Criminal Conspiracy Law in Japan

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I. INTRODUCTION

The United Nations adopted the Convention against Transnational Organized Crime (hereinafter "CATOC") on November 15, 2000. CATOC requires signatory countries to criminalize either conspiracy, participation in an organized criminal group, or both these activities. Ratification of the convention has typically been uneventful, with the
vast majority of signatory countries meeting this requirement with preexisting law.4

Japan is one of several CATOC signatory countries5 that has no criminal conspiracy law,6 nor is participation in an organized criminal group a crime in Japan.7 The attempt to criminalize conspiracy in Japan has stalled in the face of widespread protest, delaying Japan’s ratification of CATOC.8 The debate as to whether and how to criminalize conspiracy in Japan provides a unique opportunity to analyze criminal conspiracy liability in modern society. This Note describes proposals in Japan to create a criminal conspiracy law, Japan’s existing criminal law related to criminal conspiracy, and the criticism levied in Japan against a conspiracy law.

Part II of this Note describes CATOC’s group criminality requirement. Part III outlines the provisions of several versions of Japan’s conspiracy bill and compares these provisions to common-law conspiracy. Part IV analyzes Japan’s conspiracy law by examining both substantive and procedural laws in Japan related to criminal conspiracy, as well as criticism within Japan of the conspiracy bills.

II. THE GROUP CRIMINALITY REQUIREMENT OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

CATOC is a comprehensive document, although it is CATOC’s conspiracy provision that is controversial in Japan.9 CATOC has been praised as an important milestone in the general development of interna-

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5. Review of the implementation, supra note 3, at para. 17, 21 (noting that participation in an organized criminal group was not a crime in Iceland, Thailand, Myanmar, and that organizing/facilitating a serious crime involving an organized criminal group was not a crime in Angola, El Salvador, Iceland, Madagascar, and Myanmar).


8. For a more in-depth discussion, see Ito Kensuke, Kokusai soshiki hanzai to kyobbzai (International Group Criminality and Conspiracy), Juristo (Nov. 15, 2006) (Japan).

9. CATOC, supra note 1, Annex I., art. 5.
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tional criminal law. The convention requires signatory states to criminalize money laundering, to criminalize corruption, and to allow seizure of criminal assets.

CATOC also requires all signatory countries to criminalize certain group criminal activities. The CATOC approach to group criminality is a practical combination of two commonly-used approaches to criminalizing group activity. Article five, paragraph one, contains the requirement to criminalize "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 offenses, when committed intentionally:

(a) Either or both of the following as criminal offenses 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

11. CATOC, supra note 1, Annex I, art. 6.
12. CATOC, supra note 1, at Annex I, art. 8.
15. Id. at 170.
contribute to the achievement of the above-described criminal aim.\textsuperscript{16}

\textit{CATOC} requires creation of a substantive crime distinct from the "attempt or completion" of criminal activity.\textsuperscript{17} Liability appears to be cumulative with the underlying offense.\textsuperscript{18} A country may adopt "either or both" of two criminal offenses.\textsuperscript{19} The first option is recorded in section (a)(i), essentially the common law crime of conspiracy.\textsuperscript{20} Section (a)(ii) contains the second option, the equivalent of the civil law crime of criminal association.\textsuperscript{21} The criminal association offense has been characterized as a form of enterprise liability.\textsuperscript{22} The knowledge, intent, aim, purpose, or agreement requirements in these sections may be inferred from objective facts.\textsuperscript{23}

In some ways, \textit{CATOC} group criminal liability is carefully limited.\textsuperscript{24} Any offense must be committed "intentionally."\textsuperscript{25} The conspiracy-like offense is limited to agreements to commit a "serious crime," which is defined as "an offen[s]e punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."\textsuperscript{26} Also, "where required by domestic law," additional limitations may be imposed on the conspiracy offense.\textsuperscript{27} The offense may be limited by requiring that an act be committed in furtherance of the conspiracy.\textsuperscript{28} Also, the offense may be limited to only agreements "involving an organized criminal group."\textsuperscript{29}

An "organized criminal group" is defined by the convention as "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 offen[s]es . . . in order to obtain . . . material benefit."\textsuperscript{30} A "structured group" is further defined as a group "that is not randomly formed for the immediate commission of an offen[s]e and that does not need to have formally defined roles for its members, continuity of its

\begin{itemize}
\item \textsuperscript{16} CATOC, supra note 1, Annex I, art. 5.
\item \textsuperscript{17} CATOC, supra note 1, at art. 5(1)(a).
\item \textsuperscript{18} Clark, supra note 14, at 171 n.40.
\item \textsuperscript{19} CATOC, supra note 1, art. 5(1)(a).
\item \textsuperscript{20} Clark, supra note 14, at 170.
\item \textsuperscript{21} Clark, supra note 14, at 172.
\item \textsuperscript{22} Clark, supra note 14, at 172 n.44.
\item \textsuperscript{23} CATOC, supra note 1, art. 5(2).
\item \textsuperscript{24} Clark, supra note 14, at 171 n.42.
\item \textsuperscript{25} CATOC, supra note 1, at art. 5(1).
\item \textsuperscript{26} CATOC, supra note 1, at art. 2(b). The definition of serious crime is similar to the Council of Europe definition. Kemp, supra note 10, at 155–56.
\item \textsuperscript{27} CATOC, supra note 1, art. 5(1)(a).
\item \textsuperscript{28} CATOC, supra note 1, at art. 5(1)(a)(i); Clark, supra note 14, at 171 ("This is a close relative of the common law 'overt act' requirement.").
\item \textsuperscript{29} CATOC, supra note 1, art. 5(1)(a)(i).
\item \textsuperscript{30} CATOC, supra note 1, at art. 2(a).
\end{itemize}
membership or a developed structure."31 These nested definitions limit the offense to only "organized" and "structured" groups.32

The CATOC criminal association offense is also limited. The offense must be committed "with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crime in question."33 Also, the accused must take "an active part in" the "criminal activities" of an organized criminal group.34 Alternatively, if the accused has "knowledge that his or her participation will contribute to the achievement of" the criminal aim of the group, the activities in which the accused takes an active part may be other, presumably non-criminal, activities of the organized criminal group.35 Thus, even otherwise lawful conduct may result in liability if done knowingly.36 However, any criminal association offense must be intentionally and knowingly committed, and there must be an overt act.37

