UNIVERSITY OF ESSEX **DISSERTATION**

SCHOOL OF LAW

LLM/MA IN: Human Rights LLM
STUDENT'S NAME: Kae Kuno
SUPERVISORS'S NAME: Dr. Clotilde Pegorier
DISSERTATION TITLE Problems of The Act on the Punishment of Organized Crimes and Control of Crime Proceeds in Japan **----------** **----------**

COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)

MARK:	
SIGNATURE:	**DATE:**

UNIVERSITY OF ESSEX

SCHOOL OF LAW

LLM in Human Rights

2018-2019

Supervisor: Dr. Clotilde Pregioner

DISSERTATION

Problems of The Act on the Punishment of Organized Crimes and Control of Crime Proceeds in Japan

Name: Kae Kuno
Registration Number (optional):

Number of Words: 19865

Date Submitted: October 8th 2019

Table of contents

Page number

I. Introduction

A. Enactment of the Anti-conspiracy law

On June 15th, 2017, the Japanese government enacted the law on the Punishment of Organized Crimes and Control of Crime Proceeds (the Anti-conspiracy law).[1] The Anti-conspiracy law newly covers 227 crimes to punish acts at the stage of conspiracy.[2] Although the official abbreviated name for the Anti-conspiracy law is the Offence to Criminalize an Act in Furtherance of Planning to Commit Terrorism and Other Serious Crimes, the new law is so-called the Anti-conspiracy law in that it is the first time that Japan adopted a general framework of criminalization of anti-conspiracy.[3]

B. The Anti-conspiracy law is a type of "preventive detention".

Based on the Japanese government's explanation, this Anti-conspiracy law was enacted mainly to prevent terrorisms.[4] That is the reason that the government called its abbreviated name as the Offence to Criminalize an Act in Furtherance of Planning to Commit Terrorism and Other Serious Crimes, putting the word "terrorism".[5] By applying law, based on the government's explanation, it would be possible to prevent terrorism in advance because this law enables to arrest and detain future terrorists at the stage of conspiracy.

---

[1] see the Japan Federation of Bar Associations (JFBA), 'Statement on the Enactment of the Bill to Revise the Act on Punishment of Organized Crimes and Control of Crime Proceeds, Including the Criminalization of Conspiracy' (*JFBA*, 15 June 2017) <https://www.nichibenren.or.jp/en/document/statements/170615.html> accessed 28 August 2019.

[2] see The Japan Times, 'Stop and Rethink Conspiracy Bill | The Japan Times' (*The Japan Times*, 26 May 2017) <https://www.japantimes.co.jp/opinion/2017/05/26/editorials/stop-rethink-conspiracy-bill/#.XWTeNSgzY2w> accessed 27 August 2019.

[3] see Ministry of Foreign Affairs of Japan, 'Press Conference by Foreign Minister Fumio Kishida' (*Ministry of Foreign Affairs of Japan*, 21 March 2017) </press/kaiken/kaiken4e_000356.html> accessed 27 August 2019; see Kanako Takayama, *Kyobozaino naniga mondaika [What are the problems of the Anti-conspiracy law?]* (Iwanami Shoten, Publishers 2017) 6.

[4] see Ministry of Foreign Affairs of Japan (n 3).

[5] ibid.

One might deny regarding the Anti-conspiracy law to be categorized as a type of “preventive detention.” Though there is no internationally agreed-upon definition, the most pervasive definition of "preventive detention" is "persons arrested or imprisoned without charge.”[6] Many experts have similarly defined the term as the ‘deprivation of liberty for imperative reasons of security without criminal charge.’[7] Based on these experts’ definitions, Claire clarifies that preventive detention is a framework of detention outside the operation of State criminal law, and does not contemplate criminal charge, prosecution or judicial trial.[8] In Japan, even under the Anti-conspiracy law, imprisonment or detention “without charge” is not accepted.[9] In other words, the Anti-conspiracy law’s detention framework is within the criminal procedure and thus, based on Claire's definition, the detention framework under the Anti-conspiracy law seems to be out of the scope of the ‘preventive detention’.

However, this narrow conception of ‘preventive detention’ should not be accepted. Elias argues preventive detention can be applied to detention framework of those within a penal code.[10] While denying the definition of ‘preventive detention’ mentioned above, Elias proposes three types of preventive detentions as a substitute, namely pre-trial detention, immigration detention, and national security detention.[11] Though Elias mentions eight criteria to form these three types of “preventive detention”, the most fundamental criterion is the legal basis.[12] Elias points out preventive detention can be categorized depending on the power to detain people

---

[6] Stella Burch Elias, ‘Rethinking Preventive Detention from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects’ (2009) 41 Columbia Human Rights Law Review 99, 110.

[7] Claire Macken, *Counter-Terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law* (Routledge 2011) 6.

[8] ibid 7.

[9] see Toyoji Saito ' Preventive Detention in Japan' in Stanisław Frankowski and Dinah Shelton (eds), *Preventive Detention: A Comparative and International Law Perspective* (M Nijhoff 1992) 177.

[10] see Elias (n 6) 116.

[11] ibid 128.

[12] ibid 114,115.

and a country is categorized in pre-trial detention framework if the jurisprudential and/or legislative basis for its detention of terrorist suspects is anchored in its criminal law and penal code.[13] Based on his categorization, the Japanese Anti-conspiracy law is within the scope of the pre-trial detention framework because the law is along with criminal procedure and enables to detain suspects before trial.[14] Though Elias analysis numerous countries, Japan is not mentioned in his essay because he focuses on common law, commonwealth countries and European democracies.[15] However, this does not mean his categorization is limited to these countries. As Elias suggests including more civil law countries would bolster the strength of his essay's conclusions, his definition would be also applicable to Japan, which is regarded as a civil law country.[16]

This essay supports Elias's categorization of three-types detention framework for two reasons. First, the traditional narrow conception of "preventive detention" may have caused inaccurate and insufficient analysis among scholars. Though Elias criticizes only American scholars for their limited analysis, this criticism may be also true to Japanese scholars.[17] While not a few Japanese experts analysis the Anti-conspiracy law by comparing other countries' conspiracy law, there seems to be insufficient arguments from the perspective of preventive detention.[18] This may be due to a lack of recognition that the Anti-conspiracy law can be categorized as a type of preventive detention. Broadening the definition of preventive detention may deep insight about the Anti-conspiracy law. Second, there is no standard, internationally agreed definition of preventive detention yet.[19] In other words, different interpretation including Elias's one can be possible. Therefore, Elias's definition of preventive detention should be approved and this essay analysis the Anti-conspiracy law with acceptance that this law is a type of

[13] ibid 129.

[14] Shinichiro Koike, Youko Yonekura and Daisuke Yamada (eds), *Kyobozai Konmentaaru [Commentary of the Anti-Conspiracy Law]* (Gendai Jinbun Company 2019) 107.

[15] see Elias (n 6) 108.

[16] ibid; see Takayama (n 3) 5.

[17] see Elias (n 6) 105.

[18] see Koike, Yonekura and Yamada (n 14) 228–243.

[19] Elias (n 6) 110.

"preventive detention".

C. Structure of this essay

This paper aims to reveal various problems the Anti-conspiracy law has. Before pointing out the problems, understanding Japanese situation about preventive detention is needed.

Hence, in the following chapter, this essay tries to introduce Japanese history of preventive detention and the Japanese government's efforts to enact the Anti-conspiracy law. The government explained the Anti-conspiracy law is against terrorism and this essay focuses on history from this point of view.[20]Thus, this essay does not introduce Japanese history of preventive detention for the mentally disordered, though Japan has a long history of this measure, because these measures are categorized as psychiatric health care and does not necessarily relate to terrorisms.[21] Similarly, preventive detention for drunkards is also out of the scope of this essay.[22]On the other hand, the Maintenance of the Public Order Act, which was enacted in 1925 and abolished in 1945, should be noted.[23] The Japanese government enacted the Act against communists, who the government regarded threats to the nation.[24] Considering the fact communists questioned the regime of the nation at that time and the government explained those who try to change the national policy using violence would be punished under the Act, this measure has some similarities with counter-terrorism measure.[25] Some academics point out there are numerous similarities between the Anti-conspiracy law and the Maintenance of the Public Order Act.[26]Moreover, some experts even call the Anti-conspiracy law as the renewed version of the Maintenance of the Public Order Act.[27] From these perspectives, in the

[20] see Ministry of Foreign Affairs of Japan (n 3).

[21] see Frankowski and Shelton (n 9) 171.

[22] see ibid 172.

[23] see ibid 170.

[24] ibid.

[25] see Hideo Hiraoka and Yuichi Kaido, *Shin kyobozaino kyohu: kikenna heiseino chiannizihou[Terror of new Anti-conspiracy law: Dangerous Heisei-era's Anti-conspiracy law]* (Ryokuhu Publication 2017) 204, 206.

[26] Koike, Yonekura and Yamada (n 14) 240.

[27] Hiraoka and Kaido (n 25) 207.

first half of the following chapter, the background, abuse, and abolishment of the Act will be introduced. After that, in the latter half of the chapter, this essay aims to reveal the background of the Anti-conspiracy law by introducing previous attempts from 2003 to 2005 by the Japanese government to enact a law of anti-conspiracy, and strong oppositions from Japanese people.

Then, in the first half of the second chapter, this essay tries to introduce how the Japanese government succeeded in enacting the Anti-conspiracy law for its fourth attempt. By comparing explanations with the previous ones by the government, this essay tries to reveal political manoeuvres by the government. Then, in the latter half of the second chapter, this essay tries to reveal problems of the Anti-conspiracy law under an international human rights law. Japan, which is located in East Asia, is not under control of any regional international law such as the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[28] Therefore, these regional frameworks are out of the scope of this essay. On the other hand, Japan ratified the main international treaties including the ICCPR.[29] As mentioned before, the Anti-conspiracy law enables to detain future terrorists and inevitably causes deprivation of the right to liberty. Thus, the most relevant article of the ICCPR may be Article 9, which prescribes the right to liberty. After clarifying the meaning of the article especially the word ‘arbitrary’, this essay attempts to reveal some problems of the Anti-conspiracy law under Article 9 of the ICCPR by focusing on concerns raised by Mr. Joseph Cannataci, the Special Rapporteur on the right to privacy.[30]

In the third chapter, this essay aims to clarify problems of the Anti-conspiracy law with reference to other countries’ practices. Though it has been two years since the Anti-conspiracy law came into effect, there have been no arrested cases under the law so far.[31]

---

[28] see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Second edition, Cambridge University Press 2016) 290.

[29] International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976)999 UNTS 171(ICCPR).

[30] Joseph Cannataci, ‘Mandate of the Special Rapporteur on the Right to Privacy’ (18 May 2017).

[31] Asahi Shinbun Company, ‘Asahi Sinbun Degital ’ Kyo Bo Zai Se Ko Ninenn “Tekiyounashi”’

Considering that analyzing problems of the law in terms of jurisprudence in Japan is not possible, it is useful to analyze and compare with other countries' practices of preventive detention because this would enable to give potential problems that the Anti-conspiracy law has. Though analyzing more countries' practices would deepen the insight about the Anti-conspiracy law, under the limitation of volume of the essay, this essay would pick up two countries for reference.

First country that this essay picks up is the United Kingdom. The reason is that the United Kingdom recently shifted its detention framework from the immigration one into the pre-trial one.[32] There are arguments about the shift and by analyzing the discussion, this essay aims to reveal whether the Anti-conspiracy law is desirable as a pre-trial detention framework.

As a second practical reference, this essay picks up the United States considering this country was the one that was attacked by the atrocious terrorist attack on 11 September 2001.[33] After the attack, the United States drastically reinforced its national power against terrorism, which caused serious human rights violations issues.[34] Then, by revealing these issues, this essay tries to gain implications for the Japanese Anti-conspiracy law.

II. The history of preventive detention -The Maintenance of the Public Order Act and the Japanese government 's efforts and failures to enact the Anti-conspiracy law-

A. The History of the Maintenance of the Public Order Act

1. Enact of the Maintenance of the Public Order Act

Japanese history of preventive detention dates back to World War II period. Historically, until the end of World War II, the Japanese Emperor was regarded to have absolute power.[35] Under the Imperial Constitution, which was promulgated on the 11th February

---

(Asahi Newspaper Digital: No Application of the Anti-Conspiracy Law for Two Years)' (10 July 2019) <https://www.asahi.com/articles/DA3S14089943.html> accessed 28 August 2019.

[32] Elias (n 6) 172.

[33] see Shane Darcy, 'Preventive Detention and Post-September 11th Legislation Human Rights Focus' (2002) 5 Trinity College Law Review 158, 162.

[34] see ibid.

[35] see Elisa Bertolini, 'Western and Japanese Constitutional Thought in the Shaping of the Role of

1889 and entered into force the following year, the Emperor was regarded as sacred and inviolable and had all sovereign powers.[36] Communists questioned this absolute power of the Emperor and there was a concern that some extreme communists planned to murder the Emperor.[37] Based on the situation, the government regarded communists as threats to the nation and needed to take measures against them.[38] Thus, the Maintenance of the Public Order Act was enacted in 1925.[39] Though not mentioned explicitly in the Act, its real purpose by the government was to repress communists.[40]

At first, preventive detention was not included in articles of the Maintenance of the Public Order Act. The Japanese government tried to introduce preventive detention against "thought offenders" in the 1927 preparatory draft and 1934 draft, targeting communists.[41] These drafts proposed two years of detention in order to reform their beliefs.[42] However strong opposition was held in the Imperial Diet believing "thought offenders" would not be reformed even under detention because most of them had a strong belief and believed in their crimes.[43] These opposed people suggested indeterminate sentences instead of preventive detention.[44] In the end, these drafts did not pass the Diet at that time.[45]

2. Adoption of preventive detention under the Maintenance of the Public Order Act

---

the Japanese Emperor in the 1889 and 1946 Constitutions' [2018] Historia Constitucional 641, 656,665.

[36] see ibid 656.

[37] see Frankowski and Shelton (n 9) 170.

[38] see ibid.

[39] ibid.

[40] ibid.

[41] Hakaru Abe, 'The Former Japanese System of Preventative Detention' (1961) 3 J. INT'L COMM. JUR. 99, 99.

[42] ibid.

[43] see ibid.

[44] ibid.

[45] ibid.

In 1939, World War II broke out and Japan took part in the war.[46] The Japanese government thought it was necessary for the people of Japan to unite and for this purpose, it became very important for the government to take adequate measures against "thought offenders", mainly targeting against communists.[47] Under this necessity, the Act was largely revised to have stronger measures against "thought offenders", including the adoption of the concept of preventive detention for the first time in Japanese history.[48] Under the Act, a person who plans to the commission of changing national policy or polity, or deny the system of private property, is subjected to punishment.[49] When arrested under the Act, a person could be detained continuously after the expiration of a prison period if he had not changed his thought pattern and showed eminent danger of repeating the political offenses listed in the law.[50] Moreover, under the revised Act, a paroled ex-prisoner or a probationer of a political offense could be detained based on a prediction of future "criminal" conduct.[51]

3. Abuse of the Maintenance of Public Order Act

When proposing the Maintenance of Public Order Act, the Japanese government explained there was no risk of abuse of the Act by police because the scope of the Act was severely limited.[52] However, contrary to the government's explanation, this Act became so abusive that it caused hundreds of thousands of innocent people arrested just because their beliefs were against the national policy and more than one thousand people died due to torture, cruel or inhuman treatment, or other

[46] see ibid.

[47] see ibid 99–100.

[48] Frankowski and Shelton (n 9) 170.

[49] Hiraoka and Kaido (n 25) 204.

[50] Frankowski and Shelton (n 9) 170.

[51] ibid.

