the Spaniards (which colonized the former for 333 years), a new colonizer through the Americans.[100] Described as the "oddest Western colonial adventure in Southeast Asia," the Americans declared war against the Spaniards and then subsequently purchased the Philippines from Spain – suiting better the Americans' Pacific policy as the Philippines would strengthen the United States' position in Southeast Asia.[101] The United States then had not only apprehensions of Japan seeking to expand its influence,[102] but congruently, colonizing the Philippines likewise catered to the United States economic interests.[103]

Colonial experience mostly defined the national borders, created modern political and administrative institutions, established some basic parameters of economic systems, and charted industrialization and modern internal development through the introduction of Western laws, urban

94 *Reid,* p. 120; *Tarling,* pp. 21-25; *Tilman,* p. 17.
95 *Reid,* p. 121; *Tarling,* p. 34.
96 *Reid,* pp. 123-124; *Tarling,* pp. 25-26.
97 *Cotterell,* pp. 239-268; *SarDesai,* pp. 87-132; *Tarling,* pp. 39-41.
98 *SarDesai,* p. 140. See also *Solidum,* p. 4.
99 *Ricklefs/Lockhart/Lau, et al.,* p. 167; *SarDesai,* pp. 133-139; *Tarling,* pp. 69-74. See for further information, *Ricklefs/Lockhart/Lau, et al.,* pp. 227-237.
100 *SarDesai,* p. 155.
101 *Cotterell,* p. 266.
102 *Cotterell,* p. 266.
103 *Ricklefs/Lockhart/Lau, et al.,* pp. 251-252; *SarDesai,* pp. 156-157.

planning, educational institutions, immigration policies, money markets, location of administrative centers, as well as transportation and communication lines.[104] In addition, the colonized states were fortified against neighbors thought to be hostile, were made part of an international network of posts subject to a single authority, and governed by regularly replaced administrators.[105]

This modernity notwithstanding, it consequently caused pervasive and inherent economic dislocation and distress and had the undesirable effect of actually lowering the economic well-being of people.[106] Traditional structure and values of rural society was undermined intentionally – ultimately disrupting its economy and way of life, resulting in changes in the social strata.[107] With the introduction of modern internal development and other forms of innovation, colonizers reinforced distinction between elites and masses, and social distances were prescribed, which defined and delineated social classes.[108]

Additionally, colonialism reinforced a different kind of cultural hybridity amongst their colonized states.[109] Among all the colonizers Southeast Asia had, the Portuguese, although the first to have colonized parts of the region, had little influence in the course of history in the new nations of Southeast Asia.[110] As Robert Tilman narrates, the French had much more impact on Vietnam, Kampuchea, and Laos; the British on Burma, Malaysia, and Singapore; the Spanish and Americans on the Philippines; and the Dutch, on Indonesia.[111] That said, it was the Philippines which had the most unique colonization experience among all Southeast Asian countries and consequently received the most impact of colonial contact and cultural penetration.[112] Having been colonized long before other countries in Southeast Asia were, colonial ways of doing things were more established.[113] The Spaniards were principally governed by considerations of religion with religious and civil-political authorities heavily intertwined, forcefully converting most Pilipinos to Catholicism notwithstanding even

104 *SarDesai,* pp. 141, 146; *Tilman,* p. 17.
105 *Reid,* p. 121.
106 *SarDesai,* p. 161.
107 *Reid,* pp. 130-132; *SarDesai,* p. 161.
108 *Tilman,* p. 17.
109 *Reid,* pp. 130-132.
110 *Tilman,* p. 17.
111 *Tilman,* p. 17.
112 *SarDesai,* pp. 63, 82.
113 *Ricklefs/Lockhart/Lau, et al.,* p. 193.

the strong Islamic resistance then in southern Philippines.[114] Then after being colonized by the Americans, the Philippines was immersed further to American policy and westernized education, literature, language, elite-led politics, and other aspects of culture.[115]

Through colonization, the majority of Asian countries were reduced from flourishing and autonomous communities to colonies, protectorates, or client states with western encroachment either land or by sea, regardless of how colonizers tried to rationalize their occupation and whether their colonial experience was either unabashedly abusive or benign and benevolent.[116] Correlatively, the different colonial legacies each country in the region experienced has, as one wrote, drawn up "curtains of ignorance and separation between the nations of Southeast Asia, cut off thitherto flourishing contacts among their peoples," and even "established new patterns of trade."[117] This later resulted in a variance of national experiences, diversity of institutions, and difference in strategic outlooks.[118] One could observe Southeast Asia less and less in terms of a *Schicksalgemeinschaft* – or a community with a shared destiny, with the progressive and aggressive Western intrusions in Southeast Asia.[119] Rather, one is exposed to a "startling paradox", wherein Western intrusion or colonization resulted in the region's high political fragmentation into self-contained political and economic domains catering to imperial interests.[120] Interaction amongst the countries, mostly through the "ebb and flow of migrants and traders" within the region seemingly ceased,[121] and whatever history of "Southeast Asia" developed during this period could understandably be entangled with the history of European colonial regime.[122] Thus, it was not surprising, as many historians suggested, the colonial period introduced far-reaching changes, consolidated and divided cultures and communities, and becomes a significant contributor and/or factor to how modern Southeast Asia was shaped and contoured as to how it is known presently, including

114 *Reid,* pp. 112-113; *Ricklefs/Lockhart/Lau, et al.,* pp. 194-195; *SarDesai,* pp. 70-73, 82.
115 *Ricklefs/Lockhart/Lau, et al.,* p. 227; *SarDesai,* pp. 158-165.
116 *Cotterell,* p. 239; *SarDesai,* p. 141.
117 *Severino,* ASEAN, p. 4.
118 *Severino,* ASEAN, p. 4.
119 *Benda,* p. 112.
120 *Acharya*, p. 1007; *Appadorai*, p. 277; *Benda,* p. 112.
121 *Appadorai,* p. 277; *Severino,* ASEAN, p. 4.
122 *Benda,* p. 112.

how states dealt with one another and forged socio-political and economic relationships.[123]

### c. The Times of War

As narrated above, colonialism has brought a lot of changes in the Southeast Asian region, one of which is the sudden shift from being autonomous communities to being subservient states. Instead of having actions and resources catering to one's own interests, it catered to another. Economic dislocation, distress, and exploitation, as above mentioned, was not uncommon during the colonial era. Thus, it did not take long until small elite groups of people among the colonized groups sought to be taken out of traditional trappings, escape alien rule, and find independence through the participation in nationalist movements.[124]

Colonialism itself provided the means to the creation of a nationalist consciousness among elites in Southeast Asia.[125] Through the introduction of modern intellectualism, industrialization, and/or education, on one hand, the minds of the youth were opened to "political ideas of the West, including self-government and the fundamental freedoms of press, assembly, and speech" and equally brought knowledge of revolutions elsewhere in Western experience.[126] On the other hand, there came with a proliferation of imperial philosophies after empires were consolidated in the Southeast Asian region in some parts of the region.[127] At the same time, colonialism ironically had the effect of re-fueling a glorious historical past for most Southeast Asians. Due to Western efforts to undertake archaeological excavations, historical antiquities were unearthed, temples restored, and arts studied, that consequently ignited pride amongst nationalists about their magnificent history and hopes for a brighter future.[128]

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123 *Benda,* p. 112; *Ricklefs/Lockhart/Lau, et al.,* p. 166; *SarDesai,* p. 141; *Tilman,* p. 16.
124 *SarDesai,* pp. 144-147.
125 *SarDesai,* pp. 141, 147.
126 *SarDesai,* p. 147.
127 Examples were the Dutch "Ethical Policy" and the French *mission civilisatrice*, which basically said that colonial rule should yield reciprocal benefits: colonial empires are more of a responsibility to give better government, education, and welfare and that it is important to stress the imperial participation of European-educated native elites.*Christie,* pp. 9-10.
128 *SarDesai,* p. 147.

Nationalist movements in the region could be described in phases. At the beginning, especially prior to 1914, a majority of the nationalist movements in Southeast Asia focused more on "self-strengthening" initiatives and endeavors rather than "anti-colonial."[129] The indigenous elite were familiar with the warnings of Social Darwinism: a civilization that fails to adapt to changing times would be susceptible to decay and failure.[130] Steering away from this majority was the Philippines, which was the first in Asia to successfully mature in terms of nationalism and carry out anti-colonial nationalist movements for independence albeit the same were earlier besieged with stumbling blocks.[131] As mentioned earlier, Pilipinos declared their independence from the Spaniards in 1898 but got cheated in the process when Americans "extended their assistance" to drive the Spaniards out.[132] Nationalist movements nonetheless continued under the American rule but the same was more toned down as Americans gave them more concessions to realize their self-government.[133]

Thereafter, there was an obvious change in tone in nationalist movements in the Southeast Asian region starting from the First World War. There was an upsurge of anti-colonial movements across the region and throughout Asia.[134] Underlying these movements were different competing ideologies such as nationalism, communism and Islam, which were arguably symptoms of the upheaval against the colonial agenda.[135] The myth of European imperial superiority and invulnerability was seemingly debunked during this time period.[136] At the same time, it did not help that in throwing support to the Allies, the United States chose to put an ideological sugarcoating over the aims of the Allies during the war.[137] If the Allies were fighting for the right to self-determination for all the peoples of Europe, it should not be surprising that the colonized states would demand for such right as well.[138]

Such circumstances affected the imperial systems in the region. Some countries such as Burma and the Philippines saw significant changes and

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129 *Christie,* p. 10.
130 *Christie,* p. 10.
131 *Ricklefs/Lockhart/Lau, et al.,* pp. 197-198, 224-227; *SarDesai,* pp. 150-165.
132 *Ricklefs/Lockhart/Lau, et al.,* p. 227; *SarDesai,* pp. 155, 204.
133 *SarDesai,* p. 204.See generally*Ricklefs/Lockhart/Lau, et al.,* pp. 283-291.
134 *Christie,* p. 11.
135 *Christie,* p. 11.
136 *Beeson,* p. 8; *SarDesai,* pp. 204-205.
137 *Christie,* p. 11.
138 *Christie*, p. 11.

were allowed to some degree to have self-governments.[139] On the other hand, those colonies which did not have any significant political changes or any concrete self-government movements found themselves heavily influenced by revolutionary communist ideologies, which point to the direct relationship between capitalism and imperialism.[140] Communism flourished as a radical political agenda in the struggle for national liberation.[141] Nationalism prevailed in the region nonetheless as it engendered unity above everything else: a self-conscious, sustained effort to make a united identity.[142]

Any momentum gained by nationalist movements for self-government was later interrupted through the Japanese interregnum and Second World War. Japan while acting through the "Greater East Asia Prosperity Sphere" campaign had three goals in conquering the western colonies of Southeast Asia and making the latter alternative sources of supply during its war with China and eventual conflict with western powers: (1) "seizing the so-called Southern Resource Area, (2) securing a defense perimeter through the Pacific Islands through the eastern border and against India in the west, and (3) containing China".[143] Japan eventually allied itself with Germany and Italy in the Second World War, staging a theatre of war in the Southeast Asian region.[144] Starting its assault in 1941, the Japanese invasion of the Western colonies in Southeast Asia was efficacious, complete, and swift – conquering all either through diplomatic pressure or force by 1942.[145]

Notably, it was more or less during this time period when the term "Southeast Asia" came into prominence, through the identification of the region in political and military terms by United States President Franklin Roosevelt and British Prime Minister Winston Churchill through the establishment of the Supreme Allied Command in Southeast Asia ("SEAC") in August 1943.[146] Albeit the boundaries of SEAC were changed from time to time during the Second World War, it was concerned with discussions of geographical extent, command arrangements and relationships, and

139 *Christie*, p. 12.
140 *Christie*, p. 12.
141 *Christie*, p. 13.
142 *Christie*, p. 13.
143 *Cotterell*, p. 270; *Ricklefs/Lockhart/Lau, et al.*, p. 293.See also *Reid*, p. 323.
144 *Cotterell*, p. 272.
145 *Cotterell*, pp. 270-280; *Reid*, p. 324; *Ricklefs/Lockhart/Lau, et al.*, pp. 293-294.
146 *Solidum*, p. 5.

other related matters.[147] At the same time, perceptions of "Southeast Asia" heavily derived from the Japanese interregnum which changed colonial fortunes and partition brought by the Western powers.[148]

With the Japanese interregnum dismantling European and American colonial administrations, some indigenous political activists either found themselves aligning with the Japanese in creating an "Asia for Asians" and propagating the Greater East Asia Prosperity Sphere whilst some found themselves imprisoned or punished for continuing to support European and/or American endeavors.[149] The Japanese postured itself as the liberator of Southeast Asia and attempted to win over local supporters through deliberate, even haphazard, violent propaganda.[150] Despite the foregoing, the Japanese failed to win over Southeast Asian peoples.[151] Repression was an aspect of Japanese rule but at the end of the day, its severity was self-defeating and even counter-intuitive to the promise Japanese occupation brought.[152] Stating it otherwise, the Japanese did not practice what they preached: while condemning the violence and exploitation the Westerners did to the colonized, the Japanese had also no qualms in perpetuating the same.[153]

The foregoing notwithstanding, Japanese interregnum had an undeniable impact on the process of decolonization in Southeast Asia and the ushering of a so-called Southeast Asian renaissance.[154] With the ousting of European and American colonial authority, nationalist leaders had the opportunity to communicate and cooperate with rural communities and espouse ideas of an independent nation – something unspeakable, even seditious, under European or American colonial rule.[155] At the same time, student leaders, nationalists, activists, and politicians, who were previously

147 *Solidum,* pp. 5-6. See also *Beeson,* p. 18.
148 *Cotterell,* pp. 269-270, 280; *Solidum,* p. 6.
149 *Reid,* pp. 324, 326; *Ricklefs/Lockhart/Lau, et al.,* p. 294.
150 Japan humiliated publicly Westerners amongst local populations, allowed nationalist governments to be established in countries such as Indonesia, Myanmar, and the Philippines, while promoting local languages and indigenous cultural monuments through the censorship of European and/or American symbols of governance. *Christie,* p. 14; *Cotterell,* p. 280; *Ricklefs/Lockhart/Lau, et al.,* p. 295; *SarDesai,* p. 205; *Solidum,* p. 20.
151 *Cotterell,* p. 281.
152 *Cotterell,* p. 281; *Ricklefs/Lockhart/Lau, et al.,* p. 295.
153 See *Cotterell,* pp. 281-284; *Ricklefs/Lockhart/Lau, et al.,* pp. 295-300.
154 *Beeson,* p. 8; *SarDesai,* p. 204.
155 *Ricklefs/Lockhart/Lau, et al.,* p. 316.

censored, were now allowed to articulate their ideas.[156] In the meantime, any brutality the Japanese exhibited opened further the consciousness to rid the region of foreign overlords.[157]

Following the surrender of the Japanese in August 1945, key elements in shaping the post-colonial/post-war period were already identified.[158] Despite being keen of retaking their colonies back after the Japanese occupation, the Western colonizers not only lacked the needed resources but more importantly, were confronted with a differently charged spirit of nationalism and yearning for independence.[159] To the exception of the Philippines, which relatively had a smoother transition to independence, some Western colonizers like the British and Dutch had difficulties letting go and thus, negotiations and revolutions anew and all in efforts to gain independence occurred in other parts of Southeast Asia: from the First Indochina War (Viet Minh against the French), Indonesian revolution, Burmese threat of revolution, to conflicting movements in Laos and Cambodia.[160] Ultimately, the Philippines, Burma, Indonesia, and Malaya gained their independence in 1946, 1948, 1949, and 1957, respectively, while Singapore and Borneo territories were strategically attached to Malaya in the 1950's.[161]

Despite being conferred independence, dissension became apparent in some parts of the region amongst those where minority rights, views, "loyalist communities," and political structures designed to protect these interests tended to be forgotten.[162] In a rush for some colonial powers to appease increasing nationalist movements, those in the ethnic minorities or "loyalist communities" were positioned in a marginal position.[163] The same can be said with ideologically or religiously based movements in the region, especially Communism, which was already far-reaching and has noticeably spread its influence and impact in the Southeast Asian region.[164] Its influence remarkably eroded in some parts of Southeast Asia

156 See *Ricklefs/Lockhart/Lau, et al.,* pp. 300-316. See for how transition to independence movements were supported by the Japanese, *Reid,* pp. 327-331.
157 *Ricklefs/Lockhart/Lau, et al.,* p. 316. See also *Reid,* p. 326.
158 *Christie,* p. 16; *Ricklefs/Lockhart/Lau, et al.,* p. 317.
159 *Christie,* p. 16; *Cotterell,* pp. 287-291; *Ricklefs/Lockhart/Lau, et al.,* p. 317; *Tarling,* p. 120.
160 See *Christie,* p. 16; *Cotterell,* pp. 291-294; *Ricklefs/Lockhart/Lau, et al.,* p. 317.
161 See *Ricklefs/Lockhart/Lau, et al.,* pp. 321-345.
162 *Christie,* p. 19.
163 *Christie,* p. 19.
164 See in general*Ganesan*, pp. 212-213; *Pasadilla*, p. 2.

during the independence negotiations, "a key period when the nationalist organizations needed simultaneously to reassure the international community and the departing colonial powers that their governments would be 'responsible' and broad-based, and also to ensure firm control of the new state apparatuses that were being created."[165] Thus, it did not come as a surprise during this time period that Southeast Asian countries like Indonesia, Burma, Malaya, and the Philippines were confronting a rise of communist, Islamic, and ethnic minority insurgencies and coups.[166] It did not help either that during the same time frame, the Vietnamese nationalist and communist groups were about to overtake the French in the anti-colonial First Indochina War.[167]

During these hard times, it became apparent that while the process of decolonization in the region may have been aided unintentionally by the Japanese interregnum and how the Americans marketed the Allied forces' ideology during the war, these factors only formed parts of the way toward the creation of a coherent region.[168] As Beeson remarked, the region as a whole might have pierced the myth of European imperial superiority and foundations for an Asian renaissance period may have been laid down, but at the end of the day, the newly independent Southeast Asian countries were confronted with national consolidation issues, "let alone any broader process of regional coordination or institution building".[169] Admittedly, once the joys and excitement of newly-found independence settled in, the newly independent Southeast Asian countries were confronted with twin problems of nation building and economic development – herculean issues given that these countries did not have much economic resources left after a long period of colonization but moreover, there were common issues of internal dissent and heterogeneous societies amongst themselves, as well as colonial political models, which were not quite applicable anymore to the newly independent states' status and needs.[170] It did not help either that since the outbreak of the Second World War, the idea of a "Southeast Asia" region was made more visible, legitimated, and given a political connotation.[171] Understandably, the region then unwittingly or

165 *Christie,* p. 20.
166 *Christie,* pp. 1, 20; *Weatherbee,* International Relations, p. 63.
167 *Ganesan,* p. 213; *Weatherbee,* International Relations, pp. 64-65, 79.
168 *Beeson,* p. 8.
169 *Beeson,* p. 8.
170 *Beeson,* p. 8; *Tarling,* p. 92; *Tilman,* p. 19.
171 *Emmerson*, pp. 8-9.

unwillingly garners attention and needed to prove that they could stand independently of their former colonizers.

### d. New challenges while paving avenues for regional cooperation

One of the thought-of solutions Southeast Asian countries made, together with other neighboring countries in Asia, which more or less were similarly situated and confronting similar issues and problems, was to make efforts to open communication amongst themselves and perhaps forge cooperation.[172] The first attempts at this possible Asian cooperation was seen through the Asian Relations Conference, led by India through its first Prime Minister Jawaharlal Nehru, in 1947 and 1949, respectively – the same period when not all Asian countries were not yet fully independent.[173] Unofficial in nature, two major purposes were highlighted: (1) to have a better understanding of Asia's problems and (2) efforts for cooperation.[174] Eight (8) issues were listed as part of the conference's agenda,[175] and within this context, there was a common sentiment amongst all participants against foreign dominance in Asia and the need for them to focus on self-determination and racial equality.[176] In connection thereto, the 1947 conference bore witness to the development of prescribing common rules for domestic affairs, especially those affecting countries' respect for the principle of equality amongst all citizens, whilst the 1949 conference bore witness to how the participating countries agreed to consult amongst themselves how to promote coordination and cooperation within the framework of the United Nations.[177]

During the 1947 conference, the establishment of an Asian Relations Organization was envisioned as a precursor to maintaining progress that has already been made, but the said organization, meant to be led by

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172 *Acharya*, p. 34; *Appadorai,* pp. 275-276.
173 *Acharya,* Whose Ideas Matter?, p. 34.
174 *Appadorai,* p. 276.
175 These issues are the following: "national movements for freedom, racial problems, inter-Asian migration, transition from colonial to national economy, agricultural reconstruction and industrial development, labor problems and social services, cultural problems, and status of women and women's movements." See *Acharya,* Whose Ideas Matter?, p. 34; *Appadorai*, p. 207; *Appadorai,* The Asian Relations Conference in Perspective, p. 279; *McCallum*, p. 14; *Solidum,* p. 13.
176 *Acharya,* Whose Ideas Matter?, pp. 34-35.
177 *Acharya,* Whose Ideas Matter?, p. 34; *Solidum,* p. 14.

Nehru as President, unfortunately failed to properly take off.[178] Aside from conflicting political interests on the part of India back then,[179] competition between India and China for leadership became pronounced and this was to the dislike of many participants.[180] Moreover, the Asian Relations Conference to begin with was organized with pan-Asian sentiments, or the future establishment of a pan-Asian federation, which were weak and discredited by the willingness of leaders to only provide either political or moral support to those facing their own anti-colonial struggles.[181] Any aspiration of an Asian Unity during this time period seemed farfetched and did not reflect the *zeitgeist*.[182] Thus, it did not come as a surprise that the Asian Relations Conference, together with the so-called Asian Relations Organization failed to further develop.

This unfortunate circumstance notwithstanding, a seed was planted amongst Southeast Asian countries during this conference towards the benefits of regionalism. Burma's Aung San had the opinion previously that while India and China each should remain single entities, the Southeast Asian countries would benefit more if they form a sub-regional entity.[183] It became even more prevalent during the second Asian Relations Conference in 1949 that neither India nor China would support the individual nationalist interests of some participants (such as Burma), that debates and talks were held among Indonesia, Burma, Thailand, Philippines, and Malaya on creating a Southeast Asian Association that would first closely cooperate culturally and economically but could later be a more closely knit political cooperation.[184] This "Southeast Asian Association" did not however materialize after such talks during the Asian Relations Conference.

Not to be hampered by the failure of Asian Relations Conference to continue, the Philippines on 04 July 1949 attempted to create an organization for cooperation amongst states in Asia.[185] Called the "Asia-Pacific Union", it sought to secure the sovereignty of all countries in Asia while identifying

178 *Appadorai*, The Asian Relations Conference in Perspective, pp. 282-283.
179 *Appadorai*, The Asian Relations Conference in Perspective, pp. 283-284.
180 *Solidum*, p. 13.
181 *Acharya*, Whose Ideas Matter?, pp. 35-36; *Appadorai*, The Asian Relations Conference in Perspective, pp. 283-284. *See also Acharya*, Asia is Not One, p. 1006.
182 *Appadorai*, The Asian Relations Conference in Perspective, p. 283.
183 *Acharya*, Asia is Not One, p. 1008.
184 *Acharya*, Asia is Not One, p. 1008.
185 *Solidum*, p. 14.

Communism as a threat.[186] However, such organization failed to get the participation of most countries in the region because they neither wanted to be embroiled in the then brewing Cold War nor thought it was the right time for such an Asian pact.[187]

As attempts such as the Asian Relations Organization, negotiations for a Southeast Asian Association, and proposals for an Asia-Pacific Union unraveled, talks remained amongst South and Southeast Asian countries. Through a conference held in May 1950 at Baguio, Philippines, wherein the participants acknowledged the value of consulting one another to further the "interests of the people of the region and to ensure that in any consideration of the special problems of South and Southeast Asia, the point of view of the peoples of this area be prominently kept in mind."[188] Despite not having an organized group during this time, this meeting facilitated even further the "taking of a more or less common attitude on the part of the members of the region" in handling common issues such as colonialism, racial discrimination, and the like.[189]

In the meantime, the United States was strategically placing itself as a dominant and influential figure in Asian international relations.[190] After the Second World War, the United States and the Soviet Union rose as the two superpowers of the world.[191] A rivalry that eventually turned to conflict arose between Communism and the West in Europe ("Cold War"), which later spilled over globally in 1947, when the Soviet Union propagated that the world is divided into two irreconcilable communist and capitalist camps, whilst the United States identified Communism as a global threat.[192] East and Southeast Asia were eventually thrown into the Cold War stage through the triumph of communists against nationalists in the Chinese Civil War; the attack of communist North Korea against non-communist South Korea in 1950; the emergence of the Democratic Republic of Vietnam as a full-fledged communist state in 1950-51 and its continued full-military assaults against the French.[193]

Having scant interest in having a regional organization in Asia until the outbreak of the Korean War, the Americans were more interested in

186 *Solidum*, p. 14.
187 *Solidum*, p. 14.
188 *Appadorai*, The Bandung Conference, p. 208.
189 *Appadorai*, The Bandung Conference, p. 208.
190 See*Weatherbee*, International Relations, p. 63.
191 *Tarling*, p. 119.
192 *Christie*, p. 21; *Tarling*, pp. 119-120.
193 *Christie*, p. 21; *Tarling*, pp. 120-121.

collective defense or "mutual security."[194] Recognizing political developments favoring Communism in some parts of the region and the need to contain it, as well as the development problems these newly-independent states were encountering, the United States tactically offered political and economic aid in exchange for alliance in the Southeast Asian and overall Asia Pacific region. It branded itself to be the champion of anti-communist unity or leader of the "free world" and fought against any form of communist aggression.[195] While some states viewed these offers with disdain and/or animosity,[196] some were willing to hear what the United States had to say, albeit with reservations.[197] Those against the proposal of collective defense believe in particular that such kind of agreements encroaches against the concepts of non-intervention and non-alignment, which was a growing sentiment among the Asian countries during this time period.[198] At the same time, it increases the risk of involving the Asian countries into the power struggle between the world powers, especially since there is a general opinion to have an independent voice in world politics.[199]

These concerns being legitimate notwithstanding, American influence prevailed through the establishment in 1954 of the Southeast Asian Treaty Organization ("SEATO") wherein two Southeast Asian countries, Thailand and the Philippines, agreed to join together with great powers such as United States, Great Britain, Australia, New Zealand, and Pakistan, with the aim to fight communist aggression in the region through collective economic and military action.[200] Time-wise, the establishment of SEATO coincided with the role the United States inherited from the French in propping up non-communist South Vietnam after Vietnam's partition into communist North and non-communist South during the Geneva Conference.[201]

Although only Thailand and Philippines are the Southeast Asian countries who are part of the organization, SEATO could be arguably considered the first regional grouping in Southeast Asia, though great power-led, considering that the operative heart of the treaty creating SEATO lies in

194 *Acharya,* Whose Ideas Matter?, p. 42; *Brands*, pp. 250-270; *Dingman*, pp. 463-465.
195 *Brands,* p. 265; *Dingman,* pp. 458, 460-462, 467-479; *Ganesan,* pp. 212-213; *Weatherbee,* International Relations, pp. 63-34.
196 *See for example, Acharya*, p. 51; *Weatherbee,* International Relations, pp. 63-34.
197 *Dingman,* pp. 463-465.*See in general, Brands, pp. 250-270.*
198 *Acharya,* Whose Ideas Matter?, p. 54.
199 *Acharya,* Whose Ideas Matter?, p. 54.
200 *Dingman,* p. 474; *Weatherbee,* International Relations, p. 65.
201 *Christie,* p. 21.

the containment of communism in the Southeast Asia region.[202] SEATO, however, was different from the North American Treaty Organization ("NATO"), to which the former can easily be likened.[203] Unlike the NATO, there were neither military units assigned to the organization nor was there any unified military structure.[204] SEATO did not likewise call for collective defense, but rather consultation should there be a threat or attack.[205] If at all, SEATO was never meant to be a military alliance compared to NATO, but rather, it was a political tool to legitimize the containment strategy and interference maneuvers being then employed by the United States in the Southeast Asian region.[206]

The establishment of the SEATO did not settle well with the other Southeast Asian countries and their Third World contemporaries. SEATO was not considered by many as reflective of a Southeast Asian endeavor because it was made through initiatives of the United States to strengthen their alliance with other world powers and secure their defense in the Southeast Asian region.[207] For many, it was clearly "Cold War gerrymandering":[208] a way of creating new forms of spheres of influence as well as another manner of imposing dominance over weaker state-associates. Undeniably, there was a brewing power struggle in Asia and more likely than not, countries in it would be caught in the crossfire unwittingly and unwillingly.[209]

Given such strong resentment towards the influence being imposed by the United States, consultations and meetings were already being held among leaders of Southeast Asian countries such as Ceylon (now Sri Lanka), India, Pakistan, Burma, and Indonesia, focusing on how the "united voice of Asia could be heard in the councils of the world" during the same timeframe when negotiations and preparations were being made by the United States in the establishment of SEATO.[210] Having their first meeting

202 *Weatherbee,* International Relations, p. 65.
203 *Brands,* p. 269.
204 *Weatherbee,* International Relations, p. 65.
205 *Hemmer/Katzenstein,* p. 578; *Weatherbee,* International Relations, p. 65.
206 *Acharya,* Whose Ideas Matter?, pp. 42-43; *Ganesan,* p. 213; *Hemmer/Katzenstein,* p. 578; *Weatherbee,* International Relations, pp. 65-66.
207 *Reid*, p. 23.
208 *Acharya,* Whose Ideas Matter?, pp. 45-46; *Emmerson,* p. 9.
209 *See Acharya,* Constructing a Security Community, p. 51; *Acharya*, p. 20; *Weatherbee,* International Relations, p. 66.
210 *Acharya,* Whose Ideas Matter?, pp. 37-38; *Ang*, pp. 29-31; *Reid,* The Bandung Conference and Southeast Asian Regionalism, p. 23; *Weatherbee,* International Relations, p. 66.

in April 1954 in Colombo, these states were later dubbed the "Colombo Powers",[211] which argued for the importance of non-intervention in Asia.[212] The meeting in Colombo was initially for proposing regionalism to derail the further initiatives of the United States as well as the condemnation of any external interference in domestic affairs by either communist or anti-communist forces.[213] Indonesia, under the leadership of Prime Minister Sukarno, was keen in making this condemnation as Sukarno viewed US-intervention with disdain.[214] India's Nehru shared similar sentiments. Nehru believed that by building regional pacts in Asia, it shrinks the area of peace and increases the opportunity for world powers to intervene anew in internal affairs, which contradicts the general opinion of the newly-independent states.[215] Needless to state, Southeast Asian countries should have a "place in the negotiation table on issues of regional relevance" and not just be forced in choosing sides.[216]

In view of these purposes, together with having a more coherent regional position and promotion of mutual cooperation,[217] the Colombo Powers agreed in their December 1954 meeting in Bolor, Indonesia to organize a conference between Asian and African heads of government and/or foreign ministers to discuss these issues.[218] In April 1955, this Conference came into fruition when twenty-nine African and Asian heads (though predominantly Asian) of government and/or foreign ministers, including China, convened in Bandung, Indonesia.[219] Known as the "Bandung Conference", it became a hallmark event in the emergence of a stronger sen-

211 It was imperative to the interests of the United States for the Colombo Powers to acquiesce to the SEATO, believing that without them, there would be not much hold in Southeast Asia. Hence, the United States exerted much effort in convincing the latter to join. However, given the Colombo Power's strong opposition, the United States had to settle with the cooperation of both Thailand and the Philippines. *See Acharya,* Whose Ideas Matter?, pp. 50-60.

212 *Acharya,* Whose Ideas Matter?, p. 37.

213 *Abraham*, p. 197; *Weatherbee,* International Relations, p. 66.

214 *Weatherbee,* International Relations, p. 66.

215 *Acharya,* Whose Ideas Matter?, p. 46.

216 *Abraham,* p. 197; *Acharya,* Asia is Not One, p. 1007; *Weatherbee,* International Relations, p. 66.

217 *Appadorai,* The Bandung Conference, p. 235; *Weatherbee,* International Relations, p. 67.

218 *Acharya,* Whose Ideas Matter?, p. 38; *Appadorai,* The Bandung Conference, pp. 209-210.

219 *Ang,* p. 27; *Gupta*, p. 65.

timent towards an independent and neutral Third World as well as the establishment of a regional order in the Southeast Asian region.[220]

The Bandung Conference differed with the defunct Asian Relations Conference because it was interested more in maintaining the true sense of independence and autonomy. Moreover, as Burke remarked, the Bandung Conference was the first time that states of both Asia and Africa, most of which were newly independent, were able to come together and freely discuss common issues and attempt to formulate a unified approach vis-à-vis international relations.[221] Whilst some viewed the Bandung conference as a gathering with purely anti-Western undertones and rejection of anything Western leaders have contributed,[222] the conference was a forum for leaders of Asia and Africa to discuss and freely express themselves, without the imposition of any world power on issues transcending anti-imperialism such as human rights, the concept of freedom, national self-determination, and even peaceful relations notwithstanding differences.[223] Its contributions to regional order have been summarized in the conference's final communique, which sets forth the so-called Bandung principles, observance of which could lead to peaceful coexistence and friendly cooperation amongst one another.[224] Finding influence in the so-called Five Principles of Peaceful Cooperation,[225] these principles among others include "respect for sovereignty and territorial integrity of all countries," "abstention from intervention or interference in the internal affairs of another country,"

220 *Acharya/Tan*, p. 1; *Burke*, p. 948; *Gupta,* p. 65.
221 *Burke,* p. 948.
222 *Acharya/Tan,* p. 1; *Ang,* p. 29; *Burke,* p. 949.
223 *Appadorai,* The Bandung Conference, p. 212; *Burke,* pp. 950-961; *Weatherbee,* International Relations, p. 66.
224 *Acharya/Tan,* pp. 3-11; *Appadorai,* The Bandung Conference, p. 214; *Weatherbee,* International Relations, p. 67.
225 The „Five Principles of Peaceful Cooperation", also known as "Five Principles" or "PanchShila," finds it roots *per se* in the treaty between India and China in 29 April 1954, which called for "mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and peaceful existence." This was later on popularly invoked and/or adapted in the Geneva Convention on Indochina, Bandung Conference, and Moscow convocation of Communists in celebration of the 40th Anniversary of the Bolshevik Revolution. In general, these principles have been supported by communists and non-communists alike. It is only the Western and non-Western governments who dislike the principles in how it was written. *See Appadorai,* The Bandung Conference, p. 214; *Fifield*, pp. 504-505; *Richardson*, p. 5.

"settlement of all international disputes by peaceful means," and "promotion of mutual interests and cooperation."[226]

In relation to the foregoing, recognition of non-intrusive, informal, and consensus-based diplomacy has been given primordial consideration through the Bandung conference.[227] It was emphasized during the conference that no contentious issues would be discussed and in lieu of majority voting, consensus shall be done in decision-making.[228] Stating it otherwise: not one voice would dominate the discussions. There was more emphasis "on social trust rather than on the rule of law in negotiations."[229] As a participant once recollected, this process of consultation and consensus became imperative to the success of the Bandung conference, wherein parties were rooted in "relatively unstructured discussions, a high degree of informality, pragmatism, expediency, and a search for a practical minimal solution that all parties can live with."[230]

After the Bandung conference of 1955, there were expectations that another conference would be held the following year.[231] This did not seem to happen, and no similar conference followed suit (to the relief of some countries like the United States, which viewed the Bandung Conference with worry and caution).[232] There seemed to be irreconcilable differences between those in Southeast Asia and South Asia, as India then (a Bandung Conference co-convener and member of the Colombo Powers) was more concerned in promoting its own agenda, which is the strengthening of its relations with China.[233] It did not help likewise that it butted heads with other participants, when it tried to dominate discussions and impose on others its views.[234]

In light of this, it can be noted at this juncture that on one hand, attempts to regionalize and organize themselves become attractive at the notion of respecting autonomy, sovereignty, and upholding non-intervention. On the other hand, attempts ultimately fail or a proposal fails to launch at the outset when one or some try to dominate the agenda or

226 *Stubbs*, p. 457; *Weatherbee,* International Relations, p. 67.
227 *Acharya/Tan,* p. 10; *Appadorai,* The Bandung Conference, pp. 232-233; *Stubbs,* p. 458.
228 *Acharya/Tan,* p. 10.
229 *Stubbs,* p. 458.
230 *Abdulgani*, pp. 71-72; *Acharya/Tan,* p. 10; *Stubbs,* pp. 458-459.
231 *Abraham,* p. 211.
232 *Ang,* p. 39.
233 *Reid*, The Bandung Conference and Southeast Asian Regionalism, pp. 24-25.
234 *Reid*, The Bandung Conference and Southeast Asian Regionalism, p. 24.

impose its own interest upon the others (regardless of whether a world power or participating state in the conference).

Moreover, as some observed, neutralism seemed to lose its appeal and commitments under the Bandung Conference could no longer be observed due to nationalist or ideological considerations.[235] On one hand, China by the end of 1958, albeit an original participant during the first (and only) Bandung conference, was shifting its foreign policies while pursuing its own interests in the Southeast Asian region – even violating the principle of non-intervention – and gradually pulling away from its association from the Soviet Union, which was also pursuing new agenda.[236] On the other hand, India had to consequently face its own disputes with China and Pakistan.[237] Moreover, internal struggles were reaching new heights in countries like Vietnam, Laos, and Cambodia.[238]

Despite the discontinuance of the Bandung conference, its principles were integral to another regional movement in Southeast Asia. As some observers pointed out, the Bandung Conference eventually represented the first steps towards a non-alignment movement in the Southeast Asian region.[239]

In 1961, a conference was held in Belgrade wherein Southeast Asian countries Burma, Indonesia, and Cambodia were present together with other countries from Asia, Africa, the Middle East, and Europe.[240] During the same, the Non-Alignment Movement ("NAM") was established.[241] This was underpinned by many – somehow unsettling – events that occurred around the globe within six (6) years between the Belgrade Conference and the Bandung Conference, that Third World states, especially the

235 *Ang,* p. 39.
236 *Acharya,* Asia is Not One, p. 1009; *Ang,* p. 39; *Ganesan,* p. 213; *Jian*, pp. 89-99; *Zhang*, pp. 523-526.
237 *Abraham,* p. 212.
238 *Ang,* pp. 39-42. There was a growing resolution, as propounded by Vietnam's Ho Chi Minh, amongst these three (3) countries of helping one another politically and/or militarily because a success or failure of the other has direct impact on the other. Hence, in the revolutionary movements in each country, there was a trickle-down effect on the other's territory. *See in general* Acharya, Asia is Not One, p. 1008.
239 *Abraham,* p. 197.
240 *Abraham,* p. 197; *Weatherbee,* International Relations, p. 68.
241 *Abraham,* p. 197; *Weatherbee,* International Relations, p. 68.

newly-independent ones, could not help but be fearful for the fragility of their sovereignty.[242]

Acting with an anti-imperialism platform and adherence to the Five Principles of Peaceful Cooperation akin to the Bandung Conference,[243] the Non-Alignment Movement distinguishes itself from the Bandung Conference with its different intellectual content, set of participants, and the degree by which the great powers sought to interfere with its outcome.[244] NAM specifically zeroes in the importance of establishing security equidistance between the dangers of the Cold War and the need for collective action to avoid further world tension.[245] Conversely, the Bandung Conference was focused on post-colonial considerations affecting foreign policy issues.[246] In relation to this, the Bandung Conference underlines the moral violence being perpetrated by the continuation of discredited political systems and excluding Asian states in global decision-making, while NAM emphasizes the desire of Third World countries "to preserve a measure of independence for themselves" and the corresponding need to take an active role in the international order in pursuit of individual and collective interests.[247] The NAM distinguished itself from neutrality, which connoted a "passive and isolationalist policy of non-involvement in all conflicts."[248]

In the same year when the NAM was established, attempts at regionalism were being made specifically in Southeast Asia through the establishment in 1960 of the Association of Southeast Asia ("ASA").[249] Southeast Asia (perhaps reconsidering the ideas planted as early as the Asian Re-

242 *Gupta,* p. 65. As Gupta enumerated, there were the "Suez Canal crisis and the Soviet invasion of Hungary in 1965, the admission of 16 newly independent African countries to the United Nations in 1960, the escalation of the Cold War tensions following the downing of an American U2 spy plane over Soviet airspace in 1959, and growing U.S. involvement in places as diverse as Cuba, Vietnam, Congo, and Laos."

243 *See Fifield,* pp. 504-505; *Richardson,* p. 5.

244 *Abraham,* p. 197.

245 *Abraham,* p. 197; *Park*, p. 45; *Weatherbee,* International Relations, p. 68.

246 *Abraham,* p. 197.

247 *Abraham,* p. 211; *Gupta,* p. 67; *Park,* p. 45.

248 *Gupta,* p. 65. Interestingly, NAM made constant criticism of the West's cultural imperialism which resulted in the displeasure of countries such as the United States, which thought of NAM as a communist Trojan horse. This did not dissuaded the growth in membership however, though more of an "anti-bloc" rather than a formal institution. See further, *Park,* pp. 56-57; *Weatherbee,* International Relations, p. 68.

249 *Ganesan,* pp. 212-213.

lations Conferences) was taking the helm in promoting regionalism in Asia and ASA was arguably the first genuine Southeast Asian regional institution.[250] ASA, composed of Malaya (now Federation of Malaysia), Philippines, and Thailand, only lasted for two years, or until 1963 given the formation of the Federation of Malaysia, which included Sabah, a territory the Philippines had a claim to.[251] Further, ASA was composed without Indonesia, which was arguably then the strongest nation in Southeast Asia.[252] Indonesia then viewed ASA as a neocolonialist inspired organization and did not want to become involved in an organization whose policies were focused on the negative, given that it was "anti-this and anti-that."[253]

With the failure of ASA, Malaya, together with Indonesia and the Philippines, again attempted to form in July-August 1963 a regional organization called MAPHILINDO.[254] On paper, MAPHILINDO sought to construct a quasi-confederal framework for relations amongst the three countries in pursuit of uniting the Malay race or forming a "Greater Malay Federation."[255] Later on it was revealed that MAPHILINDO was politically motivated on the part of the Philippines and Indonesia to frustrate the establishment of the Federation of Malaysia, which, through former Indonesian Prime Minister Sukarno's strong influence was thought to be a continuation of British imperialism as Malaysia heavily favored their former colonizers.[256] Prime Minister Sukarno of Indonesia was a stark supporter of anti-imperialism and he condemned Malaysia's pro-British ways.[257] Thus, even before MAPHILINDO could be truly functional, the same was "stillborn" due to declaration of Malaysia in September 1963 and corresponding armed confrontation ("*konfrontasi*") made by Indonesia, as led by then Prime Minister Sukarno, against Malaysia between 1964 and 1966.[258] It did not likewise help alleviate the brewing tension when Singa-

250 *Acharya*, Asia is Not One, p. 1009; *Ganesan*, pp. 212-213.
251 *Crozier*, p. 17; *Frost*, p. 4; *Ganesan*, p. 213; *Hensengerth*, pp. 7-8; *Takagi*, p. 268.
252 *Acharya*, Whose Ideas Matter?, p. 83.
253 *Crozier*, p. 17.
254 *Di Floristella*, pp. 56-57; *Ganesan*, p. 213; *Takagi*, p. 269; *Weatherbee*, International Relations, p. 71.
255 *Acharya*, Asia is Not One, p. 1009; *Crozier*, p. 17; *Takagi*, p. 269.
256 *Hensengerth*, p. 8; *Weatherbee*, International Relations, p. 73.
257 *Kivimäki*, p. 19.
258 *Acharya*, Asia is Not One, p. 1009; *Davidson/Kammen*, pp. 55-57; *Di Floristella*, pp. 56-57; *Frost*, p. 4; *Ganesan*, p. 213; *Takagi*, p. 269; *Weatherbee*, International Relations, p. 71.

pore in 1965 was separated from the Federation of Malaysia due to political and governmental differences,[259] and Malaysia took it against Brunei Darussalam when the latter refused to join the Malaysian federation while giving asylum to the former's dissidents.[260]

Notably, the collapse of ASA and the failure to launch MAPHILINDO was symptomatic of weak processes built not on convergence of interests, but of one trying to put its interest more than the other.[261] While this phenomenon may be explained by cultural undertones and differently formed perceptions, this could be equally observed in the beginning of regional discussions in Southeast Asia such as the Bandung Conference and NAM, wherein, amidst the free-flowing informal discussions that were able to dilute any attempt at dominance by any participant, one could observe how Sukarno-led Indonesia tried to dominate discussions through the imposition of its own agenda and ideals, and how a Nehru-led India thought itself and its ideas more superior than others while attempting to talk down those which did not conform to its ideas.[262] As experiences from these failures suggest, political and military interests should be taken out of the negotiation table during the formative years of learning cooperation; goodwill and trust are imperative; and Asian solutions for Asian problems should be applied in preserving peace.[263]

Moreover, the collapse of early attempts at regionalism placed a magnifying glass on the underlying strained bilateral relations amongst the Southeast Asian countries.[264] There was an obvious strain in the relationships between Malaysia and Indonesia due to the *konfrontasi*, although in the meantime, Prime Minister Sukarno has been ousted from his position and replaced by General Suharto, who negotiated the end of the *konfrontasi*;[265] Malaysia and the Philippines, due to territorial claims to Sabah; Indonesia and Singapore, due to the former's decision for terrorists to bomb the latter during the *konfrontasi* and the latter's decision to execute two Indonesian soldiers involved in the *konfrontasi* attacks; and between Malaysia and Singapore, due to the latter's separation from the former.[266]

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259 *Cotterell*, p. 391; *Frost*, p. 4.
260 *Thambipillai*, p. 45.
261 *Di Floristella*, p. 57.
262 *Acharya*, Asia is Not One, p. 1007; *Reid*, The Bandung Conference and Southeast Asian Regionalism, pp. 24-25; *Solidum*, p. 20.
263 *Solidum*, p. 18.
264 *Ganesan*, p. 212.
265 *Davidson/Kammen*, pp. 57-28.
266 *Funston*, p. 208; *Ganesan*, p. 212; *Weatherbee*, International Relations, pp. 70-72.

Making things worse, as attempts to create regional movements and/or groupings started to unfold in Southeast Asia, together with establishing international relations amongst the countries in it and their neighboring countries, localized conflicts were already greatly exaggerated through the intervention of external agents brought by the bipolarizing conflict between the Soviet Union and the United States as well as the increasing influence of China in the region.[267] As the United States took over the French in 1954, the former intervened in the escalated conflict between North and South Vietnam in 1963, which sparked the Second Indochina War.[268] Rallying support from Southeast Asian countries such as Thailand and the Philippines, the United States launched an offensive against the communist Viet Cong.[269] Additionally, the United States, together with Thailand, launched a "secret war" in neutral Laos upon learning that Pathet Laos was a North Vietnam ally.[270] Cambodia, wanting then to maintain neutrality, ultimately aligned with the United States after the ousting of its leader, while indigenous communist groups called the Khmer Rouge tried on their own to cease power in the country.[271]

The above-mentioned circumstances were understandably alarming not only for the countries in Southeast Asian but also the entire Asia Pacific region and needed to be addressed.[272] In response, two developments in regional institution building could be cited: the Asia and Pacific Council ("ASPAC") founded in Seoul, Korea in 1966 and the Association of Southeast Asian Nations ("ASEAN") founded a year later in Bangkok, Thailand.[273] On one hand, ASPAC was designed to bring together most of the non-communist Western Pacific nations to deal with external threats and at the same time, provide a possible framework for cooperation.[274] Having Australia, Japan, Malaysia, Taiwan, New Zealand, Philippines, South Korea, South Vietnam, and Thailand as its members, ASPAC sought to present itself as an indigenous Asian group, which sought to complement, if not substitute, SEATO – providing an Asian voice in Asia back then.[275]

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267 *Di Floristella*, p. 2; *Ganesan*, p. 212.
268 *Cotterell*, p. 390; *Weatherbee*, International Relations, pp. 68-70.
269 *Weatherbee*, International Relations, pp. 68-69.
270 *Weatherbee*, International Relations, p. 69.
271 *Becker*, pp. 117-118; *Weatherbee*, International Relations, p. 69.
272 *Severino*, p. 13; *Weatherbee*, International Relations, p. 72.
273 *Acharya*, Whose Ideas Matter?, pp. 81-82.
274 *Acharya*, Whose Ideas Matter?, p. 82; *Frost*, p. 3.
275 *Acharya*, Whose Ideas Matter?, p. 82.

On the other hand, the ASEAN was formed on 08 August 1967, in Bangkok, Thailand amongst Indonesia, Malaysia, Singapore, Thailand, and the Philippines, through the signing of the "Bangkok Declaration", which represented the convergence of interests in seeking progressive economic growth, social progress, and cultural development vis-à-vis the development of a regional identity.[276] The ASEAN, like ASPAC, presented itself as an indigenous Asian organization, initiated "within the community of nations of the area to help themselves."[277] Implicitly, the ASEAN had the function of fostering regional peace and security.[278] As former Indonesian Deputy Prime Minister Adam Malik noted, national and regional security loomed in the minds of the ASEAN founding fathers.[279] In particular, there was a need to address the intervention of superpowers in the Southeast Asian region that aggravated localized conflicts as well as the re-integration of Indonesia in the region after the ousting of its former dictator-Prime Minister Sukarno and cessation of *Konfrontasi*.[280] However, the Bangkok Declaration intentionally downplayed political and security matters to avoid it being viewed as a defense pact or military alliance, or a threat that favors one side over another, or an arena for the "quarrels of the strong."[281] In light of this, the ASEAN, together with ASPAC, brought in a new dawn in the Southeast Asian region and was not seen to serve any military function, but rather cater to a new concept of security that catered on coordinated and concerted political actions based on joint undertakings.[282] Furthermore, the ASEAN was viewed to serve to ease tensions amongst its member states, limit competition, and be able to produce tangible outcomes.[283] As early as the Bangkok Declaration, there was emphasis amongst the member states, like in the Bandung Conference, on consultation and consensus-based decision-making.[284]

Both ASPAC and ASEAN were then viewed as complementary forms of indigenous regionalism. As noted by former United States President

276 *Acharya,* Whose Ideas Matter?, p. 83; *Di Floristella,* pp. 1, 57; *Severino,* ASEAN, p. 1; *Weatherbee,* International Relations, p. 77.
277 *Acharya,* Whose Ideas Matter?, p. 83.
278 *Severino,* ASEAN, p. 1.
279 *Di Floristella,* p. 57.
280 *Severino,* ASEAN, p. 12; *Weatherbee,* International Relations, p. 77.
281 *Severino,* ASEAN, p. 11.
282 *Di Floristella,* pp. 1, 57; *Severino,* ASEAN, pp. 11-13.
283 *Di Floristella,* p. 57; *Severino,* ASEAN, p. 13.
284 *Acharya*, p. 10; *Di Floristella,* pp. 68-70; *Severino,* ASEAN Today and Tomorrow, p. 24; *Weatherbee,* International Relations, p. 99.

Richard Nixon, during this time period, there was a flourishing active regionalism and positioning of "influence of Asia's smaller states in the future political environment of the region."[285] There was a "developing coherence of Asian regional thinking" that considered "problems and loyalties in regional terms," and evolved "regional approaches to development needs and to the evolution of a new world order," having recognized that Asia could stand as a rightful counterbalance to the West and that ultimately, Asian solutions are needed for Asian problems through cooperation.[286]

This notwithstanding, the ASEAN outlives ASPAC as a regional institution, when the latter winded up operations in 1972.[287] As Acharya narrated, not only was ASPAC believed to be a Western front against China and communism but its legitimacy was questionable given the membership of the likes of South Vietnam, Australia, and New Zealand, which were admittedly of western influence.[288] ASPAC also had little chance of further expanding its membership, with other countries in the region believing it to be a sugarcoated regional security agreement, especially since all member states of ASPAC, except Malaysia, have military ties with the United States, and the latter was still active in its foreign policy in the Asia-Pacific region.[289]

The short lifespan of ASPAC did not mean however that the ASEAN had it easy. The ASEAN and its member states could not help but be confronted with criticism and cynicism within and outside the Southeast Asian region. To illustrate, some believed it to be illustrative of ASEAN lacking any concrete vision,[290] as it is a more ambitious organization by having no limits in setting goals for itself, compared to organizations of the same nature which preceded it in the region.[291] Likewise, the ASEAN gave inadvertedly the wrong signal of being non-inclusive to communist states because the founding member states were all non-communist,[292] despite the ASEAN promoted itself to be a voluntary association where all countries in the Southeast Asian region could be members to. Consequently, it could not be helped that when the ASEAN sent invitations to Burma

285 *Acharya*, Whose Ideas Matter?, p. 84.
286 *Nixon*, p. 131.
287 *Frost*, p. 3.
288 *Acharya*, Whose Ideas Matter?, pp. 84-85.
289 *Acharya*, Whose Ideas Matter?, p. 85; *Nixon*, p. 116.
290 *Hensengerth*, p. 8.
291 *Severino*, ASEAN, pp. 2-3.
292 *Hensengerth*, p. 8; *Severino*, ASEAN, p. 3.

and Cambodia, these two states declined as they wanted to preserve their non-aligned status.[293] It did not help that communist states such as China, North Vietnam, and the Soviet Union already condemned the ASEAN to be an extension of SEATO and "puppet of American imperialism."[294]

## 2. Historical Development of the ASEAN

The foregoing developments did not hamper the ASEAN from moving forward. The regional organization underwent an interesting historical development since its establishment in 1967, and with it multi-faceted changes were brought in the organization. This historical development could be better understood, as Cabellero-Anthony propounded, by dividing these phases loosely into three periods of (1) consolidation, (2) expansion, and (3) reconsolidation,[295] which would be elucidated below.

### a. Consolidation Stage

The ASEAN's early consolidation period proved to be a rough start. Even if the ASEAN was a promising regional organization, it understandably needed to prove itself and put things in order by tackling the different internal and external issues it was facing. Being dubbed as the "Balkans of the East" in the early 1960's even if the same was not the intention of the founding member states,[296] the Southeast Asian region was in a tumultuous situation and many thought that the ASEAN perhaps would not survive its infancy.[297] Thus, it was in the course of things that each member state had a real stake with its membership and making the ASEAN work. To put things in perspective: Indonesia needs to redeem its reputation after the *Konfrontasi*; Malaysia needed to prove it was not a neo-colonial state; Singapore was the newest state after being expelled by Malaysia from the latter's federation; Philippines and Malaysia needed to work together despite their territorial disputes; and Thailand, after experi-

293 *Severino,* ASEAN, p. 3.
294 *Anwar*, p. 132; *Fifield*, p. 53.
295 *Caballero-Anthony,* p. 5.
296 *Caballero-Anthony,* p. 20; *Crozier,* p. 20.
297 *Lee*, p. ix.

encing disappointment with SEATO, had always wanted an environment where there is mutual support among neighboring countries.[298]

Three (3) things were first in order: (1) to prevent the Southeast Asian region from being embroiled further in the Cold War; (2) to manage the localized conflicts affecting the region (e.g. Indochina war situation); and (3) to establish the norms they need to adhere to vis-à-vis their inter-state and external relations. By this time, the Cold War was still ongoing and the Second Indochina War escalating. The solution was not however easily available because the Bangkok Declaration, which established ASEAN, did not include any specific reference as to how conflict management should be carried out.[299] The Bangkok Declaration only provided four (4) main points: (1) a stripped down institutional machinery wherein foreign ministers shall have annual meetings to be chaired by in rotation by the host country, with special meetings as may be required; (2) a standing committee consisting of ambassadors of the member states; (3) permanent committees for specific subjects; and (4) the establishment of national secretariats.[300]

Therefore, Malaysia was prompted in early 1968 to suggest the idea of neutralization for the ASEAN member states.[301] The initial idea was to have a collective declaration of neutrality that needs to be guaranteed by the world powers themselves and to have non-aggression treaties amongst each other.[302] Later changed to forming a "zone of peace, freedom, and neutrality," such was proposed to be implemented into two levels: first, ASEAN member states must espouse non-aggression principles amongst each other on the basis of mutual respect on sovereignty and territorial integrity, and to enact measures ensuring peace and security amongst themselves; and second, neutrality must be guaranteed by the external powers.[303]

In response, some member states articulated a more autonomous regional order during the Third ASEAN Ministerial Meeting in December 1969.[304] Three (3) options were raised: aligning with a foreign power, getting Southeast Asia to be declared a neutral zone, or coming up with

298 *Solidum*, pp. 22-23.
299 *Amer*, p. 1032.
300 *Crozier*, p. 19.
301 *Saravanamuttu*, p. 186.
302 *Saravanamuttu*, p. 186.
303 *Saravanamuttu*, p. 186.
304 *Saravanamuttu*, p. 186; *Tarling*, p. 159.

an indigenous form of stability, the last of which was favored.[305] Watering down further the original Malaysian proposal by disposing with foreign power guarantees, the Kuala Lumpur Declaration of 1971 which established Southeast Asia as a Zone of Peace, Freedom, and Neutrality ("ZOPFAN") or a zone "free from any form of interference of outside powers" was produced as a kind of *acquis associational* in a special meeting of the ASEAN foreign ministers in Kuala Lumpur, Malaysia in 27 November 1971.[306] ZOPFAN as the first regional political initiative of ASEAN,[307] it intended to define and guide ASEAN's relations with extra-regional states and was the first indication of the Association's ideas of what the code of conduct of states should be, within and outside the Association.[308] While being not exactly a declaration of neutrality but rather of an intent which does not impose legal obligations upon its signatories – allowing each ASEAN member state to freely construct its own meaning of the concept – ZOPFAN was fashioned to be a proactive regional strategy independent of the United States' security policy, one which was not threatening to the Indochinese states, and preventive of any further intrusion of great powers in the Southeast Asian region.[309] Indeed, ASEAN was threading on thin ice during this time with a menagerie of political and security uncertainties in the region: communists having consolidated their force in Indochina, lesser presence of the United States in the region, the brewing conflict between China and the United States, and call for collective security of the Soviet Union in the region, among others.[310]

ZOPFAN had its share of criticism, especially from Vietnam, which believed ZOPFAN to be supportive of American imperialism and out of touch from the real struggles of Southeast Asia.[311] It also received lukewarm response from even ASEAN member states such as Singapore, which preferred a balance of power in the region.[312] This notwithstanding, ZOPFAN remained in place.

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305 *Tarling,* p. 159.
306 *Crozier,* p. 21; *Tarling,* p. 159.
307 *Weatherbee,* International Relations, p. 74.
308 *Caballero-Anthony,* p. 63.
309 *Weatherbee,* International Relations, p. 74.
310 *Caballero-Anthony,* p. 63.
311 *Weatherbee,* International Relations, p. 74.
312 *Saravanamuttu,* p. 188.

Meanwhile, communist victories in Cambodia, Laos, and Vietnam in April 1975 occurred.[313] This shifted the political problem in Southeast Asia to how structures can be devised that would accommodate both the non-communist and communist Indochina states.[314] Weatherbee narrates that ASEAN member states were particularly concerned with Vietnam and the latter's intentions in the region, given that it not only was becoming arrogant and triumphalist,[315] but there was also growing support that Vietnam and China were giving to communist insurgencies in different parts of the region.[316] What made matters more difficult for the ASEAN was that China and the Soviet Union were still heavily tied to the region despite the United States distancing itself. While China supported the Khmer Rouge in Cambodia, the Soviet Union, on the other hand, supported Laos and Vietnam.[317] This situation prompted ASEAN member states to privately discuss amongst themselves that perhaps, a US political role could prove useful as counterweight in the growing Sino-Soviet competition in the region.[318] Given the Philippines' existing bilateral alliance (maintaining military bases in the country) with the United States, the former was able to contribute to easing the situation by highlighting the "umbilical cord of the American security commitment to the region."[319] Moreover, the United States and China have just normalized their relations through the "Shanghai Communique" in 1972.[320] This led three ASEAN member states – Malaysia, Philippines, and Thailand – to reconsider their lack of relations with China, while Indonesia and Singapore remained cynical.[321] Consequently, open diplomatic relations were paved between China and these respective countries, their respective bilateral agreements each containing a "antihegemony clause" (a clause similarly found in the Shanghai

313 To illustrate, the Khmer Rouge forces successfully seized Phnom Penh after a five-year long civil war, communist forces seized the presidential palace in Saigon after defeating the United States in Vietnam, and communist victories in Laos soon followed. *Ciorciari*, pp. 13,56; *Weatherbee,* International Relations, p. 75.
314 *Weatherbee,* International Relations, p. 75.
315 *Lee*, p. x.
316 *Weatherbee,* International Relations, p. 75. See also *Ciorciari,* p. 57.
317 *Ciorciari,* pp. 58-60.
318 *Weatherbee,* International Relations, p. 75.
319 *Weatherbee,* International Relations, p. 75.
320 *Glaubitz*, p. 205; *Weatherbee,* International Relations, p. 75.
321 *Weatherbee,* International Relations, pp. 75-76.

communique), opposing any country or group of countries from establishing hegemony or any sphere of influence at any part of the region.[322]

Coincident with the rise of communist-led Indochina, Portuguese colonial rule ended in East Timor in 1975 and this prompted different indigenous political groups to race for power and occupation of said territory.[323] Soon after, the Revolutionary Front for an Independent East Timor ("FRETILIN") won and proclaimed the Democratic Republic of East Timor ("DRET").[324] Fretting the idea of a communist stronghold within reach of its territory (given that China and Hanoi ha championed the DRET), Indonesia took matters in its own hands and went for military invasion, annexing East Timor as one of its provinces[325] – an act which raised questions among other ASEAN member states as to what the true territorial ambitions of Indonesia were.[326]

The annexation of East Timor notwithstanding, it was the emergence of communist victories and total communist control in Indochina which was viewed as the bigger elephant in the room that ASEAN member states needed to address.[327] Without securing stronger regional cooperation, such elephant might thrust its tusks through regional security and safety.[328] Henceforth, in less than a year since the victories, or in February 1976, ASEAN member states conducted the ASEAN's first summit, wherein all founding member state leaders were present to, among others, strengthen political and security cooperation frameworks, establish a central secretariat (composed of a Secretary-General, three bureau directors, and support staff), and codify the norms that would dictate inter-state relations in the region.[329] There was likewise a paradigm shift to stronger economic cooperation and also, two political documents were produced in this first summit.[330]

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322 *Glaubitz,* pp. 205, 212-213; *Weatherbee,* International Relations, p. 75. As a side note, China defines „hegemony" as any expansion of political and economic power and exercise of control. See *Glaubitz,* pp. 205-206.
323 *Weatherbee,* International Relations, p. 77.
324 *Weatherbee,* International Relations, p. 77.
325 *Cotterell,* pp. 343, 360.
326 *Weatherbee,* International Relations, p. 77.
327 *Narine*, p. 415.
328 *Tuan*, p. 64; *Weatherbee,* International Relations, p. 76.
329 *Crozier,* p. 22; *Severino,* ASEAN, pp. 6-7; *Weatherbee,* International Relations, p. 76.
330 *Crozier,* p. 21; *Tuan,* p. 64.

