Japan Country Report

By Makoto Seta

I. Brief Overview of the Japanese System of Governance

Before exploring the detail about the relationship between international law and Japanese law in the context of maritime crimes, it seems necessary to briefly explain the Japanese System of Governance. Like most western States, the System separates the power of government into three branches: the legislative, the executive and the judicial.

1. The Diet

According to Article 41 of the Japanese Constitution, the Diet is "the highest organ of state power" and "the sole law-making organ of the State".[1] It is composed of two Houses, namely, the House of Representatives and the House of Councilors.[2] Although the members of both Houses are chosen by the same way, i.e. general election, supremacy is granted to the House of Representatives, in some particular cases.[3] Similar to the American Congress, both Houses employ committees to expedite their duty,[4] as provided in Articles from 40 to 54 of the Diet Act.[5]

2. The Cabinet

Article 65 of the Constitution stipulates the executive power is granted to the Cabinet. Since Japan adopts the Parliamentary Cabinet System where the executive branch highly depends on the support of the legislative branch, the Prime Minister is designated by the Diet among its members.[6] In such a system, "the legislative and executive branches of government are fused."[7] Consequently, the bills submitted by the Cabinet account for the vast majority of

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[1] Japanese Statutes in this report are *available at* "Japanese Law Translation Database System< http://www.japaneselawtranslation.go.jp/?re=02>" which is operated by Ministry of Justice (MOJ), unless other resources are provided.
[2] Article 42 of the Constitution.
[3] *See* Articles 59, 60 and 67.
[4] Hayes, L. D., *Introduction to Japanese Politics*, (2005) p. 51.
[5] This act is *available at* <http://law.e-gov.go.jp/htmldata/S22/S22HO079.html> (*Japanese only*).
[6] Article 67.
[7] Hayes, *supra* note 4, p. 55.

proposed legislation.[8] Moreover, this fact increases the influence of bureaucrats to the legislative process, because most bills submitted by the Cabinet are drafted by civil servants.[9] Therefore, it can be said that bureaucrats play an important role for Japanese legislation.

3. The Court

According to Article 76 of the Constitution, the whole judicial power is granted to the Supreme Court and inferior courts. In the same manner as most western States, the Japanese Court System provides a three-tiered structure: the Supreme Court, high courts and basically district courts.[10] Japanese courts are widely characterized by 'judicial passivism' and especially, the Supreme Court tends to avoid involvement in politically sensitive area,[11] including diplomatic matter.

II. Ratification and Implementation of International Treaties

1. Treaty Ratification Procedure

According to Article 73 of the Constitution,

> The Cabinet, in addition to other general administrative functions, shall perform the following functions: … (3) Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.

Therefore, the Japanese Government concludes international treaties, based on this provision. Generally, the procedure to enact implementing legislation is not included in treaty ratification procedure. Still, since Japan as a custom, enacts implementing legislations before it ratifies treaties, the law-making process of implementing legislation is also explained in this section. In order to conclude treaties, the Japanese Government takes following four steps:

(i) Works by Government Agencies
(ii) Examination by Cabinet Legislation Bureau

[8] Abe, H., Shindō, M. and Kawato, S., translated by White, J. W., *The government and politics of Japan*, (1994) p. 20.
[9] *Ibid*.
[10] Shibuya, H. and Akasaka, M., *Kenpo 2: Touchi*, (2010) pp. 126-127.
[11] Hayes, *supra* note 4, p. 66.

(iii) Procedure in the Diet

(iv) Treaty Conclusion and Procedure to come into effect

(i) Works by Government Agencies

Like in most states, Ministry of Foreign Affairs (MOFA) takes charge of diplomacy, including conclusion of treaties. Especially, International Legal Affairs Bureau in MOFA is responsible for the conclusion of treaties and other international agreements.[12] In the process to conclude a treaty, Government Agencies must negotiate with other States, authenticate treaties, and draft implementing legislations. Therefore, aside from a couple of exceptions, it is rare for MOFA to prepare for a conclusion of treaties without cooperation with other Government Agencies. For example, in the case of International Maritime Organization (IMO) meetings, staffs from Ministry of Land, Infrastructure, Transport and Tourism (MLIT) are sent to represent Japan.[13] Sometimes, more than two Government Agencies cooperate. For instance, when preparing for concluding FTA with Korea, staffs from Ministry of Finance, Ministry of Agriculture, Forestry and Fisheries (MAFF), Ministry of Economy, Trade and Industry (METI) as well as MOFA participated in the bilateral negotiation.[14]

Which Government Agencies get involved in treaty negotiation depends on the subject-matter of the international convention. It is frequently pointed out that an interagency conflict occurs, concerning Japan's position on treaty negotiation. However, that kind of conflict is inevitable, considering the fact that each Government Agency has its own policy. Premised on that conflict, Government Agencies will reach a conclusion which is in line with Japan's national interest.[15]

Before authenticating a treaty with other relevant States, usually Japanese Government Agencies agree how to implement that treaty; in other words, whether new legislation or revision of statutes is needed.[16] After authenticating a treaty, Government Agencies, including International Legal Affairs Bureau in MOFA translate it into Japanese in order to

[12] MOFA Website, *available at* <http://www.mofa.go.jp/about/hq/org.html>. *See* Order for Organization of Ministry of Foreign Affairs, *available at* <http://law.e-gov.go.jp/htmldata/H12/H12SE249.html> (*Japanese only*).
[13] MLIT Website, *available at* <http://www.mlit.go.jp/maritime/imo/index.html> (*Japanese only*).
[14] MAFF Website, *available at* <http://www.maff.go.jp/j/kokusai/renkei/fta_kanren/f_korea/pdf/fta-4-1.pdf> (*Japanese only*).
[15] Matsuda, M., "Practical Theories and Procedures for Concluding Treaties", *Hokkaido Journal of New Global Law and Policy*, Vol. 10 (2011) pp. 321-322.
[16] *Ibid*., p. 324.

facilitate subsequent procedures. If implementing legislations are needed, usually the agency responsible for the subject-matter of that treaty makes them.[17]

(ii) Examination by Cabinet Legislation Bureau

After translating treaties and drafting new legislation if any, they are examined by the Cabinet Legislation Bureau (CLB), which is established within the Cabinet with a view to assisting it on legislative matter, by examining bills, orders and treaties.[18] It mainly checks the following four points: (1) the relationship between the proposed bill on one hand and the Constitution and other existing laws on the other, as well as the legal appropriateness of the contents of the bill; (2) whether or not the intentions of the proposed bill are accurately expressed in the text; (3) whether or not the structure of the bill (e.g. the order of articles) is appropriate; (4) whether the usage of letters or words is correct, with reference to the existing laws.[19]

In this way, CLB works as 'legal counsel' for the Cabinet.[20] CLB consists of seconded staff from other Government Agencies as it does not employ bureaucrat by itself.[21] Therefore, in spite of the fact that CLB is an examiner for other Government Agencies, CLB actively modifies the translated sentences and drafts of implementing legislation in close conjunction with other Government Agencies.[22] With the completion of examination by CLB, the government has almost drafted a bill.