[52] Hiraoka and Kaido (n 25) 204.

reasons.[53] This may be the reason that the Maintenance of the Public Order Act was regarded as the most notorious law in Japanese history.[54]

One of the most tragidic examples was the death of Takiji Kobayashi. He was a famous Communist writer in Japan and published a novel Kanikosen (The Crab Canning Ship), which was regarded as a peak of a genre called proletarian literature.[55] He was targeted by police because of his activities as a Communist. One day, under the Act, he was called to a police station in Tokyo for investigation.[56] After several hours, he died in the police station and his corpse was handed to his family.[57] Though the police published his cause of death as a heart attack, numerous scars and bruises all over the body explicitly showed the fact of the severe torture inflicted upon him.[58] One of his friends took a picture of the body and published the photo after World War II.[59] A lot of Japanese people still remember the miserable image of the photo as the notorious history of their own country. Moreover, this history reminds the danger of giving the power of police under the name of preventive detention.

4. Abolishment of the Maintenance of the Public Order Act in 1945

The Maintenance of the Public Oder Act was abolished in 1945 but it was not because the law was regarded as abusive or ineffective.[60] Japan lost World War II in

[53] NHK, 'The Maintenance of the Public Order/Clip/' <https://www2.nhk.or.jp/school/movie/clip.cgi?das_id=D0005403086_00000&p=box>.

[54] see Hiraoka and Kaido (n 25) 207.

[55] See Haruo Abe, 'Self-Incrimination--Japan and the United States' [1955] Journal of Criminal Law, Criminology and Police Science 613, 691; Ulrich Heinze, 'System Theory as Global Sociology-Japanese Ramifications of Parsonian and Luhmannian Thought' (2013) 44 The American Sociologist 54, 62.

[56] Abe (n 55) 691.

[57] see ibid.

[58] ibid 619.

[59] See ibid.

[60] Abe (n 41) 102.

1945 and the occupation by the Allied Powers began.[61] The General Headquarters of the Allied Forces (GHQ) pushed the democratization of Japan and through this process, on October 4, 1945, the GHQ published a memorandum titled “Removal of Restrictions on Political, Civil and Religious Liberties”.[62] In this memorandum, the GHQ requested to abolish systematic repression of freedoms such as the freedom of thought and speech that the Japanese government had been systematically controlling.[63] Based on this directive, the system of preventive detention was abolished due to the abrogation of the Maintenance of Public Order Act.[64]

B. Efforts and failures by the Japanese government to enact an anti-conspiracy law

1. The first attempt by the government and its failure

(1) The first attempt by the government to pass "a bill to amend a part of Penal Code to manage the globalization and organization of crime”

In this section, this essay aims to introduce a brief history of the Japanese government’s continuous efforts and failures to enact a law of anti-conspiracy from 2003 to 2005. Before succeeding to enact the law in 2017, as shown in the next chapter, the government submitted almost the same bill three times and none of them succeeded to pass the National Diet.[65]

First attempt was held in 2003. The Japanese government proposed a bill which is named as "a Bill to amend a part of the Penal Code to manage the globalization and

[61] Ryuichi Yamakawa, ‘Strangers When We Met: The Influence of Foreign Labor Relations Law and Its Domestication in Japan’ [1995] Pacific Rim Law & Policy Journal 363, 370.

[62] see National Diet Library, ‘Glossary | Birth of the Constitution of Japan’ (*Birth of the Constitution of Japan*) <https://www.ndl.go.jp/constitution/e/etc/glossary.html> accessed 23 August 2019.

[63] ibid.

[64] Frankowski and Shelton (n 9) 170.

[65] Brandon Marc Higa, ‘Japan’s Anti-Conspiracy Law: Relinquishing Japan’s Civil Liberties in the Name of Global Counterterrorism Efforts’ (2017) 19 Asian-Pacific Law & Policy Journal 201, 214.

organization of crime" (the Bill).[66] Though the main content has been the same as the current Anti-conspiracy law, the Bill was not explained by the government as a counter-terrorism measure. Instead, the government explained the need to enact the Bill only with relation to the United Nations Convention against Transnational Organized Crime (UNCTOC).[67] This multilateral treaty was adopted by General Assembly resolution 55/25 of 15 November 2000, aiming at fighting against transnational organized crime.[68] This treaty opened for signature by Member States in Palermo in 2000.[69] Article 5(1) of the UNCTOC mentions as below:[70]

> Article 5. Criminalization of participation in an organized criminal group
>
> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
> (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a. Criminal activities of the organized criminal group; b. Other activities of the organized criminal group in the knowledge that his or her

[66] Hiraoka and Kaido (n 25) 126.

[67] see ibid.

[68] United Nations Office on Drugs and Crime, 'United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (*United Nations Convention against Transnational Organized Crime*, 2019) <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 17 August 2019.

[69] ibid.

[70] United Nations Convention against Transnational Organized Crime 2001 (A/RES/55/25).

participation will contribute to the achievement of the above-described criminal aim;
(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

Article 5(1) of the UNCTOC requires signatory countries to criminalize either conspiracy act as mentions in (a) or participation in an organized criminal group as mentions in (b) or both of these acts. The Japanese government explained that the Penal Code of Japan did not have articles code to criminalize these activities and the Anti-conspiracy Bill needed to be passed to fulfill Japan's obligation to the U.N. as a signatory state to a multilateral treaty.[71]

(2) Opposition from the JFBA about submitting the Bill to the National Diet

When noticing that the Japanese government was planning to submit the Bill to the National Diet in 2003, the Japanese Federation of Bar Association (JFBA) strongly opposed to the Bill. The JFBA is a federal body, where all attorneys, legal professional corporations, and registered foreign lawyers in Japan should register.[72] The JFBA publish opinion papers and statements based on its duty to protect human rights and realize social justice.[73] Noticing that the Bill had the potential risk of human rights violation, on January 20, 2003, the JFBA published an opinion paper in Japanese titled "an opinion paper about a new domestic legislation based on the UNCTOC"[74].

[71] see Hiraoka and Kaido (n 25) 126.

[72] JFBA, 'Nihonn Bengoshi Rengokai [The JFBA]: Membership' (23 August 2019) <https://www.nichibenren.or.jp/en/about/us/profile/membership.html> accessed 23 August 2019.

[73] JFBA, 'Nihonn Bengoshi Rengokai [The JFBA]：What Is the JFBA?' <https://www.nichibenren.or.jp/en/about/us/profile.html> accessed 14 September 2019.

[74] JFBA, 'Kokuren "ekkyo soshiki hanzai bousi zyoyaku" teiketu ni tomonau kokunai houseibi nikannsuru ikennsyo [An opinion paper about a new domestic legislation based on the UNCTOC]'(JFBA, ２０January2003).

In its opinion paper, the JFBA criticized that the Bill was beyond the scope of the UNCTOC.[75] Article 3 of the UNCTOC prescribes that the scope of the Convention was "where the offence is transitional in nature and involves an organized criminal group."[76] However, the Bill did not have any limitation in terms of its scope and it was applicable not only transnational offenses but also any purely domestic offenses.[77]

(3) Failure of the first attempt to enact the Bill

Despite strong opposition from the JFBA, the government did not stop its effort to enact the Bill and the Bill was submitted to the House of Representatives in the National Diet.[78] Nevertheless, the Bill was shelved without any discussion in the House due to a dissolution of the House.[79] Article 7(3) of the Constitution of Japan prescribes that the cabinet has the power to dissolve the House of Representatives under the name of the Emperor.[80] The Prime Minister, as a leader of the cabinet, has the power to decide when to dissolve the House.[81] After a dissolution, an election for the House follows.[82] Thus, when the Prime Minister considers there is a better chance of winning an election for the House, he is more likely to decide the dissolution.[83]

Junichiro Koizumi, the Prime Minister at that time, decided to dissolve the Parliament in October 2003 taking into consideration the winning chance of the following

---

[75] ibid 2–3.

[76] United Nations Office on Drugs and Crime (n 68).

[77] JFBA, 'Kokuren "ekkyo soshiki hanzai bousi zyoyaku" teiketu ni tomonau kokunai houseibi nikannsuru ikennsyo [An opinion paper about a new domestic legislation based on the UNCTOC]' (n 74) 1–2.

[78] see Hiraoka and Kaido (n 25) 126.

[79] ibid.

[80] nihonkoku kenpou [The Constitution of Japan] (adopted November 3 1946, entered into force May 3 1947).

[81] Nakasaki Taro, 'syuin kaisan, syusyouha naze dekiruno? itikarakeisetu: asahishinbun dezitalu [Why can the Prime Minister dissolve the Lower House?: Asahi newspaper degital]' (*Asahi newspaper digital*, 28 September 2017) <https://www.asahi.com/articles/ASK9X55XHK9XUTFK011.html> accessed 14 September 2019.

[82] ibid.

[83] ibid.

election.[84] Mr. Koizumi may have given priority to winning the election over passing the Bill thinking he could submit and pass the Bill in the next Diet. As Mr. Koizumi foresaw, the election ended up winning the Liberal Democratic Party (LDP), where the Prime Minister belonged.[85]

2. The second attempt by the government and its failure

(1) The second attempt by the government to enact the Bill

The ruling party submitted "a Bill to amend a part of Penal Code to manage the globalization and organization of crime" (the Bill) in the National Diet in July 2005.[86] The submission of the Bill was not surprising considering the ruling party won the election in 2003 and there was no discussion about the Bill in the previous Diet. The name and the content did not change at all from the previous bill.[87]

(2) Opposition from opposition parties in the National Diet

In the National Diet, the opposition parties such as the Democratic Party of Japan strongly opposed the Bill and there was a huge discussion in the Diet.[88] Through its discussion, the opposition Parties succeeded to reveal many problematic issues in the new anti-conspiracy Bill.

First point was, as the JFBA mentioned in its opposing paper in 2003, that the scope of the Bill was broader than the requirement by Article 5 of the UNCTOC.[89] The opposition Parties succeeded to clarify this problem more by taking a religious group

[84] ibid.

[85] NHK, 'syugiin sangiin senkyono rekishi| NHK senkyo WEB [The history of election of the Lower House and Upper House of Parliament/ NHK election WEB]' (2019) <https://www.nhk.or.jp/senkyo/> accessed 14 September 2019.

[86] Hiraoka and Kaido (n 25) 127.

[87] ibid.

[88] ibid 127.

[89] JFBA, 'Kyobozai Kokoga Mondaida [The Anti-Conspiracy Law Problems Are Here]' (JFBA, 31 January 2006)6–7.

as an example.[90] Article 1 (a) of the UNCTOC defines an "organized criminal group" and it requires the group to "in order to obtain, directly or indirectly, a financial or other material benefit."[91] Thus, the organized group purely for religious aim is out of the scope of the treaty because these groups do not have aim of obtaining any financial or other material benefit.[92] On the other hand, the Bill did not have any limitation clause about the aim and hence, and the Bill would be applicable for these religious groups.[93] More fundamentally, the opposition parties criticized the Bill would cause a massive surveillance society due to difficulty of collective evidence[94] Consider a murder case for example. When the crime is accomplished, the victim is already dead and some tools for killing the victim may have already been used. Then, collective evidence from the dead body or these tools might be possible. On the other hand, at the stag of conspiracy, suspects may not have bought a knife yet because this Bill would criminalize acts at the stage of conspiracy, which is much earlier than real attempt of crimes. Therefore, the main evidence for proving conspiracy would be daily communication among suspects.[95] In order to collect enough evidence from these communications, police need to monitor daily communications such as telephones and emails among not only potential terrorists but also ordinary people because no one knows when ordinary people become dangerous people.[96]

(3) The second failure by the government to enact the Bill

The issues raised by the opposition parties were so controversial in the National Diet that the ruling party failed to reach a vote stage of the Bill. In Japan, it is regarded that in order to go to a stage of voting a bill, not only the ruling party but also opposition

[90] ibid.

[91] United Nations Convention against Transnational Organized Crime 2001 (n69).

[92] JFBA, 'Kyobozai Kokoga Mondaida [The Anti-Conspiracy Law Problems Are Here]' (n 89) 6–7.

[93] ibid.

[94] ibid 29.

[95] ibid 29.

[96] see ibid.

parties should agree in the Diet.[97] Based on the principle, the ruling party had to spend much time on explaining the Bill and before exhausting the discussion, in August 2005, there came up another huge issue, privatization of the postal services. Mr. Junichiro Koizumi, the Prime Minister at that time, considered the issue of the postal services as the heart of his reform of the nation.[98] Thus, when the bill related to the privatization of the postal services was defeated in the House of Councilors, Mr. Koizumi decided to dissolve the House of Representatives.[99] Mr. Koizumi said he would like to have an opportunity to ask the people for their judgment whether the privatization of the postal services should be approved or not by having an election.[100] Thus, the Bill was abandoned again in August 2005 before the Bill was entered into a voting stage.[101]

3. The third attempt by the government and its failure

(1) The third attempt by the government to enact the Bill

An election due to dissolution in August 2005 ended up massive win of the ruling party, LDP.[102] Then, as the third attempt, the Japanese government submitted the same Bill as the previous one in September 2005.[103] This continuous attempts to enact an Anti-conspiracy law shows the persistence of the government to enact the Bill.

(2) Opposition from the JFBA and locals

---

[97] Nobuyuki Sato, 'Kyouko Saiketuha Naniga Monndainanoka: Opinion: Yomiuri Sinbun [What Are the Problems of Ramming through a Bill? Opinion]: Yomiuri Online' (2013) <https://yab.yomiuri.co.jp/adv/chuo/opinion/20131224.html> accessed 18 September 2019.

[98] Junichiro Koizumi, 'Press Conference by Prime Minister Junichiro Koizumi【Upon Dissolution of the House of Representatives】' (*Prime Minister of Japan and his Cabinet*, August 2005) <https://japan.kantei.go.jp/koizumispeech/2005/08/08kaiken_e.html> accessed 3 October 2019.

[99] ibid.

[100] ibid.

[101] Hiraoka and Kaido (n 25) 126.

[102] NHK, 'syugiin sangiin senkyono rekishi| NHK senkyo WEB [The history of the Lower House and Upper House of Parliament/ NHK election WEB]' (n 84).

[103] Hiraoka and Kaido (n 25) 127.

This time, again, the JFBA strongly opposed to the Bill. The JFBA criticized the criminalizing of an act of conspiracy that did not consist of principles of the Japanese domestic law.[104] The Bill would make it possible to punish more than 600 crimes at the stage of conspiracy, which are far prior stage to preparations.[105] Considering the Penal Code of Japan, attempts or preparations are punishable only for exceptional cases, the JFBA pointed out this new Bill would change and deteriorate the whole system of criminal procedure.[106]

This criticism may be persuasive in that the Japanese government surprisingly mentioned this point before the adoption of the UNCTOC. In *travaux preparations*, the Japanese government once mentioned: "it is inconsistent with our legal principle to criminalize the acts of conspiracy and preparation of all serious crimes."[107] The reason that the government radically changed its position and decided to ratify the treaty remains unknown yet shocking.

Unlike the previous two times, this time, not only legal experts but also many Japanese ordinary local people opposed to the Bill due to raising awareness about the danger of the Bill.[108] This time, some academics pointed out the similarities between the Maintenance of Public Order Act and the Bill and local Japanese people feared the Bill would give abusive power to police, causing severe human rights

---

[104] see JFBA, 'Nihon Bengoshi Rengokai: Kyobozaiga Keizokushingi Saretakotonituiteno Kaityo Dannwa [the JFBA: A Statement about Conspiracy]' (*JFBA*, 1 November 2005) <https://www.nichibenren.or.jp/activity/document/statement/year/2005/2005_18.html> accessed 3 October 2019.

[105] see Hiraoka and Kaido (n 25) 127.

[106] JFBA, 'Nihon Bengoshi Rengokai: Kyobozaiga Keizokushingi Saretakotonituiteno Kaityo Dannwa [the JFBA: A Statement about Conspiracy]' (n 104).

[107] General Assembly, 'Proposals and Contributions Received from Governments' (1999) A/AC.254/5/Add.3,7.

[108] see Japanese Communist Party, 'Kyobozai Saiteisyutuni Ikari/ Hanntaino Shiminnto Giinnga Tudoi/Soudanshigouidakede Tuminannte [An Angeer about Resubmission the Anti-Conspiracy Bill]' (5 October 2005) <https://www.jcp.or.jp/akahata/aik4/2005-10-05/2005100514_01_2.html> accessed 3 October 2019.

abuse targeting ordinary people.[109] As shown in the first half of this chapter, there was hatred against the notorious Maintenance of Public Order Act. This negative image may have triggered Japanese people to oppose the Bill.