CATOC requires signatory countries to implement its provisions, and thus countries must criminalize one or both of the above offenses.38 Article five requires countries to "adopt such legislative and other measures as may be necessary to establish [group] criminal offens[es]."39 Also, the convention generally requires each state to "take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure implementation of its obligations under this Convention."40 Additionally, the group criminal offenses must be "established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group . . . except to the extent article five . . . would require the involvement of an organized criminal group."41 Thus, a state may not

31. CATOC, supra note 1, at art. 5(2)(c).
32. Clark, supra note 14, at 171 n.42.
33. CATOC, supra note 1, at art. 5(1)(a)(ii); Clark, supra note 14, at 172 (characterizing the criminal association offense as "knowingly associat[ing] with and tak[ing] an 'active part' in an organized criminal group").
34. CATOC, supra note 1, art. 5(1)(a)(ii).
35. CATOC, supra note 1, art. 5(1)(a)(ii).
36. Clark, supra note 14, at 172.
37. See Clark, supra note 14, at 172, 173 n.46. See KADISH & SCHULHOFER, supra note 4, at 176–81, for discussion of other statutes requiring an act.
38. CATOC, supra note 1, art. 5(1) & 34.
39. CATOC, supra note 1, at art. 5(1).
40. CATOC, supra note 1, at art. 34(1).
41. CATOC, supra note 1, at art. 34(2). See also The International Centre for Criminal Law Reform and Criminal Justice Policy and The Centre for International Crime Prevention (UNODC), Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime 12 (2003) [hereinafter CATOC Legislative Guide] ("It is strongly emphasized that while offenses must involve transnationality and organized crime for the Convention and the international cooperation provisions to apply, neither of these should be made elements of the domestic offense.").
merely create a narrow transnational offense to comply with the convention’s requirements. 42 Although parties are obligated to supply information on their implementation and to support various coordination and improvement efforts, there are no explicit penalties for non-compliance with CATOC provisions. 43

III. JAPAN’S CRIMINAL CONSPIRACY BILLS

Without a great deal of debate, Japan’s Ministry of Justice, Japan’s Diet, and Japanese media have focused on the common law conspiracy prong of CATOC’s group criminality requirement, leaving the crime of association with a criminal group aside. 44 All bills introduced in the Diet have been conspiracy bills. 45 Perhaps politicians’ familiarity with the judicially-developed doctrine of joint principle conspiracy, discussed below, has led to this focus on conspiracy. 46 Another possible reason is disappointment with existing law, which attacks criminal organizations rather than criminal conspiracies. 47

42. See Clark, supra note 14, at 168 n.27 (noting that “[i]t is rather a remarkable decoupling of the obligations of a Party from the “Transnational” basis of the Convention.”). However, some countries have, despite the requirements of CATOC art. 34(2), included a transnational element in defining a conspiracy crime Opinion Paper, Japan Fed’n of Bar Ass’n, JFBA Opposes Criminalization of Conspiracy, (Sept. 14, 2006), available at http://www.nichibenren.or.jp/en/activities/statements/060914.html. (“Saint Christopher and Nevis ratified the Convention without reservations by establishing conspiracy offenses of which prerequisite the transnational nature.”).
43. See Clark, supra note 14, at 183–84.
44. See generally HÔMUSHO KEIJI KYOKU [MINISTRY OF JUSTICE, CRIMINAL BUREAU], HANZAI NO KOKUSAIKA OYOB1 NI SOSHIKIKA NARAB1 NI JYOH1 SHOR1 NO KOU1DOKA NI TAI1SHO SURE TAME NO KEH1 NO NADO NO ICHIBU NO KAIRU SOHR1 HÔRITSUAN NO GAIYO [A SUMMARY OF CHANGES TO THE CRIMINAL LAW TO DEAL WITH INTERNATIONALIZATION, INCREASED GROUP ACTIVITY, AND INCREASED USE OF INFORMATION TECHNOLOGY BY CRIMINALS], http://www.moj.go.jp/HOUAN/KYOUBOUZAI/referO5.pdf (Japan) (last visited Mar. 19, 2008) [hereinafter MINISTRY OF JUSTICE SUMMARY] (describing changes required and CATOC in terms of the conspiracy provision).
45. See Ito, supra note 8, at 76–77.
Japan’s first bill to criminalize conspiracy\(^{48}\) was introduced in 2003 in Japan’s 156th diet session.\(^{49}\) The bill also contained money laundering, witness tampering, and asset forfeiture provisions, none of which drew nearly the same level of attention.\(^{50}\) The criminal conspiracy provision is below:

Article 6-2: The Group Crime of Conspiracy:

Whomever conspires to accomplish an act which is a crime under the following section, as part of a group, be punished as indicated.

However, if the party surrenders themselves prior to the commencement of the crime, the punishment shall be reduced or the offender exculpated.

(1) For crimes carrying a penalty of death, life imprisonment, or over ten years imprisonment, the penalty shall be up to five years imprisonment, with or without hard labor.

(2) For crimes carrying a penalty of between four and ten years, the penalty shall be up to two years imprisonment, with or without hard labor.\(^{51}\)

The group crime of conspiracy contains three basic elements, as well as a possible fourth implied element. First, the party must conspire with others.\(^{52}\) The Ministry of Justice ("MOJ") interprets "conspire" to require "concrete and actual agreement to commit a certain crime."\(^{53}\)


\(^{49}\) Hanzai no kokusaika oyobi soshikika ni taisho suru tame no keihou nado no ichibu wo kaisei suru horitsuan [Bill to Revise Part of the Criminal Law to Deal with Internationalization and Increased Group Criminal Activity], Diet Sess. 156, B. No. 85 of 2003 (Japan) (not adopted); Ito, *supra* note 8, at 78 n.21 (including the text of the conspiracy provision from the 163rd and 164th diet session bills).

\(^{50}\) See Matsumiya, *supra* note 48, at 44, 49 n.1 (suggesting other amendments be scrutinized in addition to the conspiracy part of the bill).

\(^{51}\) Hanzai no kokusaika oyobi soshikika ni taisho suru tame no keihou nado no ichibu wo kaisei suru horitsuan [Bill to Revise Part of the Criminal Law to Deal with Internationalization and Increased Group Criminal Activity], Diet Sess. 156, B. No. 85 of 2003 (Japan) (author’s translation).