(iii) Procedure in the Diet

As Article 73 (3) of the Japanese Constitution provides, when concluding treaties, the Cabinet needs to "obtain prior or, depending on circumstances, subsequent approval of the Diet." Regarding the interpretation of this Article, three controversies arise among scholars: (1) the scope of 'treaties': which treaty is regarded as a 'treaty' under Article 73? (2) the

[17] *Ibid*., pp. 325-326.
[18] Articles 1 and 3 of "Act for Establishment of the Cabinet Legislation Bureau", *available at* <http://www.clb.go.jp/info/syokan/settihou.html> (*Japanese only*). CLB Website, *available at* <http://www.clb.go.jp/english/about.html>.
[19] CLB Website, *available at* <http://www.clb.go.jp/english/process.html>.
[20] Website of Prime Minister of Japan and His Cabinet, *available at* <http://www.kantei.go.jp/foreign/link/link1.html#1>.
[21] Mitsuda, M., "Funktion und Problematik des Legislativen Dienstes des Kabinetts zur Prüfung der Verfassungsmässigkeit von Gesetzesentwürfe", *The Faculty journal of Komazawa Women's University*, Vol. 17 (2010) pp. 259-260.
[22] Nakono, T., "Impressions of Cabinet Legislative Bureau and Duty of Public Law Studies", *The Hokkaido Law Review*, Vol. 61 (2011) pp.2074- 2075.

timing of approval: what will be the decisive factor in determining whether approval is required beforehand or subsequently? (3) the power of the Diet: whether the Diet is authorized to amend the content of a treaty or not?

'Treaty' under Article 73 is divided into two categories: (i) treaties which require the approval of the Diet; (ii) executive agreements which do not require that approval.[23] Therefore, whether treaties fall within the scope of 'treaties' or executive agreements is important for the Cabinet. In this context, the Japanese Government enunciated the criteria to make a distinction between treaties and executive agreements in the Diet. According to those criteria, a 'treaty' (1) includes statutory matters, (2) includes financial matters, and (3) establishes the fundamental relationship between Japan and one or more States and, therefore, is of politically importance.[24] Those criteria set by the Government are well supported by scholars.[25]

Concerning the detail of the timing of approval, in principle, the Precedents of House of Representative No.333 provides.[26] In regard to this point, according to most constitutional scholars, "the Government should, in principle, seek prior approval, and that subsequent approval should be allowed only in exceptional cases in which the conclusion of the agreement is considered to be urgent but the Diet is in recess or dissolved and the Government cannot afford to wait."[27]

Article 41 of the Japanese Constitution provides:

> The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Considering the fact that treaties play the same role as municipal laws to some extent, some scholars argue that the Diet should have the power to amend the content of treaties, before the Japanese Government concludes them.[28] However, based on the wording of 'approval' in Article 73, the Government and most scholars take the view that "the Diet has no power to amend a treaty but can only approve or reject the text of the treaty submitted by the

[23] Nonaka, T., Nakamura, M., Takahashi, K. and Takami, K., *Japanese Constitutional Law II*, 4th ed., (2006) p. 197.
[24] Oishi, M., "Some Problems of the Ratification of Treaties in Constitutional Perspective", *Kyoto Law Review*, Vol. 144 (1999) p. 105.
[25] Iwasawa, Y., *International Law, Human Rights, and Japanese Law*, (1998) p. 22.
[26] Shugiinn Jimukyoku, *Shugiinn Sennreishu*, (1994) p. 392.
[27] Iwasawa, *supra* note 25, p. 14.
[28] Fukasa, T., "Kokkai no Jyouyaku Shouninnkenn" in Ashibe, N. (ed.) *Enshu Kenpo*, (1988) p. 466.

Government."[29] Meanwhile, the Diet has the power to amend national legislations, including implementing legislations.[30]

As mentioned in detail above, when international agreement is regarded as 'treaty', the Diet is required to timely approve a conclusion of that treaty, pursuant to the procedure provided in the Constitution. Article 61 of the Constitution stipulates:

> The second paragraph of *the preceding article* applies also to the Diet approval required for the conclusion of treaties (emphasis added).

The second paragraph of Article 60, i.e. 'the preceding Article', provides for the procedure to adopt a budget. According to that provision, the decision of the House of Representatives shall be the decision of the Diet in the following two cases: (1) where the House of Councilors makes a decision different from that of the House of Representatives and no agreement can be reached even through a joint committee of both Houses; (2) where the House of Councilors fails to take final action within 30 days after the receipt of the budget passed by the House of Representatives, time in recess excepted,

Usually, in the House of Representatives, the Committee on Foreign Affairs is in charge of discussing whether the treaty should be approved and in the House of Councilors, the Committee on Foreign Affairs and Defense is responsible. However, unlike the approval for treaties, implementing legislations are examined in other various Committees which take responsibility for the subject-matter of those legislations.[31] It seems theoretically possible that the view of the different committee varies from each other. Practically however, this difference of Committees does not pose any problem, because of the harmonizing procedures conducted so far among Government Agencies and CLB.[32]

(iv) Promulgation and its Effect

With the Diet approval, the Cabinet may conclude treaties, representing the Japanese Government. According to Article 11 of the Vienna Convention on the Law of Treaties, the consent of a State to be bound by a treaty may be expressed in several ways such as

[29] Iwasawa, *supra* note 25, p. 16.
[30] Matsuda, *supra* note 15, p. 326.
[31] As for the details about the Diet Committee, *see* House of Representatives, *The National Diet of Japan*, (2010) pp. 17-20.
[32] Matsuda, *supra* note 15, p. 327.

ratification, acceptance, approval and accession. Among them, ratification is regarded as the most formal way under public international law.[33] Therefore, Article 7 (8) of the Japanese Constitution provides that the Emperor attests instruments of ratification. To put it simply, when a treaty requires ratification for States to be a contracting party and the Cabinet intends to ratify that treaty, the Cabinet has to have the instruments of ratification attested by the Emperor.[34]

After the promulgation of treaties by the Emperor via Official Gazette (Kanpo), treaties have domestic legal force,[35] because Japan generally enacts implementing legislation when concluding treaties as shown above and adopts 'incorporation doctrine'.

2. Status of Treaty in Japanese Law

Article 98 (2) of the Constitution sets out:

> The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Based on this Article, the Japanese Government and an overwhelming majority of scholars take the view that treaties have domestic legal force in Japan without further procedures.[36] However that Article does not clarify the following two points: (1) whether treaties are directly applicable in Japanese Court and (2) how treaties, the Constitution and statutes are prioritized.

(i) 'Direct Application' in Japanese Law

Influenced from jurisprudence in U.S. and European Countries, Japanese courts have developed the criteria to decide whether a treaty is applicable. In 1993, the Tokyo High Court judged in the following manner:

> The *specific intent* of the parties to a treaty is, of course, an important element, but

[33] Brownlie, I., *Principles of Public International Law*, 7th ed., (2008) p. 611.
[34] Takano, Y., "Conclusion and Validity of Treaties in Japan: Constitutional Requirements", *Japanese Annual of International Law (JAIL)*, Vol. 8 (1964) pp. 14-15.
[35] Matsuda, *supra* note 15, p. 329. *See* Article 7 of the Constitution which stipulates "the Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people: Promulgation of amendments of the constitution, laws, cabinet orders and treaties."
[36] Iwasawa, Y., "The Relationship between International Law and National Law: Japanese Experiences", *British Year Book of International Law*, Vol. 64 (1993) pp. 344-345.

> moreover, the provisions must be *precise*. In particular, when an international rule imposes on States an obligation to act, when it involves appropriation of national expenditure, or when a similar system already exists in domestic law, then harmony with the system must be taken into full consideration, and therefore, the content needs to be all the more precise and clear (emphasis added).[37]

Although it is not clear whether two requirements provided in this case, in other words 'specific intent' and 'preciseness', are established as a precedent,[38] Japanese courts consistently accepted direct applicability of the International Covenant on Civil and Political Rights (ICCPR).[39] However, in some context, direct applicability seems to be thought inappropriate. For example, in the field of criminal law (i.e. the subject of this paper), direct applicability has never been accepted, probably because of the legality principle which is provided under Article 31 of the Japanese Constitution.[40] Therefore, whenever ratifying treaties relating to the Japanese Criminal Law (in this report, 'Japanese Criminal Law' includes the Penal Code as well as other related statutes or rules), such as so-called anti-terrorism Conventions, Japan needs to enact implementing legislations.