First, there was the Declaration of ASEAN Concord ("Bali Concord I"), which in cross-referencing the Bandung Principles and the United Nations Charter, laid down the ASEAN's objectives and principles to ensure political stability in the region.[331] Such Declaration enumerates various programs for action (ranging from political and economic, to strengthening of ASEAN machinery) in efforts to operationalize the general goals and vision embodied earlier in the Bangkok Declaration.[332] In terms of its political program, among others, the ASEAN member states called for the "strengthening of political solidarity by promoting the harmonization of views, coordinating positions and, where possible and desirable, taking common action."[333] Beginning with an informal meeting of foreign ministers, the ASEAN member states agreed to meet at least once a year to discuss imperative international issues affecting the region.[334] As for its economic program, ASEAN member states gave more focus in efforts to achieve economic cooperation in the region.[335]

Second, there was the Treaty of Amity and Cooperation ("TAC"). Being the first ASEAN treaty, the TAC codified the norms and dispute settlement mechanism that would define one member state's relationship with another.[336] In dealing with each other, the TAC provided the following five (5) points: (1) ASEAN member states "should be guided by mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;" (2) expressed "the expectation that all nations should have a right to conduct their national existence free from external interference, subversion or coercion; (3) asserted the principle that none of the signatories should interfere in the internal affairs of any of the others; (4) declared that peaceful means should be the appropriate method of resolving disputes between members and renounced the use of force; and, finally, (5) promised effective future co-operation among the signatories."[337]

The TAC was a fundamental development for the ASEAN as it was a "charter of security and political dialogue and cooperation that aimed to

331 Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976. [hereinafter "Bali Concord I"].
332 *Amer,* p. 1033.
333 Bali Concord I, A(1); *Weatherbee,* International Relations, p. 76.
334 *Weatherbee,* International Relations, p. 76.
335 *Crozier,* p. 21.
336 *Narine,* Forty Years of ASEAN, p. 415; *Tuan,* p. 64.
337 1976 Treaty of Amity and Cooperation in Southeast Asia, entered into force 24 February 1976. See also*Crozier, p. 22; Severino, ASEAN, p. 7.*

ensure stability in the Southeast Asia by cooperation" amongst the member states on the "basis of self-confidence, self-reliance, and mutual respect for one another."[338] The TAC highlights vis-à-vis conflict resolution three (3) factors such as non-interference, resolution of conflict through peaceful means, and overall cooperation.[339] Such helped to stabilize relations among the ASEAN member states and reduce any further possibility of violent conflict.[340] In what seemed to be a convergence of political outlook from the ASEAN member states, they would not allow disputes and/or conflicts to serve as stumbling blocks or erupt into more violent situations as what history taught them.[341] Congruently, member states endorsed familiar principles prevalent in the region as well as the importance of cooperation for economic development, peace, and stability, which evinced the member states' high understanding of how to properly handle conflict with each other and within the grouping.[342] And while the Declaration of ASEAN Concord could be thought as something mutually exclusive to ASEAN member states, the TAC became applicable to other parties in Southeast Asia which were not yet members of ASEAN.[343] It later became open to accession from non-Southeast Asian countries which wish to adhere to the norms enshrined in the TAC.[344]

In connection to the two documents produced during the ASEAN first summit, ASEAN member states seemed to have built more confidence, familiarity, and understanding of each one's position on problems and issues through informal and formal meetings amongst their representatives and heads of states, albeit the same was through a gradual process.[345] But then again, such gradual process could easily be attributed to the decision-making process the ASEAN has adopted for itself. In a nutshell, as the same would be further discussed in the next Chapter, the ASEAN adopts a decision-making process based on consultation and consensus rooted on tradition found in Indonesia, Malaysia, and the Philippines.[346] Later to be known as the "ASEAN Way", focus is given on principles

338 *Crozier,* p. 22.
339 *Amer,* p. 1034; *Tarling,* p. 159.
340 *Severino,* ASEAN, p. 16.
341 *Severino,* ASEAN, pp. 12-13.
342 *Amer,* p. 1035; *Tarling,* p. 159.
343 Treaty of Amity and Cooperation, art. 18.
344 First Protocol to the Treaty of Amity and Cooperation, art. 1; Second Protocol to the Treaty of Amity and Cooperation, art. 1. See also *Amer,* p. 1033.
345 *Amer,* p. 1036.
346 *Acharya,* Bandung Revisited, p. 10; *Amer,* p. 1036.

of informality and mutual respect, rather than reliance on formalistic or legalistic mechanisms.[347]

These developments at hand, the ASEAN made efforts to call for a friendly and harmonious relationship with Vietnam but to no avail.[348] Nonetheless, Vietnam's relationship with the ASEAN improved by its establishment of bilateral diplomatic relations with the member states and conducting a peace offensive.[349] But in a sudden change of course, and receiving renewed support from the Soviet Union, Vietnam deposed the Khmer Rouge regime and invaded Cambodia in December 1978.[350] Despite intra-ASEAN friction and needing to raise arms, the ASEAN had a coherent front against the invasion and gave full cooperation for the conflict's resolution.[351]

Meanwhile, Brunei Darussalam joined the ASEAN in January 1984 after finally gaining its sovereignty and being extended an open invitation to join ASEAN in the late 1970's and joining as an observer the 14th Foreign Ministers Meeting in Manila in July 1981.[352]

At this juncture, it becomes important to note that while the ASEAN is focused in resolving conflict in the region and maintaining regional security, the ASEAN also equally valued economic development;[353] thus, a majority of agreements that followed the TAC were all economically motivated, the treaty following the TAC being a Preferential Tariff Agreement.[354] Strong economic cooperation was pursued through the establishment of an ASEAN Free Trade Area ("AFTA") through a framework agreement in 1992. Market liberalization in different economic sectors through a framework agreement on services in 1995, a Dispute Settlement Mechanism vis-à-vis economic issues through a protocol in 1996, and an ASEAN Investment Area through another framework agreement in 1998 were established.[355] ASEAN and its member states in the meantime came up instead with Declarations as to other concerns, which did not impose any legal obligation upon its signatories. And it was notably only after the

347 *Acharya,* Bandung Revisited, p. 10.
348 *Weatherbee,* International Relations, p. 77.
349 *Weatherbee,* International Relations, p. 77.
350 *Narine,* Forty Years of ASEAN, p. 415.
351 *Narine,* Forty Years of ASEAN, pp. 415-417. See also *Weatherbee,* International Relations, pp. 80-83.
352 *Crozier,* p. 20; *Thambipillai,* pp. 44-45.
353 *Crozier,* p. 23.
354 *Severino,* ASEAN Today and Tomorrow, p. 25.
355 *Yoshimatsu*, p. 122.

establishment of the AFTA in 1992, when binding agreements came at a more increasing frequency.[356]

Based on the foregoing developments it would be easy to assume that the ASEAN only centered on economic issues. However, security concerns were equally addressed. In the mid-1990's, the ASEAN member states believed it was important to hold dialogues as a result of the changing political climate brought by the cessation of the Cold War, reforms being implemented in China, and the settlement of the conflict in Cambodia.[357] By this time, the Paris Conference in Cambodia was already held in 1989, with the Paris Peace Treaty ending the external dimension of the Third Indochina War in October 1991.[358] Although its intervention was only partial in the resolution of the Vietnam-Cambodia conflict, the ASEAN was arguably at a high point vis-à-vis its unity and international effectiveness, diplomatic maneuvering, and lobbying efforts.[359] This eventually led to at least two notable developments within the organization.

First, the ASEAN in January 1992 thought it was high time to formalized political-security matters,[360] and consequently intensify dialogues with external partners, by using the post-ministerial conferences, which initially was economically motivated.[361] This plan of action eventually led to the establishment of the ASEAN Regional Forum ("ARF") in 1994, which became the forum for discussion amongst interested parties in political and security matters affecting the Asia-Pacific region.[362] The establishment of the ARF was not without criticism as others saw it as a mere "talk shop".[363] The efficacy of the ARF in question notwithstanding, it provided a forum, albeit oft informally, for state representatives to talk over about their disagreements.[364]

Second, the office of the ASEAN Secretary-General was reorganized during the ASEAN Fourth Summit in 1992. While formerly catering simply to the Secretariat, the Secretary-General could now cater to the entire Association, even being able to recommend policies for the consideration

356 *Severino,* ASEAN Today and Tomorrow, p. 25.
357 *Severino,* ASEAN, p. 93.
358 *Narine,* Forty Years of ASEAN, p. 417.
359 *Chongkittavorn*, p. 40; *Narine,* Forty Years of ASEAN, p. 417.
360 *Caballero-Anthony*.
361 *Severino,* ASEAN, p. 93.
362 *Severino,* ASEAN, p. 93.
363 *Narine,* Forty Years of ASEAN, p. 418.
364 *Narine,* Forty Years of ASEAN, p. 418.

of the concerned ASEAN bodies.[365] Also, the ASEAN Secretariat was made properly professional through the initiation of an "open and competitive recruitment" and its set of functions and responsibilities was expanded to initiate, coordinate and implement ASEAN activities.[366]

### b. Expansion Stage

It did not take long and the ASEAN went through an enlargement phase in the late 1990's through the membership of Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999.[367] After years since its inception, the ASEAN faced a duplicity of membership from the original five to ten members.[368] Such expansion phase is said to be attributable to the gradual process of rapprochement between the ASEAN member states and Cambodia, Laos, Burma, and Vietnam, respectively.[369]

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365 *Crozier*, p. 24.

366 *Crozier*, p. 24; *Solidum*, p. 30.

367 *Amer*, p. 1037; *Caballero-Anthony*, p. 5; *Tarling*, p. 161. See also *Weatherbee*, International Relations, pp. 93-96.

368 *Caballero-Anthony*, p. 5.

369 *Amer*, p. 1037. As Amer narrated herein, „xxx The gradual rapprochement with Laos and Vietnam went hand in hand with the regional initiatives to resolve the Cambodian conflict in the latter half of the 1980s, with the major breakthrough in improved relations following the formal resolution of the Cambodian conflict through the Paris Agreements on Cambodia of October 1991. The rapprochement between ASEAN and Vietnam was displayed by the establishment of diplomatic relations between Vietnam and Singapore and between Vietnam and Brunei Darussalam, respectively, thus bringing about normal relations between Vietnam and all ASEAN members. Vietnam acceded to the Bali Treaty in 1992, became an ASEAN Observer the same year and was granted full membership in ASEAN in 1995. In the case of Laos, accession to the Bali Treaty also took place in 1992 and the same year Laos became an ASEAN Observer. Finally, Laos was granted full membership in the association in 1997. Following the United Nations peacekeeping operation and the formation of a new coalition government after general elections in May 1993, Cambodia's relations with ASEAN were normalized and expanded. Cambodia acceded to the Bali Treaty in 1994 and became an ASEAN Observer in 1995. Finally, Burma has been brought closer to ASEAN through a process which has officially been termed 'constructive engagement' by ASEAN. Burma acceded to the Bali Treaty in 1995, became an ASEAN Observer in 1996 and was granted full membership in 1997. This overall process led to the expansion of membership in ASEAN from six to nine members between 1995 and 1997. Cambodia was supposed to have joined the organization in July 1997 alongside Laos and Myanmar but

In connection to this, Amer argued that ASEAN's success in being able to expand and have all Southeast Asian nations as members could be attributed to the existing conflict management mechanism the organization had in place.[370] This was seconded by others which said that the norms ASEAN and its member states live by, as codified in the TAC, prevailed in whatever role ASEAN and its member states played in the resolution of prevailing conflicts within the region and its neighboring non-ASEAN countries.[371] As experts such as Caballero-Anthony and Tarling among others observed, norms and mechanisms to manage regional order became more prevalent in the active role the ASEAN has played: not only were the norms kept within the ASEAN member states but there was an active socialization of those not within the organization so that they may likewise internalize the same norms in the conduct of their own inter-state relations.[372] This even underlined the ASEAN member states' decision to make it compulsory in 1987 for one to accede to the TAC as a condition precedent before being conferred ASEAN membership.[373] Using such norms and existing mechanisms of conflict management, ASEAN member states eventually were able to ease the animosity between them and the Indochina states and influence Myanmar to abandon their isolationist policy.[374]

### c. Reconsolidation Stage

The next stage in the historical development of the ASEAN began with a hard challenge to the organization. The ASEAN and its member states were confronted with a debilitating financial crisis in July 1997.[375] The first symptoms started in Thailand, when foreign currency speculators attacked the Thai Baht and the Thai government's inability to protect

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its membership was put on hold because of the internal political problems in the country, i.e. the fighting in July 1997 which led to the ousting of the then First Prime Minister Norodom Ranariddh by Second Prime Minister Hun Sen. Eventually, Cambodia was admitted as ASEAN'S 10th member through a decision taken at the sixth ASEAN summit in Hanoi on 16 December 1998."

370 *Amer,* p. 1037.
371 *Caballero-Anthony,* p. 5; *Tarling,* pp. 160-161.
372 *Caballero-Anthony,* p. 5.
373 *Severino,* ASEAN, pp. 94-95.
374 *Amer,* pp. 1037-1039.
375 *Narine,* Forty Years of ASEAN, p. 419.

it caused its value to decline.[376] Soon after, the crisis rapidly spread to other countries of supposedly "Asian economic miracle" – causing local currencies to devalue and economies to crash – and the ASEAN as an organization seemed unable to give a regional response.[377] When the crisis struck, the ASEAN was not in the right position to respond outright and cohesively – it admittedly lacked economic resources and sufficient institutional structures.[378] Instead of having a direct hand in resolving the financial issue, ASEAN financial ministers were prompted to put up appeals instead before the International Monetary Fund ("IMF") and larger economies like the United States, European Union, and Japan to help.[379] And though some were of the opinion that it was unreasonable to expect the ASEAN to directly deal with the damage caused by the financial crisis,[380] such still struck the ASEAN in three (3) points: (1) it undermined the confidence in whatever economic success the ASEAN has achieved; (2) the sort of inability to respond undermined claims of being a strong, united regional front; and (3) the crisis introduced problems that could not be resolved solely by the ASEAN way.[381] Worse, international media and observers faulted the ASEAN for its apparent lack of response to the haze that engulfed the region in the latter half of 1997 to 1998, the coup in Cambodia, the human rights complaints in Myanmar right after its admission in the Association, and the violence and human rights violations that occurred in East Timor after it voted for independence from Indonesia.[382] The goodwill the ASEAN has established thus far seemed to have dissipated, as it was seen only as a failure.[383]

In efforts to remedy the tainted reputation suffered by the ASEAN during the 1997 financial crisis, the organization thought it would be better to reevaluate its purpose, significance, and goals – thus entering its recon-

376 *Caballero-Anthony,* p. 204; *Narine,* Forty Years of ASEAN, p. 420.
377 *Caballero-Anthony,* p. 204; *Funston,* p. 206; *Rüland/Jetschke*, p. 398.
378 *Narine,* Forty Years of ASEAN, p. 420; *Narine*, p. 374.
379 *Caballero-Anthony,* p. 205; *Funston,* p. 213; *Narine,* Forty Years of ASEAN, p. 420.
380 *Narine,* ASEAN, p. 374.
381 *Narine,* Forty Years of ASEAN, p. 420.
382 *Caballero-Anthony,* pp. 208-209, 213-216; *Funston,* p. 206; *Narine,* Forty Years of ASEAN, p. 421. For more information about the human rights violations in Myanmar during this time period see *Emmerson*, pp. 71-74. For more information about the alleged inaction of ASEAN in addressing the East Timor crisis, see *Haacke*, pp. 65-71.
383 *Funston,* p. 206.

solidation phase.[384] One of the proposals forwarded during the immediately following ASEAN Ministers Meeting was for the ASEAN to adopt "flexible engagement" (deviating from the principle of non-intervention) to enable ASEAN to quickly avoid and/or address problems and issues with regional repercussions: this meant the "practice of ASEAN members discussing the domestic policies of other members when those policies had regional/cross-border implications."[385] Only Thailand and the Philippines supported this idea however as most were of the opinion that such open criticism could open up old wounds ASEAN sought to alleviate.[386] If one would recall, the ASEAN was built on conflicts and misunderstandings between the original member states. It was further founded on a mutual understanding that what happens inside one borders remains the concern of the affected member state alone. Thus, there is the risk that "flexible engagement" could disturb the peace the ASEAN has long worked for.

Compromising, all agreed on the use of "enhanced interaction", a process wherein individual member states could comment on domestic policies of another, should the same has regional repercussions, but would leave the ASEAN out of the equation.[387] Aside from adopting a variance of its principle of non-intervention, the ASEAN likewise adopted in the December 1997 meeting in Kuala Lumpur the so-called ASEAN Vision 2020, which called for partnership in dynamic development – the purpose of which was the encouragement of closer economic integration within the region," a community of caring societies, and a more outward-looking ASEAN.[388] Under said ASEAN Vision 2020, ASEAN member states would endeavor to intensify further economic cooperation and integration amongst each other.[389] Plans of action to put the ASEAN Vision 2020 into fruition, beginning with the Hanoi Plan of Action of 1998 were thereafter made.[390]

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384 *Caballero-Anthony,* p. 6.
385 *Acharya,* Whose Ideas Matter?, p. 128; *Funston,* p. 206; *Narine,* Forty Years of ASEAN, p. 421.
386 *Acharya,* Whose Ideas Matter?, p. 132; *Funston,* p. 206; *Narine,* Forty Years of ASEAN, p. 421.
387 *Acharya,* Whose Ideas Matter?, p. 134; *Narine,* Forty Years of ASEAN, p. 421.
388 See *Crozier,* p. 24; *Narine,* Forty Years of ASEAN, p. 420.
389 ASEAN Vision 2020; See also *Crozier,* p. 24.
390 *Crozier,* p. 24.The Hanoi Plan Action sought to accelerate the full implementation of the AFTA, expansion of the ASEAN Investment Area, and liberalization of trade in services, among others. See *Narine,* Forty Years of ASEAN, p. 420.

Alongside these changes, the office of the ASEAN Secretariat was again revamped and was given new responsibilities.[391] Congruently, an ASEAN Surveillance Program ("ASP") was established in February 1998 (after being proposed during the ASEAN Foreign Ministers Meeting in November 1997), which would work hand-in-hand with the IMF and World Bank in monitoring economic fundamentals and serving as an early warning system for any economic problems.[392] The ASEAN also announced the creation of the ASEAN Action Plan on Social Safety Nets in October 1998, which had a corresponding task force "with the objective of developing and implementing an action plan to ameliorate the impact of the crisis."[393] In line with the creation of the said action plan, Thailand proposed the ASEAN Troika, which would be composed of past, present, and future ASEAN Standing Committee, to address regional issues and stability.[394] The ASEAN Troika would not be a decision-making body however, and at the same time is prohibited from undertaking tasks not assigned to it by the ASEAN or delving into internal matters of the ASEAN member states.[395]

The reconsolidation stage, from the late 1990's onwards, paved way as well to political and security developments in the ASEAN. In March 1997, the ASEAN established the Southeast Asian Nuclear Weapons Free Zone ("SEANWFZ") as an integral component of the ZOPFAN and contribution to the global nuclear anti-proliferation regime, which shows the ASEAN commitment to promote international peace and security.[396] Modeled after the 1963 Treaty of Tlatelolco declaring Latin America a nuclear-free zone and the 1985 Treaty of Rarotonga establishing the South Pacific Nuclear Free Zone,[397] signatories will not "develop, manufacture, or otherwise acquire, possess, or have control over nuclear weapons; station or transport nuclear weapons by any means; or test or use nuclear weapons in the region."[398] They shall also not be allowed to dump, discharge, or dispose radioactive material or waste anywhere in the area covered by the

391 *Narine,* Forty Years of ASEAN, p. 420.
392 *Acharya,* Whose Ideas Matter?, p. 134; *Narine,* Forty Years of ASEAN, p. 420.
393 ASEAN Action Plan on Social Safety Nets, § 3; *Narine,* Forty Years of ASEAN, p. 420.
394 *Narine,* Forty Years of ASEAN, p. 420.
395 *Haacke,* pp. 73-74; *Narine,* Forty Years of ASEAN, p. 420.
396 *Severino,* ASEAN, p. 14; *Solidum,* p. 90.
397 *Solidum,* p. 90; *Weatherbee,* International Relations, p. 86.
398 *Severino,* ASEAN, p. 14. Treaty on the Southeast Asia Nuclear Weapons Free Zone, art. 3(1).

Treaty.[399] Other states are likewise prohibited from doing the same and may only be allowed for matters of transport.[400]

In 11 September 2001, the entire world was caught in surprise by the terrorist attacks in the United States. The United States thereafter announced that the Southeast Asian region was the second front on the global war on terror.[401] Albeit ASEAN member states had varying degrees of enthusiasm in the United States-led war against terrorism, they all continued cooperation and coordination as regards regional counterterrorism measures, considering that terrorism problems in many Southeast Asian countries are localized and terrorist networks might be operating in the region (e.g. Abu Sayyaf Group in the Philippines, Jema'ah Islamiyah in Indonesia).[402] Recognizing that terrorist groups' organizational, recruitment, and financial scope is transnational, the ASEAN came up in the November 2001 ASEAN Summit with a Declaration on Joint Action to Counter Terrorism, wherein they expressed their joint commitment to combat terrorism, including initiating cooperative joint practical counterterrorism measures that are in line with a member state's specific circumstances.[403] It bears mentioning

399 Treaty on the Southeast Asia Nuclear Weapons Free Zone, art. 3(3).

400 *Severino*, ASEAN, p. 14. Treaty on the Southeast Asia Nuclear Weapons Free Zone, art. 3(2).

401 *Caballero-Anthony*, p. 216; *Weatherbee*, International Relations, p. 193.

402 *Caballero-Anthony*, p. 213; *Weatherbee*, Southeast Asia and ASEAN: Running in Place, pp. 192-193.

403 *Weatherbee*, International Relations, p. 195.These measures include the following (See ASEAN Declaration on Joint Action to Counter Terrorism; *Caballero-Anthony*, p. 217.):
"1. Review and strengthen our national mechanisms to combat terrorism;
"2. Call for the early signing/ratification of or accession to all relevant anti-terrorist conventions including the International Convention for the Suppression of the Financing of Terrorism;
"3. Deepen cooperation among our front-line law enforcement agencies in combatting terrorism and sharing "best practices";
"4. Study relevant international conventions on terrorism with the view to integrating them with ASEAN mechanisms on combating international terrorism;
"5. Enhance information/intelligence exchange to facilitate the flow of information, in particular, on terrorists and terrorist organisations, their movement and funding, and any other information needed to protect lives, property and the security of all modes of travel;
"6. Strengthen existing cooperation and coordination between the AMMTC and other relevant ASEAN bodies in countering, preventing and suppressing all forms of terrorists (sic) acts. Particular attention would be paid to finding ways to combat terrorist organisations, support infrastructure and funding and bringing the perpetrators to justice;

that while practically speaking, the counterterrorism measures laid down in said Declaration were not new, they were meant to increase the capacity of existing frameworks in combating transnational crime.[404]

In addition to the foregoing, the ASEAN member states under the ASEAN framework entered into an Agreement on Information Exchange and Establishment of Communication Procedures on 07 May 2002 to promote cooperation in combating transnational crime, including terrorism.[405] Participation and cooperation shall be done through the establishment of communication networks, logistical arrangements, combined training, and border controls, among others.[406] Malaysia, Indonesia, and the Philippines were the first signatories to the said agreement, to be followed by Cambodia, Brunei, and Thailand.[407]

Thereafter, the ASEAN and the United States issued a Joint Declaration for Cooperation to Combat International Terrorism on 01 August 2002, which committed the ASEAN member states and the United States to "improve intelligence gathering efforts, confidence-building measures, and enhance mutual cooperation."[408]

Counter-terrorism measures were also initiated under the auspices of the ASEAN-led ARF. Two workshops were held after the 11 September attacks: first, was the Malaysia-United States workshop in confidence-building measures on 24-25 March 2002 in Honolulu, while the other was a Thailand-Australia workshop on terrorism prevention on 17-19 April

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"7. Develop regional capacity building programmes to enhance existing capabilities of ASEAN member countries to investigate, detect, monitor and report on terrorist acts;
"8. Discuss and explore practical ideas and initiatives to increase ASEAN's role in and involvement with the international community including extra-regional partners within existing frameworks such as the ASEAN + 3, the ASEAN Dialogue Partners and the ASEAN Regional Forum (ARF), to make the fight against terrorism a truly regional and global endeavor;
"9. Strengthen cooperation at bilateral, regional and international levels in combating terrorism in a comprehensive manner and affirm that at the international level the United Nations should play a major role in this regard."

404 *Weatherbee,* International Relations, p. 195.

405 Agreement on Information Exchange and Establishment of Communication Procedures, arts. 2 and 3; *Caballero-Anthony,* p. 217.

406 Agreement on Information Exchange and Establishment of Communication Procedures, arts. 4 and 5; *Caballero-Anthony,* p. 217.

407 *Caballero-Anthony,* p. 217; *Soesilowati*, p. 235.

408 *Caballero-Anthony,* p. 217.

2002.[409] Recommendations and findings from these workshops formed part of the ARF statement during its ninth meeting in July 2002.[410]

It should be noted at this point of discussion that in dealing with terrorism, the ASEAN grappled with challenges on existing regional mechanisms, to which threats of terrorism threw a new dimension to.[411] Even with a united regional front, efforts have been stalled and/or hampered by domestic politics and public sensitivities, especially in Muslim-majority countries such as Malaysia and Indonesia, or those with large Muslim-minorities such as the Philippines and Thailand.[412] This notwithstanding, the ASEAN equivocally rejected any identification of terrorism with religion and was clear in saying that "terrorist elements" refer to Islamic extremists.[413]

In connection to terrorism, one could also witness developments vis-à-vis transnational crime during the same time period. Following the hard times defined by the Cold War, the Indochina conflicts, East Timor human rights violations, and violence in Myanmar among others, an overall regime of inter-state peace and relative stability has settled in Southeast Asia, wherein security threats to Southeast Asian nations by virtue of policies and actions of other states have greatly diminished.[414] Yet, one could witness a changing face to security and stability unveil, brought by new forms of transnational problems that have regional consequences.[415] Undeniably, one of these transnational problems, together with terrorism, is transnational crime. In relation thereto, the United Nations Convention against Transnational Organized Crime ("TOC" or the "Palermo Convention") is the main international instrument as regards the fight against transnational crime.[416] Adopted in 2001 and entered into force in 2003, ASEAN member states are signatories to the TOC, with the aim of enhancing international cooperation against the expansion and strengthening of criminal syndicate networks around the globe.[417] That said, the ASEAN

409 *Caballero-Anthony,* p. 217.
410 *Caballero-Anthony,* p. 218; *Weatherbee,* International Relations, p. 195.
411 *Caballero-Anthony,* p. 218.
412 *Caballero-Anthony,* p. 218; *Soesilowati,* pp. 233-235; *Weatherbee,* International Relations, p. 194.
413 ASEAN Declaration on Joint Action to Counter Terrorism; *Soesilowati,* p. 234; *Weatherbee,* International Relations, p. 195.
414 *Severino,* ASEAN, p. 33.
415 *Severino,* ASEAN, p. 33.
416 *Weatherbee,* International Relations, p. 200.
417 *Weatherbee,* International Relations, p. 200.

had always articulated the problem of transnational crime in security terms and already had a declaratory anti-crime regime as early as 1976 with the Bali Concord I, when it called for the "intensification of cooperation among member states as well as with the relevant international bodies in the prevention and eradication of the abuse of narcotics and the illegal trafficking of drugs."[418] However, the first effort to establish a regional framework happened was the 1997 ASEAN Declaration on Transnational Crime, through the establishment of an ASEAN Ministers' Meeting on Transnational Crime ("AMMTC"), which shall coordinate activities, among others, between the ASEAN Senior Officials on Drug Matters ("ASOD") and the ASEAN Chiefs of Police Association ("ASEANAPOL"), and other officials in charge of functional areas such as customs, consular services, and immigration.[419]

The agreements and developments on counter-terrorism and against transnational crime aside, one of the most significant political and security developments during the reconsolidation stage of the ASEAN would probably be the Declaration of ASEAN Concord II in Bali in 2003, where ASEAN member states decided to establish a three-pillared ASEAN Community, the completion date of which is in 2015:[420]

> "An ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region".[421]

The ASEAN envisions further implementation of liberalization and cooperation measures and the enhancement of cooperation and integration in a wide array of areas:[422] the ASEAN Economic Community ("AEC") envisions an integrated single market and production base, building on the AFTA, AIA, and the ASEAN Framework Agreement on Services ("AFAS"); the ASEAN Security Community ("ASC"), on taking political and security cooperation to a higher plane – while still respecting the principle of non-intervention, more weight is given to security structures

418 Declaration of ASEAN Concord I, §C (4); *Emmers*, p. 15; *Weatherbee,* International Relations, p. 201.
419 *Severino,* ASEAN, pp. 33-34; *Weatherbee,* International Relations, p. 201.
420 *Crozier,* p. 25.
421 Declaration of ASEAN Concord II; *Crozier,* p. 25.
422 *Crozier,* p. 26.

such as the TAC and the ARF; the ASEAN Socio-Cultural Community ("ASCC"), in building a regional community furthering state building and development, enabling states to provide basic services to the poorest citizen.[423] To put things into fruition, the ASEAN member states adopted during the tenth ASEAN Summit in November 2004 the Vientiane Action Programme ("VAP"), which prescribes specific measures to operationalize the Declaration of Bali Concord II.[424]

Riding the momentum built by the Declaration of Bali Concord II and Vientiane Action Plan, Malaysia proposed in 2004 the need to instill changes to the institutional framework, working methods, and rules of the ASEAN to successfully establish an ASEAN community – thus, the need to draft a Charter.[425] At the 11th ASEAN Summit in Kuala Lumpur, Malaysia in 2005, the ASEAN issued a Declaration on the ASEAN Charter, and with it, constituted an Eminent Persons Group ("EPG"), which was composed of representatives from the different ASEAN member states, tasked of submitting recommendations and ideas for the Charter and encouraged to conduct a bottom-up approach of consulting with civil society groups, business sectors, and other parties that might have a stake on the new Charter.[426]

As per the Declaration, the ASEAN Charter was meant to be a constitutional document embodying the fundamentals, ideals, goals, and structure of ASEAN cooperation meant to meet the needs of the ASEAN Community and beyond, and at the same time, promising a "forward-looking, rules-based organization in a normative framework of democracy, transparency, and governance, while upholding the ASEAN way of consensus decision-making, respect for sovereignty and non-interference."[427] Based on this, one could predict a paradigm shift from informalistic to formalistic mechanisms in the organization. The EPG thereafter conducted various consultative meetings with different groups,[428] and made final recommendations

423 *Lim*, pp. 34-37; *Narine,* Forty Years of ASEAN, p. 422.
424 *Severino,* ASEAN, p. 37.
425 *Caballero-Anthony*, pp. 71-72.
426 *Caballero-Anthony,* The ASEAN Charter, p. 72.
427 *Narine,* Forty Years of ASEAN, p. 422; *Weatherbee,* International Relations, p. 105.
428 *Caballero-Anthony,* The ASEAN Charter, pp. 72-73. For purposes of clarity, Track II diplomacy or "backchannel diplomacy" is the practice of "non-governmental, informal and unofficial contacts and activities between private citizens or groups of individuals, sometimes called 'non-state actors'".

during the twelfth ASEAN Summit in the Philippines in January 2007,[429] among which included the establishment of a dispute settlement mechanism, the use of majority vote in concerns other than security and foreign policy, monitoring mechanisms to ensure compliance amongst member states, and imposition of sanctions, including expulsion or suspension of membership, in case of breach.[430] The EPG also called, alongside the existing norms and principles of the ASEAN, "the active strengthening of democratic values, good governance, rejection of unconstitutional and undemocratic changes of government, through the respect and institutionalization of the rule of law, including humanitarian law."[431]

In August 2007, the ASEAN celebrated its 40th founding Anniversary and by this time, it has been acknowledged as the engine of regionalism in Asia-Pacific with its multiple achievements and has gained a "paradigmatic status" in cooperation as "new regionalism."[432] Commemoration of the 40th Anniversary was planned for the 13th ASEAN Summit in Singapore on November 2007. A High Level Task Force in the meantime was already appointed to draft the ASEAN Charter, taking into consideration the reports given by the EPG, making sure to include practical and doable provisions.[433]

Prior to said 13th ASEAN Summit though, the ASEAN was caught by surprise with demonstrations in Myanmar in September 2007: week-long demonstrations by Buddhist monks in different parts of Myanmar were met with violence and severe repression by the military junta.[434] Such violence and corresponding human rights violation perpetrated by the military junta threatened to dampen any celebratory mood and there were calls for ASEAN to either disavow Myanmar or otherwise react to the situation.[435] Though not as quick as one could expect, the ASEAN then made a response condemning the violence committed and requested Myanmar's government to exercise restraint as well as seek political

429 *Caballero-Anthony*, The ASEAN Charter, p. 73.
430 *Caballero-Anthony*, The ASEAN Charter, p. 74; *Narine*, Forty Years of ASEAN, p. 422; *Weatherbee*, International Relations, p. 396.
431 *Caballero-Anthony*, The ASEAN Charter, p. 74.
432 *Rüland/Jetschke*, p. 398; *Weatherbee*, International Relations, p. 91.
433 *Caballero-Anthony*, The ASEAN Charter, p. 75.
434 *Caballero-Anthony*, The ASEAN Charter, p. 75; *Emmerson*, ASEAN's" Black Swans", pp. 71-72.
435 *Caballero-Anthony*, The ASEAN Charter, p. 75; *Emmerson*, ASEAN's" Black Swans", p. 72.

solutions to foster national unity.[436] And while one can naturally expect that the 13th ASEAN Summit would not push through, it still did and even with the participation of Myanmar.[437] The 40th founding anniversary was still commemorated and the ASEAN member states momentously accepted the ASEAN Charter during the said summit, becoming ASEAN law later in December 2008.[438]

Albeit one would expect that the EPG's recommendations vis-à-vis the ASEAN Charter would be accepted based on the idea of the supposed paradigm shift in the regional organization, the body of text constituting the Charter was a watered-down version of the initial inputs and recommendations given by the EPG. In other words, the 180-degree paradigm shift most were expecting with the ASEAN Charter did not happen. Nonetheless, the ASEAN Charter was arguably able to get pass the hurdle of being able to accommodate the least democratic countries in the Association.[439]

At the same time, the ASEAN Charter still was able to cater to the following purposes: "(1) formally accord ASEAN legal personality, (2) establish greater institutional accountability and compliance system, and (3) reinforce the perception of ASEAN as a serious regional player in the future of the Asia-Pacific region."[440] Stating it differently, the ASEAN by virtue of the Charter now has a juridical personality that, among others, enables it to enter into agreements on its own right; a culture of adherence to rule and serious compliance to obligations shall supplement the ASEAN way; the stakes facing ASEAN are high and hopefully through the Charter, ASEAN shall be able to reinforce its credibility considering the criticism it has faced previously.[441] Likewise, the ASEAN Charter introduced changes to the institutional structure of the Association through, among others, the introduction of an ASEAN Coordinating Council ("ACC") composed of ASEAN foreign ministers, ASEAN human rights body, single chairmanship for key high-level ASEAN bodies, and appointment of permanent representatives to ASEAN.[442]

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436 *Emmerson,* ASEAN's" Black Swans", p. 72.
437 *Caballero-Anthony,* The ASEAN Charter, p. 75.
438 *Emmerson,* ASEAN's" Black Swans", pp. 70-71; *Weatherbee,* International Relations, p. 105.
439 *Weatherbee,* International Relations, p. 105.
440 *Caballero-Anthony,* The ASEAN Charter, p. 76.
441 *Caballero-Anthony,* The ASEAN Charter, pp. 76-82.
442 *Caballero-Anthony,* The ASEAN Charter, p. 76; *Weatherbee,* International Relations, p. 106.

The Charter is also mentioned to be the first step taken by the ASEAN by which human rights are codified within ASEAN operative rules.[443] In purview of Article 14 of the Charter, protection and promotion of human rights shall be a high priority among ASEAN member states and in connection therewith, an ASEAN human rights body shall be established.[444] Albeit the Charter was silent as to how the same would be operationalized,[445] the ASEAN established on 23 October 2008 the ASEAN Intergovernmental Commission on Human Rights ("AICHR") following such pronouncement in the Charter.[446] Its Terms of Reference ("TOR") mandated it to focus primarily in the promotion of human rights and act as an advisory body to the ASEAN Secretariat and member states.[447] Acting on its mandate, the AICHR drafted and proposed the ASEAN Human Rights Declaration ("AHRD"), which was unanimously adopted and affirmed by all ASEAN member states in the 18th of November 2012.[448] The said declaration explicitly adopts the civil and political rights as well as the economic and social rights enshrined in the Universal Declaration of Human Rights,[449] but at the same time, explicitly adds the right to "safe drinking water and sanitation",[450] "the right to a safe, clean and sustainable environment",[451] protection from discrimination in treatment for "people suffering from communicable diseases, including HIV/AIDS",[452] the right to development which enjoins ASEAN member states to enact projects "aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment",[453] and the right to peace wherein every person have the right to enjoy peace "within an ASEAN framework of security, stability, neutrality, and freedom…".

In addition to the foregoing, the ASEAN also had good developments with regard fostering relations with its external partners. As early as 1972, the ASEAN has fostered a dialogue partnership with the European Econo-

443 *Tan*, p. 5.
444 ASEAN Charter, art. 14.
445 ASEAN Charter, art. 14.
446 *Tan*, p. 4.
447 *Kelsall*, p. 2.
448 ASEAN Phnom Penh Statement, 18 November 2012.
449 ASEAN Human Rights Declaration, arts. 10, 26.
450 ASEAN Human Rights Declaration, art. 28(e).
451 ASEAN Human Rights Declaration, art. 28(f).
452 ASEAN Human Rights Declaration, art. 28(g).
453 ASEAN Human Rights Declaration, arts. 35, 36.

mic Community.[454] This dialogue partnership paved way to a more formal relationship through the 1980 European Community-ASEAN Cooperation Agreement, which institutionalized the ASEAN-EU Ministerial Meetings ("AEMM"), which occurs once every two years.[455] Such was followed by the launching of the Asia-Europe Meetings ("ASEM"), which was launched in 1996 and conducted once every two years, alternating between Asia and Europe, with Asian and European ministers meeting each other in between summits.[456]

In addition to the European Union, by 1977, the ASEAN has already dialogue partnerships with the likes of Japan, Australia, New Zealand, and ASEAN foreign ministers regularly met with their counterparts from other countries, otherwise known as the ASEAN's "official dialogue partners" in Post-Ministerial Conferences ("PMC").[457] In such official dialogue setting, one member state shall act as a coordinator for a dialogue partner in a three-year rotation.[458] Over the years, these dialogue partnerships were translated into more formal partnerships as illustrated by Figure 1 below provides the formal dialogue partnerships forged and the respective dates of signing:


*Figure 1: List of ASEAN Dialogue Partnerships*

454 *Tiwari*, p. 31.
455 *Weatherbee*, International Relations, p. 113.
456 *Weatherbee*, International Relations, pp. 113-114.
457 *Weatherbee*, International Relations, p. 109.
458 *Weatherbee*, International Relations, p. 109.

Initially, PMC were conducted into two phases: the ASEAN member states shall meet with their dialogue partners as a group in a closed door meeting; thereafter, the ASEAN member states shall meet individually with each dialogue partner to discuss bilateral relationships.[459] The first phase later evolved to the establishment of the ASEAN Regional Forum, which serves as the forum for political and security discussions.[460]

In addition to the existing ARF, the ASEAN further established the so-called "ASEAN plus Three" in December 1997 with China, Japan, and the Republic of Korea. The Asian Financial Crisis gave valuable insight that Northeast and Southeast Asian countries were linked to one another.[461] Hence, ASEAN+3 has taken off with an ASEAN leadership and spawned later on offshoots such as the Chiang Mai Initiative.[462] The ASEAN+3 gatherings and/or meetings are of an informal nature, with mostly economic discussions, composed of 16 active forums (and a pending endorsement of four new ones) with no less than 48 mechanisms managing the activities and/or projects, and all geared into fostering areas of cooperation among the Northeast and Southeast Asian countries.[463]

Furthermore, the ASEAN realized the benefits it and India could gain by intensifying cooperation between each other. The same rings true with Australia and New Zealand. Hence, the ASEAN organized and established the East Asia Summit ("EAS"), with its first meeting in conjunction with the ASEAN Summit in 2005, consisting of ASEAN member states, China, Japan, Republic of Korea, India, Australia, and New Zealand.[464] The EAS was meant to be a forum for Asia-Pacific leaders to have dialogues about security and economic issues in which all participants have shared interests, which includes, but not limited to, energy, environment, natural disaster relief, terrorism, piracy, maritime security, and nonproliferation.[465] With the inclusion of the United States and Russia in the EAS, the participants came up during their sixth meeting in 2011 a "Declaration of East Asia Summit Principles of Mutually Beneficial Relations", adding to the norms of state conduct already existing in the region.[466]

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459 *Weatherbee,* International Relations, p. 109.
460 *Weatherbee,* International Relations, p. 109.
461 *Lee*, p. xii; *Weatherbee,* International Relations, p. 111.
462 *Lee*, p. xii; *Severino,* ASEAN, p. 95.
463 *Severino,* ASEAN, p. 95; *Weatherbee,* International Relations, p. 111.
464 *Lee*, p. xii; *Weatherbee,* International Relations, p. 111.
465 *Weatherbee,* International Relations, p. 112.
466 *Weatherbee,* International Relations, p. 112.

Aside from continuously flourishing relationships with its external partners, the ASEAN saw the development of various sub-regional multilateral frameworks as well as membership of the individual member states in different transregional cooperative frameworks.[467] Although such subregional and transregional groupings were developed outside the formal ASEAN framework and not necessarily linked to the ASEAN in a dialogue format, these can be viewed as integral in enhancing and furthering capacities of the ASEAN Economic Community and reflective of national interests not easily apparent through an ASEAN membership.[468]

## B. Present Institutional and Legal Framework

This next chapter of the study would try to make sense of ASEAN as an organization or regional institution. First, the reader would be walked through what the ASEAN is in general as a regional organization. This would include a discussion of the present organizational structure applicable to the ASEAN and its related organizational mechanisms. This necessarily would bring the reader to understand the norms the ASEAN lives by, including the decision-making processes and whatever conflict management mechanisms are in place should there be issues that arise amongst the member states or those that affect the ASEAN itself. Second, focus shall be given to the ASEAN institutional structure vis-à-vis regional security, specifically transnational crime, and efforts made in combating new forms of threats to regional security.

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467 *Weatherbee*, International Relations, pp. 114, 120.Subregional groupings include, but are not limited to, the Indonesia-Malaysia-Singapore Growth Triangle ("IMS-GT"), Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area ("BIMP-EAGA"), Cambodia-Laos-Myanmar-Vietnam ("CMLV") Cooperation Framework, etc. On the other hand, transregional groupings include, but are not limited to, Asian Cooperation Dialogue ("ACD"), Mekong-Ganga Cooperation ("MGC"), Indian Ocean Rim Association for Regional Cooperation ("IOR-ARC"), Southwest Pacific Dialogue, Coral Triangle Initiative ("CTI"), and Forum for East Asia and Latin America Cooperation ("FEALAC").

468 *Weatherbee*, International Relations, pp. 115, 120.

## 1. ASEAN as a Regional Organization

The ASEAN is an inter-governmental entity – a voluntary association among governments.[469] Decisions are made by governments and aside from discussions and debates amongst themselves, consultations are made with different lobby groups, non-governmental organizations, and civil society groups.[470] That said, the ASEAN as an inter-governmental association does not have a supranational government with authority superior to its member states and should not be viewed as an autonomous regional organization promoting and/or espousing supranational ideas unlike its other regional organization counterparts.[471] ASEAN member states instead cooperate on various issues whenever they could.[472]

Admittedly, the ASEAN as an international actor is a "soft" multilateral structure through which the collective policy will of member states are expressed in areas where there is consensus and act as a vehicle for the implementation of national functions.[473] The ASEAN takes in consideration that it is a "hodgepodge grouping" of states with disparate levels of political, historical, economic, and social development, from which sensibilities and centrifugal tendencies arise and remain.[474] As Muntarbhorn observed, regionalism is not being pursued as an end goal in itself but as a supplementary means to promote national development.[475] In other words, complementary national interests are sought to be harmonized by collective decision making seeking to maximize national interest through regional cooperation.[476] Thus, the ASEAN has not been historically fond of binding treaties for collective action, and there is absence of coercive instruments that make members comply with principles.[477] Regional cooperation's elaboration is by small, incremental steps, wherein member states work together on the basis of formal and informal structures as well as voluntary and informal arrangements which might eventually lead

469 *Severino,* ASEAN: What It Cannot Do, p. 3; *Weatherbee,* International Relations, p. 99.
470 *Severino,* ASEAN: What It Cannot Do, p. 3.
471 *Chesterman*, p. 200; *Crozier,* p. 19; *Severino,* ASEAN Today and Tomorrow, p. 13; *Severino,* ASEAN: What It Cannot Do, p. 4.
472 *Liu*, p. 19.
473 *Muntarbhorn*, p. 12; *Weatherbee,* International Relations, p. 91.
474 *Liu,* p. 19; *Severino,* ASEAN Today and Tomorrow, p. 15.
475 *Muntarbhorn,* p. 12.
476 *Weatherbee,* International Relations, p. 91.
477 *Di Floristella,* p. 32.

to more binding and institutionalized agreements.[478] In this respect, it is not surprising to find different forms of agreements in the purview of the ASEAN – principal agreements (treaties/arrangements/memoranda of understanding), declarations, ministerial statements, protocols, and secondary protocols – the majority of which are declarations or normative statements on common objectives without exactly imposing a legal obligation.[479] In relation to this, declarations and ministerial statements are both of a soft law nature, wherein they are concluded quickly without needing ratification.[480] While not formal and legalistic in nature, it shows an intent to form an agreement without needing to shoulder the reputational costs of any breach.[481]

Interestingly, such flexible institutional design of the ASEAN greatly reflects its historical circumstances marked by the need to consolidate the independence of post-colonial states.[482] And in light of this, the ASEAN mirrors to a degree, if not completely, neo-liberal institutionalism on how it structures social action: institutions could become effective guides to social action not only by making use of incentives and sanctions but also in terms of owning one's roles, rituals, duties, and obligations that do not necessarily follow a Western model.[483]

The general characteristics of the ASEAN as a regional organization are easily carried over to its external relations. As mentioned earlier in the Introduction, the ASEAN believes in "inclusiveness" and espouses political and economic openness to the rest of the world,[484] which necessitates openness to constructive relations with the rest of the world inclusiveness in its approach to regional endeavors should one want regional stability and security in Southeast Asia.[485] As Former ASEAN Secretary-General Rodolfo Severino once stated, "If ASEAN is anything, it is not inward-looking. It is outward-looking. It is open to trade, economic links, and security dialogues with other countries and groups of countries and with other international organizations."[486] The ASEAN was henceforth a pioneer in the system of dialogue partnerships, which would link it to its

478 *Crozier,* p. 20; *Weatherbee,* International Relations, p. 91.
479 *Cockerham*, p. 169.
480 *Cockerham,* p. 169.
481 *Cockerham,* p. 169.
482 *Di Floristella,* pp. 33-34.
483 *Di Floristella,* p. 34.
484 *Severino,* ASEAN: What It Cannot Do, p. 5.
485 *Severino,* ASEAN, pp. 13, 25; *Severino,* ASEAN: What It Cannot Do, p. 5.
486 *Severino,* ASEAN Today and Tomorrow, p. 226.

external partners for the mutual benefit of both.[487] Dialogues between the ASEAN and its external partners started with economic motives but later have evolved to include political and security dimensions, with such dialogues being held during the ASEAN Foreign Minister's Annual Post-Ministerial Conferences with dialogue partners.[488] Later on, the ASEAN Regional Forum ("ARF") was established in 1994, which became the sole forum for political and security issues in the Asia Pacific.[489] Led and established by the ASEAN, ASEAN member states, China, United States, India, Pakistan, North and South Korea, and other countries with interests in the security and other affairs of the Asia Pacific region are gathered in one framework.[490]

As regards regional security and peace, the ASEAN in a real sense has been a form of security community even before it has decided to establish the ASEAN Security Community pillar by virtue of the Declaration of Bali Concord II.[491] However, such security function must not be construed to be in a military sense or defense agreement.[492] Thus, the ASEAN does not have a common armed force to deploy in armed intervention in a member state or in a neighboring nation.[493] As Severino explains, that should there have been an incident when a member state sent an armed contingent in a trouble spot, like what the Philippines and Thailand did when East Timor was transitioning to independence, the said member states did the same on their own and outside the ambits of the ASEAN.[494] Instead, the ASEAN has taken the leading role in the creation and maintenance of regional peace and security through establishing networks for "peaceful contact and habits of cooperation", which have made recourse to inter-state armed conflict and/or violence unthinkable.[495] As di Floristella describes, the regional security framework followed by the ASEAN is more of a regional security partnership, "an arrangement created by a majority of states in

487 ASEAN's dialogue partners include Australia, Canada, China, the European Union, India, Japan, the Republic of Korea, New Zealand, Russia, and the United States.*Severino,* ASEAN: What It Cannot Do, p. 5; *Tiwari,* p. 31.
488 *Severino,* ASEAN, p. 25; *Tiwari,* p. 31.
489 *Severino,* ASEAN, p. 25; *Severino,* ASEAN: What It Cannot Do, pp. 5-6.
490 *Severino,* ASEAN: What It Cannot Do, p. 6.
491 *Severino,* ASEAN, p. 36.
492 *Di Floristella,* p. 1.
493 *Narine,* Forty Years of ASEAN, p. 414; *Severino,* ASEAN: What It Cannot Do, p. 4.
494 *Severino,* ASEAN: What It Cannot Do, p. 4.
495 *Di Floristella,* p. 1; *Severino,* ASEAN, p. 36.

the region and by extraregional powers, who act as partners in upholding plurality of means to manage regional security."[496] The partnership contemplated herein arises from the realization of ASEAN governments that it is preferable, if not practical, to construct a security system based on jointly managed mechanisms and programs, rather than one entirely founded on relative strength of a military alliance.[497]

At the same time, the ASEAN views regional security and stability more broadly, taking into account non-traditional security ("NTS") threats as well.[498] For purposes of the discussion, NTS threats are a relative new security concept that has been introduced to "capture the broadening and deepening of the security and threat agenda after the end of the Cold War."[499] It is security related to any form of threat perception, may it be ecological, terrorist, pandemic among others, falling short of the "traditional state versus state pattern."[500] Needless to mention, NTS redefines the security paradigm and necessitates non-military security approaches.[501]

Significant to the case of the ASEAN with respect non-traditional security however is that the state or military remains at the crux of security, notwithstanding the potential of NTS to shift the focus away from the state towards the individual members of society (that could possibly integrate non-military or civil-military solutions to non-traditional threats).[502] This can be further elaborated in another contribution but for purposes of this study, security in Southeast Asia encompasses both the traditional and non-traditional sense but despite this, the move towards the individual as a security reverent remains unpopular due to the existing state centrality in ASEAN affairs.[503]

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496 *Di Floristella*, p. 38.
497 *Di Floristella*, p. 38.
498 *Di Floristella*, pp. 109-116; *Maier-Knapp*, p. 78.
499 *Maier-Knapp*, p. 78.
500 *Maier-Knapp*, p. 78.
501 *Maier-Knapp*, p. 78.
502 *Maier-Knapp*, p. 79.
503 *Maier-Knapp*, p. 79.As Evans explaines further:
"The resistance to connecting nontraditional security to human security is declining, though some remain worried that at least the narrow conception of human security is either inappropriate to Asia or will slow progress in getting state action in addressing the nontradi- tional security agenda. What is distinctive about many of the approaches to nontraditional security is (1) that they are ambiguous about whether the referent of security is the state or the individual and do not dwell on tensions between the two; and (2) that its advocates normally emphasize the state and state-centric means as the best ways of responding to

Given the foregoing, the ASEAN still meets criticism and often dismissed as a mere social club or talk shop.[504] Yet, the ASEAN normalized informal processes for regional issues to be resolved in non-violent ways, whilst providing a regional context within which peaceful negotiations could be conducted.[505] Occasionally, tensions occur among member states due to centrifugal tendencies brought by diversity of membership or otherwise some remaining degree of mutual suspicion, but at the same time, no conflict has erupted in Southeast Asia.[506] Based thereon, the ASEAN espouses regional security on the basis of mutual confidence, consensus, and balance of interests.[507]

## 2. The ASEAN Organizational Structure

The ASEAN Charter is a step towards institutionalization, albeit a codification of existing practices,[508] e.g. sectoral bodies working on their respective sectors (or compartments) and implementing what has been decided on the highest level (such as the ASEAN Summit). Through it, the organizational structure and applicable mechanisms of the ASEAN have been reorganized. The ASEAN Charter provides that the following are now the organs within the ASEAN, namely, the ASEAN Summit, the ASEAN Coordinating Council, the ASEAN Community Councils, the ASEAN Sectoral Minister Bodies, the ASEAN Secretary-General together with the ASEAN Secretariat, the Committee of Permanent Representatives to the ASEAN, ASEAN National Secretariats, the ASEAN Human Rights Body, and the ASEAN Foundation. Especially for the ASEAN Summit, ASEAN Community Councils, and ASEAN Sectoral Ministerial Bodies, the ASEAN organs constitute the institutionalized consultative mechanisms initially formulated in the Bangkok Declaration of 1967 and have been a prominent feature of the ASEAN process of forging regional ties and maintaining a pleasant regional environment.[509] Said mechanisms do

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these threats, normally preferring to address these issues within their own states rather than on a regional basis. The threats may be new, but the instruments prescribed for dealing with them usually are not." See *Evans*, p. 277.

504 *Severino,* ASEAN Today and Tomorrow, p. 16.
505 *Severino,* ASEAN, p. 36.
506 *Severino,* ASEAN Today and Tomorrow, pp. 14-15.
507 *Severino,* ASEAN Today and Tomorrow, pp. 21-22.
508 *Cockerham*, pp. 180-184.
509 *Caballero-Anthony,* Regional Security in Southeast Asia, p. 57.

not only instill habits of dialogue and consultation, but more so, are meant to build trust and confidence among each other as well as deepen the socialization of ASEAN leaders and ministers, immersing them into the overall ASEAN mechanism of cooperation.[510]

For purposes of the present study, a description of each body hereunder is important due to how decision and policymaking is done in the ASEAN, which is basically top-down or bottom-top approach and at each level, discussions and implementation could be done at each level that can affect the turnout of policies the ASEAN comes out with.

### a. ASEAN Summit

The ASEAN Summit is the supreme policy-making body of the ASEAN, where the highest level of decision making takes place and which is comprised of the Heads of State or Government of the member states.[511] It shall primarily "deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Councils and ASEAN Sectoral Ministerial Bodies."[512] It could instruct relevant ministers to conduct meetings and address issues.[513] At the same time, the ASEAN Summit has authority to handle emergency situations affecting ASEAN and is primarily responsible for decision-making and settlement of disputes, as may be referred to it, in the ASEAN.[514]

### b. ASEAN Coordinating Council

Next in line is the ASEAN Coordinating Council, which is comprised of the foreign ministers of the member states and shall meet at least twice

510 *Caballero-Anthony*, Regional Security in Southeast Asia, p. 57.
511 The ASEAN Charter presently provides that the ASEAN Summit should hold two (2) meetings annually, without prejudice to special and ad hoc meetings, when necessary. See ASEAN Charter, art. 7(1) and (2)(a); *Caballero-Anthony*, Regional Security in Southeast Asia, p. 55.
512 ASEAN Charter, art. 7(2)(b).
513 ASEAN Charter, art. 7(2)(c).
514 ASEAN Charter, art. 7(2)(d)(e) and arts. 20-28.

a year.[515] The ASEAN Coordinating Council shall among others, prepare the meetings of the ASEAN Summit, coordinate the implementation of the decisions and agreements of the ASEAN Summit with the relevant community councils, and make sure policy coherence, efficiency, and cooperation is enhanced.[516]

### c. ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies

Furthermore, there shall be three ASEAN Community Councils, each representing the different ASEAN Communities as established in the ASEAN Charter, namely, the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and the ASEAN Security Community Council.[517] Under the purview of these ASEAN Community Councils shall be the relevant ASEAN Sectoral Ministerial Bodies.[518]

These ASEAN Community Councils are the relevant machineries to realize the objectives of their respective ASEAN Communities. In doing so, they shall ensure to implement the decisions of the ASEAN Summit, coordinate the different works of the sections working under them, and submit the necessary reports and recommendations.[519] They shall meet at least twice a year and shall be chaired by the appropriate minister from the member state holding the ASEAN chairmanship for the applicable year.[520]

On the other hand, the ASEAN Sectoral Ministerial Bodies shall primarily function in accordance with their respective given mandates, implement the agreements and decisions on the ASEAN Summit-level as may be applicable to their respective responsibilities, strengthen cooperation in their respective fields in support of ASEAN integration and community building, and submit the necessary reports and recommendations.[521] Figure 2 below shows the organizational structure of the ASEAN Sectoral Ministerial Bodies:

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515 ASEAN Charter, art. 8(1).
516 ASEAN Charter, art. 8(2).
517 ASEAN Charter, art. 9(1).
518 ASEAN Charter, art. 9(2).
519 ASEAN Charter, art. 9(4).
520 ASEAN Charter, art. 9(5).
521 ASEAN Charter, art. 10(1).

