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NGO Information for the Human Rights Committee, 121st session: List of Issues Prior to Reporting, Japan

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**Joint Report: The Anti-Conspiracy Law infringes upon the principle of legal certainty in criminal codes under Article 9 and 14, the right to privacy under Article 17, freedom of thought under Article 18, and freedom of speech under Article 19 of the International Covenant on Civil and Political Rights**

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**This report is submitted by the following NGOs:**

- Joint Task Force against Conspiracy Bill<sup>1</sup>
- Center for Prisoners' Rights Japan
- Green Peace Japan (GPJ)
- Human Rights Now (HRN)
- Japan Civil Liberties Union (JCLU)
- Japan Network towards Human Rights Legislation for Non-Japanese Nationals & Ethnic Minorities
- Japan NGO Network for the Elimination of Racial Discrimination (ERD Net)
- Media Research Institute
- Public for Future (Mirai no tame no Koukyo)
- Society for Abolishing the Family Registration System and Discriminations against Children Born out of Wedlock (AFRDC)
- Solidarity Network with Migrants Japan(SMJ)
- Support Group for the Case of Itabashi High School Graduation Ceremony and "Freedom of Expression"
- The International Movement Against All Forms of Discrimination and Racism (IMADR)
- The Organization to Support the Lawsuits for Freedom of Education in Tokyo
- Women's Active Museum on War and Peace(WAM)

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This joint report by 16 NGOs provides an outline of issues about the Anti-Conspiracy

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<sup>1</sup> This joint task force consists of the following NGO groups against the anti-conspiracy law: "Himitsu Hogohou Haisi" he! Jikkou Inkai (Shinbun Rouren / Heiwa Forum), Kaishaku de Kenpou 9 Jyou wo kowasuna! Jikkou Inkai (Kenpou Kaigi / Yurusuna! Kenpou Kaiaku Shimin Renrakukai), Nihon Masukomi Bunka Jyohou Rouso Kaigi (MIC), Kyoubouzai Houan ni Hantai suru Hourituka 8 Dantai Renrakukai (Nihon Minshu Hourituka Kyoukai), Touchouhou Haishi Network (Nihon Kokumin Kyuen Kai)

Law, one of the most serious issues in the current situation in Japan, of concern with regard to the state party's compliance with the provisions of the International Covenant on Civil and Political Rights (the Covenant) to assist the Human Rights Committee (the Committee) with drawing up the List of Issues Prior to Reporting in advance of Japan's seventh Periodic Report. Besides the 16 NGOs, the Amnesty International<sup>23</sup> and Japan Federation of Bar Associations (JFBA)<sup>4</sup> also expressed serious concerns on this issue.

## **I. Proposed Questions**

1. With regard to the main elements of conspiracy provided for in Article 6:2 of the revised Act on Punishment of Organized Crimes and Control of Crime Proceeds, i.e. "organized criminal groups", "plan", and "preparatory acts", does the State Party intend to make revisions to the law including providing stricter definitions of the elements in order to bring the article in line with the "principle of legal certainty in criminal codes", which is derived from Article 9 of the Covenant - which prohibits arbitrary arrest and detention - and Article 14 - which provides for the right to fair trial - and which is also a derivative principle of the *nulla poena sine lege* principle? If the State Party has no such plans, please provide information as to the reason or reasons why not.

2. There are 277 types of crimes subject to Article 6:2 of the Act on Punishment of Organized Crimes and Control of Crime Proceeds. Does the State Party intend to make revisions to the law including exempting crimes that are clearly unrelated or are only very loosely connected to organized crime in order to prevent invading the right to privacy (Article 17 of the Covenant) through excessively wide-reaching investigative acts and thus having a chilling effect upon civil activity (Article 21 of the Covenant)? If the State Party has no such plans, please provide information as to the reason or reasons why not.

3. Investigations against Article 6:2 crimes entail scrutinizing conversations and emails of suspects in order to prove conspiracy. Does the State Party intend to revise the Act on Wiretapping for Criminal Investigation to make conspiracy subject to wiretapping? If the State Party has no such plans, through what investigative methods does the State Party intend to obtain evidence necessary to prove conspiracy?

4. As seen in questions 2 and 3, the anti-conspiracy law heightens the risk of the invasion of the right to privacy. Does the State Party intend to minimize this risk and

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<sup>2</sup> [http://www.amnesty.or.jp/news/2017/0517\\_6828.html](http://www.amnesty.or.jp/news/2017/0517_6828.html)

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[https://www.washingtonpost.com/world/asia\\_pacific/in-japan-prime-minister-pushes-ahead-with-controversial-anti-conspiracy-bill/2017/05/22/a50bf7b4-3ed0-11e7-9851-b95c40075207\\_story.html?utm\\_term=.c27e4305e387](https://www.washingtonpost.com/world/asia_pacific/in-japan-prime-minister-pushes-ahead-with-controversial-anti-conspiracy-bill/2017/05/22/a50bf7b4-3ed0-11e7-9851-b95c40075207_story.html?utm_term=.c27e4305e387)

<sup>4</sup> <https://www.nichibenren.or.jp/en/document/opinionpapers/20060914.html>

strengthen protections to the right to privacy through the revision of the Act on Punishment of Organized Crimes and Control of Crime Proceeds or other laws?

