Part 3: Comparing and Contrasting the ASEAN and the EU

During the previous parts of this study, one has been able to learn the respective regional and member state frameworks of the ASEAN and the EU and their respective member states Philippines, Malaysia, United Kingdom, and Germany with respect to mutual legal assistance in criminal matters. Through learning the different regional and member state frameworks, one has been able to compare and contrast each one with other. The study began with comparing the regional frameworks of the ASEAN and the EU, respectively, to the applicable frameworks of two of their member states.

The following discussion shall be a comparison and contrast of the two (2) regional blocs. Divided into two (2) components, the first one shall focus on the regional frameworks themselves, wherein the development of (1) their respective principles, norms, and practices, (2) existing cooperation mechanisms, (3) approach to regional security, (4) and mutual legal assistance in criminal matters shall be compared and contrasted with each other to flesh out interesting points and matters ought to be taken into account should the study proceed in answering its main research question.

The second component of the discussion shall integrate into the discussion the respective member states within the respective regional organizations, mainly underscoring (1) how regional decision and policymaking and legal instruments are translated and transposed in the respective domestic orders of the member states, (2) efficiency, and (3) protection of human rights.

I. Comparing the Regional Frameworks

As mentioned above, the first step in the entire process of this portion of the study is an evaluation of the regional framework. First, an evaluation or analysis would be done of how principles, norms, and practices have developed. The study finds this imperative because it influences more or less what direction the regional frameworks would take in their respective decision making, as well as provide a gauge of how effective they would be able to influence and implement regional decisions on a member state level.

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Second, there would be a discussion of cooperation mechanisms and third, approach to regional security and international cooperation in criminal matters. These are relevant to know how the ASEAN and the EU so far have molded their respective criminal justice architecture and the same shall provide an idea once again how they would take action.

Lastly, the elements of the respective MLA arrangements among the respective member states shall be discussed. These include idiosyncrasies that might be existing per regional framework and the reasons that might explain the same.

A. Development of Principles, Norms and Practices

One of the materials the present study encountered in attempting to build the historical development of the ASEAN, the EU, and their respective regions is Victor Lieberman's two-volume book entitled "Strange Parallels".[3056] Whilst said work was not exactly cited in the present study due to differing subject matters, what one can mainly take away from his work is the prevailing theme of existing parallels occurring in history between Asia and Europe and the thesis that these parallels reflect each other one way or another and consequently affect the development of both regions.[3057] What one was undergoing is not mutually exclusive to itself. Instead, it could have a spillover effect to another part of the world, or alternatively, the same kind of event or similar circumstance is happening simultaneously. Grippingly, the comparison of the historical developments of the ASEAN and the EU would indeed show strange parallels that mirrors how one acted and reacted as against the other. There were common experiences, although at different points in time one may be found on one end of the situation, while another may be found at the opposite end of it. There were likewise common problems and conundrums faced, especially in light of how their respective member states coalesced towards each other, but with different turnarounds on how each decided to go forward. Indeed, the historical development of both the ASEAN and the EU, as well as the regions they represent, has admittedly a huge impact on how each organization developed their principles, norms, practices, and their overall daily business. To some extent, it was also reactionary to the circumstances their respective regions went through.

3056 See for reference *Lieberman*, pp. 1-6.
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The Southeast Asian region and its countries, of which ASEAN represents, are not homogenous. Topography and geography was a factor, wherein Southeast Asia would have a mainland portion and also a maritime one. Furthermore, there are different religions or influences that each country within said region underwent. The ASEAN countries might have in the early stages developed their own cultures and ideals together with their respective kingdoms, groups, and tribes, but they did not exist in autarky. Instead, there was an ebb and flow of ideas and other cultural influences through the intensive agricultural and maritime trade that was happening among the different nations. Included herein is the influence from other cultures not part of the Southeast Asian region, such as the Indians and Chinese. This led consequently to the assimilation of ideas and beliefs that enriched the socio-political aspect of the Southeast Asian countries. Thus, while culture and tradition was homegrown, it was not to the exclusion of other influences.

On the other hand, one could notice a sort of homogeneity with the European region. Its topography and geography, compared to the Southeast Asian region, allows closer or easier proximity from one country to another. Further, in the European region, a homogenous aspect grew through the influences of the Ancient Antiquities, the spread and influence of the Christian Church, and the Germanic warriors who took over the western part of the Roman Empire. Through the spread of the Ancient Antiquities, when the Ancient Greeks occupied several territories and states in Europe, and then later on, when the Roman Empire placed the entire region under its power and authority, there was a diffusion of ideals, knowledge, culture, and overall socio-political structure among the European states. Although the same was not linear and the same for everyone and every state, there was still a common denominator amongst them in the experience that later on shaped their overall identity.

In addition to this, there was the influence from the Christian Church, which influenced not only the Roman Empire but was also authoritative and influential enough in dictating European affairs during the early and modern ages. Its influence was far-reaching and existing in all European states. The experience from the Christian Church might not be exactly the same for all parts of Europe but then again, there was a common experiences in how it shaped European civilization and identity later on. To illustrate, there was the influence of how the Christian Church planted the seeds of being the supreme religion to the detriment of other religions in the region. There were incidents of forced migrations or conversions, etc. There were likewise incidents wherein the Christian Church was in-

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strumental in instigating armed conflicts with other parts of the region due to encounters with other religions. At the same time, the Christian Church was instrumental in preserving the knowledge from the Ancient Antiquities that led to formation of new forms of knowledge, etc. Further, there was no separation between church and state during the peak of the Christian Church's influence. They were instrumental in influencing sovereign decisions and kings during these times also had influence in the leadership of the Church. It was only later on, when things were too complicated and problematic that the entanglement was severed.

At this point of the discussion, it bears to mention that Southeast Asia is an artificial construct during the First World War, created to define the Allied's command area. There was no predetermined Southeast Asia prior to this time albeit the countries constituting said region were already connected somehow to one another prior to the period of the First World War. In the same respect, Europe was also an artificial construct. It was not a given, pre-constructed definition and delineation. In this regard, it can be said there was no regional identity during this time and the above-mentioned narrative evinces this. At most, what could be witnessed is the individual identities of the different countries constituting the respective Southeast Asian and European regions, which through trade would bounce off each other's socio-political and cultural influences, or otherwise engage sometimes in conflict due to territorial issues and other disputes. There were common factors here and there but overall, the regional identity has yet to be developed during the early to modern ages of both regions.

The first major interaction between the Europeans and Southeast Asians would probably be the time during which empires were being built and expanded and then later were embarking in colonialism and imperialism. This could also be said as the point wherein both regions were starting to build a regional identity centered on similarly shared experiences and circumstances.

Based on each one's historical development, Asia and Europe both entered the early modern age at the same time: there was the golden age of commerce when Asia and Europe's interaction with the world was arguably at its peak. During the same time period, European states and sovereigns started to explore and colonize states in both Africa and Asia.

Notably, one of the influences the Roman Empire had on European colonization or imperialism is the concept of hegemonic rhetoric: they are experts in sugar-coating their interventionalist expansionism as something with an altruistic and humanitarian purpose, although the same is far from

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the truth. There was also an ideal during the Roman Empire of superiority and that anything outside the Roman Empire was barbaric or second-class. The same rang true with the use of Christianity in conquests, explorations, and the like through the use of violence and forced conversions: wherein non-Christians ought to be saved (e.g. crusades, etc.) from their paganic or "evil" ways. Said kind of ideal was likely shown by the European colonizers when they colonized and ruled over states in Africa and Asia. This consequently elicited a response or reaction from their colonized states on how their non-negotiables would be, which is mainly to be self-governing and detach themselves from the shackles of colonialism and any other form of foreign intervention. Significantly, these non-negotiables presently still applies.

Prior to the colonization of the Southeast Asian states, as mentioned earlier, they had their own social, political, and cultural systems. This may be influenced by other states such as India, China, or even Arab states (which were trading partners of Asian countries). There was also good relations among the different states through the trade they fostered with one another. However, when the Europeans came and conquered the states in Asia, the Europeans introduced different changes resulting in the abrogation of pre-existing customs and practices. Technically speaking, European colonizers came in and tried to mold their colonies into their own images. There was intervention in the self-determination of the colonized. This eventually led to positive, and mostly, negative effects. A curtain was placed among the Southeast Asian nations and the once-appreciated interaction between communications was taken away. There was a disruption of the social strata and income inequality was apparent. Worse, there were accounts of violence against those colonized and the harsh taking of their respective resources. This eventually led to the brewing resentment among the colonized, in Africa and Asia alike, against their colonizers. The seeds for nationalism movements were planted to be eventually harvested later on.

Despite these negative effects, there was a rationalization the Europeans used for their actions. They were not truly honest about the motives for economic and political gains. Some were of the position that they are being altruistic in their efforts. The colonized were the "others" that needed to be educated or assisted to learn the more civilized ways of the westerners. One can notice the so-called "white man superiority" mentality. In this regard, European colonizers were also normative powers in trying to influence norms and practices. The colonized however, were not easily persuaded to buy into these rationalizations because their experience

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told them differently. To a certain degree, the norms and practices they brought in were assimilated and taken in by their colonized states. However, the process was not one-way as the colonized also were influential of the socio-political and cultural development of the colonizers.

When the First and Second World Wars happened, the ideal of European superiority crumbled into pieces, especially in the eyes of the colonized. Some of the European states lost during the World Wars their colonies and even if they wanted them back, the resistance was much stronger at this point. The seeds of nationalism and self-determination have grown and was ready to be reaped. Furthermore, the European states' own citizens were not anymore willing to support financially (through taxes) the upkeep of colonies, especially when they were not anymore convinced that there are benefits to the same.

After the peak of colonization and the World Wars, both Asian and European regions needed to rebuild themselves. Asian nations, like those in Southeast Asia, were struggling however given that after colonization, they were basically depleted of resources and incapacitated to build a nation from the ground up. One thing was for sure though. They were keen not to allow any further intervention in their affairs and this ideal was generally brought into the present. The ideas for open communication and regional collaboration also flourished given the common experiences and circumstances they were living in. On the other hand, European nations were also finding themselves in a bad situation. Taking too much damage, they needed to find ways to resolve the issues left by the First and Second World Wars. There were also ideas to foster regional cooperation on their end.

Notwithstanding the desire to communicate, collaborate, and cooperate, it was not an easy path to take for the Southeast Asian nations. The earlier attempts to form regional cooperation neither went beyond the negotiation stages nor lasted very long. Many reasons could be cited as to why they did not succeed and these were also litmus tests as to what may or may not work for the region. These factors include but are not limited to, the idea being promoted is not the *zeitgeist* of the period, i.e. the non-acceptance of pan-Asian sentiments which was among the many things promoted during the ARC, the lack of neutrality (which led to the breakdown of the Bandung Conference), the rejection of anything constituted of foreign power intervention or domination, the efforts of some to manipulate the discussion (or put themselves as leaders), as well as the fact that the Southeast Asian nations themselves were embroiled in (sometimes violent) conflict with one another. After the world wars

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and during the critical period of nation building, there was still a sense of distrust among some nations as well as unresolved issues such as for example, differences in ideologies and territorial disputes. This led later to armed conflicts or tensions with each other. Should there be for a regional organization that would be acceptable and properly work for everyone, the aforementioned factors must be taken into consideration. There is also the need to be able to work despite differences among each other.

Europe was not so much different in terms of conflict and tension among its states. Right after the First and Second World Wars, Europe was still picking up the broken pieces of war when it was embroiled in the Cold War between the US and the Soviet Union. Like in Southeast Asia but on a bigger scale, the difference in ideologies led to the European continent being divided into two sides (i.e. communist and democratic states). There were also European states which were under dictatorship or fascist rulers. Furthermore, there was the general push of regional cooperation but there were competing ideas on how this should proceed. There was also a question on where would be its starting point and which state should lead. There were also parties which were preoccupied with their own self-interests. France, for example, took a hard line against Germany and wanted to impose as many restrictions to the latter for its own gains. Regional cooperation took off only when a third state like the United States took efforts to play on countries' interests that regional cooperation became promising: anchoring on the coal and steel productions of both Germany and France. This led to the formation of the European Coal and Steel Community.