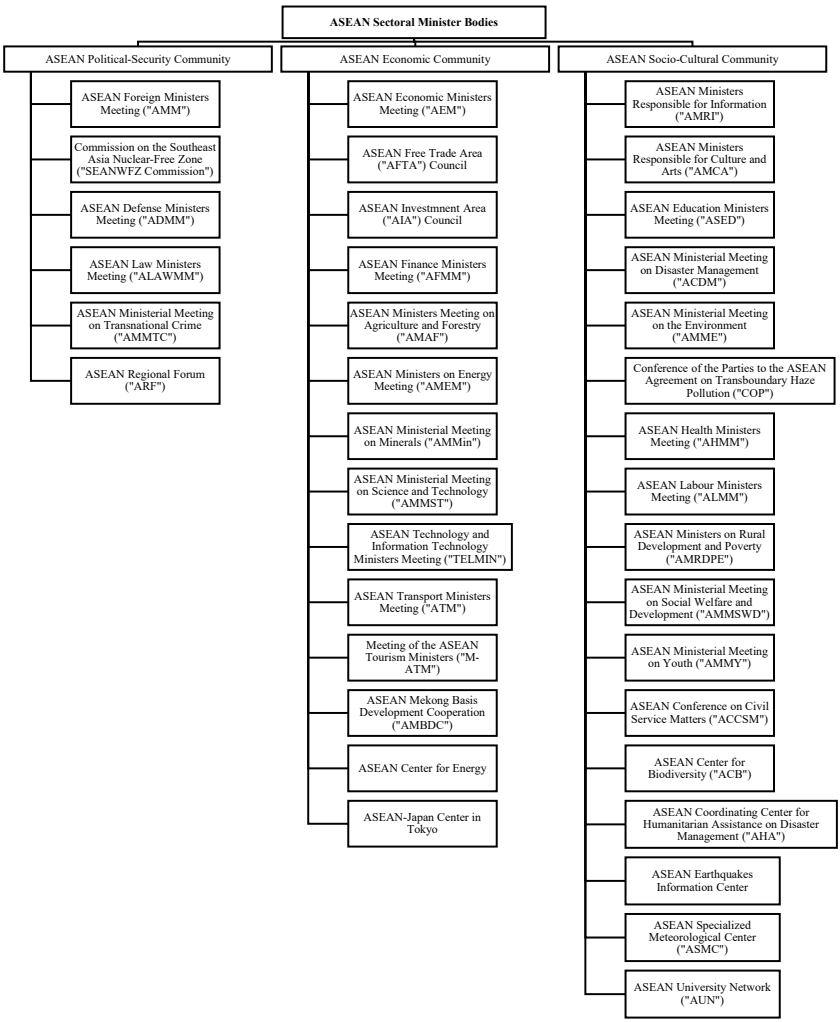


*Figure 2: ASEAN Sectoral Minister Bodies*

d. ASEAN Secretary-General and ASEAN Secretariat

The Secretary-General is appointed by the ASEAN Summit for a non-renewable term of five years, selected amongst nationals of the ASEAN member states based on "alphabetical rotation with due consideration to

integrity, capability, and professional experience, and gender equality."[522] Aside from being the Chief Administrative Officer of ASEAN, Article 11(2) of the ASEAN Charter enumerates that the Secretary-General shall carry out duties and responsibilities as may be laid down in the ASEAN Charter and other relevant instruments; facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and correspondingly submit relevant reports to the ASEAN Summit; participate in all meetings of the ASEAN Summit, ASEAN Coordinating Councils, ASEAN Community Councils, ASEAN Sectoral Minister Bodies, and other relevant ASEAN meetings; and basically be the spokesperson of ASEAN in dealing with external partners by expressing the views of ASEAN during meetings with the latter in accordance with guidelines given by the ASEAN Summit.[523] Moreover, the office of Secretary-General shall be assisted by four deputy Secretary-Generals and shall be of different nationalities from the Secretary-General and shall come from four of the ASEAN member states.[524]

In relation to this, the ASEAN Secretariat shall be composed of the Secretary-General and the staff as may be required. Aside from providing the duties of upholding integrity, efficiency, and competency, the ASEAN Charter unequivocally provides that the ASEAN Secretariat shall not seek or receive instructions from any government or external party to ASEAN and that at all times, it shall refrain from actions that may reflect on their position as ASEAN Secretariat officials responsible only to the ASEAN.[525]Accordingly, each member state undertakes to respect the exclusively ASEAN character of the Secretary-General and the staff, and not to seek to influence them in the discharge of their responsibilities.[526]

### e. Committee of Permanent Representatives to the ASEAN

Every member state is mandated to appoint a permanent representative to the ASEAN with rank of Ambassador based in Jakarta, Indonesia, where the office of the ASEAN Secretariat is currently located.[527] Such

522 ASEAN Charter, art. 11(1).
523 ASEAN Charter, art. 11(2) and (3).
524 ASEAN Charter, art. 11(4) and (5).
525 ASEAN Charter, art. 11(8).
526 ASEAN Charter, art. 11(9).
527 ASEAN Charter, art. 12(1).

permanent representatives shall comprise a committee that would act as a support group to the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies, coordinate with the different ASEAN National Secretariats and ASEAN Sectoral Ministerial Bodies, liaise with the ASEAN Secretariat and Secretary-General, facilitate cooperation between ASEAN and external partners, and perform other functions as may be mandated from the committee.[528]

### f. ASEAN National Secretariats

Each member state shall establish a National Secretariat which shall serve as a national focal point; be a repository of information on all ASEAN matters at the national level; coordinate the implementation of ASEAN decisions on a national level; coordinate and support the national preparations of ASEAN meetings; promote ASEAN identity and awareness at the national level; and contribute to community building.[529]

### g. ASEAN Intergovernmental Commission on Human Rights ("AICHR")

One of the purposes and principles established by the ASEAN in its Charter is the promotion and protection of human rights. In light of this, the ASEAN has established an ASEAN Human Rights Body as one of the organs of the Association. However, the ASEAN Charter left the functionalities of this organ open-ended by leaving its mandate to the discretion of whatever terms of reference may be established by the ASEAN Foreign Ministers Meeting.[530] Subsequent to this pronouncement, the ASEAN established the AICHR on 23 October 2009.[531] The AICHR was instrumental in the drafting and preparation of the ASEAN Human Rights Declaration, which was unanimously adopted by the ASEAN member states in November 2012.[532]

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528 ASEAN Charter, art. 12(2).
529 ASEAN Charter, art. 13.
530 ASEAN Charter, art. 14; *Caballero-Anthony,* The ASEAN Charter, p. 81.
531 *Chongkittavorn,* p. 41; *Tan,* p. 4.
532 ASEAN Phnom Penh Statement, 18 November 2012.

## 3. ASEAN Fundamental Principles, Norms, and Practices

The different principles, norms, and practices existing in the ASEAN can provide better understanding of how the regional organization functions and what fuels its decision and policymaking: basically its different principles, norms, and practices define and also explain the machinations existing within the ASEAN.

At the outset, these were inspired by those found in charters or agreements such as, but not perhaps limited to, the United Nations Charter, Bandung Declaration of 1955, Declaration of the ASA of 1961, and Manila Agreements of 1963 on the MAPHILINDO.[533] They later evolved as new issues or problems arose and ASEAN leaders were confronted with the opportunity to realign interests and give form to new ideas.[534] Many theories could be cited to explain these changes but as to the moral foundation of such evolution of norms, Solidum cites the shared cultural values among ASEAN member states:

> "Asians view the world holistically and not compartmentally. Such a view proceeds from the desire to be in harmony with nature. For example, needs are always part of the whole situation because needs are identifiable with the communal nature of Asians. Every one becomes part of a situation or need and this is why Asian thought and actions acquire a moral sense. Experts have found out that Asian thinking, unlike the West, does not proceed on a linear deductive line but by induction and intuition using symbols, riddles, and feeling. In this way, there is no fear of missing some objects on the way, which might not be along the linear deductive line. Asian thought consists of enveloping moves, only focusing on a specific center whenever this is sensed."[535]

That said, ASEAN principles and norms can be distinguished into either legal-rational or socio-cultural norms, wherein the former are the formal rationalistic principles of law while the latter are the basis for informal social controls and habits within ASEAN.[536] The following portion discusses each one.

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533 *Solidum,* pp. 79, 80.
534 *Solidum,* pp. 79, 80.
535 *Solidum,* p. 79.
536 *Narine,* Forty Years of ASEAN, p. 413.

a. Constitutional Principles

A reading of the ASEAN Charter would show the different principles that govern the ASEAN and its member states. These principles are the following: (1) respect for independence, sovereignty, equality, territorial integrity, and national identity of all member states; (2) shared commitment and collective responsibility in enhancing regional peace, security, and prosperity; (3) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law; (4) reliance on peaceful settlement of disputes; (5) non-interference in the internal affairs of ASEAN member states; (6) respect for the right of every member state to lead its national existence free from external interference, subversion and coercion; (7) enhanced consultations on matters seriously affecting the common interest of the ASEAN; (8) adherence to the rule of law, good governance, the principles of democracy and constitutional government; (9) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; (10) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN member states; (11) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN member state or non-ASEAN state or any non-state actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN member states; (12) respect for the different cultures, languages, and religions of the peoples of the ASEAN, while emphasizing their common values in the spirit of unity in diversity; (13) the centrality of the ASEAN in external political, economic, social and cultural relations remaining actively engaged, outward-looking, inclusive, and non-discriminatory; and (14) adherence to multilateral trade rules and ASEAN rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.[537]

One can derive from the foregoing enumeration, among others, the different legal-rationalistic norms that define and guide ASEAN actions as well as govern the relationships between member states. To begin, the ASEAN recognizes through ZOPFAN the "right of every state, large or small, to lead its national existence free from outside interference in its internal affairs as this interference would adversely affect its freedom, independence, and integrity, and declared that the neutralization of South-

537 ASEAN Charter, art. 2.

east Asia is a desirable objective."[538] In relation thereto, the TAC laid down the following legal-rationalistic norms the ASEAN abides to: "(1) prohibition against the use of force and a commitment to pacific settlement of disputes, (2) regional autonomy, (3) doctrine of non-interference, and (4) no military pacts and a preference for bilateral defense cooperation."[539] Further, Article 11 of TAC enjoins member states to endeavor "to strengthen their respective national resilience in their political, economic, socio-cultural, as well as security fields in conformity with their respective aspirations, free from external interference as well as internal subversive activities in order to preserve national identities."[540]

The principle of non-interference is not unique to the ASEAN as it virtually exists in other regional organizations and said to underpin the entire inter-state system.[541] This notwithstanding, the ASEAN was able to make the said principle their own as follows:

At the outset, the use of the principle of non-intervention in the ASEAN was grounded on a background of the following facts: history of colonial intervention, the great military intervention during the Cold War, and "the emergence of post-colonial nation-states in Southeast Asia, whose interstate disputes were compounded by internal problems with no regard for territorial frontiers".[542] As such, the use of the principle was a response to the challenges and problems then faced by the ASEAN, the member states of which were relatively newly independent and have "weak" internal structures.[543] There was emphasis on building each member states' national or internal resiliency to promote regional security and collaboration instead of relying on the "military umbrella of any great power" – "if each member nation can accomplish an overall national development and overcome internal threats, regional resilience will automatically result much in the same way a chain derives its overall strength from the strength

538 ZOPFAN Declaration of 1971; *Ramcharan*, p. 65.

539 TAC, art. 2; *Goh*, p. 114; *Narine,* Forty Years of ASEAN, p. 413; *Ramcharan,* p. 65.

540 TAC, art. 11; *Ramcharan,* p. 65.

541 *Severino,* ASEAN Today and Tomorrow, pp. 60-61.Said principle originated from writings of eighteenth century European legal scholars. It was then popularized by Latin American states in the 19th and 20th centuries, when they invoked the same to rebuff recolonization and meddling by Europeans, and when they wanted the United States to accept said doctrine, respectively. Thereafter, said principle found itself in the Charter of the United Nations. See *Acharya,* Whose Ideas Matter?, pp. 32-33; *Solidum,* p. 79.

542 *Ramcharan,* p. 65.

543 *Acharya,* Constructing a Security Community, p. 57.

of its constituent parts."[544] Moving forward, the principle of non-intervention was contemplated by the ASEAN as a moral and strategic doctrine, to "protect the weak from the strong".[545]

The principle of non-intervention as applied in the ASEAN context must be understood to be more than a mere reiteration of the original European or Latin American concept.[546] It does not only contemplate one's right to self-determination or the prohibition of entering into great power-led military arrangement, but in operative terms, it likewise covers the following aspects: "(1) refraining from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of government as basis for deciding membership in the ASEAN; (2) criticizing the actions of states, which were deemed to have breached the non-interference principle; (3) denying recognition, sanctuary, or other forms of support to any rebel group seeking to destabilize or overthrow the government of a neighboring state; (4) providing political support and material assistance to member states in their campaign against subversive and destabilizing activities."[547] Stating it otherwise, the principle contemplates minding one's own domestic business and affairs, refraining from actions and decisions that have a domestic effect on the other fellow member state, and/or keeping to themselves any criticism or comment that they may have against the actions or decisions of the other state. Herein the non-confrontational aspect of the ASEAN is illustrated.

In connection to the abovementioned, a variation of the first mentioned aspect of non-intervention, i.e. "refraining from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of government as basis for deciding membership in ASEAN," was proposed historically at two instances in between the periods when the ASEAN was expanding its membership and the time it was reconsolidating itself after facing many challenges and problems in the Southeast Asian region.

The first time the proposal to change the principle of non-intervention was during the invasion of Cambodia when a Malaysian political leader criticized the norm of non-intervention as playing a role in the failure

544 *Acharya*, Constructing a Security Community, p. 57.
545 *Acharya*, Whose Ideas Matter?, p. 73.
546 *Acharya*, Whose Ideas Matter?, p. 38.
547 *Acharya*, Constructing a Security Community, p. 57.

of ASEAN to address then Cambodia's problem and suggested the use of "constructive intervention", which had similarities with the concepts of humanitarian assistance, collective intervention, and peace-building.[548] This suggestion however died its natural death when said political leader was removed from office.[549]

The second time was during the 1997 financial crisis. In a domestic problem that spilled over regionally, the then foreign minister of Thailand, Surin Pitsuwan, raised that the principle of non-intervention should be modified to allow the ASEAN to play a constructive role in managing domestic issues with regional consequences.[550] The concept of "flexible engagement" (deviating from the principle of non-intervention) was then proposed to enable the ASEAN to quickly avoid and/or address problems and issues with regional repercussions: this meant the "practice of ASEAN members discussing the domestic policies of other members when those policies had regional/cross-border implications."[551]

Only the Philippines supported this idea however.[552] Most were wary that such open criticism could open up old wounds ASEAN sought to alleviate.[553] Instead, as a compromise, the member states all agreed on the use of "enhanced interaction", a process wherein individual member states could comment on domestic policies of another, should these have regional repercussions, but would leave ASEAN out of the equation.[554] This same "enhanced interaction" was subsequently used in establishing the ASEAN Surveillance Process and ministerial troika, and eventually found itself in the ASEAN Charter.[555] Moreover, should there be instances when it would seem that the "flexible engagement" concept has been accepted, like for instance in how ASEAN member states dealt with the leaders of the military junta in Burma, recent institutional changes in the ASEAN, overall, are evolutionary rather than a break from established principles and norms, like as it how with the principle of non-intervention.[556]

548 *Acharya*, Whose Ideas Matter?, p. 126.
549 *Acharya*, Whose Ideas Matter?, p. 127.
550 *Acharya*, Whose Ideas Matter?, p. 127.
551 *Acharya*, Whose Ideas Matter?, p. 128; *Funston*, p. 206; *Narine*, Forty Years of ASEAN, p. 421.
552 *Acharya*, Whose Ideas Matter?, p. 132.
553 *Acharya*, Whose Ideas Matter?, p. 132; *Funston*, p. 206; *Narine*, Forty Years of ASEAN, p. 421.
554 *Acharya*, Whose Ideas Matter?, p. 134; *Narine*, Forty Years of ASEAN, p. 421.
555 ASEAN Charter, art. 2; *Narine*, Forty Years of ASEAN, p. 420.
556 *Acharya*, Whose Ideas Matter?, pp. 137-139, 149.

b. Normative Principles

Aside from the legal-rationalistic norms abovementioned, which mainly emphasizes the primacy of the principle of non-intervention in ASEAN dealings, the ASEAN Charter provides the different fundamental principles on which the ASEAN is grounded on. These more or less represent a set of values held in common by the member states, which they decide to be part and parcel of the governing principles of ASEAN. These include (1) adherence to the rule of law, good governance, the principles of democracy and constitutional government; (2) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; (3) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN member states; and (4) upholding unity while still maintaining respect for cultural diversity.[557]

c. Decision-making norms: ASEAN Way

ASEAN socio-cultural norms are distinct to Southeast Asia and are designated as the "ASEAN Way".[558] The ASEAN Way constitutes working guidelines by which conflicts could be managed and also describe the means of carrying out actions, not specific ends, within the ASEAN.[559] The ASEAN Way includes the following principles: "principle of seeking agreement and harmony, the principle of sensitivity, politeness, non-confrontation and agreeability, the principle of quiet, private, and elitist diplomacy versus the public washing of dirty linen, and the principle of being non-Cartesian, non-legalistic."[560] If one would recall the principle of non-intervention, which can be best described as non-confrontational, then the ASEAN Way reinforces this characteristic through the aforementioned characterization of what it denotes.

In reaching common organizational positions, the processes of consultation and consensus building are used.[561] Based on Javanese tradition,

557 ASEAN Charter, art. 2.
558 *Narine*, Forty Years of ASEAN, p. 414.
559 *Goh*, p. 114.
560 *Acharya*, Whose Ideas Matter?, p. 94; *Goh*, p. 114.
561 *Acharya*, Constructing a Security Community, p. 65; *Narine*, Forty Years of ASEAN, p. 414.

consensus building has two (2) components: *muswarayah*(consultations) and *mufakat*(consensus).[562]As Emmerson explained:[563]

> "xxx The underlying approach to decision-making in ASEAN is the consensus approach, embodied in the Malay terms *musyawarah* and *mufakat*, which relies largely on patient consensus-building to arrive at informal understandings or loose agreements. As the former Prime Minister of Singapore, Lee Kuan Yew, has commented, 'We have made progress in an ASEAN manner, not through rules and regulations, but through *Musyawarah*and consensus.'
>
> "*Musyawarah*, the process of decision-making through discussion and consultation, and *mufakat*, the unanimous decision that is arrived at, are associated with the traditional approach to decision-making in the region and have played a role in village politics for centuries and, culturally, can be identified as part of the regional social system. The concept involves processes including intensive informal and discreet discussions behind the scenes to work out a general consensus which then acts as the starting point around which the unanimous decision is finally accepted in more formal meetings, rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law. The 'ASEAN way' relies to a large extent on the personal approach in contrast to the Western way of dependence on structures and their functions. The way of making regional decisions dealing with co-operation among the member States adopted by ASEAN reflects its attitude of rejecting being a supra-national body like the European Communities.' xxx"[564]

In line with this, it is believed that while majority voting might put "a strain at the fabric" of the ASEAN,[565] decision-making through *muswarayah* and *mufukat* is based on the understanding that "a leader should not act arbitrarily or impose his will, but rather make gentle suggestions of the path a community must follow, being careful always to

562 *Acharya,* Constructing a Security Community, pp. 65-66.

563 *Davidson,* p. 167., *citing* Opening Address by H.E. Lee Kuan Yew, (then) Prime Minister of Singapore, in 15th ASEAN Ministerial Meeting and Post-Ministerial Meeting with the Dialogue Countries, Singapore, 14–18 June 1982, ASEAN Secretariat (1982).

564 See also *Di Floristella,* p. 24; *Narine,* The New ASEAN in Asia Pacific and Beyond, pp. 17-19.

565 *Severino,* ASEAN Today and Tomorrow, pp. 16-17.

consult all other participants fully and to take their views and feelings into consideration before delivering his synthesis conclusions."[566] Thus, during the *muswarayah* process, paramount consideration is given to inclusiveness, informality, and equality, while participants are allowed to air their differences without the threat of the majority imposing views on the minority, and consequently, no member state would feel its national interests are threatened by collective decisions and consequently avoid derailing cooperation in other areas.[567] Additionally, the psychological setting of the process is important not to be hostile, limiting discussions to non-contentious issues and the same being "not as opponents but between friends and brothers."[568]

Considering this, the idea of consensus is believed to be a pragmatic way in carrying out ASEAN affairs.[569] However, it must not be confused with unanimity, but rather, it is a commitment in finding ways to move forward by establishing matters which already have broad support.[570] In other words, one may not always be comfortable but as long as one's basic interests are not trampled on, one must go along.

A necessary consequence of this consensus building process is that ASEAN decision-making is often "at the pace of its slowest member", making sure that no one would be left behind.[571] At the same time, the ASEAN follows the "ASEAN minus X" principle, wherein member states are allowed to opt out of agreements with the option of joining at a later time to avoid slowing down institutional progress.[572] Herein, the quiet diplomacy, for which the ASEAN has later been additionally known for, applies: in the event that the member states cannot resolve contentious issues between themselves, they can compartmentalize them in the meantime so they could focus on other areas in their agenda.[573] And should ASEAN member states cannot agree on a common policy, they would go their separate ways while "couching their differences in language

566 *Acharya*, Constructing a Security Community, p. 66.
567 *Acharya*, Constructing a Security Community, p. 66; *Di Floristella*, pp. 54-55; *Narine*, Forty Years of ASEAN, p. 414; *Weatherbee*, International Relations, p. 99.
568 *Acharya*, Constructing a Security Community, p. 66.
569 *Acharya*, Constructing a Security Community, p. 66.
570 *Acharya*, Constructing a Security Community, p. 67.
571 *Weatherbee*, International Relations, p. 99.
572 *Narine*, Forty Years of ASEAN, p. 414.
573 *Narine*, *The New ASEAN in Asia Pacific and Beyond*, *p. 19.*

that obscures differences."[574] Understandably, some would criticize these circumstances as some lack of political will from ASEAN.[575] Nevertheless, it is a manner by which the ASEAN thought to avoid compromising political cohesion by conflicts over functional programs where competitive national interests might come into play.[576] As such, ASEAN Way may be described as a way to highlight existing least common denominators among member states and use the same in a manner most beneficial to the regional framework, while not letting other irreconcilable differences get in the way of progress.

## C. Cross-border movement of evidence: ASEAN Mutual Legal Assistance in Criminal Matters

The following discussion centers on the applicable regime on mutual legal assistance in criminal matters by the ASEAN. It starts with its historical development, which includes an insight on how ASEAN deals with criminal matters, how it developed its policy on the same throughout the years and in response to circumstances, and how the regional organization fostered and/or promoted cooperation in criminal matters, in general. Through this exercise, one would get a sense of how the ASEAN positions itself and decides vis-à-vis legal cooperation, particularly mutual legal assistance in criminal matters. Afterwards, essential substantive and procedural provisions are discussed.

### 1. Historical Development of ASEAN Mutual Legal Assistance

The problem of transnational crime is severe and pervasive in the Southeast Asian region and consists of illicit drug trafficking, human trafficking, money laundering, transnational prostitution, piracy, arms smuggling, international economic crimes, cybercrime, and corruption.[577] It bears emphasis, for example, that drug trafficking is one of, if not the most, serious transnational criminal problems in the region, given that three ASEAN member states (e.g. Myanmar, Laos, and Thailand) are major producers

574 *Narine*, Forty Years of ASEAN, p. 414.
575 *Weatherbee*, International Relations, p. 99.
576 *Weatherbee*, International Relations, p. 99.
577 *Emmers*, Securitization of Transnational Crime, p. 6; *Sovannasam*, p. 77.

of narcotics and transit points for drugs sent to North America, Europe, and other parts of Asia.[578] At the same time, some of the largest and most dangerous criminal organizations operate in the region (e.g. Chinese triads, Japanese yakuza, Vietnamese gangs).[579]

As early as 1972 the ASEAN exerted efforts to combat transnational crime.[580] Beginning with drug abuse and illicit trafficking, the ASEAN established an ASEAN Expert Group Meeting on the Prevention and Control of Drug Abuse.[581] Immediately following said meeting was the establishment of the ASEAN Legal Experts on Narcotics in September 1973.[582] The Declaration of Bali Concord I was a further development in addressing the problem, when the same called for intensified cooperation among member states and relevant international bodies in the prevention and eradication of narcotics abuse and drug trafficking.[583] The same Declaration delved on the possibility of developing judicial cooperation, including an extradition treaty.[584] Following suit are the following ASEAN endeavors as summarized in Table 2 below:[585]

| Date | Description |
|---|---|
| June 1976 | Declaration of Principles to Combat Drug Abuse, signed by the ASEAN Foreign Ministers |
| 1976 | ASEAN Drug Experts held first meeting under the auspices of the ASEAN Permanent Committee on Socio-Cultural Activities |
| 1998 | Sixth ASEAN Summit and Hanoi Plan of Action called for operationalization of ASEAN Work Program to operationalize ASEAN Plan of Action on Drug Abuse Control by 2004 |

578 *Emmers*, Securitization of Transnational Crime, p. 6; *Kulsudjarit*, pp. 447-455.
579 *Emmers*, Securitization of Transnational Crime, p. 6.
580 *Sovannasam*, p. 78.
581 *Solidum*, p. 146.
582 *Solidum*, p. 146.
583 *Sovannasam*, p. 78.
584 *Sovannasam*, p. 78.
585 *Solidum*, pp. 146-147.

| Date | Description |
|---|---|
| July 1998 | Joint Declaration for a Drug-Free ASEAN by year 2020, embodying measures to reduce demand and supply, eradicate illicit drug production, processing, and trafficking in ASEAN, as well as encourage linkages among ASEAN Senior Officials on Drug Matters ("ASOD"), ASEANAPOL, and ASEAN Ministerial Meeting on Transnational Crime |

*Table 1: ASEAN initial efforts to combat drug abuse and illicit trafficking*

These initial efforts notwithstanding, globalization, technological advancement, greater mobility of people and resources through national borders has enabled transnational crime to become more pervasive, diversified, and organized.[586] The region had to acknowledge and deal with many new forms of organized crimes that transcend national borders and political sovereignty such as terrorism, new types of drug abuse and trafficking, innovative forms of money laundering activities, arms smuggling, trafficking in women and children, and piracy.[587]

At the Fifth ASEAN Summit in December 1995 in Bangkok, ASEAN leaders called for enhanced "cooperative efforts against drug abuse and illicit trafficking with special emphasis being given to demand reduction programs and information exchange and dissemination, with the aim of creating a drug-free ASEAN."[588] ASEAN Foreign Ministers also recognized the need for closer cooperation and coordinated efforts on combating transnational crime. During the 29th ASEAN Ministerial Meeting in Jakarta in July 1996, they shared the view that the management of transnational issues, such as narcotics trafficking, economic crimes (including money laundering), environmental crimes, and illegal migration, is imperative so that they would not affect the long-term viability of ASEAN and its member states.[589] This shared point of view was carried on further during

586 ASEAN Plan of Action to Combat Transnational Crime; Joint Communiqué of the Second ASEAN Ministerial Meeting on Transnational Crime (AMMTC), Yangon, Myanmar, 23 June 1999; *Sovannasam,* pp. 77,78-79.

587 ASEAN Plan of Action to Combat Transnational Crime; *Sovannasam,* p. 77.

588 ASEAN Plan of Action to Combat Transnational Crime.

589 ASEAN Plan of Action to Combat Transnational Crime, p.3; *Emmers*, Securitization of Transnational Crime, p. 9; *Sovannasam,* p. 79.

the 30th and 31st ASEAN Ministerial Meetings in 1997 and 1998, respectively.[590]

Correspondingly, ASEAN leaders raised again its call to study the possibility of closer regional cooperation on criminal matters, including the possibility of having an extradition treaty, and resolved to take firmer and sterner measures to combat transnational crime such as drug trafficking and trafficking of persons, during the First Informal Summit in November 1996 and Second Informal Summit in December 1997, respectively.[591] Notably, it was during the same Second Informal Summit in December 1997 when the ASEAN Vision 2020 was adopted and likewise, ASEAN member states adopted an ASEAN Declaration on Transnational Crime, which though still includes illicit drug trade, expands the scope of definition of what constitutes transnational crime.[592] This could be considered as the first Asian regional framework in combating drug abuse and illegal trafficking, as well as other forms of transnational crimes. Through said Declaration, the ASEAN Ministers' Meeting on Transnational Crime ("AMMTC") was established.[593] The AMMTC shall convene once every two years, and together with its senior-officials counterpart, shall become regular ASEAN forums encompassing bodies such as the ASEAN Senior Officials on Drug Matters ("ASOD") and officials dealing with functional areas such as customs, consular matters, and immigration.[594] Notably, the ASOD is one of the oldest ASEAN platforms for regional cooperation dealing with regional problems, which focuses on "prevention and rehabilitation, education, public awareness, and law enforcement."[595]

There is also an association of police forces of the different ASEAN member states called the ASEANAPOL, with which the ASEAN authorities could coordinate with, although independent and outside the formal ASEAN framework. The ASEANAPOL serves a vital role as more or less a coordinating body that shares information, intelligence, databases, and otherwise cooperates at the operational level.[596] Furthermore, the Declaration on Transnational Crime introduced proposals that encourage member

590 *Emmers*, Securitization of Transnational Crime, p. 9.
591 ASEAN Plan of Action to Combat Transnational Crime; *Emmers*, Securitization of Transnational Crime, pp. 8-9; *Sovannasam,* p. 79.
592 *Solidum,* p. 147; *Sovannasam,* p. 79.
593 ASEAN Declaration on Transnational Crime, para. 2; *Severino,* ASEAN, p. 33.
594 *Emmers*, Securitization of Transnational Crime, p. 10; *Severino,* ASEAN, pp. 33-34; *Weatherbee,* International Relations, p. 201.
595 *Severino,* ASEAN, p. 34.
596 *Severino,* ASEAN, p. 34.

states "to exchange and disseminate information, to sign bilateral treaties and mutual assistance agreements, to assign police liaison officers to other Southeast Asian capitals and to explore ways of extending cooperation with the dialogue partners, the UN, and other organizations."[597]

As Emmers notes, the establishment of the AMMTC was integral in the securitization of transnational crime: transnational crime was a non-traditional threat to ASEAN member states and their respective societies.[598] Subscribing to the principle of comprehensive security, which goes beyond the requirements of traditional security (e.g. military) and takes into consideration NTS threats or aspects vital to regional and national resilience,[599] the ASEAN believes that transnational crime is a threat "to state security and regional stability, to sovereignty and rule of law, to social and moral fabrics of Southeast Asian countries, and economic development," which in general, has the potential of eroding the political, social, and economic well-being of the ASEAN.[600] Having said this, in view of the aims laid down in the abovementioned Declaration, the ASEAN did not waste time and thereafter entered into joint declarations and/or agreements with other countries in efforts to combat transnational crime. Table 2 below provides these declarations and/or agreements.[601] Significantly, terrorism was designated by the ASEAN ministers as early as 1997 as one of the crimes on which they would cooperate and further collaboration and cooperation in terms of counter-terrorism measures was witnessed after the 11 September 2001 attacks in the United States.[602] Discussion about fortifying counter-terrorism measures resulted eventually, among others, to the Convention on Counter-Terrorism in 2007.

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597 *Emmers*, Securitization of Transnational Crime, p. 10.

598 *Emmers*, Securitization of Transnational Crime, p. 11.

599 If one backtracks to the chapter discussing the institutional framework and legal framework of the ASEAN, in particular the discussion on the position of the ASEAN as regards regional security, the ASEAN concept of "regional security" is not limited to the the concept of traditional security, which is state and military-centered kind of security (e.g. defense, etc.) but there is a slow but steady process of integrating NTS in the discussion. However, NTS remains to revolve around state actors and the concept of having the individual as a security reverent remains unpopular in the region.

600 *Emmers*, Securitization of Transnational Crime, p. 15; *Sovannasam,* p. 78.

601 *ASEAN Political-Security Department*, pp. 9-106.

602 *Severino,* ASEAN, p. 34; *Sovannasam,* p. 80.

| Date | Name of Agreement and/or Declaration |
|---|---|
| **Transnational Crime, in general** | |
| 25 March 1998 | Manila Declaration on the Prevention and Control of Transnational Crime |
| 23 June 1999 | ASEAN Plan of Action to Combat Transnational Crime |
| 02 October 2015 | Kuala Lumpur Declaration in Combating Transnational Crime |
| 20 September 2017 | ASEAN Plan of Action to Combat Transnational Crime (2016-2025) |
| **Counter-Terrorism** | |
| 5 November 2001 | 2001 ASEAN Declaration on Joint Action to Counter Terrorism |
| 1 August 2002 | ASEAN-US Joint Declaration for Cooperation to Combat International Terrorism |
| 3 November 2002 | Declaration on Terrorism by the 8th ASEAN Summit |
| 4 November 2002 | Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues |
| 27 January 2003 | Joint Declaration for Cooperation to Combat International Terrorism, 14th ASEAN-EU Ministerial Meeting |
| 8 October 2003 | ASEAN-India Joint Declaration for Cooperation to Combat International Terrorism |
| 10 January 2004 | Memorandum of Understanding ("MOU") between the Governments of the Member Countries of the Association of Southeast Asian Nations and the People's Republic of China on Cooperation in the Field of Non-Traditional Issues |
| 1 July 2004 | ASEAN-Australia Joint Declaration for Cooperation to Combat International Terrorism |
| 2 July 2004 | ASEAN-Russian Federation Joint Declaration for Cooperation to Combat International Terrorism |
| 30 November 2004 | ASEAN-Japan Joint Declaration for Cooperation to Combat International Terrorism |

| Date | Name of Agreement and/or Declaration |
|---|---|
| 27 July 2005 | ASEAN-Republic of Korea Joint Declaration for Cooperation to Combat International Terrorism |
| 29 July 2005 | ASEAN-New Zealand Joint Declaration for Cooperation to Combat International Terrorism |
| 29 July 2005 | ASEAN-Pakistan Joint Declaration for Cooperation to Combat International Terrorism |
| 28 July 2006 | ASEAN-Canada Joint Declaration for Cooperation to Combat International Terrorism |
| 13 January 2007 | ASEAN Convention on Counter-Terrorism |
| 30 June 2009 | ASEAN Comprehensive Plan of Action on Counter Terrorism |
| **Drugs** | |
| 25 July 1998 | Joint Declaration on Drug-Free ASEAN |
| 24-25 July 2000 | Joint Statement by the 33rd ASEAN Ministerial Meeting |
| 11-13 October 2000 | Bangkok Political Declaration: In Pursuit of a Drug-Free ASEAN 2015 |
| 20 October 2005 | ACCORD Plan of Action on Drug Free ASEAN |
| 17 November 2009 | ASEAN Work Plan on Combating Illicit Drug Production, Trafficking and Use (2009-2015) |
| **Human Trafficking** | |
| 29 October 2004 | Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Subregion (COMMIT) |
| 29 November 2004 | ASEAN Declaration against Trafficking in Persons Particularly Women and Children |
| 13 January 2007 | ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers |
| 25 June 2007 | ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons |
| 2007 | Guidelines for the Protection of the Rights of Trafficked Children in Southeast Asia |
| August 2010 | ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases |

| Date | Name of Agreement and/or Declaration |
|---|---|
| 21 November 2015 | ASEAN Plan of Action against Trafficking in Persons, especially Women and Children |
| 21 November 2015 | ASEAN Convention against Trafficking in Persons, Especially Women and Children |
| October 2016 | Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons |
| **Consular and Immigration** | |
| 25 July 2006 | ASEAN Framework Agreement on Visa Exemption |
| 29-30 July 2007 | Guidelines for the Provision of Emergency Assistance by ASEAN Missions in Third Countries to Nationals of Member Countries in Crisis Situation |

*Table 2: ASEAN Documents, Declarations, and Agreements vis-a-vis Transnational Crime*

In between the aforementioned agreements, declarations, and other documents, ASEAN member states under the ASEAN framework likewise entered into an Agreement on Information Exchange and Establishment of Communication Procedures on 07 May 2002 to promote cooperation in combating transnational crime, including terrorism.[603] Thus far, signatories to said Agreement are the Philippines, Indonesia, Malaysia, Thailand, Brunei, and Cambodia.[604]

As regards the 1999 Plan of Action to Combat Transnational Crime (adopted during the second AMMTC in June 1999), general and specific objectives in combating transnational crime were enumerated, including, but not limited to, different programmes of action that would expand regional norms related to combating transnational crime such as information exchange, legal matters, law enforcement matters, training, institutional capacity-building, and extra-regional cooperation.[605]

Furthermore, the same Plan of Action additionally defined and delineated the existing institutional framework in combating transnational crime

603 Agreement on Information Exchange and Establishment of Communication Procedures, arts. 2 and 3; *Caballero-Anthony,* Regional Security in Southeast Asia, p. 217; *Sovannasam,* p. 80.

604 *Soesilowati,* p. 235; *Sovannasam,* p. 80.

605 ASEAN Plan of Action to Combat Transnational Crime; *Emmers*, Securitization of Transnational Crime, p. 11; *Reeves*, p. 85.

in three (3) ways. First, the AMMTC has been designated as the highest policy-making body and main authority on ASEAN cooperation vis-à-vis transnational crime.[606] Composed of ministerial-level representatives of each ASEAN member state responsible for combating transnational crime, the AMMTC would supervise the activities of ASEANAPOL, ASOD, ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs of the Ministries of Foreign Affairs ("DGICM"), and the ASEAN Directors-General of Customs ("ADGC"), and coordinate closely with the ASEAN Senior Law Officials' Meeting ("ASLOM") and the ASEAN Attorney Generals' Meeting.[607] Second, a Senior Officials Meeting on Transnational Crime ("SOMTEC") has been institutionalized to carry out and coordinate measures approved by the AMMTC and simultaneously build a work programme to implement the plan of action.[608] Third, an ASEAN Center for Combating Transnational Crime ("ACTC") has in principle been set up, which shall "implement the plan of action, propose regional strategies, collect data on legal matters and promote intelligence sharing among the members."[609]

Albeit the aforementioned is the primary institutional framework in combating transnational crime, there are a number of other ASEAN bodies which serve an ancillary function in combating transnational crime. As Un Sovannasam, a Senior Officer in the ASEAN Secretariat notes, these ASEAN bodies are the ASEAN Finance Ministers ("AFM"), the ASEAN Law Ministers Meeting ("ALMM"), and the ASEAN Committee on Disaster Management ("ACDM").[610] The AFM, though primarily responsible in enhancing cooperation in customs activities through the ASEAN Agreement on Customs, should also strengthen cooperation in combating trafficking of narcotics and psychotropic substances while at the same time facilitate joint efforts in anti-smuggling and customs control.[611] The ALMM, on the other hand, shall assist the ASLOM in ASEAN legal cooperation.[612] In the same vein, the ACDM is responsible for ASEAN cooperation in disaster management, whether said disaster is natural or man-made, with a

606 *Reeves,* p. 85; *Sovannasam,* pp. 81, 82.
607 See ASEAN Plan of Action to Combat Transnational Crime; *Emmers*, Securitization of Transnational Crime, p. 11; *Reeves,* p. 85; *Sovannasam,* p. 81.
608 *Emmers*, Securitization of Transnational Crime, p. 11; *Sovannasam,* p. 81.
609 *Emmers*, Securitization of Transnational Crime, p. 11.
610 *Sovannasam,* pp. 81-82.
611 *Sovannasam,* p. 81.
612 *Sovannasam,* p. 82.

view to manage adverse consequences to the social and economic development of ASEAN.[613]

The foregoing mechanisms and legal framework on transnational crime were formally placed under the auspices of the ASEAN Security Community by virtue of the Declaration of Bali Concord II in 2003. Compared to a tacit declaration in its 1967 Bangkok Declaration, the ASEAN this time explicitly declared and defined its efforts to pursue its political and security purposes through the establishment of the ASEAN Security Community.[614] In light of this, one of the objectives of the ASEAN Security Community is the full utilization of "the existing institutions and mechanisms within ASEAN with a view to strengthening national and regional capacities to counter terrorism, drug trafficking, trafficking in persons and other transnational crimes; and shall work to ensure that the Southeast Asian Region remains free of all weapons of mass destruction."[615]

To implement the ASEAN Security Community, together with the ASEAN Economic Community and ASEAN Socio-Cultural Community, the ASEAN came up with the Vientiane Action Programme("VAP") in November 2004 that provided measures that sought to put the Declaration of Bali Concord II into action.[616] In connection to said VAP, one of the programme areas and measures provided under the ASEAN Security Community is to undertake preparatory steps with a view of establishing an ASEAN Treaty on Mutual Legal Assistance on Criminal Matters.[617] A mutual legal assistance treaty would enable the ASEAN member states to request another to provide information and evidence for the purpose of an investigation or prosecution.[618] Simultaneously, the VAP enjoins the establishment of an ASEAN extradition treaty, which was already envisaged by the 1976 Declaration of ASEAN Concord.[619] Such an extradition treaty would allow ASEAN member states to request from another the arrest and/or surrender of an individual to face criminal proceedings and/or execution of sentence in the requesting state.[620] Said envisioned

613 *Sovannasam*, p. 82.
614 *Severino*, ASEAN, p. 36.
615 Declaration of Bali Concord II, §A(10).
616 *Severino*, ASEAN, p. 37.
617 Vientiane Action Programme, „Programme Areas and Measures", § 1.2.5.
618 *Secretariat*, p. 22.
619 Vientiane Action Programme, „Programme Areas and Measures", § 1.2.6.
620 *Secretariat*, p. 22; *Bassiouni*, p. 4; *Klip*, p. 456.

extradition treaty shall be drafted under the purview of the ASEAN Senior Law Officials Meeting ("ASLOM").[621]

An ASEAN extradition treaty has yet to be established among the ASEAN member states. At most, there was an endorsed 2019 Model ASEAN Extradition Treaty as well as certain provisions regarding extradition are provided in the 2007 ASEAN Convention on Counter-Terrorism.[622] Nonetheless, ASEAN member states have entered on 29 November 2004 into a "Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries" ("ASEAN MLAT").[623] This treaty is said to be predicated by the Jakarta bombings of the Marriot Hotel and Australian embassy in August and September 2004, respectively.[624] The treaty is thus believed to facilitate and enhance further efforts to combat transnational crime in the Southeast Asian region.[625] The ASEAN MLAT makes assistance obligatory as a matter of international law. Traditionally, international cooperation was done between member states through processes such as letters rogatory.[626] This means that previously, when assistance is sought through this traditional manner, the requested state is not obligated to accept the request or act pursuant thereto.[627] It is fully discretionary.

Furthermore, the ASEAN MLAT does not only provide a process by which member states can request and give assistance to one another in the collection of evidence and/or information for criminal investigations and criminal proceedings, but it likewise facilitates the ASEAN member states' obligations under different mutual legal assistance in criminal matters regimes that have been established through other international instruments such as the United Nations Convention on Transnational Organized Crime ("UNTOC"), United Nations Convention Against Corruption ("UNCAC"), and the UN Counter-Terrorism Conventions.[628]

The ASEAN MLAT is intended to operate in conjunction with existing mutual legal assistance mechanisms, both informal and formal.[629] Notably, international cooperation comes in various forms: informal and for-

621 Vientiane Action Programme, „Programme Areas and Measures", § 1.2.6.2.
622 ASEAN Convention on Counter-Terrorism, art. XIII.
623 *Severino,* ASEAN, p. 34.
624 *Soesilowati,* p. 235.
625 *Secretariat,* p. 26.
626 See *Zagaris*, p. 385.
627 *Bassiouni,* p. 8.
628 *Secretariat,* p. 26.
629 *Secretariat,* p. 27.

mal. Formal tools of cooperation include the aforementioned mutual legal assistance and extradition requests. Informal cooperation, on the other hand, refers to "exchange of information that occurs directly between law enforcement and regulatory agencies with their foreign counterparts."[630] Normally used prior to an investigation becoming official and/or prior to commencement of court proceedings, it is a "separate, less rule-bound international crime cooperation tool, which is available outside the formal mutual assistance regime" and the same enables law enforcement and regulatory agencies to "directly share information and intelligence with their foreign counterparts without any requirement to make a formal mutual assistance request."[631] Among the ASEAN member states, the ASEANAPOL provides an illustration for how this arrangement works.[632] Within the ASEAN framework itself, the Heads of Specialist Trafficking Units ("HSU") process vis-à-vis human trafficking is a relevant example on how informal cooperation works.[633] With regard to this, informal and formal tools of cooperation are not necessarily mutually exclusive from one another, but instead, are most of the time complementary.[634] Hence, the ASEAN MLAT does not detract from existing cooperative mechanisms and instead sought to enhance the existing working relationships amongst security and law enforcement agencies in the Southeast Asian region by providing another tool to combat transnational crime.[635]

Significantly, the ASEAN MLAT is cross-referenced in the 2007 ASEAN Convention on Counter-Terrorism,[636] and 2015 ASEAN Convention against Trafficking in Persons, Especially Women and Children,[637] respectively.

On late April 2019, the ASEAN MLAT has been elevated to an "ASEAN treaty" and made into a truly regional instrument like the TAC that allows non-ASEAN member states to accede and become contracting parties.

630 *Secretariat*, p. 22.
631 *Secretariat*, p. 22. See also *Bassiouni*, p. 19.
632 *Secretariat*, p. 22.
633 *Secretariat*, p. 22.
634 *Secretariat*, p. 23.
635 *Secretariat*, p. 27.
636 2007 ASEAN Convention on Counter-Terrorism, art. 12.
637 2015 ASEAN Convention against Trafficking in Persons, Especially Women and Children, art. 18.

## 2. Substantive Provisions: ASEAN MLAT

The ASEAN MLAT is composed of different provisions, differentiated between the substantive and the procedural, including but not limited to, the scope of application, and the different applicable principles, conditions, and exceptions, and the manner requests should be made and executed.

### a. Applicability of Assistance

As regards the aspect of applicability of assistance, four (4) things can be mentioned. First, the ASEAN MLAT reflects a mechanism found in traditional mutual legal assistance wherein the requesting state sends a request to another state (requested state) for the latter to provide the needed legal assistance.[638] This connotes that any cross-border access or transfer of information and/or evidence is subject to the discretion of the requested state.

It must be understood at this juncture that the mutual legal assistance contemplated in the ASEAN MLAT is assistance in its traditional sense.[639] The ASEAN MLAT does not apply to the following: (1) arrest or detention of a person in view of extraditing that person; (2) enforcement in the requested member state of criminal judgments imposed in the requesting member state (except as to the extent sanctioned by the requesting member state's domestic laws); (3) transfer of persons in custody to serve sentences; and (4) transfer of criminal proceedings.[640] Moreover, nothing in said ASEAN MLAT "entitles a state-party to undertake in the territory of another party the exercise of jurisdiction and/or perform functions reserved exclusively for the authorities of that other party by its domestic laws."[641] Hence, exercise of extraterritorial jurisdiction is not conferred. One would need the consent of the other member state beforehand. Interestingly, while this kind of provision could probably be found in other mutual legal assistance arrangements, this provision evinces arguably the ASEAN principle of respect for the other's sovereignty and territorial integrity.

638 See in general *Heard/Mansell*, p. 354.
639 *Secretariat,* p. 36.
640 2004 ASEAN Mutual Legal Assistance Treaty, art. 2, § 1.
641 2004 ASEAN Mutual Legal Assistance Treaty, art. 2, § 2.

Second, the ASEAN MLAT applies to all "criminal matters", namely investigations, prosecutions, and resulting proceedings,[642] and obligates state parties to "render to one another the widest possible measure of mutual legal assistance" in accordance with the provisions of the treaty and subject to the respective domestic laws applicable.[643] One may construe this as state parties having comparatively lesser discretion to refuse assistance.[644] It is only when there are legal provisions or provisions in the ASEAN MLAT or other treaty provision precluding assistance, then the requested member state may refuse assistance.[645] The ASEAN MLAT allows a requested member state the discretion to deny a request for assistance should there be non-compliance to any material terms of the ASEAN MLAT or other relevant arrangements.[646] Such discretionary ground being found in other MLA agreements, Bassiouni once interpreted this kind of provision as serving the dual purpose of reminding the requesting state to conform to treaty provisions and specifically granting the requested state the power to insist that a defective request be corrected or to deny the request altogether.[647]

Third, the ASEAN MLAT applies solely to the provision of mutual assistance among the state parties. The provisions contained therein do not create a right on the part of any private person "to obtain, suppress, exclude any evidence or to impede the execution of a request for assistance."[648]

Fourth, the territorial application of the ASEAN MLAT was intended to cover the ASEAN member states. By virtue however of being a true regional instrument like the TAC, the ASEAN MLAT is open to signature by other states, which are not ASEAN member states. At the date of this writing, there has been no other contracting party to the ASEAN MLAT other than the ASEAN member states, although according to an official in the ASEAN, there were states that manifested intent of being a signatory.[649]

642 2004 ASEAN Mutual Legal Assistance Treaty, art. 1, § 1.
643 2004 ASEAN Mutual Legal Assistance Treaty, art. 1, § 1.
644 See *Bassiouni*, p. 388.
645 See *Bassiouni*, Multilateral and Bilateral Enforcement Mechanisms, p. 388.
646 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 2.
647 *Bassiouni*, Multilateral and Bilateral Enforcement Mechanisms, p. 390.
648 2004 ASEAN Mutual Legal Assistance Treaty, art. 1, § 3.
649 Email correspondence with Sendy Hermawati (ASEAN Secretariat) dated 15 May 2019.

b. Types of Mutual Legal Assistance

As to what types of mutual legal assistance could be provided, the ASEAN MLAT enables the following types of assistance: "(1) taking of evidence or obtaining voluntary statements from persons; (2) making arrangements for persons to give evidence or to assist in criminal investigations; (3) effective service of judicial documents; (4) executing searches and seizures; (5) examining objects and sites; (6) providing original or certified copies of relevant documents, records, etc.; (7) identifying or tracing property derived from the commission of the offense and instrumentalities of the crime; (8) the restraining of dealings in property or the freezing of property derived from crime that may be recovered, forfeited, or confiscated; (9) the recovery, forfeiture, or confiscation of property derived from the commission of the offense; and (10) locating and identifying witnesses and suspects."[650] This list is not however mutually exclusive as the ASEAN MLAT provides a catch-all provision, in which it shall likewise cover "the provision of such other assistance as may be agreed and which is consistent with the objects of this treaty and the laws of the requested member state."[651] In other words, should any other form of mutual legal assistance be required, it could be granted depending on what the state parties may agree upon and whether the same is allowable by the domestic laws of the requested member state.

c. Compatibility with Other Arrangements

As initially noted above, the ASEAN MLAT recognizes that obligations for mutual legal assistance among the state parties can be found in other instruments. Hence, the ASEAN MLAT does not detract state parties from "providing assistance to each other pursuant to other treaties, arrangements, or the provisions of their national laws."[652]

To the same degree, the ASEAN itself acknowledges the existence of both informal and formal forms of cooperation in combating transnational crime. On one end, there could be other existing extradition and/or mutual legal assistance treaties ASEAN member states may have with each other. As it stands, no ASEAN extradition treaty exists. What is currently

650 2004 ASEAN Mutual Legal Assistance Treaty, art. 1, § 2; *Secretariat, pp. 36-37.*
651 2004 ASEAN Mutual Legal Assistance Treaty, art. 1, § 2(k); *Secretariat, p. 37.*
652 2004 ASEAN Mutual Legal Assistance Treaty, art. 23.

existing is only a ASEAN Model Extradition Treaty. On another end, informal cooperation exists amongst law enforcement and administrative agencies. Albeit independent of ASEAN as an organization, the ASEAN acknowledges the existence of the ASEANAPOL, which enables networking and information-sharing among the different Chiefs of Police of each ASEAN member state.

### d. Principles, Conditions, and Exceptions Applicable

A reading of mutual legal assistance treaties would reveal that a state party needs to satisfy certain principles and conditions as well as avoid any provided exceptions before mutual legal assistance requests can generally succeed.[653] These principles, conditions, and exceptions are generally said to be a reflection of state practices that have developed over time in response to concerns of protecting interests of both requesting and requested states, as well as human rights issues vis-à-vis the criminal justice process.[654] The ASEAN Secretariat had the occasion to enumerate the major principles, conditions, and exceptions as applicable to mutual legal assistance treaties as follows: (1) sufficiency of evidence, (2) dual criminality, (3) double jeopardy, (4) reciprocity, (5) speciality or use limitation, (6) human rights considerations, (7) rights of the accused or person charged of a criminal offense, (8) consideration of likely severity of punishment, (9) political offenses, (10) military offenses, (11) national and political interests, and (12) bank secrecy and financial offenses.[655] The following is a discussion of these different principles, conditions, and exceptions, which can be found as "limitations on assistance" in the ASEAN MLAT.[656]

#### i. Sufficiency of Evidence

The requirement of sufficiency of evidence is normally found in extradition regimes, especially in common law countries, wherein upon submission of an extradition request, the authority or tribunal for extradition

653 *Secretariat*, p. 44.
654 *Secretariat*, p. 44.
655 *Secretariat*, pp. 44-50; *Bassiouni*, Modalities of International Cooperation, pp. 5, 8-9; *Boister*, pp. 203-206, 218-219, 221, 226.
656 ASEAN MLAT, art. 3.

determines if there is sufficiency of admissible evidence to justify extradition.[657] In these cases however, full disclosure of evidence is not required, and there is typically a variation from one extradition regime to another as to the gamut of evidence needed to be presented.[658] After determining that there is legal basis to seek legal assistance, the requesting member state must then provide information to support its request and such information shall depend on the jurisdiction and nature of assistance sought.[659] Such sufficiency of evidence requirement has been imported in some mutual legal assistance treaties and normally, the information provided is directly proportional to the intrusiveness of the assistance sought: the more intrusive assistance is requested, the more supporting information the requesting state should provide.[660]

Applying this to the ASEAN MLAT, a sufficiency of evidence test can be found vis-à-vis execution of search and seizures: the requested member state shall execute a request for the search, seizure, and delivery of documents, records, or items "if there reasonable grounds for believing that the documents, records, or items are relevant to a criminal matter in the requesting state."[661] A similar import can be found in providing assistance in forfeiture proceedings, when the requesting member state must provide all information which the requested member state considers necessary in executing the forfeiture order.[662] Further, the requesting member state is obligated to furnish the requested member state, in addition to the mutual legal assistance request, the supporting original signed order or a duly authenticated copy thereof.[663]

### ii. Dual Criminality

Akin to extradition, mutual legal assistance usually requires dual or double criminality and the test is whether the conduct subject of the mutual legal assistance request be considered as a criminal offense in both the requesting and requested state, and not whether the conduct is punishable

657 *Boister*, p. 221.
658 *Boister*, p. 221.
659 See 2004 ASEAN Mutual Legal Assistance Treaty, art. 6: *Secretariat*, p. 44.
660 *Secretariat*, p. 44.
661 2004 ASEAN Mutual Legal Assistance Treaty, art. 18: *Secretariat*, p. 44.
662 2004 ASEAN Mutual Legal Assistance Treaty, art. 22, § 1.
663 2004 ASEAN Mutual Legal Assistance Treaty, art. 22, § 2.

as exactly the same offense in the states involved.[664] Practically speaking, this principle intends to ensure that states would only provide assistance to one another vis-à-vis conduct that they themselves consider "criminal".[665]

As a general rule, the absence of dual criminality is a mandatory ground to refuse assistance. The ASEAN MLAT provides that the requested member state shall refuse assistance if in its opinion "the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission" that, if it had occurred in the requested member state, "would not have constituted an offense against the laws of the requested member state."[666] This is regardless of the type of assistance being requested as the ASEAN MLAT provision does not provide any qualification. The provision admits of an exception however: the requested member state "may provide assistance in the absence of dual criminality if permitted by its domestic laws.[667]

### iii. Double Jeopardy

Double jeopardy (*ne bis in idem*) is part of international law, including international human rights law, wherein „no one shall be liable to be tried or punished again for an offense for which he has already been convicted or acquitted in accordance with the law and penal procedure of each State. "[668] It is correspondingly a condition in different mutual legal assistance instruments, albeit mentioned or defined in various manners.[669]

Double jeopardy is provided in the ASEAN MLAT as a mandatory ground for refusal. A requested state shall deny assistance when the request relates to an investigation, prosecution, or punishment of a person for an offense where the person either "has been convicted, acquitted, or pardoned by a competent court or other authority in the requesting or requested member state" or "has undergone the punishment provided by law of that requesting or requested member state, in respect of that

664 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 1(e); *Secretariat,* pp. 44-45; *Bassiouni,* Modalities of International Cooperation, pp. 5, 9.
665 *Secretariat,* p. 44.
666 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 1(e).
667 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 1(e); *Secretariat,* p. 44.
668 International Covenant on Civil and Political Rights, art. 14, § 7.
669 *Secretariat,* p. 44.

offense or of another offense constitute by the same act or omission as the first-mentioned offense."[670]

In respect to this one could initially observe the existing transnational element of the prohibition against double jeopardy, albeit the transnational element is limited to the requested and requesting states. There is a consideration of whether the person-in-interest has been convicted, acquitted, or pardoned in either the requesting or requested state, or whether said person has undergone the punishment already in either of the states involved in the MLA request. The applicable provision is however silent on whether it shall extend to convictions, acquittals, or pardons, or undergoing punishment for the same offense or set of facts in another ASEAN member state or third party state.

It must be further mentioned that the ASEAN MLAT provision mirrors more or less the double jeopardy prohibition contained in the ASEAN Human Rights Declaration regarding double jeopardy, to wit, "no person shall be liable to be tried or punished for an offense he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN member state".[671] Notably, the double jeopardy prohibition in the ASEAN Human Rights Declaration is subjected to the domestic law and penal procedure of the ASEAN member state and does not necessarily embody the same kind of transnational element the ASEAN MLAT provides.

### iv. Substantive Considerations of Human Rights

Treaties on international cooperation normally enshrine human rights considerations and instill measures to protect individuals subject to mutual legal assistance requests.[672] Rights that may be relevant in the context of mutual legal assistance requests include, but not limited to, the right to life; the right to liberty and security of a person; the right to property; right not to be subjected to torture or cruel, inhumane, and degrading punishment; right to equality before the law; right to a fair and public hearing, legal representation, interpretation/translation; and the right not to be held guilty of retrospectively operative offenses or penalties.[673]

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670 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 1(d).
671 ASEAN Human Rights Declaration, art. 20(c).
672 *Secretariat*, p. 47; *Boister*, p. 206.
673 *Secretariat*, p. 47.

Applying this to the ASEAN regional level, its own ASEAN Human Rights Declaration completely adopts the rights provided for in the Universal Declaration of Human Rights.[674] Another instrument in the regional level that illustrates how the ASEAN as a regional organization considers and values human rights are those in relation to human trafficking, i.e. ASEAN Declaration against Trafficking in Persons, especially Women and Children, the ASEAN Declaration against Transnational Crime, as well as the ASEAN Vision 2020. The trust of these instruments do not only focus on the prosecution of human trafficking and/or transnational crime, but also on the protection of victims.

The consideration of human rights that shall be tackled in this section involves the use of human rights as an exemption or condition prior to granting and/or executing a request. A reading of the ASEAN MLAT and overall framework would show that this discussion is evident in two points: first, the specific grounds for refusal based on human rights, and second, the consideration of severity of punishment in the equation.

### 1. Human Rights as a Ground to Refuse a MLA Request

Human rights considerations are present in three (3) points vis-a-vis the grounds to refuse a MLA request in the ASEAN MLAT. At the outset, there is the mandatory ground for refusal by reason of double jeopardy, as mentioned above. Second, the ASEAN MLAT includes a non-discrimination clause wherein a requested member state shall refuse a request should there be "substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions."[675] And third, in assisting the attendance of a person in the requesting member state, the requested member state shall "invite the person to give or provide evidence or assistance in relation to a criminal matter in the requesting member state" if "satisfactory arrangements for that person's safety will be made by the requesting member state."[676]

674 ASEAN Human Rights Declaration, art. 10.
675 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 1(c).
676 2004 ASEAN Mutual Legal Assistance Treaty, art. 14.

2. Limited Applicable Human Rights Obligations vis-à-vis Ground for refusal; Severity of Punishment Issue

Other than the three mentioned above, no other human rights obligation is provided as a ground to refuse a MLA request. To illustrate, another aspect important to the discussion of human rights considerations in the ASEAN MLAT is on severity of punishment, or the proscription of death penalty, torture, or severe, inhumane, and degrading punishment and/or treatment. In light of this, one could note that whilst the issue of severity of punishment has been a strong consideration in extradition cases,[677] there is an ongoing trend wherein requested state parties in mutual legal assistance requests, on human rights considerations, increasingly ask assurances from the requesting state parties that "the evidence requested through mutual legal assistance will not lead to death penalty, or the imposition of cruel, inhumane, or degrading punishment, or torture of a person."[678] The ASEAN MLAT however is bereft of such provisions, despite the explicit prohibition on torture, cruel, and inhumane treatment and/or punishment being included in the ASEAN's own human rights instrument.[679]

A possible explanation for this is the long-standing ASEAN norm on the principle of non-interference, which basically entails deference given by one member state to another member state and the former refrains from commenting, questioning, or otherwise interfering in the domestic affairs or policies of the latter. To recall, such principle likewise encompasses that member states shall refrain "from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of government as basis for deciding membership in ASEAN."[680] If one would walk back to the time when Myanmar was admitted as a member to the ASEAN amidst issues of political instability and human rights violations, the ASEAN was of the position that these matters were domestic in nature to which it or its member states cannot intervene.[681] Whilst enhanced interaction is now allowed among ASEAN member states, wherein one member state can inquire or comment about

677 *Boister*, p. 227.
678 *Secretariat*, p. 48.
679 ASEAN Human Rights Declaration, art. 14.
680 *Acharya*, Constructing a Security Community, p. 57.
681 *Flers*, p. 5.

domestic affairs of the other should the same have regional repercussions and as long as the same is done outside the ASEAN framework,[682] the principle of non-interference still generally holds. Following this raison d'être, then issues on severity of punishment or any alleged violation of the prohibition against torture, or cruel, inhumane, degrading punishment or treatment would be a hands-off concern for the ASEAN and its member states as to one another.