For example, does the State Party intend to undertake systematic revisions to apply strict warrant requirements to investigative methods with a high risk of invading the right to privacy, or to create an independent oversight body for police intelligence agencies including the security police, the Public Security Investigation Agency, the SDF Intelligence Security Command, the Cabinet Intelligence and Research Office, and the National Security Agency? If the State Party has no such plans, please provide information as to the reason or reasons why not.

## **II. Facts**

### **1. Informers and past reports**

The informers of this report are the Joint Task Force against Conspiracy Bill, a communicative body connecting many domestic civil rights groups and media-related organizations opposing the anti-conspiracy bill brought forth by the Japanese government, and other human rights organizations endorsing the activities of the Joint Task Force against Conspiracy Bill'. As the anti-conspiracy bill was approved by the Diet on June 15<sup>th</sup>, 2017, this issue has never been taken up in past reports of the Covenant.

### **2. Chronology of the Anti-Conspiracy Law**

On March 21<sup>st</sup>, 2017, the government submitted to the Diet a bill revising the Act on Punishment of Organized Crimes and Control of Crime Proceeds that included the anti-terrorism=anti-conspiracy law. This bill was a partial amendment of the bill that was submitted in 2003 with the goal of ratifying the United Nations Convention on Transnational Organized Crime.

Since its initial submission in 2003, this bill did not become law for approximately 14 years, being scrapped 3 times in the face of strong opposition from Japan Federation of Bar Associations (JFBA has released opinion briefs opposing the adoption of the anti-conspiracy bill on January 20th 2003, September 14th 2006, April 13th 2012 and February 17th 2017), civil rights groups, media, and opposition parties.

In 2006, the bill was on the verge of being forcibly voted on, but the government eventually chose against doing so. Since 2009 when the bill was last scrapped, it was not submitted to the Diet until now.

This time, the government included in the submitted bill a new crime against “planning the carrying out of crimes accompanied by preparatory acts of the execution of such crimes regarding terrorist groups and other organized criminal groups”(“the new bill”), naming the crime in its abbreviated form a crime against “the preparation of terrorist and other acts”.

### **3. The problematic provision of the Law**

Article 6:2 of the proposed bill provides as follows.

\*Article 6 : 2(1)Two or more persons who plan, as part of activities of terrorist groups or other organised criminal groups, the commission of criminal acts listed in the following sections by such groups, are subject to the punishment prescribed in each of those sections, if any of them have arranged funds or goods or carried out preliminary inspections of relevant locations pursuant to the plan or other preparatory acts for the purpose of committing the planned criminal acts. An organized criminal group means a group of persons whose common purpose as the basis of organizing the group is to carry out the crimes enumerated in Appendix 3. However, those who surrender prior to executing the crime will have a reduced or exemption from that sentence.

1) Crimes listed in Appendix 4, which are punishable by death penalty, indefinite imprisonment, or imprisonment with or without labour for more than 10 years - Imprisonment with or without labour for 5 years or less.

2) Crimes listed in Appendix 4, which are punishable by either imprisonment with or without labour for more than 4 years but less than 10 years - Imprisonment with or without labour for 2 years or less."

### **4. Differences and similarities with past bills**

Compared with the original government draft in 2003, the new bill changed the subject of the crime from "groups" to "acts by organized criminal groups", and defined "groups" as those groups whose common purpose as the basis of their association is to carry out certain crimes and other acts.

The new bill punishes conspiracy "if (the subjects) 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", as opposed to the 2003 bill which punished the subjects when "two or more people planned the carrying out of" certain criminal acts.

However, these amendments were already incorporated into the ruling party's draft in 2006.

On the crimes subject to punishment for conspiracy, the government explained that they limited the number of crimes to 277, down from the 676 which the government originally had explained were required to be subject to the anti-conspiracy bill as their statutory penalties provided for a maximum sentence of 4 years or more in incarceration and constituted "serious crimes" under the definition of Article 2 of the TOC convention.

However, in 2007, the ruling Liberal Democratic Party had drafted a bill limiting the number of subject crimes to 128. Diet deliberations did not reveal the standards under which the 277 crimes in the new bill were selected.

### **5. Unprecedented forced voting in the Diet**

The anti-conspiracy bill (bill revising the Act on Punishment of Organized Crimes and

Control of Crime Proceeds) was forcibly voted on in the House of Representatives Legal Committee after only 30 hours of deliberations. As for the House of Councilors Legal Committee, deliberations only amounted to 17 hours and a half.