\(^{53}\) *Id.*
vague discussion at a bar among friends would not satisfy this element, at least according to the MOJ's interpretation.  

The second element requires that the conspiracy be related to a group. A fleeting association of persons related only by their agreement to commit a criminal act is not punishable. The MOJ has interpreted this provision to mean that an informal agreement between friends to commit a crime is not a punishable conspiracy.

Third, only conspiracies to commit a serious crime, defined as a crime punishable by more than four years imprisonment, are criminalized. The definition of a serious crime is based on the maximum possible sentence for the crime that is the objective of the conspiracy. This is the narrowest CATOC-permitted definition of criminal objectives that are punishable. There are over 600 crimes that meet this definition of serious crime.

Finally, there may be an implied fourth element. The bill requires that a party “conspire.” Proponents of the original bill argue that this language implies that an act must be done indicating an agreement to conspir. From the terse language of the bill, it is not clear whether this is the case or, if so, what kind of act qualifies as an act.

Since the elements of the bill are defined generally and briefly, and have not yet been applied, the exact scope of the crime of conspiracy as defined by the bill is not yet clear. Statues in Japan are often stated

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54. Id.
55. Ito, supra note 8, at 77. But See Kaido Yuichi & Hosaka Nobuto, Kyōōzai to wa nani ka 25–30 (Iwanami, 2006).
56. Hōmusho [Ministry of Justice], supra note 52. See Ito, supra note 8, at 77 (discussing inclusion of the terms “dantai [organization]” and “soshiki [organization]” in the text of the conspiracy provision); But see Kaido Yuichi & Hosaka Nobuto, Kyōōzai to wa nani ka 25–30 (Iwanami, 2006).
57. See Hōmusho [Ministry of Justice], supra note 52, at 7.
58. See Hōmusho [Ministry of Justice], supra note 52, at 7.
60. See CATOC, supra note 1, art. 2(b); see also CATOC, supra note 1, art. 5(1)(a)(1) (permitting the limitation of conspiracy to criminal groups). Amendments to the conspiracy provisions requiring the group to have as their objective serious crime(s) comports with the CATOC definition of a “Organized Criminal Group” per CATOC art. 2(a)
61. See Japan Fed’n of Bar Ass’n, supra note 42 (noting the uncertain scope of liability which would result from a new conspiracy law.
62. See generally Nihon Bengoshi Rengōkai [Japan Fed’n of Bar Ass’ns], supra note 59. See Hanzai no kokusaiika oyobi soshikika ni taisho suru tame no keihou nado no ichibu wo kaisei suru horitsuwan [Bill to Revise Part of the Criminal Law to Deal with Internationalization and Increased Group Criminal Activity], Diet Sess. 156, Bill No. 85, Art. 6 of 2003 (Japan) (not adopted). An overt act requirement is permitted by CATOC, art. 5(1)(a)(i).
63. See Matsumiya, supra note 48, at 45.
64. See Matsumiya, supra note 48, at 45; see also Kaido & Hosaka, supra note 55, at 25–35.
generally, and in any case courts in Japan tend to not strictly adhere to statutory language in interpreting law. Since the conspiracy bill is based on CATOC, in defining the scope of a conspiracy law, perhaps Japan’s courts will look to the convention in interpreting the elements of the crime.

The 2003 bill was defeated in the legislature. Subsequently, a similar bill introduced in the 159th diet session in 2004 was withdrawn. Yet another similar bill was introduced in the 163rd diet session in 2005, and carried forward to future diet sessions. The bills were introduced by the majority and generally conservative Liberal Democratic Party (“LDP”) party, with opposition from the Democratic Party of Japan (“DPJ”) and other opposition parties.


66. See Dan Fenno Henderson, NIINOSUKE V. CHÜBÉ: CONCILIATION IN TOKUGAWA CIVIL TRIALS 127–62 (1965), reprinted in THE JAPANESE LEGAL SYSTEM, supra note 46, at 1 (analyzing historically a Japanese court’s resolution of a case, where the court considers a variety of non-legal factors and looks to resolve the whole situation).

67. See 13 KEISHÜ 3225 (Sup. Ct., Dec. 16, 1959) (considering several treaties, even to the extent of the number of UN member countries which approved and signed the treaty provisions, in interpreting article nine of Japan’s Constitution, and discussing the necessary deference to treaties as a political question), reprinted in THE JAPANESE LEGAL SYSTEM, supra note 46, at 213, 214–15; Hoshōkin seikyū jiken [Case to Seek Compensation], 60 MINSHU 2853 (Sup. Ct., Oct. 17, 2006), translation available at http://www.courts.go.jp/english/judgments/text/2006.10.17-2004.-Ju.-No..781 .html (Japan) (referring to Paris Convention for the Protection of Industrial Property in interpreting Article 35, paragraph 1–2 of Japan’s Patent Act); Yokotakichi yakan hikō Sashitome nado seikyū jiken [Case About Suspension of Night Flights from Yokota Airport], Case No. 882 of 2006 (Sup. Ct., May 29, 2007) (referring to the US-Japan Security Treaty, but not basing its decision upon it, in denying claims for noise damages residents near an airport used for U.S. military flights).

68. See Ito, supra note 8, at 74 n.5.

69. Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no takadoka ni taisho suru tame no keihō nado no ichibu wo kai sei suru hōritsuan [Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], Diet Sess. 159, Bill No. 46 of 2004 (not adopted).


71. See generally Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no taka- dokan ni taisho suru tame no keihō nado no ichibu wo kai sei suru hōritsuan [Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], Diet Sess. 163 (Special Session), Bill No. 22 of 2005 (deliberation continued).