The ASEAN was later formed by Indonesia, Singapore, Malaysia, Philippines, and Thailand. It was a regional organization with no Pan-Asian sentiments. It would remain neutral and proscribe anything constituting foreign power intervention and domination. Member states are on equal footing, with neither one member state having the upperhand in discussions and/or agreements nor an authority that would dictate to the member states. These considerations were necessary to address the historical circumstances of the region, urgently consolidate the independence of the former colonies, and preserve the national sovereignty against external influences. These considerations underlie the different constitutional, normative, and decision-making principles and overall institutional design of the regional organization. First, with constitutional principles, the principle of non-intervention could be found at the heart of it all. It influences the different legal-rationalistic norms the ASEAN has: (1) prohibition against the use of force and a commitment to pacific settlement of dis-

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putes, (2) regional autonomy, (3) doctrine of non-interference, and (4) no military pacts and a preference for bilateral defense cooperation.

As to how the principle of intervention is interpreted, 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 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.

Admittedly, there were attempts to revisit the principle of intervention the ASEAN lives by especially during the crises the region has experienced. However, as a collective, ASEAN member states decided to maintain the status quo. The principle of non-intervention even applies to the functioning of the different ASEAN bodies, which are solely preoccupied with their area of expertise. To illustrate, the ASEAN Law Ministers' Meeting would not intervene with the works of the ASEAN Finance Ministers' Meeting or the AICHR. At most, there is an enhanced interaction: a process wherein individual member states could comment on domestic policies of another, should the same have regional repercussions, but would leave ASEAN out of the equation. The same was consequently used in establishing the ASEAN Surveillance Process and ministerial troika, and eventually found itself in the ASEAN Charter. Should there be instances when it would seem that the "flexible engagement" concept has been accepted (rejected variation of the principle of non-intervention), like for instance in how ASEAN member states dealt with the leaders of the military junta in Burma, recent institutional changes in ASEAN, overall, are evolutionary rather than a break from established principles and norms, like as it how with the principle of non-intervention.

In addition to the principle of non-intervention, or the constitutional principles and legal-rationalistic norms of ASEAN, much can be said about the decision-making principles of the regional organization. Not having any pan-Asian sentiments nor the desire for one to dictate to the member states what to do, the ASEAN remains intergovernmental. It does not have any enforcement mechanism that would reinforce agreements among each

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other. There may be rotation of chairmanship of the ASEAN each year but decision-making is still not led by one member state but instead, it is done through the so-called ASEAN way.

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 ASEAN, which include 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. The ASEAN Way was instrumental during the formative years of the ASEAN when the member states themselves were embroiled in different conflicts with one another. Despite underlying issues, they were able to move forward through the ASEAN Way. The ASEAN Way, as earlier discussed, in any case should not be taken as being the same as unanimity. Instead, this decision-making process allows common ground to be found among member states without being aversive to one another. It is a pragmatic approach that allows the ASEAN to run its daily business without hurting sensibilities and sensitivities that might result from disagreements that could arise from decision and policymaking.

It bears mentioning that while the ASEAN came up later on with an ASEAN Charter, as well as it is e*n route* to its vision of creating the ASEAN Communities and being more institutionalized, the principles, norms, and overall framework it adopts basically stayed the same. These core values or non-negotiables have stood the test of time albeit there might have been evolutions or progressions witnessed of the same.

On the other hand, the western European states were able to find what would pique their interest further in having regional cooperation. One could first look into how the European Coal and Steel Community was formed, as mentioned above, and then evolved to the European Economic Communities, the European Communities, and thereafter, the European Union. The historical development likewise evinced, akin to the ASEAN, that certain efforts did not take off because of the absence of a similar *zeitgeist* during the time of proposals (e.g. European Political Community, European Defense Community). Later, one can also notice a common mindset among the founding member states when things were agreeable to each one of them. Moreover, historical experience likewise shed light on the positions of certain member states: some were cooperative and initiated the negotiations toward more cooperation (for example, Benelux countries) while some, like the United Kingdom, which were not into the

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idea of supranationalism and did not want to wholly dip its feet into the water and expecting concessions to be given to it in the process. If one would recall, the United States in the formative years of the European Communities expected the UK to take the lead but the latter was adamant to do so. It even sought concessions from the United States during the Marshall Plan but still was not 100% committed to the propositions. It was only later on that the UK agreed. But like how history unfolded, the UK was in the stage of leaving the EU but still negotiated its position towards the Union and its member states.

Despite the common appreciation of regional cooperation, tension between being intergovernmental and supranational in nature soon arised. This led to divisiveness among the member states and impasse on certain points of the agenda that needed to be addressed (e.g empty chair policy). It can be gainsaid that everything was a slow and sure process and eventually, with the European Union, there are more supranational features than intergovernmental. Competences are clearly defined and delineated as to what exclusively belongs to the Union or the member states, and what is shared between each other. There are also principles such as conferral, subsidiary, proportionality, institutional balance, among others that underlie the functioning of the European Union.

It can be pointed out in light of this discussion that the European Union maintains the ideal of being a normative power, although in a more positive way. Through its endeavors such as the European Neighborhood Policy agreements, among other things, it has been able to influence others of its own ideals, policies, etc., with the aim of assimilating the same among its partners. Its agreements further embody the ideals, principles, and norms it lives by given the conditions or provisions the EU includes in its partnerships or agreements with other countries or partners.

B. Existing Cooperation Mechanism

The nature of the ASEAN and the EU as regional organizations would explain the difference in their respective cooperation mechanisms. As mentioned *en passant* earlier, the ASEAN is an intergovernmental organization whilst the EU is supranational (albeit there are still matters within the EU that more or less remain intergovernmental in nature).

By being mainly supranational in nature, the existence of the EU is more or less independent and separate from its member states. Hence, even if it was not always the case and only after the Lisbon Treaty, the

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EU can decide on its own on different matters belonging to its exclusive competence or those matters falling under the shared competence with its member states (under certain conditions). To recall, the EU has exclusive competence on matters involving the following: (1) the customs union; (2) the establishing of the competition rules necessary for the functioning of the internal market and monetary policy for the member states whose currency is the euro; (3) the conservation of marine biological resources under the common fisheries policy; (4) Common Commercial Policy; and (5) conclusion of certain international agreements. Shared competence, on the other hand, could include areas member states cannot exercise competence where the EU has done so such as the internal market, area of freedom, security, and justice, etc. Shared competence includes likewise areas where member states are not precluded from exercising competence such as in terms of humanitarian aid, research and technological development, and common foreign, security, and defense policies. Based on these, the EU could not only develop Union-wide policies but likewise enter into soft law agreements, treaties, or international agreements on behalf of its member states. Thus, there are agreements such as the ENPs or international treaties involving economic and trade policies.

Its policy making includes the use of directives, regulations, and decisions. In turn, member states are beholden to the principle of sincere cooperation and ensure that they abide with the decisions and policies of the EU. Furthermore, there is an enforcement mechanism through the European Commission, which acts as the EU watchdog and ensures that member states are complying with their respective commitments and responsibilities. In relation to this, the EU is unique with its legislative policy and overall constitutional mechanism. Given the same, there is the unique principle of institutional balance that keeps the EU institutions working well with each other. This is not the same as the principle of checks and balances existing in national jurisdictions. Instead, it allows proper delegation of duties and responsibilities among the EU institutions. One may not act in excess of its authority.

Anent such legislative policy, it is formalistic but still encourages at some points the consensus approach, which is similar to the ASEAN process. Should there be for example no agreement among the Parliament, Council, or Commission, then the TEU and TFEU would encourage taking consensus and open communication to resolve any existing issues. Further, the EU institutions would have agreements among each other in fostering good working relations. While they do not necessarily need to agree on everything (which would be counter-intuitive to the principle

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of institutional balance for example), there is an effort to have amiability among each other.

Additionally, it can be mentioned that the member states can forge agreements with each other under the concept of enhanced (formerly, close) cooperation, which was introduced in the Amsterdam Treaty. Under the said concept, member states which are interested to forge cooperation with one another can use the existing mechanisms and procedures available as long as they are consistent with the spirit and letter of the existing treaties.

The ASEAN by virtue of the provisions of its ASEAN Charter could also act on its own as an international organization and legally speaking, can enter into agreements on behalf of its member states. To a certain extent, this might be misleading. The ASEAN remains still as an intergovernmental organization. Its decision-making processes and the overall functioning of the organization and its respective bodies are dependent on the member states. Hence, it is a condition *sine qua non* that member states agree to the agreements or treaties the ASEAN would enter into on their behalf.

In light of this, the consensus approach remains at all levels, even at the highest authoritative body in the organization which is the ASEAN Summit. There is neither an authority which demands or enforces compliance among the member states, nor an authority which would dictate what member states need to do. In this respect, there would be no principle of sincere cooperation nor principle of institutional balance to speak of, albeit member states sworn themselves to politeness and being cooperative in the declarations and agreements concluded in the organization. In fact, the principle of non-intervention prohibits member states to be critical of each other with regard the respective national affairs of each one within the ASEAN framework. Having said this, the main legislative output in the ASEAN are the declarations (soft law agreements) and treaties. There have been no framework decisions, decisions, directives, nor regulations that would need to be transposed to the domestic law. One can note that in most years of the organization, the member states limited themselves into declarations. This is because the ASEAN is less formalistic and more into soft law endeavors. There has been a paradigm shift nowadays, depending on the area of policy subject of the agreement, wherein ASEAN member states use treaties and international agreements. Most of these treaties could be observed in economic and trade policies as well as the building blocks for the ASEAN Economic Community.

Member states can then opt to enter into bilateral treaties (even with each other) or use the ASEAN mechanism to conclude agreements with

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one another. As mentioned above, there ought to be acquiescence or agreement from all to be binding and valid. The ASEAN Way in this respect enters the picture and further, the concept of "ASEAN-X". Should there be an agreement that one or some of the member states are not agreeable to, then such member state(s) shall not be forced to do something it does not want to. Such member state(s) may of course be convinced to decide otherwise but without the compulsion or enforcement the EU, for example, can do. Given the same, only those which were agreeable to the agreement shall be included, with the option of the non-agreeing member states to join in later on. An example of this is the Agreement on Information Exchange, which was entered into under the ASEAN framework but not all member states are parties to.

Another matter that could be mentioned about cooperation mechanism with respect its member states and respective bodies and institutions is the difference between the ASEAN and the EU as regards having an adjudicatory body. The ASEAN does not have a similar body such as the CJEU in the European Union. There is no regional adjudicatory body that would be instrumental in developing regional doctrines or themes. Further, any conflicts are resolved among the member states with the same kind of ASEAN Way. Significantly, the same kind of conflict resolution in ASEAN has been consistent even from the beginning. Before Vietnam, Cambodia, Laos, and Myanmar joined the ASEAN, there were conflicts and mistrust from these countries of the organization. There were also the conflicts within the said countries that ought to be resolved. One can look back as well into the territorial dispute over Sabah for example between Malaysia and the Philippines, or the expulsion of Singapore from the Federation of Malaysia, or the *konfrontasi* done by Indonesia, which all existed prior to the decision to form the ASEAN. Through consensus approach, and not being antagonistic in general, the ASEAN was instrumental in resolving conflicts and later convincing Vietnam, Cambodia, Laos, and Myanmar to join the organization, which consequently led to its expansion. This notwithstanding, the ASEAN has been criticized for being a talk shop and being a failure as a regional organization. It was criticized for allegedly mishandling the Asian Financial Crisis in 1997, the conflict in East Timor, and the military junta in Myanmar, among other things. Part of the criticism involves the ASEAN Way as a manner of avoiding problems and not solving them outright. Nonetheless, the ASEAN as a regional organization persists and able to maintain its cooperation mechanism with its member states dealing with issues when they are ready to do so.

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The topic of existing cooperative mechanisms is not limited to the member states. It also includes external partnerships and the external actions the respective organizations engage in. The ASEAN believes in being inclusive and outward-looking. It is receptive to constructive relations with other countries or regional organizations. At the same time, it is inclusive in its approach to regional endeavors should one want stability and security in the Southeast Asian region. It follows that the ASEAN is open to trade, economic links, and security dialogues with other countries and groups of countries and with other international organizations. Based on this, ASEAN was actually the pioneer of dialogue partnerships with numerous countries and the European Union (which nowadays has been elevated to an "enhanced partnership" that calls for stronger cooperation in different areas). Such dialogue partnerships revolved initially around economic issues but later on evolved to include political and security ones. Significantly, the dialogue partnerships paved way to so-called post ministerial conferences, which allow bilateral discussions to be made between ASEAN member states and partner countries every after ASEAN Summit. Likewise, ASEAN also established the ASEAN Regional Forum, East Asia Summit, and the ASEAN+3. Following the ASEAN Way of consensus-based decision-making, the ASEAN Regional Forum provides the venue for political and security talks while the latter mentioned two forums/groupings focus on fostering cooperation between ASEAN and its neighbors.