Further, the House of Councilors Legal Committee did not even vote on the passage of the bill to the plenary session of the Diet, but instead bypassed the vote by way of conducting a “progress report” (National Diet Law Article 56:3) to the House of Councilors plenary session at AM7:46 on June 15<sup>th</sup> 2017, thus forcing the vote on the anti-conspiracy bill.

Article 56:3 of the National Diet Law allows for the upper and lower houses to request a progress report “when especially necessary”, and for “deadlines to committee review” to be set or the bills to be deliberated on in upper/lower house sessions (plenary sessions) when “deemed especially and urgently necessary”. In the case of the new bill, there were no facts indicating that there would be grave hindrances upon the daily lives of the public unless the bill was passed into law immediately, throwing the legality of above process in relation to Article 56:3 of the National Diet Law into suspicion. Additionally, it is standard procedure for “progress reports” to be proposed the day before they are conducted, but in the case of the new bill, the ruling parties suddenly proposed the “progress report” procedure to the opposition parties on the morning of the 14th. When the “progress reports” were conducted, 24 hours did not pass since they had been proposed on 14th.

The process through which the new bill was forced through the House of Councilors’ Legal Committee was unprecedented, and can by no means be described as having been adequately discussed within the Diet, much less having been subject to exhaustive dialogue with the public. This method employed by the government and the ruling parties has been strongly criticized by the opposition parties and the general public as being the act of “ultimate steamrolling”.

### **III. Legal analysis and assessment**

#### **1. The Law is Unnecessary from an international and domestic point of view**

##### **(1) The TOC convention is not aimed at counterterrorism**

In the Diet, the government dubbed the anti-conspiracy bill the bill on “the preparation of terrorist and other acts”, explaining that criminalizing conspiracy was indispensable for the ratification of the United Nations Convention on Transnational Organized Crime (TOC Convention), and that unless the Convention was ratified, Japan would be unable to host the Tokyo Olympics.

However, the Japanese government has ratified all 13 of the main terrorist conventions of the United Nations, and the TOC Convention is aimed at prosecuting organized criminal groups targeting economic and material benefits (Article 2); not preventing terrorism.

##### **(2) Measures required under Article 5 of the TOC Convention**

Article 5 of the TOC Convention calls upon state parties to enable the prosecution of

serious crimes in which organized criminal groups are expected to be involved before those crimes are attempted.

This is evidenced in Article 5.1(a) of the Convention. The article provides two options to state parties – to criminalize the act of knowingly participating in a criminal group and/or conspiracy – but it provides that these two criminal offences should be distinct from those involving the attempt or completion of the criminal activity.

Article 34 clearly provides that the Convention should be implemented in accordance with fundamental principles of the domestic laws of state parties.

Japan's criminal code system provides for the punishment of preparatory acts of crimes as an extreme exception. The anti-conspiracy law, which aims to punish up to 277 crimes in their "planning" (conspiracy) stages when there is yet to be any danger of the invasion of legally protected interests, is clearly not compatible with the existing Japanese criminal code system.

The only states that had wide-reaching anti-conspiracy laws prior to the Convention's deliberations were the United Kingdom, The United States, and Canada. Only Norway and Bulgaria have been reported to have implemented new anti-conspiracy legislation for the ratification of the Convention. Many countries have ratified the TOC Convention with zero or minimal changes to their domestic laws. Japan could also have ratified the TOC Convention without implementing the anti-conspiracy law.

### **(3) Countermeasures against organized crime in Japan**

Of approximately 70 especially serious crimes - including terrorism and violent crimes - that must be prevented before their commission in order to protect the lives and liberty of its citizens, Japan punishes the plotting of approximately 20 and the preparation of approximately 50. Through these provisions, most serious organized crimes and terrorist acts can be punished before they are attempted.

In addition to these provisions, the Act for Controlling the Possession of Firearms or Swords and Other Such Weapons and the act of unlawful assembly with weapons independently punishes the preparatory stages of crimes that may kill or injure persons, and the Act on Prohibition of Possession of Special Picking Tools, and Other Related Matters independently criminalizes the preparatory stages of grand larceny.

Under this current legal system, many doubts have been raised as to the necessity of the creation of the crime of conspiracy as provided for in the anti-conspiracy law.

### **(4) The law greatly exceeds the requirements of the TOC Convention**

Even if the implementation of the anti-conspiracy law was necessary, the 277 crimes that come under its scope include many crimes that are unrelated to either terrorism or organized crime, such as tax law or copyright law violations or acts infringing the Forest Act. The legislation greatly exceeds the criminalization measures required by the TOC Convention.

Although the text was eventually not included in the final wording of the convention, the Algerian and Egyptian governments called for a list of serious crimes to be included in the convention in the 10<sup>th</sup> session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime held in 2000 (see appendix 3). This

list garnered the support of many states. However, as the list included crimes related to terrorism, the proposal met with opposition from the United States, France, the United Kingdom, Germany, Japan and many other countries who were of the position that the list should not include terrorist acts as they were not compatible with the aim of the convention, and an agreement could not be reached.

