

## **The Relationship between the Regional Cooperative Models on Extradition and the Human Rights of the Requested Person in Human Trafficking cases**

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### **Abstract**

Even though sixty per cent of human trafficking cases around the globe occur in the ASEAN region, extradition requests are almost never made by the Member States, apart from in the case of Rohingya. In contrast, the number of surrendered persons within the EU is proliferating as a result of the transformative process of extradition from the intergovernmental to the supranational-type approach to extradition. However, since the adoption of the European Arrest Warrant (EAW), subsequent literature has assumed that the supranational-type approach of the EAW negatively impacts upon the human rights of the requested persons.

This article will examine the relationship between regional cooperative structures on extradition based on Supranational and Intergovernmental models of the EU and the ASEAN respectively, in particular, the issue of human rights protection. It is argued that the relationship between the theoretical bases of regional cooperative structures and the impact upon human rights of the requested persons has never been critically examined. Therefore, the main question of this research is whether the possible impact on the human rights of the requested person is a direct consequence of regional cooperative models. In fact, both intergovernmental and supranational-type approaches have advantages and disadvantages in protecting the requested person's human rights. With respect to the ASEAN context, the model of extradition process is not the crucial factor because law enforcement practitioners implement a more expedient process – a deportation system – in place of extradition, even though they know that it would erode the human rights of the requested person. In addition, under the supranational laws/institutions of the EU – the Charter of Fundamental Rights of the European Union, the European Court of Human Rights and the Court of Justice of the European Union – the requested person's human rights have been better protected than under the intergovernmental cooperative structure of the ASEAN. This is because the supranational legal instruments of the EU have been established for the implementation of legal mechanisms to protect human rights which are still lacking in the ASEAN.

**Keywords:** Extradition Process, EAW, Intergovernmental Model, Human Rights and Requested Person

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## 1. Introduction

In 2013, Human Trafficking Watch stated that the Asia-Pacific region accounts for the largest number of trafficking in persons offences, approximately 11.4 million (fifty-six percent of the global total),<sup>2</sup> whereas only seven percent of such offences occurred in the European region.<sup>3</sup> Thereafter, in 2014, more than sixty percent of human trafficking around the globe occurred in Southeast Asia.<sup>4</sup> Furthermore, statistics concerning the trade of trafficking in women and children show that one-third of global trafficking occurs in Southeast Asia. In addition, it can be seen from the Global Report on Trafficking in Persons provided by the United Nations Office on Drugs and Crime (UNODC) in December 2018 that 97% of trafficked victims in Southeast Asia are transferred within the sub-region.<sup>5</sup> This confirms that current measures for suppressing human trafficking in the ASEAN region are ineffective, and moreover, the extradition process is failing to combat the high number of transnational human trafficking cases. This shows that human trafficking remains a crucial problem in the Southeast Asian region.

An efficient solution for combating this crime is urgently required. However, a conventional extradition request for that offence has rarely been made among the Association of Southeast Asian Nations (ASEAN) Member States. In contrast, the

number of surrendered persons within the EU including alleged traffickers is proliferating as a result of the streamlined process of extradition using the European Arrest Warrant (EAW).

It can be seen that within nine years (2005-2013) after the adoption of the Framework Decision on the EAW (FD on EAW) in 2002, 99,841 arrest warrants were issued by the EU Member States. More than 26,000 requested persons were surrendered to the Issuing States. The statistics show that the current extradition process of the EU which has shifted from an intergovernmental cooperative structure - the current extradition structure of the ASEAN - to a supranational type approach, is more effective in surrendering an alleged offender to the criminal justice process.

This is useful for combatting the proliferation of transnational crime within the region. However, the EAW has generated concerns over its impact on the human rights of a 'requested' person. Since these concerns have not dissipated over time, it is arguable that they can be related to the supranational type approach to integration underpinning the EAW. As a result of this, this paper will examine the two models through a human rights lens.

The article considers how the influence of different regional cooperative models on extradition might be a factor which could elevate the effectiveness of the extradition

<sup>2</sup> In Awareness Human Trafficking 2013 provided shadow economy and human trafficking route in ASEAN by Human Rights Watch (3 March 2013) <<https://humantraffickingwatch.wordpress.com/2013/03/03/shadow-economy-human-trafficking-route-in-asean/>> accessed 13 August 2018

<sup>3</sup> Human Trafficking: More than 20 Million victims worldwide. News European Parliament <<http://www.europarl.europa.eu/news/en/headlines/world/20161014STO47261/human-trafficking-more-than-20-million-victims-worldwide>> accessed 10 October 2018

<sup>4</sup> Annuska Derks, 'Combating trafficking in South-East Asia: A review of policy and programme responses' No. 2 (International Organization for Migration 2000)

<sup>5</sup> Global Report on Trafficking in Persons 2018 <[https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP\\_2018\\_BOOK\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf)> accessed 18 January 2019

process, but also erode the requested person's human rights protection. It focuses on the erosion of these rights in human trafficking cases which result not only from regional cooperative models, but also from other regional-specific factors. It will examine whether the possible impact on human rights is a direct consequence of the regional cooperative model, or is in fact influenced by other factors.

The analysis is based on documentary research, requiring in-depth and sustained analysis of the key works in the area of regional integration models, extradition proceedings, human trafficking and the requested person's human rights. Typical documents in this field comprise two main categories. The first are 1) primary sources pertaining to regional and domestic law on extradition procedure, human trafficking and human rights in the EU and ASEAN which will be used for the discussion of the current regional cooperative models, the understanding on human trafficking, and the degree of the requested person's human rights protection of both regions. The second are 2) secondary literature sources concerning regional integration theories which are used for examining the EU and ASEAN regional models on extradition.

## **2. Features of Extradition: A Hybrid of Legal and Political Processes?**

Prior to discussing the features of the current extradition processes of the ASEAN and the EU, the historical background of extradition needs to be explored. Extradition

procedure has been seen as a process for requesting the handing over of an accused criminal or a fugitive offender from one place to another place where that person has been accused of, or has committed a crime. If 'the first practice of the extradition process' is used as a way to identify the first extradition, then it can be said to have originated almost 3,300 years ago with the ancient Egyptian civilisation.

