State Practice of Asian Countries in International Law

Japan

*Kanami Ishibashi**

CRIMINAL LAW – IMPLEMENTATION OF UNTOC

Enactment of the Amended Act on Punishment of Organized Crimes and Control of Crime Proceeds (also referred to as “the Act on Punishment of the Preparation of Acts of Terrorism and Other Organized Crimes”)

Japan enacted the Amended Act on Punishment of Organized Crimes and Control of Crime Proceeds (also referred to as “the Act on Punishment of the Preparation of Acts of Terrorism and Other Organized Crimes”) on 15 June 2017 and it entered into force on 11 July 2017.

This Act aims to implement UNTOC (United Nations Convention against Transnational Organized Crime). Japan signed the UNTOC in 2003. However, it had not implemented the agreement before this enactment, since under the Japanese criminal law system, the mere existence of a “plan” or “preparatory action” to commit a crime is by no means to be a crime unless a special act prescribes it be so. Therefore, to implement the UNTOC, there needed to be new legislation that made it a crime to “plan” or take “preparatory action” for a crime. While Article 5 of UNTOC requires state parties to criminalize at least one of the acts set forth in its subparagraphs, (i) “agreeing to commit a serious crime” and (ii) “participation in activities of an organized criminal group,” Japan’s legal system does not have laws to criminalize these activities. Therefore, the introduction of new legislation was necessary for Japan to implement the Convention.

In this act, the main provision was to introduce a punishment for criminal acts that were previously not provided for under Japanese law as follows:

Article 6 : 2(1) Two or more persons who plan, as part of activities of terrorist groups or other organised criminal groups, the commission of criminal acts listed in the following sections by such groups, are subject

* Associate Professor, Tokyo University of Foreign Studies.

to the punishment prescribed in each of those sections, if any of them have arranged funds or goods or carried out preliminary inspections of relevant locations pursuant to the plan or other preparatory acts for the purpose of committing the planned criminal acts. An organized criminal group means a group of persons whose common purpose is to carry out the crimes enumerated in Appendix 3. However, those who surrender prior to executing the crime will have a reduced or exemption from that sentence.

According to the definitive explanation of the Ministry of Justice, the new conception of “plan” is indicative of a “concrete and realistic agreement” and the term “act of preparation” refers to an “act which is distinct from an act of planning, carried out based on the planning, and a manifestation towards the commissioning of the planning.”

However, the Special Rapporteur of the UN Human Rights Council strongly expressed his concern about the protection of the right to privacy.¹ He found that the new bill required not only “planning” to conduct the activities listed but also taking “preparatory actions” to trigger investigations. He observed there was no sufficient clarification on the specific definition of “plan” and “preparatory actions.” He expressed concern that in order to establish the existence and the extent of such “planning” and “preparatory actions,” it would be logical to assume that those charged would have had to be subjected to a considerable level of surveillance beforehand.

Additionally, he also pointed out that there are no safeguards and remedies regarding the right to privacy in the Japanese legal system to deter more intensified surveillance with regard to privacy. In regard to these concerns, the Government of Japan responded as follows:

Under the Japanese Code of Criminal Procedure, investigations are carried out only where there is evidentially supported suspicion that a crime has occurred. Under the provision of the “offence of the preparation of acts of terrorism and other organized crimes,” investigations can only be initiated when there is evidentially supported suspicion that all three necessary conditions that constitute the offence (“involvement of an organized criminal group”, the existence of “an act of planning”, and the

1 JAPAN’S RESPONSE TO THE LETTER ISSUED BY PROF. JOSEPH CANNATA, SPECIAL RAP-
PORTEUR ON THE RIGHT TO PRIVACY (18 August 2017), [https://www.mofa.go.jp/mofaj/
files/000282252.pdf](https://www.mofa.go.jp/mofaj/files/000282252.pdf).

existence of “an act of preparation for implementation (of the crime)” exist. Therefore, the amended Act by no means allows state authorities to conduct surveillance against certain groups before any suspicion is acknowledged and the possibility for state authorities to do so is excluded by law. In addition, the establishment of the “offence of the preparation of acts of terrorism and other organized crimes” creates a new offence but does not change the powers of investigation stipulated under the Code of Criminal Procedure. Therefore, investigations into the “offence of the preparation of acts of terrorism and other organized crimes” will be conducted just like other existing crimes, and the allegation that the amended Act would intensify surveillance towards citizens is unfounded. As stated above, both in terms of law and practice, it is absolutely not the case that the amended Act will intensify surveillance of citizens, and therefore there was no need to introduce additional safeguards and remedies. Furthermore, as described in the following paragraphs, in Japan, judicial review over investigations is well functioned.

The Special Rapporteur raised the further concern that the new crime is listed in the Appendix and some are not related to the crime regulated under the UNTOC. Japan responded that the Appendix is an integral part of the main clause and contributes to clarifying the actual scope of the provision and crimes such as theft of “forestry products” and acts of terrorism and other organized crime.