Underlying the foregoing processes is the use of dialogues in fostering cooperation in and on behalf of the ASEAN member states. To a certain extent, the value of ASEAN as a normative power could be highlighted because it has been instrumental in sharing the advantages of a consensus approach as regards certain issues and problems that ought to be addressed. In fact, it was through the ASEAN that other non-ASEAN countries acquiesced to the Treaty of Amity and Cooperation, which among other things disavows the use of weapons or violence in the region. While treaties or agreements may not automatically result from these dialogues or discussions between ASEAN, its member states, and external partners, it could still end in undertakings between countries, or between ASEAN, its member states, and other countries or regional organizations. The ARF is a good example of the same, which includes influential countries such the United States and EU member states. Certain problems and issues could be raised during meetings of the same without being adversarial and antagonistic with each other. Further, there is the avenue for more understanding among each other without necessarily being controversial.

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The EU, on the other hand, is equally engaged in external relations. Admittedly, concluding agreements and arrangements with other countries and organizations form a big chunk of the organization's dealings. In light of this, the external action the EU partakes in illustrates the range of ambitious, global roles for the EU, including increasing its global clout and influence. Simultaneously, the EU promotes through its external actions the ideals and values it holds dearly, such as those involving peace and security, democracy and human rights, and aid to less privileged countries, defending the social model, establishing its position in world markets, preventing environmental damage, and ensure sustainable growth.

The normative power of the EU, which was earlier mentioned, is also apparent in its global politics. To illustrate, there are the numerous developmental programs it endeavors on. Another example is much closer to home: the European Neighborhood Policy, wherein the EU and its neighbor-partners agree on action plans grounded on incentives, which more or less caters to the EU standards and values within the socio-, economic, and political planes. This common observation notwithstanding, it was mentioned in previous chapters that not all analysts however buy into the idea of the EU as solely a normative power. They believe that the EU does not act so benignly all-time but also as a "soft imperialism power": the emphasis on democratization projects, strategies for "new abroad" are seen as examples of the EU's hegemonic power driven by both normative and strategic interests such as the need for stability. The same examples cited earlier equally apply: a look into the historical development of the ENP, for example, was initiated at the first place to secure the EU's borders, believing that what happens with its neighbors might spill over to its affairs. The provisions of the ENP were fashioned more or less to cater to EU's stability and not only to influence the Union's neighbors to internalize EU values and policies.

If these observations are truly accurate, then it would be reflective of the influence the historical development of the EU has. "Soft imperialism power" would be toned down version of what the Roman Empire espoused and the colonizers which came after in during the early modern era. One could then see how the EU and its member states are convinced of their own truths and how the same should be assimilated elsewhere. Moreover, it becomes doubtful of true underlying intentions behind its endeavors.

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C. Approach to Regional Security and International Cooperation

The European integration project has been since its inception a security project, with its key output being a powerful security community. The EU slowly eased towards the nomenclature of "security policy", which focuses on mechanisms for ensuring security both among its member states and between them and the wider world, and influences thereafter the "fluctuating balance between the EU's position as consumer and producer of security."

The EU is unique as regards how security and defense policy is handled given that the EU commits itself in its external action to "effective multilateralism" and prevention as a means of conflict management. Accordingly, the EU deepened and broadened the reach of its foreign and security policy, but it likewise adheres to a more comprehensive concept of security. The EU is equally devoted to it vis-à-vis the "area of freedom, security, and justice". During the period involving the 11 September 2001 attacks in the United States, one could see the overlapping or interconnectedness between criminal law policies and security and foreign policy in the EU. While not necessarily following the steps of the United States in handling the matter of terrorism, etc., the EU had the realization that the success of one area of policy is enhanced or determined by the other. In connection therewith, the EU has enacted a substantial number of measures, including, if not particularly, on police and judicial cooperation in criminal matters.

Compared to the EU, the ASEAN is more of a regional security partnership. It may be envisioned to be a security community at its establishment but it was not within the penumbra of a traditional security community. Instead, the ASEAN illustrates an arrangement created by a majority of states in the region and by extraregional powers, who act as partners in upholding plurality of means to manage regional security. What does not make it a traditional security community is its realization 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. Thus, one could notice an encouragement within the ASEAN for capacity-building on a member state level. Strength among the member states would translate to strength of he organization.

Further, the ASEAN organization's view of regional security and stability is not myopic. Rather, it adheres to comprehensive security and takes into consideration at the outset non-traditional security threats as well.

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Although the ASEAN is still criticized due to the processes of dialogues and consensus among its member states and with its external partners, the ASEAN has normalized informal processes for regional issues to be resolved in non-violent ways. It has also provided a regional context within which peaceful negotiations could be conducted. As observed, there have been occasional tensions 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. Based thereon, the ASEAN espouses regional security on the basis of mutual confidence, consensus, and balance of interests.

Both organizations are open to the idea of forging agreements or arrangements as regards international cooperation in criminal matters. Internally, or among the ASEAN member states, the process towards the same might be more laborious considering that no one is taking a lead within said organization that would otherwise set the needed agenda, plans, roadmaps, etc. The EU conversely has the mechanism for making agendas and laying down roadmaps that ought to be followed by virtue of its supranational nature and the Commission fills in the role of initiating legislative output. The Parliament and the European Council could also make suggestions or ask for inputs regarding a particular point. Though having its own process, which could likewise be laborious, there would be a responsible body in the EU to stir the course of the organization. .

This obviously does not occur within the ASEAN, although sometimes they have agendas set for each meeting they organized at all levels of the organization. To illustrate, the ASEAN, since its establishment, had proposals laid down to establish an extradition treaty. However, more than 50 years have passed and yet there has been no extradition treaty. ASEAN member states are still in the drawing table for said treaty. While this is understandable given the nature of how decision-making is done within the ASEAN, the time consumed might be unproductive in addressing certain issues, especially in exigent or urgent circumstances. What ASEAN member states could do then is to address these issues individually or domestically, bilaterally, with the other country involved. In the alternative, the lack of concrete, detailed, or preemptive arrangements can enable ad hoc measures and flexibility among the ASEAN member states. For example, some ASEAN member states have the Agreement on Information Exchange and Establishment of Communication Procedures. Looking into the provisions herein however, the cooperation or sharing of databases for example, happens at as needed basis. To elucidate, there is no automatic

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sharing of passenger name records between the contracting states. Instead, it is indicated as "as needed" or "as appropriate".

So far, the EU criminal justice architecture is more complex, intensive, and sophisticated than what the ASEAN has. Noticeably, the EU member states historically took seriously the importance of fostering cross-border cooperation in criminal matters, regardless of whether it is police-to-police cooperation (which notably TREVI illustrates) or judicial cooperation. Their commitment was manifested through their participation in the different treaties in the Council of Europe on judicial cooperation. To recall, the Council of Europe (to which EU member states were also a part of) was the progenitor of landmark judicial cooperation agreements in Europe such as the 1959 European Convention on Extradition and the Convention on Mutual Legal Assistance. The Council of Europe has interestingly covered all aspects of international cooperation in criminal matters such as transfer of persons in custody to serve sentences, enforcement of sentences, and transfer of criminal proceedings.

It has now admittedly the expertise, the well-financed institutions, databases, and base agreements needed to fuel any criminal justice architecture it has built thus far. To illustrate, it has the benefits of the Schengen Agreement, the Prüm Convention for sharing and exchange of DNA databases, sharing of passenger name records, among many things, to make the investigation, prosecution, and prevention of (transnational) crime efficacious. The EU is also quick at its feet compared to the ASEAN given that there are the EU institutions tasked in addressing imperative issues. There are available networks and integration on a police, prosecutorial, and judicial level through the existence of the Europol, Eurojust, and the EJN that allows close coordination and cooperation among member states. In other words, the EU possesses the required architecture to operationalize and function while the ASEAN due to its intergovernmental nature depends on the capacities of its member states to succeed. Additionally, like the ASEAN the EU allows member states to conclude agreements or arrangements with each other on certain policy areas as long as the same is in line with the vision and ideals of the EU.

It must be mentioned though that cooperation in criminal matters in the EU was not instantly supranational in nature. In the beginning, cooperation and coordination in tackling issues surrounding criminal matters was done intergovernmentally. Predominantly decisions and policymaking were done by the member states in the Council of Europe. Thus, at one point in time, the EU was akin to the ASEAN in being intergovernmental as regards decision-making and crafting mechanisms among its

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member states for more effective crime control. To illustrate, the efforts made by the ASEAN member states against drug trafficking in the Southeast Asian region, which is one of, if not the most, serious transnational crime problem in the region, is reminiscent of the TREVI cooperation and the formative years of the Europol (Drug Monitoring Center).

Comparing this to the ASEAN, it must be mentioned at the outset that the ASEAN member states take transnational crime seriously. It understood that in Southeast Asia the problem of transnational crime is severe and pervasive. It consists of illicit drug trafficking, human trafficking, money laundering, transnational prostitution, piracy, arms smuggling, international economic crimes, cybercrime, and corruption. Three ASEAN member states (e.g. Myanmar, Laos, and Thailand) are major producers of narcotics and transit points for drugs sent to North America, Europe, and other parts of Asia. 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). Hence, there were efforts to combat drug trafficking and transnational crime since the inception of the ASEAN.

The ASEAN however adopted a different approach than the EU member states. The ASEAN member states were mainly into the establishment of expert group meetings or forums where experts and ministers could meet and exchange ideas and possible proposals, as well as declarations and soft law agreements, which arguably have little to no enforceability compared to a treaty obligation. In these declarations, the ASEAN member states would declare respectively their commitments to the cause and exert efforts to fight drug trafficking or transnational crime. More often than not, these declarations would include the salient points that ought to be addressed in the respective national systems of the member states. While member states would nevertheless act despite such non-formalistic arrangements, there is no enforcement mechanism that would ensure compliance. Rather, the nature of a gentlemen's agreement exists among the member states. Member states are preempted by the principle of non-intervention to call out each other on implementation flaws. If non-compliance indeed exists, the most another member state can do is to engage the other into dialogues bilaterally, and outside the ASEAN framework. This is allowed by enhanced interaction, especially if non-compliance or the problem touches on the regional security or stability, or otherwise having regional repercussions if not addressed.

The ASEAN likewise distinguishes itself from the EU with regard the judicial cooperation mechanisms. Aside from the ASEAN MLAT, within

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the ASEAN framework there were no other forms of judicial or legal cooperation like with the EU member states vis-à-vis the Council of Europe. There are no agreements on transfer of persons in custody to serve sentences, enforcement of sentences, or transfer of criminal proceedings to speak of.

Notwithstanding the different approaches taken in this regard, both regional organizations and their respective member states were not spared from complexities arising from transnational crime. In the ASEAN for example, globalization, technological advancement, greater mobility of people and resources through national borders has enabled transnational crime to become more pervasive, diversified, and organized. 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. This pervasiveness does not only occur in the Southeast Asian region alone but European states are likewise susceptible to these problems.

Moreover, both the ASEAN and the EU were besieged with problems related to terrorism. 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, while Europe also experienced terrorist attacks like in Madrid, Spain on March 2004. In response, the ASEAN member states 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). The ASEAN came up as well 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. It bears mentioning that the counterterrorism measures laid down in said Declaration were meant to increase the capacity of existing frameworks in combating transnational crime.

In addition, the ASEAN member states (Philippines, Malaysia, Indonesia, Cambodia, Brunei, and Thailand) 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 through the establishment of communication networks, logistical arrangements, combined

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training, and border controls, among others. Likewise, counter-terrorism measures were initiated in the ASEAN-led ARF including workshops on capacity building.

With the response given by the ASEAN, terrorism threw challenges towards its existing regional mechanisms. Despite the member states being agreeable to a united front, efforts have been 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. This notwithstanding, ASEAN equivocally rejected any identification of terrorism with religion and was clear in saying that "terrorist elements" refer to Islamic extremists.