The first example of extradition was an agreement formed as a part of a Peace Treaty between Pharaoh Ramses II of Egypt and Hattusili II, the King of Hittite Empire, in 1280 B.C.<sup>6</sup> The process of the request in this agreement was made as a matter of courtesy and goodwill between sovereigns.<sup>7</sup> Clarke states that from the very beginning of the use of extradition, it seems to have been restricted to enemies of the State.<sup>8</sup> Therefore, it should be concluded that the first aim of the extradition procedure was to eliminate the political enemies of sovereigns. This serves to illustrate that the original purpose of extradition was motivated by political objectives, although it was operated through legal instruments.

Visscher noted that prior to the eighteenth century, extradition proceedings were normally used in order to deliver political enemies rather than regular criminals.<sup>9</sup> Even though it could be argued that the ancient treaties on extradition were not only limited to political crimes but also included other criminal offences such as

<sup>6</sup> Stephen Langdon and Alan H. Gardiner, 'The Treaty of Alliance between Hattušili, King of the Hittites, and the Pharaoh Ramesses II of Egypt.' (1920) 6(1) *The Journal of Egyptian Archaeology* 179

<sup>7</sup> Cherif M. Bassiouni, *International extradition and world public order* (Sijthoff 1974)

<sup>8</sup> Edward Clarke, *The Law of Extradition* (Stevens and Son: London 1903)

<sup>9</sup> Charles De Visscher, *Theory and reality in public international law* (Princeton University Press 2015)

robbery, rape, murder and other serious non-political crimes,<sup>10</sup> the latter were not seen as a danger which required concerted counter legal measures on an international scale before the eighteenth century.

Historically, the main aim of extradition procedures was to maintain the authority of state sovereignty in international cooperation in criminal matters. Human rights issues relating to requested persons were not raised as a major concern in extradition proceedings. It was not until the twentieth century that the human rights of the individual were raised in the international arena. Since the Second World War, in particular after the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the protection of the human rights of requested persons has been given greater consideration when establishing additional legal protective mechanisms.

As seen, historically, extradition processes were used for political purposes and for this reason, an extradition request had to be transmitted through diplomatic channels. In conventional extradition procedure, executive authorities - King, President, Minister or other types of executive of the Sovereign or State - take the role of the competent authority on final decision-making in executing or refusing an extradition request.

Currently, conventional extradition procedure which requires the transmission of a request through diplomatic channels is the basis of the extradition process between the ASEAN Member States and extradition between the EU Member States. This is for crimes other than the thirty-two listed

offences which use the EAW. The executive authority still acts as the competent authority because this model considers the extradition process to be a combination of international relations and international cooperation in criminal matters.

In practice, more than one country may request the extradition of an individual person and this inevitably impacts on maintaining harmonious relationships between the Requested State and the two or more Requesting States. Therefore, the request needs to be considered by the executive authority as having greater knowledge of international relations than the judicial authority, and the decision is made based on this knowledge. It could be used in order to protect a national preference, as provided in the Vietnamese Extradition Act article 39.<sup>11</sup> In addition, Parry argues that,

[T]he extradition process accommodates the legal and political aspects: the purportedly objective legal questions about the specific charges and the sufficiency of the evidence, and the subjective political and diplomatic questions about the desirability and ramifications of extradition.<sup>12</sup>

It can be seen that, in practice, an extradition process is not a purely legal process. This is because, prior to surrendering a requested person, the impact on international relations needs to be considered, particularly when the wanted person is requested by two or more Requesting States. In addition, traditional bars on the extradition process,

<sup>10</sup> Ivan Anthony Shearer, *Extradition in international law* (Manchester University Press 1971)

<sup>11</sup> Law on Legal Assistance of Vietnam 2007 No. 08/2007/QH12, art 39

<sup>12</sup> John Parry, 'Law, Politics, and the US-UK Extradition Relationship' (2012) <[https://www.fairobserver.com/region/north\\_america/law-politics-and-us-uk-extradition-relationship/](https://www.fairobserver.com/region/north_america/law-politics-and-us-uk-extradition-relationship/)> accessed 7 June 2018

those of; a prima facie case, double criminality requirement, rule of speciality, the refusal of extradition of own-nationals and for political/military/revenue offences, have typically been applied in a number of bilateral extradition treaties. This reflects how nation states use the authorities to protect their sovereignties in international cooperation in criminal processes. Therefore, it can be said that conventional extradition is a hybrid of legal and political processes.

According to the Framework Decision (FD) on the EAW, the competent authority has been transferred from the executive to the judicial authority. It means that the role of the executive authority which had been used to create harmonious relations between States or for protecting national preference has been abolished from the EAW process. None of the processes with respect to the FD on the EAW needs to be requested through diplomatic channels, but contact is made directly between the judicial authorities of the two States. Thus, an extradition process between EU Member States<sup>13</sup> - in the specific thirty-two types of offenses in the list – needs only to be considered as a purely legal process created in order to combat the proliferation of transnational crimes within the EU by streamlining the unwieldy process of conventional extradition.

Nonetheless, even though executive authorities and political processes were eradicated from the EAW, it happened only as a consequence of mutual recognition and mutual trust among the EU Member States

which result from regional political policy. Therefore, it cannot be concluded that the EAW is a purely legal process, but that it is a hybridity of both legal and political processes. In fact, both regions have a hybridity of legal and political processes, but they take different forms in cooperation on extradition. In other words, despite the fact that both the EAW and conventional extradition model have similar features, they have different models of extradition procedure because they are situated on different regional integration structures. The following section will examine the distinction between intergovernmental and supranational cooperative models on extradition.