(ii) Rank of Treaty

Irrespective of whether a treaty is directly applicable or not,[41] if a treaty has domestic legal force in Japan, it would conflict with the Constitution and statutes. Therefore, it is essential to clarify the relationship among them. As to the relationship between treaties and statutes, the Japanese Government and courts take the view that treaties rank higher than statutes.[42]

On the other hand, with regard to the relationship between treaties and the Constitution, scholarly view is divided between the 'treaty supremacy theory' and the 'constitutional

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[37] This English translation is *available at* <http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/cb8ffa8ef0951853c1256a7e002a9ee1!OpenDocument>; Judgt 5th Mar. 1993, Tokyo High Ct, *Hanrei Taimuzu*, No. 811, p. 87: *JAIL*, Vol. 37 (1994) p. 139.

[38] Obata, K., "Kokusai Jinnkenn Kiyaku- Nihonkoku Kenpo Taikei no Moto deno Jinnkenn Jyoyaku no Tekiyou", *Jurist*, No. 1321 (2006) p. 13, *footnote* 15: the Supreme Court is silent on this issue.

[39] Judgt 28th Oct. 1994, Osaka High Ct, *Hanrei Taimuzu*, No. 868, p. 61: *JAIL*, Vol. 38 (1995) p.129; Judgt 15th Mar. 1996, Tokushima Dist Ct, *Hanrei Jihou*, No. 1597, p. 123: *JAIL*, Vol. 40 (1997) p.120.

[40] Article 31 stipulates "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

[41] The treaty which is not directly applicable is also effective through other way like indirect applicability. *See* Iwasawa, *supra* note 25, pp. 81-92.

[42] *Ibid*., p. 95; Judgt 31st May. 2005, Nagoya High Ct, *Shoumu Geppou*,Vol. 54 (2008) p. 311; Judgt 28th Apr. 1999, Hiroshima High Ct, *Koutou Saibansho Keiji Saibann Sokuhoushu*, (1999) pp.137-138; the Supreme Court also implied it in Judgt 29th Oct. 2009, Supreme Ct, *available at* <http://www.courts.go.jp/english/judgments/text/2009.10.29-2008.-Gyo-Hi-.No..91.html>.

supremacy theory.' While the former allows treaties to prevail over the Constitution, the Constitution prevails over treaties based on the latter theory.[43] Although once the Tokyo High Court adopts 'treaty supremacy theory',[44] the Government mentioned "the Constitution is Japan's supreme law and supersedes the Covenant (ICCPR) in domestic effect"[45] and the Osaka High Court also supports that position.[46]

3. Criminal Jurisdiction Given to Japanese Court

Concerning the jurisdiction of Japanese courts, all the Constitution provides is that "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law" under Article 76. However, according to Hirano, 'judicial power' in this Article includes 'criminal jurisdiction' based on which courts find facts and decide on a punishment.[47] Accordingly, Japanese courts have jurisdiction if the Japanese Criminal Law is applicable to the case in question.

The scope of application of the Japanese Criminal Law is stipulated from Articles 1 to 4 of the Penal Code. According to Article 1, the Penal Code applies to anyone who commits a crime: (1) within Japanese territory and (2) on board a Japanese vessel or aircraft. Articles from 2 to 4 provide the rules for crimes committed outside Japan. Based on the protective principle, Article 2 sets out that some crimes such as Counterfeiting of Currency are punished. Then, Article 3 (1) provides the active personality principle and Article 3 (2) the passive personality principle. Furthermore, Article 4 (1) provides crimes committed by public officials on the one hand, Article 4 (2) provides crimes governed by treaties. When the Penal Code was enacted in 1907, Article 3 (2) and Article 4 (2) were not described originally. As for the detail about these provisions, explanation is added to the extent necessary in the next Chapter.[48]

III. Implementation of Global Conventions

As shown in the previous Chapter, Japan generally enacts implementing legislations before ratifying treaties. In terms of treaties related to criminal law, Japan traditionally legislates

[43] As for the details about this dichotomy, *see* Sato, I., "Treaties and the Constitution", *Washington Law Review*, Vol. 43 (1967) pp. 1065-1066.
[44] Judgt 2nd Sep. 1992, Tokyo High Ct, *Shoumu Geppou*,Vol. 39 (1993) pp. 1060-1064.
[45] *Fourth Periodic Reports of States Parties Due in 1996: Japan*, 01/10/97, CPR/C/115/Add.3, para. 11.
[46] Judgt 27th Oct. 2005, Osaka High Ct, 'Courts in Japan' Website, p. 3, *available at* <http://www.courts.go.jp/hanrei/pdf/20060511110250.pdf> (*Japanese only*).
[47] Hirano, R., *Keijisoshoho*, (1972) p. 44.
[48] *See*, pp. 14-16 of this paper.

special criminal laws rather than modifies the Penal Code.[49] As is often the case, special criminal laws are silent on general provisions, such as complicity. For such a situation, Article 8 of the Penal Code provides:

> The general provisions of this Part (Part I General Provisions) shall also apply to crimes for which punishments are provided by other laws and regulations, except as otherwise provided in such laws and regulations.

Therefore, if special criminal laws do not stipulate any provision on complicity, Articles from 60 to 65 of the Penal Code are applied.[50]

1. The United Nations Convention on the Law of the Sea (UNCLOS)

(i) National Legislation

Japan ratified UNCLOS on 20th June 1995. Days before ratifying UNCLOS, though Japan enacted some legislation like "Act on the Exercise of the Sovereign Right for Fishery, etc. in the Exclusive Economic Zone,"[51] Japan did not have any leading agency responsible for implementing UNCLOS.[52] In addition, it was pointed out that Japan needs to have comprehensive point of view, when formulating ocean policies.[53] Hence, in 2007, "Basic Act on Ocean Policy (Basic Act)"[54] was enacted and it established the Headquarters for Ocean Policy (Headquarter) in the Cabinet.[55] Therefore, currently, the Cabinet is in charge of the Basic Plan of Ocean Policy which was enacted under the Basic Act and intends to comply with UNCLOS.

As for crimes of piracy, the Japanese Criminal Law was silent for a long time. In the wake of piracy off the coast of Somalia, however, the Headquarters drafted the legislation to combat piracy. Then, Japan eventually enacted "Act on Punishment of and Measures against Acts of Piracy (Piracy Act)" in 2009 to implement UNCLOS provisions on piracy (Articles

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[49] *See* Yamamoto, J., "Current Treaty Systems to Combat International Terrorism-Features and Domestic Implementation-", *JAIL*, Vol. 32 (1989) p. 49; also *see* Yamamoto, S., *Kokusai Keijiho*, (1991) p. 354.

[50] As for the detail about the relationship between complicity and special criminal laws, *see* Okoshi, Y., "Die Teilnahme im Sonderstrafrecht", *Kobe Law Journal*, Vol. 37 (1988) pp. 669-721.

[51] This Act is *available at* <http://law.e-gov.go.jp/htmldata/H08/H08HO076.html> (*Japanese only*).