As mentioned above, the EU also encountered its share of terrorist attacks. After the September 2001 attacks in the United States, Europe realized that it was not merely a target, or a contributor due to the growing number of radicalized, marginalized, and poorly integrated Muslims in European societies, but more importantly, it was a quintessential player that needed immediate response in countering and/or battling terrorism and transborder crime. As a way to respond, there was a change in many policy areas as well as new countermeasures and strategies to impede the increasing security threat of transnational crime and terrorism. In fact, the development of EU Criminal Law was at its high peak during 2001 to 2004. One could observe further the substantial momentum gained with the nexus between internal and external security resulting in merging of police systems, judicial systems, special forces, and external military action. There was a reorganization of the security apparatus at the local, national, and European level wherein one could see a closer cooperation between intelligence services, the police, and the military at the national and transatlantic levels.

Experience with domestic terrorism and other forms of "grassroots" terrorism (e.g. left-wing terrorism in Germany, national terrorism in France, Spain, and the United Kingdom) has prompted Europe to adopt an all-encompassing approach, which included in particular, an intensification in improving and/or innovating its law enforcement and judicial measures. Europe generally stayed on the path of a criminal justice model, which included among others, an action plan to fight terrorism. Framework Decisions on the European Arrest Warrant, Joint Investigation Teams, and Terrorism came at the advent of such action plans, which meant to expedite the extradition process among member states, allow the establishment of teams comprising law enforcement and judicial representatives jointly working in cross-border investigations involving two or more member

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states, and enumerate acts that could constitute terrorism, respectively. It can be said that these three framework decisions overall meant to stress the importance of harmonizing the legislation of serious crimes.

Then the terrorist attacks in Madrid occurred in March 2004 which showed a poor implementation of EU policies on a domestic level. Prior to this, the EU came up with the 2003 European Security Strategy but implementation on a domestic level was not impressive. Thereafter a Declaration on Combating Terrorism was made on 25 March 2004 that identifies implementation flaws that member states needed to address, such as police and judicial cooperation, as well as lists strategic objectives and the "Europanization" of the threat through a formal commitment of each member state to assist should another member state fall victim to a terrorist attack.

Subsequently, the European Commission was fulfilling its role as policy entrepreneur when it fielded months after the Declaration communications formulating policies on terrorism financing, infrastructure protection, and response management, all of which were within its competencies. Careful about the supranational recipes it was formulating and proposing, the Commission focused on increasing information exchange and enhancing coordination through different mechanisms. This occurred simultaneously with the acceptance of the European Council of the 2004 Hague Programme that called for approximation of substantive criminal law provisions, which should make it easier to apply the principle of mutual recognition of penal-judicial decisions, especially so in serious offense areas with an international dimension. At the same time, the European Council recognized the need or importance to improve international exchange of information about criminal prosecutions and to this end, introduced the "principle of availability of information", under which criminal prosecuting authorities of member states should be able to perform their duties unhindered, since all useful information would be universally accessible. Aside from this, one can witness institutional changes in general within the Union through either the creation of new offices or the revigorization of existing ones as regards counterterrorism measures.

In light of the foregoing, the difference in approaches is further highlighted. Furthermore, a few observations can be mentioned regarding to the pace by which the two regional organizations function:

When the EU entered into modified intergovernmentalism with regard criminal matters, specifically on judicial cooperation, through the Amsterdam Treaty, one could notice more aggressive endeavors to foster cooperation in criminal matters. Certain developments can be mentioned in

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this respect. First, there were the aspirations for an EU Area of Freedom, Security, and Justice. The EU was at one point described to be a "laboratory" for experimental criminal law policies. Second, there was the criminalization of certain offenses and the development of substantive criminal law on a regional level. As mentioned above, the peak was during the response of the EU against terrorism in the region. Third, there was the introduction of Framework Decisions (which later changed to Directives and Regulations during the Lisbon Treaty) that hastened policies and mechanisms vis-à-vis judicial cooperation in criminal matters, without necessarily requiring the consent of the member states. Fourth, there was the introduction of the principle of mutual recognition in criminal matters, which was grounded on mutual trust among the EU member states. An example of this is the European Arrrest Warrant, which as mentioned above was integral to counter-terrorism measures. Fifth, there was a simultaneous establishment or strengthening of EU institutions on a police, prosecutorial, and judicial levels such as the Europol, Eurojust, and EJN, that are all integral in the efficacious cooperation among member states in criminal matters. Taking the foregoing into account, the EU has been able to follow through in general its roadmaps and plans of actions as regards criminal matters resulting in the sophisticated architecture it has now.

In comparison, the developments in the ASEAN are less grand and far-reaching. It also appeared to be on a slower pace. The ASEAN did not meddle into the national policies and affairs of each member state notwithstanding the call for enhanced cooperative efforts and closer cooperation in tackling cross-border crime. They shared the view that it is important to address transnational issues to prevent negative consequences to the organization and the member states but formal cooperation mechanisms like in the EU can barely be found. Instead, there was the establishment for example of the ASEAN Ministers Meeting on Transnational Crime, which signals the securitization of transnational crime in the region. Moreover, there is no integration or close cooperation within the ASEAN framework vis-à-vis the police, prosecutorial, or judicial authorities. The ASEANAPOL may be the national police organization for the ASEAN but it is not within the ASEAN framework. Further, the ASEAN does not have the same kind of sophisticated database systems that the EU has started to promote, establish, and integrate in its criminal justice architecture.

Albeit the ASEAN member states within themselves did not have concretized formal treaties on cooperation in criminal matters, the ASEAN did not waste time and thereafter entered into joint declarations and/or

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agreements with other countries in efforts to combat transnational crime. Significantly, terrorism was designated by the ASEAN ministers as early as 1997 as a prevalent issue that needs to be addressed and after the 11 September 2001 attacks in the United States, the ASEAN member states engaged in cooperative measures that are not necessarily covered by treaty obligations. The ASEAN eventually came up with a Convention on Counter-Terrorism, ASEAN Convention against the Trafficking of Persons, ASEAN Mutual Legal Assistance Treaty, among other declarations and agreements.

In comparison to the EU, it would be easy to dismiss the ASEAN as having no efforts within the organization and among its member states to have a roadmap or plan of action it can stick with and implement. It would also be easy to criticize the ASEAN for not following through on its political will and commitments. Measuring its achievements and developments with the policies of the EU could lead someone to believe that the ASEAN is a failure in its efforts. However, these criticisms arise from the lack of understanding the ASEAN and the mechanisms it has. It cannot be measured with parameters of what it is not or what it is not trying to be. As discussed earlier, the ASEAN is a different organization than the EU. It does not likewise aspire to be the EU as a supranational authority.

Having mentioned this, the ASEAN also came up with plans of action to combat terrorism and transnational crime for example. Commitments were also made with other countries for joint efforts to address these problems. Admittedly however, developments in the regional level work at a slower pace than in the EU. This has been especially the case when judicial cooperation and criminal matters in general fell under the supranational authority of the EU. The EU has designated bodies that handle legislative policy and there is a good working mechanism towards decision and policymaking. Hence, the EU has been able to establish database systems, measures such as the European Arrest Warrant and the European Investigation Order, and other infrastructures helpful to cooperation in criminal matters.

Notwithstanding the seemingly faster pace by which the EU works in its decisions and policymaking in relation to criminal matters, the EU was not immune to criticisms and challenges. To elucidate, one may notice that due to the urgent need to respond to the terrorist attacks and quell heightened emotions of its citizens, European policy makers used ready-made recipes in the Tampere Programme to address issues (i.e. establishment of structures such as Eurojust, Police Chiefs Task Force, and the

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European Police College, and strengthening of the existing Europol). Inevitably, this leads to the notion that the policy changes being introduced were not from a careful study of the threat but instead, were only through a "reactive borrowing" from a list the EU policy makers thought sufficient to address the emerging issues.

Further, implementation on a regional level does not necessarily translate to smooth and effective implementation on a member state level. While the EU policymakers were busy in crafting regional policies, it dawned on them after the Madrid attacks in 2004 that there has been dismal implementation on a member state level. There were many implementation flaws that needed to be addressed. And although implementation flaws are better avoided or handled with the supranational authority over criminal matters through approximation, there could still be differences in degree and manner of implementation. In connection to this, implementation problems could also arise due to incompatibility with the fundamental principles and norms of the member state. This was for example experienced when the European Arrest Warrant was first introduced. The idea behind it was initially for "automatic execution" without further inquiry on the basis of the principle of mutual recognition in criminal matters. It soon became apparent that this cannot be the case due to constitutional principles some member states must adhere to, such as the non-surrender or extradition of own nationals by Germany. Thus, on the EU level adjustments were made to adhere to certain intricacies.

Taking the above discussion into account, the ASEAN and the EU as regards criminal law policy and/or international cooperation in criminal matters more or less are on the same page. Any difference lies in approach and execution. Differences in approach however did not mean that one would be in a better situation than the other. Both the ASEAN and the EU encountered challenges and difficulties in relation to their respective responses to terrorism and transnational crime.

D. Mutual Legal Assistance in Criminal Matters

Both the ASEAN and the EU have mutual legal assistance agreements among its member states. As mentioned in the previous chapters, the ASEAN would have the 2004 Mutual Legal Assistance Treaty whilst the EU would have the European Investigative Order among its member states.

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As to how these came about, the EIO was not the first EU instrument tackling mutual legal assistance. Its member states started with the 1959 Council of Europe MLA Convention, which is the mother instrument on mutual legal assistance in criminal matters among European states. There are also the mutual legal assistance provisions one can find in the Convention Implementing the Schengen Agreement. Then there was the 2000 MLA Convention, which introduced new features that aim to make the MLA system among member states more efficient. Thereafter, the principle of mutual recognition based on mutual trust was applied equally to criminal law policy. There was likewise a shift from how the cooperation mechanism is based on treaty to being based on a directive that ought to be transposed domestically by the member states. A product of this in relation to MLA would be the European Evidence Warrant, which would then apply to evidence already collected and readily available to be transmitted to another member state. This became however moot and academic by virtue of the applicability of the EIO later on.

Compared to the EU, the ASEAN only has its 2004 MLA treaty as the singular ASEAN agreement tackling mutual legal assistance. It is not a directive or anything similar imposed by the ASEAN on its member states. Rather, it is an international agreement agreed upon by the member states. Further, there was no historical development wherein there were older treaties in existence. Interestingly, its member states would exercise reciprocity and provide mutual legal assistance without basis on treaty.

It can be said that the respective agreements of the ASEAN and the EU would have similar structures, maintaining the usual elements that could be found in a MLA arrangement or treaty. The difference instead lies on the applicability of the principle of mutual recognition in the EU instrument, the importance of the respective values and ideals of each organization, the applicability of other instruments and arrangements within the respective organizations, and the consideration of other issues such as technological advancements. These would be apparent in the substantive and procedural provisions of the respective mutual legal assistance arrangements.

For the substantive provisions, there are four (4) circumstances which were looked into in this present study. First, there is the applicability of assistance. As mentioned above, the EIO is based on a directive while the ASEAN MLAT is based on treaty. Assistance based on the EIO lies more on the principle of mutual recognition based on mutual trust, and the overall principle of sincere cooperation that member states need to abide with. Having said this, both the ASEAN and the EU enjoin their

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respective member states to provide the widest possible assistance to each other. Although the ASEAN instrument does not specifically state, both the EIO and the said ASEAN MLAT applies indiscriminately to both natural and legal persons. As regards discrepancies that could arise due to differences on liabilities of legal persons, for example, the ASEAN and the EU accommodate open communication among the relevant member states and its authorities to address the issue.

At this point, this study notes that it is easier to attribute the existence of open communication channels among authorities to the ASEAN than the EU due to the existence of the ASEAN Way notwithstanding the shift towards formalistic agreements such as those involving criminal matters such as the ASEAN MLAT. Interviews and personal communication with authorities from the ASEAN member states give the sense that the openness, courtesy, and respect prevalent in the ASEAN organizational culture continuously exist and is instrumental in the carrying out of tasks and responsibilities. It is revealed however that the same kind of congeniality and open communication generally exists as well for EU authorities. In general, the EU is driven by its formalistic and legalistic way of operations. There is in the organization itself a well built and oiled bureaucratic structure necessitated by its supranational nature.

This bureaucratic nature notwithstanding, there are snippets of the consensus approach scattered across its institutions and the implementation of its policies and legal framework, such as the case of international cooperation in criminal matters herein. Backtracking a bit, the consensus approach has found its way for example in the interactions between the European Parliament, European Commission, and the European Council vis-à-vis the EU ordinary legislative procedure. While not exactly falling within the four corners of how the ASEAN Way works, the rudiments of consensus-building and its benefits are still there. As regards the mechanism for regional cooperation in criminal matters, such as the EIO, despite the very formalistic requirement of filling up a pro-forma EIO, for example, practitioners are not prejudiced to contact the receiving end of its request and consult if needed. Consensus is likewise encouraged for certain issues that may be met in the EIO framework. Significantly, aspects of this open communication and networking has been institutionalized in the EU already. The EJN, Eurojust, and the EUROPOL are some of the components of the EU Criminal Justice Architecture that allows this kind of connectivity and networking to flourish. And attested to by some practitioners interviewed for this study, liaison officers and contact persons

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make it possible to effectuate needed requests and/or EIO's and apply the needed assistance to the requesting member state.