(3) Abandonment of enacting the Bill

In 2006, the Bill was abandoned before it went to the stage of voting.[110]The hatred against the abusive power may be the main reason that the government failed to enact the Bill.[111] It is said that the ruling party did not go to a stage of voting because, Junichiro Koizumi, the Prime Minister at that time, did not want to be remembered as a notorious Prime Minister, who enacted a new version of the Maintenance of Public Order Act.[112]

III. Enactment of the Anti-conspiracy law and analysis about concern raised by a UN rapporteur

A. The process of succeeding enactment of the Anti-conspiracy law

1. The government's problematic explanation about the Bill

(1) The government changed the abbreviated name of the Bill without changing its content

In this section, this essay tries to reveal how the Japanese government succeeded to enact the Anti-conspiracy law in 2017 despite strong opposition as shown in the previous chapter.

Opposition about the Anti-conspiracy Bill showed that there was a notorious image about the name of anti-conspiracy among Japanese people because of the Maintenance of the Public Order Act, which was enacted during World War II. Noticing the negative image, this time, the government stopped to call the Bill as an anti-conspiracy bill and instead called as "the Offence to Criminalize an Act in Furtherance of Planning to Commit

[109] see ibid.

[110] Hiraoka and Kaido (n 25) 192.

[111] see ibid.

[112] ibid.

Terrorism and Other Serious Crimes."[113] By putting "Terrorism" in its name, the government emphasized that the Bill was against terrorism and hence there was no risk of human rights violation toward ordinal people. The government repeatedly explained that ordinary people were out of the target of the Bill.[114]

However, the content that the Bill criminalizes at the stage of conspiracy was not changed at all. As shown from local opposition about the Bill, there remained much risk that ordinary people would be under massive surveillance under the name of counter-terrorism.[115]

(2) The government emphasized terrorist aspects though the UNCTOC is not against terrorism

In addition, this time, the government changed its reason for proposing the Bill. One of the main two reasons proposed by the government this time was to improve security ahead of the 2020 Tokyo Olympic and Paralympic Games.[116] This reasoning was proposed for the first time in the Government's efforts of the Anti-conspiracy Bill.[117] Based on the government's explanation, numerous terrorist attacks happen all over the world these days.[118] Prime Minister Shinzo Abe insisted on the necessity of enacting the Act in order to preserve Japan's reputation as the safest country.[119] However, as the JFBA revealed, Japan may have already enough measures to

[113] ibid 50.

[114] Ministry of Justice, 'Homusyo: Oshiete Terotou Zyunbizai [Ministry of Justice: An Act against Terrorism]' (2017) <http://www.moj.go.jp/keiji1/keiji12_00144.html#Q8> accessed 16 September 2019.

[115] JFBA, 'Terotou Zyunnbizaiha Kyoubouzai Desu Namaewo Kaetemo Kikennseiha Kawarimasenn[An Act against Terrorism Is Anti-Conspiracy Law. There Is Risk Even Though the Name of the Act Is Changed.](JFBA, 2017)'.

[116] Higa (n 65) 209.

[117] see JFBA, 'Kyobozai Kokoga Mondaida [The Anti-Conspiracy Law Problems Are Here]' (n 89) 1-2; see Hiraoka and Kaido (n 25) 126.

[118] see Ministry of Foreign Affairs of Japan (n 3).

[119] Higa (n 65) 209.

combat terrorisms by ratifying 13 relevant treaties about counter-terrorisms.[120] Considering the fact, questions remain whether there was a need to enact a new law.

The other reason proposed by the Japanese government was to ratify the UNCTOC. Same as previous times, the government explained that it would be essential for Japan to enact the Anti-conspiracy law to become a State Party of the UNCTOC.[121] However, unlike the previous three times, the government emphasized terrorist aspects and explained the UNCTOC as a counter-terrorism treaty.[122] The government explained that becoming a State Party of the UNCTOC would enable Japan to protect its country from terrorisms.[123] However, the UNCTOC was not intended to prevent terrorisms.[124] While the United Nation Office of Counter-Terrorism officially publishes a list of 19 universal treaties dealing with terrorism, UNCTOC is not included in the list.[125] Moreover, UNODC mentions some countries insisted that UNCTOC should be placed as a counter-terrorism measure, but, in the end, this opinion was not approved and UNCTOC was separated from the counter-terrorist measures.[126] The legislative guideline also explicitly mentions that groups such as some terrorist or insurgent groups, provided that their goals were purely non-material, would not be covered in the Convention.[127] By emphasizing the terrorist aspect, the government may have tried to

---

[120] JFBA, 'Iwayuru Kyobozaiwo Sousetusuru Houannwo Kokkaini Zyouteisurukotoni Hanntaisuru Ikennsyo [Opinion Opposing the Submission of the Bill to Criminalize Conspiracy to the Diet]' (*JFBA*, 17 February 2017)8.

[121] Higa (n 65).

[122] see Takayama (n 3) 35–44.

[123] see Ministry of Foreign Affairs of Japan (n 3).

[124] Hiraoka and Kaido (n 25) 52.

[125] UN, 'UNITED NATIONS Office of Counter-Terrorism (OCT)' <https://www.un.org/en/counterterrorism/legal-instruments.shtml> accessed 3 August 2019.

[126] Koike, Yonekura and Yamada (n 14) 185.

[127] United Nations Office on Drugs and Crime, 'Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' para 26 <https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf>.

avoid criticism from local people leading to think they were out of the target of the Bill.[128]

(3) The government explained the scope of the Bill was limited but remained broad

As response to previous criticism that the scope of the previous Bill covered was too broad, the Japanese government limited its scope from over 600 to 277 crimes.[129] The government explained that there was no risk of human rights violation by limiting its scope of the Bill.[130]

However, limiting the scope of the Bill does not automatically guarantee the limitation is appropriate. Under the current Penal Code in Japan, there is no provision of conspiracy crime.[131] Moreover, though the Code criminalizes some acts at the stage of plots, which is regarded as almost the same stage as conspiracy, this criminalization is limited to only a few crimes, while the number of criminalization of accomplished is over 200.[132] The vast gap of the number of criminalization between at the stage of plots and accomplishments shows the criminalization at the stage of plot is highly exceptional.[133] Thus, criminalizing 277 acts at the stage of conspiracy under the Bill may change the whole system of criminal system by expanding its punishable act drastically.

2. Concern raised by a UN Special Rapporteur and reaction of the government

(1) Concern from a UN Special Rapporteur on the right to privacy

Widespread protests and opposition about the Anti-conspiracy Bill caught the attention of

[128] see JFBA, 'Terotou Zyunnbizaiha Kyoubouzai Desu Namaewo Kaetemo Kikennseiha Kawarimasenn[An Act against Terrorism Is Anti-Conspiracy Law. There Is Risk Even Though the Name of the Act Is Changed.]' (n 115).

[129] ibid.

[130] Ministry of Justice (n 114).

[131] Takayama (n 3) 6.

[132] JFBA, 'Opinion Opposing the Submission of the Bill to Criminalize Conspiracy to the Diet' (*JFBA,* February 17 2017)2.

[133] ibid.

the United Nations.[134] Mr. Joseph Cannataci, a UN Special Rapporteur on the right to privacy noticed the potential risk of human rights violation and raised serious concerns about the anti-conspiracy Bill by sending a letter to the Japanese Prime Minister on 18 May 2017.[135] This letter published on the website of the UN Human Rights Office of the High Commissioner.[136] After the Rapporteur raised various concerns about the Bill, the Rapporteur mentioned the Bill, if enacted into law, may lead to undue restrictions to the rights to privacy and freedom of expression because of its broad scope.[137] The fact that not only Japanese people but also international society had serious concern about the Bill was shocking and a lot of mass media reported the news.[138]

(2) The Government's shameful reaction about the letter

The response of the Government about Mr. Cannataci's letter may have been far from ideal. Without considering the concerns sincerely, the Ministry of Foreign Affairs of Japan published a protest toward OHCHR on the same day of the publication of the letter.[139] In its protest, the Ministry criticized Mr. Cannataci mentioning the letter should not have been published in the name of the Special rapporteur of the United Nations.[140] Moreover, the Ministry condemned that the letter was released unilaterally without involvement of the Japanese government or the Ministry of Foreign Affairs.[141]

---

[134] see Higa (n 65) 220.

[135] 'UN Privacy Expert Shoots down Japan's Complaints about "anti-Conspiracy" Bill Criticism - The Mainichi' <https://mainichi.jp/english/articles/20170524/p2a/00m/0na/014000c> accessed 27 August 2019.

[136] ibid.

[137] Cannataci (n 30).

[138] 'UN Privacy Expert Shoots down Japan's Complaints about "anti-Conspiracy" Bill Criticism - The Mainichi' (n 135).

[139] Ministry of Foreign Affairs of Japan, 'Kokurenzinnkennrizikaino puraivasiino kennri tokubetu houkokusya niyoru koukaisyokann nitaisuru nihonnseihu kennkai [A view of Japan about a letter by Special Rapporteur on the right to privacy]' (*Ministry of Foreign Affairs of Japan*, 18 May 2017) </mofaj/fp/is_sc/page3_002110.html> accessed 27 August 2019.

[140] ibid.

[141] ibid.

Insisting there was no opportunity to explain the content of the legislation to the Rapporteur directly and hence, the Ministry concluded the letter was unbalanced and inappropriate.[142]

Moreover, one day later, Katsutoshi Kaneda, the Minister of Justice at that time, criticized the letter by saying that Special rapporteurs do not reflect the UN's position and that the letter appeared to have written without sufficient understanding the Bill.[143] It is without saying that Special rapporteurs are individual experts, but the Minister seemed deliberately emphasized the point under the intention of understating the importance of the letter.[144]

The evaluation of the response of the government may well be drawn by Mr. Cannataci's reaction. Mr. Cannataci characterized the government's criticism as "angry words" with "no substance".[145] Though Mr. Cannataci would have welcomed gaining more information about the Bill, the government did not provide any useful information.[146]

3. Enactment of the Anti-conspiracy law by unusual procedures

(1) The ruling party rammed the Bill through the House of Representative

The Bill was passed through a highly unusual step. In Japan, a bill becomes law after voting passage by two Houses in the National Diet, namely the House of Representatives and the House of Councilors.[147] In each House, as a matter of practice, it is regarded that not only the ruling party but also opposition parties should agree to go to a stage of voting a Bill.[148] This practice is based on the idea that under

[142] ibid.

[143] 'UN Privacy Expert Shoots down Japan's Complaints about "anti-Conspiracy" Bill Criticism - The Mainichi' (n 135).

[144] see ibid.

[145] ibid.

[146] see Cannataci (n 30).

[147] Higa (n 65) 215.

[148] Sato (n 97).

democracy, derivative discussion should be exhausted.[149] Most of Japanese current laws have been enacted through voting after this agreement.[150] However, this time, the ruling party rammed the Bill through the House of Representatives even though the opposition parties requested more discussion.[151] This aggressive attitude of the ruling party was far from preferable because they did not respect democracy and neglected their duty to give a detailed explanation about the Bill.

(2) The ruling party used a highly unusual bypass tactic in the House of Councilors

Aggressive attitude of the ruling party did not stop in the House of Representatives. In the House of Councilors, a bill is first discussed in a Committee such as Committee on Judicial Affairs, and Committee on Foreign Affairs.[152] There are seventeen Committees under the House in total and each member of the House of Councilors belong to at least one Committee.[153] Each Committee has its specialization and a bill can be discussed in detail from its specialized perspective.[154] In ordinal procedure, after passing a vote in a Committee, a bill is sent to the House of Councilors, where a floor vote is held.[155] About the Anti-conspiracy law, the Bill was sent to a Committee on Judicial Affairs, where severe discussion was held.[156] Surprisingly, the ruling party

---

[149] ibid.

[150] ibid.

[151] Sapporo Bar Association, 'Kyobozai　Houanno Syuugiinndeno Saiketu Ni Kougisuru Seimei [A Statement against Ramming through the Anti-Conspiracy Bill in the House of Representative] (*Sapporo Bar Association*, 24 May 2017) <https://www.satsuben.or.jp/info/statement/2017/03.html> accessed 17 September 2019.

[152] House of Councillors, 'Iinnkai: Kokkaino Kisotishiki: Sangiin [Committee: Basic Information about National Diet: House of Councillors]' (*House of Councillors, National Diet of Japan*) <https://www.sangiin.go.jp/japanese/aramashi/iinkai.html> accessed 4 October 2019.

[153] ibid.

[154] ibid.

[155] see Higa (n 65) 215.

[156] see 'Ruling Coalition Diverts Attention from Scandal by Ramming "conspiracy" Bill into Law' *Mainichi Daily News* (15 June 2017) <https://mainichi.jp/english/articles/20170615/p2a/00m/0na/003000c> accessed 18 September 2019.

skipped a vote in the Upper House Committee on Judicial Affairs in the middle of the discussion.[157] Though there is a tactic that skips a vote in the Upper House Committee on Judicial Affairs, Japanese legislators regard that the committee bypass tactic should not be used easily because this would lose its significance of a Committee.[158] Therefore, only when a chairperson in a Committee belongs to the opposing parties and discussion in the Committee was deliberately delayed due to his or her political reasons, the bypass tactic has been used in order to break through the delay under exceptional cases.[159] This time, the chairperson belonged to the Komeito, which was a coalition party with the ruling party, LDP, and there was no abusive delay of discussion in the Committee.[160] Thus, despite there was no reasonable need, the government used the bypass tactics to avoid opposition by the Judicial Affairs committee members, who were anticipated to strike down the bill.[161]

(3) Enact of the Anti-conspiracy law

After skipping the vote in the Committee, the Bill was sent to a floor vote. Thus, the Bill was passed within days of the 2017 Diet Session and the Bill was enacted in 2017.[162]

Enactment of the Anti-conspiracy law was criticized by locals not only because of its content but also because of its use of unusual tactics. The opposing parties criticized the ruling party did not give sufficient opportunity to discuss the Bill.[163] Even a

---

[157] Higa (n 65) 215.

[158] NHK, 'terotou zyunbizai shinnsetu houann/ tyukannsaiketu karano saiketu ["the Offence to Criminalize an Act in Furtherance of Planning to Commit Terrorism and Other Serious Crimes/ a vote after skipping a vote in a Committee]' (*Kaisetuiinn bulog [blog by NHK commentator]*, 15 June 2017) <http://www.nhk.or.jp/kaisetsu-blog/300/273280.html> accessed 19 September 2019.

[159] ibid.

[160] see Higa (n 65) 216.

[161] ibid 215.

[162] see ibid 216.

[163] ibid.

member of the LDP criticized the bypass tactic by mentioning using this tactic could lose the significance of the Committee.[164] Moreover, the JFBA immediately published a statement about the Anti-conspiracy law.[165] In its statement, the JFBA also criticized the use of skipping a vote in the Upper House Committee on Judicial Affairs.[166] Moreover, the JFBA mentioned there is a concern that general citizens can be exposed to massive surveillance.[167] Other locals also had suspicions about the government's attitude. One survey in one of the most famous newspaper in Japan revealed that majority of the respondent felt the Diet should not have enacted the Anti-conspiracy law.[168] Therefore, the Anti-conspiracy law was enacted without adequate support and understanding from locals.

B. Analysis of the problems of the anti-conspiracy Act raised by Mr. Cannataci under Article 9 of the ICCPR

1. The meaning of Article 9 of the ICCPR

(1) The framework of Article 9 of the ICCPR

In this section, this essay tries to reveal problems of the Anti-conspiracy law under an international legal framework. Mr. Joseph Cannataci, a UN Special Rapporteur on the right to privacy, raised concern about the Anti-conspiracy law by mentioning that adding 227 crimes in attachment as a form of Appendix makes it difficult for citizens and experts to understand the scope of the law.[169] Moreover, Mr. Cannataci raised concern that the

[164] 'Ruling Coalition Diverts Attention from Scandal by Ramming "conspiracy" Bill into Law' (n 156).