The Special Rapporteur noted that the term “organized criminal group” is vague and not clearly limited to terrorist organizations. Furthermore, the authorities when questioned on the broad scope of application of the new norm indicated that the new bill require not only “planning” to conduct the activities listed but also taking “preparatory actions” to trigger investigations. Nevertheless, there was no sufficient clarification on the specific definition of “plan” and “preparatory actions”.

Japan responded that it is a matter of course that the scope of “the offence of the preparation of acts of terrorism and other organized crimes” prescribed in paragraph 2 of Article 6 of the amended Act, which is an implementing legislation of the Convention, is not limited to terrorist organizations. Japan focuses on terrorism but in fact Japan does not have domestic terrorist organizations, therefore it needs another type of definition for such organizations. Thus, Japan chose the term “planning” which means a “concrete and realistic agreement” and the term “act of preparation” which means an “act distinct from an act of planning, carried out based on the planning, and a manifestation towards the commissioning of the plan.”

The Special Rapporteur also expressed concerns about the right to privacy through methods such as “GPS detection or monitoring of activities on electronic devices.” Japan responded there was no activation of surveillance by using GPS detection or monitoring of activities on electronic devices until warrants are issued by judges. Furthermore, with regards to wiretapping, extremely stringent conditions must be fulfilled for judges to issue warrants, and crimes for which wiretapping is allowed is restrictively prescribed by law. The “offence of the preparation of acts of terrorism and other organized crimes” will not be included in this restrictive list. Therefore, under Japan’s current domestic law, authorities will not be allowed to conduct wiretapping for the purpose of investigating the offence of the preparation of acts of terrorism and other organized crimes.

The Special Rapporteur also questioned the compatibility of the Act with international human rights norms and standards. Japan reiterated the amended Act is an implementing legislation of the UNTOC which 187 countries and regions are already state parties to and an act subject to punishment under the amended Act is “an act of planning” and “an act of preparation for implementation (of the crime)”. Therefore, the amended Act by no means criminalizes thought or unduly undermines the freedom of expression and the right to privacy. Furthermore, with regard to concerns on intensified surveillance, the offence of the preparation of acts of terrorism and other organized crimes is not listed in the list of crimes for which wiretapping is allowed in the first place. As such, investigative authorities are not allowed to undertake wiretapping through SNS and email, or to conduct real-time surveillance. Therefore, the concerns that the offence of the preparation of acts of terrorism and other organized crimes would lead to intensified surveillance and undermine the right to freedom of expression are unfounded.

On July 11, Japan deposited its instruments of acceptance of UNTOC with the Secretary-General of the UN. As a result, the UNTOC entered into force for Japan on August 10 2017.² Japan also deposited two more Protocols: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UNTOC; and Protocol against the Smuggling of Migrants by Land, Sea and Air that supplements the UNTOC and the UN Convention against Corruption. Japan has demonstrated its strong commitment to prevent transnational organized crime such as terrorism, trafficking in persons

² Ministry of Foreign Affairs of Japan, DEPOSIT OF THE INSTRUMENTS OF ACCEPTANCE OF FOUR TREATIES, INCLUDING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (UNTOC), https://www.mofa.go.jp/press/release/press3e_000108.html.

and smuggling of migrants, and to build an international framework to promote cooperation in combating transnational organized crime.

ENVIRONMENT – NUCLEAR DISASTER – FUKUSHIMA

In 2017, seven years after the Fukushima nuclear accident, there were three important judgments delivered on the claims for damages sought by evacuees, two of which acknowledged the government's responsibility.

Maebashi District Court

The Maebashi District Court ruled for the first time that the government has responsibility for inaction during the nuclear disaster. The court order the government and the TEPCO (Tokyo Electric Power Co.) to pay a total of only 38.55 million yen, which would be awarded to 62 of the 137 plaintiffs. In this case, psychological damages were not included in the compensation.³

Chiba District Court

The Chiba District Court ordered TEPCO to pay 376 million yen in damages to a group of Fukushima nuclear disaster evacuees and it gave concrete recognition to the evacuees' loss of hometowns, jobs and personal relationships for the first time. In this case, damages for voluntary evacuation were awarded, although the majority of the plaintiffs were residents of designated evacuation zones.⁴

Fukushima District Court

The Fukushima District Court ordered TEPCO and the government to pay a total of 500 million yen in damages to Fukushima and its neighboring prefectures. It also covered people who lived outside the evacuation area. The decision also allowed those who voluntarily evacuated to be compensated and extended the scope of those eligible for payment. The minimum amount paid to people living in the evacuation area was 8.5 million yen, while the amount