At the same time, while the prohibition on death penalty, torture and inhumane, degrading punishment exists in other international instruments, ASEAN member states have different interpretations and beliefs regarding said issue. In fact, there would be states such as Singapore and Malaysia, the constitutions of which allow the imposition of the death penalty for severe offenses. Thus, it becomes reasonable then that no such principle on considerations of severity of punishment be found in a treaty on mutual legal assistance such as the ASEAN MLAT. This is of course without prejudice to whatever may be agreed upon between the requesting state and requested state, subject to their respective domestic laws. If one would recall, the ASEAN MLAT provides for this allowance.

### v. Reciprocity

International cooperation, such as mutual legal assistance, relies on goodwill and reciprocity of states. The ASEAN MLAT reinforces the importance of reciprocity in its provisions. Firstly, it provides that subject to their respective domestic laws, the state parties shall "reciprocate any assistance granted in respect of an equivalent offense irrespective of the applicable penalty."[683] Further, the ASEAN MLAT provides reciprocity as a discretionary ground for refusal wherein a requested member state may refuse a request, should the requesting member state fail "to undertake that it will be able to comply with a future request of a similar nature by the requested member state for assistance in a criminal matter."[684]

682 *Acharya*, Whose Ideas Matter?, p. 134; *Narine*, Forty Years of ASEAN, p. 421.
683 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 10.
684 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 1(g).

vi. Speciality or use limitation

Application of the doctrine of speciality or use limitation to requests for the provisions of documents and other forms of evidence means that the same „can only be legally used for the request for which they are handed over."[685] In the context of the ASEAN MLAT, a requesting member state shall not, without the consent of the requested member state and subject to terms and conditions as the requested member state may determine, „use or disclose or transfer information or evidence" provided by the requested member state for purposes other than those provided in the legal assistance request.[686]

In the event the charge subject of the information or evidence requested is amended, the ASEAN MLAT allows the same information or evidence to be used, provided that the following requisites are met: (1) there is consent of the requested member state; (2) the offense, as charged, is an offense in respect of which mutual legal assistance can be provided under the ASEAN MLAT; (3) and the offense, as charged is made out by the facts on which the request has been made.[687] With regard to this, in submitting mutual legal assistance requests, the requesting member state is obliged to make an undertaking that the information and/or evidence requested "will not be used for a matter other than the criminal matter in respect of which the request was made and the requested member state has not consented to waive such undertaking" and failure to do such undertaking allows the requested member state to refuse the request.[688]

vii. Special Offenses and National Interest Cases

Some states deny cooperation because it might prejudice their national interests in general, which might include certain types of offenses, security, economic interest, public interest, public order, foreign affairs, or prejudice to a present investigation.[689] The ASEAN MLAT includes provisions of a similar import as shown in the following three (3) instances.

685 *Boister,* p. 204.
686 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 8(1).
687 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 8(2).
688 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 1(h).
689 *Secretariat,* p. 49.

Firstly, it is a mandatory ground to refuse a request based on national interests should either (1)"the provision of the assistance would affect the sovereignty, security, public order, public interest or essential interests of the requested member state;" (2)"the provision of the assistance could prejudice a criminal matter in the requested member state;" or (3)"the provision of the assistance would require steps to be taken that would be contrary to the laws of the requested member state."[690] In relation to this, the requested member state may also refuse a request when "the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the requested member state; or the provision of the assistance would impose an excessive burden on the resources of the requested member state."[691]

Secondly, national interests also come into play when a requested member state is sanctioned by the ASEAN MLAT to postpone execution "if its immediate execution would interfere with any ongoing criminal matters in the requested member state."[692] It is worth noting that in cases wherein postponement of execution is necessitated by any ongoing criminal matter in the requested member state, or when in general, the requested member state is inclined to refuse a request, it should take into consideration whether assistance could still be provided under certain terms and conditions.[693] Provided further, that should the assistance then be provided under certain terms and conditions, the requesting member state undertakes to comply with the same.[694] In any case, the requested member state should, at any time it refuses or postpones execution of a mutual legal assistance request, promptly inform the requesting member state of the grounds for refusal or postponement.[695]

Thirdly, some states are sanctioned to deny mutual legal assistance on the basis that the offense subject of the request is of a special offense such as it being either a political or military offense. Traditionally, assistance shall be declined on the basis that the subject offense is of a political nature.[696] This is grounded on historical tolerance of armed struggle against anti-democratic, authoritarian regimes.[697] Like in extradition

690 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 1(f), (j), (k).
691 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 2.
692 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 6.
693 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 7.
694 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 8.
695 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 9.
696 *Secretariat*, p. 49.
697 *Secretariat*, p. 49.

regimes, there is steady pressure to remove the political offenses exception in mutual legal assistance regimes.[698] This notwithstanding, the ASEAN MLAT retains political offenses as a mandatory ground to refuse mutual legal assistance requests.[699] However, the ASEAN MLAT narrows the political offense exception by not including the following as political offenses: (1) offenses against the "life or person of a Head of State or a member of the immediate family of the Head of State;" and (2) offenses against the "life or person of a Head of a central Government, of a minister of a central Government."[700]

In connection thereto, requests cannot be made for military offenses that are not considered crimes under general criminal law.[701] The ASEAN MLAT allows this a mandatory ground for refusal.

It is a different story altogether with regard fiscal offenses. Previously, states are allowed to decline assistance requests on the ground of bank secrecy and that the information is subject to regulations involving fiscal offenses.[702] Nowadays however, there has been a paradigm shift wherein the aforementioned reasons are no longer legitimate to decline assistance requests.[703] The same applies to the ASEAN MLAT wherein it provides that assistance shall not be declined by reason of secrecy of banks and similar financial institutions or that the subject offense is also considered fiscal matters.[704]

### 3. Procedural Provisions: ASEAN MLAT

#### a. Designation of Central Authorities

Mutual legal assistance in the ASEAN is highly centralized. The ASEAN MLAT uses a vertical form of cooperation through the designation of central authorities in facilitating mutual legal assistance among the member states. The relevant provision mandates state parties to designate a central authority to make and receive requests pursuant to such treaty.[705] Desig-

698 *Boister*, p. 205.
699 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 1(a).
700 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 3.
701 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 1(b); *Boister*, p. 205.
702 *Secretariat*, p. 50.
703 *Secretariat*, p. 50.
704 2004 ASEAN Mutual Legal Assistance Treaty, art. 3, § 5.
705 2004 ASEAN Mutual Legal Assistance Treaty, art. 4, § 1.

nated at the time of deposit of the instrument for ratification, approval, or accession, said central authorities shall communicate directly with one another, but may, if they choose, communicate through diplomatic channels vis-à-vis requests for mutual legal assistance.[706]

### b. Preparation of Requests under the ASEAN MLAT

#### i. Requirements for Requests

Requests under the ASEAN MLAT shall be made in writing, or "where possible, by any means capable of producing a written record under conditions allowing the requested member state to establish authenticity. In urgent situations and where permitted by the law of the requested member state, requests may be made orally, but in such cases the requests shall be confirmed in writing within five (5) days."[707]

The designated central authority shall be primarily responsible in the transmission of requests and any communication in relation thereto; however, "in urgent situations and where permitted by the law of the requested member state, requests and any communication related thereto may be transmitted through the International Criminal Police Organization (INTERPOL) or the Southeast Asian Police Organization (ASEANAPOL)."[708]

In light of this, the ASEAN Secretariat underlines the important role of the prosecuting authority in initiating a request for mutual legal assistance via the central authority.[709] The prosecutor, together with the investigator, would know the case best, including a "clear understanding of what evidence is already available and what evidence is required to support the case."[710] Furthermore, the prosecutor knows the timelines, key dates, and what may be needed in court.[711] Thus it would be imperative for the prosecutor or key investigator to coordinate with the central authority about these issues.[712]

The ASEAN Secretariat likewise stresses the importance of communication which is key to effective handling of requests between all those

706 2004 ASEAN Mutual Legal Assistance Treaty, art. 4, §§ 2-4.
707 2004 ASEAN Mutual Legal Assistance Treaty, art.5, § 1.
708 2004 ASEAN Mutual Legal Assistance Treaty, art.5, § 1.
709 *Secretariat*, p. 51.
710 *Secretariat*, p. 51.
711 *Secretariat*, p. 51.
712 *Secretariat*, p. 51.

involved – the central authority, prosecutors and investigators in both the requested and requesting member states.[713] Open and proper channels of communication is encouraged as every liaison between the requesting and requested member states, according to the ASEAN Secretariat, will help "avoid misunderstandings and secure agreement on how to best achieve the outcomes for which the assistance is sought."[714] Early open communication may also be mutually advantageous to both requesting and requested member states before a formal request is made.[715] Member states are then encouraged to make use of the online directory of the UNODC on Competent National Authorities Directory ("CNAD") which does not only provide updated contact information on competent national authorities in most states of the world, but also a means of communication and information on legal requirements for cooperation.[716] Needless to state, by making this toolkit available to the ASEAN member states – that is not exactly produced under the ASEAN framework – central authorities can assess the needed information to prepare and send an MLA request.

As to the formal requirements of a request, the request shall be made in English, including supporting documents and communication pursuant thereto, and, "if necessary, accompanied by a translation into the language of the requested member state or another language acceptable to the requested member state."[717] The request shall contain information needed to execute the request, including, "(1) the name of the requesting office and the competent authority conducting the investigation or criminal proceedings to which the request relates; (2) the purpose of the request and the nature of the assistance sought; (3) a description of the nature of the criminal matter and its current status, and a statement setting out a summary of the relevant facts and laws; (4) a description of the offense to which the request relates, including its maximum penalty; (5) a description of the facts alleged to constitute the offense and a statement or text of the relevant laws; (6) a description of the essential acts or omissions or matters alleged or sought to be ascertained; (7) a description of the evidence, information or other assistance sought; (8) the reasons for and details of any particular procedure or requirement that the requesting member state wishes to be followed; (9) specification of any time limit within which

713 *Secretariat*, p. 51.
714 *Secretariat*, p. 51.
715 *Secretariat*, p. 51.
716 *Secretariat*, p. 52.
717 2004 ASEAN Mutual Legal Assistance Treaty, art.6, § 3.

compliance with the request is desired; (10) any special requirements for confidentiality and the reasons for it; and (11) such other information or undertakings as may be required under the domestic laws of the requested member state or which is otherwise necessary for the proper execution of the request."[718]

It may also include the following information, as may be necessary to the request: "(1) the identity, nationality and location of the person or persons who are the subject of the investigation or criminal proceedings; (2) the identity and location of any person from whom evidence is sought; (3) the identity and location of a person to be served, that person's relationship to the criminal proceedings and the manner in which service is to be made; (4) information on the identity and whereabouts of a person to be located; (5) a description of the manner in which any testimony or statement is to be taken and recorded; (6) a list of questions to be asked of a witness; (7) a description of the documents, records or items of evidence to be produced as well as a description of the appropriate person to be asked to produce them and, to the extent not otherwise provided for, the form in which they should be reproduced and authenticated; (8) a statement as to whether sworn or affirmed evidence or statements are required; (9) a description of the property, asset or article to which the request relates, including its identity and location; and (10) any court order relating to the assistance requested and a statement relating to the finality of that order."[719]

As to what specific requirements one would need to comply with in a request for mutual legal assistance, the ASEAN MLAT provides legroom for a requested member state to ask the requesting member state for additional information to enable the former to execute or effectuate a request. Hence, the requesting member state shall furnish the additional information as may be necessary to effectuate the request or undertake the necessary steps in relation thereto.[720]

### ii. Person or Authority Initiating the Request

In relation to the foregoing requirements, there is no mention in the ASEAN MLAT as to whose instance would a MLA request be issued. Giv-

718 2004 ASEAN Mutual Legal Assistance Treaty, art.6, § 1.
719 2004 ASEAN Mutual Legal Assistance Treaty, art.6, § 2.
720 2004 ASEAN Mutual Legal Assistance Treaty, art.6, § 4.

en that mutual legal assistance is mainly a government to government endeavor, and that it would be the central authorities which would transmit or receive the respective MLA requests, then MLA requests shall implicitly be made at the instance of governments or the prosecution.

As to whether a private individual or a suspect or accused person can request that a MLA request be issued on the former's behalf, *prima facie* the ASEAN MLAT has been silent on the same. However, a careful reading of its provisions, in particular to Article 1(3), wherein it says that the provisions contained in the ASEAN MLAT does not create a right on the part of any private person "to obtain, suppress, exclude any evidence or to impede the execution a request for assistance," would lead one to conclude that the participation of private parties is excluded in the MLA process. Taking this and the guidelines from the ASEAN Secretariat directed towards prosecutors and investigators on preparation of requests into account, there is reason to believe that the ASEAN MLAT is centered towards the investigative and/or prosecutorial side of criminal proceedings that is state or government-centered while it is unsettled whether a private individual or suspect or accused can benefit from the same kind of instrument.

### c. Execution of Requests

#### i. Applicable Law on Execution

In the execution of requests, "requests for assistance shall be carried out promptly, in the manner provided for by the laws and practices of the requested party."[721] Based on this provision, there is the idea that the ASEAN framework follows the principle of *locus regit actum* in general. The subject provision then continues by stating that this is without prejudice however to implementing assistance in the manner requested by the requesting member state but the same is subject to the domestic laws of the requested member state.[722] In other words, the requested member state could accommodate the requests of the requesting member state as regards the manner of executing the request but in case of conflict, the domestic law or *lex loci* would prevail. It is unclear however to which degree must it be "subject to the domestic laws of the requested state" as the ASEAN

721 2004 ASEAN Mutual Legal Assistance Treaty, art.7, § 1; See for discussion on *forum regitactum*and *legit regitactum*, *Vermeulen/De Bondt/Van Damme*, p. 105.

722 2004 ASEAN Mutual Legal Assistance Treaty, art.7, § 1.

MLAT does not explain any further. Thus, this would be discretionary on the part of the requested member state.

Taking this into account, the requested member state shall "make all necessary arrangements for the representation of the requesting member state in the requested member state in any criminal proceedings arising out of a request for assistance and shall otherwise represent the interests of the requesting member state," should there be a request to do so by the requesting member state and the same is allowed by the requested member state's domestic laws.[723]

### ii. Applicable Procedural Rights

#### 1. Importance of Defense Rights

The following discussion takes into account the human rights that play a role in the procedural aspect of ASEAN mutual legal assistance among its member states. Whilst human rights play a considerable part in the substantive provisions of mutual legal assistance, human rights is equally considered in the procedural aspect as follows:

Considering that the ASEAN and its member states made a commitment to follow international covenants and agreements on human rights for example, as a bare minimum, the International Covenant on Civil and Political Rights ("ICCPR") provides the right to be informed at the time of an arrest of the reason of the arrest and any charges against the person arrested.[724] Further, it provides that the accused has "the right to be presumed innocent until proven guilty in accordance with law; the right to be informed promptly of the nature and cause of the charges against him, in a language in which he/she understands; right to have adequate time and facilities to prepare a defense and communicate with a lawyer of his/her choosing; the right not to be compelled to testify against himself/herself or to confess guilt."[725]

This set of procedural rights however are not reflected completely or provided in the ASEAN Human Rights Declaration, which is the soft law on human rights governing the ASEAN member states. Said human rights instrument vis-à-vis rights of the accused only provides protection

723 2004 ASEAN Mutual Legal Assistance Treaty, art.7, § 2.
724 International Covenant on Civil and Political Rights, art. 9(2).
725 International Covenant on Civil and Political Rights, arts. 9, 14.

against "arbitrary arrest, search, detention, abduction, or any other form of deprivation of liberty",[726] the right to be presumed innocent until proven guilty, as well as the protection against *ex post facto* laws and the enactment of bills of attainder, among others.[727] The ASEAN instrument on human rights is wanting of any provision regarding an accused's right to be informed, right against self-incrimination, right to have adequate time and facilities to prepare for one's defense, or right to counsel, which can be found in other human rights instruments.

### 2. Human Rights Considerations in Procedures Provided

Despite such want of quintessential defense rights in the ASEAN Human Rights Declaration, the ASEAN MLAT takes into consideration rights of the accused or any person charged of an offense in its provisions. This is despite the fact that the ASEAN Human Rights Declaration was formed at a later date than the ASEAN MLAT. On one hand, in obtaining testimony or sworn statements, "the parties to the relevant criminal proceedings in the requesting member state or their legal representatives may, subject to the domestic laws of the requested member state, appear and question the person giving that evidence."[728] In relation to this, the person (who may be any person who would give testimony or sworn statement as the ASEAN MLAT does not qualify) may refuse to give a sworn testimony or produce evidence where "(a) the law of the requested member state permits or requires that person to decline to do so in similar circumstances in proceedings originating in the requested member state; or (b) the law of the requesting member state permits or requires that person to decline to do so in similar circumstances in proceedings originating in the requesting member state."[729] The ASEAN MLAT further provides that "if the person claims that there is a right to decline to give sworn or affirmed testimony or produce documents, records or other evidence" under the law of the requesting member state, "the requesting member state shall, if so requested, provide a certificate to the requested member state as to the existence or otherwise of that right."[730] In other words, it is incumbent upon the

726 ASEAN Human Rights Declaration, art.12.
727 ASEAN Human Rights Declaration, art. 20.
728 2004 ASEAN Mutual Legal Assistance Treaty, art. 11.
729 2004 ASEAN Mutual Legal Assistance Treaty, art. 12, § 1.
730 2004 ASEAN Mutual Legal Assistance Treaty, art. 12, § 2.

person giving testimony or evidence to evince the existence of his/her right to testimony, which may arise from different possible reasons such as the right against self-incrimination, privilege communication, or other grounds sanctioned by the law of either requesting or requested member state.

On the other hand, in transferring persons in custody, the requesting member state ought to fulfill certain obligations for the protection of the subject person's human rights. These obligations are four-fold. First, the requesting member state is required to make an undertaking prior to approval of its request "(a) to bear and be responsible for all the expenses of the transfer of custody; (b) to keep the person under lawful custody throughout the transfer of his custody; and (c) to return him into the custody of the requested member state immediately upon his attendance before the competent authority or court in the requesting member state is dispensed with."[731]

Second, "the period during which such person was under the custody of the requesting member state shall count towards the period of his imprisonment or detention in the requested member state."[732] Thus, the duration of the person's stay in the requesting member state shall be credited to said person's benefit and time of imprisonment served.

Third, safe conduct provisions have been provided in the ASEAN MLAT. When a transfer of person in custody is made to assist in proceedings in the requesting member state, such person "(a) shall not be detained, prosecuted, punished or subjected to any other restriction of personal liberty in the requesting member state in respect of any acts or omissions or convictions for any offense against the law of the requesting member state that is alleged to have been committed, or that was committed, before the person's departure from the requested member state;" "(b) shall not, without that person's consent, be required to give evidence in any criminal matter in the requesting member state other than the criminal matter to which the request relates;" or "(c) shall not be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from the requested member state."[733] The same shall cease to apply "if that person, being free and able to leave, has not left the requesting member state within a period of 15 consecutive days after that person has been

731 2004 ASEAN Mutual Legal Assistance Treaty, art. 15, § 6.
732 2004 ASEAN Mutual Legal Assistance Treaty, art. 15, § 5.
733 2004 ASEAN Mutual Legal Assistance Treaty, art. 16, § 1.

officially told or notified that his presence is no longer required or, having left, has voluntarily returned."[734]

Fourth, such person giving testimony or appearing before the competent authority of the requesting member state "shall not be subject to prosecution based on such testimony except that that person shall be subject to the laws of the requesting member state in relation to contempt of court and perjury."[735] And in the event such person does not consent for its custody to be transferred or to attend in the requesting member state, such shall not be subjected to any penalty or liability or otherwise prejudiced in law notwithstanding anything to the contrary in the request.[736]

### 3. Defendant's Participation in the Execution of a MLA Request

In respect to any remedy that an affected person may pursue should the abovementioned rights, or any other right, be violated, the ASEAN MLAT states that it does not create a right on the part of any private person "to obtain, suppress, exclude any evidence or to impede the execution a request for assistance." One can thus not only conclude that the participation of private parties is excluded in the MLA process, but also any remedial right is not to be based on the ASEAN instrument for any remedy an affected person may pursue.

### iii. Time Element on Execution

There are no time constraints or limits provided in the ASEAN MLAT by which a receiving state ought to comply with in the execution of a request. What the applicable provision only provides, is that requests for assistance shall be "carried out promptly in the manner provided for by the laws and practice of the requested member state."[737] Additionally, the requesting member state shall "respond as soon as possible to reasonable inquiries by the requested member state concerning progress toward execution of the request."[738] At most, the urgency of any request shall be

734 2004 ASEAN Mutual Legal Assistance Treaty, art. 16, § 2.
735 2004 ASEAN Mutual Legal Assistance Treaty, art. 16, § 3.
736 2004 ASEAN Mutual Legal Assistance Treaty, art. 16, § 4.
737 2004 ASEAN Mutual Legal Assistance Treaty, art. 7, § 1.
738 2004 ASEAN Mutual Legal Assistance Treaty, art. 7, § 3.

relayed through the communication between the requesting authority, prosecutor, or investigator involved. As previously mentioned, open and preliminary communication and coordination is encouraged between the involved parties to facilitate any MLA request.

### iv. Authentication of Documents

As mentioned earlier, requests for MLA shall be in writing or by any other means capable of producing a written record for purposes of ascertaining authenticity. In relation to this, authentication of documents is not required to effectuate requests but this is without prejudice to parties requesting each other to authenticate any documents or material that may be transmitted to the other party.[739] It shall be considered authenticated for purposes of the ASEAN MLAT should "(1) it purports to be signed or certified by a judge, magistrate, or officer in or of the Party transmitting the document duly authorized by the law of that Party; and (2) either (a) it is verified by the oath or affirmation of a witness, or of an officer of the government of that party; or (b) it purports to be sealed with an official or public seal of that party or of a Minister of State, or of a department or officer of the government, of that party."[740] Moreover, subject to the domestic laws of the parties concerned, the ASEAN MLAT allows digital and electronic signatures as long as it is in accordance with the laws of the party concerned, and any such signature shall be considered legally binding.[741] Correspondingly, any digitally or electronically signed document shall be considered a legally binding document.[742] The aforementioned shall not however prevent the "proof of any matter or admission of any evidence in accordance with the law of the requesting member state."[743]

### v. Importance of Confidentiality

The requesting member state has the responsibility of confidentiality under the ASEAN MLAT. It shall "take all appropriate measures to keep

739 2004 ASEAN Mutual Legal Assistance Treaty, art.24, § 1.
740 2004 ASEAN Mutual Legal Assistance Treaty, art.24, § 2.
741 2004 ASEAN Mutual Legal Assistance Treaty, art.24, § 4(b).
742 2004 ASEAN Mutual Legal Assistance Treaty, art.24, § 4(a).
743 2004 ASEAN Mutual Legal Assistance Treaty, art.24, § 3.

confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching confidentiality requirements, the requested member state shall so inform the requesting member state, which shall then determine whether the request should nevertheless be executed."[744] Pursuant thereto, the requesting member state shall make arrangements "(1) to keep confidential information and evidence provided by the requested member state, except to the extent that the evidence and information is needed for the purposes described in the request; and (2) to ensure that the information and evidence is protected against loss and unauthorized access, use, modification, disclosure or other misuse."[745]

### vi. Return of Documents

Regardless of the type of assistance requested, the requesting member state is obliged upon the conclusion of the criminal matter in respect of which the request for assistance was made to "return to the requested member state any documents, records or items provided to the requesting member state" pursuant to the request.[746] This is without prejudice however to returning temporarily to the requested member state, upon request, "any documents, records or items provided to the requesting member state pursuant to a request" under the ASEAN MLAT if the same are needed for a criminal matter in the requested member state.[747]

### vii. Specific Procedures per Type of Assistance Rendered

The abovementioned general provisions regarding execution of requests notwithstanding, the ASEAN MLAT made specific provisions as to how each particular type of mutual legal assistance shall be executed by a requested state. Specifically, the ASEAN MLAT provides specific and/or additional requirements as regards taking of evidence and obtaining voluntary statements (Articles 10 to 12); making arrangements for persons to

744 2004 ASEAN Mutual Legal Assistance Treaty, art.9, § 1.
745 2004 ASEAN Mutual Legal Assistance Treaty, art.9, § 2.
746 2004 ASEAN Mutual Legal Assistance Treaty, art.19, § 1.
747 2004 ASEAN Mutual Legal Assistance Treaty, art.19, § 2.

give evidence or to assist in criminal matters (Articles 14 to 17); effective service of judicial documents (Article 21); searches and seizures (Article 18); providing original or certified copies of relevant documents, records, and items of evidence (Article 13); assistance in forfeiture proceedings (Article 22); and location and identification of persons (Article 20).

In connection to these specific provisions, the ASEAN MLAT would provide grounds for a person, for example, to refuse giving voluntary statements or assisting in criminal matters.[748]

Furthermore, it can be noted that the ASEAN MLAT does not provide a provision as to how a request shall be executed by the requested member state should it fall under the catch-all provision that allows mutual legal assistance requests not otherwise specifically stated therein. At most, following the wording of said applicable catch-all provision, the same shall be executed in accordance with the domestic law of the requested member state and whatever has been agreed upon by the parties.

## *II. Implementation in the member state level: Philippines*

The following portions of the study is a discussion as to how the ASEAN MLAT is being implemented in the member states which are signatories to the same. In particular, attention shall be given to the Philippines and Malaysia, which are two of the founding member states of the ASEAN. One would be walked through any historical development of mutual legal assistance in criminal matters in said countries, the available legal framework vis-à-vis mutual legal assistance, including conditions and exceptions being followed, and how the same applies in practice.

### A. Historical Development of Mutual Legal Assistance in Criminal Matters in the Philippines

#### 1. Bilateral, Regional, and Multilateral MLA Treaties

The Philippines has presently a total of nine (9) bilateral mutual legal assistance in criminal matters treaties with the following countries: Australia, China, Hong Kong, South Korea, Russia, Spain, Switzerland, the United

748 2004 ASEAN Mutual Legal Assistance Treaty, art.12, § 1.

Kingdom, and the United States.[749] It is likewise a signatory to the ASEAN Mutual Legal Assistance Treaty, the United Nations Convention on Transnational Organized Crime ("UNTOC" or "Palermo Convention"), and the United Nations Convention against Corruption ("UNCAC"), the latter two including mutual legal assistance provisions.[750] More recently, the Philippines acceded to the Budapest Convention on Cybercrime which provides for international cooperation between contracting states with respect to cybercrime.

### 2. Domestic Instruments on Mutual Legal Assistance

Under the Philippine legal framework, formal forms of international cooperation in criminal matters can be done through either traditional letters or commission rogatory, transfer of sentenced persons, extradition, or mutual legal assistance. However, it is only as regards letters rogatory and extradition, for which the Philippines has dedicated domestic legislation. The Philippines does not have a specific domestic legislation on mutual legal assistance.

For letters rogatory, the Philippine Rules on Civil Procedure provides the following procedure:

> "Sec. 11. Persons before whom depositions may be taken in foreign countries.
>
> "In a foreign state or country, depositions may be taken (a) on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the Republic of the Philippines; (b) before such person or officer as may be appointed by commission or under letters rogatory; or (c) the person referred to in section 14 hereof.
>
> "Sec. 12. Commission or letters rogatory.
>
> "A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such direction as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and

749 *Secretariat,* p. 36; *Department of Foreign Affairs,* p. 1; *Malaya/Monedero-Arnesto*, pp. 2, 9; *Soriano*, p. 136; *Quintana*, p. 141.
750 *United Nations,* p. 1; *United Nations Office on Drugs and Crime,* p. 1..

> letters rogatory may be addressed to the appropriate judicial authority in the foreign country."[751]

Extradition is governed by Presidential Decree No. 1069, otherwise entitled as "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country," or Philippine Extradition Law for brevity. As for the other international cooperation mechanisms for criminal matters, the Philippines does not have specific legislation on both mutual legal assistance and transfer of sentenced persons.[752] The legal framework for these two is normally provided by treaty.

In respect of mutual legal assistance, the Philippines, together with Cambodia,[753] does not have specific domestic legislation handling specifically mutual legal assistance in criminal matters among the ASEAN member states.[754] Instead, minute domestic law provisions on mutual legal assistance in criminal matters can be found in Philippine law for specific classes of offenses such as on anti-money laundering under the Philippine Anti Money Laundering Act, where the Philippines or another foreign state can make a request for assistance in the investigation or prosecution of a money laundering offense,[755] as well as cybercrime offenses mentioned in the Philippine Cybercrime Prevention Act, wherein permission to use international cooperation such as mutual legal assistance is provided, which allows cross-border exchange and transborder access to online evidence vis-à-vis cybercrime cases.[756] International cooperation mechanisms such as mutual legal assistance have likewise been referred to in the recent Rules on Cybercrime Warrants, which became effective on 15 August 2018.[757]

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751 Philippine Rules of Civil Procedure, Rule 23, §§ 11, 12.

752 As regards the lack of domestic law for transfer of sentenced persons see *Malaya/Monedero-Arnesto/Paras*, p. 7.

753 In the future, mutual legal assistance and extradition will be governed by Title IV of the New Code of Criminal Procedure. See *Ku*, p. 48.

754 *Secretariat,* p. 36.

755 Republic Act No. 9160, as amended by Republic Act No. 9194, § 13.

756 Republic Act No. 10175, Philippine Cybercrime Prevention Act of 2012.

757 At this juncture it is significant to mention that albeit A.M. 17-11-13-SC or the Rules on Cybercrime Warrants, which covers warrants to be issued for the production, preservation, disclosure, interception, search and seizure, destruction, etc. of online evidence vis-à-vis cybercrime cases, acknowledges the use of mutual legal assistance vis-à-vis cross-border and transnational access to online evidence, the same Rule also allows the issuance of domestic warrants/orders to service providers as long as these providers offer their services within the territory of the Philippines. Thus, it is inconsequential whether a service provider

This notwithstanding, the Philippines still has an applicable framework through the different bilateral and multilateral treaties it entered into concerning mutual legal assistance in criminal matters. These treaties and international agreements as per the doctrine of international law applied by the Philippines would be the basis in law themselves for Philippine authorities to send and receive mutual legal assistance requests, to wit:

The Philippine Supreme Court held that under the 1987 Philippine Constitution, international law can become part of the sphere of domestic law either by transformation or by incorporation: the transformation method requires "that an international law principle be transformed into domestic law through a constitutional mechanism, such as local legislation", whilst the incorporation method "applies when by mere constitutional declaration, international law is deemed to have the force of domestic law."[758] Applying the foregoing, the Philippines follows pursuant to Article 2, Section 2 of the 1987 Philippine Constitution the doctrine of incorporation in respect of generally accepted principles of international law and customary international law.[759] General accepted principles of international law in this regard includes "norms of general or customary international law which are binding on all states."[760] To illustrate, the Philippine Supreme Court in the case of *Kuroda v. Jalandoni* held that although the Philippines was not yet then a signatory to the Hague and Geneva Conventions, war crimes are punishable in the Philippines because international jurisprudence is automatically incorporated in Philippine law.[761] Same underlying considerations were used in the cases of *Lo Ching v. Archbishop of Manila* and *Borovsky v. Commissioner of Immigration*, when the Supreme Court held that the prolonged detention of a stateless alien pending deportation as illegal, citing the Universal Declaration of Human Rights which is incorporated in Philippine law.[762]

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or tech company is located outside of the Philippines, a cybercrime warrant can be issued against it by a Philippine judicial authority as long as it offers service within Philippine territorial jurisdiction. No mutual legal assistance request is necessitated by these circumstances and the traditional government-to-government cooperation usually does not apply.

758 Pharmaceutical and Health Care Association of the Philippines v. Duque, G.R. No. 173034, 09 October 2007.

759 1987 Philippine Constitution, art. 2, § 2.

760 Pharmaceutical and Health Care Association of the Philippines v. Duque, G.R. No. 173034, 09 October 2007.

761 Kuroda v. Jalandoni, 83 Phil. 171, 178 (1949).

762 Lo Ching v. Archbishop of Manila, 81 Phil. 101; Borovsky of Immigration, G.R. No. L-4362 (1951)

Conversely, the doctrine of transformation applies to treaties or international agreements wherein they become part of the law of the land pursuant to Article 7, Section 21 of the 1987 Philippine Constitution, which provides, that "no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." In other words, as long as treaties or international agreements follow the prescribed constitutional mechanism – ratified or concurred in by at least two-thirds of all members of the Philippine Senate – it is transformed into domestic law that can be applied locally in the Philippines.[763]

In view of the foregoing, there is still an existing domestic legal framework applicable albeit limited as treaties normally do not provide the minute details of execution. Treaties on mutual legal assistance in criminal matters, which have correspondingly been ratified by the Philippine Senate, have been considered as self-executory and the same have been enforced.[764] In particular, the ASEAN MLAT has been ratified through Resolution No. 126, entitled "Resolution Concurring in the Ratification of the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters" dated 06 October 2008.[765] The ASEAN MLAT is hence considered domestic law in light of Philippine Constitutional Law and can be used as a framework in catering to requests made and/or received for mutual legal assistance in criminal matters from other ASEAN member states.

Nonetheless, a domestic law tackling international cooperation in criminal matters such as mutual legal assistance would be ideal to have because as would be illustrated further on, the ASEAN MLAT in itself as a legal basis is incomplete with certain details being left to the discretion and/or national laws of the member states to be implemented. It can provide the skeletal structure of how MLA can be requested and executed between ASEAN member states but the other provisions for it to be efficacious are left to be desired.

763 Pharmaceutical and Health Care Association of the Philippines v. Duque, G.R. No. 173034, 09 October 2007.
764 *Gana Jr*, p. 56.
765 Philippine Senate Resolution No. 126, dated 06 October 2008.

## B. Substantive Provisions: Mutual Legal Assistance in Criminal Matters

### 1. Applicability of Assistance

Mutual legal assistance as it applies in the Philippines denotes a request-based system wherein requests are sent to and from the Philippines in relation to the cross-border exchange and transfer of information and/or evidence in criminal matters. The scope of application of the ASEAN MLAT applies in all criminal matters in the Philippines, excluding the arrest and surrender of a person in view of extradition, enforcement of sentences, transfer of persons in custody to serve sentences, and transfer of criminal proceedings.[766] Foreign Affairs Undersecretary Malaya et al. clarify that mutual legal assistance must relate to criminal cases only and not to purely administrative proceedings or civil actions, unless the civil action is closely linked or related to the criminal proceeding.[767] To illustrate, albeit the ASEAN MLAT is not the applicable MLA treaty herein, the Philippines sent a mutual legal assistance request to the United States of America in order to recover proceeds of corruption of two former generals of the Armed Forces of the Philippines pursuant to a civil case for forfeiture and not a criminal proceeding.[768] For the request to proceed, a clear nexus must be established between the civil action wherein legal assistance is sought vis-à-vis the criminal case for graft and corruption filed against the public officials.[769]

One of the ways to establish and prove this nexus is when the civil liability arises from the criminal liability itself. According to Article 100 of the Philippine Revised Penal Code, anyone who is held criminally liable is also civilly liable. The general rule is when a criminal action is instituted in the Philippines, the civil action for the recovery of civil liability arising from the offense charged is deemed instituted with the criminal action (Rules of Criminal Procedure, Rule 111, Section 1). The exception to the rule under the Rules of Criminal Procedure would be when either the right to institute the civil action is waived, or when the right to institute it separately is reserved, or the civil action has been instituted prior to the criminal action. Using this legal basis, the Philippines could support any outgoing mutual legal assistance request it issues should there be questions

766 See ASEAN Mutual Legal Assistance Treaty, arts. 1 and 2.
767 *Malaya/Monedero-Arnesto*, p. 8.
768 *Malaya/Monedero-Arnesto*, p. 8.
769 *Malaya/Monedero-Arnesto*, p. 8.

around a civil action or administrative proceeding in connection to a criminal case. The same can be true for the Philippines as a receiving or executing state, should these procedures apply in the requesting state.

In relation to this, the Philippines has domestic legislation mentioning mutual legal assistance and international cooperation in general for specific crimes involving money laundering and cybercrimes as defined and enumerated in the Anti-Money Laundering Act and Cybercrime Act of the Philippines, respectively.

Anent the level of assistance that state parties ought to provide vis-à-vis mutual legal assistance, there is the obligation to "render to one another the widest possible measure of mutual legal assistance" in accordance with the provisions of the treaty and subject to the respective domestic laws applicable under the ASEAN MLAT.[770] Due to being self-executory, this should be applicable in the Philippine setting. And as confirmed in interviews with officers in charge of MLA, this is indeed applied in the Philippine setting and the Philippines may render assistance to requesting states based on treaty or comity and reciprocity, albeit there is absence of a domestic statute on mutual legal assistance.[771]

To further elucidate, the Philippines adheres to the general principles of international law as a matter of state policy and endeavors to comply with its international obligations in good faith. As its Supreme Court explained in *Government of the United States of America v. Purganan*, though involving extradition, but still resonating state policy as regards entering into cooperation and treaty agreements:

> "Fourth, our executive branch of government voluntarily entered into the Extradition Treaty, and our legislative branch ratified it. Hence, the Treaty carries the presumption that its implementation will serve the national interest.
>
> "Fulfilling our obligations under the Extradition Treaty promotes comity with the requesting state. On the other hand, failure to fulfill our obligations thereunder paints a bad image of our country before the world community. Such failure would discourage other states from entering into treaties with us, particularly an extradition treaty that hinges on reciprocity.

770 2004 ASEAN Mutual Legal Assistance Treaty, art. 1, para.1.
771 See also *Soriano*, p. 136.

> "Verily, we are bound by *pacta sunt servanda* to comply in good faith with our obligations under the Treaty. This principle requires that we deliver the accused to the requesting country if the conditions precedent to extradition, as set forth in the Treaty, are satisfied. In other words, [t]he demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender. Accordingly, the Philippines must be ready and in a position to deliver the accused, should it be found proper."[772]

## 2. Types of Assistance Rendered

The ASEAN MLAT lists ten types of assistance that can be rendered between and among ASEAN member states, including, but not limited to, the taking of evidence or obtaining voluntary statements from persons, making arrangements for transfers of persons to give statements or assist in criminal matters, effecting service of judicial documents, identifying or tracing the location of persons, etc.[773]

As explained above, this list applies equally to the Philippine setting and thus, said types of assistance should be rendered by the Philippines. Nonetheless, it must be mentioned that in the event that a type of assistance is not specifically provided for in the ASEAN MLAT, the Philippines in practice, according to the official in charge in the Department of Justice, generally still provides the assistance requested for, as long as the same is agreed upon by the parties and the same does not conflict with Philippine domestic law.[774] In an interview with the relevant officials handling mutual legal assistance in the Philippines, they would normally advise the requesting member state of the applicable Philippine law and procedure to the assistance request on whether the same is feasible or not.[775] There is an open communication line between authorities in ASEAN and preliminary consultation exists that helps facilitate effectuating MLA requests.

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772 Government of the United States of America v. Purganan, G.R. No. 148571, 24 September 2002.
773 ASEAN Mutual Legal Assistance Treaty, art. 1, § 2.
774 Interview with Department of Justice Senior State Council Meredith Alvor.
775 Interview with Department of Justice Senior State Council Meredith Alvor.

In line with this, the Philippines may provide types of assistance not specifically enumerated in the ASEAN MLAT but nonetheless falling under its catch-all provision. To illustrate, the Philippine government may provide assistance with regard the interception of communication and communication data as Philippine domestic law sanctions this. Although the relevant provision of the 1987 Philippine Constitution mentions that the privacy of communication and correspondence shall remain inviolable, it nonetheless allows intrusion should there be a lawful order of the court, or when public safety or order requires, as may be otherwise determined by law.[776] As to which laws these could be, one could look into either of the following: Republic Act No. 4200 or the "Act to Prohibit and Penalized Wire Tapping and Other Related Violations of Private Communication and Other Purposes" (hereinafter "Anti-Wiretapping Law"), Republic Act No. 9372 or the Human Security Act of 2007 (under Sections 7-15 for interception of communication in terrorism cases) as amended by Republic Act No. 11479 or the Philippine Anti-Terrorism Act of 2020 (under Sections 16 to 24), the Philippine Cybercrime Act of 2012 vis-à-vis online data.[777] Procedurally, one could look into the Philippine Rules on Criminal Procedure and the Rule on Cybercrime Warrants, on general application for coercive orders and cybercrime warrants, respectively.

Going specifically to online evidence in terms of international cooperation, the implementing rules and regulations of the Philippine Cybercrime Act provides that the Philippine Department of Justice shall cooperate and render assistance to other contracting parties, as well as request assistance from foreign states, for purposes of detection, investigation, and

776 1987 Philippine Constitution, art. 3, § 3.

777 On one hand, wiretapping or interception of communication and/or communication data without consent under the Anti-Wiretapping Law is illegal. It is likewise illegal to keep and/or disclose records of the same. It would not be unlawful however for any law enforcement officer to do either acts with a lawfully obtained order in cases involving terrorism and the "crimes of treason, espionage, provoking war and disloyalty in case of war, piracy, mutiny in the high seas, rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, inciting to sedition, kidnapping as defined by the Revised Penal Code, and violations of Commonwealth Act No. 616, punishing espionage and other offenses against national security" (Anti-Wiretapping Law, § 3; Human Security Act of 2007, §§ 7-15 vis-à-vis Anti-Terrorism Act, §§ 16-24). On the other hand, the Philippine Cybercrime Act equivocally provides in Section 22 that general international cooperation agreements that may come into application vis-à-vis online evidence and cybercrime cases shall be given full force and effect.

prosecution of offenses related to the pertinent law, such as illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related offenses, cyber-squatting, cybersex, online child pornography, etc., and in the collection of evidence in electronic form in relation thereto.[778] In this respect, the principles of all existing cooperation laws such as Presidential Degree No. 1069 (Extradition Law), and existing extradition and mutual legal assistance treaties, shall apply.[779]

As to what the specific types of assistance the Implementing Rules and Regulations provide, the Philippines can, namely, (1) provide assistance in the real-time collection of traffic and/or content data with specified communications in the country transmitted by means of a computer system with respect to offenses defined under the Philippine Cybercrime Prevention Act; (2) allow another state to access publicly available stored computer data located in the country or elsewhere; (3) allow another state to access or receive, through a computer system located in the country, stored computer data located in another country, if the other state obtained the lawful and voluntary consent of the person who has the lawful authority to disclose the data to said other state through that computer system; (4) receive a request of another state for it to order or obtain the expeditious preservation of data stored by means of a computer system located within the country, and (5) accommodate request from another state to search, access, seize, secure or disclose stored data by means of a computer system located within the country, including data which has been preserved under the immediately preceding type of assistance.[780]

It bears to stress that as per the enumeration by the Implementing Rules and Regulations of the types of assistance available vis-à-vis online data and/or communication, it is only with the two last enumerated types of assistance that the rules specifically mention the requirement of a formal request for mutual legal assistance be made for the search or similar access, seizure or similar securing, or disclosure of the stored computer data. Given such, it becomes questionable therefore whether a formal request for mutual legal assistance is required for the other enumerated types of assistance. It remains however in practice that formal requests for assistance

778 Implementing Rules and Regulations to the Philippine Cybercrime Prevention Act, §§ 4, 25.

779 Implementing Rules and Regulations to the Philippine Cybercrime Prevention Law, § 25.

780 Implementing Rules and Regulations to the Philippine Cybercrime Prevention Law, § 25.

are required for any form of assistance, especially if the same shall be used in evidence and prosecutorial purposes, and not merely investigative.

Based on the foregoing, the Philippines presents an interesting case of having the legal framework to render assistance falling under the catch-all provision of its self-executory legal basis (the ASEAN MLAT) and yet it does not have a general domestic law on international cooperation which its fellow ASEAN member states have. A perusal of the different substantial law and procedural rules reveals this situation, which allows the Philippines then to render the widest possible measure of assistance it could provide.

What makes matters more interesting is that the types of assistance mentioned in the Philippine Cybercrime Act under the provisions on international cooperation mirrors to some degree, *mutatis mutandis*, the types of assistance basically provided by the ASEAN MLAT, despite the fact that the Cybercrime Act was not intended, as its title suggests, to be the implementing law of the ASEAN MLAT. This observed similarity as regards types of assistance can equally be said with another law, the Anti-Money Laundering Act, wherein requests for mutual assistance can be made by the Philippines vis-à-vis money laundering offenses in (1) the identifying, freezing, restraining, and seizing of assets alleged to be proceeds of any unlawful activity; (2) obtaining information related to any covered transaction, money laundering offense, or any matter directly or indirectly related thereto; (3) subject to the laws of the requested state, search and seize documents, materials, or objects; and (4) apply for a forfeiture order of any monetary instrument or property.[781] On the other hand, requests from a foreign state may be received as regards the following: (1) identifying, freezing, restraining, and seizing of assets; (2) giving information as regards matters needed by the foreign state vis-à-vis the Anti-Money Laundering Act; and (3) applying for a forfeiture order.[782]

The foregoing contemplated types of assistance under the Anti-Money Laundering Act are covered by the types of mutual legal assistance that can be rendered under the ASEAN MLAT, specifically those involving the identification, tracking, restriction, and/or recovery and forfeiture of properties involved in or derived from a commission of a crime. There seems to be an overlap that might lead later on to confusion, despite the disclosure from authorities that there would be no issue arising from overlaps and both the Anti-Money Laundering Act and the ASEAN MLAT

781 Republic Act No. 9160 (as amended), § 13(c).
782 Republic Act No. 9160 (as amended), § 13(b).

shall be cited as legal bases in support for the request. All legal bases that may be thought to be applicable shall be cited in the respective MLA requests. In such a case, it could either be construed as a complete disclosure of applicable legal grounds for a certain request, or a shotgun approach wherein the priority is more on breadth, quantity, or spread (to increase chances of getting the legal basis right) rather than prioritizing quality and accuracy.

Given these issues, Philippine authorities are willing and able to advise on the applicable law and procedure as well as whether a particular request is feasible or not. The open consultation and preliminary communication between parties help overcome the stumbling block posed by any lack of specific domestic legislation, or the lack of standardization in the legal framework that would spell out what is required and can be given.

### 3. Compatibility with other Agreements

Regarding how the ASEAN MLAT fits within the international cooperation commitments of the Philippines, the Philippines practices both informal and formal cooperation with its fellow ASEAN member states. On one hand, the Philippines is a signatory to treaties such as the United Nations Convention Against Transnational Organized Crime ("UNTOC") and United Nations Convention on Corruption ("UNCOC"), both of which provide for mutual legal assistance provisions, and to which the other ASEAN member states are also signatories.

The Philippines is also, within the ASEAN framework, as aforementioned, a part of the Agreement on Information Exchange and Establishment of Communication Procedures of 07 May 2002 to promote cooperation in combating transnational crime, including terrorism, through the establishment of communication networks, logistical arrangements, combined training, and border controls, among others.[783] The Philippines is a signatory together with Malaysia, Indonesia, Cambodia, Brunei, and Thailand.[784]

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783 Agreement on Information Exchange and Establishment of Communication Procedures, arts. 4 and 5; *Caballero-Anthony*, Regional Security in Southeast Asia, p. 217. Municipal law as referred to herein is another nomenclature for domestic law. These terms are used interchangeably in the Philippine legal framework.

784 *Caballero-Anthony*, Regional Security in Southeast Asia, p. 217; *Soesilowati*, p. 235.

Interviews with Philippine officials highlight existing agreements or arrangements between law enforcement authorities or regulatory bodies that facilitate cooperation with each other. For example, the Philippine National Police ("PNP") has existing agreements with other police agencies of other ASEAN member states to cooperate and help each other in terms of law enforcement activities such as, but not limited to, joint police exercises, border controls, training camps, information exchange, or just undertakings that each is willing to extend assistance – either formally or informally – should it be requested or needed by the other party.[785] These agreements are normally facilitated through the ASEANAPOL network.

The Philippines, according to an interview with a PNP official, still treats these types of agreements (even if the subject matter involves informal means of cooperation) as formal agreements because before the PNP can acquiesce to these, they need to get approval like any other executive agreement and/or treaty.[786] Before any agreement can be concluded, officials of the PNP, which is under the Department of Interior and Local Government ("DILG"), consult with the Department of Foreign Affairs ("DFA") which would be the authority to give the green light to any agreement as per Executive Order No. 459 providing for the guidelines in the negotiation of international agreements and its ratification.

Further, cooperation is also done in other law enforcement authorities and administrative agencies such as the Philippine Central Bank.[787] Mostly concerned with money laundering incidents or cases, the Central Bank communicates directly with other regulatory authorities on money laundering and other financial crimes.[788] Thus, while not equivocally elucidated in the interviews, cooperation and coordination with their respective counterparts form part and parcel of their everyday functioning. This highlights the important role this cooperation plays in the entire criminal justice architecture because if one would recall, informal cooperation refers to "exchange of information that occurs directly between law enforcement and regulatory agencies with their foreign counterparts."[789] This is normally used prior to an investigation becoming official and/or prior to commencement of court proceedings, and law enforcement and regulatory agencies are enabled to "directly share information and intelligence with

785 Interview with Philippine National Police Officer Joie Quieta.
786 Interview with Philippine National Police Officer Joie Quieta.
787 Interview with Atty. Arnold Frane.
788 Interview with Atty. Arnold Frane.
789 *Secretariat*, p. 22.

their foreign counterparts without any requirement to make a formal mutual assistance request."[790]

## 4. Principles, Conditions, and Exceptions

Undersecretary Malaya and others mention in their publication that the passage of a domestic law would be useful in providing standardized guidelines for the issuance and execution of MLA requests, negotiation of MLA agreements, and bases for the grant or refusal of requests.[791] While this has yet to happen, there is a need to find other sources to determine principles, conditions, and exceptions the Philippines apply to mutual legal assistance, which are illustrated as the mandatory or discretionary grounds used by the Philippines in refusing a MLA request. One can refer to the ASEAN MLAT due to its self-executory nature as a legal basis for mutual legal assistance between ASEAN member states (or any other state party that may later on accede to the treaty). One can also look unto other existing law and jurisprudence that discusses international cooperation in criminal matters as well as the investigative measures that fall within the ambits of a mutual legal assistance request. In light of this, laws and procedure as provided by the Philippine Constitution, Rules of Criminal Procedure, Anti-Wiretapping Act, Anti-Money Laundering Act, and Philippine Cybercrime Prevention Act among others are taken into account. Although navigating through different laws, jurisprudence, and other legal materials may seem to be a herculean task to be able to pinpoint what is applicable, it is mentioned that in practice, they work to approve all requests received and normally, requests received and sent among ASEAN member-countries are executed.[792] In other words, the end in sight is generally to make things work. To avoid denial of requests, open communication channels are maintained and preliminary consultations and communication are often done between authorities and they advise one another as to the correct content or procedure to be followed.

790 *Secretariat*, p. 22. See also *Bassiouni*, Modalities of International Cooperation, p. 19.

791 *Malaya/Monedero-Arnesto/Paras*, p. 16.

792 Interview with Department of Justice Senior State Council Meredith Alvor.

a. Sufficiency of Evidence Requirement

On the basis of the ASEAN MLAT, there is a tacit sufficiency of evidence requirement written in between its provisions: the more coercive an investigative measure is, e.g. search and seizures, the more evidence or information the requesting state must provide prior to the approval of a MLA request.

Given that this is self-executory in the Philippine setting this should be then applied. However, the ASEAN MLAT does not answer for how this would be operationalized. In this case, one then must look into the relevant and related laws as to how sufficiency of evidence applies and use the same vis-à-vis Philippine framework on mutual legal assistance.

In light of this, one can look then into existing Philippine framework on extradition, given that it is connected to mutual legal assistance as an international cooperation mechanism. There historically exists a sufficiency of evidence requirement in the granting of requests for extradition. Under the relevant provision of Presidential Decree No. 1069, for example, the court may deny a request should there be a lack of a *prima facie* case against the subject person to be extradited.[793] Significantly, international cooperation experts state that a sufficiency of evidence requirement is carried over to mutual legal assistance requests especially those entailing coercive measures as they generally require a lawful court order to be executed lawfully, although a bit more relaxed compared to extradition cases, particularly for measurers involving production of documents or taking of statements of witnesses.[794]

Anent what constitutes this sufficiency of evidence requirement, one can look first into what the Philippine Constitution provides. First, in terms of the people's rights to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, the Philippine Constitution provides under Article III or the Bill of Rights:

> "SECTION 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he

793 Presidential Decree No. 1069, § 10.
794 *Malaya/Monedero-Arnesto/Paras,* p. 13.

> may produce, and particularly describing the place to be searched and the persons or things to be seized."[795]

The Philippine Supreme Court in a plethora of cases has explained the abovementioned constitutional provision. For example, in *People of the Philippines v. Cogaed*, the Court held as follows:

> "This provision requires that the court examine with care and diligence whether searches and seizures are 'reasonable.' As a general rule, searches conducted with a warrant that meets all the requirements of this provision are reasonable. This warrant requires the existence of probable cause that can only be determined by a judge. The existence of probable cause must be established by the judge after asking searching questions and answers. Probable cause at this stage can only exist if there is an offense alleged to be committed. Also, the warrant frames the searches done by the law enforcers. There must be a particular description of the place and the things to be searched."[796]

In other words, the probable cause requirement needs to be satisfied should a mutual legal assistance request entail coercive measures.

As to what constitutes probable cause in Philippine Constitutional and Criminal Law, it is more than bare suspicion but less than what is needed to secure conviction in a criminal case ("guilt beyond reasonable ground"):[797] the Philippine Supreme Court defines "probable cause" as "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the person accused is guilty of the offense with which he is charged" and "that the objects sought in connection with the offense are in the place sought to be searched."[798] Stating it differently, it is the "existence of such facts and circumstances that can lead a reasonably discreet and prudent man to believe that an offense has been committed, and that the items, articles or

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795 1987 Philippine Constitution, art. III, § 2.

796 People of the Philippines v. Cogaed, G.R. No. 200334, 30 July 2014.

797 Clay and Feather International v. Lichaytoo, G.R. No. 193105, 30 May 2011; Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007; Sarigumba v. Sandiganbayan, G.R. Nos. 154239-41, 16 February 2005; Microsoft Corporation and Lotus Development Corporation v. Maxicorp, Inc., G.R. No. 140946, 13 September 2004, 438 SCRA 224, 225; Okabe v. Gutierrez, G.R. No. 150185, 27 May 2004.

798 People of the Philippines v. Cogaed, G.R. No. 200334, 30 July 2014; Kho v. Hon. Lanzanas, G.R. No. 150877, 4 May 2006; People v. Aruta, 351 Phil. 868, 880 (1998).

objects sought in connection with said offense or subject to seizure and destruction by law are in the place to be searched."[799] As the Philippine Supreme Court elucidated in *Clay and Feather International v. Lichaytoo:*

> "xxx In determining probable cause, the average person weighs facts and circumstances without resorting to the calibrations of the rules of evidence of which he has no technical knowledge. He relies on common sense. A finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed and that it was committed by the accused. Probable cause demands more than bare suspicion, but it requires less than evidence that would justify a conviction.
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> "A finding of probable cause does not require an inquiry as to whether there is sufficient evidence to secure a conviction. It is enough that the act or omission complained of constitutes the offense charged. The term does not mean 'actual and positive cause' nor does it import absolute certainty. It is merely based on opinion and reasonable belief. A trial is intended precisely for the reception of prosecution evidence in support of the charge. The court is tasked to determine guilt beyond reasonable doubt based on the evidence presented by the parties at a trial on the merits."[800]

The foregoing is carried over to the Philippine Rules of Criminal Procedure, wherein the following requisites must be satisfied before a search warrant can be properly issued: "(1) it must be issued upon probable cause; (2) the probable cause must be determined by the judge himself and not by the applicant or any other person; (3) in the determination of probable cause, the judge must examine, under oath or affirmation, the complainant and such witnesses as the latter may produce; and (4) the warrant issued must particularly describe the place to be searched and persons or things to be seized."[801] Notably, the oath required must refer to "the truth of the facts within the personal knowledge of the petitioner or his witnesses, because the purpose thereof is to convince the commit-

799 People of the Philippines v. Mariacos, G.R. No. 188611, 16 June 2010; Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007.

800 Clay and Feather International v. Lichaytoo, G.R. No. 193105, 30 May 2011.

801 Philippine Rules of Criminal Procedure, Rule 126, § 4; Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007; Republic v. Sandiganbayan, G.R. Nos. 112708-09, 29 March 1996.

ting magistrate, not the individual making the affidavit and seeking the issuance of the warrant, of the existence of probable cause."[802]

Taking into account the foregoing into a mutual legal assistance framework, it becomes paramount then that the requesting member state provides Philippine authorities sufficient information to allow the latter to apply accordingly for a warrant before the Philippine courts and be able to consequently execute a request for search and seizure. Anything less provided by the requesting member state, or in other words, information and/or evidence not sufficient to satisfy the *onus probandi* of probable cause might result to the denial of the issuance of a warrant.

Moreover, authorities from both the requesting member state and the Philippines are mandated to particularly indicate or describe the location of the place to be searched and/or items, documents, and records to be seized to enable law enforcement officers serving the warrant to "(1) readily identify the properties to be seized and thus prevent them from seizing the wrong items;" and (2) leave said officers "with no discretion regarding the articles to be seized and thus prevent unreasonable searches and seizures."[803] The Philippine Constitution seeks to protect against "search warrants of broad or general characterization or sweeping descriptions, which will authorize police officers to undertake a fishing expedition to seize and confiscate any and all kinds of evidence or articles relating to an offense."[804] The avoidance of fishing expeditions applies across the board and thus equally applies to mutual legal assistance in criminal matters: evidentiary requirements ought to be likewise met in such circumstances.[805] This notwithstanding, authorities are not required to describe everything in "precise and minute detail as to leave no room for doubt on the part of the searching authorities", especially those which by their nature needed to be described in general as otherwise, no warrant shall issue due to lack of technical description.[806] Concomitantly, one of the tests jurisprudence provides as regards particularity of description is "when the things

802 Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007; Prudente v. Dayrit, G.R. No. 82870, 14 December 1989.
803 Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007; People v. Tee, G.R. Nos. 140546-47, 20 January 2003.
804 People v. Tee, G.R. Nos. 140546-47, 20 January 2003.
805 *Malaya/Monedero-Arnesto/Paras,* p. 16.
806 Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007; People v. Tee, G.R. Nos. 140546-47, 20 January 2003.

described are limited to those which bear direct relation to the offense for which the warrant is being issued."[807]

In connection to these requirements, if one would recall, there is a paramount consideration to privacy and privacy of communication under Philippine Constitutional Law. As mentioned earlier, the privacy of communication and correspondence shall remain generally inviolable except upon lawful order of the court, or when public safety or order requires as may be otherwise determined by law.[808] The lawful order or warrant for such interception of communication and/or communication data, including online data, is pursuant to the Anti-Wiretapping Law, Cybercrime Prevention Act, or more recently, the Philippine Anti-Terrorism Act respectively, which more or less follow the same requirements laid down in the Rules on Criminal Procedure.[809]

The Philippine Cybercrime Prevention Act provides further parameters and/or requirements with respect to online data, communication, and correspondence. To begin with, a service provider must keep, retain, and preserve the integrity of traffic data and subscriber information for a minimum period of six (6) months from date of transaction.[810] Content data shall likewise be preserved for six (6) months from date of receipt of any order from law enforcement authorities requiring its preservation.[811] A one-time extension of six (6) months is allowed and the implementing rules and regulations provide that once the preserved, transmitted, or stored data is used as evidence in a case, the mere act of furnishing the service provider with a copy of the transmittal document to the Office of Prosecutor constitutes already notification to preserve the computer data until the final termination of the case and/or as ordered by the relevant court, as the case may be.[812]

Law enforcement authorities are allowed to collect or record by technical or electronic means computer data upon valid issuance of the applica-

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807 Hon Ne Chan v. Honda Motor Co., G.R. No. 172775, 19 December 2007.
808 1987 Philippine Constitution, art. 3, § 3.
809 *See* Anti-Wiretapping Law, § 3; Philippine Cybercrime Prevention Act, § 12; Anti-Terrorism Act, §§ 16-24; Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, § 13.
810 Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, § 12(1).
811 Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, § 12(1).
812 Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, § 12(1).

ble court warrant. The applicable Rule is A.M 17-11-03-SC or the Rule on Cybercrime Warrants. The said Rule was approved by the Philippine Supreme Court and became effective on 15 August 2018. The Philippine Supreme Court approved said Rule to allow law enforcement officers to apply for the issuance of said warrants for either the "preservation, disclosure, interception, search, seizure, and/or examination, custody, and destruction of computer data" in relation to the country's Cybercrime Prevention Act (Section 1.2). The warrants that could be issued under said Rule involves Philippine law enforcement authorities as well as service providers and tech companies wherein the former can order the latter with the appropriate warrant to preserve, disclose, intercept, search, seize, and/or examine, take into custody, or destroy computer data. This is irrespective of where the service provider or tech company is located as long as it is offering its services within the territory of the Philippines (Section 1.4[q]).