[165] JFBA, 'Statement on the Enactment of the Bill to Revise the Act on Punishment of Organized Crimes and Control of Crime Proceeds, Including the Criminalization of Conspiracy' (*JFBA*, 15 June 2017) <https://www.nichibenren.or.jp/en/document/statements/170615.html> accessed 4 October 2019.

[166] ibid.

[167] ibid.

[168] Higa (n 65) 217.

[169] Cannataci (n 30).

definition of what an “organized crime” is vague.[170] Mr. Cannataci does not quote any articles when mentioning these points, and thus, this essay tries to clarify this problem with reference to Article 9 of the ICCPR. Article 9 (1) ICCPR prescribes as below[171]:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

As the Human Rights Committee mentions, the first paragraph of Article 9(1) is applicable to all types of deprivations of liberty.[172] The Anti-conspiracy law is under restriction of the article because this law enables to arrest and detain suspects in custody, which causes deprivation of liberty. However, the right to liberty of person is not regarded as absolute.[173] Thus, under Article 9 (1), not all detention is prohibited nor preventive detention itself is prohibited.[174] Then, whether the anti-conspiracy Act is permissible depends on whether it falls within the prohibition on arbitrary arrest and detention under Article 9 (1) of the ICCPR.[175] From this point, in the next paragraph, the word "arbitrary arrest and detention" needs to be clarified.

(2) The elements of judging ‘arbitrary' in Article 9 (1) of the ICCPR

As shown in the third sentence of Article 9 (1), when the detention is carried out in a way that is not respectful of law, this will be automatically arbitrary detention. However, arbitrariness must be interpreted more broadly. *Travaux Preparatoire of the* Article 9 of

---

[170] ibid.

[171] International Covenant on Civil and Political Rights(n29).

[172] see Human Rights Committee, ‘General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)’ (30 June 1982) para 1; see Human Rights Committee, ‘General Comment No. 35 Article 9 (Liberty and Security of Person)’ (16 December 2014) CCPR/C/GC/35 para 5.

[173] Human Rights Committee, ‘General Comment No. 35 Article 9 (Liberty and Security of Person)’ (n 172) para 10.

[174] Claire Macken, ‘Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966’ (2005) 26 Adelaide Law Review 1, 4.

[175] see ibid.

the ICCPR shows the word “arbitrary” was included because the majority of the members of the Commission had considered that “the rule of law did not provide adequate safeguards against the possible promulgation of unjust laws”.[176]

Moreover, in *Mukong v Cameroon*, the UN Human Rights Committee explained ‘arbitrariness’ is not equated with ‘against the law’, but must be interpreted to include elements of inappropriateness, injustice, lack of predictability and due process of law.[177] Similarly, in No.35 General Comment, the Committee states the notion of arbitrary includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality.[178] Therefore, these elements are core principles of the arbitrary arrest and detention. However, more clarification for elements might be needed to analysis the Anti-conspiracy law.

(3) More clarification about the element of predictability

Mr. Cannataci mentioned the Anti-conspiracy law may be difficult for citizens and experts to understand.[179] This comment may relate an element of predictability, and thus, in this paragraph, this essay focuses on an element of ‘predictability’. Both No. 8 and No.35 General Comments does not explicitly clarify the meaning of ‘predictability’. However, in the No.35 General Comment, the UN Human Rights Committee mentioned that any substantive grounds for arrest or detention must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[180] In other words, it is considered that predictability is included in the elements of the ‘arbitrary detention’ in order to avoid arbitrariness in the interpretation and implementation of the law.[181] Considering

[176] Macken (n 7) 41.

[177] HRC, *Mukong v Cameroon* (Communication No. 458/1991) s9.8.

[178] Human Rights Committee, ‘General Comment No. 35 Article 9 (Liberty and Security of Person)’ (n 172) para 12.

[179] Cannataci (n 30).

[180] Human Rights Committee, ‘General Comment No. 35 Article 9 (Liberty and Security of Person)’ (n 172) para 22.

[181] Louise Doswald-Beck (ed), *Human Rights in Times of Conflict and Terrorism* (Oxford University

these, the term 'lack of predictability' may refer to vagueness of the wording of the law.[182]

However, not only the precision of the wording but also the structure of a law may be important for predictability. When the structure of a law is so complex that individual has difficulty understanding the scope of a law, he or she may not be able to foresee whether his or her conduct would cause punishment under the law. This should be also considered lack of predictability because the word "predictability" is consistent with this interpretation. Though this interpretation is not explicitly mentioned in No.8 and No.35 General Comments, this may be justified with reference to a comment by the Human Rights Committee in No. 34 General Comment, which mentions about the freedom of speech.[183] As Article 19 (3) of the ICCPR shows, the restriction of the freedom of speech must be 'provided by law'[184]. About the meaning of the word, the Committee mentions law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[185] This comment shows the significance of foreseeability for an individual's act. Though this comment is for the different article, this significance may be the same under Article 9 considering both articles require restriction must be provided 'by law'. Thus, when a structure of a law is so complex that it prevents from understanding a law, the law does not meet an element of predictability. Enough simplicity of the structure of a law may be needed for predictability.

2. Analysis of the concerns raised by Mr. Cannataci

(1) Article 6, Appendix3 and Appendix 4 of the Anti-conspiracy law

---

Press 2011) 261.

[182] see ibid 260.

[183] see Human Rights Committee, 'General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)' (n 172); see Human Rights Committee, 'General Comment No. 35 Article 9 (Liberty and Security of Person)' (n 172); see Human Rights Committee, 'General Comment No. 34 Article 19: Freedoms of Opinion and Expression'(12 September 2011) CCPR/C/GC/34.

[184] International Covenant on Civil and Political Rights(n29).

[185] Human Rights Committee, 'General Comment No. 34 Article 19: Freedoms of Opinion and Expression' (n 183) para 25.

In this section, this essay analysis whether the Anti-conspiracy law breaches Article 9 of the ICCPR focusing on the element of predictability. Before analyzing, the structure of the Anti-conspiracy law needs to be explained. Article 6(2) of the Act prescribes the scope of punishable acts[186]:

> Two or more persons who plan, as part of activities of terrorist groups or other organized criminal groups (a group of persons whose common purpose is to carry out the crimes enumerated in Appendix 3), the commission of criminal acts listed in the following sections by such groups, are subject 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.
>
> (i) Crimes listed in Appendix 4, which are punishable by death penalty or indefinite imprisonment, or imprisonment with or without labor for more than 10 years- imprisonment with o without labor for 5 years or less
>
> (ii) Crimes listed in Appendix 4, which are punishable by either imprisonment with or without labor for more than 4 years but less than 10 years- Imprisonment with or without labor for 2 years or less.

Article 6 (2) of the Anti-conspiracy law quotes both Appendix 3 and Appendix 4 in its article. Appendix 3 and Appendix 4 prescribe as below[187]:

Appendix3

(1) An act prescribed in Article3(Organized Homicide), Article 9 (1) to (3) (An act obtaining profit by corporations in order to control their management), Article 10(1) (Concealment of criminal proceeds) or Article 11 (Acceptance of criminal proceeds)

[186] Soshikitekina hanzaino syobatu oyobi hanzaisyuuekino kiseitouni kannsuru houritu [the law on the Punishment of Organized Crimes and Control of Crime Proceeds] (adopted 21 June 2017, entered into force 11 July 2017).

[187] ibid.

(2) (i) The crimes prescribed in Article 77 (1) of the Penal Code (Insurrection) (excluding Article 77 (1) (iii)) or Article 79 of the Penal Code (Accessoryship to Insurrection) (excluding Article 79 (limited to Article 79 (3)) and Article 77 (2))

(ii) The crimes prescribed in Article 81 (Instigation of Foreign Aggression) or Article 82 (Assistance to the Enemy) of the Penal Code

…

Appendix 4

(1) The act set forth in Appendix 3 (excluding the acts in the following)

(a) An act prescribed in Article 11 (Acceptance of Criminal Proceeds)

(b) An act prescribed in Article 77 in the Penal code (excluding the parts in Article 77 (3)), Article 81, Article 82 and Article 198

(c) an act prescribed in Article 1 of the Criminal Regulations to Control Explosives (Criminal Use of Explosives)

(d) an act prescribed in Article 60 (2) Child Welfare Act (limited to Article 34(1)(vii) or (viiii))

….

(2) An act prescribed in Article 7 (limited to Article7 (1)(a) to (c))

…

(2) Complexity of the structure of the Anti-conspiracy law

This essay tries to reveal the complexity of the Anti-conspiracy by taking an act of accessoryship to insurrection for example. Consider ten people become a group and plan to help a riot leader, whose purpose is to overthrow the government, by supplying food.

First, in order to understand whether this act is punishable, whether the group of ten members is regarded as ‘terrorist groups or other organized criminal groups’ must be analyzed. In Article 6 (2) of the Anti-conspiracy law, the term ‘terrorist groups or other organized criminal groups’ is prescribed as ‘a group of persons whose common purpose is to carry out the crimes enumerated in Appendix 3’. Then, as shown above,

Appendix 3 lists punishable acts. An act of 'accessoryship to insurrection' is prescribed in Article 79 of the Penal Code, which is included in the list of Appendix 3. Article 79 of the Penal Code prescribes[188]:

A person who aids the commission of any of the crimes prescribed under the preceding two Articles by the supply of arms, funds or food, or by any other act, shall be punished by imprisonment without work for not more than 7 years.

Article 79 quotes 'the preceding two Articles', and hence one must go to these two articles to understand whether the group of two people is under the regulation of Article 79. Article 77 (1) of the Penal Code prescribes[189];

A person who commits an act of riot for the purpose of overthrowing the government, usurping the territorial sovereignty of the State, or otherwise subverting constitutional order, thereby committing the crime of insurrection shall be sentenced according to the following distinctions:

(i) A ringleader shall be punished by death or life imprisonment without work;

(ii) A person who participates in a plot or directs a mob shall be punished by imprisonment without work either for life or for a definite term of not less than 3 years; a person who performs other leading functions shall be punished by imprisonment without work for not less than 1 year but not more than 10 years;

…

The group members in the example plan to supply food to a riot leader. The leader is within the scope of "a ringleader", "who commits an act of riot for the purpose of overthrowing the government", which is prescribed in Article 77 (1) (i) and supplying food is prescribed in the Article 79 of the Penal Code. Thus, these group members in the example is punishable under Article 79. Therefore, the ten members are within the definition of 'terrorist groups or other organized criminal group'.

[188] Keihou [the Penal Code] (adopted April 24 1907, entered into force October 1 1908).

[189] ibid.

This example may reveal the issue of the structure of the Anti-conspiracy is deeper than Mr. Cannataci thought. It is true that Article 6 (2) and Appendix 3 and Appendix 4 are put in different places. An individual must look at these three different articles to understand the scope of punishable acts because while Appendix 3 defines the scope of terrorist groups or other organized criminal groups, Appendix 4 prescribes the punishable acts by listing crimes. However, more importantly, Appendix 4 itself may be hard to understand even for legal experts because of many excluding and limiting clauses. Moreover, as shown in the hypothetical example, in most cases, one must go to not only Appendix 3 and 4 of the Anti-conspiracy law but also other laws such as the Penal Code in order to understand whether his or her conduct is within the definition of 'terrorist groups or other criminal groups'.[190] This procedure may require a high knowledge of laws and it may be difficult for an ordinal individual to predict whether his or her conduct is punishable under the Anti-conspiracy law. Therefore, this complexity of the Anti-conspiracy law may breach Article 9 (1) of the ICCPR because it lacks predictability.

(3) Vagueness of the word "terrorist groups or other organized criminal groups"

Then, in the following paragraphs, this essay tries to analysis the second concern by Mr. Cannataci, which was the vagueness of "organized crime". However, Mr. Cannataci may have picked up a partial part. The actual words were "terrorist groups or other organized criminal groups" as shown in Article 6(2) of the Anti-conspiracy law and these words should not be separated. And considering the law was against terrorism based on the government's explanation, "terrorist groups" should be put more emphasis. Thus, this essay analysis weather "terrorist groups" is prescribed with sufficient precision.

First, surprisingly, though Article 6 (2) prescribes "terrorist groups", there is no definition of the term within the Anti-conspiracy law. This itself may cause vagueness of the word "terrorist groups or other organized criminal group." With this regard, some may argue

[190] See Cannataci (n 30).

that by reference to international law, it is possible to understand the definition of 'terrorist group' in the law. To be sure, there are numerous 'sector'-specific treaties that address particular crime means or methods used by terrorists.[191] However, none of these specific treaties has a comprehensive definition of terrorism despite the fact numerous efforts by the international community have been put since the 1920s.[192] In the lack of a general approved definition of terrorism in treaty laws, no parallel customary rule can arise out of those treaties.[193] Therefore, it is impossible to deduce the definition by reference to international law.

Some Japanese academics argue that the definition of the term 'terrorist group' is possible by reference to domestic laws.[194] To be sure, some Japanese domestic laws have a definition of the term "terrorism". For example, under Act on the Protection of Specially Designated Secrets, in Article 12 (2)(i) terrorism is defined as below[195]:

---

[191] see Convention on offences and certain acts committed on board aircraft 1969 (704 UNTS 219); Convention for the Suppression of Unlawful Seizure of Aircraft 1971 (860 UNTS 105); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1977 (1035 UNTS 167); International Convention against the Taking of Hostages 1983 (1316 UNTS 105); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1992 (1678 UNTS 221); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1992 (1678 UNTS 304); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1989 (974 UNTS 177); Convention on the Marking of Plastic Explosives for the Purpose of Detection 1998; International Convention for the Suppression of Terrorist Bombings 2001 (2149 UNTS 256); International Convention for the Suppression of the Financing of Terrorism 2002 (2178 UNTS 229); see International Convention for the Suppression of Acts of Nuclear Terrorism 2007 (A/RES/59/290).

[192] Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer 2012) 81.

[193] ibid.

[194] Koike, Yonekura and Yamada (n 14) 15.

[195] Tokuteihimituno hogonikannsuru houritu [Act on the Protection of Specially Designated Secrets] (adopted 6 December 2013, entered into force 10 December 2014).

any terrorist activities (meaning activities intended to kill or injure people or destroy important facilities or other objects for the purpose of forcing a political or other principle or belief upon the State or other persons or causing fear or terror in society based on such principle or opinion; the same shall apply in item (iv) of the same table)

This definition of “terrorist activity” is the same as in another law, which prohibits drone around the House of Parliament and other important facilities.[196] However, an individual may have difficulty finding the definition because there is no clue in the Anti-conspiracy law that the word “terrorist groups” are prescribed in other laws. Moreover, in Japan, a definition in one law is not automatically applied in another law. One of these examples is the definition of “worker”. In Japan, under Article 9 of the Labor Standard Act, “workers” are defined as “one who is employed at a business or office and receives Wages therefrom, regardless of the type of occupation”.[197] On the other hand, under Article 3 of the Labor Union Act, "Workers" are defined as “those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation.[198]" While under the Labor Standard Act, an element of employment is required, under the Labor Union Act, such element is not required. Thus, it is regarded the definition of "workers" under the Labor Union Act is wider than that of the Labor Standard Act.[199] Similarly, even though “terrorist activity” is prescribed in different laws, there is no guarantee the definition is applied to the Anti-conspiracy law.

---

[196] Kokkaigizidou,naikausouridaizinnkanntei sonotano kunino zyuuyouna shisetutou gaikokukoouanntou oyobi gennsiryokuzigyousyono syuuhenntiikino zyoukuuniokeru kogatamuzinnkitouno hikouno kinnshinikannsru houritu[Law prohibiting drone around House of Parliament, Prime Minister’s Office of Japan, or other important facilities, diplomatic establishments of foreign countries, and nuclear cites] (adopted 18 March 2016, entered into force 7 April 2016).

[197] Roudoukizyunhou [Labor Standards Act] 1947.

[198] Roudoukumiaihou [Labor Union Act] 1949.

[199] Ministry of Health, Labour and Welfare, ‘Roudousyaseini Tuite [About Workers]’.