72. See Takada, supra note 70, 4–5; Kaidō Yūichi, [Kinji] no sōshokihanzei [The Meaning of Recent Trends in Legislation Against Group Crime and the Newly-Established Conspiracy], Hōritsu Jihō, Sept. 2006, 20, at 20 (Japan). For a list of all the conspiracy bills, showing the LDP cabinet as their source, go to http://hourei.ndl.go.jp, click on the link for “Hōritsuan,” and enter the term “kokusaika [internationalization]” into the search box. Results
bills faced opposition, sometimes even from LDP members,\textsuperscript{73} and languished in the Diet.\textsuperscript{74}

Three proposed modifications to the 163rd session bill's conspiracy provision were made in short succession in 2006.\textsuperscript{75} Each revision narrowed the proposed definition of conspiracy.\textsuperscript{76} In general, the political alignment behind the modifications was unsurprising, with LDP party sponsors introducing minor modifications to increase support within the diet for passage of the bill, while the opposition DPJ fought unsuccessfully for more aggressive limitation of the bill.\textsuperscript{77} The LDP introduced the first proposed amendment to the bill in part to address concern about the initial bill's vagueness.\textsuperscript{78} The modified conspiracy section reads:

Whomever conspires to accomplish an act which is a crime under the following section, as part of a group, (\textbf{where the objective of the group is to commit a crime listed in this section, or in section one} [which enumerates certain other crimes]) and \textbf{where an act that contributes to the success of the conspiracy has been committed} by a member of the group towards the accomplishment of the conspiracy, will be punished as indicated.

However, if the party surrenders themselves prior to the commencement of the crime, the punishment shall be reduced or the offender exculpated.

\begin{itemize}
\item are Diet Session 156, Bill No. 85, Diet Session 159, Bill No. 46, and Diet Session 163, Bill No. 22, all listed as being introduced by the cabinet. For a detailed history of the three bills, select a bill and press the "sentaku hyōji" button.
\item See Japan Fed'n of Bar Ass'ns, supra note 59, at 15–16.
\item See Ito, supra note 8, at 74 n.5; Kaido, supra note 72, at 24 (2006).
\item Revision No.1 introduced April 21, 2006 by the LDP; revision No.2 introduced April 28, 2006 by the DPJ, and revision No.3 introduced May 19, 2006 by the LDP. To find further information, go to http://hourei.ndl.go.jp (click on the link for “Horitsuan,” and enter the term “kokusaika [internationalization]” into the search box; select the third item, Diet Session 163, Bill No. 22, and press the “sentaku hyōji” button to see a history of the bill, including the three proposed revisions, “shūseian”).
\item See Matsumiya, supra note 48, at 47 (detailing one such amendment and noting the multiple amendments to the bill).
\item See DPJ Refuses to Vote on Conspiracy Bill, Postpones Tabling Revisions, Kyodo News Service (Japan) (June 2, 2006).
\end{itemize}
For crimes carrying a penalty of death, life imprisonment, or over ten years imprisonment, the penalty shall be up to five years imprisonment, with or without hard labor.

For crimes carrying a penalty of between four and ten years, the penalty shall be up to two years imprisonment, with or without hard labor.\(^\text{79}\)

The first proposed amendment contains several modifications, two of which were modifications to the text of the conspiracy provision itself.\(^\text{80}\) First, only groups with an objective to commit a serious crime qualify as conspirator groups.\(^\text{81}\) This limitation is permitted by the terms of CATOC.\(^\text{82}\) Second, an act must be committed which contributes to the success of the conspiracy.\(^\text{83}\) This act limitation seems ineffective, as essentially all acts can be said to contribute to the success of the conspiracy.\(^\text{84}\)

The first proposed amendment to the 163rd session bill also added several general limitations on the application of a conspiracy offense.\(^\text{85}\) First, the conspiracy provision "shall not intrude freedom of thought and conscience, and thus the law may not be applied to limit legitimate group activities."\(^\text{86}\) This provision is similar to article 19 of Japan's constitution.\(^\text{87}\) Also, in a modification unrelated to conspiracy, the witness

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\(^{79}\) Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no kodoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseiyan [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], Diet Sess. 164, Revision No.1 to Bill No. 22 of Diet Sess. 163 of 2006 (translation is the Author's, with additions to the Bill in bold), available at http://www.shugiin.go.jp/index.nsf/html/index_gian.htm (scroll down to select Bill No. 22 of Sess. 163 for a list of revisions).

\(^{80}\) See MATSUMIYA, supra note 48, at 47.

\(^{81}\) See MATSUMIYA, supra note 48, at 47.

\(^{82}\) See CATOC, supra note 1, art. 2(a) & 5(1)(a)(i).

\(^{83}\) See Matsumiya, supra note 48, at 47.

\(^{84}\) See Matsumiya, supra note 48, at 47.

\(^{85}\) Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no kodoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseiyan [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], supra note 79. (For a useful but non-authoritative source listing the changes incorporated in this revision to the bill, see http://kyobo.syuriken.jp/syuseian.htm) (last visited Mar. 19, 2008).

\(^{86}\) Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no kodoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseiyan [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], supra note 79 at sec. 6-3.

\(^{87}\) See KENPO, art. 19 ("Freedom of thought and conscience shall not be violated"), translated in THE JAPANESE LEGAL SYSTEM, supra note 46, at 739.
bribery provision of the bill is amended with a prohibition that it "shall not be applied to limit the legitimate activities of an attorney." 88

The opposition DPJ proposed a second revision to the 163rd session bill that was introduced shortly after the first LDP proposal, on April 28th, 2006. 89 The proposal limits the conspiracy provision explicitly to "criminal groups." 90 This modification was intended to limit the application of the proposed law to international criminal organizations, 91 which is prohibited by the terms of CATOC. 92 Also, the objective of the conspiracy must be to commit crimes punishable by imprisonment for a minimum of five years (instead of four). 93 The change from four to five years would also violate the terms of CATOC, which requires that crimes punishable by four or more years imprisonment be included in the definition of criminal objectives of a conspiracy. 94 Thus, both modifications to the text of the conspiracy provision that were introduced by the DPJ in the second proposed amendment explicitly violate the requirements of CATOC. 95

88. Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no kodoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseian 7–3 [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals, sec. 7–2(3)], Diet Sess. 164, Revision No. 1 to Bill No. 22 of Diet Sess. 163 of 2006.
89. See id.; Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no takadoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseian 7-2-(3) [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals sec. 7-2-(3)], Diet Sess. 164, Minutes of Judicial Affairs Committee Session No. 21 of 2006.
90. Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no takadoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseian [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], Diet Sess. 164, Revision No. 2 to Bill No. 22 of Diet Sess. 163 of 2006.
91. Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no takadoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseian [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], Diet Sess. 164, Minutes of Judicial Affairs Committee Session No. 22 of 2006 (statement of committee member Takayama Satoshi, that since convention is a convention against transnational crime, the law should be limited in application to international criminal groups).
92. See Clark, supra note 13, at 168 n.27.
93. Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no takadoka ni taisho suru tame no keihō nado no ichibu wo kaisei suru hōritsuan ni tai suru shūseian [Proposed Amendment to Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], supra note 90.
94. See CATOC, supra note 1, art. 2(b).
95. See Editorial, Conspiracy of Dunces Thwarts Conspiracy Bill, DAILY YOMIURI, June 4, 2006 ("The DPJ-sponsored bill would limit conspiracy charge to crimes that carry a sentence of more than five years of imprisonment and to international crime. However, the U.N. convention requires member countries to make conspiracy charges applicable to crimes
The second proposed amendment also contains a general limitation on the application of conspiracy law that is more expansive than that contained in the first revision:

Whereas the people of Japan have certain freedoms and rights guaranteed by the constitution, namely the freedom of thought, religion, assembly, association, expression, and scholarship, as well as the freedom to form labor unions and operate as members thereof, unreasonable application of section 6-2 [the conspiracy provision] is not permitted.96

This general provision contains language similar to several constitutional provisions.97

A third proposed revision to the 163rd session bill was introduced by the LDP on May 19th, 2006.98 This third proposed revision essentially returned to the language of the LDP’s first proposed revision.99 Application of the conspiracy law is limited to groups that have as their objective the commission of serious crimes.100 Also, conspiracy law may not be used to limit legitimate activities, for the purpose of maintaining freedom of thought and conscience.101 Debate has continued on the...
conspiracy bill through 2006, 102 with no version of the bill adopted by the year’s end. 103

A. Comparison to American Criminal Conspiracy

With the caveat that cultural differences make it difficult to compare laws across legal systems, 104 the conspiracy bill appears to fall comfortably within the scope of two common definitions of conspiracy: those found in American common-law conspiracy and in the Model Penal Code (“MPC”). 105 The conspiracy bill in some ways is more narrowly defined than these common definitions of conspiracy, and indeed is more narrowly defined than enterprise liability as defined by the Racketeer Influenced and Corrupt Organizations Act (“RICO”). 106

The conspiracy bill is quite similar to common-law conspiracy. 107 Both punish agreement to commit a crime as an independent offense. 108 The conspiracy bill contains narrowing provisions similar to those found in the progressive MPC 109 and more recent statutes in the United States; 110 a conspirator must commit an act in furtherance of the conspiracy. 111 Common law conspiracy, in contrast, requires no such act, and the mere agreement to commit a crime, without more, is punishable. 112 As no con-
Criminal Conspiracy Law in Japan

 Conspiracy law has been adopted in Japan, a further detailed comparison is not yet possible.113

Another similarity between the conspiracy bill and the MPC is that punishment is lessened if a party renounces the conspiracy.114 Renunciation provisions are more detailed in the MPC.115 The MPC offers a complete defense for conspirators who renounce and thwart the conspiracy of which they were a member.116 Continuing liability for acts of the conspiracy stops under the MPC for a party who either informs the other conspirators of his renunciation, or informs the authorities about the conspiracy.117 The conspiracy bill is much less detailed, as the bill simply allows for either reduction in punishment or non-punishment for a party who surrenders.118

In two ways, the conspiracy bill is more narrowly drafted than MPC or common-law conspiracy. As required by CATOC,119 the conspiracy must be related to an organization.120 By contrast, it is possible under both common-law conspiracy and the MPC to punish a fleeting agreement between otherwise unrelated parties.121 Secondly, the bill's serious-crime requirement narrows its application to only those crimes which are punishable by four or more years of imprisonment.122

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113. See Japan Fed'n of Bar Ass'ns, supra note 42 (noting uncertainty of the proposal's scope).
114. See Model Penal Code sec. 5.03(6) (2006) ("It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.").
115. This is typical in Japanese legislation. Shapiro, supra note 65, at 44 (noting generally short legislative provisions in Japan).
116. See Model Penal Code sec. 5.03(6).
117. See Model Penal Code sec. 5.03(7)(a), (c) (1981).
118. Hanzai no kokusaika oyobi soshikika narabi ni jyōhō shori no takadoka ni taishō suru tame no keihō nado no ichibu wo kaisei suru hōritsuan [Bill to Revise Part of the Penal Code to Address the Internationalization, Increased Group Activity, and Increased Technology Use of Criminals], Diet Sess. 159, Bill No. 46 of 2004 (not adopted). Note that it is typical that Japanese law to be generally stated.
119. See Clark, supra note 14, at 171 n.42. Although states have the choice to either criminalize conspiracy or association with a criminal group, in either case the crime must be related to an organization.
120. See Hōmesho [MINISTRY OF JUSTICE], Soshikitekina hanzai no kyōbōzai ni kan suru Q&A [Q&A RELATED TO THE GROUP CRIME OF CONSPIRACY. See Ito, supra note 8, at 77–78 (stating that the bill defines offense using "dantai [organization] and "soshiki [organization]"). But see Kaido Yūichi & Hosaka Nobuto, Kyōbōzai to wa nani ka 25–30 (Iwanami, 2006).
121. See Kadish & Schulhofer, supra note 4, at 697–98; Wise, supra note 104, at 316 (comparing conspiracy, which does not require a durable group, and the crime of group criminalization, which does).
122. See CATOC, supra note 1, art. 2(b).
B. Comparison to RICO

The conspiracy bill’s group requirement invites comparison with the Racketeer Influenced and Corrupt Organizations Act (“RICO”), which punishes criminality associated with an “enterprise.” The RICO “enterprise” began as a broadly defined term, and the conspiracy bill definition of group is similarly broad. Legislative debate concerning the scope of enterprise liability for RICO appears similar to that taking place now surrounding Japan’s conspiracy bill.

While RICO is a complex and controversial statute, it does appear that RICO liability extends farther than liability under Japan’s conspiracy bill. The conspiracy bill most likely requires that each member agree to join the same conspiracy, and that an overt act be committed. Some proposed revisions to the conspiracy bill go farther in requiring that the accused commit an act in furtherance of the conspiracy with which they are charged. By contrast, RICO conspiracy liability extends to “even remote associates of an enterprise.” A defendant need only have committed two crimes related to the enterprise. The defendant does not need to know the purpose, activities, or scope of the conspiracy.