However, there were no opposing opinions on the crimes not related to terrorism. Nor were there calls to add other crimes to the list.

This list is available in the official records of the process of the adoption of the convention (<https://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html>), and shows what crimes were supposed to be prevented before their attempt under the convention.

The list is the only valid reference based on the process of the negotiations of the convention that can be used to narrow down the crimes that organized criminal groups are may be involved in out of the 676 crimes punishable by a maximum of 4 years of more of incarceration. Of the crimes on the list, the only crimes that cannot be punished in Japan in their preparatory stages are human trafficking and fraudulent acts against financial institutions. It is our opinion that the anti-conspiracy law is clearly an excessive piece of legislation, and the opposing Democratic Party's counterproposal to the Diet to criminalize the preparatory acts of human trafficking and organized fraud is validly based upon the convention.

## **2. Citizens will be unclear on what acts will be criminally punishable and arbitrary government oppression of civil activities will become possible**

### **(1) The elements of the crime are ambiguous**

Additionally, the elements of conspiracy stipulated by law such as “plan”, “preparatory acts” and “organized criminal groups” are too vague. The government’s explanations of the elements have changed time and again, rendering it difficult for a citizen to clearly discern an act of conspiracy from one that is not. Coupled with the fact that the 277 crimes subject to conspiracy seen in the appendix of the law are extremely wide-reaching, it is clear that the anti-conspiracy law is in contravention of the *nulla poena sine lege* principle, the principle of legal certainty required in criminal codes, and is in violation of Article 9 and 14 of the ICCPR which prohibits arbitrary arrest and detention, Article 14 which provides for the right to fair trial, and Article 31 of the Japanese Constitution that guarantees due process in criminal procedure.

### **(2) The threat of oppression against civil and labor movements**

The 277 criminal acts subject to the anti-conspiracy law include types of “criminal acts” that are likely to be applied to civil or labor movements, such as organized forcible obstruction of business and organized compulsion. Even before the law was adopted, forcible obstruction of business was utilized to crack down on civil activities opposing U.S. bases in Okinawa. The largest threat of the anti-conspiracy law lies in the fact that there is an extremely strong danger that it will be used as a basis to punish activities by

civil entities opposing the government or to gather intelligence on or investigate such groups, thereby invading the public's right to privacy (ICCPR Article 17, Constitution Article 13), freedom of thought (ICCPR Article 18.1, Constitution Article 19) and freedom of speech (ICCPR Article 19, Constitution Article 21).

In 2007, the Liberal Democratic Party's subcommittee proposed that the number of crimes subject to the anti-conspiracy law be narrowed down to 128. The adoption of the Act on Punishment of Organized Crimes and Control of Crime Proceeds in 1999 criminalized organized forcible obstruction of business, organized compulsion, and organized damage to credit, raising their maximum statutory penalty from 3 years to 5, making the crimes subject to the anti-conspiracy law. These criminal acts are inherently ambiguous in their elements and are types of criminal acts that have been wrongfully used as tools for oppression. As mentioned above, these criminal acts were excluded from application of the anti-conspiracy act under the Liberal Democratic Party's subcommittee proposal in 2007. The government has given no reasonable explanation as to why they have brought back from the dead the anti-conspiracy act when it is so extremely susceptible to abuse. Considering the progression of oppression against civil activities opposing U.S. bases in Okinawa, it must be pointed out that there is a real danger that the government will utilize the anti-conspiracy law to crack down on civil activities.

### **(3) Government explanations admit the potential application of the law to human rights and environmental groups**

The government has repeatedly explained in the House of Representatives that "organized criminal groups are limited to terrorist groups, gangs and drug trafficking organizations", and that "people leading normal social lives and belonging to normal groups will not be subject to punishment under the law", despite the absence of clarity of such explanations in the language of the law.

However, in the House of Councilors, the government made a crucial change to its explanation, saying that even groups that "ostensibly claim to advocate environmental protection or the protection of human rights but are using these claims as a so-called façade" can be designated organized criminal groups. Additionally, it also admitted that "associates" of organized criminal groups would also be subject to investigation.

Organized criminal groups as defined by the TOC Convention are limited to groups that aim to commit serious criminal acts in order to obtain, directly or indirectly, a financial or other material benefit. Conversely, the anti-conspiracy law does not provide such limits.

This government explanation means that with the anti-conspiracy law adopted, even groups with legitimate aims, their members and their associates will be subject to daily police surveillance if the police see the groups' aims as a "façade", leaving them in danger of grave human rights violations.