More fundamentally, applying the definition of the word of the Act on the Protection of Specially Designated Secrets into the Anti-conspiracy law may contradict the explanation by the government. As shown above, the government explained the reason for enacting the anti-conspiracy Act was to ratify UNCTOC, which excludes terrorisms purely motivated by political or religious reasons from its scope of the Convention.[200] On the other hand, as shown in the definition under Article 12(2)(i) of the Act on the Protection of Specially Designated Secrets, the Act does not exclude these reasons from its definition.[201] Thus, it is not certain whether terrorisms purely motivated by political or religious reasons would be under the scope of the Anti-conspiracy law or not. This vagueness may give undesirable discretion to polices about judgment weather an activity falls under the definition of "terrorist groups or other organized criminal groups". Therefore, the Anti-conspiracy law may breach Article 9 (1) of the ICCPR because of insufficient precision of the word "terrorist group or other criminal groups".

IV. Problems of the Anti-conspiracy law by reference to discussion of the United Kingdom's practice and United States' practice

A. Analysis of the problems of the Anti-conspiracy law with reference to the United Kingdom's practice

1. History of the United Kingdom's preventive detention framework

(1) Preventive detention to Northern Ireland terrorism

In the first half of this chapter, this essay tries to reveal problems of the Anti-conspiracy law with reference to the shift of the United Kingdom's preventive detention framework. To understand the shift, first, a brief history of preventive detention framework in the United Kingdom needs to be looked through.

---

[200] Ministry of Foreign Affairs of Japan (n 3).

[201] see Tokuteihimituno hogonikannsuru houritu [Act on the Protection of Specially Designated Secrets](n194).

The United Kingdom has longstanding experience combating terrorism within its territory. In 1972, the United Kingdom government adopted preventive detention as a measure against Northern Ireland terrorism.[202] At that time, there was a conflict between the Catholic republicans in Ulster seeking to unite Northern Ireland with the Republic of Ireland and Protestants opposed Irish unification.[203] Under the law, any person suspected of having been concerned in the commission of terrorism could be detained for 28 days.[204] After that, the detainee was either released or referred to a Commissioner.[205] The Commissioner would hear the case, but the hearing was not a judicial procedure but an executive one.[206]

It is widely believed that the introduction of internment without trial in Northern Ireland was a failure because it only served to worsen the situation by causing further alienation of the Catholic community, an increase in support for and membership of the IRA and an overall increase in the level of violence.[207]

(2) Adoption of Anti-Terrorism, Crime, and Security Act after 9.11 terrorist attack

The devastating terrorist attacks against the United States on September 11, 2001, made the United Kingdom take stronger measures against terrorism.[208] On 14 December 2001, the United Kingdom Anti-Terrorism, Crime, and Security Act became a law (hereafter ATCSA).[209] Part 4 of the ATCSA granted the Home Secretary the power to certify foreign nationals who were terrorist suspects.[210] This power might be controversial in that reasonable belief and suspicion of the Home Secretary may be

[202] Macken (n 7) 9.

[203] ibid 9–10.

[204] ibid 10.

[205] ibid.

[206] Darcy (n 33) 167.

[207] ibid.

[208] ibid 166.

[209] Anti-terrorism, Crime and Security Act 2001 (2001 c 24).

[210] Elias (n 6) 172–173.

based on secret evidence.[211] Moreover, while the judicial body has the power to confirm this executive opinion, detained people and their counsel may be excluded from the hearings.[212]

Once an individual had been certified through this problematic process, he or she could be repatriated.[213] Under Article 23 of the ACTSA, if, on the other hand, his or her home country conditions were such that upon repatriation the individual might face torture or other forms of ill-treatment, he or she could be detained until such conditions changed or until another country is willing to receive him or her.[214]

In order to fully implement the ATSCA, it was necessary to derogate from Article 5(1) of the European Convention on Human Rights.[215] Article 15 of the convention allows State Parties to derogate a certain number of their human rights obligations "in time of war or other public emergency threatening the life of the nation"[216]. It was highly debatable whether the 9.11 attack would meet the requirement of the “threat the life of the nation” considering the attack happened outside of the United Kingdom.[217] However, the United Kingdom implemented derogation and the prerequisite for full implementation for the ACTSA was met.[218]

Originally, Article 23 of the ACTSA was intended to prohibit the extradition of individuals to countries in which they would face a real risk of torture, the death penalty, or any

[211] Darcy (n 33) 167.

[212] ibid.

[213] Elias (n 6) 173.

[214] Anti-terrorism, Crime and Security Act 2001; Elias (n 6) 173.

[215] Darcy (n 33) 168; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 , 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.htm.

[216] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14(n214).

[217] Darcy (n 33) 168.

[218] ibid 169.

other inhuman or degrading treatment.[219] However, the United Kingdom made use of this article for detaining suspected terrorists potentially indefinitely by insisting they may face torture or other forms of ill-treatment in their home countries.[220] This system enabled to detain non-national suspected of involvement with terrorism without charge or trial.[221] Based on Elias's taxonomy, this detention system is categorized as the immigration detention framework in that the system anchors its immigration law system.[222] Under this ATCSA provision, in three years, a seventeen were certified, sixteen of whom were detained.[223]

(3) The shift from immigration framework into pre-trial detention model

The immigration detention system under the ATCSA in the United Kingdom did not last for a long time. A former home secretary, Charles Clarke, criticized the ATCSA by mentioning the governing legislation relating to detention without charge was being applied in a 'disproportionate and discriminatory manner' against non-British citizens.[224]

Moreover, detained people challenged the lawfulness of their detention before the Special Immigration Appeals Commission(SIAC) because this was the only way of challenging the Home Secretary's certification.[225] In July 2002, the SIAC granted a declaration the detentions were incompatible with Article 5 and 14 of the ECHR in that they permitted detention of suspected international terrorists in a way that they discriminated against them on the ground of nationality.[226] This declaration was overturned by the Court of Appeal, which held that there were objective and

[219] Elias (n 6) 173.

[220] see ibid.

[221] Darcy (n 33) 169.

[222] Elias (n 6) 129,172.

[223] ibid 174.

[224] Diane Webber, 'Extreme Measures: Does the United States Need Preventive Detention to Combat Domestic Terrorism' (2010) 14 Touro International Law Review 128, 100.

[225] Daniel Moeckli author, *Human Rights and Non-Discrimination in the 'War on Terror'* (Oxford University Press 2008) 108; Anti-terrorism, Crime and Security Act 2001 s 21(8),25.

[226] Moeckli(n225)108

justifiable grounds for selecting only non-British citizens for detention.[227]After that, the case was brought before the House of Lords. In its opinion, while eight of the nine Law Lords justified the derogation made by the government, the majority also ruled the indefinite detention without trial of foreign terrorists suspects violated the right to liberty in that this derogating measure was not strictly required by the exigencies of the situation.[228] Moreover, the House of Lords held that Part 4 of the ACTSA breached the prohibition of discrimination, which was prescribed in Article 14 of the ECHR, because the section provides detention only for foreign people, and the difference was not reasonably justifiable.[229]

Consequently, the government needed to change the ATCSA into a new framework, which is equally applicable to foreign and Britain citizens.

Thus, the United Kingdom has adopted arrest and investigative detention based on a reasonable suspicion prior to criminal charge as a preliminary step of criminal procedure.[230] The United Kingdom has shifted the detention framework from its immigration model into pre-trial detention model.[231]

2. Analysis of the shift to the pre-trial detention framework in the United Kingdom

(1) Preferable opinions about the adoption of the pre-trail detention framework

The United Kingdom itself seemed to welcome its shift because the United Kingdom Home Office indicated that criminal prosecution is the first objective of counter-terrorism policy.[232] Moreover, some academics support the shift of the United Kingdom into the pre-trial detention framework for various reasons.[233] The first reason is that the United Nations

[227] Ibid.

[228] *A v Secretary of State for the Home Department* (House of Lords, Great Britain)[2004]UKHL56, para25-29,75,115-120,154,166,208,226,240,30–44.

[229] Ibid, para45-73.

[230] Macken (n 7) 153.

[231] Elias (n 6) 172.

[232] see Macken (n 7) 153.

[233] see Elias (n6) 173.

regards criminal law framework is preferable to deal with terrorism.[234] The United Nations Global Counter and Terrorism Strategy published a Plan of Action for a global strategic approach to the counter-terrorism measures of States.[235] In the Plan of Action, member states agreed to undertake a measure to make every effort to develop and maintain an effective and rule of law-based national criminal justice system as a counter-terrorism measure.[236] This statement clearly shows that an effective criminal justice system is regarded as preferable between member states.[237]

Not only the United Nation but also the International Commission of Jurists recommended a criminal framework to fight against terrorism.[238] In its 2009 report, the Commission pointed out the significance of the criminal justice system by mentioning criminal justice has evolved the basic rule of law that innocent people are allowed to go free, guilty people are properly punished for their crimes.[239] Based on the statement, the Commission emphasized the need to place preventive detention within the criminal law procedure.[240]

Lastly, the pre-trial detention framework is regarded to provide established human rights safeguards.[241] While enhanced human rights are guaranteed under detention framework based on criminal procedure, less State and interhuman rights law are

[234] Macken(n7) 153.

[235] see ibid.

[236] UN General Assembly, 'UN Global Counter-Terrorism Strategy | Counter-Terrorism Implementation Task Force' (24 October 2005) <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy#plan> accessed 6 August 2019.

[237] see Macken (n 7) 153.

[238] see ibid 154.

[239] The International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' 123.

[240] see Macken (n 7) 154.

[241] see Elias (n 6) 156; see Macken (n 7) 154.

applicable under detention framework based on intelligence.[242] For example, in the criminal law procedure, common law rules excluding improperly or unfairly obtained confessions and admissions are existed.[243] This rule enables to prevent police from interrogating criminal suspects improperly.[244] On the other hand, this evidential rule has little room to play under a system based on intelligence.[245] Moreover, granting human rights criminal procedure gives considerable legitimacy to the process.[246] For example, the independence and impartiality of the judge from the executives, who orders the initial period of preventive detention and a detainees' right of appeal to a higher tribunal of independent jurists grant considerable fairness in proceedings.[247]

Among these reasons, established human rights safeguards as shown in the last reason may be the most important one. The United States and the International Commission of Jurists mention the significance of the rule of law for their reasons to recommend pre-trial detention. This is consistent with the importance of human rights safeguards.

(2) Negative opinions about the pre-trial detention framework

On the other hand, there is some criticism about pre-trial detention framework. First one is that the criminal process is not appropriate for counterterrorism in its nature. Criminal procedure is retrospective in that arrest is appropriate only after the suspect has committed a proscribed act.[248] To be sure, most criminal justice systems have modified its retrospective focus to a certain degree and adopted laws proactively as shown in

[242] see Macken (n 7) 154,155.

[243] ibid 155.

[244] ibid.

[245] ibid.

[246] Elias (n 6) 156.

[247] ibid.

[248] Monica Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide The Way Forward' (2007) 40 Case Western Reserve Journal of International Law 593, 6 10.

inchoate offenses.[249] However, even in these offenses, retrospective nature remains in most cases because a person is required to be charged with attempt to "dangerously close" to committing the crime, or with purpose for a conviction of criminal conspiracy.[250] On the other hand, detentions in the fight against terrorism are predominantly prospective due to its focus on preventing feature.[251] Therefore, relying on criminal procedure requires States to sacrifice its security by requiring States to wait until criminal participating in terrorist attack.[252]

The second criticism is also related to the retrospective nature of criminal procedure. In order to take appropriate measures against terrorists effectively, some States may change criminal procedure by undermining its safeguards.[253] For example, new criminal laws were enacted in the United Kingdom as a response to the IRA bombings.[254] However, this change carries the potential cost of contaminating the criminal process because extraordinary powers may be introduced and justified in the anti-terrorism context but then spread to other parts of the criminal law.[255] Thus, adjusting the criminal procedure in the terrorism context may deteriorate ordinal criminal procedure.

In addition to retrospective nature, evidence is also difficult to achieve in counter-terrorism under criminal procedure. Terrorism cases may rely heavily on intelligence information, but this kind of information needs to be kept secret for fear that this reveal may prevent future investigation to prevent terrorisms.[256] On the other hand, a right to

[249] ibid 610.

[250] ibid.

[251] see ibid.

[252] see ibid.

[253] Hakimi (n248) 611

[254] Michael Yew Meng Hor, Victor Vridar Ramraj and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 131.

[255] Hakimi (n 248) 611.

[256] see ibid 613.

fair trial requires exposure of evidence to accused people. Therefore, there is a risk that trials for terrorists may not succeed due to its high standard of proof.[257]

3. Analysis of the Anti-conspiracy law from discussion about the United Kingdom's practice

(1) Japan has a problem of human rights safeguard due to long-term detention

As shown in the analysis above, the pre-trial detention framework is regarded as preferable based on the assumption that this framework gives established human rights safeguards to detained people. However, Japanese criminal procedure may not meet the criteria due to long-term detention.

Under the Japanese system of detention, detention without arrest is not admitted and arrest of the suspect is a prerequisite to his or her detention prior to the institution of prosecution.[258] When the public prosecutor has received the suspect and considers that his detention is necessary and supported by reasonable grounds, the prosecutor must petition a judge to issue a warrant for his detention.[259] Article 205 of the Code of Criminal Procedure prescribes the time limit for this request is 24 hours after the public prosecutor has received the suspect from the police and 72 hours after his or her arrest.[260] If the judge who received the request for detention decides that the suspect should be detained, in principle, the term of detention is 10 days from the date the prosecutor petitioned for the term of detention under Article 208 of the Code.[261] However, the term of detention can be extended under Article 208 and Article 209 of the Code.[262] When there exists an unavoidable delay, the detention can be extended by the judge for up to 20 days.[263] Article 208 and 209 indicate this extension is

[257] ibid 611.

[258] Frankowski and Shelton (n 9) 177.

[259] see ibid.

[260] Keizisosyouhou [brada] (adopted 10 July 1948, entered into force 1 Januray 1949) (Act No 131); Frankowski and Shelton (n 9) 177.

[261] Keizisosyouhou [Code of Criminal Procedure] (n260); Frankowski and Shelton (n 9) 177.

[262] Keizisosyouhou [Code of Criminal Procedure] (n260).

[263] Frankowski and Shelton (n 9) 177.

regarded as an exception.[264] However, in practice, the principle and the exception are reversed.[265] It is said that Judges routinely allow prosecutors' requests for arrest and detention.[266] Thus, in practice, in most cases, it is possible to detain suspects for 23 days in total from the day of arrest.[267]

Detaining 23 days before trial may seem to be relatively long, but under Japanese criminal procedure, it is possible to detain suspects for much longer term. When a detainee is charged for several separate crimes, he or she may be confined on each charge, thus 23 days detention can be repeated over and over again.[268] This tactic is used strategically and sometimes the charges do not have to be new.[269] In its traditional practice, when a corpse is found, a suspect is first detained on the charge of "corpse abandonment" and then, a maximum of 23 days later, he or she is rearrested for murder.[270]

One of the recent examples of the long-term detention is that of Carlos Ghosn, who was a former Nissan Motor Cooperation and Renault Chairman.[271] He was arrested based on the suspicion of fraud and false reporting.[272] The prosecutors requested a warrant and waited 23 days and just before the expiration day, they request another

---

[264] see Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, 'Call to Eliminate Japan's "Hostage Justice" System by Japanese Legal Professionals' (*Human Rights Watch*, 10 April 2019) <https://www.hrw.org/news/2019/04/10/call-eliminate-japans-hostage-justice-system-japanese-legal-professionals> accessed 21 August 2019.

[265] ibid.

[266] ibid.

[267] ibid.

[268] see Brad Adams, 'Japan's "hostage Justice" System' (*The Japan Times*, 11 January 2019) <https://www.japantimes.co.jp/opinion/2019/01/11/commentary/japan-commentary/japans-hostage-justice-system/> accessed 22 August 2019.

[269] ibid.

[270] ibid.

[271] see ibid.