123. See Ito, supra note 8, 77–78.
126. KADISH & SCHULHOFER, supra note 4, at 372. E.g., United States v. Manubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980) (members of large Japanese company charged with RICO violations).
127. Ito, supra note 8, 77–78 (discussing inclusion of the terms “dantai” [organization] and “soshiki” [organization] in the text of the conspiracy provision). See also KAI DO Yûichi & HOSAKA Nobuto, KYÔÔZAI TO WA NANI KA 25–30 (Iwanami, 2006).
128. For example, compare the following discussions of RICO liability and liability under the conspiracy bill. Goldsmith, supra note 125, 786–88 (1988); Ito, supra note 8, at 77.
129. See Nara, supra note 105, at 34.
130. See Nara, supra note 105, at 34.
131. Matsumiya, supra note 48, at 47.
135. Tarlow, supra note 132, at 250; Cloud, supra note 133, at 255.
136. Tarlow, supra note 132, at 250.
IV. ANALYSIS OF JAPAN’S PROPOSED CONSPIRACY LAW

As discussed in section III, the provisions of Japan’s conspiracy bill are similar to the well-established Model Penal Code, and in some way the bill is more limited than common-law conspiracy. Yet the bill has faced strong resistance, going beyond the typical academic debate concerning conspiracy law. Part of the debate is based on Japan’s existing law related to group criminal liability. In particular, the judicially-created doctrine of joint principal conspiracy may overlap with some aspects of a conspiracy law. Another reason for the debate is that criminal procedure and police practices in Japan may create opportunities for abuse of a conspiracy law.

Section A describes existing Japanese law related to group criminality. Section B describes Japan’s criminal procedure and police practice. Section C discusses criticisms of a criminal conspiracy law, including concerns arising from overlap with existing criminal group liability.

A. Japan’s Group Criminality Law

There are several areas of criminal law in Japan related to group crime. Japan’s penal code contains group criminality provisions. In addition to this statutory group criminal liability, judicial decisions have created a controversial doctrine of joint principal conspiracy.


Japan does have existing criminal laws that hold parties accountable for the acts of others. Persons who act jointly in the perpetration of a crime are all principals. Courts sometimes characterize joint actors as

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137. See Toshio, supra note 104.
138. Opposition and criticism of the conspiracy bills is discussed in Section IV.C. An example of such opposition is Nichibenren ha kyōbōzai ni hantai shimasu [Japan Federation of Bar Associations Opposes Conspiracy Law], (Sept. 14, 2006), available at http://www.nichibenren.or.jp/ja/special_theme/complicity.html.
139. For an example of criticism applying Japan’s current criminal laws to criticize the conspiracy bills, see Kaido & Hosaka, supra note 56, 7-13.
140. Japan Fed’n of Bar Ass’n, supra note 42.
143. Id.
collaborators.\textsuperscript{147} Having a deep relationship with a party who commits a criminal act and completing at least one related bad act is enough to be considered a collaborator and thus a principal.\textsuperscript{148} A person who collaborates in the perpetration of a crime can be a principal even if the person lacks the personal status required by the crime.\textsuperscript{149} For example, where a public official and a political supporter jointly act to accept a bribe, the supporter is a collaborator and thus a principal in the crime of accepting a bribe, even though the supporter is not a public official.\textsuperscript{150}

Criminal liability also exists beyond those directly involved in the crime.\textsuperscript{151} Aiding and instigating a crime are punishable,\textsuperscript{152} but at a lesser rate than actual committing the underlying offense.\textsuperscript{153} However, if an aider or instigator is deeply involved in the offense, he or she may be found liable as a principal with no reduction in punishment.\textsuperscript{154} The Penal Code allows for a limited expansion of the concept of instigation. One who "instigates an instigator" is also an instigator, and thus a principal.\textsuperscript{155} At least one case has endorsed "serial instigation," which expands this concept indefinitely, but this unlimited expansion of liability is not favored by scholars.\textsuperscript{156}

Criminal liability also exists for crimes that are not completed, as inchoate crimes are also a well-established part of Japan's penal code.\textsuperscript{157} For example, attempts are punishable, but only when specifically so stated in the relevant penal code section.\textsuperscript{158} Defenses to an inchoate criminal charge are similar to those in the MPC; for example, impossibility is a complete defense to an attempt charge.\textsuperscript{159}

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  \item 147. KEISHÔ 1108 (Osaka High Ct., Oct. 31, 2002).
  \item 148. See id. (defendant liable as collaborator in the crime of special misappropriation where defendant and criminal actor had billions of yen in unsecured loans between each other, and defendant committed the unfair act of submitted a forged appraisal report).
  \item 149. KEIHÔ, art. 65; DANDO, supra note 142, at 415 (appendix translation of the criminal code).
  \item 150. KEISHÔ 905 (Tokyo High Ct., Nov. 8, 2004).
  \item 151. See DANDO, supra note 142.
  \item 152. KEIHÔ art. 61; DANDO, supra note 142, at 414
  \item 153. KEIHÔ, art. 62–63; DANDO, supra note 142, at 414.
  \item 154. KEISHÔ 519 (Tokyo High Ct., Sept 25, 2001) (Mother who requested eldest son to commit robbery, prepared the air gun, mask, and tools, and received and used the proceeds was a joint principal).
  \item 155. DANDO, supra note 142, at 247; HIROSHI ODA, JAPANESE LAW 419–20 (2d ed. 1999); KEIHÔ, art. 61, para. 2.
  \item 156. DANDO, supra note 142, at 247 n.98.
  \item 157. KEIHÔ, art. 43–44.
  \item 158. KEIHÔ, art. 44; DANDO, supra note 142, at 411.
  \item 159. See J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 168 (1999).
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2. The Judicial Doctrine of Joint Principal Conspiracy

Courts have developed a controversial doctrine of joint principal conspiracy, which is broader than the statutory joint principal liability discussed above. The doctrine of joint principal conspiracy has two elements: First, two or more persons must agree to commit a specific crime and to rely on each other's actions to commit the crime. Second, at least one of these persons must take some action based on the conspiracy. Persons who join the conspiracy through agreement are all guilty as principals, even if they did not take part in the actual execution of the crime. Where person A conspired with B, and then B conspired with C, all such persons may be deemed to have made a single conspiracy to commit the offense. For example, where a defendant (A) made an agreement with one party (B) to attack a victim, and then (B) on a separate occasion made an agreement with another party (C) to attack the same victim, all three could be liable for the actual attack as joint principals.

160. ODA, supra note 155, at 420 (citing 12 KEISHū 1718 and noting that "[whether it is possible to punish a person who did not actually take part in committing a crime, but masterminded it and conspired with the others as a principal is a matter of dispute.").