A reading of the Rule on Cybercrime Warrants would show common requirements as to what an application for a warrant to either disclose, intercept, or search, seize, and examine data should contain, and only indicating therein whether the warrant is to disclose, intercept, or search, seize, and examine: (1) the probable offense involved; (2) relevance and necessity of the computer data or subscriber's information sought to be disclosed for the purpose of the investigation; (3) names of the individuals or entities whose computer data or subscriber's information are sought to be disclosed/intercepted/examined/searched and seized, including the names of the individuals or entities who have control, possession or access thereto, if available; (4) particular description of the computer data or subscriber's information sought to be disclosed; (5) place where the disclosure of computer data or subscriber's information is to be enforced, if available; (6) manner or method by which the disclosure of the computer data or subscriber's information is to be carried out, if available; and (7) other relevant information that will persuade the court that there is a probable cause to issue the appropriate warrant (Section 4.3). Based on these requirements, the Rules entertain the idea that the place where the disclosure, interception, or search, seizure, and examination of data shall be enforced is unknown, which is otherwise unfathomable in normal coercive measures such as search and seizure as earlier noted above.

Aside from coercive measures involving communication and communication data, the sufficiency of evidence requirement is equally relevant to requests in relation to examination of bank accounts as well as locating,

seizing, restraining, or forfeiture of assets and/or other properties.[813] These matters are covered in a mutual legal assistance request. Regarding the applicable Philippine laws, one can look mainly into the Anti-Money Laundering Act (as amended), Human Security Act of 2007, Terrorism Financing Prevention and Suppression Act of 2012, and the Anti-Terrorism Act of 2020 which enable not only the examination of bank accounts, monetary instruments, and properties involved in money laundering and unlawful activities such as terrorism and financing of terrorism, but also the freezing and sequestration of the relevant monetary instruments and properties.[814]

The Anti-Money Laundering Act (as amended) is the applicable Philippine law that penalizes money laundering and the first domestic statute that provides for mutual legal assistance to be requested and rendered by the Philippines.[815] In relation thereto, the Anti-Money Laundering Council, which is the Philippine administrative body primarily in charge of handling money laundering affairs and cases,[816] as well as acts and omissions connected to financing of terrorism as defined by law,[817] has the authority to "inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon any order of a competent court when it has been established that there is probable cause that the deposits or investments" are related to an unlawful activity or money laundering case as defined in the law.[818] Said court order is however not required in predicate offenses such as kidnapping, a narcotics offense, hijacking, destructive arson, murder, terrorism and conspiracy to commit terrorism. Nevertheless, the Anti-Money Laundering Council ought to act under the requirement of probable cause.[819]

The same Anti-Money Laundering Council is authorized to apply or file a petition *ex parte* with the Philippines' Court of Appeals for any freezing

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813 See ASEAN MLAT, art. 1, § 2(g)-(i).

814 Anti-Money Laundering Act (as amended), §§ 10, 11, 12; Anti-Terrorism Act, §§ 35, 36; Terrorism Financing Prevention and Suppression Act, §§ 10-12.

815 Anti-Money Laundering Act (as amended), §§ 4, 13.

816 Anti-Money Laundering Act (as amended), § 7.

817 Anti-Terrorism Act, §§ 35, 36.

818 Anti-Money Laundering Act (as amended), § 11

819 Anti-Money Laundering Act (as amended), §§ 11; 3(11). Unlawful activities include, but is not limited to, crimes such as kidnapping for ransom, violations of the Philippines' Comprehensive Dangerous Drugs Act, violations of the Anti-Graft and Corrupt Practices Act, plunder, terrorism and conspiracy to commit terrorism, terrorism financing, illegal gambling, piracy, qualified theft, smuggling, swindling, violations of Electronic Commerce Act, hijacking, etc.

of any monetary instrument or property alleged to be laundered, proceeds from, or instrumentalities used in or intended for use in any unlawful activity and said Court of Appeals shall issue the corresponding freezing order should probable cause exist as regards the same monetary instrument or property.[820] Furthermore, the Anti-Money Laundering Council can file an *ex parte* verified petition for forfeiture proceedings against any monetary instrument or property, upon its determination that probable cause exists that any monetary instrument or property is in any way related to an unlawful activity or money laundering offense as defined in the Act.[821] In relation to said petition, the appropriate court could issue provisional asset protection order when there is probable cause to believe that said order should be issued.[822]

Taking this into account, it bears mentioning that these forfeiture proceedings are not necessarily criminal in nature which as mentioned in the earlier sections is imperative for mutual legal assistance in criminal matters to apply. This notwithstanding, the nexus can be established between the forfeiture proceedings and the criminal case of anti-money laundering, which would make any request for assistance pertaining to the same within the penumbra of the ASEAN MLAT. Additionally, forfeiture proceedings is contemplated specifically in the list of the types of assistance that can be rendered and requested between the ASEAN member states.

Having said that, one can moreover note that it is imperative to satisfy the probable cause requirement before action can be taken by the Anti-Money Laundering Council, and of course the Department of Justice, as the central authority for mutual legal assistance requests. In this respect, it is understandable that in submitting requests by foreign states, the Anti-Money Laundering Act requires that they contain the information as detailed below, and that they are able to satisfy the probable cause requirement, at the least, in the process:

> "Section 13. Mutual Assistance among States.
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> "xxx
>
> "(e) Requirements for Requests for Mutual Assistance from Foreign States. A request for mutual assistance from a foreign State must (1) confirm that an investigation or prosecution is being conducted

820 Anti-Money Laundering Act (as amended), §§ 7(6), 10; Anti-Terrorism Act, §§ 35, 36.
821 Anti-Money Laundering Act (as amended), § 12.
822 A.M. No. 05-11-04-SC, § 11.

> in respect of a money launderer named therein or that he has been convicted of any money laundering offense; (2) state the grounds on which any person is being investigated or prosecuted for money laundering or the details of his conviction; (3) give sufficient particulars as to the identity of said person; (4) give particulars sufficient to identify any covered institution believed to have any information, document, material or object which may be of assistance to the investigation or prosecution; (5) ask from the covered institution concerned any information, document, material or object which may be of assistance to the investigation or prosecution; (6) specify the manner in which and to whom said information, document, material or object obtained pursuant to said request, is to be produced; (7) give all the particulars necessary for the issuance by the court in the requested State of the writs, orders or processes needed by the requesting State; and (8) contain such other information as may assist in the execution of the request."[823]

Taking these into account, said requirement needs to be satisfied whenever a request for assistance entails coercive measures, regardless of what is sought is a general search and seizure procedure, an interception or intrusion of privacy of communication and correspondence, including online data, or an examination of bank deposits and other monetary instrument, including its freezing or forfeiture. In case of non-coercive measures, the requirement for establishing probable cause is in general not so stringent.

### b. Dual Criminality

Dual criminality is provided as a mandatory ground for refusal in the ASEAN MLAT. In practice however, as shown in available reports, the Philippines does not decline requests for mutual legal assistance, regardless of being based on treaty or not, on the ground of dual criminality.[824] This is notably allowed by the ASEAN MLAT and such fact has been confirmed in an interview with the person-in-charge of mutual legal assistance requests within the Department of Justice. The same is likewise provided in the implementing rules and regulations of the Cybercrime Prevention

823 Anti-Money Laundering Act (as amended), § 13(e).
824 *Soriano*, p. 138.

Act, wherein dual criminality has been categorically excluded as a valid ground to refuse any request for assistance by a requesting state.[825]

As to the reason why the Philippines shall still proceed in executing a request for mutual legal assistance despite the non-existence of the dual criminality requirement as provided for in the ASEAN MLAT, Philippine jurisprudence may shed light as to why. It acknowledges the country's interest in suppressing crime:

> "The Philippines also has a national interest to help in suppressing crimes and one way to do it is to facilitate the extradition of persons covered by treaties duly entered [into] by our government. More and more, crimes are becoming the concern of one world. Laws involving crimes and crime prevention are undergoing universalization. One manifest purpose of this trend towards globalization is to deny easy refuge to a criminal whose activities threaten the peace and progress of civilized countries. It is to the great interest of the Philippines to be part of this irreversible movement in light of its vulnerability to crimes, especially transnational crimes."[826]

The Philippines gives merit in being able to afford assistance to other states through the different tools of international cooperation, in order to likewise suppress crime in its own country:

> "Indeed, in this era of globalization, easier and faster international travel, and an expanding ring of international crimes and criminals, we cannot afford to be an isolationist state. We need to cooperate with other states in order to improve our chances of suppressing crime in our own country."[827]

Moreover, the Philippines values, as a state policy, comity with other states and failure to comply with treaty obligations vis-à-vis international cooperation such as extradition and/or mutual legal assistance is thought to bring a risk of dissuading other states to enter into other treaties with it, especially those involving international cooperation which is founded on

825 Implementing Rules and Regulations to the Cybercrime Prevention Act, § 25(d).

826 Secretary of Justice v. Lantion, G.R. No. 139465, 17 October 2000; Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

827 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

reciprocity.[828] Therefore, it becomes understandable why the Philippines overlooks the requirement of double criminality to facilitate requests for mutual legal assistance.

c. Double Jeopardy

Double jeopardy is a mandatory ground for refusal under the ASEAN MLAT. To recall, a requested state shall deny assistance when the request relates to an investigation, prosecution, or punishment of a person for an offense where the person either "has been convicted, acquitted, or pardoned by a competent court or other authority in the requesting or requested member state" or "has undergone the punishment provided by law of that requesting or requested member state, in respect of that offense or of another offense constitute by the same act or omission as the first-mentioned offense."[829] Due to the self-executory nature of the ASEAN MLAT vis-à-vis mutual legal assistance the Philippines renders and requests with fellow ASEAN member states, this ought to be applicable in the Philippine setting. Thus, when the MLA request received relates to an offense wherein the subject person has been convicted, acquitted, or pardoned, or otherwise has undergone the punishment provided for, in the requesting state, then the Philippines should deny the said request. The Philippines should likewise expect a denial of a request it sends if the same circumstances exist in the requested state.

In light of the treaty provision, the concept of transnational or international double jeopardy in the Philippines has yet to be decided in jurisprudence. There has been no test case thus far when the Philippine Supreme Court upheld the prohibition on double jeopardy on the basis that the subject person has been convicted, acquitted, or pardoned, or otherwise undergone the punishment provided by the law of another state. This is especially the case with respect to mutual legal assistance matters.

In respect of this, it becomes imperative to understand then what the prohibition against double jeopardy means within the Philippine context and how it would apply in terms of requesting and receiving MLA requests. This does not include all branches and applications of the prohibi-

828 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

829 2004 ASEAN Mutual Legal Assistance Treaty, art.3, § 1(d).

tion but mostly centers on what would be important in a mutual legal assistance framework.

At the outset, it can be said that the prohibition against double jeopardy as provided in the Philippine Constitution is constructed in general terms. Under Article III of the Bill of Rights in the 1987 Philippine Constitution, Section 21 provides that "no person shall be put twice in jeopardy of punishment for the same offense."[830] And should the offense be punishable by both a law and an ordinance, a conviction for either shall constitute a bar to another prosecution on the same act.[831]

Under Philippine law, double jeopardy arises when the following requisites are present: "(1) a first jeopardy attached prior to the second; (2) the first jeopardy has been validly terminated; and (3) a second jeopardy is for the same offense as in the first."[832] First jeopardy attaches when the following exist: "(1) a valid complaint or information; (2) a court of competent jurisdiction; (3) the defendant had pleaded to the charge; and (4) the defendant was acquitted, or convicted or the case against him was dismissed or otherwise terminated without his express consent."[833]

Philippine jurisprudence admits of exceptions as to when double jeopardy could still attach even if the dismissal of the case was due to the motion of the accused: "(1) where the dismissal is based on a demurrer to evidence filed by the accused after the prosecution has rested, which has the effect of a judgment on the merits and operates as an acquittal; (2) where the dismissal is made, also on motion of the accused, because of the denial of his right to a speedy trial which is in effect a failure to prosecute."[834] In these instances, the accused cannot invoke the right against double jeopardy should it be apparent that "the trial court acted with grave abuse of discretion amounting to lack or excess of jurisdiction, such as where the prosecution was not allowed the opportunity to make

830 1987 Philippine Constitution, art. 3, § 21.

831 1987 Philippine Constitution, art. 3, § 21.Given the above-quoted constitutional provision, Philippine law contemplates two (2) kinds of double jeopardy: (1) that no person shall be put twice in jeopardy for the same offense; and (2) if an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act. See 1987 Philippine Constitution, art. 3, § 21; Rules of Criminal Procedure, Rule 117, § 7.

832 Cerezo v. People of the Philippines, G.R. No. 185230, 01 June 2011; Rules of Criminal Procedure, Rule 117, § 7.

833 Bangayan v. Bangayan, G.R. Nos. 172777 and 172792, 19 October 2011.

834 Bangayan v. Bangayan, G.R. Nos. 172777 and 172792, 19 October 2011; Paulin v. Gimenez, G.R. No. 103323, 21 January 1993, 217 SCRA 386, 389.

its case against the accused or where the trial was a sham."[835] To illustrate, double jeopardy does not exist, according to Philippine jurisprudence, "(1) where the trial court prematurely terminated the presentation of the prosecution's evidence and forthwith dismissed the information for insufficiency of evidence; and (2) where the case was dismissed at a time when the case was not ready for trial and adjudication."[836]

Furthermore, double jeopardy shall not attach and the conviction of the accused shall not be a bar to another prosecution for an offense which necessarily includes the offense charged in the former complaint or information under any of the following instances: "(1) the graver offense developed due to supervening facts arising from the same act or omission constituting the former charge; (2) the facts constituting the graver charge became known or were discovered only after a plea was entered in the former complaint or information; or (3) the plea of guilty to the lesser offense was made without the consent of the prosecutor and of the offended party except as provided in section 1(f) of Rule 116."[837] In any of these foregoing cases, the applicable provision further provides that, "where the accused satisfies or serves in whole or in part the judgment, he shall be credited with the same in the event of conviction for the graver offense."[838]

Considering the abovementioned, together with the Philippine policy cooperating in good faith and in suppressing crime, one is confronted with two different interests. On one hand, there is the general prohibition against double jeopardy, which if one follows the spirit of the constitutional prohibition itself, can lead to a conclusion that the prohibition should be upheld as regards potentially transnational crimes (and concurrent jurisdictions between countries). This would be consistent with the treaty provision. On the other hand, there is the value of being cooperative in suppressing crime altogether. The Philippines in practice generally grants all mutual legal assistance requests it receives and the commitment to suppress crime could be an explanation for this.

As to how this should be applied then, the first interest outweighs the other especially if the conviction, acquittal, pardon, or service of punishment occurred in either the requesting state or the Philippines as a requested state. This is in accordance with the mandatory ground for refusal laid

835 Bangayan v. Bangayan, G.R. Nos. 172777 and 172792, 19 October 2011.
836 Bangayan v. Bangayan, G.R. Nos. 172777 and 172792, 19 October 2011; Paulin v. Gimenez, G.R. No. 103323, 21 January 1993, 217 SCRA 386, 389.
837 Rules of Criminal Procedure, Rule 117, § 7.
838 Rules of Criminal Procedure, Rule 117, § 7.

down in the ASEAN MLAT. It is different however should the conviction, acquittal, pardon, or service of punishment occurred in a third state – or fellow ASEAN member state – for the same offense or facts constituting the offense, because the ASEAN MLAT is limited to what is between the requesting and requested state. The question then is not easily answerable given the weighing of values involved.

Further, the position of the Philippines as requesting or requested state ought to be taken into account. If the Philippines is a requesting state, then Philippine courts would need to consider the constitutional prohibition because the evidence procured would be used within Philippine jurisdiction. Thus, domestic law and principles ought to be taken into account. If the conviction, acquittal, pardon, or service of punishment occurred elsewhere, even if it is a third state or other ASEAN member state, then such circumstance could be material in determining double jeopardy. If the Philippines however is a requested state, it is unsettled whether it can apply its own constitutional values to deny a request because it potentially violates the constitutional prohibition against double jeopardy, despite this being technically allowed in the ASEAN MLAT (although limited between the requested and requesting states). Having mentioned these potential issues or hurdles, authorities have yet to encounter this exact kind of scenario in practice. What is normally done in general is to use the open communication channels and preliminary consultation to ease out any concerns or issues that may potentially arise vis-à-vis a MLA request. Given the lack of domestic legislation or specific jurisprudence or guidelines however, these deliberations or decisions would remain ad hoc and highly dependent on what has been resolved between the requesting state or requested state.

### d. Substantive Considerations of Human Rights

At this juncture, human rights considerations on a substantive level shall be looked into in respect to mutual legal assistance in the Philippines. This involves two points. First, there are human rights considerations used as grounds to refuse MLA request. As the discussion below would show, one would look deeply into Philippine law and jurisprudence to understand what human rights obligations could play a role in the refusal or execution of a MLA request. Second, there is a discussion of how limited the applicable human rights considerations are vis-à-vis grounds to refuse a request. This includes a discussion of the severity of punishment and the position

of the Philippines on the proscription of torture and cruel, inhumane, and degrading punishment and treatment and how the Philippines' position matters in terms of handling MLA requests.

### i. Human Rights Considerations as Grounds to Refuse

Considering that there is no readily made available domestic instrument spelling out the human rights to be taken into account vis-à-vis mutual legal assistance on a substantive level, other than those provided by the treaties and international agreements the Philippines enters into, consultation with authorities was imperative to know how practice goes. In interviews with Philippine authorities involved in mutual legal assistance requests, they mentioned that general human rights considerations come into play in mutual legal assistance, in the same way as it applies in cases of extradition. As to what these human rights are with regard to mutual legal assistance, or how any mechanism regarding the same would work, it is imperative to examine the different legal instruments, including jurisprudence.

First, there ought to be discussion of the role human rights play as grounds to refuse execution of a MLA request. In the publication of Malaya et al. (authorities in mutual legal assistance), human rights considerations comprise one of the grounds cited to refuse a MLA request in general, together with national or public interest, severity of punishment, bank secrecy, political offenses, double jeopardy (albeit this also could fall within the penumbra of human rights considerations), the rights of suspects charged with criminal offenses may be prejudiced, and specific types of assistance involving seizing and freezing of assets.[839] In light of this, a reading of the ASEAN MLAT would reveal that a request shall be denied if it violates the prohibition against double jeopardy (as discussed earlier), or is issued on reasons of discrimination, or in the transfer of persons to give evidence and/or information, the safety of said person ought to be ensured prior to the request being granted.

Alongside these grounds for refusal provided by the ASEAN MLAT itself, certain human rights aspects also ought to be taken into account by authorities vis-à-vis the practice of mutual legal assistance. At the outset, it can be said that the Philippines is replete with details and parameters in its law and jurisprudence as regards the importance of human rights

839 *Malaya/Monedero-Arnesto/Paras,* p. 15.

and defense rights in criminal matters, including those with earmarks of a criminal process, i.e. extradition and mutual legal assistance. Any violation generally results to grave consequences such as inadmissibility of evidence or the dismissal of the criminal case altogether. The right against double jeopardy is one of these human rights considerations, which has been tackled earlier. Generally, there would be negative consequences should the prohibition against double jeopardy be violated, although admittedly case law is left to be desired as regards any issue of double jeopardy vis-à-vis mutual legal assistance.

Additionally, there is the right to privacy, or the right to be let alone, which was institutionalized in the 1987 Philippine Constitution "as a facet of the right protected by the guarantee against unreasonable searches and seizures."[840] In Philippine law and jurisprudence, the right to privacy exists independently from one's right to liberty and in itself is deserving of constitutional protection. In relation to this, Philippine legal doctrine adheres to the so-called "zones of privacy":

> "Zones of privacy are recognized and protected in our laws. Within these zones, any form of intrusion is impermissible unless excused by law and in accordance with customary legal process. The meticulous regard we accord to these zones arises not only from our conviction that the right to privacy is a 'constitutional right' and 'the right most valued by civilized men,' but also from our adherence to the Universal Declaration of Human Rights which mandates that, 'no one shall be subjected to arbitrary interference with his privacy' and 'everyone has the right to the protection of the law against such interference or attacks."[841]

The aforementioned "zones of privacy" is created by the constitutionally conferred rights against "unreasonable searches and seizures of whatever nature and for any purpose" and the right to privacy of communication and correspondence.[842] In an earlier discussion on the existence of a probable cause requirement in the Philippines, it was already mentioned that there could only be a lawful search and seizure of one's person, property,

840 Disini v. Secretary of Justice, G.R. No. 203335, 18 February 2014, citing Pollo v. Constantino-David, G.R. No. 181881, 18 October 2011, 659 SCRA 189, 204-205.

841 Disini v. Secretary of Justice, G.R. No. 203335, 18 February 2014; See also In the Matter of the Petititon for the Issuance of Writ of Habeas Corpus of Sabio v. Senator Gordon, 535 Phil. 687, 714-715 (2006).

842 1987 Philippine Constitution, art. 3, §§ 2, 3.

house, and effects, and/or lawful interception of one's communication and correspondence, including online data or evidence (via the relevant domestic law) through a lawful order issued by the court. Stating it differently, Philippine law and jurisprudence, although admitting of some exceptions, generally requires a lawful arrest warrant before a person could be lawfully arrested and a lawful search warrant before police officers can effectuate any kind of search and seizure, including online evidence or data. Philippine law and jurisprudence further provides for stringent requirements that ought to be followed. In light of this, the Philippines adheres to the so-called exclusionary rule. No less than its Constitution provides the same:

> "Section 3.
>
> xxx
>
> "(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."[843]

Such exclusionary rule prevents the state from profiteering from its agents' stark violations of constitutionally enshrined rights.[844] As the former Supreme Court Justice Claudio Teehankee explained in his separate opinion in Nolasco v. Paño:

> "This constitutional mandate expressly adopting the exclusionary rule has proved by historical experience to be the only practical means of enforcing the constitutional injunction against unreasonable searches and seizures by outlawing all evidence illegally seized and thereby removing the incentive on the part of state and police officers to disregard such basic rights. What the plain language of the Constitution mandates is beyond the power of the courts to change or modify."[845]

The exclusionary rule extends to the application of the "fruit of the poisonous tree" doctrine in Philippine jurisdiction. Originating from United States jurisprudence, the same doctrine likewise finds application under Philippine law and jurisprudence:

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843 1987 Philippine Constitution, art. 3, § 3(2).

844 Esquillo v. People of the Philippines, G.R. No. 182010, 25 August 2010 (J. Bersamin, dissenting), citing Walder v. US, 347 US 62, 64-65 (1954).

845 Nolasco v. Paño, G.R. No. L-69803, 08 October 1985 (J. Teehankee, separate). See also People of the Philippines v. Cogaed, G.R. No. 200334, 30 July 2014.

> "We have not only constitutionalized the Miranda warnings in our jurisdiction. We have also adopted the libertarian exclusionary rule known as the 'fruit of the poisonous tree,' a phrase minted by Mr. Justice Felix Frankfurter in the celebrated case of Nardone v. United States. According to this rule, once the primary source (the 'tree') is shown to have been unlawfully obtained, any secondary or derivative evidence (the ' fruit') derived from it is also inadmissible. Stated otherwise, illegally seized evidence is obtained as a direct result of the illegal act, whereas the 'fruit of the poisonous tree' is the indirect result of the same illegal act. The 'fruit of the poisonous tree' is at least once removed from the illegally seized evidence, but it is equally inadmissible. The rule is based on the principle that evidence illegally obtained by the State should not be used to gain other evidence because the originally illegally obtained evidence taints all evidence subsequently obtained. We applied this exclusionary rule in the recent case of People vs. Salanga, et al., a ponencia of Mr. Justice Regalado. Salanga was the appellant in the rape and killing of a 15-year old barrio lass. He was, however, illegally arrested. Soldiers took him into custody. They gave him a body search which yielded a lady's underwear. The underwear was later identified as that of the victim. We acquitted Salanga. Among other reasons, we ruled that 'the underwear allegedly taken from the appellant is inadmissible in evidence, being a so-called 'fruit of the poisonous tree.'"[846]

The right against unreasonable searches and seizures and the protection of privacy of communications and correspondence find application in mutual legal assistance requests not only because a MLA request could pertain to search and seizures, but also because MLA requests involve the taking of evidence and/or voluntary statements, or forfeiture proceedings. In these instances, for the search, seizure, or forfeiture (including procedures such as freezing, etc.) to be lawful, valid warrants and/or court orders are necessitated and would depend on the information provided in a request. Otherwise, the consequent arrest, search, seizure, freezing, or any other coercive measure shall be deemed illegal and any evidence obtained in relation to this are considered inadmissible as evidence. Therefore, for example, MLA requests that are more of fishing expeditions or formulated capriciously must be denied by Philippine authorities in respect of one's constitutional rights as abovestated. The same holds true even more when

846 People of the Philippines v. Alicando, G.R. No. 117487, 12 December 1995.

the Philippines is the requesting state in a mutual legal assistance request. For evidence or information obtained through mutual legal assistance to be deemed admissible, the same must be in accordance with the requirements laid down by Philippine law and jurisprudence. Hence, it is incumbent upon Philippine authorities, especially when it is at the requesting end, to specify the procedure and requirements to be followed, should it seek to use any evidence or information obtained in court proceedings at home.

Alongside the right against unreasonable search and seizures and protection of one's privacy of correspondence and communications, the Philippine Constitution provides for one's right to due process. Under Article III, Section 1, no one shall be deprived of life, liberty, or property without due process of law. The right contemplated herein heavily follows the United States doctrine on due process, which contemplates both substantive and procedural components: substantive due process "requires the intrinsic validity of the law in interfering with the rights of the person to his life, liberty, or property," while procedural due process "consists of the two basic rights of notice and hearing, as well as the guarantee of being heard by an impartial and competent tribunal."[847] In other words, the former is concerned about what ought to be done and the latter, how it ought to be done.

Applying the right to substantive due process to mutual legal assistance requests, there is no specific judicial pronouncement and/or elucidation on its applicability in a MLA framework. Nevertheless, a look into substantive due process issues would lead one to infer that a MLA request and/or the criminal matter indicated therein must not be vague nor incomplete. The Philippine Supreme Court is remindful with regard to this, reminding in many cases that "due process requires that the terms of a penal statue must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[848] In the cases of People of the Philippines v. Dela Piedra and Romualdez v. Sandiganbayan, the Court held that "a criminal statute that fails to give a person of common intelligence fair notice that his contemplated conduct is forbidden by the statute or is so indefinite that it encourages arbitrary or erratic arrests and convictions is void for vagueness. The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for

847 Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.
848 Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004.

an offense, the nature of which he is given no fair warning."[849] Commonly known as the void-for-vagueness doctrine, which again is influenced by United States doctrine and commonly applied to free speech cases, it could be applied to a certain degree on criminal cases and the Supreme Court had the occasion to provide a test for the same:

> "A statute establishing a criminal offense must define the offense with sufficient definiteness that persons of ordinary intelligence can understand what conduct is prohibited by the statute. It can only be invoked against that species of legislation that is utterly vague on its face, i.e., that which cannot be clarified either by a saving clause or by construction.
>
> "A statute or act may be said to be vague when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ in its application. In such instance, the statute is repugnant to the Constitution in two (2) respects - it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of what conduct to avoid; and, it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle. But the doctrine does not apply as against legislations that are merely couched in imprecise language but which nonetheless specify a standard though defectively phrased; or to those that are apparently ambiguous yet fairly applicable to certain types of activities. The first may be 'saved' by proper construction, while no challenge may be mounted as against the second whenever directed against such activities. With more reason, the doctrine cannot be invoked where the assailed statute is clear and free from ambiguity, as in this case.
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> "The test in determining whether a criminal statute is void for uncertainty is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. xxx"[850]

The Court clarified however that "the 'vagueness' doctrine merely requires a reasonable degree of certainty for the statute to be upheld - not absolute

849 People v. dela Piedra, G.R. No. 121777, 24 January 2001, 350 SCRA 163; Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004 (J. Tinga, separate opinion).

850 Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004.

precision or mathematical exactitude."[851] "Flexibility, rather than meticulous specificity," according to the Court, "is permissible as long as the metes and bounds of the statute are clearly delineated."[852] An act will not be held invalid or void "merely because it might have been more explicit in its wordings or detailed in its provisions, especially where, because of the nature of the act, it would be impossible to provide all the details in advance as in all other statutes."[853]

In light of these pronouncements, should the mutual legal assistance request be incomplete or vague as to what criminal matter is involved, or the request is not specific as to what criminal matter it covers or the purpose the assistance requested for relates to, or the request seems rather a shotgun approach or fishing expedition, then substantive due process issues shall arise. Should the Philippines be at the receiving end of such a request, then it would be constitutionally enjoined to deny said requests, or ask the requesting state to be more definite in what is indicated in the subject request.

In sum, the foregoing should be taken substantively into consideration alongside what has been specifically provided in the ASEAN MLAT in the requesting and receiving of MLA requests.

### ii. Limited Applicable Human Rights Obligations vis-à-vis Grounds to Refuse; Severity of Punishment Issue

Additionally, one cannot help but take a look into what Philippine law and jurisprudence provides regarding torture, violence, and intimidation, and/or cruel, inhumane, degrading treatment. While mutual legal assistance is unlike extradition wherein arrest and surrender of a person involved, information and/or evidence gathered through a mutual legal assistance request can equally lead to the success of a criminal investigation and/or prosecution and eventual risk of losing one's liberty. Thus, the discussion on punishment is only imperative.

On one hand, the Philippine Constitution provides the proscription of torture, violence, intimidation, etc. during the custodial investigation of a

851 Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004.
852 Estrada v. Sandiganbayan, 421 Phil. 290, 430, 19 November 2001; Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004.
853 Estrada v. Sandiganbayan, 421 Phil. 290, 430, 19 November 2001; Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004.

suspect, wherein "no torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him."[854] Moreover, "secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited."[855] And should any confession or admission be obtained through the foregoing means, the same is considered inadmissible as evidence.[856] Applying the same to mutual legal assistance, the Philippines, either as a requested or requesting state, should ensure that its authorities do not engage in any form of torture, violence, intimidation or any other means that vitiate the free will of an individual while effectuating a mutual legal assistance request. Should authorities need to take someone in their custody for purposes of mutual legal assistance, they should ensure the well-being of this person and at all times, respect the person's human rights.

On the other hand, there is also a constitutional proscription on torture and/or cruel, inhumane, or degrading treatment as a form of punishment:

> "Section 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*.
> "(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law."[857]

One can note two things from the above-quoted constitutional provision. First, the Philippine Constitution does not necessarily proscribe the imposition of the death penalty. Nonetheless, it limits its imposition to those considered as "heinous crimes" and compelling reasons as may be provided in law by the Philippine Congress.[858] Furthermore, the Philippine Constitution does not automatically equate the "employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman

854 1987 Philippine Constitution, art. 3, § 12.
855 1987 Philippine Constitution, art. 3, § 12(2).
856 1987 Philippine Constitution, art. 3, § 12(3).
857 1987 Philippine Constitution, art. 3, § 19.
858 See People v. Echegaray, G.R. No. 117472, 25 June 1996.

conditions" to torture and/or cruel, inhumane, degrading punishment.[859] Instead, it gives the discretion to Philippine legislature to deal with the same.[860]

All things considered, given the foregoing different human rights espoused in the Philippines, one must take into account that the ASEAN MLAT would allow for a limited number of grounds based on human rights, on the basis of which a requested state can deny a request. With such given circumstances, one cannot help but ask whether the Philippines can still invoke "general human rights considerations" as a ground to refuse a request when it is a requested state and the MLA request involves a matter that violates, threatens to violate, or is inconsistent with the Philippines' human rights obligations as enshrined in its Constitution, laws, and other treaty obligations.

There are two possible arising scenarios. On one hand, if the ASEAN MLAT is followed to the letter as the legal basis, then the Philippines cannot invoke "general human rights considerations" as a ground for refusal because it is not truly provided for, except in very particularly enumerated instances. Furthermore, the Philippines as illustrated in extradition cases follows in general a hands-off approach. In deciding on an extradition matter, which more or less is carved from the same cloth as mutual legal assistance,[861] the Supreme Court acknowledged five (5) postulates of extradition which includes the grant of due process rights to the accused by the requesting state as follows:

> "Second, an extradition treaty presupposes that both parties thereto have examined, and that both accept and trust, each other[']s legal system and judicial process. More pointedly, our duly authorized representatives signature on an extradition treaty signifies our confidence in the capacity and the willingness of the other state to protect the basic rights of the person sought to be extradited. That signature signifies our full faith that the accused will be given, upon extradition to the requesting state, all relevant and basic rights in the criminal proceedings that will take place therein; otherwise, the treaty would

859 1987 Philippine Constitution, art. 3, § 19(2).
860 People v. Echegaray, G.R. No. 117472, 25 June 1996.
861 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

> not have been signed, or would have been directly attacked for its unconstitutionality."[862]

It seems that there is a tacit acceptance that the Philippines would not probe or interfere with how the requesting member state's legal system and judicial process works. Instead, it works on mutual trust and confidence that the requesting member state shall do what is right in the protection of the rights of the accused. Arguably, this can be translated to mutual legal assistance requests, which although of a lesser degree than extradition, also involves criminal matters.

At the same time, Philippine courts are enjoined to more or less follow the rule of non-inquiry as follows:

> "The Court realizes that extradition is basically an executive, not a judicial, responsibility arising from the presidential power to conduct foreign relations. In its barest concept, it partakes of the nature of police assistance amongst states, which is not normally a judicial prerogative. Hence, any intrusion by the courts into the exercise of this power should be characterized by caution, so that the vital international and bilateral interests of our country will not be unreasonably impeded or compromised. In short, while this Court is ever protective of the sporting idea of fair play, it also recognizes the limits of its own prerogatives and the need to fulfill international obligations."[863]

The Supreme Court further clarifies:

> "On the other hand, courts merely perform oversight functions and exercise review authority to prevent or excise grave abuse and tyranny. They should not allow contortions, delays and over-due process every little step of the way, lest these summary extradition proceedings become not only inutile but also sources of international embarrassment due to our inability to comply in good faith with a treaty partners simple request to return a fugitive. Worse, our country should not be converted into a dubious haven where fugitives and escapees can unreasonably delay, mummify, mock, frustrate, checkmate and defeat the quest for bilateral justice and international cooperation."[864]

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862 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

863 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

864 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

Thus, the Philippine courts generally maintain a hands-off position and only an oversight function through judicial review to avoid grave abuse of discretion and possible tyranny with respect to the use of international cooperation instruments.

On the other hand, the Philippines can alternatively apply "national interest" as a ground to refuse a MLA request. Albeit catch-all and subjective in nature, national and public interest is involved vis-à-vis human rights obligations because no less than the Philippine Constitution provides that adherence to human rights is part of the Philippines' state principles and policies. This would also be more consistent with the Supreme Court's recent decision to tackle the propriety of an investigative measure (deposition through written interrogatories) vis-à-vis a granted mutual legal assistance request and the question of whether one's right to confrontation of witnesses in a criminal case is infringed by virtue thereof. In the case of *People of the Philippines v. Sergio*,[865] the Court, while not delving into the validity of the execution of the mutual legal assistance, painstakingly looked into the merits of the case and the requested investigative measure to settle issues involving rights. Although the rights discussed are more on procedural rights, a reading of the case reveals the importance given by the Supreme Court on the tenets of due process, orderly administration of justice, and fair play. Thus, a hands-off policy may be the general rule in terms of international cooperation but the Supreme Court shall not quickly turn a blind eye on human rights issues if called for by the circumstances.

Given these two possible routes, Philippine authorities have yet to deny requests for mutual legal assistance on the ground of the possible conflict with its human rights obligations, such as its constitutional prohibition on the use of torture, cruel, inhumane, and/or degrading punishment, or the imposition of the death penalty. Because as intimated during interviews, no request has been denied on this ground yet.[866] The Philippines seemingly gives paramount consideration to fulfilling its treaty obligations and the absence of this condition might be reason enough for the Philippines to not use the same. But then again, it would be a case-to-case basis. Authorities interviewed mention the need for balancing of values – on whether again the member state shall give more importance to fulfilling treaty obligations blindly or provide resistance when human rights considerations are involved. Should there be any consolation to this purportedly

865 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.
866 Interview with Department of Justice Senior State Council Meredith Alvor.

stumbling block in upholding human right considerations, Philippine authorities are always in constant communication and consultation with its counterparts from other ASEAN member-countries.[867] Thus, they advise and assist one another as to avoid fielding in requests that contain grounds for refusal, such as those involving human rights violations. Nevertheless, open lines of communication and consultation may be insufficient solutions to address issues involving human rights. In view of this, a possible threshold would be those constitutionally provided or those rights in accordance with customary law obligations. These could be positioned as non-negotiables, regardless of whether the evidence and/or information obtained is to be used elsewhere.

e. Reciprocity

The ASEAN MLAT, as applied as a framework in the Philippines, provides reciprocity as a discretionary ground for refusal of a request for mutual legal assistance in criminal matters. This is in a way resonated in the Anti-Money Laundering Law wherein it is provided that the principles of mutuality and reciprocity shall be at all times recognized in affording mutual legal assistance.[868] Taking it more generally, the Philippines values as mentioned above as a state policy, comity with other states and failure to comply with treaty obligations vis-à-vis international cooperation such as extradition and/or mutual legal assistance is thought to bring a risk of dissuading other states to enter into other treaties with it, especially those involving international cooperation which is founded on reciprocity.[869] Thus it is not surprising that in practice, reciprocity is paramount in the handling of mutual legal assistance requests especially in the ASEAN.[870] Thus far, according to authorities, no ASEAN country has risked being denied a request for violation of reciprocity and comity because they know the repercussions of reneging on their treaty and international obligations.[871]

867 Interview with Department of Justice Senior State Council Meredith Alvor.
868 Anti-Money Laundering Act (as amended), § 13(a).
869 Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.
870 Interview with Department of Justice Senior State Council Meredith Alvor.
871 Interview with Department of Justice Senior State Council Meredith Alvor.

### f. Speciality or Use Limitation

The ASEAN MLAT allows a requesting member state to refuse a request on the ground that the other party fails to undertake that it shall not use the item requested for a matter other than the criminal matter indicated in its request and that the requested member state has not waive such undertaking. In the examination of Philippine domestic law mentioning mutual legal assistance or international cooperation in general, the speciality and use limitation cannot be found in the relevant provisions of the Anti-Money Laundering Act but can otherwise be found in the implementing rules and regulations of the Cybercrime Prevention Act, wherein the requesting state is required to use the requested information subject to the conditions specified in the grant.[872] Such speciality and use limitation is understandable in cybercrime instances wherein data protection is given primordial consideration in the law. Also, in a report by Philippine authorities, it was mentioned that such use limitation would apply in practice, and actually a standard provision in MLA arrangements of the Philippines with other countries.[873]

Given these circumstances, there is admittedly on its face a gap as to how this omission could be explained. A closer inspection would however reveal that the speciality or use limitation should apply, especially in instances wherein coercive measures are required in a MLA request. If one would recall, the Philippines has stringent requirements before a lawful search and seizure, arrest, or any other coercive measure can be done. One of this is the probable cause requirement before a lawful court order can be issued authorizing such coercive measure needed. Non-compliance with this in addition to other requirements would engage the so-called exclusionary rule and fruit of the poisonous tree doctrine, which would be deemed as evidence obtained in violation of rights and the law as inadmissible. In light of the same, it was also mentioned earlier that fishing expeditions and shotgun approaches in terms of searches and seizures as well as other coercive measures is frowned upon by Philippine law and jurisprudence. Philippine jurisprudence elucidated this clearly.

Thus, there ought to be particularity in the item to be seized, place to be searched, person to be arrested, etc. It follows that particularity is necessarily stated in the purpose of said coercive measure. This means that

872 Implementing Rules and Regulations to the Cybercrime Prevention Act, § 25(e).

873 *Quintana*, p. 142; *Soriano*, p. 138.

a court order that authorizes a coercive measure for a particular case and/or object cannot be used to do the same coercive measure for the same object but for a different case. This is regardless whether the applicant of the court order suddenly had the epiphany or realization that said evidence to be obtained is useful elsewhere. Otherwise this would violate one's rights as provided in no less than the Philippine Constitution. Based on this rudimentary requirements that exist in Philippine law, the speciality and use limitation should then apply to mutual legal assistance requests especially to those obtained through coercive measures because to use evidence obtained through a coercive measure other than the purpose for which it was requested would violate one's right against unreasonable searches and seizures. To avoid any infringement of rights, one should apply anew for a coercive measure to be done (if needed) to obtain evidence or information for another criminal matter not covered by the original MLA request.

### g. Special Offenses and National Interest Cases

In the Philippine setting, national and public interest considerations are grounds to refuse assistance in the Anti-Money Laundering Act. A request may be refused if it is in violation of the Philippine Constitution or domestic law, or affects public order or national interest, unless the request is covered by a treaty to which the Philippines and the requesting state are parties to.[874] The Philippines may therefore still effectuate a mutual legal assistance request if this has been granted through an applicable treaty or international agreement.

The same ground for refusal can be found in the implementing rules and regulations of the Cybercrime Prevention Act wherein a request may be refused if the government considers the request to be prejudicial to its sovereignty, security, public order, or other national interest.

The ASEAN MLAT allows likewise a requested state to deny a request for assistance should the offense involved be considered a political offense. Under the Philippine setting, while the same is not provided as a ground for refusal in the Anti-Money Laundering Act, it can be found in the implementing rules and regulations of the Cybercrime Prevention Act.[875]

874 Republic Act No. 9160 (as amended), § 13(d).

875 Implementing Rules and Regulations to the Cybercrime Prevention Act, § 25(3)(i).

Bank secrecy is not an exception to mutual legal assistance requests under the ASEAN MLAT. In the Philippine setting however, there was cited difficulty in executing requests involving coercive measures as regards examination of bank deposits.[876] While the same is allowed under the Anti-Money Laundering Law under certain conditions,[877]the Philippines still has strict bank secrecy laws especially with respect to foreign bank deposits.[878] At most, only the law against terrorism financing clearly allows examination of foreign bank accounts.[879] Still, there is no definite judicial determination whether the mutual legal assistance treaties, since they were entered into by the Philippines on a later date, repeal the applicable bank secrecy law.[880] What the Department of Justice then does to comply – even substantially – with requests is to proceed with filing its application to the appropriate courts and let the latter decide on whether to approve it or not.[881]

## C. Procedural Provisions on Mutual Legal Assistance

### 1. Designation of Central Authority

The Department of Justice serves as the central authority for all mutual legal assistance requests. In pursuant to this, requests are directly made by or transmitted from the Department of Justice, which is the Central Authority for all mutual legal assistance requests, unless the subject treaty expressly states that the requests shall be transmitted through diplomatic channels.[882] Formerly, it was the International Affairs Division ("IAD") of the Department of Justice which assists in the processing and implementation of such requests.[883] This division was however recently abolished and it is now the Office of the Chief State Counsel ("OCSC"), likewise of the Department of Justice, which assists the Justice Secretary in handling mutual legal assistance requests, together with requests for extradition.[884]

876 *Quintana*, p. 146.
877 Republic Act No. 9160 (as amended), § 11.
878 *Gana Jr*, p. 57.
879 The Terrorism Financing Prevention and Suppression Act of 2012, § 10.
880 *Gana Jr*, p. 57.
881 *Gana Jr*, p. 57.
882 *Quintana*, p. 142.
883 *Gana Jr*, p. 50.
884 *Quintana*, p. 142.

Despite the lead role being played by the Department of Justice in MLA matters, the Department of Foreign Affairs still has a hand in implementing and/or executing MLA agreements or international cooperation, in general. As mentioned above this mandate comes from Executive Order No. 459 issued then by former President Fidel Ramos, which essentially provides authority to the Department of Foreign Affairs as the point person as regards negotiations and ratification of international agreements. More importantly, it is grounded on the quintessential function of the Foreign Affairs department to oversee diplomatic relations between countries. This rings true even with the existing ASEAN MLAT between ASEAN member states. While the Department of Justice acts mainly on legal matters, requirements, etc., the Department of Foreign Affairs ensures smooth sailing relationships between member states. To illustrate, the Philippine government in April 2015 famously invoked the ASEAN MLAT in trying to stop the execution of Mary Jane Veloso, who was convicted for drug trafficking in Indonesia.[885] The Department of Justice sent a MLA request to Indonesia, alleging therein that Mary Jane Veloso is the private complainant in the criminal case for illegal recruitment in the Philippines against her recruiter, who allegedly conned Veloso into smuggling kilos of illegal drugs to Indonesia. Should the illegal recruiter of Veloso be convicted in the case, it would prove that Veloso was a victim of human trafficking and not a drug trafficker. In the case herein, the DFA plays an imperative role in brokering negotiations to have the MLA request effectuated despite Veloso being in death row already.[886]

## 2. Preparation of Requests

### a. Requirements for Requests

Given that there is no general statute on mutual legal assistance in criminal matters in the Philippines, or any jurisprudence defining and delineating what should be stated in mutual legal assistance requests and as to what types of assistance can be requested by the Philippines, one can conclude that on paper, what the Philippines only has so far are the provisions

885 *Esmaquel*, p. 1.

886 See *Department of Foreign Affairs,* p. 1; *Human Rights in ASEAN,* p. 1; *Department of Foreign Affairs*, DFA statement on the stay of execution of Mary Jane Veloso, p. 1.

of the ASEAN MLAT on preparation of requests vis-à-vis requests that it can issue or execute from its fellow ASEAN member states.

According to Undersecretary Malaya et al., a request issued by or received for mutual legal assistance from the Philippines should have, as a minimum, the following information: "(1) the name of the requesting office and the competent authority conducting the investigation or criminal proceedings to which the request relates; (2) the purpose of the request; (3) the basis of the request; (4) the nature of the assistance sought; (5) a description of the criminal matter and its current status; (6) a statement setting out a summary of the relevant facts and laws; (7) a description of the offense to which the request relates to, including the corresponding maximum penalty therefor; (8) a description of the facts alleged to constitute the offense and a statement or text of the relevant laws of the requesting state; (9) a description of the essential acts or omissions or matters alleged or sought to be alleged; (10) a description of the information or other assistance sought; (11) the reasons for and the details of any particular procedure or requirement that the requesting State wishes to be observed; (12) a specification of any time limit within which compliance with the request is desired; (13) any special requirements for confidentiality and the reasons therefor; (14) such other information or undertaking as may be required under the domestic law of the requested state or which is otherwise necessary for the proper execution of the request."[887]

While the foregoing may be the general information that ought to be provided in a request, specificities could be found in the specific domestic laws tackling or mentioning mutual legal assistance, such as what is provided in the Anti-Money Laundering Act as regards money laundering offenses (as well as terrorism or terrorism financing cases) when either the Philippines is the requesting or requested state,[888] and in the Implementing Rules and Regulations of the Philippine Cybercrime Act as regards cybercrimes.[889]

The specificities provided by existing laws on mutual legal requests involving money laundering and cybercrime offenses notwithstanding, the general lack of concrete and easily identifiable requirements on how requests for assistance may be prepared by and for the Philippines would have its advantages and disadvantages. On one hand, Philippine officials

887 *Malaya/Monedero-Arnesto/Paras*, p. 14.
888 Republic Act No. 9160 (as amended), § 13(c) and (e).
889 Implementing Rules and Regulations to the Cybercrime Prevention Act, § 25(d).

during the Sixth Good Governance Seminar for Southeast Asian Countries reported that having no domestic law on mutual legal assistance serves as a problem even if the Philippines allow the framework provided in treaties to be self-executory.[890] Effectuating requests is made cautiously given the absence of definitive jurisprudence and generally, authorities need to second guess on what is and what is not allowed.[891] Consequently, it is rather indistinct as to what other information the Philippines would need from the requesting member state to make things work. At most, what Philippine authorities could rely on are the domestic provisions per type of assistance requested. Should the request for assistance need to go through the courts, what the authorities could only do is rely on the court's discretion, whether it shall grant the application or not. As the Philippine representative noted, the ability to render the widest range of assistance to non-treaty partners is heavily hampered.[892]

On the other hand, the lack of specificities on what a request must contain, etc., could also be advantageous because it gives the Philippine central authority elbow room on whether to grant a request or not. Not much formality is required as long as the minimum required information is provided and the substantial requirements are complied with, to the exception of money laundering and cybercrime offenses wherein certain specificities should be met. Moreover, the practice of open communication and preliminary consultation in ASEAN helps alleviate the issues of having no specific domestic legislation. As mentioned by Philippine authorities in interviews, ASEAN authorities are able to consult one another as to how to proceed with a certain request and this helps overcome any problem or issue that may hinder the preparation and execution of a request. And while no clear written law is provided for, though desirable, it does not prevent authorities from keeping abreast of each member state's laws and regulations.

### b. Person or Authority Initiating the Request

Based on this, all requests sent and received shall be coursed through the Department of Justice as central authority. These requests are coursed likewise through diplomatic channels, or in the Philippines' case, the De-

890 *Quintana*, p. 146; *Soriano*, p. 140.
891 *Gana Jr*, p. 57.
892 *Quintana*, p. 146.

partment of Foreign Affairs. In relation to this, there is no clearly defined and delineated law that allows a private individual – may it be a private offended party, accused, or suspected person – to initiate or request for a mutual legal assistance request to be issued on its behalf. There is also no test case or jurisprudence yet discussing this matter.[893] Whilst a litigant or party in a criminal case can ask for such a relief in court through filing the necessary motion under Rule 15 of the Philippine Revised Rules of Court, there is no adequately defined legal basis under the same rules that allows a mutual legal assistance request to be issued. At most, the Revised Rules of Court provides for issuance of letters rogatory (Rule 23, Sections 11 and 12) and/or the use of modes of discovery, i.e depositions, interrogatories, request for admission, production of documents or evidence, and physical or mental examination of persons, as provided under Rules 23 to 29 of the Revised Rules of Court.

### 3. Execution of Requests

The ASEAN MLAT procedural provisions vis-à-vis execution of requests shall be equally applicable in the Philippine setting as domestic law. That said, no specific provisions have been provided as to how requests for mutual legal assistance vis-à-vis money laundering cases be handled and effectuated. And aside from the ASEAN MLAT itself and other MLA treaties the Philippines is a party to, there is no statutory provisions in handling mutual legal assistance requests in general.

#### a. Applicable Law on Execution

Following the mandate of the ASEAN MLAT, the Philippines executes requests for mutual legal assistance subject to its domestic law. Philippine authorities have confirmed this approach during interviews. Nonetheless, requesting states can inform about how they would like their requests to be carried out and the Philippine authorities shall as much as possible, and as long as the same does not prohibit domestic law, concede to such requests. Issues, i.e. meeting the requirements for search and seizure actions, would normally arise, according to Philippine authorities, when

893 According to interviews as well, there has been no instance yet when a private individual asked for a MLA request to be issued on his or her behalf.

the requests need to be coursed through the courts because of compliance with evidentiary requirements, etc.

b. Applicable Procedural Rights

i. Importance of Defense Rights; Human Rights Considerations in MLA and Criminal Processes in General

Consideration of defense rights is apparent in the Philippine criminal justice system. It is not only ingrained in the Philippine Constitution but one also ought to take safeguards into account across the many stages of a criminal matter. The same rings true in the execution of a MLA request. While there is no specific pronouncement domestically as to what applies to mutual legal assistance aside from what is provided in the ASEAN MLAT itself (see Part I, C, 3(b)for a complete discussion), e.g. safe conduct or safe harbor provisions, consent to be transferred, etc., a study of the pertinent Philippine laws, rules, and jurisprudence on criminal procedure can be used what these rights are.

ii. Human Rights Considerations in MLA and Criminal Processes in General

First, procedural due process considerations should be applied. This is the second facet of one's right to due process under Philippine jurisdiction. The first one – substantive due process – was discussed earlier in the discussion of human rights considerations in the substantive provisions of MLA. While again there is no specific judicial pronouncement vis-à-vis mutual legal assistance, the case of Secretary of Justice v. Lantion, which relates to extradition, can be illustrative of the importance of procedural due process in MLA proceedings.

The Supreme Court said in the case at bar that procedural due process is indispensable, even in extradition proceedings notwithstanding the lack of mention in the law and in the treaty applicable.[894] It is satisfied when the following are present: "(1) a court or tribunal clothed with judicial power to hear and determine the matter before it; (2) jurisdiction lawfully acquired by the court over the person of the defendant or over the

894 Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.

property subject of the proceedings; (3) the defendant must be given an opportunity to be heard, and (4) judgment must be rendered upon lawful hearing."[895]

And such procedural due process can only be foregone in three (3) instances: (1) in a proceeding where there is an urgent need for immediate action, "like the summary abatement of a nuisance per se, the preventive suspension of a public servant facing administrative charges, the padlocking of filthy restaurants or theaters showing obscene movies or like establishments which are immediate threats to public health and decency, and the cancellation of a passport of a person sought for criminal prosecution;" (2) where there is "tentativeness of administrative action, that is, where the respondent is not precluded from enjoying the right to notice and hearing at a later time without prejudice to the person affected, such as the summary distraint and levy of a delinquent taxpayer, and the replacement of a temporary appointee;" (3) "where the twin rights have been previously offered but the right to exercise them had not been claimed."[896] It is only when these exceptions are availing that procedural due process can be foregone. In light of this, the Supreme Court had once explained that extradition is not a criminal proceeding:

> "Even if the potential extraditee is a criminal, an extradition proceeding is not by its nature criminal, for it is not punishment for a crime, even though such punishment may follow extradition. It is *sui generis*, tracing its existence wholly to treaty obligations between different nations. It is not a trial to determine the guilt or innocence of the potential extraditee. Nor is it a full-blown civil action, but one that is merely administrative in character. Its object is to prevent the escape of a person accused or convicted of a crime and to secure his return to the state from which he fled, for the purpose of trial or punishment.
>
> "But while extradition is not a criminal proceeding, it is characterized by the following: (a) it entails a deprivation of liberty on the part of the potential extraditee and (b) the means employed to attain the purpose of extradition is also 'the machinery of criminal law.' This is shown by Section 6 of P.D. No. 1069 (The Philippine Extradition Law) which mandates the "immediate arrest and temporary detention of the accused" if such "will best serve the interest of justice." We further note that Section 20 allows the requesting state 'in case of urgency' to

895 People of the Philippines v. Buemio, G.R. Nos. 114011-22, 16 December 1996.
896 Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.

> ask for the 'provisional arrest of the accused, pending receipt of the request for extradition;' and that release from provisional arrest "shall not prejudice re-arrest and extradition of the accused if a request for extradition is received subsequently."[897]

Albeit not technically a criminal proceeding and ostensibly administrative in nature, the Supreme Court recognizes that an extradition proceeding bears the "earmarks of a criminal process": "A potential extraditee may be subjected to arrest, to a prolonged restraint of liberty, and forced to transfer to the demanding state following the proceedings. 'Temporary detention' may be a necessary step in the process of extradition, but the length of time of the detention should be reasonable."[898]

The principles of extradition are arguably applicable, more or less, in mutual legal assistance requests because the latter also involves international cooperation and the criminal process.[899] It is most of the time treaty-based, but sometimes also reciprocity-based, cooperation to which the Philippines adheres to the international law principle of *pacta sunt servanda* and comity.[900] Mutual legal assistance, like extradition, is an administrative proceeding with earmarks of a criminal process, wherein certain rights available during criminal proceedings may be engaged in the effectuating or rendering of a mutual legal assistance request especially in requests involving taking of evidence and/or voluntary statements, searches and seizures, making arrangements to appear in requesting state, transfer of persons in custody, and the like. Therefore, it is only sensible that due process should also be considered in effectuating and making mutual legal assistance requests in the same manner it does to extradition proceedings. It follows that in processing and effectuating mutual legal assistance requests, regardless on whether the instrument enabling the same is silent on due process, it is incumbent upon Philippine authorities to uphold due process both as a requesting and requested state, and should it come to a situation it is endangered to be violated or already entrenched upon,

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897 Government of Hong Kong Special Administrative Region v. Olalia, G.R. No. 153675, 19 April 2007.

898 Government of Hong Kong Special Administrative Region v. Olalia, G.R. No. 153675, 19 April 2007.

899 See Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

900 See Government of the United States of America v. Purgunan, G.R. No. 148571, 24 September 2002.

then Philippine law and jurisprudence dictates that Philippine authorities should uphold human rights.

Second, there is one's right to remain silent, wherein the use as evidence of confessions and admissions of the accused as against himself is prohibited if the same does not comply with the requirements provided by law and jurisprudence.[901] At the outset, the right to remain silent, or otherwise called the right against self-incrimination, applies to all proceedings, whether civil, criminal, and administrative.[902] No one shall be compelled to be a witness against himself.[903] Philippine law has strict requirements regarding this, and in turn, provides for when confessions and admissions could be considered admissible. Under the Constitution and existing law and jurisprudence, "a confession to be admissible must satisfy the following requirements: (1) it must be voluntary; (2) it must be made with the assistance of competent and independent counsel; (3) it must be express; and (4) it must be in writing."[904]

While waiving this right is acceptable, the waiver to be valid must "however, be voluntary, knowing and intelligent, and must be made in the presence and with the assistance of counsel."[905] Absence of a valid waiver and/or requirements of a valid confession results to any admission or confession being held as inadmissible as evidence.[906] The same is another application of the exclusionary rule or "fruit of the poisonous tree" rule in Philippine law and jurisprudence. As the Court once said, "Even if the confession contains a grain of truth, if it was made without the assistance of counsel, it becomes inadmissible in evidence, regardless of the absence of coercion or even if it had been voluntarily given."[907]

Significantly however, the right to remain silent or the right against self-incrimination "extends only to testimonial compulsion and not when the body of the accused is proposed to be examined."[908] In fact, "an accused may validly be compelled to be photographed or measured, or his garments or shoes removed or replaced, or to move his body to enable the foregoing things to be done, without running afoul of the proscription

901 Ho Wai Pang v. People of the Philippines, G.R. No. 176229, 19 October 2011.
902 Philippine Constitution, art. 3, § 17; Bermudez v. Castillo, 64 Phil 483 (1937).
903 Philippine Constitution, art. 3, § 17.
904 People of the Philippines v. Tan, G.R. No. 117321, 11 February 1998.
905 People of the Philippines v. Tan, G.R. No. 117321, 11 February 1998.
906 People of the Philippines v. Tan, G.R. No. 117321, 11 February 1998.
907 People of the Philippines v. Tan, G.R. No. 117321, 11 February 1998.
908 People of the Philippines v. Piedad, G.R. No. 131923, 05 December 2002.

against testimonial compulsion."[909] These situations only entail mechanical acts, when an accused or person "was made to undergo which was not meant to unearth undisclosed facts but to ascertain physical attributes determinable by simple observation."[910] Hence, the right to counsel, or even the right against self-incrimination, does not operate when an accused, or any person in general, is subjected to examinations such as DNA tests, taking of urine samples for drug tests, paraffin tests, or even the use of marked money in the person's apprehension.[911]

Such "mechanical acts" do not cover signatures, providing a handwriting sample, or writing in general, however, as the same involves "something more than moving the body, or the hands, or the fingers" and "requires the application of intelligence and attention".[912] In some cases, the Supreme Court has even been considered that providing a signature is as a declaration against interest or tacit admission of the crime charged, and thus if done without the assistance of counsel, is deemed to violate the right against self-incrimination.[913] And as such, are deemed inadmissible in evidence.[914]

That said, the tier of protection given by the right against self-incrimination works differently when one is an accused called as a prosecution witness and when one is only an ordinary witness: "whereas an ordinary witness may be compelled to take the witness stand and claim the privilege as each question requiring an incriminating answer is shot at him, and accused may altogether refuse to take the witness stand and refuse to answer any and all questions."[915] As the Court acknowledges that the accused is admittedly called to the witness stand by the prosecution for the purpose of incriminating him and the rule intends to avoid and prohibit such procedure to compel a person "to furnish the missing evidence necessary for

909 People of the Philippines v. Paynor, G.R. No. 116222, 9 September 1996; Gutang v. People of the Philippines, G.R. No. 135406, 11 July 2000.
910 Gutang v. People of the Philippines, G.R. No. 135406, 11 July 2000.
911 See People of the Philippines v. Gamboa, G.R. No. 91374, 25 February 1991; Gutang v. People of the Philippines, G.R. No. 135406, 11 July 2000; People of the Philippines v. Piedad, G.R. No. 131923, 05 December 2002.
912 Beltran v. Samson, G.R. No. 32025, 23 September 1929.
913 People of the Philippines v. Bandin, G.R. No. 104494, 10 September 1993.
914 People of the Philippines v. Bandin, G.R. No. 104494, 10 September 1993.
915 Chavez v. Court of Appeals, G.R. No. L-29169, 19 August 1968.

his conviction."[916] Accordingly, this rule may apply even to a co-defendant in a joint trial.[917]

As to how these rights apply to mutual legal assistance requests, there could be requests that involve getting a person to give statements or evidence that tend to incriminate said person. It is likewise possible that this person is actually a person-in-interest, suspect, or accused person, who instead of being extradited first, his/her statement or testimony is taken. In this case, the person can raise his right against self-incrimination. However, said person is not allowed not to appear altogether or refuse to take part, but only to refuse to answer each incriminating question shot at him. Alternatively, the same person may also be subjected to physical tests that require mechanical acts, e.g. provide urine or blood samples, etc., then at this instance, no right against self-incrimination or right to counsel attaches. Said person could be placed under any physical and/or medical examination. It would be a different story under Philippine law and jurisprudence, however, should the person be asked to write or sign something, to be used as a specimen later on for a criminal matter in the requesting state. In such case, the Philippine authorities must make sure that the rights against self-incrimination shall be respected.