### **3. Conventional Extradition Process Vs European Arrest Warrant**

#### **3.1 ASEAN Conventional Extradition Process**

Currently, ASEAN lacks a special convention on extradition at regional level similar to Europe. At the regional level, only two ASEAN Conventions include provisions on extradition. These are the ASEAN Convention on Counter Terrorism of 2007, and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) of 2015 in articles 13<sup>14</sup> and 19<sup>15</sup> respectively. In fact, neither extradition procedure in the conventions provides substantive details about the process. Forexample, article 13<sup>16</sup> of the 2007 Convention legislated on the extradition procedure by

<sup>13</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1

<sup>14</sup> ASEAN Convention on Counter Terrorism 2007, art 13

<sup>15</sup> ASEAN Convention Against Trafficking in Persons, Especially Women and Children 2015, art 19

<sup>16</sup> ASEAN Convention on Counter Terrorism 2007, s 13 states that “the Party shall be obliged to submit the case without undue delay for the purpose of prosecution, through proceedings in accordance with the domestic laws of that Party”.



referring back to the domestic laws of the contracting parties of the convention.

Despite the fact that the 2015 Convention provided more detail about extradition proceedings compared with the 2007 Convention, the extradition procedure has also continued to refer back to the domestic law related to extradition of the contracting parties of the convention.<sup>17</sup> Technically, the 2015 Convention endeavoured to simplify the extradition procedure by requiring the contracting parties to designate a central authority for cooperation on extradition in article 19. However, in nine out of ten ASEAN Member States, the domestic laws still require the official transmission through diplomatic channels. Vietnamese law is the exception.<sup>18</sup> This fact shows that the streamlined process of extradition provided by regional convention has not been made compulsory for the ASEAN Member States. Domestic laws always carry more weight than the regional legal apparatuses under the intergovernmental cooperative model. Therefore, the unwieldy process of extradition between the ASEAN Member States still remains.

In terms of human rights protection, apart from the nationality of the requested persons, neither convention provides for refusal of an extradition request on the basis of human rights protection. The extradition clause in the ACTIP refers back to domestic laws and treaties on extradition of the Member States and therefore the requirements and grounds for refusal of extradition in human trafficking cases have to be implemented

with respect to domestic extradition laws/treaties.

Currently, all traditional bars to extradition remain in the Extradition Acts of some ASEAN Member States. For example, the requirement of a prima facie case, rule of speciality and the double criminality requirement have remained in the Extradition Act between Thailand and Lao PDR 2000 in Article 7 (1) (b), 13 (1) and 2 (1), respectively and in the Extradition Act between Thailand and the Philippines 1984 in Article 16, 9 and 2 (1), respectively. It can be seen that even though the ACTIP has been implemented between the ASEAN Member States, all those legal measures still remain for protecting the requested person's human rights in human trafficking cases.

In terms of the efficacy of implementing the extradition proceedings, the regional cooperative structure of the ASEAN, by being based on an intergovernmental model, is one of the main problems hindering regional cooperation in criminal matters. The law cannot be enforced properly if the ASEAN States do not harmonise their own national laws to the standards provided at regional and international levels. In contrast, even though the EAW was established by a Framework Decision which was developed under an intergovernmental cooperative structure, the EU Directive is enforceable in the EU Member States which are obliged to transpose European supranational law to the domestic laws within a time limit.

Interestingly, extradition proceedings between Brunei,<sup>19</sup> Singapore,<sup>20</sup> and Malaysia<sup>21</sup>

<sup>17</sup> ASEAN Convention on Counter Terrorism 2007, art 13

<sup>18</sup> Legal Assistance of Vietnam 2007 No. 08/2007/QH12, art 38

<sup>19</sup> Law of Brunei, Chapter 154 Extradition (Malaysia and Singapore)

<sup>20</sup> The Extradition Act of Singapore of 2000 provides a special rule of extradition to and from Malaysia in Part V

<sup>21</sup> The Extradition Act of Malaysia of provides a special procedure on extradition to and from Brunei and Singapore in Part V, s 25 - 28

have special rules which are different from the extradition to and from other ASEAN Member States. The relationship between these three countries on extradition has changed from a relationship between Requesting and Requested States to one of cooperation between Issuing and Executing States, whereby the judicial authority of the Issuing State could directly contact the judicial authority of the Executing State in order to surrender the requested person. This mechanism was created in order to streamline the extradition process as provided in the Framework Decision on the EAW.

In fact, these countries are Commonwealth countries within the ASEAN region and are based on the Common Law system. Historically, their criminal procedures have been influenced by English law. For this reason, they have mutual recognition in judicial proceedings which lead to streamlining the extradition process between them. However, the structure of extradition procedure between Brunei, Singapore, and Malaysia has never been raised as a model for wider application at regional level within the ASEAN. This is because the similarity of their criminal procedures does not apply to other ASEAN Member States, and apart from extradition proceedings between the three countries mentioned, conventional extradition procedures have remained the fundamental mechanisms for surrender procedures between the ASEAN Member States.

It can be seen that, with respect to the extradition proceedings between those three ASEAN Member States, a transformative

process of extradition was established based on the mutual recognition of their judicial decisions, even though they are still based on the intergovernmental cooperative model. This is because the streamlined process of extradition did not result from the regional law or institution provided by the ASEAN, but occurred from the intergovernmental cooperation of those three countries in order to elevate the effectiveness of the prosecution process in transnational criminal cases between them. This fact could be used to affirm that the streamlined process of extradition, by transferring the competent authority from an executive to a judicial authority resulting from mutual recognition, is not a model exclusive to the supranational-type approach of the EAW.

The lack of a special regional convention on extradition is not the only problematic factor relating to regional cooperation among the ASEAN Member States. The different extradition proceedings of the Member States resulting from the regional intergovernmental model are also problems which impact on the right to liberty of the requested person.

### **3.2 European Arrest Warrant**

The initial transformative structure from the EU conventional extradition process to a new form of surrender was agreed at the Tampere European Council<sup>22</sup> meeting in October 1999 which aimed at creating an area of freedom, security and justice among the EU Member States under the principle of mutual recognition.<sup>23</sup> At the same time,

<sup>22</sup> Tampere is the name of the town in Finland in which the European Council held a special meeting on the creation of an area of freedom, security and justice in the European Union.