[52] MLIT Website, *available at* <http://www.mlit.go.jp/sogoseisaku/ocean/BAOP.html> (*Japanese only*).

[53] Kuribayashi, T., "Kaiyouho no Hatten to Nihon" in Sugihara, T. (ed.) *Umi: Nihon to Kokusaiho no Hyakunenn: 3 Kann*, (2001) p. 26.

[54] English translation is *available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/BAOP.pdf>.

[55] As for the outline of the Basic Act, *see* Okuwaki, N., "The Basic Act on Ocean Policy and Japan's Agendas for Legislative Improvement", *Japanese Yearbook of International Law (JYIL)*, Vol.51 (2008) pp. 164-216.

101-110).[56] That act provides not only the constituent elements of piracy, but also how to police and arrest pirates on the high seas. Therefore, it has a character of code of criminal procedure, as well as one of penal code.[57] As for the leading agency, MILT to which Japan Coast Guard (JCG) belongs is in charge of this Act.

(ii) Constituent Elements and Punishments

Article 2 of the Piracy Act defines 'piracy' as a crime, in compliance with both Article 101 of UNCLOS and general principles of Japanese Criminal Law, such as the legality principle.[58] For that purpose, in addition to illegal acts, all three requirements for the definition of piracy under UNCLOS, namely, (1) the high seas, (2) 'private ends', and (3) two ships,[59] are also inserted in the definition under the Piracy Act. However, Japan intentionally modified two points. The first point is the geographical scope of piracy. While UNCLOS limits its scope on the high seas, the Piracy Act extends the geographical scope to territorial seas and internal waters of Japan, in order to equally treat persons having committed piracy on the high seas and those within Japanese territorial sea and internal water.[60] The second point is that the definition of the Act excludes the piracy conducted by aircrafts which is described in Article 101, since the piracy conducted by aircrafts is unrealistic.[61]

While UNCLOS defines piracy very vaguely, as providing "any illegal acts of violence or detention, or any act of depredation", the Piracy Act intends to embody those terms in subparagraphs from (i) to (iv) of Article 2 as shown below: (i) seizing or taking control of

[56] As for the full text of the Piracy Act in English, *see* "National Legislations", *JYIL*, Vol.53 (2010) pp. 838-843.

[57] *See* Kanehara, A., "Japanese Legal Regime Combating Piracy-the Act on Punishment of and Measures against Acts of Piracy-", *JY IL*, Vol. 53 (2010) pp. 469-470.

[58] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 7 (23rd April, 2009) p. 4; The minutes of the Diet of Japan are *available at* <http://kokkai.ndl.go.jp/>(*Japanese only*).

[59] According to Article 101, "Piracy consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

[60] Minutes of the Committee on Diplomacy and Defense, House of Councilors, 171st Session, No. 16 (4th June, 2009) p. 22.

[61] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 6 (22nd April, 2009) pp. 10-11.

the operation of another ship, (ii) robbing property on board, (iii) kidnapping a person on board, (iv) intimidating a third party. Moreover, there is not any rule for complicity under UNCLOS, whereas the Piracy Act provides rules for them. In addition to subparagraphs from (i) to (iv), the Piracy Act additionally includes into the definition of piracy the following acts only when they are committed for the purpose of committing subparagraphs from (i) to (iv): (v) breaking into or damaging another ship, (vi) operating a ship and approaching in close proximity of, or beleaguering, or obstructing the passage of another ship, (vii) preparing weapons.

The meaning of 'private ends', which is provided under both the Piracy Act and UNCLOS, was debated during the 171st Diet from January to July 2009. According to Mr. Oba, Secretary General of the Headquarters, 'private ends' means private desire for benefit, animus, revenge and other purpose which are not related to the intention of foreign government.[62] With regard to the relationship between piracy and terrorism, Mr. Oba explained that whether terrorism or not is not related to the criterion of 'private ends' and some terrorism would be considered piracy while others would not.[63] Since Japanese scientific research whaling ships are attacked by Sea Shepherd, whether its activity would be piracy under international law or not was focused. In this regard, nonetheless, the government's view was not clear. While the Minister of MILT answered it would not be,[64] foreign Minister said it would be.[65]

Article 3 (1) stipulates that the perpetrators of piracy as referred to in subparagraphs (i) to (iv) are punished by "imprisonment with penal servitude" (*choueki*) either for life or for a definite term not less than 5 years. On the other hand, the perpetrators of subparagraphs (v) and (vi) are punished by *choueki* for not more than 5 years, and ones of subparagraphs (vii) for not more than 3 years, according to subparagraphs (3) and (4) of Article 3 respectively. Moreover, when a person cause death at the scene of the crimes as referred to in subparagraphs (i) and (ii), the person shall be punished by the death penalty or *choueki* for life.

(iii) Jurisdiction over Acts of Piracy

[62] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17th April, 2009) p. 7.
[63] Minutes, *ibid*., p. 7.
[64] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15th April, 2009) p. 19.
[65] Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 6 (22nd April, 2009) p. 21.

As previously explained,[66] if the Japanese Criminal Law is applicable, Japanese courts have jurisdiction and as the previous sections show, the Piracy Act provides applicable penal law to piracy which has no link with Japan at all. Therefore, it can be said that Japanese courts exercise jurisdiction over piracy, based on the universal principle.

Apart from legislative and adjudicative jurisdiction, the Piracy Act provides enforcement jurisdiction over piracy under that Act. Therefore, as long as the Piracy Act extends its definition of piracy to crimes which have no connection to Japan, that Act also extends enforcement jurisdiction to those crimes. According to Article 5, JCG mainly takes responsibility to police piracy, and Article 6 sets out the policing procedure, especially with regard to use of weapons. In addition, Articles 7 and 8 provide that the Maritime Self Defence Force (MSDF) may also police piracy only when the Ministry of Defence orders with the approval of the Prime Minister.

(iv) Prosecution of Acts of Piracy

Currently, in Japan, one criminal case as to piracy is under proceeding. What is important in that case is that Japan itself does not have any connection to that case. Therefore, it can be said that that case is the first exercise of the universal jurisdiction by Japan. As for the detail facts about the case, on 5th March 2011, the oil tanker MV *Guanabara* which flies Bahamas flag and is owned by Japanese shipping company reported to Counter Task Force (CTF) that it was under attack. In response, the U.S. warship USS Bulkeley intercepted Guanabara, and secured its 24 crew members (2 Croatians, 2 Romanians, 2 Bulgarians, and 18 Philippines) from four suspected pirates on 6th March.[67] After failing to persuade the Bahamas to accept those pirates, U.S. extradited them to Japan.[68] On 11th March, Japan sent some JCG officers to Djibouti, and arrested those pirates there and took them to Japan.

Since it is the first time for Japan to try pirates based on the Piracy Act, Japan is facing and will face many problems, in common with other States, such as translation from Somali to Japanese and identifying their age.[69] Despite these difficulties, the Tokyo District Public Prosecutors Office decided to indict them for attempt to commit piracy under the Piracy Act.[70] On the one hand, this Japanese decision can be highly evaluated, because it is a good

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[66] *See* p. 9 of this paper.

[67] Combined Maritime Forces, "CMF Ship USS Bulkeley Frees Ship and Crew from Pirates", *available at* <http://combinedmaritimeforces.com/2011/03/06/cmf-ship-uss-bulkeley-frees-ship-and-crew-from-pirates/>.

[68] "Kaizoku Rikken Nami Takashi", *Asahi Shinnbunn* (11th Mar. 2011).