Third, the Philippine Constitution confers rights to an accused in a criminal case. An accused is entitled to the right to be presumed innocent until proven guilty, right to be heard and produce evidence by accused or his counsel, right to be informed, right to speedy, impartial, and public trial, and the right to confront evidence and/or witnesses.[918] In terms of mutual legal assistance, the right to counsel and the right to be informed can come into play.

Anent the right to counsel, the Supreme Court acknowledges that the right to be heard will be incomplete without the right to counsel:

> "The right to be heard would be of little avail if it does not include the right to be heard by counsel. Even the most intelligent or educated man may have no skill in the science of the law, particularly in the rules of procedure, and, without counsel, he may be convicted not because he is guilty but because he does not know how to establish his innocence. And this can happen more easily to persons who are ignorant or uneducated. It is for this reason that the right to be assisted

916 Chavez v. Court of Appeals, G.R. No. L-29169, 19 August 1968.
917 Chavez v. Court of Appeals, G.R. No. L-29169, 19 August 1968.
918 1987 Philippine Constitution, art. 3, § 14.

> by counsel is deemed so important that it has become a constitutional right and it is so implemented that under our rules of procedure it is not enough for the Court to apprise an accused of his right to have an attorney, it is not enough to ask him whether he desires the aid of an attorney, but it is essential that the court should assign one de officio if he so desires and he is poor grant him a reasonable time to procure an attorney of his own."[919]

Accordingly, the right to counsel is guaranteed "to minimize the imbalance in the adversarial system where the accused is pitted against the awesome prosecutor machinery of the State."[920] It proceeds from one's right to due process, which is more than a "mere formality that can be dispensed with or performed perfunctorily."[921] As regards this, a court judge is duty-bound by the rules of procedure and by jurisprudence to do the following should the accused be unaided by counsel during the court proceedings: "(1) it must inform the defendant that it is his right to have attorney before being arraigned; (2) after giving him such information the court must ask him if he desires the aid of an attorney; (3) if he desires and is unable to employ attorney, the court must assign attorney de officio to defend him; and (4) if the accused desires to procure an attorney of his own the court must grant him a reasonable time therefor."[922]

In light of having one's right to counsel during criminal proceedings, the Supreme Court has clarified that primordial consideration of a suspect or accused person's preference for counsel applies more aptly and specifically to a person under investigation.[923] And even if said right of preference extends to a criminal case, the Supreme Court held that "such preferential discretion cannot partake of a discretion so absolute and arbitrary as would make the choice of counsel refer exclusively to the predilection of the accused."[924]

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919 People of the Philippines v. Holgado, G.R. No. L-2809, 22 March 1950.
920 Inacay v. People of the Philippines, G.R. 223506, 28 November 2016.
921 Inacay v. People of the Philippines, G.R. 223506, 28 November 2016.
922 People of the Philippines v. Holgado, G.R. No. L-2809, 22 March 1950.
923 1987 Philippine Constitution, art. 3, § 14(2); Amion v. Chiongson, AM No. RTJ-97-1371, 22 January 1999.
924 Amion v. Chiongson, AM No. RTJ-97-1371, 22 January 1999. As held in People v. Barasina:
"Withal, the word preferably under Section 12(1), Article 3 of the 1987 Constitution does not convey the message that the choice of a lawyer by a person under investigation is exclusive as to preclude other equally competent and independent attorneys from handling his defense. If the rule were otherwise,

Applying the principle above to criminal proceedings in court, the Supreme Court held it "may likewise say that the accused's discretion in a criminal prosecution with respect to his choice of counsel is not so much as to grant him a plenary prerogative which would preclude other equally competent and independent counsels from representing him. Otherwise, the pace of a criminal prosecution will be entirely dictated by the accused to the detriment of the eventual resolution of the case."[925] Stating it otherwise, the right to counsel in criminal proceedings cannot be interpreted to mean that an accused can hijack proceedings.

On the other hand, there is the right of an accused to be informed of the nature and cause of the accusations against him.[926] The objectives of this right are three-fold: "(1) to furnish the accused with such a description of the charge against him as will enable him to make the defense; (2) to avail himself of his conviction or acquittal for protection against further prosecution for the same cause; (3) to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had."[927] Public policy prohibits waiver of said right, and thus, "the complaint or information filed against the accused be complete to meet its objectives," meaning, "an indictment must fully state the elements of the specific offense alleged to have been committed."[928]

In implementing the right, the Rules of Criminal Procedure specifically require that "the acts or omissions complained of as constituting the offense, including the qualifying and aggravating circumstances, must be stated in ordinary and concise language, not necessarily in the language used in the statute, but in terms sufficient to enable a person of common understanding to know what offense is being charged and the attendant qualifying and aggravating circumstances present, so that the accused can properly defend himself and the court can pronounce judgment."[929] In

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then, the tempo of a custodial investigation, will be solely in the hands of the accused who can impede, nay, obstruct the progress of the interrogation by simply selecting a lawyer, who for one reason or another, is not available to protect his interest. This absurd scenario could not have been contemplated by the framers of the charter." People of the Philippines v. Barasina, G.R. No. 109993, 21January 1994, as cited in Amion v. Chiongson, AM No. RTJ-97-1371, 22 January 1999.

925 Amion v. Chiongson, AM No. RTJ-97-1371, 22 January 1999.

926 1987 Philippine Constitution, art. 3, § 14(1); Go v. BangkoSentral ng Pilipinas, G.R. No. 178429, 23 October 2009.

927 People of the Philippines v. Flores, G. R. No. 128823-24, 27 December 2002.

928 People of the Philippines v. Flores, G. R. No. 128823-24, 27 December 2002.

929 Go v. BangkoSentral ng Pilipinas, G.R. No. 178429, 23 October 2009.

connection thereto, law and jurisprudence allows quashal of a complaint or information should it fail to allege the facts constituting the offense and even provided a test to appreciate a motion to quash due to insufficiency of facts.[930]

In addition to allowing an accused to file a motion to quash, the right to be informed means that a person cannot be convicted, even if the crime was duly proven, unless the same is included or necessarily included in the complaint or information.[931]

Taking these rights of the accused together, the Supreme Court had explained that albeit certain rights should only come into play during the trial stage, they have been equally conferred in administrative proceedings, which have a criminal or penal nature.[932] Thus, the right to counsel, together with the right to due process and the right against self-incrimination have been extended to apply to administrative proceedings of criminal nature.[933] One of these proceedings concerns the evaluation stage of extradition proceedings, which according to the Supreme Court, are akin to a preliminary investigation.[934] As explained earlier, extradition proceedings have earmarks of a criminal process and one's liberty might consequently be at stake. Thus, the Supreme Court found it fitting to allow a person to exercise the aforementioned constitutional rights during such proceedings. And as mutual legal assistance proceedings are on the same plane as extradition in being an administrative proceeding with criminal nature – or as stated earlier, having the "earmarks of a criminal process" – the conferred rights should equally apply as well in such circumstances.

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930 According to the cases of People of the Philippines v. Romualdez, G.R. No. 166510, 23 July 2008, and Go v. BangkoSentral ng Pilipinas, G.R. No. 178429, 23 October 2009:
"The determinative test in appreciating a motion to quash xxx is the sufficiency of the averments in the information, that is, whether the facts alleged, if hypothetically admitted, would establish the essential elements of the offense as defined by law without considering matters aliunde. As Section 6, Rule 110 of the Rules of Criminal Procedure requires, the information only needs to state the ultimate facts; the evidentiary and other details can be provided during the trial.
"To restate the rule, an Information only needs to state the ultimate facts constituting the offense, not the finer details of why and how the illegal acts alleged amounted to undue injury or damage matters that are appropriate for the trial."

931 People of the Philippines v. Flores, G. R. No. 128823-24, 27 December 2002.

932 See Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.

933 Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.

934 Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.

As regards the right to be informed and the right to be informed of the nature and cause of the accusation, the Supreme Court qualifies vis-à-vis the evaluation stage of an extradition proceeding, which is akin to what can occur in mutual legal assistance requests:

> "In the case at bar, the papers requested by private respondent pertain to official government action from the U. S. Government. No official action from our country has yet been taken. Moreover, the papers have some relation to matters of foreign relations with the U. S. Government. Consequently, if a third party invokes this constitutional provision, stating that the extradition papers are matters of public concern since they may result in the extradition of a Filipino, we are afraid that the balance must be tilted, at such particular time, in favor of the interests necessary for the proper functioning of the government. During the evaluation procedure, no official governmental action of our own government has as yet been done; hence the invocation of the right is premature. Later, and in contrast, records of the extradition hearing would already fall under matters of public concern, because our government by then shall have already made an official decision to grant the extradition request. The extradition of a fellow Filipino would be forthcoming."[935]

In other words, the right to be informed only becomes applicable after the evaluation stage of an extradition request, or when the government has made a decision as to how to proceed. Prior to such decision, the right to be informed does not exist and the confidentiality of some documents and communication ought to be respected. This can be equally applied to mutual legal assistance requests, wherein confidential and diplomatic information may also be exchanged between the Philippines and the requesting state during the evaluation stages. It is only after the Philippines has decided to effectuate the request may a person invoke the right to be informed should said person be affected by the mutual legal assistance request.

Taking the different rights mentioned, it can be settled that mutual legal assistance has earmarks of a criminal process. It is also a tool for criminal law enforcement and subsequently, prosecution. Like extradition, mutual legal assistance requires speed and efficiency but following what the Supreme Court held in the Secretary of Justice v. Lantion case, the Philippine Constitution recognizes values more than speed and efficiency

935 Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.

and while government action can be applauded, it should not be detrimental to the values of a vulnerable citizenry, which is protected by rights such as due process and other rights of an accused.[936] Therefore, even if mutual legal assistance requests are administrative in nature too, it does not excuse itself from respecting rights, even if the same is not equivocally provided for in law or jurisprudence. Besides, the Philippines as a state policy applies the rules of fair play in the absence of a law or principle of law.[937] In terms of the ASEAN MLAT, an application of the basic twin due process rights of notice and hearing or the basic rights of someone subjected to either investigation or prosecution will not go against it.[938]

In addition to the foregoing, it might be worthwhile to discuss herein the constitutional rights during custodial investigation, which is "any questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[939] Admittedly, arrest and detention normally apply in extradition or transfer of sentenced persons. Furthermore, the ASEAN MLAT is equivocal in establishing safe conduct (or safe harbor) provisions, which disallows in general detention or any other form of restriction of liberty, prosecution, etc. for any crime committed prior to the transfer, or otherwise to be held criminally liable for any statement made unless for perjury or contempt in court. Nonetheless, rights of custodial investigation can still apply because there are investigative measures through mutual legal assistance, e.g. taking of evidence and/or information, voluntary statements, etc., that can trigger these rights depending on the questioning involved or the direction authorities are taking towards the interviewee. As relevant jurisprudence provides, the test herein to determine whether rights should apply is "when a person is taken into custody and is singled out as a suspect in the commission of the crime under investigation and the police officers begin to ask questions on the suspect's participation therein and which tend to elicit an admission."[940] Thus, if at any part of the giving of information or testimony this test is satisfied, then the safe conduct provisions should be engaged, wherein the requested state's

936 See Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000; Association of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform, G.R. Nos. 78742, 79310, 79744, 79777, 14 July 1989; Stanley v. Illinois, 404 US 645, 656 (1972).
937 See Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.
938 See Secretary of Justice v. Lantion, G.R. No. 139465, 18 January 2000.
939 Sebastian v. Garchitorena, G.R. No. 114028, 18 October 2000.
940 People of the Philippines v. Pavillare, G.R. No. 129970, 05 April 2000.

attention is called on the matter, find for judicial relief, and/or the rights conferred by the Constitution apply.

Should the nature of the taking of evidence indeed evolve to one of "custodial investigation" and questioning proceeds, Article 3, Section 12 of the Constitution provides that "any person under investigation for the commission of an offense shall have the right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel." Notably, this constitutional provision follows the rationale as enshrined in the 1966 American case of Miranda v. Arizona, which applies the Fifth Amendment in the United States Constitution to custodial investigations.[941]

*Incommunicado* interrogation of individuals in police-dominated atmosphere, while not physical intimidation, is equally destructive of human dignity, and current practice is at odds with principle that individual may not be compelled to incriminate himself.[942] The rights engaged during custodial investigation by virtue of the Miranda case are meant "to prohibit incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."[943]

As regards these rights, firstly, a person has the right to be informed of one's right to remain silent and to counsel: the Constitution herein contemplates the right to be informed of one's right to remain silent and to counsel as "to contemplate the transmission of a meaningful information rather than just a ceremonial and perfunctory recitation of an abstract

941 Miranda v. Arizona, 384 U.S. 436, 467-468 (1966).According to Miranda:
"Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that, without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored."

942 See Miranda v. Arizona, 384 U.S. 436 (1966).

943 People of the Philippines v. Canton, G.R. No. 148825, 27 December 2002.

constitutional principle."[944] The said right under custodial investigation to be informed "implies a correlative obligation on the part of the police investigator to explain, and contemplates an effective communication that results in understanding what is conveyed."[945] Anything short of this is said to be a denial of the right, and since the right entails comprehension, "the degree of explanation required will necessary vary, depending upon the education, intelligence and other relevant personal circumstances of the person under investigation. Suffice it to say that a simpler and more lucid explanation is needed where the subject is unlettered."[946] Thus, when a person is already being treated as a "suspect", authorities ought to inform the subject person immediately. Otherwise there is already a violation of one's rights.

Secondly, there is the right to remain silent as already discussed above. Thirdly, the right to counsel is also available during custodial investigations and herein the suspect has the right to a competent and independent counsel, who is preferably his/her own choice. As clarified above, the consideration of the suspect's preference is given more during custodial investigations rather than during trial and it is important that this preference is not used as a tool to hijack proceedings.

### iii. Defendant's Participation in the Refusal or Execution of a MLA Request

Given the foregoing plethora of rights that can be engaged in the execution of MLA requests in the Philippines, it becomes interesting to know where a suspect or accused person, or otherwise interested person, stands in terms of finding relief vis-à-vis the sending or executing of a MLA request. On the basis of the ASEAN MLAT, it states that the "provisions of this Treaty shall not create any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of any request for assistance" (Article 1, 1[3]). This provision could then be interpreted to either mean that a private person, may it be a suspect,

944 People of the Philippines v. Nicandro, G.R. No. L-59378, 11 February 1986; People of the Philippines v. Pinlac, G.R. Nos. 74123-24, 26 September 1988; See also People of the Philippines v. Tan, G.R. No. 117321, 11 February 1998: People of the Philippines v. de la Cruz, G.R. No. 118866-68, 17 September 1997.

945 People of the Philippines v. Nicandro, G.R. No. L-59378, 11 February 1986; People of the Philippines v. Pinlac, G.R. Nos. 74123-24, 26 September 1988.

946 People of the Philippines v. Nicandro, G.R. No. L-59378, 11 February 1986.

accused, or third person, to request that a MLA request be issued on its behalf to secure evidence, or said person cannot ask for the exclusion or suppression of any evidence, or impede the execution of a MLA request, obtained through the provisions of the ASEAN MLAT should there have been misfeasance or non-feasance. In other words, a private person – with no qualification on whether he/she is a suspect or accused person – has no business in MLA requests.

Notwithstanding the apparent exclusion of a private person who might be affected by a MLA request or the execution thereof, an affected person – like in extradition cases – still has the right of action to question the granting of the MLA request or any investigative measure executed by virtue of a MLA request under Philippine jurisdiction. The Philippine Judiciary is imbued under Article VIII, Section 1 of the Philippine Constitution with judicial power, which includes the power to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government. Known as expanded power of judicial review or certiorari jurisdiction, such power allows the Supreme Court or the lower courts (if delegated by the Supreme Court through the Rules of Court) to test the validity of executive and legislative acts for their conformity with law and the Constitution.[947] In such cases, the courts have no power to substitute its judgment for that of the concerned government authority, e.g executive or Department of Justice vis-à-vis mutual legal assistance, but it can nonetheless look into the question of whether there has been "improvident exercise" or abuse of such power that gives rise to justiciable controversy:[948] whether there has been lack or excess of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. Petitions invoking the power of judicial review are normally anchored on Rule 65, Section 1 of the Rules of Civil Procedure through a special civil action for certiorari.[949]

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947 Congressman Garcia v. Executive Secretary, G.R. 157584, 02 April 2009.

948 Congressman Garcia v. Executive Secretary, G.R. 157584, 02 April 2009; Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, August 15, 2000, 338 SCRA 81, citing Tañada v. Cuenco, 103 Phil. 1051 and Baker v. Carr, 369 U.S. 186.

949 Rule 65, Section 1 of the Revised Rules of Civil Procedure provides: "Section 1. *Petition for certiorari*. - When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of its or his jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy

The Philippine Supreme Court defines grave abuse of discretion as "to mean the capricious or whimsical exercise of judgment that is so patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility."[950] It is also present when an act is either "(1) done contrary to the Constitution, the law, or jurisprudence, or (2) executed whimsically, capriciously, or arbitrarily out of malice, ill will, or personal bias."[951]

Therefore, the affected person or petitioner has the right of action to resort to the courts should he/she believe that the MLA request has either been issued by the Philippine authorities or granted (or executed) by the Philippine authorities with grave abuse of discretion as above stated. Examples that could be used herein is the gross violation of the rights abovementioned, or patent disregard for the same, or any action or decision that illustrates the aforementioned.

It is a different question altogether whether a person affected by an MLA request due to any violation of the rights abovestated, can receive the relief. It has yet to be fully tested with Philippine courts in terms of whether a MLA request can be withdrawn or the execution thereof can be suspended or stopped as a form of relief to an affected indivdual.[952] At most, one could look into the decision of the Philippine Supreme Court in *People of the Philippines v. Sergio* involving the case of Mary Jane Veloso, which as mentioned earlier is one of the more popular and well-known Philippine cases involving the use of the ASEAN MLAT. Interestingly, a reading of the case would show not only the novelty and complexity surrounding mutual legal assistance and the rights it could affect in criminal

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in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require." See further Arceta v. Mangrobang, G.R. No. 152895, 15 June 2004.

950 Congressman Garcia v. Executive Secretary, G.R. 157584, 02 April 2009. See also Chua v. People of the Philippnes, G.R. No. 195248, 22 November 2017, citing Yu v. Judge Reyes-Carpio, 667 Phil. 474 (2011).

951 Commissioner of Internal Revenue v. Court of Tax Appeals, G.R. No. 203403, 14 November 2018, citing Air Transportation Office v. CA, et al., 737 Phil. 61, 84 (2014).

952 *Malaya/Monedero-Arnesto/Paras,* p. 16.

proceedings, but there is also the confirmation that relief can be granted depending on the circumstances.

The facts of the case are as follows. The Philippine government was able to request the Indonesian government to stay the execution of Mary Jane Veloso pending the criminal case for illegal recruitment she filed against her alleged illegal recruiter in the Philippines.[953] Herein the Philippine government was able to request that Veloso's deposition be taken while she was being held in prison in Indonesia, which was intended to be used as evidence in the illegal recruitment case. Indonesia granted the request but imposed the following conditions relative to the taking of Mary Jane Veloso's testimony: (1) she will remain in detention; (2) no cameras shall be allowed; (3) the lawyers of the parties shall not be present; and (4) the questions to be propounded shall be in writing.[954] Thereafter a motion for leave was filed with the court *a quo* to proceed with the deposition through written interrogatories.[955] The taking of the deposition proceeded despite the accused's contention that the actual presence of the witness is required in the illegal recruitment case filed against them as otherwise, their right of confrontation shall be violated.[956] This prompted the accused to question the trial court's ruling. Needless to state, whatever resolution the Supreme Court adopted on said matter, including the admissibility of the deposition as evidence in the illegal recruitment case, can send a butterfly effect as to how one views mutual legal assistance requests and the use of evidence pursuant thereto, including the general protection of human rights and interests of individuals that might be affected by the investigative measures involved.[957]

In its Decision, one can note how the Supreme Court gave more weight into the issue of rights at hand rather than solely focusing on procedure. At the outset, there was no need to dwell on the propriety of the mutual legal assistance request and its subsequent grant. There was focus instead on the investigative measure to be carried out. The Supreme Court upheld the taking of deposition through written interrogatories as well as ruled that the accused's right to confrontation would not be violated by virtue thereof. The Court held that the extraordinary circumstances surrounding Mary Jane Veloso were compelling reasons enough to allow the deposition

953 *Malaya/Monedero-Arnesto/Paras,* p. 16.
954 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.
955 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.
956 *Malaya/Monedero-Arnesto/Paras,* p. 16.
957 *Malaya/Monedero-Arnesto/Paras,* p. 16.

and its use as evidence against the accused. The Court upheld the principle that rules shall be "liberally construed to promote their objective of securing a just, speedy, and inexpensive disposition of every action and proceeding."[958] Stating differently, procedural rules are meant to facilitate an orderly administration of justice and should not be strictly applied causing injury to a substantive right of a party to a case.[959] Citing the relevant provisions of the ASEAN MLAT and the conditions imposed by the Indonesian authorities for the reprieve given to Mary Jane Veloso, the Supreme Court noted that the Rules of Criminal Procedure are bereft of any provision as to how a deposition of a prosecution witness, who is both convicted of a grave offense by final judgment and imprisoned in a foreign jurisdiction, may be taken to perpetuate the testimony of such witness. In particular, nothing in the Rules provide for a situation when a witness is unable to testify in open court because he is imprisoned in another country.

Depositions are however recognized under the Rules of Civil Procedure and in a plethora of cases, the Court has allowed the Rules of Civil Procedure to be applied suppletorily in criminal proceedings under compelling reasons. It is on this score that the Supreme Court found no reason to depart from its practice of liberally construing procedural rules for the orderly administration of substantial justice. Any strict application of the rules would defeat the very purpose of the grant of reprieve by the Indonesian authorities to Veloso and also, as the Supreme Court held, would not be in congruence with the purpose of the ASEAN MLAT to render mutual legal assistance in criminal matters.[960]

Discussing further, the Supreme Court upheld the right to due process of both Mary Jane Veloso and the state to prove her innocence before the Indonesian authorities, present the case against the accused, as well as comply with the conditions set for the grant of reprieve by the Indonesian

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958 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

959 The Court was quick to remind though that procedural rules are not to be belittled or dismissed simply because their non-observance may have prejudiced a party's substantive rights. Thus, the bare invocation of "the interest of substantial justice" is not a magic phrase that will automatically oblige the Supreme Court to suspend procedural rules. Like all rules, they are required to be followed except only for the most pervasive of reasons when they may be relaxed to relieve the litigant of an injustice not commensurate with the degree of his thoughtlessness in not complying with the procedure prescribed. People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

960 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

government, respectively.[961] According to its Decision, "the benchmark of the right to due process in criminal justice is to ensure that all the parties have their day in court. It is in accord with the duty of the government to follow a fair process of decision-making when it acts to deprive a person of his liberty. But just as an accused is accorded this constitutional protection, so is the state entitled to due process in criminal prosecutions. It must likewise be given an equal chance to present its evidence in support of a charge."[962] Thus, the Supreme Court held that the trial court acted correctly within its jurisdiction to grant the taking of deposition by written interrogatories:

"The grant of the written interrogatories by the Indonesian Government perceives the State's opportunity to present all its desired witnesses in the prosecution of its cases against Cristina and Julius. It is afforded fair opportunity to present witnesses and evidence it deem vital to ensure that the injury sustained by the People in the commission of the criminal acts will be well compensated and, most of all, that justice be achieved. Hence, the right of the State to prosecute and prove its case have been fully upheld and protected.

Further, the right of the State to prove the criminal liability of Cristina and Julius should not be derailed and prevented by the stringent application of the procedural rules. Otherwise, it will constitute a violation of the basic constitutional rights of the State and of Mary Jane to due process which this Court cannot disregard.

The fundamental rights of both the accused and the State must be equally upheld and protected so that justice can prevail in the truest sense of the word. To do justice to accused and injustice to the State is no justice at all. Justice must be dispensed to all the parties alike."[963]

As regards the accused's constitutional right to confront a witness, the Court considered meticulously the merits of the case and held that there would be no infringement under the circumstances. Considering the two-fold purpose of the right,[964] the Court held that whilst it is true that the

961 The Supreme Court referred likewise to Secretary of Justice v. Lantion to remind about the importance of due process, the elasticity in its interpretation, and its dynamic and resilient character that allows it to meet every modern problem whilst accommodating progress and improvement. People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

962 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

963 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

964 The two-fold purpose is as follows: (1) primarily to afford the accused an opportunity to test the testimony of the witness by cross-examination; and (2)

accused would not be able to confront Mary Jane Veloso face-to-face under the present circumstances, the terms and conditions laid down by the trial court are enough to ensure ample opportunity to cross examine by way of written interrogatories: (1) the accused through counsel are required to file the necessary comment and may raise objections to the proposed questions in the written interrogatories submitted by the prosecution; (2) the trial judge shall promptly rule on the objections and only the final questions would be asked during the taking of deposition in Indonesia; (3) the answers shall be written verbatim and a transcribed copy shall be given to the counsel of the accused who in turn shall submit their proposed cross interrogatory questions to the prosecution; (4) should there be objections from the prosecution to the questions, the trial judge shall promptly rule on the same and the final cross interrogatory questions shall then be conducted; and (5) the witness' answers shall be taken in verbatim and a transcribed copy thereof shall be given to the prosecution.[965]

The second purpose of the right – to allow the judge to observe the deportment of the witness – has likewise been upheld because under the same terms and conditions, the trial court judge shall be present during the conduct of written interrogatories. This will give the "ample opportunity to observe and to examine the demeanor of the witness closely."[966] Moreover, the trial court judge can still carefully perceive the reaction and deportment of the witness as she answers each question propounded to her both by the prosecution and the defense, albeit the deposition is in writing.[967]

Considering the tenor of the Philippine Supreme Court's decision, one can note that while it is still left unclear whether an affected person may question the validity of the MLA request itself and/or the grant thereof, he/she is not precluded from questioning the resulting investigative measure from such a request, the implementation of said measure, as well as the admissibility of any evidence obtained therefrom. Furthermore, the Supreme Court could grant the needed relief and provide the needed redress for any violation of rights as long as circumstances may warrant it. As *People of the Philippines v. Sergio* illustrated, the Court shall not avoid the

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secondarily, to allow the judge to observe the deportment of the witness. See People of the Philippines v. Nicolas, G.R. No. 135877, 22 August 2002, as cited in People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

965 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

966 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

967 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.

question on whether a constitutional right is infringed. This is especially the case when the Philippines is the requesting state, the criminal proceedings are situated in the Philippines, and the evidence obtained through MLA is used in Philippine courts. As the present case and a cantina of other Philippine cases illustrate, there would always be paramount consideration of due process, orderly administration of substantive justice, and fair play. Thus, the merits of each case shall be weighed and any question of (possible) infringement shall be addressed accordingly. Furthermore, if one would recall the discussion on substantive rights, the Philippines follows the exclusionary rule and fruit of poisonous tree doctrine. Hence, going through the merits is a necessary step. If there is a court finding that one's right has been violated in obtaining evidence, said investigative measure is held as void or invalid, and any resulting evidence is inadmissible in court. This means that in the Philippine context, one can assail the evidence itself should there be questions on the admissibility of any evidence obtained through MLA.

### c. Applicable Time Element on Execution

Given the lack of specific domestic legislation on facilitating and making of mutual legal assistance requests, there is no legislated time limit within which the Philippines as a requested state should execute a request. Despite this, it was mentioned earlier that in the minimum requirements a MLA request should generally have, regardless of whether the Philippines is a requesting or requested state, any time limit within which compliance with the request is desired should be specified. In respect thereto, the Philippines as a requested state or the foreign state (or in terms of the ASEAN MLAT, the ASEAN member state) would be advised accordingly as to the time element involved in the investigative measure being requested.

Taking this into account, the Philippines is more or less aware of the importance of time elements in executing requests. In fact, the Department of Justice uses the following procedure in practice vis-à-vis requests for assistance: (1) requests for mutual legal assistance are transmitted directly in general between the central authorities of the two states; (2) for requests made based on treaty, the Department of Justice shall evaluate the request; (3) after evaluation, the Department of Justice shall transmit the request to the competent authority: for example, the Anti-Money Laundering Council ("AMLC") for money laundering cases and the Office of the Ombuds-

man for corruption cases; (4) for requests made on the basis of reciprocity (which happens when the request is not based on treaty), then the Department of Foreign Affairs will have the opportunity to review the same; (5) the appropriate applications shall be filed in appropriate Regional Trial Courts for requests involving coercive measures such as search and seizure, forfeiture, etc.; and then (6) documents or evidence taken in relation to the request shall be transmitted through the fastest possible means.[968]

Having said that, interviews with Philippine authorities made it clear that there is normally no problem executing a request quickly should the request be in order and requirements are fulfilled, especially if the request does not require any coercive order or court warrant before it can be implemented.[969] As mentioned, delay normally arises when the authorities would need to go through the court process.[970] Should the information, document, or evidence requested need not go through the court, conformity with other additional formalities is not necessary. The Philippines is under the obligation to execute as fast as possible the request and give the same without any issue .[971] Moreover, there is, as mentioned earlier, an existing practice among ASEAN member states of an open line of communications. There is always an open line of communication and preliminary consultation with one another to ensure that requests for assistance are effectuated, and if possible, effectuated promptly as divulged through the interview with Philippine authorities. The Philippines as either requested or requesting state may consult preliminarily with its counterpart to ensure that the request for assistance is in order and should there be any problems, determine what could be done to still allow the request to be implemented. Open line of communication and preliminary consultation also takes the form of sending to each other draft and/or unofficial copies of the request so that the receiving party can deliberate and act on said request quicker.

968 *Quintana*, p. 142
969 Interviews with Department of Justice Senior State Council Meredith Alvor, Atty. Arnold Frane, Ms. Joie Quieta.
970 Interview with Department of Justice Senior State Council Meredith Alvor.
971 Interview with Department of Justice Senior State Council Meredith Alvor.

### d. Authentication of Documents

As one would recall, the ASEAN MLAT does not require further authentication to effectuate requests, or as regards evidence that may be transmitted to the requesting party, but this is without prejudice to any request from a party to the other to authenticate any documents or material that may be transmitted to the other party, even though the same is not required to effectuate any request for assistance made. The ASEAN MLAT likewise provides certain conditions, when these materials are deemed authenticated.

In light of this, the Philippines Rules of Court were originally bereft of provisions tackling specifically evidence obtained through mutual legal assistance. There were no rules regarding authentication or the need for further proof. Instead, what was provided are the basic rules on authentication that might need to be accounted for when presenting evidence obtained through mutual legal assistance. With the new amendments to the Rules of Evidence made by the Philippine Supreme Court through A.M. No. 19-08-15-SC (2019 Proposed Amendments to the Revised Rules of Evidence), which became effective last 01 May 2020, further proof and/or authentication of evidence obtained through mutual legal assistance is arguably unnecessary.

At the outset, the Philippine Revised Rules of Court distinguishes between public and private documents and the nature of such documentary evidence to be presented determines which rules shall apply.[972] On one hand, public documents are self-authenticating and admissible as evidence without need for further proof.[973] These documents are either "(a) the written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country; (b) documents acknowledge before a notary public except last wills and testaments; (c) documents that are considered public documents under treaties and conventions which are in force between the Philippines and the country of source; and (d) public records, kept in the Philippines, of private documents required by

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972 Asian Terminals v. Philam Life Insurance, G.R. Nos. 181163, 181262, 181319, 24 July 2013; Salas v. Sta. Mesa Market Corporation, G.R. No. 157766, 12 July 2007.

973 Philippine Revised Rules of Court, Rule 132, §§ 23, 24, 25, 27 and 30 (as amended).

law to be entered therein."[974] Documentary evidence and/or information obtained through a mutual legal assistance framework falls under this classification, especially when one looks into the conditions of when a document is authenticated under the ASEAN MLAT and/or the information transmitted is an official act of a government body as abovestated.

Accordingly, the Philippine Rules of Court provide that "documents consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated."[975] The Rules of Court further provide that "all other public documents are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter."[976] Furthermore, should the public document refer to "the written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country" – when admissible for any purpose – "may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody."[977]

Further, in cases where the office in which the record is kept is in a foreign country, two scenarios are possible. First, if the foreign country involved is a contracting party to a treaty or convention to which the Philippines is also a party, or considered a public document under such treaty or convention, "the certificate or its equivalent shall be in the form prescribed by such treaty or convention subject to reciprocity granted to public documents originating from the Philippines."[978] Second, for documents originating from a foreign country which is not a contracting party to a treaty or convention referred to in the next preceding sentence, "the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office."[979]In relation to these, "a document that is accompanied by a certificate or its equivalent may be presented in evidence without further proof, the

974 Philippine Revised Rules of Court, Rule 132, § 19 (as amended).
975 Philippine Revised Rules of Court, Rule 132, § 23.
976 Philippine Revised Rules of Court, Rule 132, § 23.
977 Phillipine Revised Rules of Court, Rule 132, § 24 (as amended).
978 Phillipine Revised Rules of Court, Rule 132, § 24 (as amended).
979 Phillipine Revised Rules of Court, Rule 132, § 24 (as amended).

certificate or its equivalent being *prima facie* evidence of the due execution and genuineness of the document involved. The certificate shall not be required when a treaty or convention between a foreign country and the Philippines has abolished the requirement, or has exempted the document itself from this formality."[980]

Applying these new amended rules to evidence obtained through mutual legal assistance, especially as regards "public documents", Philippine authorities do not need to present further proof and/or authenticate these kinds of evidence when being presented in court, as long as certain conditions are met. It can likewise be gainsaid that any exchange of evidence and/or information through mutual legal assistance when the Philippines is a requesting party is streamlined as the Philippines is relieved of any obligation to ask the requested party to undertake additional steps vis-à-vis authentication for purposes of presenting evidence in court.

As regards instances when the Philippines is the requested party and attestation is required, the Rules provide likewise how this attestation should be made, the relevant Rules provide that it should state "in substance, that the copy is a correct copy of the original, or a specific part thereof, as the case may be."[981] Moreover, "the attestation must be under the official seal of the attesting officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court."[982] One must further take note that "any public record, an official copy of which is admissible in evidence, must not be removed from the office in which it is kept, except upon order of a court where the inspection of the record is essential to the just determination of a pending case."[983] Further, should the public document refers to "public record of a private document", it may be proved "by the original record, or by a copy thereof, attested by the legal custodian of the record, with an appropriate certificate that such officer has the custody."[984]

In relation to this, there could be instances in a mutual legal assistance framework when private documents, as defined under the Philippine Rules of Evidence are adduced, e.g. a person whose testimony or evidence is taken presents or submits evidence not considered "public". For this, authentication of private documents have a different set of rules, to which authorities must adhere to should these be presented later in court. A doc-

980 Phillipine Revised Rules of Court, Rule 132, § 24 (as amended).
981 Philippine Revised Rules of Court, Rule 132, § 25.
982 Philippine Revised Rules of Court, Rule 132, § 25.
983 Philippine Revised Rules of Court, Rule 132, § 26.
984 Philippine Revised Rules of Court, Rule 132, § 27.

ument is considered private within the ambits of Philippine law as "any other writing, deed or instrument executed by a private person without the intervention of a notary or other person legally authorized by which some disposition or agreement is proved or set forth."[985] Notably, "before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either: (a) by anyone who saw the document executed or written; (b) by evidence of the genuineness of the signature or handwriting of the maker; or (c) by other evidence showing its due execution and authenticity."[986] Any other private document need only be identified as that which it is claimed to be.[987] During authentication in court, as Philippine jurisprudence provides, "a witness positively testifies that a document presented as evidence is genuine and has been duly executed or that the document is neither spurious nor counterfeit nor executed by mistake or under duress."[988]

As to how authenticity and genuineness of handwriting can be proven, "the handwriting of a person may be proved by any witness who believes it to be the handwriting of such person because he has seen the person write, or has seen writing purporting to be his upon which the witness has acted or been charged, and has thus acquired knowledge of the handwriting of such person."[989] Moreover, "evidence respecting the handwriting may also be given by a comparison, made by the witness or the court, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge."[990]

In relation to this, the authentication of a private document before the Philippine courts is only excused in four instances. As jurisprudence summarizes, authentication is not required either: (1) "when the document is an ancient one," or "a private document is more than thirty years old, is produced from the custody in which it would naturally be found if genuine, and is unblemished by any alterations or circumstances of suspicion;" (2) "when the genuineness and authenticity of the actionable document have not been specifically denied under oath by the adverse party;

985 Asian Terminals v. Philam Life Insurance, G.R. Nos. 181163, 181262, 181319, 24 July 2013; Philippine Revised Rules of Court, Rule 131, § 21.
986 Philippine Revised Rules of Court, Rule 132, § 20 (as amended).
987 Philippine Revised Rules of Court, Rule 132, § 20 (as amended).
988 Salas v. Sta. Mesa Market Corporation, G.R. No. 157766, 12 July 2007.
989 Philippine Revised Rules of Court, Rule 132, § 22.
990 Philippine Revised Rules of Court, Rule 132, § 22.

(3) when the genuineness and authenticity of the document have been admitted; or (4) when the document is not being offered as genuine."[991]

In line with the foregoing, the Philippine Rules on Electronic Evidence as well as E-Commerce Act would gain significance vis-à-vis digital authentication. As per the Rules on Electronic Evidence, electronic signatures or digital signatures are deemed admissible in evidence "as the functional equivalent of the signature of a person on a written document" as long as they properly authenticated in accordance with the rules.[992]

In addition to the foregoing discussion, there would be naturally some instances wherein the authentication of a documentary evidence is required for courts outside of the Philippines. Accordingly, the authentication of documents in this instance is done through the Department of Foreign Affairs, specifically under its Office of Consular Services, in the context of the 1963 Vienna Convention on Consular Services.

### e. Importance of Confidentiality

Lack of domestic legislation notwithstanding, confidentiality is of primordial consideration at all times in handling requests for mutual legal assistance. The need for confidentiality is even required to be disclosed as minimum information in MLA requests. Irregardless of any request or mention of the need for confidentiality, the Department of Justice exerts its best efforts to keep the same confidential, including its contents and the actions taken regarding it.[993] In cases where confidentiality has been breached, the requesting member state shall be duly informed of the same to determine if it still wants to pursue the request.[994] This notwithstanding, should the request require filing of an application before the appropriate courts, the request and information provided therein shall, in accordance with Philippine law, be considered public record.[995]

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991 Salas v. Sta. Mesa Market Corporation, G.R. No. 157766, 12 July 2007.
992 Philippine Rules on Electronic Evidence, Rule 6, §§ 1, 2; see also E-Commerce Act, §§ 7, 8.
993 *Soriano*, p. 138.
994 *Soriano*, p. 138.
995 *Soriano*, p. 138.

f. Return of Evidence

Like the issue on applicability of the speciality and use limitation on MLA requests, there is an apparent gap in the law regarding the obligation to return evidence. While the self-executory ASEAN MLAT would provide the obligation to return evidence to the requested member state upon cessation of proceedings or finishing of the criminal matter subject of the MLA request, there is no other law which would mention the obligation to return evidence to the Philippines. It would seem however that the obligation to return evidence to Philippine authorities can be implied, aside from referencing solely to the ASEAN MLAT.

By backtracking again to how coercive measures could be lawfully done in the Philippines, one could notice the requirement of making the appropriate return on the warrant after said warrant has been executed. In executing validly issued search warrants, for example, the officer tasked to do the search and seizure must "deliver the property seized to the judge who issued the warrant, together with a true inventory thereof duly verified under oath."[996] The rules further provide that the issuing judge shall ascertain if the return has been made "ten (10) days after issuance of the search warrant," and "if none, shall summon the person to whom the warrant was issued and require him to explain why no return was made."[997] If the return has been made, the judge shall ascertain whether a receipt for the property seized (Section 11 of the Rules) has been "complied with and shall require that the property seized be delivered to him."[998] In the same vein, any return on the search warrant "shall be filed and kept by the custodian of the log book on search warrants who shall enter therein the date of the return, the result, and other actions of the judge."[999]

Further, the applicant-law enforcement officer is obliged to give to the custody of the Regional Trial Court which issued authorization within 48 hours since the authorization's expiration all made recordings, etc. in relation to said authorization.[1000] The same kind of return is mandated

996 Philippine Rules of Criminal Procedure, Rule 126, § 12(a).
997 Philippine Rules of Criminal Procedure, Rule 126, § 12(b).
998 Philippine Rules of Criminal Procedure, Rule 126, § 12(b).
999 Philippine Rules of Criminal Procedure, Rule 126, § 12(c).
1000 Authorization shall not exceed sixty days from the date of issuance of the order, unless extended or renewed by the Court upon being satisfied that such extension or renewal is in the public interest. Additionally, Republic Act No. 4200, Anti-Wiretapping Law, § 3 provides: "All recordings made under court authorization shall, within forty-eight hours after the expiration of the period

vis-à-vis online data under the Cybercrime Prevention Act and Rules on Cybercrime Warrants, wherein there are rules on depositing to the custody of the relevant Regional Trial Court and certification of the relevant law enforcement authorities as to what was collected or intercepted.[1001] This includes a certification that no duplicates of the whole or the part thereof have been made, or if made, have been accordingly submitted to the court.[1002] Simultaneously, there is also the duty for service providers and law enforcement authorities to destroy computer data completely and immediately after the expiration of the relevant periods provided by law, as the case may be.[1003] And regardless of whether the interception and/or intrusion involves traditional wiretapping or computer data, the exclusionary rule equally applies, wherein any evidence gathered without a valid warrant or beyond the authority conferred by the warrant shall be inadmissible as evidence before any court or tribunal.[1004]

Given these requirements, and lack of amendment thereof as regards international cooperation matters such as mutual legal assistance, it would be proper to require the return of evidence after a particular criminal matter subject of a MLA request has been finished and the evidence, object and/or information requested is no longer required for that particular criminal matter. This would allow executing authorities in the Philippines to comply with their positive duty as provided by law.

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fixed in the order, be deposited with the court in a sealed envelope or sealed package, and shall be accompanied by an affidavit of the peace officer granted such authority stating the number of recordings made, the dates and times covered by each recording, the number of tapes, discs, or records included in the deposit, and certifying that no duplicates or copies of the whole or any part thereof have been made, or if made, that all such duplicates or copies are included in the envelope or package deposited with the court. The envelope or package so deposited shall not be opened, or the recordings replayed, or used in evidence, or their contents revealed, except upon order of the court, which shall not be granted except upon motion, with due notice and opportunity to be heard to the person or persons whose conversation or communications have been recorded." Similar import can be found nowadays in the Anti-Terrorism Act of 2020.

1001 Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, § 16; Rules on Cybercrime Warrants, §§ 4.5, 5.5, 6.6, 6.8, 7.1 (submission to custody of court).

1002 Anti-Wiretapping Law, § 3.

1003 Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, §§ 16, 17; Rules on Cybercrime Warrants, § 8.2.

1004 Implementing Rules and Regulations of the Philippine Cybercrime Prevention Act, § 18.

g. Specific Procedures per Type of Assistance

It has been stressed before that a domestic statute on mutual legal assistance, or even something that would define and delineate how requests for mutual legal assistance shall be dealt with – or at least, consolidate existing principles, conditions, exceptions, as well as procedure and other requirements – is left to be desired. This in turn creates the need to consolidate what can be found in existing law, rules of court procedure, and other rules and regulations to discern the different procedures as to how specific types of mutual legal assistance is being executed or effectuated in the Philippine setting. This includes whatever intricacies each investigative measure has.

To illustrate these complexities and the problems that could arise due to lack of any straightforward standardization, one can look into the commonly requested investigative measure via mutual legal assistance: taking of evidence and/or voluntary statements. As discussed below, the Philippines presents itself as a unique case because despite the usual notion that taking of evidence and/or voluntary statements is a straightforward process, different nuances or issues arise from how the laws and procedures that could apply are scattered across different planes, making it complex to assuredly determine the direction one must take. Stating it differently, the Philippines within its own domestic context present the problem of lack of harmonization and standardization necessary to an effective machinery of international cooperation such as mutual legal assistance.

With respect to any request for mutual legal assistance in the taking of evidence and/or voluntary statements, the Department of Justice shall evaluate and should find the same meritorious, endorses the request to the National Bureau of Investigation and/or National Prosecution Service to process and effectuate the same.[1005] The said units may then proceed to issue the necessary subpoena, which is "a process directed to a person requiring him to attend and to testify at the hearing or the trial of an action, or at any investigation conducted by competent authority, or for the taking of his deposition" and/or "may also require him to bring with him any books, documents, or other things under his control."[1006] Under Philippine remedial law, the first refers to a *subpoena ad testificandum*

1005 See Executive Order No. 292 (Administrative Code of the Philippines), Title III, §§ 1, 3-4, 11-13; *Soriano*, p. 131.

1006 Act Establishing a Bureau of Investigation (Republic Act No. 157), § 5; Prosecutor Service Act of 2010, § 9; Philippine Rules of Court, Rule 21, § 1.

whilst the latter refers to a *subpoena duces tecum*, and when issued together, is referred to as *subpoena ad testificandum et duces tecum*.[1007]

With respect to this, should said *subpoena duces tecum* be "unreasonable and oppressive, or the relevancy of the books, documents or things does not appear, or if the person in whose behalf the subpoena is issued fails to advance the reasonable cost of production thereof," or "that the witness is not bound thereby," the issuing authority may quash the issued subpoena "upon motion promptly made and, in any event, at or before the time specified therein."[1008] This necessarily means that any request for mutual legal assistance should sufficiently provide the required information to justify the attendance of a person to either give testimony or produce documents and other pieces of evidence, or both. Otherwise, there is the risk of having a motion filed to quash any subpoena issued with respect to any mutual legal assistance request.

The relevant rules of procedure likewise provide for how said subpoena should be sent to the relevant person, who either needs to provide testimony or produce documents or evidence, or both.[1009]

In addition, if one looks further into the Rules of Court, taking of evidence and/or voluntary statements from a person through the use of discovery and deposition mechanisms is also sanctioned in the Philippines.[1010] While the use of modes of discovery is equally sanctioned for criminal cases in the Philippines,[1011] there is no clear cut definition and delineation of its usage in mutual legal assistance proceedings. Going back to *People of the Philippines v. Sergio* and how the Supreme Court decided to accommodate the deposition of Mary Jane Veloso through written interrogatories whilst being imprisoned in Indonesia, it would seem that deposition was allowed due to the special circumstances of this case. Here-

1007 Remedial Law refers to the Rules of Court or Procedural Law in the Philippines. Philippine Rules of Court, Rule 21, § 1.

1008 Philippine Rules of Court, Rule 21, § 4.

1009 Accordingly, summons shall be served, whenever practicable, by handling a copy thereof personally to the person involved, or when it cannot be done due to justifiable causes, "(a) by leaving copies of the summons at the defendant's residence with some person of suitable age and discretion then residing therein, or (b) by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof." Service should be made to allow the person against whom the subpoena is issued should be given reasonable time to prepare and travel to the place of attendance. *See* Philippine Rules of Court, Rule 14, §§ 6-7, Rule 21, § 6.

1010 Philippine Rules of Court, Rules 21, 23, 24-25.

1011 See Rules of Criminal Procedure, Rule 114, § 10.

in, the rules were liberally applied because the rules of criminal procedure were bereft of any provision applicable to the condition of Mary Jane Veloso who while being an indispensable witness to an illegal recruitment case in the Philippines, was also convicted of a grave offense, currently incarcerated in a foreign country, and in death row. Further, any strict application according to the Supreme Court will not be in congruence with purpose of the ASEAN MLAT, "which is enforced precisely to be applied in circumstances like in the case of Mary Jane."[1012] The ASEAN MLAT, according to the Court, recognizes the significance of cooperation and coordination among the states to prevent, investigate and prosecute criminal offenses especially if perpetuated not only in a single state just like in the case of drug and human trafficking, and illegal recruitment, the very charges that were filed against the accused Sergio et al.

Albeit there is comfort in knowing that no less than the Supreme Court recognizes modes of discovery as consistent with the aim and purpose of mutual legal assistance, one cannot simply rely on the Court's pronouncement herein to conclude with certainty that modes of discovery such as depositions through written interrogatories vis-à-vis mutual legal assistance are sanctioned. If the case did not involve the special circumstances surrounding Mary Jane Veloso, then the Court would have definitely decided differently. If there is anything else one can learn from *Sergio*, it would be to ensure that Philippine law and procedure is standardized to avoid further confusion or the need to resort to liberal construction of procedural rules in the first place. This is the first order of business. But while one waits for this momentous occasion to come, if one follows the analogy given in *Sergio* as well as by Undersecretary Malaya et al. between mutual legal assistance and "depositions pending action" under Rule 23 of the Rules of Court, wherein they mention how mutual legal assistance does not require an ongoing criminal case to be effectuated (currently being in the investigative stage suffices),[1013] then there would be reasonable ground to argue that the usage of modes of discovery is sanctioned. Further, if one acts on the premise of reciprocity and the rationale of mutual legal assistance being a more efficient and modern way of facilitating judicial cooperation, then discovery procedures should be deemed allowed as a procedure to effectuate mutual legal assistance requests. That said, the relevant provisions provide that depositions or recourse to discovery pro-

1012 People of the Philippines v. Sergio, G.R. No. 240053, 09 October 2019.
1013 *Malaya/Monedero-Arnesto/Paras,* p. 7.

cedures are available pending court action, before action, and pending appeal.[1014] And in case one is similarly situated as Mary Jane Veloso, then deposition through written interrogatories is allowed to perpetuate testimony.

It becomes more complex when one considers the different rules in the taking of evidence and/or voluntary statements as regards persons who are currently in custody or imprisoned in the Philippines. As per the applicable rules, "when application for a subpoena to a prisoner is made, the judge or officer shall examine and study carefully such application to determine whether the same is made for a valid purpose."[1015] Further, the rules provide that "no prisoner sentenced to death, reclusion perpetua or life imprisonment and who is confined in any penal institution shall be brought outside the said penal institution for appearance or attendance in any court unless authorized by the Supreme Court."[1016] In the same vein, depositions made on persons who are currently imprisoned shall only be made through leave of court on such terms as the court prescribes.[1017] In other words, should the mutual legal assistance request refer to taking of voluntary statements of persons currently imprisoned, there is no other recourse but to go to court about it.

Another nuance about the taking of evidence and/or voluntary statements involves the production and inspection of documents or other pieces of evidence as well as the physical and mental examination of persons. On one hand, there is the production and inspection of documents, etc., wherein the court in which an action is pending may "(a) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control, or (b) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon," upon motion for good cause of a party.[1018]

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1014 Philippine Rules of Court, Rules 23, 24, 25.
1015 Philippine Rules of Court, Rule 14, § 2.
1016 Philippine Rules of Court, Rule 14, § 2.
1017 Philippine Rules of Court, Rule 23, § 1.
1018 Philippine Rules of Court, Rule 27, § 1.

On the other hand, as regards the physical and/or mental examination of persons, it is allowed in actions where the physical and/or mental condition of a person is in question.[1019] The court in which the action is pending may in its discretion order a person to submit to a physical or mental examination by a physician.[1020] In line with this, there shall be a waiver of privilege, meaning, "the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical examination."[1021]

According to the ASEAN MLAT, which is the Philippine legal basis, a person, who is required to give a sworn statement or testimony, or produce documents, records, or other forms of evidence pursuant to a request for assistance, may decline to do so on two accounts: "(1) the law of the requested member state permits or requires that person to decline to do so in similar circumstances in proceedings originating in the requested member state; or (2) the law of the requesting member state permits or requires that person to decline to do so in similar circumstances in proceedings originating in the requesting member state."[1022] Should the person decline on the second given ground, "the requesting member state shall, if so requested, provide a certificate to the requested member state as to the existence or otherwise of that right."[1023]

Considering these, there are arguably unsettled issues that need to be straightened out as soon as possible. Agreeing with the statement of Undersecretary Malaya et al. above, there is the need for domestic legislation on mutual legal assistance to provide the parameters, baselines, and guidelines de rigeur. In other words, there is a want of harmonization and/or standardization in the domestic legal system itself.

As regards other types of assistance not specifically listed in the ASEAN MLAT, the lack of any singular instrument that would define, delineate, and explain the different forms of assistance the Philippines is problematic in effectively sending and receiving mutual legal assistance requests, as arguably, a requesting state should either second-guess or outright be abreast of the different laws which could be applicable when sending a request to the Philippines. It can particularly be difficult if the requesting state

1019 Philippine Rules of Court, Rule 28, § 1.
1020 Philippine Rules of Court, Rule 28, § 1.
1021 Philippine Rules of Court, Rule 28, § 4.
1022 2004 ASEAN Mutual Legal Assistance Treaty, art.12, § 1.
1023 2004 ASEAN Mutual Legal Assistance Treaty, art.12, § 2.

would be unfamiliar with the legal system applicable to the Philippines. In practice, the hurdles could be however surpassed through constant communication and consultation with other central authorities. As per interviews with authorities involved in mutual legal assistance requests, they advised one another on the applicable law and procedure, or whether the said requested assistance can be effectuated or not.

## *III. Implementation in the member state level: Malaysia*

The next portion discusses mutual legal assistance in Malaysia, the other member-state which the present study looks into as regards mutual legal assistance within the ASEAN. Interestingly, and as mentioned as early as the introduction of the present study, Malaysia, together with the Philippines, is one of the founding member states of the ASEAN. Furthermore, Malaysia was the member state that proposed and helped in drafting the present provisions of the ASEAN MLAT according to the treaty's explanatory note. In the next following sections and pages, one would be walked through to how mutual legal assistance developed historically in Malaysia, what the present legal framework is vis-à-vis substantive and procedural provisions of mutual legal assistance, including a discussion of how the said provisions are applied in practice, as well as issues and problems that may be highlighted or pointed out.

### A. Historical Development of Mutual Legal Assistance

#### 1. Bilateral, Regional, and Multilateral Mutual Legal Assistance Treaties

Malaysia has entered into different bilateral and multilateral treaties. It is a signatory to the ASEAN MLAT, and five (5) bilateral mutual legal assistance treaties, namely with Australia, Hong Kong, United States of America, United Kingdom, and India.[1024] Additionally, Malaysia is a signatory to treaties containing provisions on mutual legal assistance, such as the UNCAC and UNTOC.[1025]

1024 *Kamal*, p. 87.
1025 See *Kamal*, p. 87.

## 2. Domestic Legislation on Mutual Legal Assistance

Aside from entering into bilateral, regional, and multilateral treaties, Malaysia has various domestic instruments on international cooperation. As regards mutual legal assistance, such is provided for in the following: Dangerous Drugs Act 1988 (with regard forfeiture of property), Order 66 of the Rules of the High Court 1980, and the Mutual Assistance in Criminal Matters Act 2002 ("MACMA"), which is supplemented by the Mutual Assistance in Criminal Matters Regulations 2003.[1026]

MACMA entered into force in 01 May 2003 and is mainly the Malaysian law that governs mutual legal assistance in criminal matters between Malaysia and other countries, including other matters in relation therewith. It applies to requests made both pursuant to a MLAT and those made on a non-treaty basis. Needless to state, its provisions are controlling with respect to mutual legal assistance in criminal matters in Malaysia.

As to how the MACMA relates to the ASEAN MLAT, Malaysia ought to enact domestic laws such as the MACMA, which in turn is imperative to effectuate treaties, such as those relating to mutual legal assistance, locally.

To understand the context, Malaysia historically followed the practice of British courts with respect to international law: doctrine of transformation vis-à-vis treaties or international agreements while doctrine of incorporation vis-à-vis customary international law.[1027] Presently, Malaysia is one of the states, in respect of which its Constitution does not provide anything as to the status of international law vis-à-vis its domestic law.[1028] This notwithstanding, Malaysia follows the doctrine of transformation with regard treaties and international agreements.[1029]

In view thereof, one can find provisions in the Constitution nonetheless that speak of the treaty-making capacity in Malaysia.[1030] On one hand, the Federal Constitution of Malaysia, in Article 74(1), provides that the "Parliament may make laws with respect to the matters enumerated in the 'Federal List' or the 'Concurrent List'."[1031] Accordingly, such "Federal List" includes, in the Ninth Schedule, "External Affairs", which enumerates among others "treaties, agreements, conventions with other countries

1026 Explanatory note to the ASEAN Model Treaty for Mutual Legal Assistance in Criminal Matters, p. 2; *Kamal*, p. 83.
1027 *Hamid/Sein*, pp. 196, 197.
1028 *Dewanto*, p. 5; *Hamid/Sein,* p. 198.
1029 *Hamid/Sein,* p. 200.
1030 *Hamid/Sein,* p. 198.
1031 Federal Constitution of Malaysia, art. 74(1); *Hamid/Sein,* p. 198.

and all matters which bring the Federation into relations with other countries" and "implementation of treaties, agreements, and conventions with other countries."[1032] It can be concluded thereon that the Federal Parliament has the exclusive power to implement international treaties and make them operative domestically.[1033]

On the other hand, Article 39 of the same Federal Constitution vests executive authority to the "constitutional Monarch and Head of State Yang di-PertuanAgong and exercisable by him or by the Cabinet or any Minister authorized by the Cabinet."[1034] Such authority extends, as Article 80(1) of the Federal Constitution provides, to all matters with regard to which the Parliament may legislate laws.[1035] Therefore, the executive authority of the Federation – vis-a-vis the Federal List that enumerates among others treaties and international agreements – extends to the making and conclusion of treaties, agreements, and conventions with other countries.[1036]

Such has been reaffirmed in the case of *The Government of the State of Kelantan v. the Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*, wherein Kelantan assailed the constitutionality of Malaysia Agreement, an international treaty among the United Kingdom, Malaysia, and Singapore.[1037] The Kelantan government was of the position that the consent of the individual federal states is required before international arrangements for Malaysia can be lawfully implemented.[1038] In sustaining the validity of the Malaysia Agreement, the High Court stated that there is nothing in the Constitution requiring consultation with any State Government or the Ruler of any State, before an international agreement can be implemented.[1039] Based on the foregoing, it can be then concluded that the Federal Government has the treaty-making power in Malaysia while the Parliament has the power to legislate to give treaties legal effect domestically, especially for those treaties that affect rights of private persons or involves changes in domestic laws.[1040]

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1032 *Hamid/Sein,* p. 198.
1033 *Hamid/Sein,* p. 198.
1034 Federal Constitution of Malaysia, art. 39; *Hamid/Sein,* p. 198.
1035 Federal Constitution of Malaysia, art. 80(1); *Hamid/Sein,* p. 199.
1036 *Hamid/Sein,* p. 199.
1037 [1963] MLJ 355 (Federation of Malaya High Court); *Hamid/Sein,* p. 199.
1038 *Hamid/Sein,* p. 199.
1039 The Government of the State of Kelantan v. the Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj, [1963] MLJ 355 (Federation of Malaya High Court); *Hamid/Sein,* p. 199.
1040 *Hamid/Sein,* pp. 199-200.

In view of the foregoing provisions, the MACMA is the domestic legal basis for for mutual legal assistance in Malaysia and is necessary to implement and/or operationalize the ASEAN MLAT and other mutual legal assistance treaties Malaysia is a signatory of or to otherwise give legal effect to the same locally. Consequently, the MACMA provisions apply whenever Malaysia sends or receives requests for mutual legal assistance in criminal matters.