<sup>23</sup> Christian Kaunert, “‘Without the power of purse or sword’: the European arrest warrant and the role of the Commission” (2007) 29(4) *Journal of European integration* 387

the circumstances of the terrorist attacks of 9/11 in the USA not only highlighted the crucial importance of sufficient EU legal measures on internal security, but also put immense pressure on the EU's Justice and Home Affairs (JHA) decision-making system to generate appropriately substantial legislative action within nine months of the terrorist attract.<sup>24</sup> Therefore, the EU aimed to streamline the extradition process for combatting transnational criminal activities, particularly terrorism, at that time.

In the EU context, the streamlined process of extradition is possible because 'the principle of mutual recognition' has been used as a basis for regional cooperation in criminal matters.<sup>25</sup> This principle was proposed by the Conclusions of the Tampere European Council by stating that,

[E]nhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.<sup>26</sup>

This method was created on the presumption that human rights protection of the EU Member States meets the standards and norms which are set out in the European Court of Human Rights (ECtHR).<sup>27</sup> This is because all EU Member States adopted the European Convention on Human Rights (ECHR) 1953 and the EU Charter of Fundamental Rights 2000. As a result, the assumption of similar standards of human rights protection was key and led to the elimination of some legal mechanisms which had been used for protecting the human rights of the requested process in the extradition process.

Regional cooperation on the EAW is requested and granted within an integrated transnational judicial system among the EU Member States which, by partially pooling their sovereignty, have permitted national judicial authorities to engage directly with each other to facilitate surrender. The aim of the EAW is to replace the system of all multilateral extradition conventions that were built from 1957 until the EU or Schengen Extradition agreement at the end of 2002. All European Conventions on Extradition have been replaced by the Council Framework Decision on the EAW and the surrender procedures between Member States (2000/584/JHA) since 1 January 2004.<sup>28</sup> Currently, the European extradition procedure has been transformed from the conventional extradition process to a system of surrender between

<sup>24</sup> Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems' 1313

<sup>25</sup> Susie Alegre Leaf, 'Mutual recognition in European judicial cooperation: A step too far too soon? Case study—the European arrest warrant' (2004) 10(2) *European Law Journal* 200

<sup>26</sup> European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999 Mutual Recognition and Judicial Decision <<https://www.refworld.org/docid/3ef2d2264.html>> accessed 25 January 2019

<sup>27</sup> European Court of Human Rights <<https://www.echr.coe.int/Pages/home.aspx?p=home>> accessed 18 January 2018

<sup>28</sup> Joanna Apap and Sergio Carrera, 'Judicial Cooperation in Criminal Matters-European Arrest Warrant—A Good Testing Ground for Mutual Recognition in an Enlarged EU? CEPS Policy Briefs No. 46, February 2004' (2004) 2



judicial authorities.

Since the promulgation of the EAW, extradition procedures among the EU Member States have been significantly modified in numerous ways. Firstly, the decision authority on extradition was transferred from the executive to the judicial authority.<sup>29</sup> Secondly, the relationship between countries involved in extradition proceedings has been changed from the relationship between the Requesting and Requested States to the Issuing and Executing States. Thus, the structure of the relationship between Issuing and Executing States is similar to an internal criminal procedure within a single sovereign state. As Sanger argues, the ‘principle of mutual recognition of criminal decision means Member States must recognise and execute an arrest warrant originating from another Member State as if it were originating from one of their own courts’.<sup>30</sup> In practice, the issuing judicial authority may transmit the warrant directly to the executing judicial authority.<sup>31</sup> This process takes a much shorter period of time when compared to the traditional diplomatic channels and conventional extradition procedure.<sup>32</sup> Lastly and most significant for my argument, the EAW facilitates surrender by abolishing numerous

traditional bars to extradition including the double criminality requirement which existed before. This means that defendants can be surrendered to an Issuing State even if the criminal activity under consideration may not be punishable in the legislation of the defendant’s country of nationality and/or residence.<sup>33</sup> While facilitating extradition, these obstacles, could be seen as legal measures to protect human rights and have been eroded to a certain extent.

#### **4. Extradition Processes and the Erosion of Human Rights**

In ASEAN, the human rights of the requested persons are protected in the same way as the human rights of accused persons and defendants with respect to the Criminal Procedure Code. Legal measures which are provided by Criminal Procedure Code of the ASEAN Member States are based on the International Covenant on Civil and Political Rights (ICCPR). All traditional bars to extradition such as the rule of speciality, the double criminality requirement, and grounds for refusal of extradition on nationality still remain. In contrast, after the adoption of the EAW in 2002, numerous scholars, such as Alegre,<sup>34</sup> Apap,<sup>35</sup> Hinarejos,<sup>36</sup> Sanger,<sup>37</sup>

<sup>29</sup> Muhammad Anwar, ‘What Are the Main Distinction between Extraditions and Surrender (EAWFD)?’ (2012)

<sup>30</sup> Andrew Sanger, ‘Force of circumstance: the European arrest warrant and human rights.’ 6(1) *Democracy and Security* 17

<sup>31</sup> Council Framework Decision on the European Arrest Warrant 2002, art 9(1)

<sup>32</sup> Michael Plachta, ‘European Arrest Warrant: Revolution in Extradition?’ (2003) 11(2) *European Journal of Crime Criminal Law and Criminal Justice* 178

<sup>33</sup> Alicia Hinarejos, ‘Recent human rights developments in the EU Courts: The Charter of Fundamental Rights, the European arrest warrant and terror lists.’ (2007) 7(4) *Human Rights Law Review* 793

<sup>34</sup> Susie Alegre Leaf, ‘Human rights and the future of extradition in the European Union: Implications of recent case law in the United Kingdom, France and Spain.’ (2003) 4(4) *ERA Forum* 63

<sup>35</sup> Apap and Carrera, ‘European Arrest Warrant: A Good Testing Ground for Mutual Recognition in the Enlarged EU’ 2

<sup>36</sup> Hinarejos, ‘Recent human rights developments in the EU Courts: The Charter of Fundamental Rights, the European arrest warrant and terror lists.’ 793