[69] Sakamoto, S., "Sotsui e Kokusaihou no Souki Seibi wo", *Kaiji Shinnbunn* (18th Mar. 2011).

[70] "Shousenn Mitsui Tanker Shuugeki no Group, Kaizoku Ho de Kiso", *Toyokeizai Online*, 11th Apr. 2011,

way of contributing to maintain maritime order. On the other hand, it can be said that Japan should not have taken those pirates, considering the custom of European countries and U.S., according to which, only when their own national or ship are attacked, they commence criminal proceedings with bearing the costs.

2. 1979 International Convention against the Taking of Hostages (Hostage Taking Convention)

Japan ratified the Hostage Taking Convention on 8th June 1987.[71] When ratifying that Convention, Japan amended two legislations. Firstly, Japan amended "Act on Punishment of Compulsion and Other Related Acts Committed by Those Having Taken Hostages (Hostage Act)" which was enacted as a result of the 1977 hijack of Japan Airlines flight 472, because the constituent elements of hostage provided in that Act do not comply with Hostage Convention. In concrete terms, before its amendment in 1987, Article 1 (1) of the Hostage Act did not adequately cover crimes of compulsion against third person except family members, which is required to criminalize under Articles 1 and 2 of the Hostage Taking Convention.[72] As for the leading agency, MOJ is in charge of that Act.

Secondly, since the Penal Code was not applicable to some crimes of hostage at that time, Japan amended the scope of application of the Code, by inserting Article 4 (2) into the Penal Code which says:

> This Code shall also apply to anyone who commits outside the territory of Japan those crimes prescribed under Part II which *a treaty obliges Japan to punish* even if committed outside the territory of Japan.[73]

Based on this provision, Japan became able to exercise its jurisdiction over not only crimes of hostage, but also all crimes for which compulsory jurisdiction is provided in treaties if Japan ratifies those treaties. This provision is applied only when other provisions, namely from Articles from 1 to 4 (1) of the Penal Code cannot cover the crime in question.[74]

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available at <http://www.toyokeizai.net/business/society/detail/AC/1bf7a10218ca57b26bc27c72e10cef75/>.

[71] MOFA Website, *available at* <http://www.mofa.go.jp/mofaj/gaiko/terro/pdfs/kyoryoku_04_2.pdf> (*Japanese only*).

[72] Taya, C., "Terokannrenn Nijyoyaku no Teiketsu ni Tomonau Keiho Tou no Kaisei", *Shoji-Homu*, No. 1116, (1987) pp. 27-28.

[73] As for this provision, the author modifies the translation which MOJ made and emphasizes the part he does so.

[74] Itoh, K., "The 1987 Penal Code and Other Special Criminal Laws Amendments Law: A Response to the Two U.N. Conventions against International Terrorism", *JAIL*, No. 32 (1989) p. 29.

Moreover, this provision does not intend to make treaties directly applicable.[75] It is applied only against crimes whose constituent elements are provided in the Japanese Criminal Law. Meanwhile, as to crimes concerning permissive jurisdiction in treaties, the Penal Code does not have any specific provision.[76] Nevertheless, since Article 3 (2) of the Penal Code provides the passive personality principle, Japan may exercise its jurisdiction in the case of Article 5 (1) (d) of the Hostage Taking Convention.

According to Article 1 of the Hostage Act, the perpetrators of compulsion as referred to in the said Article are punished by *choueki* either for not less than 6 months but not more than 10 years. As for the attempts, Article 1 (3) stipulates they are also punished. Moreover, Articles 2 and 3 provide more serious forms of compulsion by hostage takings, such as using weapons and hijacking. In accordance with Article 4, when a person causes death at the scene of the crimes as referred to Articles 2 and 3, the person shall be punished by the death penalty or *choueki* for life.

3. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA)

Japan ratified the 1988 SUA on 24th April 1998. Unlike in the case of other treaties, Japan does not enact the implementing legislation for the 1988 SUA. This is because the existing provisions for ordinary crimes would cover all offences under the 1988 SUA. Therefore, in order to examine whether Japan can punish all offences under the 1988 SUA or not, it is essential to explore some Articles of the Penal Code for which MOJ is the leading agency.

Article 3 (1) of the 1988 SUA listed offences such as seizing a ship and injuring any person on board. Then, according to subparagraphs (1) and (4) of Article 6 of the 1988 SUA, contracting parties shall establish the compulsory jurisdiction over those offences, based on the territorial principle, the flag state principle, the active personal principle and when the suspects of the said offenses are found within their territory. Under the Penal Code, all offenses covered by the 1988 SUA are punishable if those occur within Japanese territory or the ships flying Japanese flag,[77] whereas the scope of active personality is limited to some serious crimes like homicide, under the Japanese Criminal Law. Therefore, Japan cannot punish less serious crimes such as intimidation which is stipulated under Article 222 of the

[75] Taya, *supra* note 72, p. 27.
[76] Therefore, Japan could not exercise universal jurisdiction over piracy until the Piracy Act was enacted.
[77] Tsuruta, J., "Kaisei SUA Jyoyaku to sono Nihon niokeru Jisshi" in Kuribayashi, T. and Sugihara, T. (eds.) *The Law of the Sea and Japan*, (2010) pp. 141-143.

Penal Code and damage to property under 261, based on Article 3 (1), namely, the active personal principle,[78] though Article 3 (1) of the 1988 SUA obliges States to punish those crimes. However, based on Article 4 (2), Japan may exercise its jurisdiction over the crimes which are committed by Japanese nationals but not covered by Article 3 (1) and also when the suspects are found in Japan as referred to Article 6 (4) of the 1988 SUA.

As aforementioned in the previous section, regarding permissive jurisdiction, only the passive personality principle which Article 3 (2) of the Penal Code stipulates is provided under the Japanese Criminal Law. This Article 3 (2) was enacted as a result of the *Tajima* Case to which some people assert to apply the 1988 SUA and others do not.[79] The MV *Tajima* is a ship flying Panama flag and operated by a mixed Japanese and Filipino crew. When it sailed on the high seas off Taiwan, one Japanese sailor was killed by two Filipino sailors on 4th April 2002. Officers of JCG investigated that ship with approval of the Panamanian Government and submitted a report on that case to it. However, since it took a long time for the Panamanian Government to translate the report and consider the response to it, the crew of Tajima had to detain the perpetrators. After about one month, on 14th May, Panamanian authority required Japan for provisional arrest of those seafarers and it took another one month to extradite them to Panama.[80] Finally, on 20th May 2005, the Panamanian Court acquitted those two seafarers.[81] As for this case, though Japan may exercise its jurisdiction without violating international law as Hayashi said,[82] Japan lacked the national legislation to punish crimes when a victim of those crimes is Japanese. Then, Japan introduced Article 3 (2) into the Penal Code on 11th July 2003.[83]

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[78] *See* p. 9 of this paper.

[79] At the Legal Committee of the IMO, the delegation of Japan commented that the 1988 SUA is not applicable to a case like *Tajima*, since Article 3 (1)(b) of the 1988 SUA requires the safety of navigation to be endangered. Meanwhile, the Ninth Circuit Court of Appeals of the U.S. takes a different view in *United States v. Shi*. In that case, despite the similarity with the *Tajima* case, namely where a seafarer kills another sheafaer, the Court applied the Article 3 (1)(b). Whether the 1988 SUA is applicable or not may depend on the interpretation of the terms "if that act is likely to endanger the safe navigation of that ship" under Article 3 (1)(b). Considering the fact that a ship is operated by the minimum man power in accordance with both national and international rules, it is not irrational to say that the lack of one seafarer in a ship would endanger the navigation of that ship. *See* IMO Legal Committee, *Report of the Legal Committee on the Work of its Eighty-Seventh Session*, (23 October 2003) LEG 87/17, p. 25; Tanaka, Y., "Framework of State Jurisdiction over Maritime Terrorism under the SUA Convention", *Ocean Policy Studies*, No. 2 (2005) pp. 134-135; Kontrovich, E., "International Decisions-*United States v. Shi*", *American Journal of International Law,* Vol. 103, pp. 734-740.