## **3. The government must respond to claims by the United Nations Special Rapporteur including with regard to oversight of police intelligence agencies**

### **(1) Letter to the Japanese government by the U.N. Special Rapporteur on the right**



### **to privacy**

On May 18<sup>th</sup>, 2017, in the midst of the anti-conspiracy bill being deliberated, Joseph Cannataci, the U.N. Special Rapporteur on the right to privacy, sent a letter to Prime Minister Abe expressing his concern that the anti-conspiracy bill “could lead to excessive limitations to the right to privacy and freedom of expression” (appendix 4). We strongly concur with the Mr. Cannataci’s analysis in his letter.

In this letter, Mr. Cannataci points out the fundamental problems in the anti-conspiracy bill as follows:

In particular I am concerned by the risks of arbitrary application of this legislation given the vague definition of what would constitute the “planning” and the “preparatory actions” and given the inclusion of an overbroad range of crimes in Appendix which are apparently unrelated to terrorism and organized crime.

The principle of legal certainty requires that criminal liability shall be limited to clear and precise provisions in the law, ensuring reasonable notice of what actions the law covers, without unduly broadening the scope of the proscribed conducts.

The “anti-conspiracy bill” in its current form does not appear to conform to this principle given that its vague and subjective concepts could be interpreted very broadly and lead to legal uncertainty.

The right to privacy appears to be particularly affected by the possibility of broad application of this law.

Further, Mr. Cannataci makes the observation that the adoption of the anti-conspiracy act would strengthen surveillance activities while Japan’s legal system does not provide for a legal framework to safeguard against invasion of the right to privacy, stringent judicial oversight, or oversight measures against intelligence agencies.

### **(2) The government adopted the anti-conspiracy law without responding to the letter**

The government did not propose making the anti-conspiracy law subject to wiretapping or to create an institution allowing the wiretapping of conversations in rooms within the anti-conspiracy bill; the Minister of Justice, however, has explained in the Diet that making the anti-conspiracy law subject to wiretapping would be a matter for future consideration.

However, the Japanese government chose the dishonorable path of merely “strongly protesting” Mr. Cannataci’s letter and neglect to give a substantive response in any shape or form until the adoption of the law. It is indispensable to take the measures to safeguard privacy rights proposed by the U.N. Special Rapporteur Mr. Cannataci, especially to work towards the establishment of a third-party entity to oversee surveillance activities conducted by police and other bodies in order to give substance to the rights guaranteed by Article 17 of the ICCPR.

## **IV. Conclusion**

Opposition against the anti-conspiracy bill spread throughout the entire nation. Manifold rallies, demonstrations, street campaigns were conducted. Daily sit-ins and joint activities were carried out day and night in front of the Diet. Within the Diet, the 4 opposing parties and 1 faction joined forces and fought the bill.

Legal practitioners also stood up to the bill, with JFBA and all 52 prefectural bar associations issuing statements opposing the anti-conspiracy bill.

Many criminal and constitutional law scholars, wide-ranging researchers, writers, journalist, and the mass media voiced their opposition and put forth their arguments.

Opinion polls saw opposition to the bill surpass those in favor, and calls for careful deliberation of the bill exceeded an overwhelming 70% in most polls.

However, the Japanese government ignored this national opposition and intervention from the Special Rapporteur to the bill and forced through the bill.

The law was enacted on July 11<sup>th</sup>. If the law is arbitrarily implemented, the privacy of the people will be put under surveillance and freedom of expression will recoil in the face of the potentially devastating effects of the legislation.

We, as NGOs in Japan, express our strong hope that the Committee will address this matter in its list of issues for the seventh periodic report of Japan. And we, the Japanese people, desperately implore that the Committee undertakes a thorough inquiry into this matter and recovers Japan's human rights protection and democratic political system through its appropriate recommendations.

## **V. Reference Material**

### **1. Relevant Conventions**

“Article 2 “Use of terms

“For the purposes of this Convention:

“(a) ‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

“(b) ‘Serious crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

“(c) ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

“(d) ‘Property’ shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

“(e) ‘Proceeds of crime’ shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

“(f) ‘Freezing’ or ‘seizure’ shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

“(g) ‘Confiscation’, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

“(h) ‘Predicate offence’ shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;

“(i) ‘Controlled delivery’ shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence; “(j) ‘Regional economic integration organization’ shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to ‘States Parties’ under this Convention shall apply to such organizations within the limits of their competence.”

## “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 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.

“2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

“3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary- General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.”

#### “Article 34

##### “Implementation of the Convention

“1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

“2. The offences established in accordance with articles 5, 6, 8 and

23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

“3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.”

## **2. Summary of Legislative Guide**

Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2004)

By UNODC

<https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

### **A. General requirements**

1. States parties are required to take certain legislative and administrative steps towards implementing the Organized Crime Convention. They are to take such measures in a manner consistent with the fundamental principles of their domestic law, as stated in article 34, paragraph 1, which provides:

“Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.”