<sup>37</sup> Sanger, ‘Force of circumstance: the European arrest warrant and human rights.’ 17

Spencer,<sup>38</sup> Peers,<sup>39</sup> Marin,<sup>40</sup> Mitsilegas,<sup>41</sup> Schallmoser,<sup>42</sup> Klimek,<sup>43</sup> Albi,<sup>44</sup> and Xanthopoulou,<sup>45</sup> argued that the EAW erodes the requested person's human rights protection. Moreover, human rights concerns were also raised by the European Parliament Resolution in 2014<sup>46</sup> which made recommendations to the Commission on the review of the EAW pertaining to the failure to explicitly include human rights safeguards and the lack of a proportionality test in the FD on the EAW.<sup>47</sup> This can be seen when a judicial authority issues a warrant for relatively minor offences which then obliges other judicial authorities to execute anywhere within the EU. This exposes the individual to disproportionate disruption of personal and family life, in particular lengthy periods on remand in custody in a foreign legal system in circumstances where s/he is unlikely to be sentenced to a custodial term.

In fact, conventional extradition procedure applies only to serious crimes,

such as rape, murder, terrorism, human trafficking and so on, whereas the EAW, as noted previously, is now being implemented to cover such minor offenses as a stolen telephone in the Zak case,<sup>48</sup> and a theft of ten chickens and driving without a licence in the Aranyosi and Caldaru cases.<sup>49</sup> Spencer states that "certain countries in Europe (for example, Poland) issue warrants for behaviour which scarcely seems to justify the trouble involved in sending the suspect or convicted person back: minor shoplifting, for example, or in one case, the reckless riding of a pedal cycle".<sup>50</sup> This is because, in practice, public prosecutors in Poland have no discretion in deciding whether to prosecute or not-prosecute in a particular criminal case. In other words, Polish prosecutors have operated under the 'obligation to prosecute' principle.<sup>51</sup>

In practice, an extradition procedure has a greater possibility to affect the right to respect of family life of a surrendered person

<sup>38</sup> John R. Spencer, 'Extradition, the European Arrest Warrant and human rights.' (2013) 72(2) *The Cambridge law journal* 250

<sup>39</sup> Steve Peers, 'The European Arrest Warrant: the dilemmas of mutual recognition, human rights and EU citizenship.' *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law-La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (2013) TMC Asser Press 523

<sup>40</sup> Luisa Marin, 'Effective and Legitimate?: Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant.' (2014) 5(3) *New journal of European criminal law* 327

<sup>41</sup> Valsamis Mitsilegas, Sergio Carrera, and Katharina Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?' (2014) 74 *CEPS Paper in Liberty and Security in Europe*

<sup>42</sup> Nina Marlene Schallmoser, 'The European arrest warrant and fundamental rights.' (2014) 22(2) *European journal of crime, criminal law and criminal justice* 135

<sup>43</sup> Klimek, *European arrest warrant* (n 22)

<sup>44</sup> Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-operative Constitutionalism.' (2015) 9(2) *Vienna Journal of International Constitutional Law* 151

<sup>45</sup> Ermioni Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment.' (2015) 6(1) *New Journal of European Criminal Law* 32

<sup>46</sup> European Parliament Resolution of 27 February 2014 with Recommendations to the Commission on the Review of the European Arrest Warrant (2013/2109(INL)) < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014IP0174>> accessed 3 January 2019

<sup>47</sup> *ibid* para C

<sup>48</sup> *Zak v. Regional Court in Bydgoszcz* [2008] EWHC 470

<sup>49</sup> C-404/15 and C659/15 PPU *Pál Aranyosi and Robert Caldaru*, EC:C:2016:198

<sup>50</sup> John R Spencer, 'Mutual recognition of decisions in criminal justice and the United Kingdom' *The future of mutual recognition in criminal matters in the European Union* (2009) 18

<sup>51</sup> Poland Opinion on the Act on the Public Prosecutor's Office as Amended (2017) < [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e)> accessed 7 December 2018

who has to leave his/her hometown to go to the Issuing State. Therefore, the principle of proportionality should be considered when finding the balance between the efficacy of regional cooperation on extradition and the requested person's human rights before issuing the warrant. Sanger argues that the conventional extradition proceedings had more concern for protecting human rights through considering the proportionality principle.<sup>52</sup>

With respect to mutual recognition of judicial decisions, even though Article 8 of the EAW requires 'the evidence of an enforceable judgment, an arrest warrant or any other enforceable decision',<sup>53</sup> the requirement of a prima facie case was not retained in the FD on EAW. In fact, although prima facie evidence still exists in the ordinary prosecution process at national level, the absence of this requirement in the EAW leaves the requested person's human rights unprotected. Spencer notes that the EAW might lead to surrender which is oppressive and unjust<sup>54</sup> as occurs when an arrest warrant is issued even when sufficient evidence relating to the committed criminal activity is lacking. This is due to the requirement to demonstrate a prima facie case in the Executing States having already been abolished. Thus, a requested person's right to liberty might be eroded because s/he has to be detained without sufficient evidence. Furthermore, Sanger also argues that the issued arrest warrant without sufficient

evidence might lead to the surrender of the requested person to the Issuing State. Once there, s/he might be unable to get bail because s/he has no residence in that State<sup>55</sup> and thus this would have an impact on the right to liberty of the requested person.