[80] As for the detail about *Tajima* case, *see* Watanabe, T., "Die Bestrafung der Auslandstaten durch das passive Personalitätsprinzip", *Seiwa Journal of Law & Politics*, Vol. 12 (2005) pp. 103-104.

[81] "2 Filipino Seamen Acquitted of Murder Charges", *Parola*, No. 125 (2005) p. 7, *available at* <http://www.psap-parola.org/home/wp-content/files/pdf/publication/parola125.pdf>.

[82] Hayashi, M., "Tnaker'Tajima' Sennnai no Senninn Satsugaijikenn heno Taiou ha Tekisetsu de attaka" *available at* < http://www.sof.or.jp/jp/news/1-50/49_3.php>.

[83] As for the detail about *travaux préparatoire* of Article 3 (2), *see* Tatsui, S., "Kokuminn Hogo no tameno

Irrespective of a ground of jurisdiction, the same punishments are applied to the same crimes. The relationship between punishment and crimes which are provided in the Penal Code and would correspond to offenses under the 1988 SUA is shown in the following table.

Table 1: Crimes Corresponding to Offences covered by the 1988 SUA

Art. No.	Crime	Punishment
199	Homicide	The death penalty or *choueki* for life or for a definite term of not less than 5 years
204	Injury	*Choueki* for not more than 15 years or a fine of not more than 500,000 yen
205	Injury Causing Death	*Choueki* for a definite term of not less than 3 years
220	Unlawful Capture and Confinement	*Choueki* for not less than 3 months but not more than 7 years
222	Intimidation	*Choueki* for not more than 2 years or a fine of not more than 300,000 yen
261	Damage to Property	*Choueki* for not more than 3 years, a fine of not more than 300,000 yen or a petty fine

Actually, the Japanese Government regards some activities of the Sea Shepard as offences covered by the 1988 SUA.[84] Nonetheless, in the trial of Peter Bethune, a member of that environmental group, the Tokyo District Court convicted him of crimes under the Penal Code, such as injury, though that case does not refer to the application of the 1988 SUA.[85] As for the attempts, Chapter VIII (included in Part I) of the Penal Code provides general principle. According to Article 44 in that Chapter, "an attempt is punishable only when specifically so provided in the Article concerned." In terms of crimes listed above, only attempt of homicide is provided in Article 203.

4. 1999 International Convention for the Suppression of the Finance of Terrorism (1999 Terrorism Financing Convention)

Japan ratified the 1999 Terrorism Financing Convention on 11th June 2002. When ratifying

Kokugaihann Shobatsu ni tsuite", *Hogaku-Kyoshitsu*, No. 278 (2003) pp. 24-28.

[84] Morikawa, K., "Kaijyo Bouryokukoui" in Yamamoto, S. (ed.) *Kaijyo Hoan Hosei*, (2009) p. 325, *footnote* 17.

[85] As for the detail about the trial, *see* Hirose, H., "Kaijyo Hoan Jiken no Kenkyu: No. 54", *Sousa Kenkyu*, No. 712 (2010) pp. 73-84.

that Convention, the Japanese Government established two implementing legislations in 2002. One is "Act on Punishment of Financing to Offences of Public Intimidation (Financing Act)"[86] and the other is "Act on Identity Confirmation of Customers, etc. by Financial Institutions, etc. (Identity Act)." While MOJ is in charge of the former,[87] the Financial Service Agency the latter.[88]

The former Act is legislated to criminalize the provision and collection of funds for terrorist purposes. For that purpose, Article 1 of the Act defines "an offence of public intimidation" in accordance with Article 2 and the Annex for the 1999 Terrorism Financing Convention. "An offence of public intimidation" is defined as some offences carried out with the aim to intimidate the public, national or local governments and etc. The covered offenses are listed in the anti-terrorism Conventions, including offences of hostage taking provided in Article 1 (1) and SUA offences provided in Article 1 (2). On that basis, Article 2 of the Act criminalizes the provision of funds for that offence and Article 3 for the collection of funds.

While those Articles create offences for attempts, they are silent on ones of complicity. Therefore, the Articles from 60 to 65 of the Penal Code are applied. However, considering the fact that provision and collection of funds themselves originally fall within the scope of complicity in an offence of public intimidation,[89] the scope of complicity for crimes under the Financing Act would be limited. The perpetrators and attempts of those offences are punished with *choueki* for not more than ten years or a fine of not more than 10,000,000 yen. It is said that this penalty is set in reference to penalties in other countries.[90] As for jurisdiction, in the same way as the Hostage Taking Convention, while all compulsory jurisdictions are provided from Articles 1 to 4 of the Penal Code, concerning permissive jurisdiction, only the passive personality principle is provided.

The latter Act, Identity Act, is not related to the criminalization of the 1999 Terrorism Financing Convention. However, by obliging financial institutions to identify their customers and record their transactions, that Act is expected to contribute to forestall

[86] English translation is *available at* < https://www.imolin.org/doc/amlid/Japan/Japan_Terrorist_Financing_Act_2002.pdf>.
[87] MOJ Website, *available at* <http://www.moj.go.jp/hisho/shomu/syokan-horei_horitsu.html#02> (*Japanese only*).
[88] FSA Website, *available at* <http://www.fsa.go.jp/houan/154/hou154.html> (*Japanese only*).
[89] Tamino, K., "Act on Punishment of Financing to Offences of Public Intimidation, and the other", *Journal of Police Science (JPS)*, Vol. 55 No. 9 (2002) pp. 15-23.
[90] *Ibid*., p. 17.

terrorism and investigate flow of funds to terrorist organizations.[91]

5. 2000 United Nations Convention on Transnational Organized Crime (2000 UNTOC)

Japan signed the 2000 UNTOC on 12th December 2000 but has not ratified yet. Actually, in spite of the Diet approval of the Convention in 2003, the Japanese Government has not been able to ratify it, because the Diet cannot pass one of two bills to implement obligations under the Convention, named "Bill for Partial Revision of the Penal Code to respond to an Increase in International and Organized Crimes."[92] On the other hand, the other bill was promulgated on 1st April 2007 as "Act on Prevention of Transfer of Criminal Proceeds (Proceeds Act)."[93] While MOJ takes responsibility for the former bill,[94] the National Policy Agency (NPA) the latter Act.[95]

The reason the Diet disapproved the bill originally submitted by the Cabinet is obvious. That is because the bill intends to introduce the idea of 'conspiracy' very broadly.[96] As Furuya points out, that bill attempted to introduce into the Japanese Criminal Law more various crimes than those that Article 5 (1) of the 2000 UNTOC obliges contracting parties to make punishable for 'conspiracy.'[97] Therefore, not only opposition political parties, but also many lawyers and scholars were cautious about the possible violations of human rights that alleged conspiracy to those crimes would cause.[98] Consequently, the Diet could not pass the bill and this fact prevents Japan from ratifying the 2000 UNTOC.