3 Maebashi District Court, March 17, 2017 (Jap.), http://www.courts.go.jp/app/files/hanrei_jp/691/086691_hanrei.pdf.

4 Chiba District Court, September 22, 2017 (Jap.), http://www.courts.go.jp/app/files/hanrei_jp/264/087264_hanrei.pdf.

given to voluntary evacuees was set at 80,000 yen. Regarding government involvement in the accident, the court ruled that it was possible to foresee that a 15.7 meter tsunami wave could have hit the power plant and the government's failure to order utilities to prepare for such an event by the end of 2002 created government responsibility.⁵

ENVIRONMENT – BIOLOGICAL DIVERSITY

Enactment of the Act (April 21, 2017 promulgated, Act No. 18) which Amends a Part of the Act (Cartagena Act) on Securing Biological Diversity by Regulation Such as the Use of Genetically Modified Organisms etc.⁶

Before the revision, the Cartagena Act specified measures to prevent the adverse effects on biodiversity caused by the use of genetically modified organisms. However, there is no provision for implementing the measures to be taken in the event of adverse effects on biological diversity, which is required of the parties following the Supplementary Protocol adopted thereafter.

In order to implement the Supplementary Protocol in Japan, the Act amending the Cartagena Act was promulgated on April 21, 2017. The revised Cartagena Act came into effect on March 5, 2018, when the supplementary protocol comes into effect, along with the revisions to relevant ministerial decrees and notifications. The amended Cartagena Act add to the provision that the Minister of the Environment can order measures to achieve its recovery if there is a significant negative impact on biodiversity.

Specifically, as a result of the illegal use of genetically modified organisms (import, distribution, cultivation, etc.) without approval based on the Cartagena Act, there has been adverse effects on biological diversity. If there is a decline in population density, a decrease in the area of the habitat, a deterioration in the habitat environment, etc., the user will be required to take necessary measures to cure the problem.

The species and area subject to the action order are designated by the Ministry of the Environment. In addition, the requirements of the action order and the contents of the action necessary curing the harm are stipulated in the basic matters.

5 Fukushima District Court, October 10, 2017 (Jap.), http://www.courts.go.jp/app/files/hanrei_jp/223/087223_hanrei.pdf.

6 See, <http://www.maff.go.jp/j/syouan/nouan/carta/about/attach/pdf/kaisei-1.pdf>.

ENVIRONMENTAL LAW – GENETIC RESOURCES – FAIR AND EQUITABLE SHARING

ABS Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization⁷

In October 2010, at the 10th Conference of the Parties to the Convention on Biological Diversity, which was chaired by Japan, The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity” (Nagoya Protocol) was been adopted.

The Nagoya Protocol sets out the opportunity for acquisition of genetic resources under the Convention and rules for more consistent access and benefit-sharing (ABS) of benefits arising from its use. In order to implement this Protocol, Japan adopted the Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization as domestic measures.

By taking measures to promote ABS (Access and Benefit-Sharing), the Guideline ensures the precise and smooth implementation of the Nagoya Protocol and contribute to the conservation and sustainable use of biodiversity. Protocol Articles 15, 16 and 17 (Measures taken as a User Country) requires that a report be provided on the acquisition of genetic resources including:

1. The acquirer of genetic resources, in principle, will report to the Minister of the Environment within six months after the International Compliance Certificate is posted on the International Clearing House (ABSCH). In addition to genetic resources, when acquiring related traditional knowledge, report them together. The Minister of Environment request a report for non-reporters.
2. Notification of legally acquired genetic resources domestically and internationally. The Minister of the Environment publishes the content of the report on the Ministry of the Environment website and provides it to ABSCH.
3. After 5 years from the report, the Minister of Environment request information related to the use of genetic resources. The Minister of the Environment ask for information again to non-given person. In addition, the Competent Minister provide guidance and advice as needed.

⁷ ABS GUIDELINES ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION, http://abs.env.go.jp/pdf/english_guidelines.pdf. See also, http://abs.env.go.jp/pdf/pamphlet_en.pdf.

4. Cooperation to the petition for violation of laws and regulations in the providing country.

If a party reports the violation of the laws and regulations of Japan as the providing country, the Minister of the Environment shall, as necessary, request information to persons handling genetic resources etc. and provide them to that party.

Protocol Article 6 (Measures as a Providing Country) provide acquisition opportunities for Japan's use of genetic resources. In this case, Japan's prior consent is not required. However, in consideration of changes in the social situation regarding ABS, etc., examination should be made within 5 years from the enforcement, and when it is deemed necessary, measures will be taken.

Protocol Article 5, 9, 17, 19 and 20 (Encouragement concerning ABS) ensures that provider/user of genetic resources in Japan or the user of genetic resources etc. in the provider country ensures that the distribution of profits arising from the use of resources is fair and equitable. They are required to conclude a contract; strive to use the benefits for biodiversity conservation, etc.; and attempt to include information sharing provisions in mutually agreed conditions set forth the contract. According to this Guideline, the Nagoya Protocol entered into force in Japan on August 20, 2017.