[272] see ibid.

warrant.[273] The prosecutors repeated this procedure, enabling the suspect in the Tokyo Detention House for more than 100 days.[274] Another example may be Mark Kapeles, former CEO of bitcoin exchange Mt. Gox.[275] He was found guilty of data falsification and before the sentence, he spent 358 days in detention from his arrest in August 2015.[276] This long-term detention is one of the reasons that Japanese criminal procedure is criticized as "hostage justice".[277]

There may be a concern that this long-term detention may be used more often than before under cases of the Anti-conspiracy law in order to gain confessions. As shown in its negative opinion about pre-trial detention framework, information about suspects may be collected mainly by intelligence, which cannot be exposed in trial. Though the negative opinion had a concern about failing to reach the high standard of proof, this type of failure may not happen in Japan. Japan has an extremely high rate of conviction, 99.0 %.[278] In order to keep the astonishingly high rate, instead of losing the case, prosecutors may try to gain confessions even by abusing their power. [279] Especially, in Japan, it is regarded most judges rely excessively on confessions as proof of guilt.[280] Thus, confession may become fundamental evidence for cases of the

[273] ibid.

[274] Edo Naito, 'Examining Carlos Ghosn and Japan's System of "Hostage Justice"' *The Japan Times Online* (April 2019) <https://www.japantimes.co.jp/news/2019/04/17/national/crime-legal/examining-carlos-ghosn-japans-system-hostage-justice/> accessed 21 August 2019.

[275] ibid.

[276] ibid.

[277] see 'EDITORIAL: Ghosn's Long Detention Puts Justice System under Spotlight：The Asahi Shimbun' (*The Asahi Shimbun*) <http://www.asahi.com/ajw/articles/AJ201903070021.html> accessed 21 August 2019.

[278] Kazuko Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan Symposium: An International Exploration of Wrongful Conviction' [2011] University of Cincinnati Law Review 1245, 1248.

[279] see Melissa Clack, 'Caught between Hope and Despair: An Analysis of the Japanese Criminal Justice System' [2002] Denver Journal of International Law and Policy 525, 534.

[280] Ito (n 278) 1251.

Anti-conspiracy law. This heavy reliance on confession may cause detain suspects repeatedly until they confess their crimes, ending up extremely for the long term.

(2) Heavy reliance of confession may deteriorate the whole criminal system

The second negative opinion about pre-trial detention may be true to Japan in that preeminence of confession may deteriorate the Japanese criminal system. Japan has experienced significance numbers of wrongful convictions against innocent people based on false confessions.[281] From1983 to 1989, four death row cases, namely Menda case, Shitagawa case, Shimada case, and Matsuyama case were recognized as wrongful convictions by the Japanese court.[282] All these defendants were forced to confess after long, coercive interrogation.[283] This wrongful convictions may have been occurred because courts have trusted evidences from prosecutors especially confessions automatically.

However, there may be a tendency to reform its excessive trust on evidences from prosecutors. One recent example is a case known as Shibushi. Shibushi is a name of a small town in western Japan.[284] Thirteen people living in the town were arrested under suspicion of vote-buying in 2003.[285] The police made them confess by putting them for a long-term detention, ending up months of detention for several cases.[286] However, all of them were recognized innocent in 2007 in a district court. The judge regarded their confessions as gained forcibly by mentioning they had “made confessions in despair while going through marathon questioning”.[287] The judge analyzed the process of

[281] ibid 1253–1254.

[282] ibid 1254.

[283] ibid.

[284] Norimitsu Onishi, ‘Pressed by Police, Even Innocent Confess in Japan - The New York Times’ (*The New York Times*, 11 May 2007) <https://www.nytimes.com/2007/05/11/world/asia/11japan.html> accessed 6 October 2019.

[285] ibid.

[286] ibid.

[287] ibid.

gaining confessions without adopting the confessions automatically.[288] This judgment may show courts' recent attitude to break away from excessive trust of confession. This preferable tendency may be overturned. Under cases of the Anti-conspiracy law, judges may adopt confessions as proof even if confessions have doubt of being gained forcibly in order to protect its nation from terrorist threat. As the negative opinion about the pre-trial detention framework mentions, there is no guarantee that this attitude would be limited to terrorism cases. Rather, this tendency would deteriorate the whole Japanese criminal procedures, going back to a criminal system a decade ago and this would increase the risk of wrongful convictions.

(3) Japan has problems with human rights safeguards due to 'substitute prison'.

Japanese criminal procedures may have problems not only because of long-term detention but also because of the "substitute prison" (Daiyo Kangoku) system. These detention facilities are jails that are attached to police stations and acts as detention centers during interrogation and investigation process.[289] While the Code of Criminal Procedure requires that suspects be detained in penal institutions, the Penal Detention Facilities Act prescribes suspects may be detained alternatively in detention facilities, which is called the "substitute detention system." In practice, in almost all cases, this 'substitute prison' is used for detaining suspects.[290] Under this system, suspects can be detained in police detention facilities for a period of up to 23 days to facilitate investigations without the possibility of bail and with limited access to a lawyer. [291] There is no other system in the world where police detention can be continued for as many as 20 days.[292] This is another reason that the

[288] see ibid.

[289] Clack (n 279) 531.

[290] see ibid 532.

[291] see Committee against Torture, 'Concluding Observations on the Second Periodic Report of Japan, Adopted by the Committee at Its Fiftieth Session (6-31 May 2013)'28 June 2013, CAT/C/JPN/CO/2 para 10.

[292] JFBA, 'Opinion Paper Regarding the Japanese Government's Comments on the Concluding Observations of the Human Rights Committee' (*JFBA*)6.

Japanese criminal system is sometimes criticized as “hostage justice”.[293]

The system of the “substitute prison” has been repeatedly criticized by the Human Rights Committee in its periodic report. In 1998, the Committee raised concern that the system was not under the control of a separate authority., though subject to a branch of the police, which does not deal with investigation,[294] Based on the concern, the Committee pointed out the system may increase the chances of abuse of the rights of detainees.[295] In 2008, the Committee pointed out that under the substitute prison system, suspects can be detained in police detention facilities for a period of up to 23 days to facilitate investigations, without the possibility of bail and with limited access to a lawyer especially during the first 72 hours of arrest.[296] Based on the point, the Committee again raised concern that the substitute detention system increases the risk of prolonged interrogations and abusive interrogation methods to obtain a confession.[297]And the Committee recommended that Japan should abolish the detention system.[298] In 2014, the Human Rights Committee criticized the Japanese attitude more clearly. The Committee showed its explicit regret for Japanese government’s attitude of continuing to justify the use of substitute prison by citing the lack of available resources and the efficiency of the system.[299] Moreover, the Committee maintained its concern that the system reinforces the risk of extracting forced confessions combined with the absence of an entitlement to bail or a right to State-appointed counsel prior to the indictment[300]

---

[293] see ‘EDITORIAL: Ghosn’s Long Detention Puts Justice System under Spotlight：The Asahi Shimbun’ (n 277).

[294] Human Rights Committee, ‘Concluding Observations of the Human Rights Committee Japan’ 19 November 1998, CCPR/C/79/Add.102, para 23.

[295] ibid.

[296] Human Rights Committee, ‘Concluding Observations of the Human Rights Committee JAPAN’ 18 December 2008, CCPR/C/JPN/CO/5 , para 18.

[297] ibid.

[298] ibid.

[299] Human Rights Committee, ‘Concluding Observations on the Sixth Periodic Report of Japan*’ 20 August 2014, CCPR/C/JPN/CO/6, para 18.

[300] ibid.

Not only the Human Rights Committee but also the Committee against Torture criticized substitute prisons. In 2013, in its periodic report, the Committee expressed its serious concern at the lack of safeguards in the substitute prison system.[301] In 2007, the Committee mentioned this facility increases the possibilities of abuse of their rights, and may lead to a de facto failure to respect the principles of presumption of innocence, right to silence and right of defense.[302] Then, the Committee clearly recommended that Japan should limit the use of police cells during pre-trial detention.[303]

Despite internationally grave concern, the Japanese government has been reluctant to abolish the system of substitute prison.[304] Rather, the government may be eager to maintain this system. Japan has not accepted recommendations about the abolition of substitute prison even though the same recommendations were made from the 1st Universal Periodic Review, which took place more than 10 years ago.[305] More clearly, in 2013, in a meeting of the periodic report by the Committee against torture, the government revealed its position that the abolition or reform of the pretrial detention system was unnecessary.[306] Again in 2018, in its views about recommendation by Universal Periodic Review, the government repeated its position by mentioning 'Japan believes there is no need to reform the current detention system.'[307]

---

[301] Committee against Torture (n 291) para 10.

[302] Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture JAPAN' 3 August 2007,CAT/C/JPN/CO/1, para 10.

[303] ibid.

[304] see Ito (n 278) 1253.

[305] Human Rights Council, 'Written Statement Submitted by the Japan Federation of Bar Associations. Statement by the Japan Federation of Bar Associations for the UPR Outcome of Japan' 28 February 2018, A/HRC/37/NGO/182, 2.

[306] Committee against Torture (n 291) para 10.

[307] Human Rights Council, 'Report of the Working Group on the Universal Periodic Review - Japan - Addendum - Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review' 1 March 2018, A/HRC/37/15/Add.1, para 161.135.

Under cases of the Anti-conspiracy law, as shown above, confession may hold an important position in trial. Especially combined with long-term detention, substitute prison can be more problematic because the facility enables police to interrogate suspects for an extremely long time while depriving the suspects of sleep and food and forbidding them from using a restroom.[308] Under the Japanese criminal system, there is no strict regulation about the time duration of interrogations, and thus, it is possible to interrogate suspects even until late at night.[309]

This would cause worsening detainee's mental condition because they may think prosecutors may be able to detain them in this severe condition with new allegations again and again until they confess. Thus, substitute detention system under cases of the Anti-conspiracy law may violate basic human rights safeguard such as presumption of innocence and right to silence. Therefore, even though the Anti-conspiracy law is within a framework of pre-trial detention, the detention may not be preferable.

B. Analysis of the problems of the Anti-conspiracy law with reference to the United States' practice

1. History of the United States' preventive detention measures against terrorism

(1) Various preventive detention measures before the 9.11 terrorist attack

In this section, this essay tries to reveal problems of the Anti-conspiracy law with reference to the United States' practice about preventive detention. To understand the practice, a brief history of preventive detention against terrorism in the United States needs to be looked through.

It is without saying that a series of horrific and devastating terrorist attacks in the United States on 11 September 2001 caused harsh response against terrorism known as 'a war against terrorism'.[310] However, the United States government targeted Osama Bin Laden and his Al Qaeda network through a series of anti-terrorist programs dating back to the

[308] see Clack (n 279) 532–533.

[309] see Human Rights Committee (n 296) para18.

[310] see Darcy (n 33) 158.

mid-1990's, which was well before the 9.11 terrorist attack.[311]With this aim, several preventive measures have been used to detain terrorists preventatively although preventive detention of terror suspects itself is not permitted in the United States' domestic law.[312] For example, the United States has used numerous offences that include conspiracy elements to arrest and detain suspects preventively.[313] Moreover, the material support statutes permit arrest suspects preventively without proof of performance of any actual harm.[314] For example, in 2349A, forty-seven offenses are prescribed such as bombing a place of public use, a government facility, or a transportation system, or killing, injuring persons in the United States or using a dangerous weapon in a way that involves conduct that transcends national boundaries.[315] 2349A enables to detain suspects when he or she provided support with the intent or knowledge that the support would be used for or, in preparation for, the predicate offense.[316] Thus, prosecutors may be able to intervene in and disrupt nefarious activity at a very early stage.[317] Furthermore, a material witness statute has been misused as a counter-terrorism measure.[318] This statue, dating back 1789, enables to detain persons believed to be a material witness to a crime if a judicial officer determines that such a person would flee if served with a subpoena to testify at grand jury proceedings or a trial.[319] Though this detention is solely to guarantee his or her civic duty of giving evidence, this framework was used to detain terrorists.[320]

---

[311] Jonathan Grebinar, 'Responding to Terrorism: How Must a Democracy Do It - A Comparison of Israeli and American Law Comment' (2003) 31 Fordham Urban Law Journal 261, 277.

[312] Diane Webber, *Preventive Detention of Terror Suspects: A New Legal Framework* (Routledge 2016) 169.

[313] ibid 172.

[314] ibid.

[315] 18 USCs2349A; Webber(n310)172.

[316] Webber (n310) 172.

[317] ibid.

[318] ibid 173.

[319] see ibid.

[320] ibid.

(2) Adoption of the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001

After the terrorist attacks on September 11th, 2001, the United States drastically changed its scheme against terrorism in order to take measures effectively.[321] This shift may be well described by Attorney General John Ashcroft's statement in his address to the House that "[w]e cannot wait for terrorists to strike to begin investigations and to take action... We must prevent first - we must prosecute second".[322]

First, an emergency directive was issued by the Attorney General on 19 September 2001 allowing for the detention of non-nationals based on a suspicion of being involved in terrorism.[323] This instrument enabled the Immigration and Naturalization Service to hold non-nationals in custody without charge for 48 hours or for "an additional reasonable time, if necessary, under an emergency, or in other extraordinary circumstances".[324]

However, the most noteworthy law enacted as a response to the terrorist attacks may be the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act).[325] By amending section 1182 of the Immigration and Nationality Act, Section 411 of the PATRIOT Act, entitled "Definitions Relating to Terrorism," expanded a definition of "terrorist activity" and "engaging in terrorist activity" into including those who use a firearm during any unlawful activity.[326] Besides, section 411 redefines the term "engage in terrorist

[321] see Darcy (n 33) 162.

[322] ibid 163.

[323] Interim Rule on Custody Procedures (8 CFR Part 287, [INS No2171-01]); Moeckli (n 225) 162.

[324] Interim Rule on Custody Procedures (n323); Darcy (n 33) 162.

[325] Grebinar (n 311) 277.

[326] Joshua D Zelman, 'Recent Developments in International Law: Anti-Terrorism Legislation-Part Two: The Impact and Consequences Focus on: International Terrorism: Recent Developments' (2001) 11 Journal of Transnational Law & Policy 421, 422.

activity", making an alien removable by merely providing food or housing for a friend or family member who is allegedly involved with a terrorist organization, whether or not such alien knew that the friend or family member was involved in such activity.[327]

Section 412 of the Patriot Act enables to allow the indefinite detention of aliens. Section (a) of 236A of the Patriot Act, entitled 'Mandatory Detention of Suspected Terrorists', sanctions the detention for up to seven days without charge of non-nationals who are terrorists, supporters of terrorist activity or "engaged in any other activity that endangers the national security of the United States".[328] Persons are so classified where the Attorney General has "reasonable grounds to believe that they are involved in terrorism or that they constitute a threat to national security".[329] Additionally, non-nationals may be held for seven days without even being charged with a crime, let alone an immigration violation.[330] After the seven days, the detained shall be placed in removal proceedings or charged with a criminal offense and if neither are instituted the detainee must then be released.[331] However, after removal proceedings have been initiated, where the removal "is unlikely in the reasonably foreseeable future" and "if the release of the alien will threaten the national security of the United States or the safety of the community or any person", indefinite detention may be possible.[332]

2. Critics against the US practice

(1) Broad definition of terrorism under section 411 may cause arrest of those who are not related to terrorism

There is a concern that the definition of terrorism under the Patriot Act is too

[327] ibid 423.

[328] Darcy (n 33) 163.

[329] ibid.

[330] Zelman (n 326) 423.

[331] Darcy (n 33) 163.

[332] ibid 163–164.

broad.[333] Under Section 211.1(1)(a) and (2)(b) of the Model Penal Code prescribes that an assault occurs when one causes injury to another's person with or without a deadly weapon.[334]This crime is within the scope of Section 411 of the PATRIOT Act.[335] Thus, under the PATRIOT Act, an alien may be regarded as terrorist only if she hits her boyfriend with a stick, breaking his arm and hold the suspect indefinitely.[336] Similarly, the PATRIOT Act makes someone a terrorist for burning down her own business, even if the assault commits a crime to collect money from her insurance company.[337] Therefore, the broad definition of terrorism would cause undesirable discretion to detain people under the name of terrorism even though, in fact, their crimes have nothing to do with terrorism.