As for Article 6 of the 2000 UNTOC which requires contracting parties to criminalize the laundering of proceeds of crime, the Proceeds Act was enacted. Actually, the Proceeds Act itself does not have any provisions for crime and punishment. With abolishing the Identity

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[91] Goto, K., "Act on Identity Confirmation of Customers, etc. by Financial Institutions, etc.", *JPS*, Vol. 55 No. 9 (2002) pp. 52-53.

[92] Furuya, S., "Kokusai Soshiki Hanzai Boushi Jyoyaku no Tokusihtsu to Kokunai Jisshi ni okeru Monndai", *Bulletin of Waseda Institute of the Policy of Social Safety*, Vol. 1 (2009) p. 225.

[93] Yoneda, T., "Development of Financial Intelligence and Hindrance to Activities by Yakuza Mobs and other Underground Clusters", *JPS*, Vol. 60 No. 7 (2007) p. 1; Provisional translation in English is *available at* <http ://www.npa.go.jp/sosikihanzai/jafic/horei/Lawptcp.pdf>.

[94] MOJ Website, *available at* <http://www.moj.go.jp/keiji1/keiji12_00029.html> (*Japanese only*).

[95] NPA Website, *available at* <http://www.npa.go.jp/syokanhourei/index.htm> (*Japanese only*).

[96] Niiya, T., "Keiho Rironn to Kyoubouzai", *Ho to Minshushugi*, No. 408 (2006) pp. 54-58.

[97] Furuya, *supra* note 92, pp. 240-241.

[98] Shibashi, T., "On Conspiracy", *Chuo Law Journal*, Vol. 2 (2006) pp. 124-129; Adachi, M., "Keiho wo Henshitsu saseru Kyoubouzai", *Horitsu Jihou*, Vol. 78 No.4 (2006) pp. 1-3; Matsumiya, T., "Jittai Keiho to sono Kokusaika", *Horitsu Jihou*, Vol. 75 No.2 (2003) pp. 25-30.

Act,[99] the Proceeds Acts just improves the procedure to police money laundering, especially in the following two points: (i) making obligations on the financial institutions ('specified business operator' under Article 2 (2)) other than ones already obliged under the Identity Act;[100] and (ii) moving the Financial Intelligence Unit from the Financial Service Agency to the National Public Safety Commission under NPA.[101]

6. Protocol of 2005 to 1998 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Protocol)

Japan neither signs nor ratifies the 2005 SUA Protocol. The main reformations by the Protocol are following two points: (i) obliging contracting parties to criminalize transportation of Weapons of Mass Destruction (WMD) and related materials under Articles 3 and 5, (ii) setting out the procedure for Non-flag State to visit the suspected ship in accordance with the so-called 'four hours rule' under Article 8*bis*.[102] Given this content of the 2005 SUA Protocol, MILT is supposed to be a leading agency responsible for considering its ratification.

As for the first point, "Foreign Exchange and Foreign Trade Act" regulates the transportation thorough the sea lanes around Japan.[103] However, it is not rational to interpret the Act in the way as to prohibit vessels transporting WMD and related materials from passing through Japanese territorial sea without calling at a Japanese port.[104] This is because only thorough minimum necessary control, that Act intends to maintain the peace and security.[105] In addition, while the possession of some weapons, such as Chemical Weapons and Biological Weapons is prohibited under the Japanese Criminal Law,[106] it does not criminalize the transportation of those weapons itself.[107]

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[99] FSA Website, *available at* <http://www.fsa.go.jp/policy/honninkakunin/> (*Japanese only*).
[100] Eguchi, H., "Process of Enactment and Gist on 'Law for Prevention of Transfer of Crime Proceeds'", *JPS*, Vol. 60 No. 7 (2007) p. 36
[101] Yoneda, T., "Development of Financial Intelligence and Hindrance to Activities by Yakuza Mobs and other Underground Clusters", *JPS*, Vol. 60 No. 7 (2007) pp. 2-4.
[102] *See* Klein, N., *Maritime Security and the Law of the Sea*, (2011) pp. 180-181.
[103] As for general information about the Japanese export control of weapons, *see* Kihara, S., "Nihon" in Asada, M. (ed.) *Export Control: A Strategy for Preventing Weapons Proliferation*, (2004) pp. 139-141.
[104] Tsuruta, *supra* note 77, p. 146.
[105] Article 1.
[106] *See* "Act on the Prohibition of Chemical Weapons and the Regulation of Specific Chemicals" *available at* < http://law.e-gov.go.jp/htmldata/H07/H07HO065.html> and "Act on Implementing the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and the Other Conventions" *available at* <http://law.e-gov.go.jp/htmldata/ S57/S57HO061.html> (*both Japanese only*).
[107] Morikawa, K., *supra* note 84, p. 319.

In contrast, the second point seems less problematic. It is said that Articles 17 and 18 of "Japan Coast Guard Law"[108] would generally allow JCG to visit and investigate the suspected vessels in compliance with 'four hours rule'.[109]

IV. Extradition and Mutual Assistance

1. Extradition

(i) The Act of Extradition

The existence of a treaty is not a condition for Japan to extradite a fugitive. Actually, Japan concluded bilateral extradition treaties only with U.S. in 1980[110] and Korea in 2002 so far.[111] Unless treaties oblige so, Japan is not obliged to extradite a fugitive, but at the same time Japan is not prohibited to do so except for the some particular cases provided by customary international law.[112] Therefore, Japan extradites a fugitive based on the principle of reciprocity,[113] in accordance with the Act of Extradition.

Under its Article 2, the Act provides the rule for the situations under which a fugitive is not extradited. They are broadly categorized in the following situations: (a) when the requested offence is related to political offence;[114] (b) when the requirements concerning the double criminality are not fulfilled;[115] (c) when the fugitive is pending in or judged by Japanese courts;[116] and (d) when the fugitive is Japanese national.[117]

Usually, MOFA receives an extradition request and the Minister of Foreign Affair generally has to forward that request to the Minister of Justice. Then, according to Article 4 (1), basically, the Minister of Justice shall:

> forward the related documents to the Superintending Prosecutor of the Tokyo High Public

[108] English translation is *available a*t <http://nippon.zaidan.info/seikabutsu/2001/00500/contents/00021.htm>.
[109] *Ibid*., pp. 319-320; Tsuruta, *supra* note 77, pp. 143-146.
[110] Treaty on Extradition between the United States of America and Japan, *available at* <http://internationalextraditionblog.files.wordpress.com/2011/03/japan.pdf>.
[111] Treaty on Extradition between the Republic of Korea and Japan, *available at* <http://www.oecd.org/dataoecd/63/42/39798181.pdf>.
[112] Shaw, M., *International Law*, 6th ed, (2008) p. 686.
[113] Article 3 (ii) of the Act of Extradition.
[114] Article 2 (i) and (ii). As for the precedent about this issue, *see* Yasutomi, K., "Political Offences and Hijacking with the Japanese Law for Extradition of Fugitives from Justice", *JAIL*, Vol. 34 (1991) pp. 69-81.
[115] Article 2 from (iii) to (vi).
[116] Article 2 (vii) and (viii).
[117] Article 2 (ix).

> Prosecutors Office and order an application to be made to the Tokyo High Court for examination as to whether the case is one in which the fugitive can be extradited.

Upon receiving the order from the Minister of Justice, the Superintending Prosecutor detains the fugitive, with a detention permit which has been issued in advance by a judge of the Tokyo High Court.[118] In addition, according to Article 8 (1), a public prosecutor of the Tokyo Office shall:

> promptly apply to the Tokyo High Court for an examination on whether the case is extraditable. This application for examination shall be made within twenty-four hours of the public prosecutor of the Tokyo High Public Prosecutors Office taking the fugitive into custody under a detention permit or receiving the fugitive who was taken into custody under a detention permit.