With respect to the different standards of human rights and punishment policies among states, the double criminality principle becomes a mechanism to protect the human rights of the requested persons when perspectives on criminal activity between the Requesting and Requested States are different. For this reason, Williams argues that this measure has been used as a shield to protect individuals from unfair prosecution procedure or punishment for activities which are not punishable in the home country of the requested person.<sup>56</sup>

Although the double criminality requirement still exists, it does not apply to the list of thirty-two generic types of offences which include human trafficking as promulgated in Article 2 (2) of the FD on the EAW.<sup>57</sup> This provision specifies that all these criminal activities, if they are punishable in the Issuing Member State by a detention order or a custodial sentence for maximum period of at least three years, are determined by the legislation of the Issuing Member State and that it shall surrender the requested person without verification of the fact of double criminality.<sup>58</sup> This research argues that the abolition of the double criminality requirement breaches the principle of legality

<sup>52</sup> Sanger, 'Force of circumstance: the European arrest warrant and human rights' 17

<sup>53</sup> Council Framework Decision on the European Arrest Warrant and the Surrender Procedure between the Member States, art 8

<sup>54</sup> Spencer, 'Mutual recognition of decisions in criminal justice and the United Kingdom.' 18

<sup>55</sup> Sanger, 'Force of circumstance: the European arrest warrant and human rights.' 17

<sup>56</sup> Sharon A. Williams, 'The Double Criminality Rule and Extradition: A Comparative Analysis' (1991) 15 *Nova Law Review* 581

<sup>57</sup> Mark Mackarel, 'European Arrest Warrant-The Early Years: Implementing and Using the Warrant, The' (2007) 15 *European Journal of Crime Criminal Law and Criminal Justice* 37

<sup>58</sup> John R. Spencer, 'The European arrest warrant.' (2004) 6 *Cambridge Yearbook of European legal studies* 201

which is a basic legal requirement for the protection of the right to be free from punishment without law. This is because, theoretically, the legality principle was created to assure that no alleged offender might be punished arbitrarily or retroactively.<sup>59</sup>

In addition, judges Blekxtoon and Deen-Racsomány argue that the abolition of grounds for refusal of extradition on nationality - when the principle of the double criminality requirement is also eliminated from the extradition process - creates some loopholes which have the potential to erode the requested person's human rights.<sup>60</sup> It can be considered in a hypothetical example where Germany receives an EAW for surrendering X to the Republic of Ireland on a charge of abortion. X is a German national who committed abortion in the Republic of Ireland and fled back to Germany. Currently, abortion is unlawful in the Republic of Ireland but lawful in Germany. With respect to the Basic Law of the Federal Republic of Germany it is stated that 'No German may be extradited to a foreign country. The law may provide otherwise for extradition to a member state of the European Union or to an international court, provided that the rule of law is observed'.<sup>61</sup> Therefore, Germany would have to extradite the requested person to the Republic of Ireland, even though abortion is a legal activity in Germany. In this case, if the requested person were to be surrendered to the Republic of Ireland, s/he might be unable to get bail because s/he

has no residence in the Republic of Ireland. From this hypothetical example, it could be concluded that the right to be free from punishment without law and the right to liberty of the requested person – a German national – could be eroded resulting from the abolition of both grounds for refusal on the double criminality requirement and nationality of the FD on EAW.

Even though the protection of the requested persons' human rights seems to have been eroded resulting from the abolition of some legal measures in the EAW as indicated, with respect to the EU context, other mechanisms have been used for protecting them, in the form of EU regional integration. According to the form of regional integration, supranational and intergovernmental type approaches remain fundamental models of the European integration process. In order to integrate regional cooperation among the EU Member States, supranational laws and supranational institutions have been provided. In terms of supranational law, the EU Member States are required to transpose regional law to their domestic laws, particularly the laws which were provided by the Council of the EU.

However, even though the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU) are based on an intergovernmental cooperative model, these two regional legal apparatuses have been transposed for the protection of human

<sup>59</sup> Kenneth S. Gallant, 'The Principle of Legality in International and Comparative Criminal Law, Chapter 7: Legality as a Rule of Customary International Law Today & Conclusion: The Endurance of Legality.' (2009)

<sup>60</sup> Zsuzsanna Deen-Racsomány and Rob Blekxtoon, 'The decline of the nationality exception in European extradition?' (2005) 13(3) European Journal of Crime Criminal Law and Criminal Justice 317

<sup>61</sup> Basic Law for Federal Republic of Germany 2014, art 16

rights by the national laws of the EU Member States. The implementation of the ECHR is applied in all cases which infringe human rights protection because all EU Member States have ratified this Convention.<sup>62</sup> It can be said therefore that the ECHR has been used to reduce the gap in differing standards of and perspectives on human rights protection among the EU Member States. In other words, human rights protection is a compulsory requirement as a basis of all international cooperation in criminal matters in the EU.<sup>63</sup> Therefore, even though the adopted regional legal instruments such as the EAW seem to erode human rights protection, the ECHR and the Charter of Fundamental Rights of the EU standards can be used to override those instruments as indicated. This is because these regional legal instruments have been used by the Court of Justice of the European Union and the European Court of Human Rights in order to conduct and harmonise standards of human rights protection among EU Member States.<sup>64</sup>

### **5. Relationship between the Regional Cooperation Structures on Extradition and the Erosion of Human Rights Protection**

In practice, if the assumption of similar standards on human rights among the ASEAN Member States were to be applied in the regional cooperative structure based

on the intergovernmental model, some legal mechanisms which would be used for protecting human rights of the requested persons would probably be abolished. This is because in order to suppress a proliferation in transnational crime, a streamlined process which abolishes unnecessary processes is required. The assumption of a similar standard on human rights will lead to the elimination of legal measures relating to human rights from the conventional extradition process of the ASEAN as occurred in the EAW.

From this point, it follows that the erosion of mechanisms to protect human rights is not a result of the different regional cooperative structures of supranational or intergovernmental models. The presumption that all Member States have similar standards to protect human rights, particularly those of “mutual recognition of judicial decision” is one of the key factors which impact on the reduction of mechanisms for the protection of human rights in the proceedings of international cooperation in criminal matters.