(2) Discrimination against non-nationals especially against Arab origin

Another concern is that such detentions have caused discrimination *against* certain groups. The executive powers of detention in the US target not only members of al-Qaeda but also all foreign nationals who are suspected of having links with terrorist groups.[338] However, in 2006, for example, the clear majority of prosecutions for terrorist crimes in the United States did not involve foreign terrorist organizations.[339] Rather, a large part of those individuals who have been charged with terrorism offenses that are allegedly related to are US citizens.[340] Therefore, a law allowing indefinite detention only for foreign nationals does not have any justifiable grounds to treat foreign nationals and US citizens differently. This discrimination is more serious for those of Arab origin in that various reports mention people are arrested

[333] see ibid 164.

[334] MODEL PENAL CODE(American Law Institute 1962); Zelman (n 326) 425.

[335] Zelman (n 326) 425.

[336] ibid.

[337] ibid.

[338] Moeckli (n 225) 121.

[339] ibid.

[340] ibid.

merely because they are of Arab origin.[341] Thus, there is a concern that executive power targets a certain group of people just because of their origin or appearance, which causes discrimination.[342]

(3) Low rate of success under the PATRIOT Act

It is not denying that there has difficulty to assess the effectiveness of preventive detention campaigns precisely because governments will insist on the success of the campaigns.[343] Nevertheless, it would seem relatively reasonable to expect that the authorities would be able to bring at least some of these cases before the courts. On the contrary, statistics reveal that, of the more than 1,000 foreigners preventively detained in the United States immediately after September 11, only three have been charged with any terrorism-related crime.[344] This rate may be more shocking by comparison with numbers prior September 11. Before September 11, the average percentage of charges that were brought before the courts on suspicion of terrorism involvement was more than 50 percent.[345] This low rate of success under new detention measures may imply failure of the new measure.

3. Analysis of the Anti-conspiracy law with reference to the critics against the US practice

(1) Risk of arrest of people who are not related to terrorism

While the PATRIOT Act has a problem due to its broad definition, the Anti-conspiracy has a similar problem due to its broad scope of the law. Based on the government's explanation, the Anti-conspiracy law was for counter-terrorism. Then, the scope of criminalization also had to be related to terrorism. However, some crimes that are not related to terrorisms were also punishable under the law. For example, breaching some of the articles of the Forest Act, the Cultural

[341] Darcy (n 33) 165.

[342] ibid.

[343] Moeckli (n 225) 122.

[344] ibid.

[345] ibid.

Properties Preservation Act, and the Copyright Act, are punishable under the law.[346] Consider some group members copy musical scores and distribute others. This breaches Article 119 of the Copyright Act, which prohibits violations of copyrights, but this act does not have anything to do with terrorism.[347] However, this act would be punishable under the law.[348] This wide scope of the Anti-conspiracy law may give undesirably abusive discretion to police about arresting people.

(2) Risk of discrimination in practice

Although unlike the United States, under the Anti-conspiracy law, there is no formal difference between citizens and non-citizens, that does not necessarily guarantee there is non-discrimination in applying the law.[349] Rather, there is a concern that anti-state activists can be targeted discriminately under the Anti-conspiracy law.[350] For example, the government explained that Non-Profit Organizations would be excluded from the target of the bill.[351] However, as revealed in chapter III, there remains vagueness of the scope of the Anti-conspiracy law because of its ambiguity of the term "terrorist groups or other criminal groups." Considering NGOs sometimes take a contrary view of government actions and works, this vagueness of the term would cause a risk that police or prosecutors would label NGOs as enemies or illegal organizations or even terrorist organizations in order to oppress these organizations'

[346] JFBA, 'Terotou Zyunnbizaiha Kyoubouzai Desu Namaewo Kaetemo Kikennseiha Kawarimasenn[An Act against Terrorism Is Anti-Conspiracy Law. There Is Risk Even Though the Name of the Act Is Changed.]' (n 115).

[347] see ibid.

[348] see ibid.

[349] see Soshikitekina hanzaino syobatu oyobi hanzaisyuuekino kiseitouni kannsuru houritu [the law on the Punishment of Organized Crimes and Control of Crime Proceeds] (n186).

[350] see the Human Rights Now, 'Written Statement* Submitted by the Human Rights Now. Japan: Concerns with the "Crime of Preparation for Terrorism and Other Acts" Bill' 29 May 2017, A/HRC/35/NGO/49.

[351] ibid 4.

activities.[352]

In fact, there may be already tendency that detention is applied discriminately severely toward those who have an anti-state view. One of the recent examples is the arrest and charging of Hiroji Yamashiro, who is a resident of Okinawa.[353] The excessive concentration of more than 70 percent of United States military bases in Okinawa, which comprises only 0.6 percent of the land of Japan, has long been a source of conflict between local people living in Okinawa and the government.[354] Mr. Yamashiro is a leader of the civilian protest of the construction in Okinawa, of the new military base and facilities of the United States of America.[355] While anger among the Okinawa residents grew as the government promoted the construction in Okinawa of the United States military base, the police repeatedly arrested Mr. Yamamoto aiming to chill public protest and dissent.[356] Mr. Yamashiro was first arrested on 17 October 2016 for a minor offense of cutting barbed wire, with the damage amounting to 2,000 yen.[357] Continuously, Mr. Yamashiro was arrested on 20 October for obstruction of performance of public duty and causation of injury and then again on 20 November 2016 for forcible obstruction of business.[358] In the end, Mr. Yamashiro was released on 18 March 2017 due to bail after five months in detention.[359] Considering the long-term detention, the Japanese government appears to target discriminately and arrest Mr. Yamashiro for his exercise of the rights and freedoms as an Okinawan pacifist and environmentalist.[360] Not only the duration of the detention but also the treatment in the

[352] see the Human Rights Now (n 350).

[353] see Human Rights Council and Working Group on Arbitrary Detention, 'Opinions Adopted by the Working Group on Arbitrary Detention at Its Eighty-Second Session, 20–24 August 2018' 27 December 2018, A/HRC/WGAD/2018/55,para 4.

[354] ibid 75.

[355] ibid 4.

[356] see ibid 70.

[357] ibid 8.

[358] see ibid 9–10.

[359] see ibid 58.

[360] see ibid 70.

detention may have been discriminately. Though there was little risk of flight or evidence tampering, Mr. Yamashiro was not even permitted to contact his wife for months.[361] As the Working Group pointed out, there is no way but to consider that the Government was meant to have a chilling effect on Mr. Yamashiro and his fellow Okinawan protesters for their vocal opposition to the construction of the United States military bases in Okinawa.[362] This case was under different laws, but this kind of discrimination is also possible under the Anti-conspiracy law. Thus, there is a risk of discrimination in applying the law by targeting and arresting only those who protest the government's view under the name of counterterrorism and national security.

(3) No arrested cases under the Anti-conspiracy law

Regarding the rate of success, the Japanese situation may be worse than the United States' one. On July 9th, 2019, the Minister of Justice revealed there have been no arrested case so far under the Anti-conspiracy law.[363] There have been more than two years since the law passed and only one year is left before the 2020 Tokyo Olympic and Paralympic Games. If, as the government explained, there was a risk of being targeted by terrorists, there should have been at least some arrested cases. The fact that there have been no arrested cases may show there was no need for new measures against terrorism including enactment of the Anti-conspiracy. Moreover, Tokyo is already regarded as one of the safest cities all over the world.[364] Japan has been attacked by Japanese terrorists only once in 1995 and after that, no terrorist attack has ever happened.[365] Considering the fact, there may not be persuasive that Japan is endangered with attacks by terrorists.

---

[361] see ibid 69.

[362] ibid.

[363] Asahi Shinbun Company (n 31).

[364] See 'The Safe Cities Index 2017' (*Safe Cities 2017*) <http://safecities.economist.com/safe-cities-index-2017> accessed 1 August 2019; 'The World's Safest Cities Ranking, 2018' (*CEOWORLD magazine*, 19 September 2018) <https://ceoworld.biz/2018/09/19/the-worlds-safest-cities-ranking-2018/> accessed 1 August 2019.

[365] See Higa (n 65) 209.

In addition, as some academics point out, the increasing number of solo actor or "lone wolf" cannot be charged with conspiracy.[366] There are several reasons for this uprising. One of the reasons is that terrorist groups seem to encourage solo terrorist acts.[367] For example, Al-Qaeda's Yemen branch published a magazine article in English, inciting attacks by lone operatives and providing a bomb alone.[368] Al-Qaeda also released a video encouraging unilateral violence titled, "You Are Only Responsible for Yourself."[369] Another reason for the growing phenomenon of the "lone wolf" is that Internet has enabled to commit terrorists without group training nor group reinforcement because all information such as guns and explosive to government facilities can be obtained on website.[370] If this trend of solo terrorist continues, there would be none or little arrest cases under the Anti-conspiracy law because agreement between parties must exist for police to arrest them. Therefore, this trend also casts doubt about the necessity and efficiency of the Anti-conspiracy law.

v. Conclusion

The Act on the Punishment of Organized Crimes and Control of Crime Proceeds (the Anti-conspiracy law) is an unprecedented law that changes the Japanese Penal Code in that it establishes a new category to criminalizes acts at the stage of conspiracy.

In the first chapter, this essay revealed a brief history of Japanese preventive detention by introducing the Maintenance of the Pubic Order Act ant the continuous government's efforts to enact an Anti-conspiracy law until 2005. The Maintenance of

[366] see Webber (n 310) 172.

[367] Kendall Coffey, 'The Lone Wolf - Solo Terrorism and the Challenge of Preventative Prosecution' [2011] FIU Law Review 1, 3.

[368] ibid.

[369] ibid.

[370] see ibid 3–4.

the Public Order Act included the concept of preventive detention for the first time in Japanese history. During World War II, this Act was largely abused by police to oppress communists, who questioned absolute power of the Japanese Emperor, and this Act caused hundreds of thousands of innocent people arrested and more than one thousand people were dead due to torture, cruel or inhuman treatment, or other reasons. This notorious image of preventive detention may be one of the reasons that Japanese local people strongly opposed to the enactment of the Anti-conspiracy law. Noticing the potential risk of the law, local people, the JFBA and the Opposing Parties strongly opposed to the Bill about anti-conspiracy, although the government repeatedly explained the need for enacting the law with relation to the UNCTOC. This opposition succeeded to abandon the Bill for three times.

However, the government finally succeeded to enact the Anti-conspiracy law for its fourth attempt. In the first half of the second chapter, this essay revealed various tactics used by the government in order to enact the law. First, the Government changed the abbreviated name into “the Offence to Criminalize an Act in Furtherance of Planning to Commit Terrorism and Other Serious Crimes”, aiming to eradicate its negative image, which often combined with the notorious history of the Maintenance of the Public Order Act. Second, the government emphasized terrorist aspects in order to impress the law did not target ordinary people. Third, the government limited its scope of the Bill as response to previous criticism. Although the Special Rapporteur gave deep concern about the potential risk of human rights violations about the law, the government immediately criticized that the letter to understate the concern. letter. Furthermore, the government rammed through the Bill at the House of Representatives and moreover, skipped a vote in the Upper House Committee on Judicial Affairs. By revealing these tactics, it can be said that the Anti-conspiracy law does not have support or understanding from Japanese people.

In the latter half of the second chapter, this essay revealed problems of the Anti-conspiracy law by reference to the Article 9 of the ICCPR. The article prohibits

arbitrary arrest and detention. This essay clarified not only the vagueness of the wording of a law but also the complexity of the structure of the law should be included for analysing the element of predictability, which is one of the elements of arbitrariness. The Anti-conspiracy law has complex structure in that an individual must check Article6(2), Appendix 3, and Appendix 4 of the law, and sometimes even other laws in order to predict whether his or her conduct would be punished. Moreover, lack of definition of “terrorist groups” may cause vagueness of the word “terrorist groups or other organized criminal groups". This complexity of the law and vagueness of the term of the law may breach Article 9 of the ICCPR.

In the last chapter, this essay revealed other fundamental problems that the Anti-conspiracy law has with reference to the United Kingdom’s practice and the United States’ practice. In the first half of the chapter, this essay analysed discussion about United Kingdom’s shift into pre-trial detention framework, and this essay revealed for pre-trial detention to be regarded desirable, enough human rights safeguards need to be provided. With this regard, Japan may not have these basics because of long-term detention and the existence of substitute prison. Moreover, more reliance on confessions may happen under the Anti-conspiracy law, which has a risk of increasing wrongful convictions.

The United States was the country that was attacked by terrorists on 11 September 2001 and this attack caused harsh response against terrorism. However, this shift may not be successful in that the definition of the PATRIOT Act was too vague and detentions may have caused discrimination. The rate of charging suspects before courts is much lower than that of before September 11. Similar concerns may be held in the Anti-conspiracy law in that crimes unrelated to terrorism may fall under the scope of the law and in that there is a risk of discrimination in applying the law only for those who have anti-state views. Moreover, the fact that there have no cases of arrest since the law was enacted two years ago and the uprising phenomenon of lone wolf show that the Anti-conspiracy law may not be helpful as counter-terrorism.

The Japanese government failed to pass the Anti-conspiracy law three times mainly due to strong opposition and nevertheless proposed the bill to enact anti-conspiracy for the fourth time. Then, the Anti-conspiracy law was enacted by using various unusual steps. These facts show the government's persistence about enacting the Anti-conspiracy law.

Though the government explained the Anti-conspiracy law is against terrorism, this essay revealed the law does not seem to target terrorists considering the UNCTOC is not against terrorism and the government itself did not explain the need for enacting the law with relation to terrorism for the previous three times.

Moreover, this essay may give implications of the real reason why the government was eager to enact this controversial law. Under the Anti-conspiracy law, crimes that are not related to terrorism may be punishable. Thus, the government may target those who have an anti-state view. Under the Japanese criminal procedure known as "hostage justice", detaining people for long term and interrogating them under severe condition is possible. This would cause severe impact not only for detained people but also those who are along with them because these people may refrain from their activities for fear of being arrested. Through this process, the government may be able to oppress various anti-state activities. This oppression was what happened during World War II under the Maintenance of the Public Order Act against communists. In that sense, this law has potential risk of being renewed version of the Maintenance of the Public Order Act. In order to avoid this tragedy happening, appropriate application of the Anti-conspiracy law is needed. Thus, it is necessary for Japanese people to make all efforts to prevent abuse of the Anti-conspiracy law.

Bibliography

Primary Sources

A v Secretary of State for the Home Department (House of Lords, Great Britain) ,16 December 2004, [2004] UKHL 56

Mukong v Cameroon (UN Human Rights Committee) Communication No. 458/1991

Anti-terrorism, Crime and Security Act 2001 [the United Kingdom]2001 (2001 c 24)

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1992 (1678 UNTS 221)

Convention for the Suppression of Unlawful Seizure of Aircraft 1971 (860 UNTS 105)

Convention on offences and certain acts committed on board aircraft 1969 (704 UNTS 219)

Convention on the Marking of Plastic Explosives for the Purpose of Detection 1998

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1977 (1035 UNTS 167)

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

Interim Rule on Custody Procedures (8 CFR Part 287, [INS No2171-01])

International Convention against the Taking of Hostages 1983 (1316 UNTS 105)

International Convention for the Suppression of Acts of Nuclear Terrorism 2007 (A/RES/59/290)

International Convention for the Suppression of Terrorist Bombings 2001 (2149 UNTS 256)

International Convention for the Suppression of the Financing of Terrorism 2002 (2178 UNTS 229)

International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976)999 UNTS 171.

Keihou [the Penal Code] [Japan] (adopted April 24 1907, entered into force October 1 1908)

Keizisosyouhou [Code of Criminal Procedure] [Japan](adopted 10 July 1948, entered into force 1 Januray 1949) (Act No 131)

Kokkaigizidou,naikausouridaizinnkanntei sonotano kunino zyuuyouna shisetutou gaikokukoouanntou oyobi gennsiryokuzigyousyono syuuhenntiikino zyoukuuniokeru kogatamuzinnkitouno hikouno kinnshinikannsru houritu[Law prohibiting drone around House of Parliament, Prime Minister's Office of Japan, or other important facilities, diplomatic establishments of foreign countries, and nuclear cites] [Japan](adopted 18 March 2016, entered into force 7 April 2016)

MODEL PENAL CODE (American Law Institute 1962)

nihonkoku kenpou [The Constitution of Japan][Japan] (adopted November 3 1946, entered into force May 3 1947).