## B. Substantive Provisions: Mutual Legal Assistance in Criminal Matters

### 1. Applicability of Assistance

MACMA illustrates a request-based system on mutual legal assistance in Malaysia wherein requests are sent to and from Malaysia for the cross-border exchange and transfer of information and/or evidence in criminal matters. The law provides that assistance shall be provided in criminal matters. "Criminal matters" is not necessarily defined but is mentioned that it is "in respect of a serious offense or foreign serious offense, as the case may be, and enumerates the following to included hereto: (1) a criminal investigation, (2) criminal proceedings, or (3) ancillary criminal matter.[1041] MACMA further defines ancillary criminal matters as those involving either "the restraining of dealing with, or the seizure, forfeiture, or confiscation of, property in connection with a serious offense or a foreign serious offense, as the case may be" or "the obtaining, enforcement or satisfaction of a forfeiture order or a foreign forfeiture order, as the case may be."[1042]

Not all criminal offenses are subject to mutual legal assistance but are only limited to those which are "serious offenses" or "foreign serious offenses", which MACMA defines as either (1) "an offense defined under the Anti-Money Laundering Act 2001", (2) "an offense against the laws of Malaysia where (i) the maximum penalty for the offense is death or (ii) the minimum term of imprisonment is not less than one year", or (3) any attempt, abetment or conspiracy to commit any of the preceding two offenses.[1043] On the other hand, foreign serious offenses are either offenses (1) "against the law of a prescribed foreign State stated in a certificate pur-

1041 MACMA, § 1.
1042 MACMA, § 1.
1043 MACMA, § 1.

porting to be issued by or on behalf of the government of that prescribed foreign State", or (2) "that consists of or includes activity which, if it had occurred in Malaysia, would have constituted a serious offense."[1044]

Assistance may be given by Malaysia to both treaty and non-treaty based requests.[1045] MACMA provides for "prescribed foreign states", which are foreign states with existing treaties or agreements with Malaysia. Those without existing agreements are not considered as such. In connection to this, to be formally a "prescribed foreign state", the Minister in charge of legal affairs declares by order that there is any treaty or other agreement between Malaysia and that foreign state under which the latter has agreed to provide mutual legal assistance to the former;[1046] and any such order may provide limitations, restrictions, exceptions, modifications, adaptations, conditions, or qualifications.[1047] It is also subject to revocation or amendment by subsequent order by the Minister.[1048] Notably, any order declaring a foreign state as a prescribed foreign state shall not only be conclusive evidence that the arrangement indicated therein is in compliance with the provisions of MACMA, but that MACMA also applies in the case of said foreign state and that the validity of the order shall not be questioned in any legal proceedings.[1049]

On the other hand, before a non-prescribed foreign state – or a foreign state without any treaty or agreement with Malaysia vis-à-vis mutual legal assistance – is afforded assistance, the Minister in charge of legal affairs, upon recommendation of the Attorney General, gives a special direction in writing that MACMA shall apply in relation to the requested mutual legal assistance "subject to any restriction, limitation, exception, modification, adaptation, condition, or qualification contained in the direction."[1050]

### 2. Types of Assistance Rendered

MACMA enables Malaysia to provide and obtain international assistance in criminal matters, to the exclusion of extradition, arrest, or detention with a view to extradite, of any person, which is covered by other laws,

1044 MACMA, § 1.
1045 MACMA, §§ 16, 17.
1046 MACMA, § 17(1).
1047 MACMA, § 17(2).
1048 MACMA, § 17(4).
1049 MACMA, § 17(3).
1050 MACMA, § 18.

in the following forms: "(1) providing and obtaining evidence or things; (2) the making of arrangements for persons to give evidence, or to assist in criminal investigations; (3) the recovery, forfeiture, or confiscation of property in respect of a serious offense or a foreign serious offense; (4) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offense or foreign serious offense; (5) the execution of requests for search and seizure; (6) the location and identification of witnesses and suspects; (7) the service of processes; (8) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offense or foreign serious offense; (8) the recovery of pecuniary penalties in respect of a serious offense or foreign serious offense; and (9) the examination of things and premises."[1051]

MACMA also contains a catch-all provision wherein nothing in said MACMA prevents the provision or obtaining of international assistance to or from any foreign state other than those above enumerated.[1052] As to how this provision applies in practice, in an interview with officials from the Transnational Crime Unit of the Prosecution Division in the Attorney General's Chambers, which acts as the central authority for both extradition and mutual legal assistance requests in Malaysia, requesting states normally do a preliminary consultation to ask whether a particular type of assistance is allowed and thereafter the said Transnational Crime Unit shall assist and check the applicable domestic laws and accordingly advise.

Interestingly, a reading of the list of types of assistance that could be rendered under the MACMA would reveal that interception of communication and online evidence is not explicitly provided for. In consultation with Malaysian officials, it was mentioned that these forms of assistance normally is done through the informal channels.[1053]Wiretapping by public officials is only sanctioned for offenses committed in Malaysia and has not been expanded to cover aspects of international cooperation.[1054] At the same time, should interception of communication and/or correspondence as well as online evidence is requested from Malaysia and allowed, it does

1051 MACMA, §§ 3, 5.
1052 MACMA, § 4(2).
1053 Interview with prosecutors from the Office of the Attorney-General.
1054 Interview with prosecutors from the Office of the Attorney-General.

not cover content of said communication/correspondence but only the fact that it occurred.[1055]

### 3. Compatibility with Other Agreements

MACMA explicitly provides that it does not prevent the provision or obtaining of international assistance in criminal matters to and from the International Criminal Police Organization ("INTERPOL") or any other international organization.[1056] At the same time, MACMA does not prevent, although it has become the primary legal basis for mutual legal assistance requests, the rendering and receiving of mutual legal assistance as may be provided in other earlier written laws, such as those provided under Order 66 of the Rules of the High Court 1980, Part VII of the Dangerous Drugs Act 1988 on Forfeiture of Property, and Sections 50 and 52 of the Extradition Act 1992.[1057]

In the same vein as rendering and receiving assistance from INTERPOL and other international organizations, assistance upon an informal request or other form of arrangement is not provided for in the MACMA.[1058] In light of this, Malaysian officials do not shy away from acknowledging and promoting how informal assistance is an invaluable tool in international cooperation in combating crime.[1059] At the preliminary stages of investigation, when coercive measures are not yet required, some "informal assistance" may suffice to provide useful information.[1060] This "informal assistance" is understood to be assistance through channels outside of the formal mutual legal assistance regime, often through direct communications between counterparts or police sharing intelligence or data, which is legally available through domestic databases.[1061] Admittedly, its strength relies on networking and exchange of information.[1062]

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1055 Interview with prosecutors from the Office of the Attorney-General.
1056 MACMA, § 4(1).
1057 MACMA, § 4(3); Dato' Mohamed Hashim Shamsuddin v. Attorney General, Hong Kong [1986] 2 MLJ 112; Lorrain Esme Osman v Attorney General of Malaysia [1986] 2 MLJ 288; *Office of the Attorney General*.
1058 MACMA, § 4(2); *Kamal*, p. 92.
1059 *Kamal*, p. 92; *Sidek*, p. 122.
1060 *Kamal*, p. 92.
1061 *Kamal*, p. 92.
1062 *Sidek*, p. 122.

To illustrate, the Malaysian Anti-Corruption Commission ("MACC") may request their counterparts abroad to provide intelligence or information and similarly may provide assistance to their counterparts.[1063] It has thus far relied on informal assistance provided by Komisi Pemberantasan Korupsi (Corruption Eradicating Corruption or "KPK") in Indonesia, Corrupt Practices Investigation Bureau ("CPIB") in Singapore, and the Independent Commission against Corruption ("ICAC") in Hong Kong in its detection and investigation of certain individuals.[1064] The same informal assistance occurs between different Malaysian agencies, such as the Central Bank, and their foreign counterparts.

Having said this, the most common example of informal assistance arguably occurs in police-to-police cooperation in Malaysia. In an interview with the Royal Malaysian Police's point person for mutual legal assistance and extradition requests, police-to-police cooperation is recognized as vital with respect to investigation and information gathering. Malaysian Police maintains a network with other police authorities around the world and in the ASEAN, and the ASEANAPOL (albeit an independent body from the ASEAN) serves as an indispensable conduit. The same officer clarifies that more often than not, whatever information gathered during this said police-to-police cooperation serves as stirring information that leads to more formal requests for cooperation. He stressed that whatever is gathered during police-to-police cooperation is not used as evidence before the courts. What is used as evidence are those gathered through the prosecutorial stage and/or the government-to-government cooperation which happens through mutual legal assistance.

## 4. Principles, Conditions, and Exemptions

The MACMA provides categorically the mandatory and discretionary grounds for refusal, which are more or less the principles, conditions, and exceptions Malaysia applies to mutual legal assistance in criminal matters.[1065] In practice, officials of the Attorney General's Chambers intimated that they work to approve all requests received and normally, requests received and sent among ASEAN member-countries are executed. To avoid denial of requests, open communication channels are maintained and

1063 *Kamal*, p. 92; *Sidek*, p. 122.
1064 *Sidek*, p. 122.
1065 MACMA, § 20(1)(3); *Kamal*, pp. 85-86.

preliminary consultations and communication are often done between authorities and they advise one another as to the correct content or procedure to be followed.

a. Sufficiency of Evidence

On the basis of the MACMA, there is a tacit sufficiency of evidence requirement written in between its provisions: the more coercive an investigative measure is, e.g. search and seizures, the more evidence or information the requesting state must provide prior to the approval of a MLA request. At the outset, a reading of the provisions of MACMA would reveal that before any assistance can be given by Malaysia to a foreign state, it must be satisfied that the information or evidence requested is relevant to the criminal matter subject of the mutual legal assistance request.[1066] Moreover, there are types of assistance requests which have a sufficiency of evidence requirement before assistance can be rendered by the government of Malaysia, in particular, are the requests for taking of evidence for criminal proceedings, production orders for criminal matters, including requests for search and seizure, requests for attendance of persons in prescribed foreign state, and locating and/or identifying persons.[1067] For instance, in effectuating requests for search and seizures against a person, a court order is firstly required and prior to an issuance of the same, the court needs to be satisfied that "there are reasonable grounds for suspecting that a person specified in the request has committed or has benefited from a foreign serious offense".[1068] Likewise, in locating and/or identifying persons, the Attorney General may grant the request if he is satisfied, among others, that there are reasonable grounds to believe that the person being sought to be located and/or identified is or might be concerned in, or could give or provide evidence or assistance relevant to, the criminal matter, and that the person is in Malaysia.[1069]

In connection to this, the applicable Malaysian law provides a consequent ground for refusal when the sufficiency of evidence requirement is not satisfied. One of the mandatory grounds for refusal provided for is insufficiency of importance – when the thing requested for is of insufficient

1066 See for example MACMA, § 35(1), (2).
1067 MACMA, §§ 22, 23-26, 27, 34, 35-36, 39.
1068 MACMA, § 36(2).
1069 MACMA, § 39(2).

importance to the investigation or could be reasonably obtained by other means.[1070] Discerning importance necessarily entails the weighing of the evidence and/or information the prescribed foreign state provided with the resources required to fulfill said request. In this regard, the process of open communication and preliminary consultations in practice plays a significant role to avoid incidents of denial resulting from insufficiency of importance.

### b. Dual Criminality

Dual criminality exists as a requirement in MACMA as it is a mandatory ground for refusal under Section 20(1)(f). A request may be denied should it relate to an "investigation, prosecution, or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would not have constituted an offense against the laws of Malaysia."[1071] Based on this provision, what matters is not the nomenclature of the criminal offense but the act or omission constituting this criminal offense. Thus, following the provision, should the act or omission the MLA request relates to is not punishable in Malaysia, then Malaysia can deny the request.

While being a strict requirement, in practice, there is no automatic denial of requests based on this ground. The central authorities of Malaysia and the other relevant state advise one another as to what law could apply by looking into particulars.[1072] This pertains to cases wherein the case is punishable as a crime in Malaysian domestic law but the requested state does not seem to have the same kind of law, and vice versa.

### c. Double Jeopardy

Double jeopardy is provided as a mandatory ground for refusal under Section 20(1)(e) MACMA when Malaysia is the requested state. A request shall be denied should it pertain to the investigation, prosecution, or punishment of a person for an offense in case where either (1) the person has been convicted, acquitted, or pardoned by a competent court or other

1070 MACMA, § 20(1)(h).
1071 MACMA, § 20(1)(f).
1072 Interview with prosecutors from the Office of the Attorney-General.

authority in the prescribed foreign state; or (2) has undergone the punishment provided by the law of that prescribed foreign state.

Two things can be mentioned at the outset with this provision. First, it can be gainsaid based on said provision that the MACMA adopts to a certain extent a transnational element in the application of double jeopardy as a mandatory ground for refusal because Malaysia shall consider if a conviction, acquittal, pardon, or service of punishment has already occurred in another state – herein, the requesting "prescribed foreign state." One should note however that herein only the requesting state is involved. There is no involvement of any other state, wherein conviction, acquittal, pardon, or service of punishment may have occurred. Second, one can note with this provision that the conviction, acquittal, pardon, or service of punishment pertains to the prescribed foreign state (requesting state herein) and not Malaysia. Stating it otherwise, if the conviction, acquittal, pardon, or service of punishment occurred in Malaysia, then strictly following the MACMA provision, the double jeopardy as mandatory ground for refusal shall not apply.

Notwithstanding the foregoing observations, it remains questionable if this strict application should be the case, given that there is a prohibition against double jeopardy in Malaysia itself. To begin with, the protection against double jeopardy is provided in the Federal Constitution of Malaysia, wherein "a person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."[1073] The said protection is likewise provided for in Article 302 of the Malaysian Criminal Procedure

1073 Federal Constitution of Malaysia, art.7(2).

Code.[1074] The same article in the Malaysian Criminal Procedure Code further provides illustrative examples of how the provisions apply.[1075]

It must be understood however that in Malaysian domestic law, the protection against double jeopardy, or otherwise known as the protection against repeated trials, is not absolute and admits of many exceptions. Thus, some have commented that the protection in actuality has slim prac-

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1074 Criminal Procedure Code, art. 302 provides:
"Person once convicted or acquitted not to be tried again for same offence
302. (1) A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167.
(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection 165(1).
(3) A person convicted of any offence constituted by any act causing consequences which, together with that act, constituted a different offence from that of which he was convicted, may be afterwards tried for that last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened at the time when he was convicted.
(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding the acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.
(5) The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section."

1075 (a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged upon the same facts with theft as a servant, or with theft simply, or with criminal breach of trust.
(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for robbery.
(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.
(d) A is tried and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.
(e) A is charged and convicted of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within subsection (3) of this section.

tical significance.[1076]The following are the four (4) main circumstances wherein the rule on double jeopardy is not deemed violated and retrial is not sanctioned:

First, when proceedings have been discharged. Discharge of proceedings can result from different reasons, but does not automatically result to double jeopardy being consequently engaged.[1077] Normally, discharge of proceedings shall result to acquittal of the accused should it become expressed or apparent that the prosecution is not interested in pursuing the case any further, or that there shall be failure to prosecute the case for good reasons, or it is unlikely that the case can be prosecuted expeditiously in the short future.[1078]

Second, double jeopardy does not apply whenever the superior courts order the quashing of previous proceedings and a retrial. The constitutional provision explicitly provides this, and has been reaffirmed in a number of cases.[1079] Retrial, as contemplated here, means that everything should start anew, and all pieces of evidence "should be therefore tendered afresh and decided upon accordingly by a new trial judge."[1080] One must take note however, that in exercising the power to order a retrial, the said power is discretionary and there is no yard stick as to when it should or should not be ordered.[1081] At most, the appellate court must be guided by what is in the interest of justice and whether the "preponderance of justice is against or in favor of a retrial."[1082]

Third, double jeopardy does not also apply when a person is charged with a different offense on the basis of the same set of facts in a subsequent trial, if the accused could not have been charged with or convicted of that different offence in the court which convicted him first.[1083] "Different offense" is contemplated to mean that the previous offense for which the

1076 *Harding*, p. 224.
1077 *Fook/Mansoor/Hassan*, pp. 41-59.
1078 Public Prosecutor v. Lau Ngiik Yin, [2007] MLJU 668 at [4]; *Fook/Mansoor/Hassan,* p. 49.
1079 Federal Constitution of Malaysia, art.7(2); Sau Soo Kim v. Public Prosecutor [1975] 2 MLJ 134; Fan Yew Teng v. Public Prosecutor, [1975] 2 MLJ 235.
1080 *Fook/Mansoor/Hassan,* p. 653.
1081 *Fook/Mansoor/Hassan,* pp. 653, 655-656.
1082 *Fook/Mansoor/Hassan,* pp. 654, 656.
1083 *Faruqi*; *Harding,* p. 224.

accused has been tried and the subsequent offense must not have the same essential ingredients.[1084]

Fourth, double jeopardy does not apply when retrial is due to technical errors. After being detained in West Malaysia for an alleged violation of a law only applicable in Sarawak, a writ of habeas corpus was issued to order the release of Datuk James Wong Kim Min.[1085] However, this did not constitute a bar to any subsequent detention resulting in the application of the correct law.[1086]

At the same time, double jeopardy does not attach during appeals, preventive detention, different proceedings, as well as civil proceedings (civil liability arising from criminal liability) under Malaysian law. When either a prosecutor in a criminal case appeals the acquittal of the accused,[1087] or when the suspect/accused was only preventively detained under the now repealed Internal Security Act or other law allowing preventive detention,[1088] or when a non-criminal action or civil action arises against the accused to whom a criminal penalty has already been imposed or criminal action has been initiated,[1089] the same does not constitute double jeopardy.

Taking all intricacies and provisions into account, in a mutual legal assistance context, two conclusions can be derived. On one hand, when Malaysia is the requesting state, the prohibition against double jeopardy as explained above should be taken into account. Whatever MLA request Malaysian authorities would send would naturally involve investigative measures, evidence, and other information that shall be used in Malaysian courts. These Malaysian courts would naturally uphold Malaysian law, including constitutional prohibitions such as that against double jeopardy. Thus, the parameters as stated above would be material in a Malaysian context.

On the other hand, Malaysia shall not consider it indeed as a mandatory ground for refusal should the conviction, acquittal, pardon, or service of punishment occurred in Malaysia or a third state other than the requesting state. A reading of the MACMA provision would point to this direction.

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1084 Jamali bin Adnan v. Public Prosecutor [1986] 1 MLJ 162; [1985] CLJ (Rep) 167; Public Prosecutor v. Teh Cheng Poh, [1978] 1 MLJ 68; See also Federal Constitution of Malaysia, art.7(2); Interpretation Act 1967, § 59; Criminal Procedure Code, § 302.

1085 Re: Datuk James Wong Kim Min [1976] MLJ 245; *Faruqi*.

1086 *Faruqi*.

1087 Criminal Procedure Code, §§ 306, 307.

1088 *Harding*, pp. 172-178; *Harding,* Law and Goverment, pp. 215-223.

1089 Federal Constitution of Malaysia, art. 7(2); *Faruqi*.

Thus, Malaysia would not concern itself whether the mutual legal assistance request involves something to which a person has already been convicted, acquitted, pardoned, or has undergone punishment already in its own domestic shores. Instead, with the prohibition against double jeopardy as mandatory ground for refusal, Malaysia as requested state exercises an oversight function to pinpoint to the requesting state that the request violates the prohibition against double jeopardy because within the requesting state, the subject person has already been either convicted, acquitted, pardoned, or underwent the punishment already. Stating it differently, Malaysia as a requested state is imbued with a function to prevent the requesting state from violating the prohibition. Given as such, the open communication and preliminary consultation occurring between ASEAN member state authorities play a key role. Notwithstanding the lack of consideration of any conviction, acquittal, etc. in Malaysia as a mandatory ground to refuse a MLA request, this is without prejudice to Malaysia to mention this to the requesting state, especially for matters which might involve extraterritorial jurisdiction or transnational crimes. The same applies for matters that might raise a red flag for a possible violation of the prohibition on the part of the requesting state as per convictions, acquittals, etc. in its own domestic level or third state.

### d. Substantive Considerations of Human Rights

At this point of the discussion, it is imperative to look at how human rights are considered on a substantive level vis-à-vis Malaysia and mutual legal assistance. For purposes of the discussion two points shall be addressed. First, how human rights play a role in the context of grounds to refuse a mutual legal assistance request. Second, how does the general proscription on torture, cruel, inhumane, and degrading treatment and punishment come into play in dealing with mutual legal assistance requests. Third, whether Malaysia can raise its human rights obligations to deny a request.

#### i. Applicable Human Rights Obligations vis-à-vis Mutual Legal Assistance

As to the first question, one can look into the MACMA to get what specifically applies or not in a mutual legal assistance context. One of these is double jeopardy being a ground to mandatorily refuse a request

for legal assistance, as stated above. Moreover, MACMA includes a non-discrimination provision wherein requests shall be denied if it is a violation of non-discrimination rights of a person.[1090] Interestingly, this reflects the fundamental right to equality as enshrined in Article 8 (specifically the second clause) of the Malaysian Federal Constitution. Further, the Attorney General may refuse requests for legal assistance if the same would, or likely, impair the safety of a person, whether the person is within or outside Malaysia.[1091] Other than the foregoing grounds, the MACMA does not provide for any other ground for refusal based on human rights considerations or obligations Malaysia may have.

### ii. Limited Applicable Human Rights Obligations vis-à-vis Grounds to Refuse; Severity of Punishment Issue

Having mentioned the foregoing human rights being considered in a mutual legal assistance context in Malaysia, another question that would be interesting to raise at this juncture is as regards how the likely severity of punishment, including torture, death penalty, and cruel, inhumane, and degrading punishment come into play with respect to mutual legal assistance requests from and to Malaysia. As mentioned earlier, considerations of severity of punishment, torture, or death penalty have been factored in some mutual legal assistance agreements.

There is a general international proscription against the imposition of the death penalty or those considered as cruel, inhumane, and degrading treatment and/or punishment.[1092] On one hand, imposition of the death penalty is limited to the "most serious crimes" as per the relevant provision of the International Covenant on Political and Civil Rights, and is further subjected to safeguard provisions enacted through the United Nations Economic and Social Council.[1093] On the other hand, whipping or flogging has been held to be forms of cruel, inhumane, and degrading punishment.[1094] Several reports and statements from different human rights bodies condemn the use of the same as a form of punishment.[1095]

1090 MACMA, § 20(1)(d).
1091 MACMA, § 20(3)(b).
1092 See in general *Bentele*, pp. 297-303.
1093 International Covenant on Civil and Political Rights, art. 6(2); Economic and Social Council Resolution 1984/50.
1094 *International Bar Association*, p. 3.
1095 See *Bahrampour*, p. 1065; *Nowak*, pp. 6-8.

This notwithstanding, the death penalty and whipping presently remains as sanctioned forms of punishment in Malaysia.

In understanding why said forms of penalties are sanctioned in Malaysia, one must understand that Malaysian criminal law puts a strong emphasis on both crime control and public protection.[1096] Deviant behavior would attract punishment and Malaysian criminal law allows the imposition of the following forms of punishment: imprisonment, combination of imprisonment and fine, fine, whipping, and death, the imposition of which depends on public interest, circumstances of the offense, accompanying mitigating and aggravating factors, and antecedents of the offender.[1097] In light of this, capital punishment is not *per se* unconstitutional and the Malaysian Parliament is sanctioned by no less than the Malaysian Federal Constitution itself to impose said capital punishment.[1098] Malaysian criminal law does not find anything unusual in making the death penalty for certain offenses as mandatory, as perhaps its efficiency as a deterrence may be, to an extent, diminished if it was otherwise.[1099] A sentence of death in Malaysian criminal law is viewed to not only signify the gravity of the offense and stress the public disapproval, but also to serve as a warning to others, punish the offender, and protect the public.[1100] In fact, the Malaysian Supreme Court emphasizes that courts, in the imposition of the death penalty – dependent on circumstances of the case such as gravity of the offense, accused's previous offenses, public interest in crimes of such nature, and a sufficient factor of deterrence for others – should take great responsibility and there must be great courage in the imposition of said penalty.[1101] In this respect, the Malaysian Supreme Court has been remindful that when the circumstances of the case warrant death, the court should not hesitate from its duty to impose such sentence.[1102] Henceforth, the Supreme Court has once changed a penalty of imprisonment and fine to a punishment of death for the trafficking of 550 grams of heroin, on the ground that the penalty of life imprisonment and whipping was deemed

1096 See Sinnathurai Subramaniam v. Public Prosecutor, [2011] 5 CLJ 56, CA; *Fook/Mansoor/Hassan,* p. 427.
1097 *Fook/Mansoor/Hassan,* pp. 427, 487-491.
1098 Malaysian Federal Constitution, art.5(1); *Fook/Mansoor/Hassan,* p. 428.
1099 See Public Prosecutor v. Lau KeeHoo, [1983] 1 MLJ 157, FC; *Fook/Mansoor/Hassan,* p. 428.
1100 See Chang Liang Sang &Ors v. Public Prosecutor, [1982] 2 MLJ 231, FC; *Fook/Mansoor/Hassan,* pp. 427-428.
1101 *Fook/Mansoor/Hassan,* pp. 491-492.
1102 *Fook/Mansoor/Hassan,* pp. 491-492.

inadequate vis-à-vis the circumstances of the offense and that the accused was a repeat offender:

> "[T]he learned judge had the percipience to see the special malignancy of the offense and the antecedents of the offender but not the courage to reflect it in the sentence. We are of the view that he was clearly in error which entitles this court to interfere."[1103]

Another controversial type of imposable punishment in Malaysia is whipping, as it is prescribed by legislation and the courts are given the discretion on whether to impose the same.[1104] In relation to this, one can note the different applicable and existing principles vis-à-vis the imposition of whipping as a punishment. Firstly, the Malaysian Criminal Procedure limits the number of imposable strokes, which cannot be carried out in installments, to not more than 24 strokes and 10 strokes, in the case of an adult or youthful offender, respectively.[1105] In line with this, the relevant Malaysian law provides that the age of the youthful offender is determined from the date of the commission of the offense.[1106] At the same time, Malaysia's Subordinate Courts Act of 1948 restricts the competence of a First Class Magistrate to a sentence of only 12 strokes.[1107]

Malaysian criminal law allows a single trial for two or more distinct offenses. In the event that a person has been convicted for these two or more distinct offenses, any two or more is punishable by whipping, the combined sentences of whipping shall still not exceed the maximum threshold of 24 strokes for adults and 10 strokes for youthful offenders.[1108] This same threshold applies even if the offenses for which the accused was convicted of calls for mandatory whipping.[1109]

The aforementioned maximum threshold applies only when there is a single trial. In the event that one is convicted of an offense wherein the imposable penalty is whipping, then he/she is convicted for another

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1103 Loc Hock Seng v. Anor and Public Prosecutor, [1980] 2 MLJ 13, FC; *Fook/Mansoor/Hassan,* pp. 491-492.

1104 *Fook/Mansoor/Hassan,* p. 506.

1105 Malaysian Criminal Procedure Code, §§ 288(1), 289; LiawKwaiWah v. Public Prosecutor, [1987] 2 MLJ 69, 71, SC; *Fook/Mansoor/Hassan,* p. 506.

1106 Malaysian Child Act of 2001, § 16; Ong Lai Kim v. Public Prosecutor, [1991] 3 MLJ 111, 115; *Fook/Mansoor/Hassan,* p. 506.

1107 Malaysian Subordinate Court Act of 1948, § 87(1)(c).

1108 Malaysian Criminal Procedure Code, § 288(5); Tuan Mat bin Tuan Lonik v. Public Prosecutor; *Fook/Mansoor/Hassan,* p. 506.

1109 Public Prosecutor v. Tan SweeHoon, [1993] 3 SLR 758, 762; *Fook/Mansoor/Hassan,* p. 506.

offense, but in another trial albeit the trial was held in the same day, wherein the imposable penalty is again whipping, the maximum threshold would not apply and said convicted person can be whipped as many times as the judgments from each trial court indicated.[1110] This notwithstanding, sentences of whipping could be aggregated but are not allowed to run concurrently.[1111]

Not all can be subjected to whipping under Malaysian criminal law. Females, males sentenced to death, and males whom the court considers more than 50 years of age are exempted from the sentence of whipping, except those males who have been sentenced under particular provisions of the Penal Code.[1112]

Additionally, the penalty of whipping under Malaysian criminal law is imposable to make the criminals feel the taste of the violence which they have inflicted on their victims.[1113] Arguably this is due to the overarching themes of public interest (it is believed in Malaysian criminal law that society through the courts must show its abhorrence of certain crimes which is translated to the different sentences courts pass), retribution, deterrence, and reformation that apply as Malaysia's principles on sentencing.[1114] As such, whipping, should it be imposed, ought to be effective.[1115] The law recognizes though that there would be incidents that the prisoner shall be unfit to undergo whipping or it is stopped on medical advice before it is carried out. In such circumstances, a report shall be made to the court, which then shall have the discretion to either remit the sentence or sentence the prisoner to a term of imprisonment of not more than 24 months in lieu of the foregone or suspended whipping.[1116]

Taking the foregoing into account, one can get the sense of a strong criminal sentencing culture from Malaysia, which includes the imposition of both capital punishment and judicial corporeal punishment, the quantum of which depends on the circumstances of each case brought before the court. In this respect, said strong criminal sentencing culture can pro-

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1110 Chai Ah Kau v. Public Prosecutor, [1974] MLJ 2 191, 192, [1972-1974] SLR 609; *Fook/Mansoor/Hassan,* p. 507.
1111 Public Prosecutor v. Chan Chuan and Amor, [1991] 2 MLJ 538, 540; *Fook/Mansoor/Hassan,* p. 508.
1112 *Fook/Mansoor/Hassan,* p. 508.
1113 *Fook/Mansoor/Hassan,* p. 509.
1114 *Fook/Mansoor/Hassan,* pp. 401-407.
1115 See Jaa'far&Ors v. Public Prosecutor, [1961] MLJ 186; *Fook/Mansoor/Hassan,* p. 509.
1116 Malaysian Criminal Procedure Code, § 291; *Fook/Mansoor/Hassan,* p. 509.

vide a basis as to why no such condition of looking into the likely severity of the punishment can be found in the applicable law on mutual legal assistance in Malaysia. Aside from the fact that Malaysia itself imposes the controversial death penalty and whipping, it is also a reflection of reigning Malaysian criminal law principles and guidelines Malaysia lives by.

Based on the foregoing, the imposition of death penalty and whipping as punishment in Malaysia has not been an issue in mutual legal assistance requests with other ASEAN member states in practice. As per clarification with the officials of its central authority and point person for mutual legal assistance requests in the Royal Malaysian Police, problems regarding Malaysia's imposition of death penalty or whipping as punishment only arise with non-ASEAN countries (e.g. Australia), which do not impose the death penalty or whipping as punishment, or otherwise proscribes the imposition of such. In such cases, Malaysia is made to undertake that should a person be found guilty in the prosecution of the criminal matter to which a request for mutual legal assistance has been made, Malaysia shall not impose the death penalty or whipping as a form of punishment.

All things considered, one cannot help but ask whether Malaysia can invoke "general human rights considerations" as a ground to refuse a request when it is a requested state and the MLA request involves a matter that violates, threatens to violate, or is inconsistent with the Malaysia's human rights obligations as enshrined in its Constitution, laws, and other treaty obligations. In light of this, if one strictly adheres to what the relevant law provides, the answer would be in the negative. The law only provides a limited number of grounds to refuse a request based on human rights (as stated earlier). There is nothing that allows Malaysian authorities to refuse requests on other human rights considerations. This means that under the law, Malaysia is proscribed from raising any possible violation or actual violation of human rights obligations as a ground to refuse a mutual legal assistance request. Significantly, if one backtracks to the use of the prohibition against double jeopardy as a ground to refuse wherein there has been either a conviction, acquittal, pardon, or service of punishment already for the same offense or facts constituting the offense, the said ground only takes into account the requesting state. As discussed above, any similar incident in Malaysia is not taken into account. It is then safe to surmise that Malaysia adopts more or less a rule of non-inquiry and does not factor in its own domestic obligations or prohibitions in the equation of whether to approve or not a mutual legal assistance request.

Alternatively, if any conflict would arise between a MLA request and Malaysia's standing human rights obligations, Malaysia could possibly

raise essential public interest as a ground to refuse, to wit, "the provision of the assistance would affect the sovereignty, security, public order or other essential public interest of Malaysia." Essential public interest could involve a gamut of things affecting the state and thus, can be raised should there be an ensuing conflict from a received MLA request.

Having mentioned this, Malaysia in practice has yet to encounter this kind of issue, regardless of it being with its fellow ASEAN member states or other states sending mutual legal assistance requests. Herein the open communication and preliminary consultation again plays a crucial role between requesting and requested states to discuss any possible stumbling blocks and/or hurdles as regards a MLA request and the best possible route to overcome these issues. Nevertheless, preliminary consultation may prove insufficient to address human rights issues. Thus, a possible solution would be to place a threshold wherein human rights obligations constitutionally provided or those rights in accordance with customary law obligations are considered non-negotiables.

### e. Reciprocity

The requesting state is required to undertake reciprocity under the MACMA.[1117] Malaysia shall refuse a request should the appropriate authoritiy of the prescribed foreign state, in respect of the request, failed to comply with the terms of any treaty or other agreement between Malaysia and that prescribed foreign state.[1118] Further, the Attorney General will refuse a request should the requesting state fail to undertake that it will, subject to its laws, assist Malaysia in any future request for mutual legal assistance, if that requesting state is not a party to a treaty with Malaysia.[1119] This rarely happens however in practice. Reciprocity is practiced by Malaysia and so far, no problems have been encountered vis-à-vis mutual legal assistance with other ASEAN member states as from experience, ASEAN member states extend to one another the widest possible measure of assistance needed and work with each other in efforts to effectuate requests.

1117 MACMA, § 20(3)(d).
1118 MACMA, § 20(1)(a).
1119 *Kamal*, p. 84.

f. Speciality or use limitation

The government of Malaysia shall refuse a request for assistance should the requesting state fail to undertake that the thing requested will not be used for a matter other than the criminal matter in respect of which the request was made.[1120] Such mandatory ground for refusal shall not be applied should the lack of undertaking be made with the consent of the Attorney General.[1121] Officials from the Attorney General's Chambers, admitted that there are certain circumstances wherein it is discovered that a piece of information, document, or evidence can be likewise used for another criminal matter not covered by the original request. The requesting state cannot just use the said piece of information, document, or evidence already possessed. The requesting state, even if it is Malaysia, should go through the said process of sending a request anew for the subject information, document, or evidence be used for the other criminal matter.

g. Special Offenses and National Interest Cases

National or public interest is sanctioned as a mandatory ground for refusal. The Attorney General shall refuse requests for assistance should the same impair the sovereignty, security, public order, or other essential public interest of Malaysia.[1122] Requests shall also be refused should the assistance require acts that are contrary to any Malaysian written law.[1123] As clarified by officials from the Attorney General's Chambers on what applies in practice, Malaysian domestic law shall always prevail in assessing requests, should there be discrepancies between the applicable laws.

The aspect of national and public interest branches out to other mandatory grounds for refusal in the MACMA, such as "insufficient gravity" and "insufficient importance to the investigation." With respect to insufficient gravity, requests shall be denied should "the facts constituting the offense to which the request relates do not indicate an offense of sufficient gravity."[1124] And likewise, requests shall be denied should "the thing requested for is of insufficient importance to the investigation or could reasonably

1120 MACMA, § 20(1)(j).
1121 MACMA, § 20(2).
1122 MACMA, § 20(1)(i).
1123 MACMA, § 20(1)(m).
1124 MACMA, § 20(1)(g).

be obtained by other means."[1125] While the same on its face may seem like stumbling blocks in making requests, officials have clarified in interviews that in practice, the Attorney General could advise beforehand during preliminary consultations that the criminal matter subject of the request is of insufficient gravity and suggest to the requesting state to look for another applicable law, which could be used and of which imposes a higher penalty than the criminal case which was originally intended. In such a situation, the person subject of the criminal matter being investigated or prosecuted shall be charged differently or with a higher penalty vis-à-vis its equivalent in Malaysia. At the same time, the mandatory ground for refusal "insufficient importance", as explained by the Royal Malaysian Police officer in charge of mutual legal assistance requests, was placed as a safeguard against fishing expeditions, which is not the goal of mutual legal assistance requests. Nonetheless, open communications still remain to make requests possible. What the requesting state could do is to file the request again and supplant further information that would justify its request.

It is also a matter of national and public interest when the request involves a pending criminal matter and/or investigation in Malaysia or when the same contradicts domestic law.[1126] As explained during the relevant interviews, Malaysian proceedings (i.e. investigation, prosecution) shall take precedence. Following the so-called sub judice rule, any request in relation to any pending matter shall only be entertained once proceedings in Malaysia are finished. Should information be shared while criminal matters are pending, at most it shall be through informal assistance and whatever information is shared shall only be used for personal consumption and not as evidence before the courts.

Additionally, it is also an aspect of denying requests on the ground of national and public interest wherein the Attorney General has the discretion to deny the request if in the opinion of the Attorney General, the provision being requested for shall impose an excessive burden on the resources of Malaysia.[1127] The MACMA however further provides that in the event that the costs and expenses in relation to the assistance requested or being effectuated is of extraordinary or substantial nature, the Attorney General shall communicate with the appropriate authority of the request-

1125 MACMA, § 20(1)(h).
1126 MACMA, § 20(1)(l)(m).
1127 MACMA, § 20(3)(c).

ing member state on the conditions the assistance shall be effectuated or under which the Attorney General shall cease to give effect to it.[1128]

Aside from national and public interest, the Attorney General shall deny requests for assistance should the same involve offenses which are political or military in nature.[1129] MACMA however limits the political offense exception to not include the following offenses as "political": (1) offenses against the life or person of a Head of State or a member of his/her immediate family; (2) offenses against the life or person of a Head of Government or a member of his/her immediate family; (3) any offense established under any multilateral treaty or agreement to which Malaysia and the requesting member state are signatories of and which is correspondingly declared as non-political offense for purposes of mutual legal assistance; (4) any other offense declared by the Minister in charge of legal affairs by order published in the Gazette; and (5) any attempt, abetment, or conspiracy to commit the immediately preceding stated offenses.[1130] MACMA further provides that the Attorney General may restrict the application of the foregoing provisions to a "request from a prescribed foreign state that has made similar provisions in its laws."[1131]

In relation to political offenses, Malaysia has already experienced in practice being denied a request because the criminal matter subject of the request is "political" in nature. Malaysian authorities did not elaborate further on the facts of the case but nonetheless disclosed that they needed to ask for reconsideration and provide more information that what they are interested in is the criminal matter only and not at any political nature of the same.

Bank secrecy and/or fiscal offenses are not grounds for refusal in the MACMA. Stating it otherwise, no request shall be denied by Malaysia due to this reason. Requests for assistance in relation to bank accounts, fiscal offenses, etc., shall be accordingly effectuated in relation to existing Malaysian laws such as those on money laundering, terrorism financing, etc. More often than not, the Attorney General shall already advise the Central Bank and the relevant bank subject of the request should the former already receive a preliminary copy of the request from any ASEAN member state.

1128 MACMA, § 20(4).
1129 MACMA, § 20(1)(b)(c).
1130 MACMA, § 21(1).
1131 MACMA, § 21(2).

## C. Procedural Provisions: Mutual Legal Assistance

### 1. Designation of Central Authority

MACMA designates the office of the Attorney General of Malaysia as the central authority for mutual legal assistance who is authorized to make or receive formal requests to and from other states, which shall be coursed through diplomatic channels.[1132] In the interview with officials from the Attorney General's Chambers, it was clarified that the Transnational Crime Unit of the Prosecution Division is responsible for incoming and outgoing mutual legal assistance (together with extradition) requests, in addition to negotiating and drafting mutual legal assistance and extradition treaties. These tasks used to belong to the General Chamber's International Affairs Division but to streamline processes, these are assigned presently to the Prosecution Division.

Given that the Attorney General is responsible for incoming and outgoing mutual legal assistance requests, during the interview it was likewise mentioned that said central authority closely works with other agencies such as, but not limited to, the Royal Malaysian Police, Interpol, Securities Commission, Malaysian Anti-Corruption Commission, Malaysian Maritime Enforcement Agency, and Central Bank to effectuate the requests received and sent. This gives them first-hand knowledge of issues and matters arising from international cooperation requests such as mutual legal assistance.

It must be noted further that while the Attorney General only concerns itself with formal requests, the officials interviewed mentioned that informal requests to the Malaysian Central Bank likewise go through their office as mandated by law.

In relation to being the designated central authority for mutual legal assistance requests, the Attorney General is mandated to keep and maintain a Register, which shall contain information pertaining to requests for assistance under MACMA, including the following 15 pieces of information: (1) requests made by Malaysia to a foreign state under MACMA; (2) the results of requests made by Malaysia to a foreign state under MACMA; (3) details of the things seized pursuant to a request made by Malaysia to a foreign state under MACMA and the return of such things to the appropriate authority of the foreign state, where applicable; (4) details of the prisoners or persons under detention transported to Malaysia pursuant

1132 MACMA, §§ 7, 19; *Kamal*, p. 83.

to a request made by Malaysia to a foreign state under MACMA; (5) details of the assets traced, restrained, and recovered pursuant to a request made by Malaysia to a foreign state under MACMA to enforce a forfeiture order; (6) details of the persons located pursuant to a request made by Malaysia to a foreign state under MACMA; (7) details of the processes served in a foreign state pursuant to a request made by Malaysia to a foreign state under MACMA; (8) requests received by Malaysia from a prescribed foreign state under MACMA; (9) results of requests received by Malaysia from a prescribed foreign state under MACMA; (10) details of the things seized pursuant to a request received by Malaysia from a prescribed foreign state under MACMA, the return of such things to the appropriate authority of Malaysia, where applicable, and the return of such things to the rightful owner, where applicable; (11) details of the persons who have travelled to and the prisoners and persons under detention who have been transported to a prescribed foreign state pursuant to a request received by Malaysia from a prescribed foreign state under MACMA; (12) details of the assets traced, restrained, and recovered pursuant to a request received by Malaysia from a prescribed foreign state under MACMA and their disposal; (13) details of the persons located pursuant to a request received by Malaysia from a prescribed foreign state under the Act; (14) details of the processes served in Malaysia pursuant to a request received by Malaysia from a prescribed foreign state under MACMA; and (15) such other information as the Attorney General considers appropriate.[1133]

### 2. Preparation of Requests

#### a. Requirements for Requests

Every received request shall "(1) specify the purpose of the request and the nature of the assistance being sought;" and (2) "identify the person or authority that initiated the request." It shall likewise be accompanied by the following: (1) "a certificate from the appropriate authority of that prescribed foreign state that the request is made in respect of a criminal matter" within the meaning of MACMA; (2) "a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;" (3) where the request refers to either (a) "the location of a person who is suspected to be involved in or to have benefited from

1133 Mutual Assistance in Criminal Matters Regulations, § 35.

the commission of a foreign serious offense;" or (b) "the tracing of property that is suspected to be connected with a foreign serious offense", "the name, identity, nationality, location or description of that person, or the location and description of the property, if known, and a statement setting forth the basis for suspecting the matter;" (4) "a description of the offense to which the criminal matter relates, including its maximum penalty;" (5) "details of the procedure which that prescribed foreign state wishes Malaysia to follow in giving effect to the request, including details of the manner and form in which any information or thing is to be supplied to that prescribed foreign state pursuant to the request;" (6) "where the request is for assistance relating to an ancillary criminal matter and judicial proceedings to obtain a foreign forfeiture order have not been instituted in that prescribed foreign state, a statement indicating when the judicial proceedings are likely to be instituted;" (7) "a statement setting out the wishes of that prescribed foreign State concerning the confidentiality of the request and the reason for those wishes;" (8) "details of the period within which that prescribed foreign state wishes the request to be met;" (9) "if the request involves a person travelling from Malaysia to that prescribed foreign state, details of allowances to which the person will be entitled, and of the arrangements for security and accommodation for the person while he is in that prescribed foreign state pursuant to the request;" (10) "any other information required to be included with the request under any treaty or other agreement between Malaysia and that prescribed foreign state, if any;" and (11) "any other information that may assist in giving effect to the request" or which is required under the provisions of MACMA or any regulation in connection thereto.[1134]

Insufficiency in information or general failure to comply with the foregoing shall not be a ground for refusing assistance.[1135]

As reported during the 2012 seminar on cooperation, the Office of the Attorney General has encountered challenges when dealing with preparing outgoing requests for mutual legal assistance. The problems cited were, namely, (1) the failure of some states to identify or designate a responsible central authority to facilitate the implementation of mutual legal assistance requests; (2) unavailability of practical guides regarding domestic mutual legal assistance legal frameworks and guidelines; (3) delay in effectuating mutual legal assistance requests; (4) states not regularly reviewing treaties and laws to keep abreast on best practices as to international mu-

1134 MACMA, § 19(3)(c).
1135 MACMA, § 19(4).

tual legal assistance; (5) lack of training of personnel involved in mutual legal assistance; (6) the complexity of MLA; (7) states who refuse extraditing their own nationals and decide to prosecute the latter themselves get involved in complex requests for mutual legal assistance; (8) some states are not in a position to maintain confidentiality; (9) requests are executed not in accordance with procedures specified in the request.[1136] With respect to other ASEAN member states, on the other hand, Malaysian officials, through interviews, have clarified that even if there may seem to be stumbling blocks vis-à-vis mutual legal requests, there is nothing considerable that has prevented Malaysia and/or the other ASEAN member states to render and request mutual legal assistance among each other. The open consultation and communications definitely help the process as the respective authorities could guide each other accordingly as to the substantial and procedural requirements needed to be satisfied before a request can be executed. Moreover, the sending of draft copies or advance copies to one another helps ease the downtime needed to process requests and each country could then advise one another outright should a red flag regarding grounds for refusal arise. In the same vein, Malaysian officials point to numerous trainings and seminars available to ASEAN member state authorities on international and regional cooperation, and specifically mutual legal assistance, which help them identify rooms for improvement, and adopt best practices.

Given the foregoing circumstances, the MACMA and its regulations provide a concrete guide on how requests should be prepared and what requirements ought to be met. Aside from the general requirements stated above, the MACMA and regulations provide for specific requirements for the preparation of certain specific types of assistance, especially those which the Attorney General should comply with should Malaysia be the requesting state. These specific types of assistance include the request for taking of evidence;[1137] attendance of persons in Malaysia;[1138] enforcement

1136 *Kamal*, p. 92.

1137 MACMA, § 8; See also Mutual Assistance in Criminal Matters Regulations, § 6(a).

1138 MACMA, §§ 9, 10, 11, 12. See also Mutual Assistance in Criminal Matters Regulations, § 7(1).

of forfeiture orders;[1139] assistance in locating or identifying persons;[1140] and assistance in service of processes.[1141]

b. Person or Authority Initiating the Request

Regardless of whether Malaysia makes or receives the requests, all requests shall be made by or through the office of the Attorney General and any request shall be made through diplomatic channels.[1142] Thus, requests shall be made at the instance of the Attorney General.

In relation to this, the law is silent as to any participation from a private individual or suspect or accused person to ask that a MLA request be issued on their behalf by the Attorney General. As the current provisions of the Malaysian law is drafted, it is more centered on the use of the MLA instrument for prosecution and investigation.

3. Execution of Requests

a. Applicable Law on Execution

Requests made to Malaysia shall be subject to the domestic law. However, this does not preclude the application of a procedure which the requesting state wishes Malaysia to follow in executing a request. Under § 4 of the Mutual Assistance Criminal Matters Regulations [hereinafter "MACMA Regulations"] 2003, which supplants the provisions of MACMA, a requesting state requesting assistance in a criminal matter may provide details of a procedure it wishes Malaysia to follow in effectuating the former's request.[1143] The same shall then be applied by Malaysia insofar it does not conflict or violate any of its domestic legislation or the provisions of the MACMA Regulations, and in such case "the relevant provisions of the Criminal Procedure Code shall apply with the necessary modifications."[1144] This resonates what an interviewee has mentioned about mutual

1139 MACMA, § 13. See also Mutual Assistance in Criminal Matters Regulations, § 9.
1140 MACMA, § 14.
1141 MACMA, § 15.
1142 MACMA, § 17.
1143 Mutual Assistance in Criminal Matters Regulations, § 4(2).
1144 Mutual Assistance in Criminal Matters Regulations, § 4(2).

legal assistance requests being "robotic" in nature.[1145] The requesting state must provide point-by-point the procedure to be followed by the requested state in executing the request. Otherwise, the requested state shall follow its own laws.

b. Applicable Procedural Rights

Considerations have been given to human rights and rights of the accused or persons charged of an offense in the procedure involved in executing requests for mutual legal assistance in Malaysia. This is in the context of the pertinent constitutional and statutory laws applicable together with criminal procedural rules, as well as the MACMA which provides the procedure to be followed in executing investigatory measures.

i. Importance of Defense Rights; Human Rights Considerations in MLA and Criminal Processes in General

At the outset, in its rudimentary level the Malaysian Federal Constitution, as supplemented by the relevant provision of the Criminal Procedure Code, grants an accused the basic right to be informed as soon as may be of the grounds of his/her arrest and the right to be allowed to consult and be defended by a legal practitioner of his choice.[1146] In relation to the right to be informed, it is a condition precedent to a lawful arrest that the party arrested as soon as may be, should know on what charge or on suspicion of what crime he/she is arrested, or at least the facts which are said to constitute a crime on his/her part, albeit "as soon as may be" depends on the facts of the case.[1147] In relation to this, the cause for one's arrest must be equivocally provided. Thus, in one occasion the Court held that the cause written in a detention order cannot be written in an alternative form as the same violates the constitutional right of an accused to be informed of the reason for his arrest.[1148] Said condition is applicable across

1145 Interview with ASP Loh from Royal Malaysian Police.
1146 Malaysian Federal Constitution, art.5(3); Malaysian Criminal Procedure Code, § 28A; *Fook/Mansoor/Hassan,* pp. 78-79; *Harding,* Law and Goverment, p. 213.
1147 R v. Lemsatef [1977] 2 All ER 835; Abdul Rahman v. Tan Jo Koh [1968] 1 MLJ 25, FC; *Fook/Mansoor/Hassan,* p. 79.
1148 Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia and Anor [1993] 3 MLJ 265.

the board, even to arrests done by virtue of the now repealed Emergency Ordinance 1969 and other still applicable preventive detention laws.[1149]

Other than the right to be informed, the accused has a constitutional right to counsel, which applies to different stages in the criminal process: consultation in the police station and representation in court.[1150] This right to legal representation naturally covers remand proceedings (wherein police authorities would need to either reinvestigate or continue investigations)[1151] and is also applicable to non-criminal proceedings.[1152] In connection thereto, the police must inform the arrested person before any questioning can commence, that the latter may communicate or attempt to communicate with a friend or relative to inform of his whereabouts; and/or communicate or attempt to communicate and consult with a legal practitioner of his choice.[1153]

This constitutional conferment notwithstanding, Harding commented that this conferred right is actually lamentable in practice.[1154] While the constitutional right is not qualified to be afforded "as soon as may be", the Federal Court of Malaysia has earlier declared that the right to counsel should be balanced with the duty of the police to gather evidence and even if the former is engaged immediately upon arrest, it cannot be exercised if it shall impede police investigation or the administration of justice.[1155] Thus, in certain cases, denial of outright access to counsel during police investigation for a period of ten and six days respectively, was held justifiable as an example of the "public interest" exemption provided in the Constitution.[1156] As Harding commented, these cases almost rendered unenforceable in practice, especially since habeas corpus is not an available remedy herein, given that an arrest remains lawful notwithstanding the denial of the right to counsel.[1157] That said, the right must be granted within a reasonable period of time and the *onus probandi* is with the police authorities to prove that the right shall impede police investigations and/or

1149 *Fook/Mansoor/Hassan,* pp. 78-79; *Harding,* Law and Goverment, p. 213.
1150 *Harding,* Law and Goverment.
1151 *Fook/Mansoor/Hassan,* pp. 86-89; *Harding,* Law and Goverment, p. 214.
1152 *Fook/Mansoor/Hassan,* pp. 84-85.
1153 Malaysian Criminal Procedure Code, § 28A; *Fook/Mansoor/Hassan,* p. 82.
1154 *Harding,* Law and Goverment, p. 213.
1155 *Harding,* Law and Goverment, p. 213.
1156 Ooi Ah Phua v. Officer-in-Charge of Criminal Investigations, Kedah/Perlis [1975] 2 MLJ 198; Hashim Bin Saud v. Yahaya Bin Hashim [1977] 2 MLJ 116; *Harding,* Law and Goverment, p. 213.
1157 *Harding,* Law and Goverment, p. 214.

administration of justice.[1158] Police authorities cannot deny or obstruct the exercise of the right on frivolous or arbitrary grounds, and should the right be exercised by the accused, it must be held outside the hearing of the police authorities, though within their sight.[1159]

With respect to trial proceedings, one can note that the right to counsel would have two components, namely, the reasonable opportunity to obtain the service of counsel, and said counsel is his particular choice.[1160] Such components to the right to counsel during trial notwithstanding, one must understand however, that the constitutional right does not preempt trial proceedings just because the accused has not secured services of a counsel of his own choice.[1161] As a former Chief Justice explained, what the right means is that the accused is entitled to be represented by counsel of his choice if the latter is willing and able to represent him.[1162] The Court had occasion to discuss further this right in *Mohamed bin Abdullah v. Public Prosecutor.* In said case, the accused sought to appeal his conviction on the ground that at the date of hearing his criminal case, the Sessions Court judge proceeded with trial even if the counsel of the accused had an urgent matter to attend to and was not present during said hearing.[1163] And when the accused was about to present his defense, his second counsel appeared and asked him to exercise his right to remain silent. Accused was thereafter adjudged guilty. It was held that there had been no miscarriage of justice; said right does not confer a right to counsel in every case, and that it does not mean that an accused person cannot be tried unless he is represented by counsel.[1164] Taking these things into consideration, Harding explains that the right to counsel is a good example of a constitutional right that gives way to demands of public interest and convenience.[1165]

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1158 Ramli Bin Salleh v. Yahaya Bin Hashim [1973] 1 MLJ 54; *Harding,* Law and Goverment, p. 214.
1159 Ramli Bin Salleh v. Yahaya Bin Hashim [1973] 1 MLJ 54; *Harding,* Law and Goverment, p. 214.
1160 *Fook/Mansoor/Hassan,* pp. 86, 88.
1161 *Fook/Mansoor/Hassan,* p. 88; *Harding,* Law and Goverment, p. 214.
1162 PalaniappaChettiar v. ArunasalamChettiar, FM Civil Appeal No. 34 of 1958, [1961] MLJ xxxii; Bakar bin Ahmad v. Public Prosecutor [1968] 4 MC 294; *Fook/Mansoor/Hassan,* p. 88.
1163 *Fook/Mansoor/Hassan,* p. 88.
1164 *Fook/Mansoor/Hassan,* p. 88.
1165 *Harding,* Law and Goverment, p. 214.

### ii. Human Rights Considerations in MLA and Criminal Processes in General

In light of the foregoing rudimentary rights applicable to an accused or person suspected of an offense or crime, applications of these rights are arguably in place in rendering and requesting mutual legal assistance in criminal matters. In taking evidence in Malaysia to be used for criminal proceedings in the requesting state, the person who is subject of the criminal proceedings in the requesting state and/or his legal representative is authorized to be present in the proceedings related to the taking of evidence in Malaysia.[1166] Further, the person subject of the criminal proceedings in the requesting state is considered by Malaysian law as competent but not compellable as a witness.[1167]At the same time, no person who is required to give evidence for the purpose of any criminal proceeding in the requesting state can be compelled to answer any question that said person could not be compelled to answer in the proceedings in the requesting state. Stating it differently, a mutual legal assistance request in taking evidence in Malaysia for purposes of a criminal proceeding in the requesting state cannot be used as a tool to circumvent one's right to remain silent during proceedings in the requesting state.

Rights of the accused are also taken into consideration with respect to requests for attendance in the requesting state of a person in Malaysia. In complying with such request, the person whose attendance is requested, cannot either: (1) be detained, prosecuted or punished for any offence against the law of the requesting state that is alleged to have been committed, or that was committed, before the person's departure from Malaysia; (2) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from Malaysia; or (3) be required to give evidence or assistance in relation to any criminal matter in the requesting State other than the criminal matter to which the request relates.[1168] The latter can only be done should the person have left the requesting state or the person has had the opportunity of leaving the requesting state and has remained in the requesting state otherwise than for the purpose of giving

1166 MACMA, § 22(3).
1167 MACMA, § 22(7).
1168 MACMA, § 27(3)(a).

evidence or assistance in relation to the criminal matter to which the request relates.[1169]

Furthermore, any evidence to be given by said person, whose attendance was requested in the requesting state, will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offense against the law of the requesting state, other than the offense of perjury or contempt of court with respect of the giving of evidence.[1170] In connection thereto, a person whose attendance has been requested in the requesting state, cannot be held liable should it refuse or fail to attend, as requested.[1171] A similar provision can be found in assistance in service of process, when the attendance of a person is required by virtue of said process from the requesting state.[1172]

The same consideration of accused's rights can be said with regard requests for executions of foreign forfeiture orders. Malaysian law requires registration of said foreign forfeiture orders.[1173] In view thereof, before the High Court registers the same, it assures that the person affected by the order, if not present during the proceedings in the requesting state, has still been notified accordingly.[1174]

Another instance refers to requests for production orders in criminal matters. It imports similar provisions as to one's right not to be compelled to produce or make available anything that it cannot be compelled to produce or make available in the requesting state's criminal proceedings; as well as the right to remain silent and the right of the person, who is subject of criminal proceedings in the requesting state, or his/her legal representation to be present in local proceedings in Malaysia in view of the assistance request made.[1175] This notwithstanding, it seems that the right against self-incrimination is not applicable in cases where a person is not excused from producing or making available a thing subject of a production order. This logic is based on the grounds that "the production or making available of the thing might tend to incriminate the person or make the person liable to a penalty" or the "production or making available of the thing would be in breach of an obligation, whether imposed by

1169 MACMA, § 27(3)(a).
1170 MACMA, § 27(3)(b).
1171 MACMA, § 27(4).
1172 MACMA, § 41.
1173 MACMA, § 32(1).
1174 MACMA, § 32(2).
1175 MACMA, § 23.

law or otherwise, of the person not to disclose the existence of the contents of the thing."[1176]

Reading the same would give the idea that the person subject of the production order then must comply notwithstanding threat or risk of being held criminally, civilly, or administratively liable. However, further reading of the provisions would reveal that no such threat of liability exists as following provisions in the law provide immunity from civil and criminal action to the person complying with the production order and the same was done in good faith.[1177] Criminal liability shall only exist, as per provisions on production order, should there be non-compliance without reasonable excuse with the production order, or whether in purported compliance with the order, the person either fails to indicate to the authorized officer any false or misleading information the former knows of, or provide the correct information the person is in possession of, or can reasonably acquire.[1178]

### iii. Defendant's Participation in the Refusal or Execution of a MLA Request

Given the foregoing rights integrated and applicable in a mutual legal assistance framework, a question arises whether an affected person, may it be the accused or suspected person himself (or someone collaterally affected by the mutual legal assistance request or the execution thereof) can find relief in the Malaysian courts through judicial review vis-à-vis a mutual legal assistance request and/or its execution. At the outset, the MACMA is bereft of any provision providing for judicial relief.[1179] Thus, there is initial uncertainty as regards what procedures one individual may undertake should one be affected by a mutual legal assistance request or the execution thereof.

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1176 MACMA, § 24.
1177 MACMA, § 25.
1178 MACMA, § 26.
1179 This is in stark contrast to the Malaysian Extradition Act 1992, which provides for remedies such as *habeas corpus* and judicial review under Sections 31 and 32, respectively, for persons who may be affected by an extradition order. See for a case illustrating judicial relief vis-à-vis extradition, as well as explaining the availability of appeal from the High Court to the Court of Appeal, Public Prosecutor v. Ottavio Quattrocchi, 30 April 2003, [2003] 2 CLJ 613.

Nonetheless, a reading of the Malaysian Rules of Court 2012 would show that judicial relief is still available through the use of Order 53 or judicial review. Judicial review is available against any government order and includes the power of the High Court(s) "to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution,[1180] or any of them, or for any purpose" as provided in the first paragraph of the Schedule to the Courts of Judicature Act 1964.[1181] Hence, any person adversely affected by any mutual legal assistance order and/or the execution thereof vis-à-vis fundamental liberties, may apply accordingly for judicial review.[1182]

It is a different question however on whether such relief shall be granted. As of the time of this writing, there has been no test case or jurisprudence tackling mutual legal assistance and/or the execution thereof as it affects an individual, accused, or suspected person. At most, there has only been case law vis-à-vis extradition and judicial review provided for in the applicable law. Thus, it is yet to be seen which direction courts would take should relief be sought vis-à-vis mutual legal assistance. Furthermore, there has been a standing debate on the applicability of one's right to access to justice or ask for judicial relief when none is provided for in the law. Albeit judicial review is an option for aggrieved parties when fundamental liberties are at stake, judicial determination on this issue prior to the Rules of Court 2012 has not been the same especially when it involves a law which does not provide any remedy. Whilst the Court of Appeal in two popular incidents cited the constitutionality of one's right to access to justice or ask for judicial relief,[1183] which allows relief to be granted by the courts, the Malaysian Federal Court overruled the Court of Appeal and held that the constitutional right is not absolute and judicial review

1180 Part II of the Constitution constitutes the fundamental liberties, i.e. the right to life and liberty, no slavery, prohibition against ex post facto laws and double jeopardy, equality, prohibition of banishment and freedom of movement, freedom of speech, assembly, and association, freedom of religion, rights in respect of education, and rights to property.

1181 Malaysian Rules of Court 2012, Order 53, para. 1.

1182 Malaysian Rules of Court 2012, Order 53, para. 2.

1183 KekatongSdnBhd v. DanahartaUrusSdnBhd, [2003] 3 MLJ 1; Sugumar Balakrishnan v. PengarahImigresenNegeri Sabah, [1998] 3 MLJ 289.

cannot be overstretched when the statute does not provide for any judicial remedy.[1184]

Taking this into account, it becomes likewise interesting to note that aside from questioning the MLA request and/or its execution, an affected person is not prejudiced to question the admissibility of evidence obtained through MLA. The amendments to the Evidence Act of 1950 provide that no further proof is required as regards evidence obtained through MLA as long as certain conditions are satisfied. Nevertheless, there may be instances in the execution of investigative measures vis-à-vis a MLA request wherein the subsequent reception of evidence offends against public policy (or public interest) or a particular rule of law, e.g. evidence of matters which are privileged against disclosure.[1185] In this case, it is incumbent upon the court to decide on the admissibility of evidence under Section 136 of the Evidence Act.