164. See 12 KEISHū 1718 (Sup. Ct., May 28, 1958). For example, if A and B reach an agreement, either A or B must take such an action.

165. See 12 KEISHū 1718 (Sup. Ct., May 28, 1958); see also 17 KEISHū 1795 (Sup. Ct., Oct. 17, 1963) (referencing 12 KEISHū 1718).

166. 12 KEISHū 1718 (Sup. Ct., May 28, 1958), available at http://www.courts.go.jp/english/judgments/text/1958.05.28-1954.-A-.No..1056.html (finding that when one member of original conspiracy further conspired with others, all were liable as principals in the subsequent offense).

167. See 12 KEISHū 1718 (Sup. Ct., May 28, 1958). See also 17 KEISHū 1795 (finding a conspiracy to kill a government official between those who agreed to investigate the movements of the officials, the party who ordered the shooting, and the shooter).
The actions of a group of defendants can constitute agreement, satisfying the first element of a joint principal conspiracy. In one case, a group of juvenile defendants acted together to rape and murder a victim. The defendants seized the victim and took her to a remote location in their stolen vehicles. All of the defendants except one were found liable for at least attempted rape of victim. One defendant, "F", was also clearly at the scene, and had almost certainly interacted with the victim. All defendants were liable for the subsequent murder of the victim. On these facts, defendant F was a conspirator in the rape.

The doctrine is an expansion of joint principal liability under section 60 of the criminal code. One rationale behind joint principal conspiracy liability is that a person who uses another to accomplish a criminal act is liable for the underlying offense, much as would be the case for using a tool such as a weapon to commit a crime.

Scholars criticize joint principal liability as going beyond the legislative purpose of section 60. The joint principal conspiracy doctrine has been characterized as generally "vague and obscure," with each judge applying the doctrine differently. Judges also apply conspiracy-like language to find liability based on sections of the penal code other than section 60. Due to the vagueness of the judicial doctrine, some

175. See 12 Keishū 1718 (Sup. Ct., May 28, 1958) (describing judicially-developed doctrine of joint principal conspiracy).
176. See 12 Keishū 1718 (Sup. Ct., May 28, 1958) ("such a person can be regarded as also having committed the offense by using another's act as a means") (Adapted from English translation by the Judicial Research Foundation).
177. See Matsumiya, supra note 48, at 45 n.4.
178. See Sagawa Yukako, Case of a Principal Offender in a Concerted Action Absent Explicit Conspiracy, 22 Ritsumeikan L. Rev. 126, 128 (2005), accord. Asada Kazushige, Kyōdōzai ga hanzaiton ni oyobosu eikyo [The Effect of Conspiracy on Criminal Law Theory], Horitsu Jihō, Sept. 2006, 53 (noting authority critical of the judicial doctrine of conspiracy). See, e.g., 56 Keishū 307 (Sup. Ct., Jul. 18, 2002) ("independently or in conspiracy with X and Y" not a constitutionally vague charge); 55 Keishū 127 (Sup. Ct., Apr. 11, 2001) (conspiracy conviction facts were not insufficient where time, place and method of killing were not specified and finding was that "A or the defendant or both of them killed B by strangling him with his hands or tools or by other similar methods.").
critics fear that courts will combine the existing judicial doctrine of joint principal conspiracy with a new conspiracy law to greatly expand liability for the substantive underlying crimes committed by members of the conspiracy.  

The use of confessions of defendants accused of joint principal conspiracy against each other is a concern of critics of the doctrine. Normally, a defendant may not be convicted constitutionally solely based on their own confession. However, in the case of joint principal conspiracy, a conviction may be based on confessions of other parties to the conspiracy because this is not a conviction “solely based on their own confession.” Other constitutional protections continue to operate, however. For example, a co-conspirator’s confessions that were obtained where investigators falsely told each party that the other had confessed were disallowed as unconstitutionally coerced.

Liability under the joint principal conspiracy doctrine may be expanding. The judicial doctrine of joint principal conspiracy had been understood as requiring intentional agreement to commit the criminal objective of the conspiracy. The defendant, the head of a


See Japan Fed’n of Bar Ass’ns, supra note 42 (“Currently, co-principals are punishable for implied conspiracy. If the conspiracy itself is criminalized, the implied conspiracy forms conspiracy offenses and the scope of punishment might be extremely broad [sic].”); NIHON BENGOshi RENGōKAI [JAPAN FEDERATION OF BAR ASSOCIATIONS], supra note 59, at 24–26; cf. Matsumiya, supra note 48, at 45–46. Such expanded liability would be similar to Pinkerton liability under some U.S. conspiracy laws. See generally KADISH & SCHULHOFER, supra note 4, at 684–91.

See Tatsuyuki, supra note 140 (discussing the problem of using co-conspirators confessions against other co-conspirators in the context of the proposed conspiracy law).

See 24 KEISHū 1718, para. 8 (constitutional provision should be “strictly construed” as an exception to the principle of free evaluation of evidence). But see 54 Minshū 255 (Sup. Ct., Feb. 7, 2000) (conspiracy liability of several juveniles was improper where it was based almost solely on their confessions).

See 24 KEISHū 1670 (Sup. Ct., Nov. 25, 1970).

See 24 KEISHū 1670 (finding a conspiracy by husband and wife to possess gun, where investigator told each spouse that the other had confessed, and may have hinted that only one would be punished for the crime).

See Sagawa, supra note 178, at 127–128.

See Asada, supra note 178, at 54.

57 KEISHū 507 (Sup. Ct., May 1, 2003) (acknowledging that the defendant, who is the boss of an organized crime group (boryokudan), shall be criminally liable as a co-principal for the conspiracy of his bodyguards to possess firearms) (Adapted from English translation by the Judicial Research Foundation); Yukako, supra note 178, at 126–28.
bōryokudan[^190] was criminally liable in a joint principal conspiracy with his bodyguards to possess handguns.[^191] The defendant was protected by bodyguards from a related gang called “S.W.A.T. members” while visiting Tokyo.[^192] He never directly ordered weapons to be carried, nor did he have specific knowledge about the weapons.[^193] However, he was aware of the gun possession in general, benefited from it, and had the power to stop it.[^194] This was sufficient for the court to find an implicit understanding and joint principal conspirator liability.[^195] A conspiracy existed between the defendant, five “S.W.A.T. member” bodyguards, and three other bōryokudan members who were involved in controlling the bodyguards.[^196]

B. Police Practice and Criminal Procedure

In addition to the substantive criminal laws discussed in section A, above, Japan’s police practices and criminal procedure are a basis for concern for critics of Japan’s conspiracy bills, who fear that insufficient procedural protections will result in abuse of a conspiracy law.[^197] Japan’s national police force has been accused of oppression of liberal elements in society.[^198] Although there have been occasional direct confrontations


[^191]: See 57 Keishū 507 (Sup. Ct., May 1, 2003).