When the Tokyo High Court receives the application, it must begin to examine that application and render a decision. If the fugitive is detained, that decision shall be rendered within two months from the day on which the fugitive was taken into custody.[119] Moreover, the decision becomes effective through the notification by the Court to a public prosecutor of the Tokyo High Public Prosecutors Office.[120]

(ii) Extradition for the Offenses Covered by Each of the Conventions

Under the treaties which oblige the contracting parties to extradite or prosecute (*aut dedere aut judicare*), States have the discretion to decide how to comply with that obligation, including how to extradite a requested person. The first way of extradition is to include the offences covered by each of the Conventions, as extraditable offences in existing extradition treaties.[121] In terms of extraditable offences, Article 2 (1) of the said two bilateral extradition treaties provides:

> extraditable offenses are offenses which are punishable under the laws of both Parties by death, by life imprisonment, or by deprivation of liberty for a maximum period of at least one year.

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[118] Article 5.
[119] Article 9 (1).
[120] Article 10 (2).
[121] *See* Article 10 (1) of the Hostages Convention, Article 11 (1) of the 1988 SUA, Article 11 (1) of the 1999 the Terrorism financing Convention, Article 16 (3) of UNTOC and Article 10 (1) of the 2005 SUA Protocol.

As already explained, the offences covered by each of the Conventions are punishable by *choueki* for not less than 1 year. Therefore, at least from Japanese point of view, those offences can be included as extraditable offences in both U.S.-Japan and Korea-Japan treaty.

The second way of extradition depends on State Systems. If a State does not make extradition conditional on the existence of a treaty, that State must recognize the offences covered by each of the Conventions, as extraditable offences.[122] As aforementioned, Japan may extradite a fugitive in the absence of an extradition treaty.[123] However, sometimes Article 2 of the Act of Extradition would conflict with the obligation *aut dedere aut judicare*. According to the said Article,

> a fugitive shall not be extradited in any of the following circumstances; provided that this shall not apply in cases falling under items (iii), (iv), (viii), or (ix) when *the extradition treaty* provides otherwise (emphasis added).

Then, subparagraphs (iii) and (iv) of Article 2 says the requested offense must be punishable by imprisonment with or without penal servitude for not less than three years in both Japan and the requesting State. As a result, just an intimidation stipulated in Article 222 of the Penal Code generally does not fall within the scope of extraditable offence, though it is one of the offences covered by the 1988 SUA.[124] Yet, if the 1988 SUA is regarded as 'the extradition treaty' in Article 2, the obligation under the 1988 SUA would prevail. Actually, the definition of 'the extradition treaty' is stipulated in Article 1 (i). However, it is still not clear whether that definition includes the anti-terrorism Conventions, including the 1988 SUA.[125]

2. Mutual Assistance

Japan traditionally granted mutual legal assistance based on its one municipal law, namely, "Act on International Assistance in Investigation and Other Related Matters (Assistance Act)." However, after 2003, Japan started to conclude mutual legal assistance treaties (MLAT) and currently has MLAT with four States and two region as the following table

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[122] *See* Article 10 (3) of the Hostages Convention, Article 11 (3) of the 1988 SUA, Article 11 (3) of the 1999 Terrorism Financing Convention, Article 16 (6) of UNTOC and Article 10 (3) of the 2005 SUA Protocol.
[123] *See* p. 21 of this paper.
[124] *See* p. 17 of this paper.
[125] Yakushiji, K., "Coordination between Japanese Law on Extradition and International Conventions Japan has concluded", *International Law in the Age of International Cooperation*, Study Report Series No. 30 (2004) p. 53.

shows.

Table 2: MLATs with Japan

	Partner	Date of sign	Date of effect
1	U.S.	Aug. 5th, 2003	Jul. 21st, 2006
2	Republic of Korea	Jan. 20th, 2006	Jan. 26th, 2007
3	People's Republic of China	Dec. 1st, 2007	Nov. 23rd, 2008
4	Hong Kong	May 23rd, 2008	Sep. 24th, 2009
5	Russia	May 12th, 2009	Feb. 11th, 2011
6	European Union	(JAP) Dec. 15th, 2009 (EC) Nov. 30th, 2009	Jan. 2nd, 2011

If a requesting State is not a partner for one of the MLATs, Japan may assist that State in accordance with the Assistance Act. According to Articles 2 and 4 of that Act, Japan does not provide assistance in the following situations: (a) when the offense for which assistance is requested is related to political offence;[126] (b) when the requirements concerning double criminality are not fulfilled;[127] (c) when the principle of reciprocity is not expected to work;[128] and (d) unlike in the case of the Act of Extradition, "when the requesting country does not clearly demonstrate in writing that the evidence is essential to the investigation."[129]

In the same manner as extradition, firstly MOFA receives the request for assistance, and forwards that application to MOJ with some exceptional cases.[130] The Assistance Act is mainly composed of the following four Chapters: (I) General Provisions, (II) Collection of Evidence, (III) Transfer of a Sentenced Inmate for Testimony Regarding a Domestic Sentenced Inmate and (IV) Confinement of a Foreign Sentenced Inmate. Unlike extradition, subject to the procedure provided by the Assistance Act, the Minister of Justice has the authority to make definitive decision without a review by judges. However, it was pointed out that the use of diplomatic channels through MOFA would "slow many requests and potentially impede urgent requests."[131] Therefore, with a view to facilitating the procedure of mutual legal assistance, the Japanese Government amended the Assistance Act in 2004.[132] As a result of that amendment, currently a requesting State can directly take a

[126] Article 2 (i).
[127] Article 2 (ii).
[128] Article 4 (ii).
[129] Article 2 (iii).
[130] Article 4.
[131] Financial Action Task Force, *Third Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing or Terrorism: Japan*, (2008) p. 205, *available at* < http://www.fatf-gafi.org/dataoecd/6/45/46653946.pdf >.
[132] Yamauchi, Y., "Kokusai Sousa Kyojyo Ho oyobi Soshikitekina Hanzai no Shobatsu oyobi Hanzaishueki no Kiseitou nikannsuru Horitsu no Itibuwo Kaiseissuru Horitsu ni tsuite", *Gendai Keijiho*, No. 67 (2004) p. 100.

contact with officers of MOJ in some circumstances.[133] Moreover, since the 2004 reformation inserts the phrase "unless otherwise provided by a treaty" into subparagraphs (ii) and (iii) of Article 2, the conflict between the Assistance Act and MLATs cannot occur. As a result, this Act would apply to the offences covered by each of the Conventions.

V. Conclusion

As for the compliance with international law, Japan does not have the best reputation. For example, in terms of international human rights law, Anand says Japan "is struggling to implement them (various covenants on human rights) in its internal laws."[134] Meanwhile, Japan appears enthusiastic about policing and prosecuting the perpetrators of maritime crimes, partly because Japan is surrounded by ocean. Moreover, in today's system, the Headquarters is expected expeditiously to legislate the municipal laws concerning ocean, with reconciling interagency conflicts. Considering the elaborate character of the Piracy Act, the first product of the Headquarters, it is possible to highly evaluate that Act. However, applying that Act is more important than establishing it. For the future, we have to carefully track the Piracy Act not to have it end up being a pie in the sky.

[133] Article 5.
[134] Anand, R. P., "Japan and International Law in Historical Perspective" in Ando, N. (ed.) *Japan and International Law: Past, Present and Future*, (1999) pp. 395-396.