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1992 (1678 UNTS 304)

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1989 (974 UNTS 177)

Roudoukizyunhou [Labor Standards Act] [Japan] 1947

Roudoukumiaihou [Labor Union Act] [Japan]1949

Soshikitekina hanzaino syobatu oyobi hanzaisyuuekino kiseitouni kannsuru houritu [the law on the Punishment of Organized Crimes and Control of Crime Proceeds] (adopted 21 June 2017, entered into force 11 July 2017)

Tokuteihimituno hogonikannsuru houritu [Act on the Protection of Specially Designated Secrets] (adopted 6 December 2013, entered into force 10 December 2014)

United Nations Convention against Transnational Organized Crime 2001 resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25

Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 [United States of America], 26 October 2001

Secondary Sources

Abe H, 'Self-Incrimination--Japan and the United States' [1955] Journal of Criminal Law, Criminology and

Police Science 613

Abe H, 'The Former Japanese System of Preventative Detention' (1961) 3 J. INT'L COMM. JUR. 99

Adams B, 'Japan's "hostage Justice" System' (*The Japan Times*, 11 January 2019) <https://www.japantimes.co.jp/opinion/2019/01/11/commentary/japan-commentary/japans-hostage-justice-system/> accessed 22 August 2019

Asahi Shinbun Company, 'Asahi Sinbun Degital ' Kyo Bo Zai Se Ko Ninenn "Tekiyounashi"' (Asahi Newspaper Digital: No Application of the Anti-Conspiracy Law for Two Years)' (10 July 2019) <https://www.asahi.com/articles/DA3S14089943.html> accessed 28 August 2019

Avenue HRW| 350 F, York 34th Floor | New and t 1.212.290.4700 N 10118-3299 U|, 'Call to Eliminate Japan's "Hostage Justice" System by Japanese Legal Professionals' (*Human Rights Watch*, 10 April 2019) <https://www.hrw.org/news/2019/04/10/call-eliminate-japans-hostage-justice-system-japanese-legal-professionals> accessed 21 August 2019

Bantekas I and Oette L, *International Human Rights Law and Practice* (Second edition, Cambridge University Press 2016)

Bertolini E, 'Western and Japanese Constitutional Thought in the Shaping of the Role of the Japanese Emperor in the 1889 and 1946 Constitutions' [2018] Historia Constitucional 641

Cannataci J, 'Mandate of the Special Rapporteur on the Right to Privacy' (18 May 2017)

Clack M, 'Caught between Hope and Despair: An Analysis of the Japanese Criminal Justice System' [2002] Denver Journal of International Law and Policy 525

Coffey K, 'The Lone Wolf - Solo Terrorism and the Challenge of Preventative Prosecution' [2011] FIU Law Review 1

Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture JAPAN'3 August 2007, CAT/C/CO/1

——, 'Concluding Observations on the Second Periodic Report of Japan, Adopted by the Committee at Its Fiftieth Session (6-31 May 2013)'28 Junw 2013, CAT/C/JPN/CO/2

Darcy S, 'Preventive Detention and Post-September 11th Legislation Human Rights Focus' (2002) 5 Trinity College Law Review 158

Doswald-Beck L (ed), *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011)

'EDITORIAL: Ghosn's Long Detention Puts Justice System under Spotlight：The Asahi Shimbun' (*The Asahi Shimbun*) <http://www.asahi.com/ajw/articles/AJ201903070021.html> accessed 21 August 2019

Elias SB, 'Rethinking Preventive Detention from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 Columbia Human Rights Law Review 99

Frankowski S and Shelton D (eds), *Preventive Detention: A Comparative and International Law Perspective* (M Nijhoff 1992)

General Assembly, 'Proposals and Contributions Received from Governments'

Grebinar J, 'Responding to Terrorism: How Must a Democracy Do It - A Comparison of Israeli and American Law Comment' (2003) 31 Fordham Urban Law Journal 261

Hakimi M, 'International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide The Way Forward' (2007) 40 Case Western Reserve Journal of International Law 593

Heinze U, 'System Theory as Global Sociology-Japanese Ramifications of Parsonian and Luhmannian Thought' (2013) 44 The American Sociologist 54

Higa BM, 'Japan's Anti-Conspiracy Law: Relinquishing Japan's Civil Liberties in the Name of Global Counterterrorism Efforts' (2017) 19 Asian-Pacific Law & Policy Journal 201

Hiraoka H and Kaido Y, *Shin kyobozaino kyohu: kikenna heiseino chiannizihou[Terror of new Anti-conspiracy law: Dangerous Heisei-era's Anti-conspiracy law]* (Ryokuhu Publication 2017)

Hor MYM, Ramraj VV and Roach K (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005)

House of Councillors, 'Iinnkai: Kokkaino Kisotishiki: Sangiin [Committee: Basic Information about National Diet: House of Councillors]' (*House of Councillors, National Diet of Japan*) <https://www.sangiin.go.jp/japanese/aramashi/iinkai.html> accessed 4 October 2019

Human Rights Committee, 'General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)'(30 June 1982)

——, 'Concluding Observations of the Human Rights Committee Japan'CCPR/C/79/Add.102 19 November 1998

——, 'Concluding Observations of the Human Rights Committee JAPAN' CCPR/C/JPN/CO/5 18 December 2008

———, 'Concluding Observations on the Sixth Periodic Report of Japan*' CCPR/C/JPN/CO/6 20 August 2014

——, 'General Comment No. 34 Article 19: Freedoms of Opinion and Expression'(12 September 2011) CCPR/C/GC/34

——, 'General Comment No. 35 Article 9 (Liberty and Security of Person)'(16 December 2014) CCPR/C/GC35

Human Rights Council, 'Written Statement Submitted by the Japan Federation of Bar Associations. Statement by the Japan Federation of Bar Associations for the UPR Outcome of Japan'

——, 'Report of the Working Group on the Universal Periodic Review - Japan - Addendum - Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review' 1 March 2018, A/HRC/37/15/Add.1

Human Rights Council and Working Group on Arbitrary Detention, 'Opinions Adopted by the Working Group on Arbitrary Detention at Its Eighty-Second Session, 20–24 August 2018'

Ito K, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan Symposium: An International Exploration of Wrongful Conviction' [2011] University of Cincinnati Law Review 1245

Japanese Communist Party, 'Kyobozai Saiteisyutuni Ikari/ Hanntaino Shiminnto Giinnga Tudoi/Soudanshigouidakede Tuminannte [An Angeer about Resubmission the Anti-Conspiracy Bill]' (5 October 2005) <https://www.jcp.or.jp/akahata/aik4/2005-10-05/2005100514_01_2.html> accessed 3 October 2019

JFBA, 'Kokuren "ekkyo soshiki hanzai bousi zyoyaku" teiketu ni tomonau kokunai houseibi nikannsuru

ikennsyo [An opinion paper about a new domestic legislation based on the UNCTOC]'(JFBA, January 20 2003)

——, 'Nihon Bengoshi Rengokai: Kyobozaiga Keizokushingi Saretakotonituiteno Kaityo Dannwa [the JFBA: A Statement about Conspiracy]' (1 November 2005) <https://www.nichibenren.or.jp/activity/document/statement/year/2005/2005_18.html> accessed 3 October 2019

——, 'Kyobozai Kokoga Mondaida [The Anti-Conspiracy Law Problems Are Here]'(JFBA, 31 January 2006)

——, 'Terotou Zyunnbizaiha Kyoubouzai Desu Namaewo Kaetemo Kikennseiha Kawarimasenn[An Act against Terrorism Is Anti-Conspiracy Law. There Is Risk Even Though the Name of the Act Is Changed.](JFBA,2017)'

——, 'Iwayuru Kyobozaiwo Sousetusuru Houannwo Kokkaini Zyouteisurukotoni Hanntaisuru Ikennsyo [Opinion Opposing the Submission of the Bill to Criminalize Conspiracy to the Diet]'(JFBA, 17 February 2017)

——, 'Opinion Opposing the Submission of the Bill to Criminalize Conspiracy to the Diet'

——, 'Opinion Paper Regarding the Japanese Government's Commets on the Concluding Observations of Th e Human Rigts Committee'

——, 'Statement on the Enactment of the Bill to Revise the Act on Punishment of Organized Crimes and Control of Crime Proceeds, Including the Criminalization of Conspiracy' (*JFBA*, 15 June 2017) <https://www.nichibenren.or.jp/en/document/statements/170615.html> accessed 4 October 2019

——, 'Nihonn Bengoshi Rengokai [The JFBA]: Membership' (23 August 2019) <https://www.nichibenren.or.jp/en/about/us/profile/membership.html> accessed 23 August 2019

— —, 'Nihonn Bengoshi Rengokai [The JFBA]：What Is the JFBA?' <https://www.nichibenren.or.jp/en/about/us/profile.html> accessed 14 September 2019

Koike S, Yonekura Y and Yamada D (eds), *Kyobozai Konmentaaru [Commentary of the Anti-Conspiracy Law]* (Gendai Jinbun Company 2019)

Koizumi J, 'Press Conference by Prime Minister Junichiro Koizumi【Upon Dissolution of the House of Representatives】' (*Prime Minister of Japan and his Cabinet*, August 2005) <https://japan.kantei.go.jp/koizumispeech/2005/08/08kaiken_e.html> accessed 3 October 2019

Macken C, 'Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966' (2005) 26 Adelaide Law Review 1

——, *Counter-Terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law* (Routledge 2011)

Masferrer A (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer 2012)

Ministry of Foreign Affairs of Japan, 'Press Conference by Foreign Minister Fumio Kishida' (*Ministry of Foreign Affairs of Japan*, 21 March 2017) </press/kaiken/kaiken4e_000356.html> accessed 27 August 2019

——, 'Kokurenzinnkennrizikaino puraivasiino kennri tokubetu houkokusya niyoru koukaisyokann nitaisuru nihonnseihu kennkai [A view of Japan about a letter by Special Rapportuer on the right to privacy]' (*Ministry of Foreign Affairs of Japan*, 18 May 2017) </mofaj/fp/is_sc/page3_002110.html> accessed 27 August 2019

Ministry of Health, Labour and Welfare, 'Roudousyaseini Tuite [About Workers]'

Ministry of Justice, 'Homusyo: Oshiete Terotou Zyunbizai [Ministry of Justice: An Act against Terrorism]' (2017) <http://www.moj.go.jp/keiji1/keiji12_00144.html#Q8> accessed 16 September 2019

Moeckli D author, *Human Rights and Non-Discrimination in the 'War on Terror'* (Oxford University Press 2008)

Naito E, 'Examining Carlos Ghosn and Japan's System of "Hostage Justice"' *The Japan Times Online* (April 2019) <https://www.japantimes.co.jp/news/2019/04/17/national/crime-legal/examining-carlos-ghosn-japans-system-hostage-justice/> accessed 21 August 2019

Nakasaki T, 'syuin kaisan, syusyouha naze dekiruno? itikarakeisetu: asahishinbun dezitalu [Why can the Prime MInister dissolve the Lower House?: Asahi newspaper degital]' (*Asahi newspaper degital*, 28 September 2017) <https://www.asahi.com/articles/ASK9X55XHK9XUTFK011.html> accessed 14 September 2019

National Diet Library, 'Glossary | Birth of the Constitution of Japan' (*Birth of the Constitution of Japan*) <https://www.ndl.go.jp/constitution/e/etc/glossary.html> accessed 23 August 2019

NHK, 'terotou zyunbizai shinnsetu houann/ tyukannsaiketu karano saiketu ["the Offence to Criminalize an Act in Furtherance of Planning to Commit Terrorism and Other Serious Crimes/ a vote after skipping a vote in a Committee]' (*Kaisetuiinn bulog [blog by NHK commentator]*, 15 June 2017) <http://www.nhk.or.jp/kaisetsu-blog/300/273280.html> accessed 19 September 2019

——, 'syugiin sangiin senkyono rekishi| NHK senkyo WEB [The hisory of the Lower House and Upper House of Parliament/ NHK election WEB]' (2019) <https://www.nhk.or.jp/senkyo/> accessed 14 September 2019

——, 'The Maintenance of the Public Order/Clip/' <https://www2.nhk.or.jp/school/movie/clip.cgi?das_id=D0005403086_00000&p=box>

Onishi N, 'Pressed by Police, Even Innocent Confess in Japan - The New York Times' (*The New York Times*, 11 May 2007) <https://www.nytimes.com/2007/05/11/world/asia/11japan.html> accessed 6 October 2019

'Ruling Coalition Diverts Attention from Scandal by Ramming "conspiracy" Bill into Law' *Mainichi Daily News* (15 June 2017) <https://mainichi.jp/english/articles/20170615/p2a/00m/0na/003000c> accessed 18 September 2019

Sapporo Bar Association, 'Kyobozai Houanno Syuugiinndeno Saiketu Ni Kougisuru Seimei [A Statement against Ramming through the Anti-Conspiracy Bill in the House of Representative]' (*Sapporo Bar Association*, 24 May 2017) <https://www.satsuben.or.jp/info/statement/2017/03.html> accessed 17 September 2019

Sato N, 'Kyouko Saiketuha Naniga Monndainanoka: Opinion: Yomiuri Sinbun [Wthat Are the Problems of Ramming through a Bill? Opinion]: Yomiuri Online' (2013) <https://yab.yomiuri.co.jp/adv/chuo/opinion/20131224.html> accessed 18 September 2019

'Stop and Rethink Conspiracy Bill | The Japan Times' <https://www.japantimes.co.jp/opinion/2017/05/26/editorials/stop-rethink-conspiracy-bill/#.XWTeNSgzY2w> accessed 27 August 2019

Takayama K, *Kyo bo zai no na ni ga mon dai ka [What are the problems of the Anti-conspiracy law?]* (Iwanami Shoten, Publishers 2017)

the Human Rights Now, 'Written Statement* Submitted by the Human Rights Now. Japan: Concerns with

the “Crime of Preparation for Terrorism and Other Acts” Bill’

The International Commission of Jurists, ‘Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights’

‘The Safe Cities Index 2017’ (*Safe Cities 2017*) <http://safecities.economist.com/safe-cities-index-2017> accessed 1 August 2019

‘The World’s Safest Cities Ranking, 2018’ (*CEOWORLD magazine*, 19 September 2018) <https://ceoworld.biz/2018/09/19/the-worlds-safest-cities-ranking-2018/> accessed 1 August 2019

UN, ‘UNITED NATIONS Office of Counter-Terrorism (OCT)’ <https://www.un.org/en/counterterrorism/legal-instruments.shtml> accessed 3 August 2019

UN General Assembly, ‘UN Global Counter-Terrorism Strategy | Counter-Terrorism Implementation Task Force’ (24 October 2005) <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy#plan> accessed 6 August 2019

‘UN Privacy Expert Shoots down Japan’s Complaints about “anti-Conspiracy” Bill Criticism - The Mainichi’ <https://mainichi.jp/english/articles/20170524/p2a/00m/0na/014000c> accessed 27 August 2019

United Nations Office on Drugs and Crime, ‘Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ <https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf>

——, ‘United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (*United Nations Convention against Transnational Organized Crime*, 2019) <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> accessed 17 August 2019

Webber D, ‘Extreme Measures: Does the United States Need Preventive Detention to Combat Domestic Terrorism’ (2010) 14 Touro International Law Review 128

——, *Preventive Detention of Terror Suspects : A New Legal Framework* (Routledge 2016)

Yamakawa R, ‘Strangers When We Met: The Influence of Foreign Labor Relations Law and Its Domestication in Japan’ [1995] Pacific Rim Law & Policy Journal 363

Zelman JD, ‘Recent Developments in International Law: Anti-Terrorism Legislation-Part Two: The Impact and Consequences Focus on: International Terrorism: Recent Developments’ (2001) 11 Journal of Transnational Law & Policy 421