### c. Applicable Time Element on Execution

The MACMA or its Regulations does not provide for time periods by which requests must be acted on by Malaysia as a requested state. While the law and regulations painstakingly specifies the applicable procedure per type of assistance, there is no mention of any time limit that Malaysian authorities ought to abide with. In relation to this, the interview conducted of the Malaysian authorities in the Office of the Attorney General showed that lack of time limits notwithstanding, there would be no issue on executing requests for assistance quickly should the requirements be complied with and that the assistance requested does not require a court order to be given by Malaysia. Reverting to the information ought to be provided in a request as a minimum, the request could indicate the time element involved within which the request should be effectuated or executed. According to the authorities interviewed, the problem normally arises as regards time whenever an application before the court is needed to be made and on average, it could take as much as one (1) year before any coercive order will be issued.

As to how expedite the execution of requests, the Malaysian authorities divulged that there is open communication and preliminary consultation

1184 Danaharta Urus SdnBhd v. KekatongSdnBhd, [2004] 2 MLJ at 257; Pihak-BerkuasaNegeri Sabah v. Sugumar Balakrishnan, [2002] 3 MLJ 72.

1185 Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC.

among the ASEAN member states vis-à-vis mutual legal assistance. Authorities of each member states can consult with one another regarding their respective requests to make sure that requirements are being complied with, and should there be some issue or for example, a ground for refusal exists, then they could easily discuss how to go about the problem to be still able to effectuate a request. Moreover, it has been an ASEAN practice for requesting states to send draft and/or unofficial copies of requests to allow processing to start, or be able to know if anything should be changed in a request.

### d. Authentication of Documents

Subject to the MACMA provisions on requests for forfeiture orders (§ 13), proof of orders of prescribed foreign state (§ 33), and evidence in relation to proceedings and orders in prescribed foreign state (§ 34), and any law relating to admissibility of evidence, the MACMA provides under Section 42 that any document obtained, provided, or produced pursuant to a request made under this Act and that is duly authenticated is admissible in evidence without further proof in any criminal proceedings.[1186] The same Section 42 continues by stating that a document is considered duly authenticated if (1) it purports to be signed or certified by a judge, magistrate, or officer in or of the prescribed foreign state, and (2) either it is (a) verified by the oath or affirmation of a witness, or of an officer of the government of that prescribed foreign state, or (b) it purports to be sealed with an official or public seal of the prescribed foreign state or of a minister of the state, or of a department or officer of the government, of that prescribed foreign state.[1187] In line of these provisions, the MACMA then enjoins all Malaysian courts to take judicial notice of the official or public seal previously referred to.[1188] One must understand in relation to these provisions that the same does not prevent the proof of any matter or admission to evidence of any document in accordance with other provisions of the MACMA or any other Malaysian law.[1189]

Alongside Section 42, the same MACMA in Section 8(1) and (2) provides *inter alia*, that in situations wherein Malaysia is the requesting state,

1186 MACMA, § 42(1).
1187 MACMA, § 42(2).
1188 MACMA, § 42(3).
1189 MACMA, § 42(4).

the Attorney General may "request for evidence or thing in a foreign state to be taken and sent to him if he satisfied that there are reasonable grounds for believing that such evidence or thing are relevant to a criminal proceeding or criminal matter in Malaysia." Additionally, Section 8(3) provides that any evidence or thing received pursuant to a MLA request maybe admitted subject to the provisions of the Malaysian Evidence Act and Criminal Procedure Code. In light of this, the Malaysian Evidence Act of 1950 (as amended in 2012) includes Chapter VA containing sections 90D, 90E, and 90F, which all generally relate to the admissibility of evidence obtained through mutual legal assistance in Malaysian courts.[1190] According to the amendments, any evidence procedure through mutual legal assistance shall be admitted as evidence without further proof, provided certain minimum requirements are met.

Interestingly, the insertions to the Evidence Act was prompted by a case wherein the Federal Court ruled that the evidence obtained through a MLA request was not admissible in evidence, which in turn resulted in the acquittal of an accused. In Public Prosecutor v. Tan Sir Eric Chia Eng Hock, evidence taken in Hong Kong was obtained by Malaysia through mutual legal assistance. Accused was charged for criminal breach of trust for allegedly authorizing payments to another company, purportedly for the technical assistance to be provided by the latter. However, said technical assistance turned out to be free of charge and the authorized payments were traced later in the foreign accounts of the relatives of the accused. The pieces of evidence obtained through mutual legal assistance was then used in the criminal proceedings against the accused.[1191] Subsequently, the Sessions Court acquitted the accused by stating that the prosecution failed to prove a *prima facie* case as well as the pieces of evidence obtained through mutual legal assistance were inadmissible due to authentication issues.[1192]

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1190 *bin Musa/bin Jaafar*, pp. 104-106.

1191 Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565.

1192 The Sessions Court cited non-compliance with Section 33 of the Evidence Act, which provides, among others, that evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the

When judgment was rendered in the trial court, there was yet no amendment to the Evidence Act tackling evidence obtained through MLA and the applicable provisions were only found in the MACMA vis-à-vis taking evidence by Malaysia through the Attorney General, i.e admitted subject to provisions of the Evidence Act and Criminal Procedure Code.[1193] This was eventually appealed by the prosecution and in both instances before the High Court and Court of Appeal, the trial court's decision was overturned with the finding that the Hong Kong evidence was admissible.[1194] The High Court was of the position, as affirmed later on by the Court of Appeal, that the MACMA is actually a special piece of legislation to facilitate mutual legal assistance and should not be hampered by the provisions of the Evidence Act notwithstanding the mention of the said law in Section 8(3). Subjecting the operationalization of the MACMA to the technical requirements of the Evidence Act, according to the High Court, renders nugatory or redundant the intention of a speedy and convenient method of cross-border exchange of evidence. Notably, this position from the High Court – and later by the Court of Appeal – is reflected in Section 42 of the MACMA, although not discussed in the case at bar. Despite however the position of the High Court and the Court of Appeal, their decisions were overturned upon appeal to the highest court of the land (Federal Court) by the accused; ergo, the evidence obtained through mutual legal assistance was inadmissible as evidence due to lack of authentication.[1195]

Thus, the decision in the Eric Chia case prompted the eventual amendment of the Evidence Act 1950. This amendment notwithstanding, authorities remain wary how the new provisions are to be tested in courts: it is plausible according to them that new technical legal challenges would arise in future cases where the prosecution would wish to offer foreign evidence obtained through MLA, which may touch on areas not covered by the present amendments to the Evidence Act.[1196]

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case the court considers unreasonable.Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565; *bin Musa/bin Jaafar*, p. 103.

1193 Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565; *bin Musa/bin Jaafar*, p. 103.

1194 Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565; *bin Musa/bin Jaafar*, p. 103.

1195 See for facts of the case, Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565; *bin Musa/bin Jaafar*, p. 104.

1196 Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565; *bin Musa/bin Jaafar*, p. 106.

e. Importance of Confidentiality

A reading of the relevant law would reveal that confidentiality is not a mandatory duty of Malaysia as a requested state. In the provisions regarding requests made to Malaysia through the Attorney-General, the requesting state must explicitly make a statement setting out its wishes concerning the confidentiality of the request and the reason for the wishes.[1197] That said, one can surmise upon interviewing Malaysian officials regarding mutual legal assistance, they uphold the confidentiality of the requests they make and receive and are not in liberty to disclose full details on these requests. If they provide illustrations or examples of requests they have handled, they provide only general information.

f. Return of Evidence

It is a mandatory ground for refusal should a requesting state fail to undertake the return of the evidence requested to the Attorney General upon the latter's request after the completion of the criminal matter in respect of which the request was made.[1198] Thus, the requested evidence and/or information cannot be withhold by the requesting state irrespective of whether the requested evidence could be used for another matter. As discussed earlier, there is an applicable speciality and use limitation to evidence and/or information requested. It is limited to the criminal matter specified in the request. Instead of withholding or postponing the evidence and/or information requested, the proper recourse of the requesting state would be to return upon request of the Attorney General and completion of the criminal matter subject of the original request, and in the meanwhile or thereafter, give a request anew. While the same would seem tedious and tend to prolong proceedings even further, in practice, the requesting state could already furnish Malaysian authorities draft and/or advance copies of its new requests so that the latter could outright take cognizance thereof. Sending of draft and/or advance copies, as earlier discussed, is a prevalent practice among ASEAN member-countries with regard mutual legal assistance requests to expedite processing of requests, as disclosed by Malaysian authorities.

1197 MACMA, § 19(3)(vii).
1198 MACMA, § 20(1)(k).

g. Specific Procedures per Type of Assistance

MACMA additionally provides the different procedural provisions as to how certain types of assistance shall be carried out. This includes the taking of evidence for criminal proceedings (§ 22); production order for criminal matters (§ 23); attendance of person in requesting member state (§§ 27 to 30); enforcement of foreign forfeiture orders (§§ 31 to 34); searches and seizures (§§ 35 to 38); assistance in locating and identifying persons (§ 39); and assistance in service of processes (§ 40).

With specific provisions on specific types of assistance, Malaysia as a requesting state or another ASEAN member state sending a MLA request to Malaysia shall be accordingly apprised of the specific requirements that needs to be met before a request could be allowed or executed. There is no additional step needed to look into other statutes, regulations, or texts as the MACMA and its corresponding Regulation provides for the same.

This includes the applicable rights that need to be taken into account. To illustrate, MACMA considers the person vis-à-vis requests for taking of evidence or voluntary statements, who is subject of the criminal proceedings in the prescribed criminal state, as competent, yet not compellable, to give evidence.[1199] His/her right against self-incrimination shall be respected at all costs and any statement/testimony he/she shall give shall not be used against him for purposes of any judicial proceeding, disciplinary proceeding, or other proceedings in Malaysia, except in a prosecution for perjury, contempt of court in respect of that evidence, or using the evidence to impeach the credibility of the person who gave said evidence in any judicial proceedings for the purposes under the Evidence Act 1950.[1200]

Another example is the request of attendance of a person in a foreign country. In addition to obtaining consent from the subject person, the appropriate authority of the requesting foreign state must give the adequate undertakings in relation to its request before said request can be effectuated (MACMA, § 27[2][c][d], § 27[3]): (1) that the person shall not (a) be detained, prosecuted or punished for any offense against the law of the prescribed foreign State that is alleged to have been committed, or that was committed, before the person's departure from Malaysia; (b) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from Malaysia; or (c) be required to give evidence or assistance

1199 MACMA, § 22(7).
1200 MACMA, § 22(8), (10) and (11).

in relation to any criminal matter in the prescribed foreign State other than the criminal matter to which the request relates, unless the person has left the prescribed foreign state or the person has had the opportunity of leaving the prescribed foreign state and has remained in the prescribed foreign State otherwise than for the purpose of giving evidence or assistance in relation to the criminal matter to which the request relates; (2) that any evidence given by the person in the criminal proceedings to which the request relates, if any, will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offense against the law of the prescribed foreign state, other than for the offense of perjury or contempt of court in relation to the giving of that evidence; (3) that the person will be returned to Malaysia in accordance with arrangements agreed to by the Attorney General; and (4) such other matters as the Attorney General thinks appropriate.

Under the law, the person whose attendance is requested in the prescribed foreign state shall not be subjected to penalty or liability by sole reason of its refusal or failure to consent to attend as requested.[1201]

Having said the foregoing, there could be issues arising from the lack of provisions in the law as regards those other types of assistance not specifically mentioned in the MACMA. In response, the interviewed authorities from the Attorney General said that preliminary consultation is available to advise on the applicable provisions and requirements per type of assistance.

### *IV. Comparing the Philippines and Malaysia with the Regional Framework*

The following portion of the study endeavors to compare the ASEAN regional framework with the member state frameworks of the Philippines and Malaysia. Through the exercise of comparing and contrasting the regional and member state frameworks, one can determine not only whether and to what extent the international requirements have been implemented in the national legal systems, but also the existing gaps, problems and issues that ought to be addressed in the mutual legal assistance regime within the ASEAN. To do so, this chapter shall be divided into three (3) main points as done above – a discussion of the historical development of mutual legal assistance, the important substantive provisions, and the

1201 MACMA, § 27(4).

procedural provisions applicable to the ASEAN MLAT and member state frameworks.

## A. Need for Implementing Legislation and Harmonization of Legal Framework

At the outset, the historical development of a mutual legal assistance instrument and legislation on the regional sphere would show that on a regional level, the acknowledgment to foster and strengthen cooperation among the different ASEAN member states has been there from the beginning, when the ASEAN was formed by the original five member states. This is in line with the acknowledgment that transnational crime, including terrorism, is not only a national concern and also has regional security implications. This further reinforces the idea that regional security and safety has always been a primordial consideration for the ASEAN albeit in the formative years of the Association, there were formal arrangements only as regards economic policies while those involving socio-political and/or regional security matters remained mainly informalistic despite the numerous declarations, meetings, and arrangements the ASEAN and its member states entered into vis-à-vis transnational crime (starting with drugs). There were only more formal arrangements among member states when the ASEAN took on the challenge to form the ASEAN Communities and lumping altogether within the ASEAN Security Community matters, arrangements, and agreements concerning transnational crime, terrorism, and other matters involving regional security and safety. Included herein is the inclusion of more sectoral bodies with ancillary – but not less significant – roles and functions to combat transnational crime and terrorism in the region. It must be noted though that whilst more sectoral bodies have been involved, with the ASOMTC mainly taking the helm in implementing policies vis-à-vis transnational crime, these sectoral bodies in light of the ASEAN's intergovernmental and now pillarized organization are generally compartmentalized and mainly worked on their respective sectors and function areas independently. Coordination among sectoral bodies can be illustrated mostly as one goes one step up the hierarchy in the ASEAN organizational structure, e.g ASEAN Community Councils, Coordinating Council, ASEAN Summit.

The discussion on international cooperation among ASEAN member states has not been foreign to the regional organization. In fact, discussions began about an extradition treaty as early as the inception of the ASEAN

but heretofore, there is no ASEAN Extradition Treaty to discuss. The ASEAN member states are still at the negotiation table on this matter, albeit the same has been taking a lot of time. So far, what they have come up with is only an ASEAN Model Extradition Treaty that is neither binding nor executory among the member states. It is a different story however with regard the ASEAN Mutual Legal Assistance Treaty, which entered into force in 2004. As discussed earlier, this enables member states to give the widest possible measure of assistance in criminal matters. And with making it a regional instrument, this widest possible of assistance is now not limited among the ASEAN member states but is also open to other non-ASEAN state parties.

On a member state level, the Philippines and Malaysia have existing bilateral and multilateral agreements as regards international cooperation and mutual legal assistance in particular. Nonetheless, Malaysia is the only one between the two which has a domestic legislation specifically tackling mutual legal assistance in criminal matters. Together with Cambodia among the ASEAN member states (although Cambodia is in the process of making the necessary changes), the Philippines does not have any specific legislation other than having mini-MLA provisions found in its Anti-Money Laundering Act and Cybercrime Prevention Act, for example. In relation to this, Malaysia needs domestic legislation to give domestic effect to treaties and arrangements it enters into. As its case law explains, while the head of state has the treaty making power to enter into international agreements, etc., domestic legislation is required on the other hand to give these international agreements and treaties domestic effect. Thus, in Malaysia's case in respect of mutual legal assistance has the Mutual Assistance in Criminal Matters Act ("MACMA").

As regards the Philippines, it follows the doctrine of transformation in international law as regards treaties and international agreements. As long as the constitutional requirements are followed, i.e. ratified by the required percentage in the Senate, treaties and international agreements entered into by the Philippines could be considered self-executory. With respect to mutual legal assistance between the Philippines and the other ASEAN member states, the ASEAN MLAT became the legal basis for the same absent any other specific domestic legislation on mutual legal assistance.

This self-executory mechanism notwithstanding, a look into the Philippine situation would show that a domestic law specifically consolidating matters about international cooperation, or specifically mutual legal assistance in criminal matters, as well as providing the needed standardization, definition, and delineation of procedural guidelines is strongly needed.

As will be further elaborated below, the Philippines suffers from a lack of harmonization and standardization vis-à-vis international cooperation. Although authorities such as those in the member state's Department of Justice or Department of Foreign Affairs could fill in the gaps vis-à-vis implementation and execution or describe a general way of practice, the fact that the different legal, jurisprudential, and procedural bases are not streamlined causes different nuances, gray areas, issues, etc. that ought to be addressed in the soonest possible time. Furthermore, given that the Philippines has now nine (9) mutual legal assistance treaties with different countries in addition to the ASEAN MLAT which applies among the ten ASEAN member states, this means that the Philippines could be confronted with nine plus nine different ways of handling mutual legal assistance. Hence, it is most likely that the central authorities and/or administrative agencies handling MLA are immersed in an ad hoc kind of practice per type of scenario, honed only through time by practice and experience, but without a formative and reliable legal framework available. This triggers a ripple effect, wherein questions on admissibility, reliefs available to affected persons, etc. inevitably arise but yet remain undetermined and unsolved. Further, there is also no baseline approach in negotiating MLA agreements with other possible countries, which is different from how streamlined and detailed the Malaysian law is. And indeed, no less than Philippine authorities themselves admit this problem. This problem remains true despite the existence of open communication channels and preliminary consultation between authorities because while open communication is a welcomed development among practitioners, it does not erase the other pervasive problems caused by the absence of a domestic legislation.

It bears mentioning herein that while specific domestic legislation is imperative, it is equally important that such domestic legislation is harmonized with the rest of the applicable domestic legal framework to be efficacious when operationalized and applied. The applicable domestic legislation must be consistent with the other laws and rules of court or criminal procedure. Stating it differently, statutes and rules touching on mutual legal assistance or international cooperation in general must be *in pari materia*, i.e. wherein they can be construed seamlessly (as one law) with reference to each other. Otherwise, stumbling blocks could arise that render the purpose of mutual legal assistance nugatory. This was shown in the case of Malaysia, which, despite having a specific domestic legislation on mutual legal assistance, was confronted in the criminal case against Eric Chia (Perwaja case) with the issue of authentication of evidence obtained

through mutual legal assistance in its use in Malaysian courts. To recall, the Evidence Act and Criminal Procedure Code were mentioned in the MACMA although the provision likewise mentions that evidence obtained through MLA requires no further proof as to the facts stated therein. Nonetheless, the lack of the appropriate provision then in the Evidence Act tackling evidence obtained through MLA prompted the Federal Court to rule in favor of the accused as regards lack of authentication of evidence. Malaysia has subsequently made the necessary amendments albeit still unsure if the same would suffice in future cases touching on technical issues not tackled by the amendments. Henceforth, it is important for the member states to ensure that their respective domestic frameworks are sufficient and consistent to ensure mutual legal assistance would work efficaciously.

## B. Substantive Provisions

### 1. Applicability of Assistance

The ASEAN mutual legal assistance mechanism reflects that of a traditional one, wherein it is request-based: one state sending another a request to another state for the cross-border exchange and/or transfer of information and/or evidence in criminal matters. This traditional sense also connotes the existence of discretion on the part of the requested state to decide whether to execute or comply with the MLA request. Despite the existence of discretion, the ASEAN MLAT and respective local legislations limit the grounds to refuse a request. Further, the member states are enjoined to give the widest possible amount of assistance vis-à-vis a received request. In practice, officials both from the Philippines and Malaysia intimated the endeavor to make mutual legal assistance between the ASEAN member states smooth sailing.

The obligation to render assistance for the ASEAN, the Philippines, and Malaysia, at the outset does not differ. It applies to criminal matters but would not apply to the extradition, arrest, detention in view of arrest, transfer of proceedings, satisfaction of judgment. While these compose the genus of international cooperation, they are not contemplated in the ASEAN MLAT, the MACMA, and the Philippine implementation of the ASEAN MLAT. In other words, should these be requested, the requesting member state ought to look somewhere else for legal basis.

Criminal matters is not defined across all levels (especially the Philippines given that it would follow what the ASEAN MLAT provides) but rather, what generally constitutes criminal matters is enumerated, i.e criminal investigations, prosecutions, and resulting proceedings. Malaysia refers to the resulting proceedings in its domestic law as "ancillary criminal matters" which involves, for example, forfeiture proceedings and the like as a result of criminal liability. Philippine authorities further elucidate that while mutual legal assistance pertains solely to criminal matters, there are instances wherein it is allowed for administrative proceedings or civil actions arising from the criminal action (civil liability arising from criminal liability). The nexus however needs to be established.

It is interesting that in the obligation to assist, both the Philippines and Malaysia would render treaty-based and non-treaty based mutual legal assistance in criminal matters, with the latter mostly relying on reciprocity. Malaysia takes it a step further in this aspect through specificities in its domestic legislation as to how a request proceeds should the requesting member state be a preferred foreign state – which is requesting based on an existing treaty – and one which is not a preferred foreign state. Notably, in the regional and member state levels, no distinctions or delineations are provided as regards whether the subject of the mutual legal assistance is a natural or legal person. Without such clear exception, it can be assumed that it is applicable to both.

Despite the seeming willingness and cooperative attitude both the Philippines and Malaysia show vis-à-vis the implementation of the ASEAN MLAT and facilitating international cooperation, MACMA provides a limitation to the obligation to render assistance: the criminal offense must be either a "serious offense" or "serious foreign offense", which means it must be punishable for at least one (1) year, which is a limitation not present in the ASEAN MLA instrument. Tacitly, the Philippines places the same limitation when it requires as a general rule in the requests it issues and receives information about the criminal matter in relation to the MLA request, including information on the possible punishment and/or sanctions. Considering these limitations resonate with one another, the ASEAN MLAT provides as a ground to refuse a request should it cause undue burden to the requested state and/or the same relates to national interests, which includes the mobilization of resources most of the time.

## 2. Types of Mutual Legal Assistance

Anent the types of assistance that could be rendered, the ASEAN MLAT provides a list of 11 types of assistance, with the last provision being a catch-all provision, wherein parties may render assistance not specifically enumerated as long as the parties agreed on the same and the same is not in violation of the requested state's domestic law. Notably, the ASEAN MLAT does not mention assistance in the form of covert operations, interception of communications and correspondence, or the collection and interception of online data, which might be imperative or necessitated by the times when technology is so advanced.

The want of any mention of these types of assistance can be seen as well in the Malaysian legislation. When asked about interception of communications and online data however, Malaysian authorities mentioned it is normally done through informal forms of cooperation, or when the interception of communications is done, it does not involve content data and would relate to crimes committed in Malaysia.

As regards the Philippines, on the other hand, it is admittedly difficult to determine the exact types of assistance it can render given the lack of specific legislation other than the ASEAN MLAT spelling these out. The ASEAN MLAT can provide on a minimum an idea as to what the types of assistance can be given, and generally, authorities would grant a MLA request as long as the parties agree and the request does not contravene domestic law. That being said, it becomes apparent upon execution of certain types of assistance, as discussed above that a specific domestic legislation or guidelines *de rigeur* is strongly left to be desired because of nuances scattered across the entire domestic framework and the general vagueness and uncertainty as to how issues are to be addressed in law and procedure. This can potentially lead to problems with investigative measures involving getting to court, e.g. transfer of persons in custody to take evidence or give information, etc.

Hurdles and issues notwithstanding on specific types of assistance the ASEAN MLAT enumerated, a reading of the Philippine domestic legal framework would interestingly reveal that the Philippines despite the lack of domestic legislation could effectuate investigative measures not otherwise specifically provided for in the ASEAN MLAT – or in other words, those that might fall under the catch-all provision. This includes interception of communication data, online evidence, etc. which as mentioned, is not provided for in the Malaysian legislation. Additionally, the international cooperation provisions, requirements, and parameters in the

Philippine Cybercrime Act mirror the types of assistance or cooperation mechanism found in the ASEAN MLAT. This therefore reveals that while there is a want of domestic legislation, the Philippines might be slowly getting to the point of standardizing its international cooperation mechanism.

Having mentioned the foregoing, interviews with Philippine officials and Malaysian officials alike reveal the importance and benefits of preliminary consultation and open communication between ASEAN member states as regards mutual legal assistance, and they openly assist each other as to what type of assistance is feasible or not, including the concomitant legal basis for the same. The Philippines for one, as mentioned by its authorities, would effectuate almost 100% of the time MLA requests it receives. The open communication channels also account for how Philippines despite a lack of domestic law is still able to render assistance. This similarity in expression from authorities reveal the willingness to provide the widest possible measure of assistance to one another, as well as the adoption of the same language among practitioners that notwithstanding issues and problems that may arise, they are willing to cooperate with one another to make the system work.

### 3. Compatibility with other Arrangements

Both the regional and member state level recognize and accept that giving and effectuating MLA requests is compatible with other existing arrangements and treaties, including informal forms of cooperation. Informal channels of cooperation mostly happen between law enforcement agencies and administrative agencies handling criminal matters. Thus, in the ASEAN context, mutual legal assistance does not preclude assistance that can be obtained through the use of INTERPOL, ASEANPOL, or otherwise police-to-police cooperation between member states.

As regards the Philippines and Malaysia, both are engaged actively in this kind of cooperation amongst their respective law enforcement authorities and regulatory bodies. The Philippines for example, if one would look into the Implementing Rules and Regulations of its Cybercrime Prevention Act as discussed in the types of assistance involved vis-à-vis online data, delineates when formal requests are needed. Formal requests are needed for those that will be used as evidence in court. One does not need to go through the process of formal cooperation if the data or information for investigative purposes only. And as explained by some

Malaysian authorities, informal forms of cooperation are normally resorted to during investigations and before any formal prosecution or criminal case is filed. It is also resorted to if a formal government-to-government arrangement is not yet necessary in the process or the piece of evidence or information does not require going through the court. Stating it differently, whatever is obtained through an informal cooperation does not result to this information and/or evidence being used in criminal proceedings but could otherwise help in building a case against a suspect and/or accused person. Informal forms of cooperation are thus actually encouraged to some extent.

In line with this, a Philippine official mentioned that in the case of the Philippines, should there be arrangements or agreements made by its law enforcement agencies with other law enforcement agencies of other countries, like other ASEAN member states, they would still consider these as "formal arrangements" needing consultation with the Department of Justice and Department of Foreign Affairs to make sure these agreements are in order. This could include joint capacity building, joint exercises, as well as informal channels of cooperation. In other words, any commitment for informal cooperation between each other is formalized in writing.

## 4. Principles, Conditions, and Exceptions

Comparing the regional framework and respective member state frameworks with one another reveals interesting insights as regards the different principles, conditions, and exceptions applicable in mutual legal assistance. These principles, conditions, and exceptions can be divided into seven, to wit: (1) sufficiency of evidence requirement, (2) dual criminality, (3) double jeopardy, (4) substantive consideration of human rights, (5) reciprocity, (6) speciality or use limitation, and (7) special offenses.

First, a look at the regional instrument shows that a sufficiency of evidence requirement exists in a manner wherein the more intrusive a requested measure is, the more information should be provided by the requesting member state. This applies equally to Malaysia wherein the sufficiency of evidence requirement can be observed in certain types of assistance it can render to a requesting state, in particular those which involve coercive measures such as production orders, searches and seizures, and even the location and identification of persons. The same would be granted if there are "reasonable grounds to believe" that the particular subject of the coercive measure is connected to the criminal matter and/or

located in Malaysia. Additionally, there are consequences under Malaysian law when the sufficiency of evidence requirement is not met. Under the MACMA, a request received by Malaysia can be denied if there is "insufficient information," which, if one steps back to statements from Malaysian authorities, relates to the avoidance of the use of MLA as part of fishing expeditions.

It is interesting to note that the Philippines would arguably have the most well-defined and delineated sufficiency of evidence requirement as its law and jurisprudence would provide. It involves the establishment of probable cause, which does not exist as a standard in Malaysia, before a warrant may be issued for any coercive measure, may it be searches and seizures, interception of communications and correspondence such as wire-tapping, and/or interception and collection of online data and evidence. Accordingly, probable cause is defined to be more than reasonable suspicion but less than reasonable doubt and entails the existence of such facts and circumstances that would lead a reasonable man to believe that a crime has been committed and that the objects to be seized, place to be searched, or person to be arrested is connected to the crime. This consequently means that should requests involving coercive measures be made to the Philippines, the requesting member state ought to provide sufficient information and evidence to support its request to enable Philippine authorities to convince the court upon application for any coercive measure to grant its application and lawfully proceed with the applied coercive measure. Admittedly though, the evidentiary requirement with respect to MLA requests is less stringent compared to extradition requests.

Second, as regards the dual criminality requirement, the said requirement exists at the regional and member state level. Dual criminality simply means that the act(s) and/or omission(s) mentioned in the MLA request ought to be punishable in both the requested and requesting states. As per the ASEAN MLAT, dual criminality is a mandatory ground to refuse a request regardless of type of assistance covered by the MLA request. A similar application can be found in MACMA.

Being a mandatory ground for refusal in the ASEAN MLAT and MACMA of Malaysia, the dual criminality requirement does not noticeably exist in the Philippine Cybercrime Prevention Act while the same exists as a mandatory ground for refusal under the Anti-Money Laundering Act. The Cybercrime Prevention Act is a later legislative enactment and more or less what reflects in practice in the Philippines. In practice and more or less as a policy, the Philippines would not deny a MLA request even if the dual criminality requirement is not satisfied. It can be thus said

that although dual criminality is a mandatory ground for refusal with regard the ASEAN MLAT framework, it is generally treated otherwise on the Philippine domestic level. Malaysian authorities, on the other hand, mention that in instances wherein the subject act or omission included in the MLA request, they try to make it work with their counterparts in suggesting what could otherwise fall under a punishable criminal offense in Malaysia so that the MLA request can be effectuated. Taking this into account, dual criminality is one of the important principles at the crux of mutual legal assistance and must be given utmost consideration and discussion. Nonetheless, as the member state examples show, there is either an easing of the requirement or it is not treated as a stumbling block in the execution of an offense. The propensity even, as shown by the Philippines, is to disregard its significance in the execution of requests.

Third, the double jeopardy prohibition in the regional and member state level of ASEAN can be different from one another to a certain extent. In the ASEAN MLAT, there is the prohibition of double jeopardy and it is a mandatory ground to refuse a request should it exist, wherein a requested state shall deny assistance when the request relates to an investigation, prosecution, or punishment of a person for an offense where the person either has been convicted, acquitted, or pardoned by a competent court or other authority in the requesting or requested member state; or has undergone the punishment provided by law of that requesting or requested member state, in respect of that offense or of another offense constitute by the same act or omission as the first-mentioned offense. The same has arguably a transnational element (although limited between the requesting and requested states) in application and is reasonably consistent with the provisions provided in the ASEAN Human Rights Declaration regarding double jeopardy, to wit, "no person shall be liable to be tried or punished for an offense he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN member state." In relation to this, at least three (3) observations can be said:

One: the double jeopardy prohibition in the ASEAN Human Rights Declaration is subjected to the domestic law and penal procedure of the respective ASEAN member states. Relying on each member state's domestic law and penal procedure just means that there is no ASEAN-wide applicable standard or accepted definition on when double jeopardy shall be engaged. The lack of any ASEAN adjudicatory body regarding human rights makes it improbable that an ASEAN-accepted definition and/or standard would take shape anytime soon. Thus, any development of the

prohibition (or principle) in a regional sense would be heavily be reliant or take shape on a domestic level.

Two: one can add to this the general lack of harmonization in the first place among ASEAN member states of their respective laws. A look into Malaysia and the Philippines alone show that while on its face, they espouse similar values as to how they treat the prohibition on double jeopardy (the prohibition being encapsulated in their respective constitutions), there had been criticism for example on Malaysia that the prohibition can be lamentable in practice most of the time given the many exceptions to the prohibition. There are also differences as to how the first jeopardy could attach and other idiosyncrasies of each member state. In fact, it must be pointed out that there is no well-defined and delineated framework of double jeopardy vis-à-vis mutual legal assistance for both countries, albeit they entertain double jeopardy as a mandatory ground to refuse a MLA request in the ASEAN MLAT context. Furthermore, even if it is the most ideal and in accordance with spirit of the prohibition to be applied transnationally, it has yet to be seen on whether the respective constitutional prohibitions of Malaysia and the Philippines would be expanded on a transnational application through case law or statute, especially in cases wherein transnational crimes are involved and/or there could be a possible exercise of either universal or extraterritorial jurisdiction.

Three: the prohibition on double jeopardy as contemplated in the ASEAN MLAT, although it lends a transnational character to the prohibition against double jeopardy as it considers both the requesting and requested states, it does not look beyond these two parties. There is no mention as to what would then happen if for the offense subject of the offense occurred, the accused or person involved has been convicted, acquitted, or pardoned in a third state, which is not necessarily an ASEAN member state. This situation can likewise contemplate instances wherein the accused or person involved has satisfied the judgment or undergone the punishment for the same contemplated offense or crime.

In the same vein, the Malaysian law suffers from the same handicap wherein in the usage of the prohibition against double jeopardy as a ground to refuse a request, the law only considers a conviction, acquittal, pardon, or service of punishment in the requesting state. Any similar incident in Malaysia is not taken into account in the relevant provision.

Two conclusions can be derived and it also depends whether the state involved is the requested or requesting state. First, when either the Philippines and Malaysia are the requesting states, the evidence or information requested through the MLA request would naturally be used within their

respective domestic courts, which concomitantly should apply domestic laws and principles. Thus, it is without question that the prohibition against double jeopardy as applied domestically ought to be applied. It is prudent to take into account any conviction, acquittal, pardon, or service of punishment that has occurred elsewhere, regardless of the requested state or third state.

Second, the conclusion is altered when the subject state is the requested state and with different possible outcomes for both the Philippines and Malaysia. Based on the skeletal reading of the pertinent ASEAN MLAT provision, *verba legis*, the answer would be for the Philippines to proceed with the request notwithstanding a circumstance wherein the conviction, acquittal, pardon, or service of punishment occurred in a third state, because the provision in the treaty only considers the requested or requesting state. Following strictly the MACMA provision, on the other hand, would limit Malaysia to deny a request only when the conviction, acquittal, pardon, or service of punishment occurred in the requesting state. Malaysia would not concern itself if the circumstances occurred on its own domestic soil.

Conversely, the spirit of the prohibition in its transnational sense should result to a denial of the request, or at the least make the requested state wary of granting the request, in both cases wherein the circumstances occurred in Malaysia or in a third state. Considering the foregoing, the fact that this has not been encountered in practice, as well as the fact of the need to balance interests on a case-to-case basis, the solution would probably lie in the preliminary consultation and open communication between authorities in the ASEAN. For posterity sake, the officials of the requested and requesting state could likewise call the attention or coordinate with the appropriate officials of the third state or other ASEAN member state, wherein the person involved has been convicted, acquitted, or pardoned, or otherwise underwent the punishment for the questioned offense or crime. For Malaysia specifically, if the request triggers the prohibition as provided in Malaysian law, then it should call the requesting state's attention. The ASEAN MLAT allows the same anyway, wherein should there be questions or inquiries about a particular request, the requested and requesting states may consult each other.

Fourth, general human rights considerations as substantive provisions in mutual legal assistance in criminal matters in the ASEAN regime were also examined. On a regional level, one of the more recent developments within ASEAN is the ASEAN Declaration of Human Rights, which basically mirrors the UN Declaration of Human Rights but adding other rights not

included in the latter. With the said ASEAN Human Rights Declaration, one could note that there is no enforcement mechanism or corresponding ASEAN Human Rights Court established to adjudicate rights and redress violations of said instrument. Interestingly, the ASEAN Declaration of Human Rights was made through the work of the ASEAN Intergovernmental Commission on Human Rights. The establishment of any regional court or adjudicatory body would not fall under their mandate but instead fall another ASEAN body, i.e. ASEAN Law Ministers Meeting. Lack of enforcement mechanism notwithstanding, there are certain human rights that are included in said Declaration that may be relevant in the context of mutual legal assistance and criminal matters in general.

Looking then at the specific ASEAN MLAT instrument, considerations of certain rights come into play with respect to the substantive provisions of valid and mandatory grounds for refusal. There is, at the outset, the mandatory ground for refusal by reason of double jeopardy in the ASEAN mutual legal assistance regime. A request can be denied also when it was issued on discrimination grounds. Further, one can look into the human right safeguard in assisting the attendance of a person in the requesting member state, wherein the requested member state shall "invite the person to give or provide evidence or assistance in relation to a criminal matter in the requesting member state" if "satisfactory arrangements for that person's safety will be made by the requesting member state." In other words, satisfactory arrangements for the person's safety is a condition precedent before transfer of persons to give and/or provide evidence or assistance is allowed.

These considerations are equally available in the Philippines and Malaysia. With regard the Philippines, it follows what the ASEAN MLAT provides, but a step further is necessary to capture the requirements ought to be followed in the Philippines in light of human rights not only due to the lack of a domestic legislation specifically addressing these issues, but likewise the non-mention of further details or applicable rights in the ASEAN MLAT. To state the least, the ASEAN MLAT as a legal basis can only provide so little information as to what Philippine authorities ought to consider. For other details or general human rights to be considered, other relevant Philippine law and jurisprudence ought to be perused, which is different if one considers the MACMA as mostly a one-stop shop in knowing how MLA works in Malaysia. Thus, it should not be surprising that in the discussion of the Philippine and Malaysian frameworks, the discussion of the Philippine framework is apparently more exhaustive because there is no law or jurisprudence that settles the matter. Any apparent

disjunct or "incomparability" is thus explained by the need to fill in missing links and probe different sources to find answers.

In connection to this, a study of relevant Philippine law and jurisprudence reveals the importance of respecting one's constitutional right to privacy in correspondence and communication, the right against unreasonable searches and seizures, and one's right to substantive due process. Violation of these rights has repercussions not only on the validity of a mutual legal assistance request (i.e. right to privacy and against unreasonable searches and seizures demands that a MLA request shall not be made on a shotgun approach or fishing expedition) but also on the admissibility of evidence (considering that the Philippines follow the exclusionary rule and fruits of the poisonous tree doctrine). Moreover, substantive due process under Philippine law requires that the MLA request is complete and not vague. Otherwise, not only is one's right to be informed violated and one's right to substantive due process infringed, but the intrinsic validity of the MLA request likewise becomes questionable.

In addition to the aforementioned grounds for refusal on the basis of human rights, one can also look into how the issue of severity of punishment or the imposition of torture, cruel, inhumane, or degrading punishment is factored in the MLA framework. While being given a strong consideration in extradition cases, this has not been done within the context of ASEAN mutual legal assistance, despite the explicit prohibition on torture, cruel, and inhumane treatment and/or punishment being included in the ASEAN's own human rights instrument. A possible explanation of this is the ASEAN principle of non-interference, wherein member states shall refrain "from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of government as basis for deciding membership in ASEAN." This is also reminiscent of ASEAN's argumentation regarding Myanmar's membership in the organization despite its political instability and human rights violations. The ASEAN posited that these matters are domestic in nature and outside the concerns of the organization or its member states pursuant to the principle of non-intervention. Naturally, issues of severity of punishment or prohibition against torture and cruel, inhumane, degrading punishment or treatment fall within the ambits of human rights violations. Thus, it can be arguably be excluded from being a concern of fellow member states or the ASEAN as an organization.

Even if enhanced interaction now more or less exists in different planes of ASEAN policies, wherein one member state can inquire or comment

about domestic affairs of the other should the same have regional repercussions and as long as the same is done outside the ASEAN framework, it would be a stretch to implore "enhanced interaction" in these circumstances as there is a weak nexus, if any such connection exists, between imposition of punishment within a state's domestic jurisdiction and regional repercussions. Imposition of punishment is ingrained in a state's culture as illustrated in Malaysia that it can be arguably considered an internal affair to the exclusion of any possible interference from others. The principle of non-interference still generally holds and arguably explains the absence of said principle involving the consideration of severity of punishment.

Accordingly, Malaysia allows the imposition of the death penalty and whipping as forms of punishment to the extent that its Supreme Court had the occasion to even reprimand judges who hesitated to impose the same even if taking account of the circumstances should warrant the imposition of the death penalty. As regards whipping, the Federal Constitution and Malaysian Criminal Law imposes parameters for its imposition. To that extent, conditions are improved. Interestingly, Malaysia would actually have the experience of being either denied extradition or mutual legal assistance requests, or being required to make undertakings they would not subject the accused to the death penalty by some countries outside ASEAN, which prohibit the imposition of the death penalty and with which Malaysia has existing treaties or agreements.

On the other hand, the Philippines constitutionally prohibits torture and the imposition of severe, inhumane, and degrading punishment, and does not necessarily constitutionally prohibit the imposition of the death penalty but limits its imposition to heinous crimes as may be defined by the legislature. The death penalty is currently suspended. However, it remains to be seen whether the Philippines would take the extra step of denying requests it receives if the same involves a violation on the imposition of the death penalty and severe, inhumane, and degrading punishment. One would be inclined to answer in the negative. Judging from state policy elucidated in Philippine jurisprudence, the Philippine judiciary would not only adopt a general hands-off policy in these matters but moreover, the Philippine authorities rather work on a mutual trust that the requesting state knows what it is doing.

In relation to the foregoing substantive considerations of human rights in the MLA framework, it becomes imperative to inquire whether member states could invoke other general human rights considerations in order to deny a MLA request, i.e. domestic human rights principles, values, prohibitions, and international human rights obligations, which may con-

flict with a request received. If one follows the strict letter of the ASEAN MLAT and the MACMA, the answer is in the negative. No ground for refusal is provided wherein a requested state can deny a request if the same conflicts with an existing human rights obligation. This is further supported by existing rule of non-inquiry the Philippines follows as regards international cooperation requests. There is a good faith compliance that the requesting state adheres to the law or human rights obligations. The same can be derived from Malaysia as well, by excluding any circumstance occurring in Malaysia vis-à-vis double jeopardy when it is the requested state.

Alternatively, should the member state be placed in a position of strong urgency to uphold its human rights obligations over a MLA request received, especially with those constitutionally provided or falling under customary international law obligations, then it could resort to the use of the "national interest" ground for refusal, because arguably they cannot go against constitutional principles and standards or those considered customary law. Having mentioned this, both Malaysia and the Philippines have yet to encounter this in practice. At most, the member states would openly communicate and consult with one another about any issue that would arise in respect of any human rights issues or problems that may arise due to a MLA request. This open communication avoids admittedly the issue and not directly addresses it, however.

The fifth principle or condition that can be mentioned is reciprocity. On both a regional and member state level, this exists. A request may be denied if there is no undertaking for reciprocity in the ASEAN MLAT and the same applies to the Philippines and Malaysia. From the perspective of authorities from both Malaysia and the Philippines, there has been no problem rendering and requesting assistance with other ASEAN member states on the basis of reciprocity. There seems to be a tacit understanding that ASEAN member states shall be willing, ready, and able to provide the required assistance in criminal matters.

The sixth principle or condition is the speciality and use limitation which also exists on both the regional and member state level. The ASEAN MLAT and Malaysian legislation clearly provides this, while this is seen in practice in the Philippines. Any evidence or information may not be used for any other criminal matter other than that subject of the MLA request, regardless of the realization that it can be used elsewhere. What must be done is to write or make a request anew, both in Malaysia and the Philippines. Advance notice can be given however, given the open channels of communication between ASEAN member states' authorities. In relation to

this, should one be interested to what is the basis of such speciality and use limitation being used in practice in the Philippines, this is based on the stringent requirements provided by no less than its Constitution on the use of coercive measures. The same applies when one applies for the appropriate warrant in Malaysia. There is a particularity requirement on what needs to be seized, which to be searched, etc., that it arguably applies to MLA requests involving the same kind of coercive measures. Further, there is a general requirement to make a return on the information and/or evidence seized, as well as details as to how a certain warrant or order was served, or the date subsequently destroyed. To illustrate, the Philippine Cybercrime Act or Anti-Wiretapping Act requires the destruction of any recording made after usage as evidence and/or lapse of a certain period of time.

Lastly, special offenses and national interest are often identified as exceptions to mutual legal assistance. These play a substantive part in the granting and executing of MLA requests. While political offenses and military offenses exceptions have been limited in the ASEAN MLAT as exceptions to mutual legal assistance, fiscal offenses may no longer be used as an excuse to deny a MLA request. Further, there are a lot of political reasons a state may use in denying a MLA request. These include instances when there is a pending criminal matter or investigation in the requested state or when the national interest of the requested state shall be affected. As to what these national interests can be, a state can define unilaterally what falls under national interest. Having said this, there seems to be no semblance of this being invoked often by ASEAN member states on the basis of what has been mentioned in interviews about granting almost 100% of the time all requests received from each other. Also, there exists an open communication and preliminary consultation, even to the extent of sending draft or advance copies of requests to each other, to ensure that the same are in order and feasible to be executed without encountering any grounds for refusal or any violation of the requested state's domestic law.

## C. Procedural Provisions

The following discussion focuses on salient procedural aspects of mutual legal assistance: (1) the designation of central authorities which highlights vertical cooperation in the ASEAN framework; (2) preparation of requests; and (3) execution of requests.

### 1. Usage of Vertical Cooperation in Mutual Legal Assistance: Central Authorities

In respect of the designation of central authorities, the ASEAN and its member states all espouse a vertical type of cooperation as regards mutual legal assistance, wherein requests for international cooperation go through a single focal point or central authority, which shall be then in charge of sending and receiving requests for mutual legal assistance in criminal matters. This is vertical in nature because it follows a top-down or bottom-top approach in facilitating requests. For the Philippines, this shall be the Department of Justice through its Office of the General Counsel. For Malaysia, this shall be the Attorney General's Chambers through the Prosecution's Office, in particular, the Transnational Crimes Division. These authorities then coordinate with the respective agencies to effectuate any request and basically would be on top of any matter in relation to the MLA request received or sent. Notably, informal forms of cooperation generally do not course through these central authorities but it could still happen. For Malaysia, informal requests to the Central Bank are mandated by law to still be coursed through the central authority, for example.

It must be noted that despite the designation of the respective Department of Justice or Attorney General's Chambers as the central authorities for the Philippines and Malaysia, their respective Foreign Affairs Department still plays a role in the negotiation, implementation, and execution of mutual legal assistance requests. This is sanctioned by the ASEAN MLAT itself in allowing member states to require coursing MLA requests through diplomatic channels.

### 2. Preparation of Requests

As regards preparation of requests, said preparation on both the regional and member state level have minimum general requirements – for example, having the request written in English and in a form capable of producing written records for purposes of establishing authenticity – additional information can and must be provided dependent on the type of assistance requested. This can be connected to the sufficiency of evidence requirement generally existing in mutual legal assistance wherein more information ought to be provided the more intrusive the measure requested is. Malaysia, in relation to this, would provide in its law how Malaysia should make their own requests, as well as how requests made to

Malaysia should be. On the other hand, despite the lack of specific domestic legislation, requirements for request can be found in the micro-MLA provisions in some Philippine laws. Likewise, minimum information to be indicated in a request in general was provided by Philippine authorities, although this is without prejudice for requesting additional information that may be necessitated to execute a request.

In relation to this, the open communication between authorities and any preliminary consultation that occurs between them makes the ASEAN MLA system work and facilitates better preparation of requests and if needed, there would be proper guidance as to what may be wanting, questionable, or problematic in a request received. This follows the recommendations of the ASEAN Secretariat. The ASEAN Secretariat recommends the availability of open and effective channels of communication between authorities and even mentioned that most of the time it would be mutually beneficial to both parties to have liaison and communication prior to sending out any request to ensure the effectiveness of execution and at the same time, to communicate any issues and intricacies relating to the assistance being sought. The ASEAN Secretariat even encourages the use of the CNAD built through the efforts of the UNODC which contains updated contact information of the different national authorities from most states in the world, provides means of communication, and provides the different requirements to satisfy when sending a request to another state. With respect to this, the entire ASEAN framework, including the member states, have a useful toolkit in their possession, albeit not necessarily constructed under the auspices of the ASEAN framework but nevertheless readily made available by an international office such as the UNODC to cater to the needs of the ASEAN member states.

As to whose instance a MLA request shall be made, it is both apparent in the regional and member state level that it shall be prepared and issued by the respective central authorities, like the Attorney General of Malaysia. In connection to this, the ASEAN Secretariat mentioned the role of the prosecutor and/or investigator to coordinate and communicate with the respective central authority in sending out a request because said prosecutor/investigator would have the best knowledge of the case details as well as the information that needs to be obtained. There is no mention in both a regional and member state level whether a private individual, suspect, or accused person, have any right for a MLA request to be issued on its behalf. It is uncertain whether any participation is allowed. If one looks into the provisions of the ASEAN MLAT, whilst it is silent in general on who may initiate a MLA request, it equivocally provides that a private

person cannot derive any right from the instrument to obtain, secure, or exclude any evidence. The MACMA also does not provide the option. As regards the Philippines, it is not so clear cut absent any specific domestic legislation. At most, one could try to file the necessary motion (for relief) in court but the Rules of Court and Criminal Procedure are bereft of any further specific provision tackling MLA. At most, one has only the discussion of the rules on discoveries and depositions. One can thus interpret this in general as excluding private parties, including suspected or accused persons, from initiating a MLA request. The MLA process remains a government-to-government endeavor or prosecutorial instrument to the exclusion of defense.

### 3. Execution of Requests

#### a. Applicable Law

The applicable law in the regional and member state level do not conflict one another as regards the execution of requests. At both levels, the general rule is the application of the *locus regit actum* principle wherein generally, what would be applicable shall be the law of the requested state. This is without prejudice to the requesting state requesting that its own law and procedure be followed in the execution of a request, as long as the requested state acquiesces and the same is not in violation of the latter's domestic law. In other words, *lex loci* is prioritized over *lex fori.* To further understand, one interviewee explained that the requesting state should clearly provide and define how it would want its MLA request to be executed and normally the requested state shall execute the same "robotically" or on a non-discretionary manner. Absent any specific instructions, the requested state shall execute in accordance with its laws. Thus, it would be imperative that a requesting state lay down with particularity how they would want their respective MLA request to proceed should it be executed.

Although the same has been stressed many times already, the open communication and preliminary consultation among ASEAN authorities help overall in the effectuating of MLA requests in the region. As one interviewee in the Philippines commented, there are less requests denied execution because authorities find a way to overcome any ground for refusal that could have existed vis-à-vis a request. Authorities work together and cooperate with one another to make sure MLA is well facilitated.

Given that one another is technically just a phone call away, any problems and issues are better ironed out should there be any.

### b. Applicable Procedural Rights

Reverting to the ASEAN Human Rights Declaration, there are some rights of an accused encapsulated in the International Covenant on Political and Civil Rights which are considerably absent. Said ASEAN Declaration vis-à-vis rights of the accused only provides at most protection against "arbitrary arrest, search, detention, abduction, or any other form of deprivation of liberty", the right to be presumed innocent until proven guilty, as well as the protection against *ex post facto* laws and the enactment of bills of attainder, among others. The ASEAN instrument on human rights is bereft of any provision regarding an accused's right to be informed, right against self-incrimination, right to have adequate time and facilities to prepare for one's defense, or right to counsel. In other words, the quintessential procedural rights are not found in the ASEAN instrument.

On the contrary, these rights are constitutionally conferred in the Philippines and Malaysia. The Philippines also has a specific constitutional provision on one's right during custodial investigation (patterned from the US' Miranda doctrine) and as regards the rights of the accused, this has been jurisprudentially held to be applicable to extradition proceedings and arguably, to mutual legal assistance ones too, because while these proceedings are administrative in nature, they bear earmarks of the criminal process which may prejudice rights. Notably, the constitutional right to be informed is only engaged with extradition and MLA proceedings after the evaluation stage. Malaysia equally confers these rights.

How Malaysia and the Philippines take into account human rights in general and the rights of the accused resonates with the safeguards found mainly in the execution of requests for mutual legal assistance in the ASEAN MLAT. Herein are considerations of one's right to be informed, to counsel or legal representative, to confront witnesses, and against self-incrimination, the latter also being present in safe conduct provisions vis-à-vis transferring of persons in custody. Further safeguards include crediting the person's length of stay in the other member state to the time served for the said person's punishment. It can be stated then that the ASEAN MLAT provides the procedural rights that needed to be respected and upheld, which the ASEAN Human Rights Declaration – a later instrument – otherwise does not.

In light of the foregoing, there is the question on whether a private individual affected by a MLA request and/or the execution thereof can find relief on a domestic level. Both Malaysia and the Philippines provide for judicial review, wherein an affected individual can file the necessary application (under Order 53 of the Malaysian Rules of Court) or petition (under Rule 65 of the Philippine Rules of Court). It is a different question altogether whether judicial relief can be actually obtained. To illustrate, under Rule 65 of the Philippine Rules of Court a petitioner must be able to establish that the MLA request and/or the execution thereof was made with excess or lack of jurisdiction, or grave abuse of discretion amounting to lack of discretion. In other words, an error of jurisdiction must be established. Following however how the Philippine Supreme Court decided in *People of the Philippines v. Sergio*, it can be gainsaid that under Philippine jurisdiction, while it is still left unclear whether the Supreme Court shall touch on the validity of a mutual legal assistance request or the propriety of the request and/or any following procedure at the instance of an affected individual, the Supreme Court shall not hesitate to rule on the investigative measure arising from said mutual legal assistance request, its implementation, and any right that is adversely affected by it, especially if the criminal proceedings are held in Philippine jurisdiction. Although the Supreme Court upheld the deposition through written interrogatories and held that the accused's right to confrontation of witnesses was not violated, nothing in the Decision precludes the Supreme Court from granting redress or relief should circumstances warrant in the future.

Having mentioned these, there is further remedy available to an individual to question the admissibility of evidence in both the Philippines and Malaysia. The Philippines follow the so-called exclusionary rule that demands exclusion of an investigative measure and any evidence obtained through it (fruit of poisonous tree doctrine) if there has been a violation of human rights. While there is no exact 1:1 correspondence with Malaysia on such doctrine, Malaysia also has its share of exclusionary rules and courts are given the mandate to rule on the admissibility of evidence should the same be obtained against public policy or interest, or generally affects the notion of fairness of proceedings.

### c. Applicable Time Limits

There are no time limits involved in the execution of requests in both the regional and member state level aside from what is provided in the

ASEAN MLAT that the requesting state should execute requests "promptly", there is a conscious effort to be informed among Philippine and Malaysian authorities whether there is a time element involved in the execution of a request. This applies whether they are in the issuing or receiving end of a request. A look into the information required to be contained in a request, both the Philippines and Malaysia provide therein that it should be mentioned when the request is expected to be executed and/or effectuated. The initial and preliminary consultation among member states help ease the problems encountered in relation to any delay in execution. During this initial and preliminary consultation, member states can also send each other draft and advance copies of their requests so that the requested member state can already work on the same. Based on interviews, this only happens vis-à-vis MLA requests among ASEAN countries. Additionally, promptness of execution is highly affected when the request involves coercive measures and application before the courts. Once submitted before the courts, there is little the authorities may do in influencing how fast applications would be processed. In other words, it is within the control of their respective courts as to how expedient a court order or grant of application shall be issued. Otherwise, execution of requests would be relatively fast, as described by Philippine authorities above. Moreover, should the request be faster through informal channels and the object or evidence requested is not necessitated to be presented before the courts, this method is encouraged.

d. Authentication of Documents

Whilst the ASEAN MLAT mentions that objects, evidence, or information received through MLA do not need further authentication, it is without prejudice to any request for authentication. There are provisions in the ASEAN MLAT that states what is considered to be authenticated for purposes of treaty. In the Philippines, the new amendments to the Rules of Evidence dispense the requirement of authentication for "public documents" issued in relation to a treaty or convention to which the Philippines and the source foreign country are parties to. Considering that evidence transferred through mutual legal assistance are considered "public documents" in accordance with the Philippine Rules of Evidence, then the process is now streamlined for authorities to use this evidence in courts. Further authentication would however be taken into account in relation to "private documents" such as evidence brought forward by

witnesses/persons offering testimony through MLA and not necessarily already in the possession of a requested state. In this case, Philippine law provides the requirements.

In Malaysia, the MACMA provides evidence obtained through MLA requires no further proof provided certain requirements are met and the same being subjected to the Evidence Act and Criminal Procedure Code. Later on, provisions were inserted in the Evidence Act in 2012 to reflect these rules.

Although the abovementioned provisions and/or rules seem clear-cut, direct to the point, and would facilitate the importance of mutual legal assistance, this was not necessarily the case for Malaysia in one landmark case, which resulted in the acquittal of the accused. To wit, the insertions made to the Evidence Act was prompted by the problem encountered by Malaysian authorities in the usage of evidence obtained through mutual legal assistance. Said evidence was used in a criminal case before the Malaysian courts. The accused insisted that while the MACMA provides that no further proof is required, it has to be subjected still to the rules of authentication provided in the Evidence Act and/or Criminal Procedure Code. The Sessions Court (court *a quo*) sided with the accused and ruled for an acquittal. The High Court and Court of Appeal held in favor of the prosecution, stating among others, that the MACMA was a special kind of legislation that subjecting it to the requirements of the Evidence Act is counter-intutive and renders the purpose of mutual legal assistance nugatory. The Federal Court however sustained the ruling of the Sessions Court and upheld the acquittal. Thus, the Evidence Act was amended to harmonize the applicable domestic laws and hopefully avoid the same problem encountered in the case.

It can be likewise mentioned that the abovementioned case highlights the need to harmonize laws with one another because despite having clear-cut provisions in one, if the necessary amendments and rules are not made in another, then stumbling blocks or problems might ensue. This can be made worse if one does not have the specific domestic legislation to begin with. Any issue is only alleviated in the case of the Philippines due to the recent amendments to its rules of evidence, which no less than its own Supreme Court authored, to avoid possible issues vis-à-vis documents and/or evidence obtained in relation to a treaty or convention.

e. Confidentiality

Confidentiality is important in requests for MLA. The ASEAN member states have the positive duty to maintain it in the receipt and execution of requests. As regards Philippine practice, the authorities make sure that confidentiality is maintained all throughout the proceedings and would promptly involve the requesting member state should the same be compromised or otherwise endangered to be violated. This is regardless of whether the request indicates the need for confidentiality. However, should the MLA request involved be coursed through the courts due to any coercive measure to be executed, the same forms part of public record and on this degree, not covered by confidentiality. The Malaysian legislation, on the other hand, does not explicitly mention the positive duty of confidentiality but in practice seems to be highly maintained.

f. Return of Documents

Return of documents is also a procedural provision one needs to consider in terms of MLA. This can be connected to the speciality and use limitation most of the time. Once the requesting state is finished with the criminal matter subject of the MLA request and the requested state asks for the return of the object, document, or other evidence requested, the requesting state is duty-bound to return the same notwithstanding any further use it may realize for the said object, document, or evidence for any other criminal matter. This is clear in the regional instrument and the domestic law of Malaysia on MLA. Regardless of any further use of the object, evidence, or information being held on to pursuant to a MLA request, the requesting state needs to make a request anew to be able to properly use the evidence for any other purpose. There is admittedly a gap in the law vis-à-vis the Philippines but looking into the applicable law and procedure on coercive measures and the need to make the appropriate return and/or report to the courts after being granted the appropriate warrant for the execution of a coercive measure, and surrendering whatever was seized or collected during said execution, then the return of evidence would be important.

g. Specific Procedures

And last but not the least, the ASEAN MLAT and MACMA would provide specific procedures for the specific types of assistance. These include the safeguards authorities need to comply with. Countries with no specific MLA legislation like the Philippines admittedly lack this and one would need to look into different and scattered laws that could be made applicable. Thus, for the Philippines, one can look into procedures that may be found in its Rules of Court, etc. for what may be made applicable to a particular type of request. To illustrate, one could look into the procedure vis-à-vis the taking of evidence and/or voluntary statements which branch out to different possible issues and problems. The lack of streamlining and harmonization in Philippine law leads to gray areas and unsettled issues that need to be straightened out as soon as possible. There is the need for domestic legislation on mutual legal assistance to provide the parameters, baselines, and guidelines de rigeur. In other words, there is a want of harmonization and/or standardization in the domestic legal system itself.

In addition to this, one can note that the ASEAN MLAT and MACMA, while providing specific provisions, do not necessarily go with the times in terms of assistance that may be provided involving technology or online evidence. It does not provide explicitly for the interception of communications and online data, which, in Malaysia, generally occurs through informal modes of cooperation, and if ever allowed, involves offenses punishable in Malaysia and does not concern with content data. Philippine legislation, although not specifically centered on MLA, covers cooperation clearly in these areas. Additionally, it must be mentioned that even if the ASEAN MLAT would contain these types of assistance then in the catch-all provision, it would have been a good value-added if provisions have been provided for types of assistance that go ahead with technological, and general, global advances. Thus, as mentioned, the Philippines presents an odd but effective case of not having the domestic statutes covering specifically mutual legal assistance but it later turns out that it has the framework to support investigative measures not mentioned specifically in the ASEAN MLAT.