2. Chapter III of this guide addresses the substantive criminal law requirements of the Convention. In essence, States parties must establish a number of offences as crimes in their domestic law, if these do not already exist. States with relevant legislation already in place must ensure that the existing provisions conform to the Convention requirements and amend their laws, if necessary.

3. The substantive criminal law provisions establish participation in an organized criminal group, laundering the proceeds of crime, corruption and obstruction of justice as crimes. Sections B-E of the present chapter address each of these offences, respectively.

4. The activities covered by these offences are vital to the success of sophisticated criminal operations and to the ability of offenders to operate efficiently, to generate substantial profits and to protect themselves as well as their illicit gains

from law enforcement authorities. They constitute, therefore, the cornerstone of a global and coordinated effort to counter serious and well-organized criminal markets, enterprises and activities.

5. Several terms that are central to the matters addressed in the present chapter of the guide, such as “organized criminal group”, “structured group”, “serious offence” and “predicate offence”, find their definition in article 2 of the Convention. The reader should closely examine chapter II, section B, of the present guide on the use of terms with respect to the definition of terms used in these articles.

### *1. Minimum standards of implementation*

41. The Convention introduces minimum standards that have to be met by States parties, but each State party remains free to go beyond them. Article 34, paragraph 3, recognizes that domestic laws adopted by States to prevent and combat transnational organized crime may well be stricter and include more severe sanctions than the provisions that are required in strict accordance with article 34, paragraph 3, of the Convention, which reads as follows:

“Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.”

42. The criminalization of the proscribed conduct must be made through criminal law. Any measures that need to be taken would have to be in addition to the legislation of criminal offences. The only exception to this is when it comes to legal persons, the liability of which can be criminal, civil or administrative, depending on the domestic legal principles (art. 10, para. 2).

43. National drafters should focus on the meaning and spirit of the Convention rather than attempt simply to translate Convention text or include it verbatim in new laws or amendments. The drafting and enforcement of the new offences, including legal defences and other legal principles, are left to the States parties (see art. 11, para. 6). Therefore, they must ensure that the new rules are consistent with their domestic legal tradition, principles and fundamental laws. This avoids the risk of conflicts and uncertainty about the interpretation of the new provisions by courts or judges.

44. The criminal offences mandated by the Convention may apply in conjunction with other provisions of the domestic law of States or law introduced by the Protocols. An effort must therefore be made to ensure that the new criminal offences are consistent with current domestic law.

## 2. *Scope of application*

45. In general, the Convention applies when the offences are transnational in nature and involve an organized criminal group (see art. 34, para. 2).

However, as described in more detail in chapter II, section A, of the present guide, it should be emphasized that this does not mean that these elements themselves are to be made elements of the domestic crime. On the contrary, drafters must not include them in the definition of domestic offences, unless expressly required by the Convention or the Protocols thereto. Any requirements of transnationality or organized criminal group involvement would unnecessarily complicate and hamper law enforcement. The only exception to this principle in the Convention is the offence of participation in an organized criminal group, in which case the involvement of an organized criminal group is of course going to be an element of the domestic offence. Even in this case, however, transnationality must not be an element at the domestic level.

48. The international community has witnessed a rise in the activities of criminal groups, which have brought about significant negative financial and human consequences in virtually all countries. Frequently, people assist organized criminal groups in the planning and execution of serious offences without direct participation in the commission of the criminal act. In response to this problem, many countries have adopted criminal laws proscribing lesser participation in criminal groups.

49. The approaches countries have adopted so far vary depending on historical, political and legal backgrounds. Broadly speaking, the criminalization of participation in organized criminal groups has been achieved in two different ways. Common law countries have used the offence of conspiracy, while civil law jurisdictions have used offences that proscribe an involvement in criminal organizations. Other countries combine such approaches. The Convention does not deal with prohibition of membership in specific organizations.

50. Because criminal groups cross national borders and frequently affect many countries at once, the need to coordinate and harmonize laws is clear. Some initiatives have already been taken in that direction at a regional level, such as the adoption by the Council of the European Union on 21 December 1998 of the Joint Action on making it a criminal offence to participate in a criminal organization in the member States of the European Union. However, this is not merely a regional issue, but one that demands an effective global response.

51. The Convention aims at meeting the need for a global response and at ensuring the effective criminalization of acts of participation in criminal groups. Article 5 of the Convention recognizes the two main approaches to such criminalization that are

cited above as equivalent. The two alternative options of article 5, paragraph 1 (a) (i) and paragraph 1 (a) (ii) were thus created to reflect the fact that some countries have conspiracy laws, while others have criminal association (*association de malfaiteurs*) laws. The options allow for effective action against organized criminal groups, without requiring the introduction of either notion—conspiracy or criminal association—in States that do not have the relevant legal concept. Article 5 also covers persons who assist and facilitate serious offences committed by an organized criminal group in other ways.