Another aspect that can be mentioned as regards applicability of assistance is on territorial application. The EIO does not apply to all EU member states such as Denmark and Ireland. The EU Criminal Justice Architecture is unique in this sense wherein some member states can opt out of a particular measure and should they decide to apply said measure, like the UK vis-à-vis the EIO, they ought to manifest their intention to opt in.

In relation to this, there is the pending issue nowadays with the EU due to the exit of the United Kingdom, which opted in earlier to the EIO and other arrangements constituting the EU Criminal Justice Architecture. Albeit agreement has been reached, there is still uncertainty given the change of status of the relationship between the UK and the EU.

In comparison, the territorial application of the ASEAN MLAT applies to all member states of the ASEAN, which are signatories to the said treaty. The member states were all on board the MLA treaty. More recently, the ASEAN MLAT was made into a true regional instrument that allows contracting parties that are not ASEAN member states. While many expressed their intention to accede, the contracting parties of the ASEAN MLAT at the date of this writing has still been limited to the ASEAN member states.

Second, one could look into the types of assistance the respective MLA instruments cover. Both would apply to coercive and non-coercive measures alike. The EIO would not however apply to joint investigative teams and cross-border surveillance, for example, as these measures are covered by different EU instruments. The ASEAN MLAT, on the other hand, provides a specific list of measures, with a catch-all provision that allows other measures to be entertained, depending on what is agreed upon by the relevant member states. It follows that joint investigative teams might be possible, for example, under the ASEAN context, should the same be agreed upon by the member states involved. Further, there is the possibility of exchange of online evidence on the basis of said catch-all provision, albeit specific provisions on the same are not provided for in the ASEAN MLAT.

Third, there is the compatibility of their respective MLA instruments with other arrangements. For the EU, one could look into the overall criminal justice architecture it has developed throughout the years. There is also possible resort to informal forms of cooperation using the networks that could be provided by the Eurojust, Europol, and the EJN, for example. As regards the ASEAN, this could mainly contemplate as well exist-

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ing arrangements such as using the Agreement on Information Exchange and Establishment of Communication Procedures as another legal basis. There is also the existence of formal and informal channels of cooperation among ASEAN member states. The ASEANAPOL, albeit independent of the organization, is vastly used and available in establishing contacts as per informal cooperation. In respect to this comparison, the importance of using both forms of informal and formal cooperation in the criminal justice process cannot be underestimated. Hence, one can look into the integration and cooperation models occurring in the EU not only on a judicial cooperation level but also in the infrastructures on the police, prosecutorial, and judicial levels.

Fourth, the ASEAN and the EU both have a baseline of principles, conditions, and exceptions applicable in their respective instruments. Firstly, one could cite the sufficiency of evidence requirement both have in respect of the investigative measures that could be covered by their respective instruments. This requirement is best understood by stating that in the event of more intrusive measures, more information or relevance of the investigative measure should be provided for. This is understandable given the harder scrutiny domestic courts would require as regards coercive measures. Thus, this requirement is meant to easier facilitate the execution of an EIO or MLA request, respectively.

Another requirement apparent in both the ASEAN and EU instruments is on dual criminality. Both provide the same as a ground to refuse a request. However, the EU differentiates itself by qualifying said requirement. While it would apply in general, it would not apply to a list of 32 offenses under certain conditions. Dual criminality is one of the requirements existing with speciality and reciprocity in traditional mutual legal assistance instruments. Although the ASEAN MLAT retains the same in its purest form, the difference in the EU context can be attributed to the principle of mutual recognition.

The prohibition on double jeopardy or the application of the principle on *ne bis in idem* applies in both the ASEAN and EU instruments as a mandatory ground for refusal. There is no congruence on how the concepts are defined and applied however. As regards the ASEAN, there is the prohibition of double jeopardy under the ASEAN MLAT and it is a mandatory ground to refuse a request: 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

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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 in application (although limited between the requesting and requested states) 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."

Considering the foregoing, the definition of the prohibition in the ASEAN Human Rights Declaration is made dependent on domestic law and procedure. There is also no ASEAN counterpart to any European Court of Human Rights or European Court of Justice that could further provide clarification and definition to the matter. Thus, there would be reliance on the application of the member states and how they would understand the concept. This further illustrates a quasi-formality, wherein member states can determine by themselves a policy, a definition, or a procedure, albeit the general details or the needed commitment may be provided in the regional instrument.

Moreover, the transnational element being espoused in the ASEAN MLAT provision is not consistent with the much later ASEAN Human Rights Declaration. There is seemingly no harmonization between two similar ASEAN instruments. Furthermore, the transnational element introduced in the ASEAN MLAT provision restricts itself between the requesting and requested state. Yet, there could be instances when the conviction, acquittal, pardon, or service of punishment occurring in another ASEAN member state or third state. If one follows the strict wording of the ASEAN MLAT, then the ground to refuse would not apply. However, if one is true to the spirit of the prohibition and the transnational element the ASEAN MLAT provision imbibes, then it would be proper for the MLA request to be denied should the conviction, acquittal, pardon, or service of punishment occurred in another ASEAN member state or third state.

The foregoing observations about the ASEAN context notwithstanding, this does not mean that the EU has perfectly determined and settled the principle of *ne bis in idem*. At the outset, the prohibition on double jeopardy is provided for in the European Convention on Human Rights and later on, in the Charter of Fundamental Rights. Notably, the existence of these instruments maybe similar to the ASEAN instrument on human rights but unlike ASEAN, the EU has an adjudicatory body.

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Before, the principle's application only had an internal effect but there had been efforts to give it a transnational effect in light of the formation of an area of freedom, security, and justice as well as the principle of free movement of persons. Efforts towards the same include Article 54 of the CISA, which includes an enforcement element. This enforcement element in turn has been declared by the CJEU as compatible with the principle and should be therefore applied. Despite this, there are still questions on the coverage and range of the principle due to domestic differences in application. It does not help that the EIO does not provide an exact definition compared to the European Arrest Warrant, which more or less adopts the CISA definition of the principle. The lack of detailed provision in the DEIO notwithstanding, it was suggested earlier that it is proper to follow the *ne bis in idem* principle as found in the CJEU judgment and the European Arrest Warrant. In the alternative, one could resort to avoiding *ne bis in idem* situations at the outset. The Eurojust in line with this issued guidelines in handling conflicts of jurisdiction, which can be used in preempting or avoiding problems that may arise due to the *ne bis in idem* principle.

One of the principles, conditions, and exceptions likewise tackled in mutual legal assistance and EIO in the ASEAN and the EU respectively, is the substantive consideration of human rights. In this respect, the use of human rights considerations exist as grounds for refusal can be highlighted. The prohibition on double jeopardy is included herein as well as one's right to refuse on the basis of substantial grounds to believe that obligations under Article 6 TEU shall be violated. This provision clarifies that member states can deny recognition or execution of an EIO on the basis of its human rights obligations as provided for in the ECHR, CFR, and the TEU. Interestingly, this is an offshoot of a question raised in a case involving the EAW: on whether human rights obligations of a member state could be used as a ground to refuse recognition or execution. With the CJEU clarifying the matter, the said clarification was transposed in respect to the EIO.

These human rights obligations could involve the principle of non-discrimination, right to life, prohibition of torture or cruel, inhumane, or degrading punishment or treatment, which could be triggered in EIO situations. Obligations as regards the right to life and the prohibition of torture and cruel, inhumane, or degrading punishment or treatment have extraterritorial application, wherein EU member states are not allowed to extradite, remove, or expel any person to another state where there is serious risk of death penalty, torture, or cruel, inhumane, degrading

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punishment or treatment. Within the EU the issue of death penalty would not be an issue but on a broader context this extraterritorial application requires that either the member state ought to demand an undertaking that the death penalty shall not be imposed or deny any request altogether.

On the contrary, the ASEAN MLAT may provide that certain rights come into play with respect to the substantive provisions of valid and mandatory grounds for refusal (i.e. double jeopardy, non-discrimination, attendance of person in requesting state), but it does not have the same ground for refusal with regard human rights obligations akin to the EIO instrument. Thus, it becomes questionable whether an ASEAN member state can raise extraterritorial application of its human right obligations to deny a MLA request. Again, if one follows the strict letter of the law, then the limited grounds for refusal listed in the ASEAN MLAT must be enforced to the exclusion of other existing human rights obligations. This would also be consistent to the prior position of the ASEAN vis-à-vis Myanmar's membership notwithstanding its past political instability and alleged human rights violations: the ASEAN believed these matters are domestic in nature and should not be interfered with in accordance with the principle of non-intervention. Alternatively, an option in the ASEAN MLAT would be to use national interest as a ground to refuse a MLA request, which is generally subjective.

Another principle or condition involved in mutual legal assistance is reciprocity, which forms the triumvirate of principles in mutual legal assistance together with speciality and dual criminality. Accordingly, the ASEAN MLAT retains the importance of reciprocity. Substantive and procedural-wise, the principle exists. There is the exercise of executive discretion through the central authorities whilst the grounds for refusal illustrate the existence of the procedural aspect of reciprocity.

On the other hand, the principle of mutual recognition might seem to have congruence with reciprocity but in truth, it abrogates the principle one way or another. As mentioned earlier, there is the taking away of executive discretion by allowing direct contacts to be made. Procedural-wise, the grounds for refusal have been minimized with respect to the EIO and even if there might be questions as to the necessity, proportionality, or adequacy of an EIO, it is to be determined by the issuing authority itself. The executing authority does not have the ground to refuse execution of the EIO on this ground, based on the DEIO.

As mentioned, speciality or use limitation is one of the core principles applied to mutual legal assistance. The ASEAN MLAT specifically requires this and concomitantly, requires the return of evidence upon the cessation

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of proceedings the requested evidence or information was requested for. The DEIO does not explicitly provide this, and this certainly raised the question on whether it still applies within the context of the principle of mutual recognition. However, should one look into the specific provisions of the DEIO one could observe that there is a use limitation provided in the EU framework. Furthermore, the EU framework has data protection considerations, wherein certain parameters and requirements ought to be followed in relation to the processing of personal data and information for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. Generally, personal data shall be processed for the purpose for which it was collected and it ought to be ensured that processing shall be for a lawful purpose. Accordingly, transfer of personal data and information has concomitant requisites and parameters to be followed. Adequate standards or conditions ought to be satisfied most especially if information is to be transferred to non-EU member states and international organizations.

Another substantive principle that finds application in the ASEAN MLAT which differs with the EIO is the existence of national interest matters and specific offenses. National interests play a significant role in denying execution of a MLA request under the ASEAN MLAT. Specifically, the request must be denied if any of the following exist: "the provision of the assistance would affect the sovereignty, security, public order, public interest or essential interests of the requested member state;" "the provision of the assistance could prejudice a criminal matter in the requested member state;" or "the provision of the assistance would require steps to be taken that would be contrary to the laws of the requested member state." As to what constitutes national interest, etc., it would seem that the requested state does not need to explain itself. Further, there is no provision detailing what the same means.

At the same time, the ASEAN MLAT still maintains the political and military offenses exception, albeit it limits the same to specific circumstances. On the contrary, the EIO foregoes the political and military offenses exception. This does not mean however that national interests do not provide grounds to refuse any longer. There is a right to refuse execution if on grounds of territoriality, national interests, privilege, etc. Furthermore, an executing authority is given the right to postpone execution if the same would compromise an existing criminal matter or the evidence and information required is being used for a pending matter.

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Anent the procedural provisions important to MLA or the EIO, three main observations can be made as regards designation of central authorities or the type of cooperation the ASEAN and the EU respectively apply, preparation of requests, and execution of requests.

First, in respect of cooperation mechanism, there is a stark difference between the two organizations on how they envision the cooperation between authorities in their respective MLA instruments. The EU uses horizontal cooperation that allows for direct contacts among authorities whilst the ASEAN still retains the vertical form of cooperation wherein central authorities are involved. In this regard, direct contacts expedite theoretically the processing and executing of requests. There could be issues however in determining to which executing authority a request needs to be sent. This is where open communication as well as the relevant role the EJN and contacts such as liaison magistrates could come into play.