In addition, in a number of cases, Thai frontline law enforcement practitioners would rather use the expedient process – a deportation system - based on section 12 of the Immigration Act as a loophole to deport a person who would otherwise have received the right to defence in extradition proceedings.<sup>65</sup> The right to stand trial in order to plead against extradition is recognised by

<sup>62</sup> Steven Greer, *The European Convention on Human Rights: achievements, problems and prospects* (Cambridge University Press 2006)

<sup>63</sup> Armin Von Bogdandy, ‘European Union as a Human Rights Organization-Human Rights and the Core of the European Union, The’ (2000) 37 *Common Market Law Review* 1307

<sup>64</sup> Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury Publishing 2004)

<sup>65</sup> Mark Charoenwong, ‘The Feasibility of Implementing the European Arrest Warrant Model into the ASEAN Context for Combating Human Trafficking’ (DPhil Thesis, University of Kent 2019)



the Extradition Act section 27,<sup>66</sup> but not in a deportation process. In fact, technically it could take from three months to two years to complete an extradition process whereas a deportation will normally take from one day to no longer than one week. In practice, law enforcement practitioners' annual performance is evaluated using the number of cases they have completed within one year. Therefore, the shortest process, that is deportation, has a more positive impact on their performance and it could be suggested that they focus more on their annual performance ratings than concern for the implementation of a mechanism which provides a higher level of human rights protection. Moreover, the Immigration Act of Thailand B.E.2522 (1979) also allows the implementation of the deportation process in the cases where there is,

[r]eason to believe that entrance into the Kingdom was for the purpose of being involved in prostitution, the trading of woman of children, drug smuggling, or other types of smuggling which are contrary to the public morality.<sup>67</sup>

In addition, with respect to the Thai Immigration Act of 1979, the Thai deportation system lacks a judicial review process which could be used for preventing forced

removal and protecting the individual's right to remain as is required in the laws of the EU Member States.<sup>68</sup> Therefore, it is argued that, in practice, the right to defence and the deported person's right to remain are eliminated when law enforcement practitioners avoid implementing the extradition process and use deportation in its place.

Hence, it can be said that the erosion of human rights protection occurs for reasons resulting from problems of law enforcement or the fact that for expediency, law enforcement practitioners would rather implement the mechanism which is more likely to erode human rights protection - the deportation process – than the extradition process. This is because extradition procedures are more complicated and therefore the process takes longer than deportation. This illustrates the problems resulting from a regional cooperative model on extradition which is based on the intergovernmental approach. Furthermore, as long as legal enforcement officers lack concentration on and concern for the protection of human rights of the requested persons, neither the lack of a regional convention on extradition in the ASEAN region nor the current legal mechanisms for the protection of human rights in national extradition procedure are the main factors which erode the requested persons' human rights protection.

<sup>66</sup> Extradition Act of Thailand B.E. 2551 (2008), s 27

“After the person sought for extradition has been arrested, whether there be a request under this Act, the arresting competent authority shall inquire such person whether to consent to the extradition.

Where the person sought according to paragraph 1 expresses such consent, it shall be prepared in writing according to the form stipulated by the Central Authority. The Public Prosecutor shall then arrange for such person to be brought to the Court by filing a petition for examining such consent promptly. Where the Court is of the opinion that such person has given consent voluntarily, it shall make an order detaining such person for extradition according to Section 22.”

<sup>67</sup> Immigration Act of Thailand B.E. 2522 (1979), art 12 (8)

<sup>68</sup> Judicial Reviews and Injunctions (Home Office 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/753933/chapter-60-judicial-reviews-v17.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/753933/chapter-60-judicial-reviews-v17.0.pdf)> accessed 13 December 2018

## 6. Different Understandings of Human Trafficking in ASEAN

The intergovernmental cooperative structure of the ASEAN not only provides different extradition procedures but also causes difficulty in providing common understandings on human trafficking within the region. In fact, at regional level, in 1997, ASEAN Member States agreed to work together to combat trafficking in women and children in the “ASEAN Vision 2020”. Following that, the ASEAN Declaration Against Trafficking in Persons was adopted in 2004. Since then ASEAN Member States have developed action plans to ensure that trafficking is a punishable crime in each of the ASEAN Member States. Although the 2004 ASEAN Declaration Against Trafficking in Persons provided a regional direction for cooperation among the Member States to combat human trafficking it did not provide substantive detail on legal mechanisms which could be used for fighting this criminal activity. After the 27th ASEAN Regional Summit in Kuala Lumpur on 21 November 2015, the ASEAN Leaders signed the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP). This is the first regional convention which aims to prevent and combat trafficking in persons within the region. However, it remains more focused on ‘women and children’ than trafficking in general. In practice, even though six Member States have ratified the ACTIP, the definition of human trafficking has been transposed to their domestic laws

differently from the provided definition in the Convention.

The definition of human trafficking among ASEAN Member States has remained different under the intergovernmental cooperative structure. This leads to the human rights of an alleged trafficker being affected when confronted with punishment without law in cases where the double criminality requirement is partly abolished, as provided by the FD on EAW. Currently, five out of ten ASEAN Member States: Burma,<sup>69</sup> Cambodia,<sup>70</sup> Philippines,<sup>71</sup> Thailand,<sup>72</sup> and Brunei<sup>73</sup> have introduced specific legislation for anti-trafficking offences, while the other Member States are still developing penal codes or other related laws for the same purpose.<sup>74</sup> Even without a specific law on human trafficking in some ASEAN Member States, all states already have national legal instruments which can be used to charge and prosecute the perpetrators of trafficking and related exploitation. Nevertheless, a number of ASEAN countries, such as Malaysia, Singapore and Vietnam retain deficiencies in existing specific laws on prosecution in male forced labour cases.

The national legal apparatuses in some Member States in the ASEAN do not fully comply with current international and regional standards to combat trafficking owing to the different understandings of the criminal element of human trafficking, particularly on the issue of the sex of a trafficked victim. The lack of concentration on the issue of gender equality is a major

<sup>69</sup> Anti-Trafficking in Persons Law of Burma 2005

<sup>70</sup> Law on Suppression of Human Trafficking and Sexual Exploitation of Cambodia 2008

<sup>71</sup> Anti-Trafficking in Persons Act of the Philippines 2003

<sup>72</sup> Anti-Trafficking in Persons Act of Thailand 2008

<sup>73</sup> Trafficking and Smuggling of Person Order of Brunei 2004

<sup>74</sup> ASEAN Response to trafficking in person ‘Ending Impunity for trafficking and securing justice for victims’

problem in the existing laws of all Member States. For example, most of the laws on human trafficking in the ASEAN do not cover trafficking in men and boys. Furthermore, the purpose of trafficking for sexual exploitation remains the major focus when combating trafficking. Other forms of trafficking, such as in male forced labour, are not covered in several domestic laws of ASEAN Member States.