### **3. Serious Crimes List proposed at Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime**

A/AC.254/5/Add.26

<https://www.unodc.org/unodc/en/treaties/CTOC/background/session10.html>

Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime

Tenth session

Vienna, 17-28 July 2000

II. Proposals and contributions received from Governments

Algeria, Egypt, India, Mexico and Turkey

[Original: English]

Algeria, Egypt, India, Mexico and Turkey proposed the following indicative list of offences to be included in an annex to the United Nations Convention against Transnational Organized Crime:

1. Illicit trafficking in narcotic drugs and psychotropic substances.
2. Trafficking in persons, in particular women and children.
3. Illicit trafficking in and transport of migrants.
4. Counterfeiting of currency.
5. Illicit trafficking in or stealing of cultural objects.
6. Illicit trafficking in or stealing of nuclear materials, their use or threat to misuse them.
7. Acts of terrorism as defined in the pertinent international conventions.
8. Illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials.
9. Illicit trafficking in or stealing of motor vehicles, their parts and components.
10. Illicit trafficking in human organs and body parts.
11. All types of computer and cyber crimes and illicit access to or illicit use of computer systems and electronic equipment, including electronic transfer of funds.
12. Kidnapping, including kidnapping for ransom.
13. Illicit trafficking in or stealing of biological and genetic materials.
14. Extortion.



15. Fraud relating to financial institutions.

**4. Letter to the Japanese Government by the Special Rapporteur on the right to privacy**

[http://www.ohchr.org/Documents/Issues/Privacy/OL\\_JPN.pdf](http://www.ohchr.org/Documents/Issues/Privacy/OL_JPN.pdf)

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Mandate of the Special Rapporteur on the right to privacy

18 May 2017

Hon. Prime Minister,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy pursuant to Human Rights Council resolutions 28/16.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning a proposed bill revising parts of the Act on Punishment of Organized Crimes and Control of Crime Proceeds also known as the "anti-conspiracy" bill which due to its broad scope may if adopted into law lead to undue restrictions to the rights to privacy and to freedom of expression.

According to the information received:

A bill revising parts of the Act on Punishment of Organized Crimes and Control of Crime Proceeds also known as the "anti-conspiracy" bill was submitted by the Japanese Government to the Parliament last 21 March 2017.

Reportedly, the amendments proposed significantly expand the scope covered by Article 6 (Preparation for organized homicide and other organized crimes) of the law. According to the translation made available to us the new article would read as:

"Article 6 : 2(1) Two or more persons who plan, as part of activities of terrorist groups or other organised criminal groups, the commission of criminal acts listed in the following sections by such groups, are subject to the punishment prescribed in each of those sections, if any of them have arranged funds or goods or carried out preliminary inspections of relevant locations pursuant to the plan or other preparatory acts for the purpose of committing the planned criminal acts. An organized criminal group means a group of persons whose common purpose is to carry out the crimes enumerated in Appendix 3.

However, those who surrender prior to executing the crime will have a reduced or exemption from that sentence. 1) Crimes listed in Appendix 4, which are punishable by death penalty, indefinite imprisonment, or imprisonment with or without labour for more than 10 years - Imprisonment with or without labour for 5 years or less. 2) Crimes listed in Appendix 4, which are punishable by either imprisonment with or without labour for more than 4 years but less than 10 years - Imprisonment with or without labour for 2 years or less.”

Prime Minister Shinzo Abe  
Cabinet Secretariat Government of Japan

Further to this amendment,<sup>277</sup> new types of crime would be added through the "Appendix 4". Concerns were raised that such an important part of the law is part of an attachment to the law since it makes it much harder for citizens and experts to understand the actual scope of the provision.

Additionally, appendix 4 would permit the application of laws for crimes which appear to be totally unrelated with the scope of organized crime and terrorism, such as those related to Article 198 of the Forest Act which criminalizes theft of forestry products in reserved forests, Articles 193, 195, 196 of the Cultural Properties Preservation Act which prohibit *inter alia* exporting without permission and destroying important cultural properties and Article 119 of the Copyright Act, which prohibits violations of copyrights.

Reportedly, the bill was submitted with the aim of adapting national legislation to the United Nations Convention on Transnational Organized Crime supporting the international community in its efforts to combat terrorism. Yet, questions were raised on the pertinence and necessity of this additional legislation.

Reportedly, the government alleged that the targets of investigations to be pursued because of the new bill would be restricted to crimes in which an “organized crime group including the terrorism group” is realistically expected to be involved. Yet, the definition of what an “organized criminal group” is vague and not clearly limited to terrorist organizations. It was further stressed that authorities when questioned on the broad scope of application of the new norm indicated that the new bill requires not only “planning” to conduct the activities listed but also taking “preparatory actions” to trigger investigations. Nevertheless, there is no sufficient clarification on the specific definition of “plan” and “preparatory actions” are too vague to clarify the scope of the proscribed conducts.