Furthermore, the horizontal form of cooperation illustrates an application of the principle of mutual recognition based on mutual trust. It depoliticizes the mutual legal assistance process by taking away executive discretion and mainly entrusting judicial authorities to decide on the recognition or execution of an EIO. This consequently affects the substantive aspect of reciprocity, which, as discussed in the earlier chapters, is being considered abrogated partially, if not wholly, by the principle of mutual recognition.

In comparison, the retention of vertical cooperation through central authorities retain the needed central expertise and control from the member states. Reciprocity is something the ASEAN holds in high value and thus, the political and executive discretion remains. This is especially highlighted by stating the use of diplomatic channels in the ASEAN MLAT to transmit and send MLA requests. Moreover, the retention of central authorities optimizes the control and monitoring of international cooperation requests. It makes it easier to know where one needs to go to as regards information on international cooperation, and more or less the authorities would have the needed knowledge on the same.

Second, as regards preparation of requests, the EIO innovates through the introduction of a prescribed form to be complied with by the member states. There is a pro-forma EIO whilst the ASEAN MLAT would only provide what is necessarily included in a particular request. The prescribed EIO may affect flexibility but issues that could arise from the same are dealt with on a practitioner-level, the same with the ASEAN.

As to in whose instance an EIO or MLA request can be issued, one of the unique selling points of the EIO was that it supposedly allows

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participation from the defense vis-à-vis the EIO. Accordingly, the DEIO provides that the defendant himself can ask for the issuance of an EIO on its behalf but the same could be problematic because in inquisitorial proceedings, the participation of the defense is different as it could be in an adversarial one. Included in assessing this issue is the difficulty in the first place for the defense to know whether an EIO has been issued or not as the same is normally resulted in during investigations and prior to the case being filed in court. At most, in inquisitorial proceedings, the defense would only be apprised during the court proceedings already.

Contrariwise, the ASEAN MLAT is prosecution-centric. It is a law enforcement or prosecutorial tool to the exclusion of any participation from the defense to request that a MLA request be issued on its behalf. In fact, the ASEAN MLAT provisions would provide that nothing in said treaty would give any rights to the suspect or accused person subject of the MLAT to intrude in the execution of the same. It can be therefore said that the ASEAN instrument is centered on the government-to-government interaction and cooperation with lesser consideration of defense rights that can be affected by the same, albeit there are provisions handling general human rights considerations.

Third, as to the execution of a MLA request or EIO, there would be specific procedures provided for specific investigative measures under both the ASEAN and EU context. As regards the applicable law, both the ASEAN and EU frameworks can accommodate the procedures and formalities provided by the requesting or issuing state that ought to be followed in the investigative measure to be executed or implemented. As long as this would not be contrary to fundamental principles of the requested or executing state, or in violation of its domestic laws, said requested procedures shall be followed. On the part of the EU, this solution was thought to address issues arising from admissibility of evidence and human rights concerns. In addition to this, both the ASEAN and EU frameworks introduced the possibility of including in an EIO or MLA request for authorities of the requesting or issuing state to be present during the investigative measure to be implemented or executed. Furthermore, the EU framework provides the safeguard of allowing the executing state to suggest another investigative measure should the one requested is not allowed or provided for in the domestic legal system of the executing state, or in cases the same would violate the fundamental principles and laws. This is nonetheless subject to exceptions, wherein the EU framework enumerates instances wherein an investigative measure ought to be available in the member states such as regards the hearing of a witness, expert, victim, suspected or

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accused person or third party in the territory of the executing State, for example (five instances in total are provided).

At this point it must be mentioned however that in comparing the provisions of both the ASEAN and EU in their respective frameworks, the general rule provided in the ASEAN MLAT is more of a *locus regit actum* arrangement because generally, the request ought to be executed in accordance with the laws and procedures of the requested state. Any accommodation for a *forum regit actum* arrangement is the exception because the ASEAN MLAT then allows the requesting state to provide the formalities needed to be taken into account during execution, although this should not be contrary to the domestic laws of the requested state. Comparing this to the DEIO, it goes straight away to the general rule of a *forum regit actum* arrangement. Notwithstanding this difference in phrasing, both the ASEAN and EU frameworks would have the same net effect: formalities and procedures provided by the requesting or issuing state can be accommodated as long as not in contradiction or violation of domestic laws of the requested or executing state. In cases of violation, *lex loci* would prevail.

With regard the applicability of procedural rights, both the ASEAN MLAT and the DEIO integrated in their provisions procedural rights vis-à-vis the rights of an accused, suspect, or affected person. Specific procedures for specific investigative measures likewise take these rights into account. Additionally, there is the integration of the directives of procedural rights in the DEIO, which intends to approximate more or less procedural rights in criminal proceedings across the EU. The integration of the directives on procedural rights could still be admittedly problematic given the existence of different types of criminal proceedings among the member states. On the other hand, the ASEAN MLAT integrates procedural rights in its provisions albeit the same procedural rights are not present in the ASEAN Human Rights Declaration. This is admittedly a weird phenomenon considering that the ASEAN Human Rights Declaration was enacted after the ASEAN MLAT. Thus, the later instrument should have reflected already the procedural rights being respected among the member states.

Concomitant to the issue of procedural rights is the question on whether the suspected or accused person could intervene in the issuance and/or execution of the EIO or MLA request. The DEIO mostly provide provisions that require remedies to be taken up in the issuing state and not the executing state. In line with this, member states must ensure that within their own national legal orders, legal remedies equivalent to those available for similar domestic cases shall be provided for in the investigative

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measures to be indicated in the EIO. While substantive issues surrounding the EIO may only be challenged in the issuing state, the executing state must ensure that fundamental rights are respected, e.g. possibility to refuse execution on substantial grounds that it could cause infringements of these rights, or the possibility to consult the issuing authority on doubts about the proportionality of the investigative measures included in the EIO.

This same kind of remedy is not provided in the ASEAN MLAT. As earlier noted, the ASEAN framework is prosecutor-centric and more focused on a government-to-government exchange. The ASEAN MLAT is deplete of any provisions concerning judicial relief(s) that a suspect, accused person, or any other affected person.

One of the important factors that affect the execution of requests would be the time limits applicable. This is one of the improvements introduced by the EIO, which does not exist with the ASEAN MLAT. At most, the widest possible assistance exercised by ASEAN member states can be cited as an applicable provision, as well as the need for practitioners to act "promptly". Although the time limits the EIO provides are not mandatory, the time limits provide guidelines as to the speediness authorities ought to take when accepting requests. In connection to this, there are requirements to confirm receipt of an EIO. This gives a clear confirmation to issuing authorities that receipt was in order and could thus count the number of days an EIO has remained with an executing authority. In light of this, there is possible resort to the Eurojust should there be unreasonable delays or non-response on EIOs. While not an adjudicatory body, the Eurojust is authorized to help in the resolution of issues and/or disputes as regards the execution of an EIO. Conversely, the ASEAN does not have the same kind of body a member state can run to in case of delays. Hence, they would be limited in settling the issue among themselves.

To conclude, while the basic elements constituting a MLA system exist for both the ASEAN and the EU, the instruments that apply are different in origin and nomenclature. Moreover, there are differences in certain aspects due to differences in treatments by the ASEAN and the EU. Salient differences as regards substantive provisions include the horizontal vs. vertical cooperation practiced by the respective organizations, the application of the principle of mutual recognition, the right to participate by the defense rights, and the different human rights obligations member states ought to comply with. With respect to the procedural provisions, salient differences could be found with the prescribed forms of the EIO and the time limits member states are encouraged to abide with.

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II. Comparing the Member State Frameworks with Each Other

After the evaluation of the regional frameworks themselves, the member state frameworks shall now be entered into the equation, in particular knowing how the respective member state frameworks are able to translate or apply to their respective domestic orders what the regional framework has provided. This is constituted of three steps, all in furtherance of the research question as to how mutual legal assistance in criminal matters can be developed between and within the ASEAN and the EU.

First, there is the question on transposition of law in the member states. This includes the law in the books and the law in practice. It is important to know this because it can provide an idea as to how member states are willing and able to implement in their own domestic jurisdictions agreements or arrangements concluded in the regional level. By seeing how strong compliance is, one would gain insights as to how this can translate to strengthening cooperation further not only within the member states themselves but moreover, between the regional frameworks they are a part of.

Second, there is the question of efficiency. By identifying efficiency concerns, solutions could be thought of to address the problems.

Third, there is the protection of human rights. This would be important given that both the ASEAN and the EU endeavors to uphold the promotion and protection of human rights. While this rhetoric exists on a regional level, it is interesting to know how the same is considered on a domestic level and how committed member states are to this endeavor.

A. Transposition of law in member states including law in practice

In respect to the transposition of the regional instrument or its implementation in the member states, including the law in practice, ten insights could be gained as follows:

First, the Philippines, Malaysia, United Kingdom, and Germany have been generally faithful to their respective regional instruments covering mutual legal assistance and the EIO. Their adoption of the regional instruments, including its implementation into their respective domestic jurisdictions, is in line with the objective of the respective instruments in fostering international cooperation in criminal matters. Substantive and procedural provisions remain true in general to the intent and provisions of the respective regional instruments, although there might be instances

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that deviations or additional requirements could be cited that were included in the domestic law.

It must be mentioned at the outset that despite the existence of the ASEAN MLAT, the Philippines does not have domestic legislation dedicated to mutual legal assistance in criminal matters. This highlights somehow the lack of enforcement mechanism on the part of the ASEAN to elicit compliance from its member states to enact the necessary legislation to put into fruition what has been agreed upon on a regional level. Notwithstanding this, the Philippines has proven itself as an agreeable and cooperative partner in mutual legal assistance in the region and with its fellow ASEAN member states. The lack of domestic legislation has not stopped the member state from providing the widest possible measure of mutual legal assistance with the ASEAN MLAT being enough domestic basis to provide the same. As a general rule, it would not deny requests it receives from fellow member states. The said member state uses the ASEAN MLAT together with applicable provisions of its criminal law and procedure to execute requests in the fastest possible time. Further, it ensures that execution is made promptly although issues of delay are normally met if the investigative measure requires court approval to do so.

Despite the aforementioned, one could think of issues that could arise out of the lack of domestic legislation. These include not knowing which procedures or provisions are needed to take into account in making a request, including what would be prohibited, etc. There is no readily available information on the same and the regional agreement could only provide to a certain extent. Details are normally left out to the discretion of the member states. And although the ASEAN member state authorities would have open channels of communication with each other, allowing for preliminary consultations or clarifications, no less than the Philippine authorities themselves have been candid about the benefits of having domestic legislation. There have been proposals and draft legislation on international cooperation in criminal matters but a law has yet to be passed.

On the other hand, Malaysia has the domestic legislation tackling international cooperation in criminal matters, including legislation on mutual legal assistance in criminal matters. Under said law, the Malaysian government confers special status to so-called preferred foreign states to which mutual legal assistance in criminal matters and to which the provisions of the law would apply. In the event the requesting state is not a preferred foreign state, special accommodation could still be given but subject to the discretion of the relevant authorities.

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With this being mentioned, the domestic law on mutual legal assistance is arguably complete and equivocal in its provisions. Compared to the Philippines wherein one needs to navigate through different substantial and procedural laws to know which is applicable, the Malaysian law provides the needed guidance as to how MLA should proceed.

The Malaysian law would provide that the widest possible assistance shall be provided for criminal matters and ancillary criminal matters, which include situations of needed freezing, confiscation, etc. of properties in relation to a crime. This notwithstanding, not all criminal matters shall be allowed mutual legal assistance because Malaysia only allows the same for serious offenses and serious foreign offenses. This means in general that the offense must be punishable by at least one year. In relation to this, the MLA request could be denied for reasons of "insufficient importance" or "insufficient relevance to the investigation". Even if this seems to delimit the assistance that Malaysia gives to its fellow ASEAN member states or other states requesting its assistance, it is understandable because it avoids fishing expeditions and the allotment of resources that could have been allotted elsewhere.