Even though Malaysian Law does not provide a specific law on human trafficking, specific provision on traffic in female persons has been promulgated by the Women and Girls Protection Act of 1973 in Part IV. Traffic in female persons states that,

[A]ny person who buys, sells, traffics in, or procures or brings into or takes out of Malaysia for the purpose of such traffic and whether or not for the purpose of present or subsequent prostitution, any female person, shall be guilty of an offence and shall on conviction be liable to imprisonment.

In Singapore, the criminal activity pertaining to human trafficking has been enacted by the Penal Code of Singapore Section 141(5). This section provides the explicit prohibition on ‘trafficking in women and girls’ by stating that,

[A]ny person who buys, sells, procures, traffics in, or brings into or takes out of Singapore a woman or girl for the purpose of prostitution is to be punished.

Vietnamese Law prohibits the trafficking of children by the Criminal Code of 1985, amended in 1992 in Section 149 stating that,

[A]ny person kidnapping, trading in or fraudulently exchanging a child shall be subject to a term of imprisonment.

From the legal definitions cited above, it can be seen that the national legal apparatuses of Indonesia, Lao PDR, Malaysia, Singapore, and Vietnam do not provide a specific definition of trafficking in persons. Furthermore, the scope of prohibition on trafficking in the national laws of Malaysia, Singapore, and Vietnam is limited only to the protection of women and children as trafficked victims. Therefore, trafficking of males is not a punishable crime according to the domestic laws of these states.

It can be concluded that the ASEAN intergovernmental convention for fighting human trafficking cannot resolve the problem of different perspectives on the criminal elements of trafficking among the ASEAN Member States. This is because under an intergovernmental model, Member States have the freedom to provide different legal measures in order to combat human trafficking, even though a regional legal instrument has already been provided. This differs from a supranational-type approach which requires all Member States to transpose regional legal apparatus into their laws. It could be argued that a lack of common understanding on human trafficking is one of the problems in combating this criminal activity within the region, in particular when an extradition process needs to be used.

## **7. The Appropriateness of the Extradition Model in the ASEAN for Suppressing Human Trafficking**

In order to suppress the proliferation of human trafficking within the ASEAN region,

regional and national policies providing a higher standard of human rights protection for the requested person are needed. In particular, there should be a requirement stated in regulations and practitioner guidelines in the operational process of extradition which obliges practitioners to avoid the implementation of a deportation system in place of extradition. Funds are also needed for training practitioners with a view to increasing their consciousness of human rights protection. In addition, if a process of judicial review were to be applied with the aim of reducing or preventing forced removal when practitioners choose to implement a deportation system in place of an extradition process, the requested person's right to defence would be better protected. To motivate law enforcement practitioners to implement legal measures for protecting the requested person's human rights, Governments should create mechanisms for encouraging them to place more concern on human rights protection. In particular, the way in which practitioners' performance is evaluated should not focus simply on the number of completed cases but look more thoroughly at how they are handling complex issues including human rights.

At the same time, at regional level, the complicated extradition process under the intergovernmental model needs to be further streamlined by the ASEAN Extradition Treaty which still remains in the negotiation process. For example, the retention of a formal request through diplomatic channels is still required even though the central authorities have been designated to handle extradition in the domestic laws of all ASEAN Member States. Therefore, this requirement needs to be abolished. In addition, in order to provide an appropriate mechanism to combat human

trafficking, all ASEAN Member States have to reduce the obstacles to cooperation on extradition. For example, the ASEAN countries which strictly require bilateral treaties on extradition should allow the extradition process on the basis of the principle of reciprocity. Moreover, a minimum standard of extradition requirement should be agreed and provided by all ASEAN Member States.

In fact, although all ASEAN Member States ratified the Palermo Protocol which provided the definition of human trafficking, the Member States have transposed the definition to their domestic laws differently. Thus, the substantive differences in definitions of human trafficking among the Member States need to be eliminated. For example, there needs to be agreement that forced labour of both sexes constitutes human trafficking and is an illegal activity. In addition, a system for monitoring the implementation of legal mechanisms for protecting human rights is required.

The research recommends that the extradition proceedings of the ASEAN should accept arrest warrants for specific types of offence provided by the national courts of the Member States. This would streamline and immensely reduce the length of time to complete an extradition process when based on intergovernmental structure. However, this recommendation is problematic because, at present, mutual trust and mutual recognition have not been fully achieved amongst the ASEAN Member States. Furthermore, this recommendation inevitably impacts on national jurisdictions which tend to resist interference in internal affairs with respect to regional integration. Until this collective mentality changes very little of what is recommended is likely to occur in the foreseeable future. Perhaps the

most significant lesson to be learned from the EU experience is that motivation to collaborate on a supranational structure requires the political will of all Member States and that any changes in the ASEAN region will require a similar will to examine attitudes to non-interference and national sovereignty in order to cooperate in finding answers to the problem.

## 8. Conclusion

The most distinctive findings of this research were that the different regional cooperative structures on 'extradition' were not the key factor in the erosion of the human rights protection of requested persons. In practice, other factors such as the implementation of the principle of mutual recognition of judicial decision and the individual perspectives of law enforcement practitioners, have more influence in eroding requested persons' human rights. This is because, in practice, the human rights of requested persons in the ASEAN have been eroded as a consequence of the avoidance of implementing the extradition procedure. In other words, the erosion of the requested persons' human rights does not directly result from the inappropriateness of the legal mechanisms used in extradition proceedings based on the intergovernmental cooperative model, but from other factors. However, with respect to the supranational laws/institutions of the EU, the requested person's human rights have been better protected than in the ASEAN owing to the fact that the implementation of the extradition process is conducted by the supranational Courts – the ECtHR and the CJEU – of the EU.

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