Additional concerns indicate that in order to establish the existence and the extent of such “a planning” and “preparatory actions”, it is logical to assume that those charged would have had to be subjected to a considerable level of surveillance beforehand. This expectation of intensified surveillance calls into question the safeguards and remedies existing in Japanese law with regard to privacy and surveillance.

Concerns were also raised on the potential impact of the legislation in the work of non-Governmental Organizations, especially those working in sensitive areas for national security. The government allegedly reiterated that the norm application would not affect this sector. Yet, it was alleged that the vagueness in the definition of “organized criminal group” could still create the opportunity for legitimizing for example the surveillance of NGOs considered to be acting against national interest.

Finally, reports underline the lack of transparency around the drafting of the original draft and the pressure of the Government for the rapid adoption of the law during the current month undermining the promotion of adequate public debates.

Serious concern is expressed that the proposed bill in its current form and in combination with other legislation may affect the exercise of the right to privacy as well as other fundamental public freedoms given its potential broad application. In particular I am concerned by the risks of arbitrary application of this legislation given the vague definition of what would constitute the “planning” and the “preparatory actions” and given the inclusion of an overbroad range of crimes in Appendix which are apparently unrelated to terrorism and organized crime.

The principle of legal certainty requires that criminal liability shall be limited to clear and precise provisions in the law ensuring reasonable notice of what actions the law covers without unduly broadening the scope of the proscribed conducts. The “anti-conspiracy bill” in its current form does not appear to conform to this principle given that its vague and subjective concepts could be interpreted very broadly and lead to legal uncertainty.

The right to privacy appears to be particularly affected by the possibility of broad application of this law. Further concerns expressed that the allegedly expedited process used to push draft law may have a detrimental impact on human rights since the fast tracking of legislative procedures, unduly limit broader public debate on this crucial matter. Five specific areas of my mandate's concern focus on the absence of privacy relevant safeguards and remedies:

1. Our initial assessment of the current draft would suggest that the new law or accompanying measures would not introduce any new additional specific articles or provisions which would establish appropriate safeguards for privacy in an environment where increased surveillance would be required to establish the existence of an offence under the new proposed anti-terror law
2. As far as knowledge in the public domain permits us to establish, there are also no plans to either reinforce ex-ante warrants for the carrying out of surveillance;
3. There seem to be no plans to establish a statutory independent body in order to pre-authorise the carrying out of surveillance for national security purposes. This suggests that the establishment of such vital checks remains at the discretion of the specific agencies carrying out the operations.
4. Additionally, there are concerns about the oversight of the operations of law enforcement and security and intelligence services especially insofar as their activities are compliant or the extent to which they may interfere with the right to privacy through methods which are neither necessary nor proportionate in a democratic society. A sub-set of these concerns is the quality of judicial oversight and review when police request surveillance measures in order to carry out observations such as GPS detection or monitoring of activities on electronic devices.
5. Concerns are raised particularly with regard to the impact of the application of the new norms on the right to privacy given the broad opportunity the new norm would create for the Police to request for warrants to search for information on suspect individuals. According to information received, courts in Japan have to date demonstrated themselves to be extremely prone to accept warrant request: practically all applications for wiretapping made by the police were reportedly accepted by courts in 2015 (figures made available to us suggest that approximately only 3% or less of all requests for warrant were rejected).

While I do not wish to prejudge the accuracy of the information on the proposed law reforms and their potential impact on the right to privacy in Japan, I would like to draw the attention of your Excellency's Government to the obligations regarding the right to privacy, established by the International Covenant on Civil and Political Rights (ICCPR), which Japan ratified in 1978. Article 17(1) of the ICCPR provides for the rights of individuals to be protected, inter alia, against arbitrary or unlawful interference with their privacy and correspondence and provides that everyone

has the right to the protection of the law against such interference. Furthermore, I would also like to call your Government attention to General Assembly resolution A/RES/71/199 where States note that “While concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law.”

As it is my responsibility, under the mandates provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the accuracy of the above-mentioned allegations.
2. Please provide information on the status of the bill revising parts of the Act on Punishment of Organized Crimes and Control of Crime Proceeds
3. Please provide information on the compatibility of the draft law with international human rights norms and standards.
4. Please provide details on the opportunities for public participation including whether civil society representatives, will have an opportunity to review the draft law and provide comments thereon.

If requested, I would be honored to provide any expertise and counsel on the matter to support the Japanese government in order to improve the pending legislative act as well as other existing legislation in Japan as appropriate and required by the international legal order.

Finally, in light of the advanced stages of the legislative process, in my view, these are matters warranting immediate public attention. Therefore, I would like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to privacy and I will prepare a press release explaining my concerns and indicating that we have been in contact with your Government to clarify the issues in question.

Your Excellency's Government's response will also be made available on the same website as well as in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurance of my highest consideration.

Joseph Cannataci  
Special Rapporteur on the right to privacy