Anent the member state frameworks of the EU such as in Germany and the United Kingdom, the sword of Damocles finally dropped on United Kingdom as regards the issue of Brexit due to the now applicable Trade and Cooperation Agreement as well as the amendments made domestically to encapsulate the new relationship between the UK and the EU. It is yet to be seen though what the actual future impact this new relationship brings to UK cooperation in criminal matters with other EU member states. Interestingly, in considering what would happen with the participation of the UK in the various parts of the EU criminal justice architecture, some opined that ideally the cooperation should continue, etc. and in practice, the learnings of the EIO and the application of the principle of mutual recognition should continue. Taking the new amendments and revisions brought by the new arrangement between the UK and the EU into account however would show that while the EIO is no longer applicable, its essence, principles, and practices have been adopted in the new rules. Thus, it can be surmised more or less that how EIO was carried out during its applicability would be carried forward albeit in another name and form.

Second, the member state frameworks provide assistance on all kinds of investigative measures, coercive and non-coercive alike. There would be investigative measures excluded on the part of Germany and the United Kingdom on the basis of the DEIO such as joint investigative teams,

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but in the event that there would be questions on whether a particular investigative measure is covered by the EIO or not, and whether the EIO should be accepted in respect to such investigative measure; in practice, authorities would execute the same more often than not. There would also be no issues as much as possible if the investigative measure concerned is non-coercive in nature. Further, should there be issues or problems on a particular EIO or MLA request, practitioners generally resolve the same in efforts to effectuate the EIO or MLA request as much as possible.

Third, there are discrepancies as to what the regional framework provides as regards designation of authorities and how the United Kingdom implemented the same. Although the EIO promotes the use of direct contacts or horizontal cooperation through the use of issuing and executing authorities, the UK opted to retain its central authorities in receiving EIOs from other member states and then forwarding the same to the relevant executing authorities for execution. This keeps more or less the essence of traditional mutual legal assistance, like both the Philippines and Malaysia practice in their respective jurisdictions, and the tenets of the substantive aspect of reciprocity as it keeps the executive discretion exercised by the state.

Albeit what the UK prompted to do vis-à-vis retention of central authorities (like in the Philippines and Malaysia) can easily be dismissed to be incongruent with the spirit and aim of the EIO directive, the retention of central authorities actually makes total sense because of the unique function the courts in the UK, the Philippines, and Malaysia have. As UK authorities explained, you cannot expect UK courts to act in the same manner as other judicial authorities in other EU member states. Together with the Philippines and Malaysia, UK espouses adversarial proceedings and do not have the same system as one can find for example in Germany and most EU member states (inquisitorial proceedings). Thus, the idea of judicial authorities would be different between each kind of proceedings. With respect to the UK, it would be incompatible with the function of its courts should it be designated as administrative postboxes for incoming EIOs.

Fourth, there are insights one could gain from the so-called sufficiency of evidence requirement and how the respective member state frameworks apply the same. There is a direct proportional relationship between the information to be provided in a MLA request or an EIO and the intrusiveness of the investigative measure being requested. Stating it otherwise, one must provide more information or explain the relevance of the MLA request or EIO should coercive measures or more intrusive measures are re-

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quired. In light of this, the completeness of the set of facts is not required for Germany but only such as that would enable the proper recognition and execution of the EIO. As German authorities pointed out, it is different from the Anglo-American tradition that requires probable cause to be established, which the Philippines interestingly applies as regards coercive measures such as searches and seizures and/or interceptions of communications, for example. Probable cause, as contemplated herein, is more than reasonable suspicion. It is the existence of substantial grounds for a reasonable man to believe that a crime has been committed and that the place needs to be searched or the items or objects to be seized is related thereto. Probable cause is ingrained in the legal fiber of the Philippine system and thus, any request to be sent to the Philippines involving coercive measures would need to comply with this requirement because the same would course through the Philippine courts for the issuance of the needed court order authorizing the relevant coercive measure.

Fifth, it can be discerned from all the member state frameworks that dual criminality has not been an actual issue in the execution of either MLA requests or EIOs in practice. The lack of dual criminality is not even a ground to refuse a request vis-à-vis the Philippine Cybercrime Act. In relation to the EU member states, there has been an effort to minimize the application of the requirement by making it inapplicable to a list of 32 offenses under certain conditions. Both Germany and the UK has implemented the same. Having said these, in practice, no issue has been encountered on the same.

Sixth, there is something interesting about the implementation or application of the prohibition of double jeopardy in the respective member state frameworks. At the outset, all of the Constitutions (or basic laws) and code of criminal procedure of the respective member state frameworks have provisions tackling the same. Germany is unique among the rest as its law is clear with respect to the transnational application of the prohibition. Following Article 54 CISA, the CJEU judgment, and the provision found in the EAW, Germany includes an execution element in addition to the objective and subjective elements of the principle of *ne bis in idem*. Furthermore, the existence of double jeopardy does not necessarily translate to outright denial of an EIO. It would be discretionary on the authority involved. A yardstick for discretion for local authorities is their duty to prosecute: no crime should remain unpunished. Another yardstick is whether the purpose of the proceedings in the issuing state is mainly to determine whether the prohibition has been violated. Thus, it would be a weighing of factors despite the existence of any double jeopardy in an EIO.

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The German definition on *ne bis in idem* deviates however from the general (but undetailed) provision found in the regional instrument. UK conversely provides the same undetailed provision in its domestic legislation. In connection hereto, there is uncertainty as regards the cross-border or transnational application of the principle (or prohibition) in the UK, especially with the looming resolution of the issue of Brexit. It could simply follow its domestic interpretation or follow the judicial pronouncements of the CJEU.

As regards the Philippines and Malaysia, the ASEAN MLAT limits the transnational element of the prohibition against double jeopardy between the requested and requesting state. Malaysian law limits it to the requesting state, i.e. conviction, acquittal, pardon, or service of punishment occurred in the requesting state. This paved way to the question as to when the conviction, acquittal, pardon or service of punishment occurred in another ASEAN member state or third state. As mentioned in the earlier discussions, two conclusions can be derived and it also depends on 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, the prohibition against double jeopardy as applied domestically ought to be applied.

Second, the conclusion is altered when the subject state is the requested state and with different possible outcomes for both the Philippines and Malaysia. The Philippines ought 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. Interestingly, these conundrums have yet to be encountered in practice. A pragmatic solution would probably lie on the need to balance interests on a case-to-case basis and the usage of preliminary consultation and open communication between authorities in the ASEAN.

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Seventh, the speciality or use limitation applies in the member state frameworks in both ASEAN and the EU, albeit the speciality principle was not directly mentioned in the DEIO. All member states uphold this principle and consequently, would demand the return of documents or evidence upon cessation of proceedings for which the EIO or MLA request was made. Moreover, the UK and Germany have data protection laws vis-à-vis the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. These particular laws require personal data or information to be processed for lawful and specific purposes, among other requirements that ought to be satisfied should said data or information be transferred or processed further. Having mentioned this, in the event that the evidence or information is discerned usable for another criminal matter, it would be imperative for the requesting state or issuing state to issue another EIO or send another MLA request. Depending on the receiving end, an advance notice could be made with the EIO to formally follow, according to an interviewee. As regards the ASEAN member states, this is allowed in practice as long as there has been prior communication.

Eighth, the prominence of national interests and special offenses as an exception to the execution of an EIO or a MLA request is apparent among the different member state frameworks examined. For Malaysia, for example, a MLA request shall be denied if it shall contravene sovereignty, security, public order, or any other essential public interest of Malaysia. It shall also be denied if the Attorney General opines that the said request shall impose an excessive burden upon the resources of Malaysia. Included herein as well are the political and military offenses exceptions. Furthermore, criminal proceedings or a pending criminal investigation in Malaysia shall take precedence over MLA requests involving the same evidence or information.

On the other hand, snippets of national interest could be found in Philippine legislation with MLA provisions. Whilst there is no general legislation for MLA in the Philippines, national interest could still play a part in the denial or execution of MLA requests. This is due to the significance the country places on reciprocity, wherein procedurally, a country should not be made to do something against its will. Thus, in traditional MLA agreements such as the ASEAN MLAT, there are grounds for refusal to ensure that there is equality in footing between cooperating states and that one is not forced to do something against its interest or will.

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With respect to the EU member states, the same national interest-based grounds for refusal are retained in their respective domestic legislation. These include the existence of privilege, territoriality, pending criminal matters, etc. Further, Germany and the UK included in their respective laws the ground to refuse based on substantial grounds to believe that executing the EIO would violate their obligations under Article 6 of the TEU. While this has a human rights element, it embodies as well a national interest.

Ninth, the EU member states follow the designated form provided for by the EIO. The pro forma EIO is implemented and ought to be complied with by Germany and the UK. This pro forma EIO would have its pros and cons but it is still being implemented. On the other hand, the ASEAN member states do not have the same kind of pro forma EIO but they would need to provide the needed information as required in their respective legislations. In the case of the Philippines, authorities were the ones who provided the minimum information required in a request, but the ASEAN MLAT could also be a good starting point. In all member states, additional information can be asked from the requesting/issuing member state to be able to effectuate properly a MLA request or EIO.

Tenth, the time limits provided for in the DEIO are equally found in the domestic laws of the UK and Germany. Authorities would admit that these are not mandatory. Nonetheless, they promote efficiency and effectiveness of the procedure. Should the investigative measure be non-coercive, compliance would be faster. However, issues could be met if the coercive measure needs to go through the courts.

On the other hand, there may be no time limits in the ASEAN regional instrument and member states are only encouraged to act "promptly", but authorities tend to act swiftly on requests. Further, both Malaysia and the Philippines require themselves as requesting states and those which may send MLA requests to them to provide information about the time element involved in their requests, so the requested states will be aware of any urgency involved.

B. Efficiency

Assessing the respective member state frameworks, including the law in practice, one could state that there have been no alarming problems of efficiency among practitioners. As much as possible the member states are able to give the needed assistance in the collection and transmittal of

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required information and evidence. There is a willingness among them to work with each other. In the event that there are problems or issues encountered, or there are uncertainties as to a certain procedure or investigative measure to be included in a MLA request or EIO, practitioners maintain open channels of communication that allows for preliminary consultations among each other. This is regardless of the ASEAN or the EU member states. Germany and the UK also benefit from the support the entire EU Criminal Justice architecture gives to them through the Eurojust, the EJN, and other infrastructures or databases the EU provides. There is also the existence of liaison magistrates.

In relation to this, the time constraints member states encounter in the recognition or execution of a MLA request or an EIO can also be considered as regards efficiency. While the EIO would provide for time limits, the ASEAN MLAT does not. Despite this, ASEAN member states exert efforts to execute requests as soon as possible. Delays are commonly encountered when a request is coursed through the courts for the issuance of the required order for a coercive measure. This issue is not however mutually exclusive to the Philippines and Malaysia. Stumbling blocks could also be encountered in Germany and the United Kingdom. Thus, while providing time limits can encourage member states to work faster, there could be inevitable issues that would delay execution, especially those outside the control of the executing authorities.

Third aspect that affects efficiency is the designation of central authorities. To the exception of Germany, all member state frameworks maintain central authorities. Theoretically, direct contacts enable faster and more efficient exchange of EIOs among authorities. However, with the structural changes introduced by the EIO, the UK is still able to work faster than expected and execute the needed investigative measure. The central authorities of both the Philippines and Malaysia are also on the same page. Thus, while direct contacts make matters theoretically faster, the speed or efficiency would highly depend on the willingness of the authorities themselves to cooperate. If authorities are self-motivated, then mutual legal assistance regardless of name or deviation would work.

C. Protection of Human Rights and Defense Rights

In comparing and assessing the protection of human rights and defense rights in the context of mutual legal assistance, three aspects could be looked into. First, one ought to consider the general stance of the member

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states as regards human rights in their respective domestic policies. Second, there is the integration of human rights protection in their respective domestic laws tackling MLA or the EIO. This includes consideration of human rights in the grounds to refuse a MLA request or an EIO, preparation and execution of the request, as well as the specific procedures for the investigative measures that could be subject of the MLA request or EIO. Third, one needs to consider how strong defense rights are being promoted, protected, or defended on the member state level.

First, as regards the general stance of the member states pertaining to human rights, all member state frameworks have an avowed commitment to the protection of human rights. Their respective Constitutions or basic laws would provide these different human rights that ought to be respected, promoted, and protected. This is reflective of the constitutional principles of their respective regional organizations.

Both Germany and the UK are duty-bound to uphold their human rights obligations under Article 6 of the TEU vis-à-vis the EIO, which both the Philippines and Malaysia do not equivocally provide. These include obligations found in the Charter of Fundamental Rights and the European Convention on Human Rights. Thus, should they have substantial grounds to believe that their obligations under said provision shall be violated, they could deny the recognition or execution of an EIO.

One of the obligations that Germany and the UK need to comply with is the prohibition of the death penalty and the imposition of torture, or cruel, inhumane, and degrading punishment. Thus, these member states cannot entertain requests if the punishment involves the death penalty, torture, or cruel, inhumane, and degrading punishment. This is a non-negotiable. In connection to this, Malaysia imposes the death penalty and whipping as two forms of punishment. The Philippines does not completely prohibit the death penalty and limits its imposition on heinous crimes as may be determined by law, although nowadays the imposition of the death penalty has been suspended.

Additionally, there is significant value in the determination of what is necessary, proportional, and adequate as regards issuing an EIO. Proportionality is one of the fundamental principles of Germany that ought to be respected and upheld. Otherwise, there could be negative consequences for non-compliance. For example, should this not be followed in issuing an EIO, the admissibility of the evidence obtained through it shall be affected. The UK considers likewise the concept of proportionality, albeit in a different manner from Germany, in its decisions especially those involving human rights. As regards the Philippines and Malaysia, however,

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this principle is not explicitly provided or otherwise defined under a different nomenclature (e.g. substantive due process, procedural due process, substantial fairness, etc.).

In relation to the foregoing, it can be said that non-observance of human rights obligations by each member state would have negative repercussions. The Philippines has for example the fruit of poisonous tree doctrine and exclusionary rule. To elucidate, searches and seizures under the Philippine Constitution is prohibited unless the same is with a lawful warrant issued by the court. Any evidence obtained in violation of the same, including anything obtained in relation to it, is considered inadmissible as evidence.

Second, as regards how human rights are integrated in the respective domestic laws on MLA or the EIO, the Philippines stands out uniquely given the lack of domestic law that would spell out the human rights needed to be taken into account. This notwithstanding, a reading of the other relevant laws and procedure would show that human rights are of primordial consideration in the Philippine jurisdiction. Authorities ought to act respectfully and any violation of human rights (even in extradition or MLA proceedings which only have earmarks of a criminal process) deserve redress. In connection to this, the probable cause requirement relates to the protection of human rights. The Philippine Constitution prohibits fishing expeditions and abuse of the use of searches and seizures. Thus, there is the probable cause requirement that avoids unscrupulous or frivolous searches and seizures, or the otherwise interruption of one's right to privacy. To be personally determined by the judge, this protects anyone subjected to a coercive measure from abuse. Further, authorities are duty bound to make a return to the judge of what has happened with any warrant issued. For those involving communications, including online evidence, they would be later required to destroy any record or data involving the same.

The other examined member states, on the other hand, take into account human rights across the different provisions of their respective domestic laws tackling either the EIO or MLA. There is clear explanation on what ought to be considered in the execution of requests, the grounds to refuse, and the specific procedures needed to be followed as per investigative measure. Though it must be mentioned at this juncture that one still needs to read in the UK Regulations certain human rights safeguards or parameters that have not been explicitly mentioned in the law, e.g. examination of witnesses, when right to representation is engaged, etc. The same can be said with Germany through the need to be aware of intricacies

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in certain investigative measures such as search and seizures that can be found in its Code of Criminal Procedure.

Having said this, one can go back to the discussion on the prohibition against double jeopardy or the *ne bis in idem* principle. As mentioned earlier, all member states would have in their respective frameworks an elucidation and application of said prohibition. They were able to transpose in their respective frameworks the principle and its concomitant prohibition. This can be considered a win already vis-à-vis the principle. However, if one would look into the transnational nature of the *ne bis in idem* principle being promoted in the regional frameworks, Malaysia, Philippines, and the UK have their shortcomings because they do not have respective laws or jurisprudences tackling the same. Looking into their respective MLA or EIO related domestic laws does not help as well. The MACMA of Malaysia limits the prohibition to the conviction, acquittal, pardon or service of sentence in the requesting state. It does not consider any similar circumstance occurring in its own jurisdiction, another member state, or a third state. The UK, on the other hand, only provided a general provision on *ne bis in idem* without elucidating or defining its scope or parameters. As to how these gaps in their respective frameworks can be addressed, resolution would depend on whether they are a requesting or requested state (as discussed earlier). There would still be unforeseeability however as to how a subjected person can be protected against double jeopardy.

Germany, on the other hand, has integrated in its domestic framework the transnational nature of the principle in line with the EU legal approach. Being an optional ground for refusal, Germany's position is sound. In following the regional approach, it recognizes how the same can affect the decisions of its own authorities as well as those of other member state authorities in relation to legal assistance requests, wherein the subject person may be subjected to the prohibition. As to how this human rights consideration is operationalized, refusal is not automatic. Instead, authorities in Germany consider whether the EIO refers to the issue of determining whether the prohibition has been violated in the first place. Generally, German authorities would apply a hands-off approach and allow the issuing authorities to determine the issue within their own proceedings. Delegation of this discernment is however decreased if there is an apparent risk to the person involved as regards such person's rights.

It can further be mentioned that the UK specifically provides non-discrimination as a ground to refuse execution of an EIO, which is not found in the regional instrument. An EIO may be refused execution if the same was issued on discriminatory grounds. While not having a direct counter-

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part in the German law, non-discrimination is one of the human rights obligations Germany adheres to. Thus, if substantial grounds exist that the EIO would be incompatible with its human rights obligations as defined in Article 6 ECHR and the CFR, then Germany can also deny recognition or execution of the EIO based on non-discrimination.

Moreover, even if theoretically speaking, the UK could not deny an EIO on grounds of necessity, proportionality, or adequacy, it is still possible to find relief with UK authorities as an executing state. There is the option of referring the matter to the relevant central authority or going to the courts for redress. This is especially possible if the issuance was made unbeknownst to the suspect, accused, or other interested person in the issuing state. As for asking the courts for relief, courts would probably take a strict approach on the matter and thus, arguments ought to be convincing and clear as to any violation to one's rights.

Furthermore, the UK law provided for a so-called variation or revocation order. Issued under limited grounds based on human rights (such as discrimination), this order may be issued to vary or revoke the execution of the EIO or transmittal of the requested evidence or information. Traditionally, UK could revoke consent to the transmittal of evidence, regardless of being sent already, if it finds reasonable grounds to do so, including grounds based on the protection of human rights. While there is no test case yet, there was the plausibility of this kind of relief in the UK. What is currently provided is the suspension of transmitting the requested evidence under the EIO Regulations pending resolution of a legal remedy and/or the existence of serious and irreparable remedy. As to whether this exists in Germany, there is no variation or revocation order in German law. At most, there would be the provision that allows suggesting the use of another investigative measure.

It must be mentioned at this point that the Philippines and Malaysia do not share the same ground for refusal as that of Germany and the UK wherein they could deny a request if there are "substantial grounds to believe" that it would be incompatible with Article 6 CFR obligations – or general human rights obligations in the context of the Philippines and Malaysia. It became imperative earlier to inquire whether they 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 conflict with a request received. The answer is in the negative if one follows the strict letter of the ASEAN MLAT and the MACMA. No ground for refusal is provided wherein a requested state can deny a request if the same conflicts with an

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existing human rights obligation. This is further supported by existing rule of non-inquiry the Philippines follows as regards international cooperation requests. The same applies to Malaysia as well, by not only excluding any circumstance occurring in Malaysia vis-à-vis double jeopardy when it is the requested state, but more importantly, by not providing the ground for refusal itself in its domestic law.

Alternatively, should the member state be placed in a position of strong urgency to uphold its human rights obligations over a MLA request received, for example in cases when the human rights involved are constitutionally provided or falling under customary international law obligations, then both Malaysia and the Philippines could resort to the use of the "national interest" ground for refusal as a form of catch-all exemption that takes into account public interest. Having mentioned this, both Malaysia and the Philippines have yet to encounter this in practice. Thus, it remains to be tested whether using national interest as a ground to refuse a MLA request due to a human rights obligation will succeed. 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 comes however with the caveat that open lines of communication might prove insufficient in addressing imperative human rights issues that may arise. Thus, it might be prudent to clearly delineate and define boundaries.

Third, as regards how defense rights play a role, this could be analyzed on three aspects. One, there is the participation of the defense in the issuance of a MLA request or EIO in its behalf. Two, one could look as to whether the suspect, accused, or interested person could interfere in the issuance or execution of a MLA request or an EIO. Three, one could look into how defense rights play a role in the execution of investigative measures subject of the MLA request or the EIO.

Anent the participation of the defense for the issuance of a MLA request or an EIO, there is seemingly no legal basis in the Philippines and Malaysia for the defense to do this. Albeit they both have adversarial proceedings, the MACMA itself does not provide the right for the defense to request the issuance of a MLA request for its benefit in a case. As regards the Philippines, the same applies given that it has no domestic legislation on mutual legal assistance and only uses the ASEAN MLAT as legal basis. The ASEAN MLAT, as one may recall, does not contain a provision providing said right or any other provision of similar import. Further, Philippine criminal procedure is of similar fashion. Philippine Rules of Court provides for the filing of motions that ask for judicial relief or the use of modes of

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discovery but the Rules of Court lack provisions that tackle international cooperation instruments such as a MLA request. Although the Supreme Court itself recognized that modes of discovery are in congruence with the aim of the ASEAN MLAT in more recent case law, this would not be sufficient to excuse the lack of procedural law that allows issuance of a MLA request at the instance of the defense or any other interested person. Therefore, MLA remains a prosecution or investigative tool mainly among the ASEAN member states.

On the other hand, participation of the defense to ask the issuance of an EIO in its behalf is one of the selling points of the EIO. The UK law would accommodate this as a possibility, not only according to authorities but given as well its adversarial proceedings, wherein prosecution and defense have equality of arms. However, there is no case law yet nor test case yet. This conversely does not exist in Germany or it otherwise hard to fathom how it will be made possible. Within the penumbra of inquisitorial proceedings, authorities mention the impossibility of the defense asking for an EIO to be issued in its behalf. In light of this, it can be gainsaid that if one considers the principle of sincere cooperation and the aim of the DEIO to generally empower the defense or accused in criminal proceedings vis-à-vis the issuance of an EIO, then Germany is seemingly lacking or otherwise failing in its obligations to put this into motion. Nevertheless, as discussed in an earlier chapter, Germany cannot truly be fully faulted for its shortcomings because there has already been an observed incompatibility between an inquisitorial kind of proceeding and what the DEIO wishes to uphold vis-à-vis participation of the defense. Stating it differently, the idea of allowing the defense to participate in the issuance of an EIO or MLA request is appreciated and should be upheld pursuant to defense rights, but ought to be reevaluated perhaps as regards how it can be truly put in fruition in the difference in proceedings (such as inquisitorial or adversarial) among the EU member states.

This mentioned impossibility further relates to the second aspect of defense rights vis-à-vis MLA requests or the EIO. In an inquisitorial proceeding, such as in Germany, there is the impossibility for a suspect, accused, or interested person to question the issuance of the EIO. The EIO is normally issued during the investigation phase of the proceedings and thus, the collection of evidence is not known to the suspect or accused person involved. At most, the remedy lies in the evidence or information obtained in relation to the EIO, which is for all intents and purposes incompatible with what the regional framework seeks to implement. The UK provided contrariwise remedies for the defense vis-à-vis the issuance or

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execution of the EIO. As mentioned earlier, there is the variation and/or revocation order that could be applied for. There is likewise the suspension of transmitting evidence due to the resolution of a legal remedy. Admittedly though, it remains unclear what exactly these legal remedies would constitute.

Alternatively, both the Philippines and Malaysia would provide a remedy for the defense in respect to the issuance and/or execution of an EIO, but in a limited approach. For the Philippines, mutual legal assistance has earmarks of a criminal process to which certain rights would apply. Judicial review can also be availed of especially if proven that there is grave abuse of discretion leading to lack or excess of jurisdiction. Akin to the Philippines, Malaysia provides for judicial review by virtue of Order 53 under the Rules of Court 2012 to question any government order or issuance vis-à-vis fundamental rights in its Federal Constitution. As to the issue on whether relief could be granted, one can note from more recent Philippine case law 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 needed relief can be granted 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 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.

Third, one can mention the integration of defense rights in the specific investigative measures contemplated in the respective member state frameworks. This is generally apparent in all the member state frameworks examined. One could look into the right of representation, the right against self-incrimination, and the general considerations of one's consent before being asked to participate in an investigative measure requested. There might be discrepancies as to when the respective applicable rights would be engaged, but they nevertheless exist and respected in practice.

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