[^192]: See 57 Keishū 507 (Sup. Ct., May 1, 2003).

[^193]: See 57 Keishū 507 (Sup. Ct., May 1, 2003).

[^194]: See 57 Keishū 507 (Sup. Ct., May 1, 2003); see also Asada, supra note 178, at 54; Kaido & Hosaka, supra note 56.

[^195]: Asada, supra note 178, at 54.

[^196]: See 57 Keishū 507 (Sup. Ct., May 1, 2003)

[^197]: See Shinya, supra note 141, at 60 (discussing conspiracy laws and Japan’s Security Police, a special unit charged with keeping the public order in Japan); Nihon bengoshi ren-gōkai [Japan Fed’n of Bar Ass’ns], supra note 59; see also Jennifer Granick, Peace and Privacy in the Pacific, WIRED, Aug. 2, 2006 (discussing arbitrary use of trespassing laws against pacifists protesting against the government).

between protestors and police,\textsuperscript{199} of far greater concern to critics is discriminatory application of a conspiracy law as a tool of oppression.\textsuperscript{200}

Japanese police investigators have the potential to abuse a conspiracy law because they can control criminal suspects for long periods of time, and use this time to extract confessions that will be considered by a judge in assessing the suspect's guilt.\textsuperscript{201} With the cooperation of prosecutors,\textsuperscript{202} suspects may be detained in police custody for up to twenty-three days with limited access\textsuperscript{203} to counsel.\textsuperscript{204} This practice has been criticized as violating international standards,\textsuperscript{205} but has been repeatedly upheld by Japan's courts.\textsuperscript{206} The suspect is not permitted to have counsel present, even during interrogation,\textsuperscript{207} and must submit to questioning that can last "all day and on occasion late into the evening."\textsuperscript{208}

\begin{footnotes}
\footnote{199. PARKER, supra note 198, at 196 (noting that a student activist reports being "shocked by the police behavior" where fellow activists were "shoved down by police, and their glasses knocked off").}

\footnote{200. See NIHON BENGOSHI RENGÔKAI [JAPAN FED'N OF BAR ASS'NS], supra note 59 (expressing concern about use of conspiracy law against labor and political movements); Granick, supra note 197 (discussing arbitrary use of trespassing laws against pacifists protesting against the government). See also Walter L. Ames, The Japanese Police: A General Survey, 2 POLICE STUD. INT'L REV. POLICE DEV. 6, 7-8 (1980) (community boards ineffective, no local financial control of internal security operations, and no local government administrative ties to local police stations).}

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\footnote{202. See Foote, supra note 201, 430 n.88, 431 (1991) (noting prosecutors requested police detention for an initial 10-day period in over 85% of cases, and requested an additional 10-day extension in over one third of cases). For further explanation, see Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union, 27 SYRACUSE J. INT'L L. & COM. 1, 34 (2000), for a discussion of a similar system in Russia and Ukraine that notes the lack of standards in prosecutor decisions to detain.}

\footnote{204. See Foote, supra note 201, at 432-33 (stating that defense counsel typically needs permission from prosecutors to meet with their client, with the average number of meetings during the 20-day detention period being two to five 15-minute meetings).
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\footnote{205. IWASA, supra note 204, at 262 n.53 (collecting authorities); see Foote, supra note 201, at 417; NIHON BENGOSHI RENGÔKAI [JAPAN FED'N OF BAR ASS'NS], supra note 47, at para. 227 (noting that the "Japanese government was formally notified by the Human Rights Committee that the two confinement bills violated ICCPR [an international standard] because of the daiyo kangoku [literally "substitute prison"—holding the suspects under police custody instead of at a jail or other non-police facility] system... ").}

\footnote{206. See, e.g., 17 KEISHÛ 1795.}

\footnote{207. Foote, supra note 201, at 432-34.}

\footnote{208. Foote, supra note 201, at 431.}
\end{footnotes}
twenty-three day period. An additional twenty-three days can be added on a separate charge. During this time, police control the suspect’s environment and work to extract a confession. These tactics sometimes result in suspects confessing to crimes they did not commit.

Once in court, procedural protections do not effectively prevent the use of a suspect’s confession. Although police must warn a suspect of his or her right to not answer questions, the warning may be delayed and a statement made prior to receiving this warning is still admissible as evidence against him or her. In general, a defendant’s hearsay statement made prior to trial can also be admitted if it contains damaging admissions. Although the Japanese Constitution prohibits the admission into evidence of confessions obtained “under compulsion, torture or threat, or after prolonged arrest or detention,” courts are reluctant to exclude confessions for procedural defects. Indeed, there are few rigid evidence rules, as cases are decided by judges, not juries.

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210. See Iwasawa, supra note 204, at 261; Foote, supra note 201, 440 n.133 (noting one case in which the suspect was re-arrested for fourteen different crimes, and thereby was detained in mostly police custody for almost three years). See, e.g., Setsuo Miyazawa, Policing in Japan: A Study in Making Crime 20–25, 67–88 (1992), reprinted in The Japanese Legal System, supra note 46, at 482.


212. See Setsuo, supra note 210, at 475 (making of a false confession to acting alone in an arson where suspect actually played only a minor role upon police questioning). Nihon Bengoshi Rengōkai [Japan Fed’n of Bar Ass’ns], supra note 47, at para. 180–83 (noting that this system produces “false charges” and “forced confessions,” noting that there is “no suitable check functions” on the police, and characterizing the flaws of the system as resulting in “human rights violations”).

213. See generally Foote, supra note 201.

214. See Foote, supra note 201, at 434–35.

215. See Oda, supra note 155, at 428.

216. See Kenpō, art. 38, para. 2.

217. Miyazawa, supra note 210, at 475; Ramseyer & Nakazato, supra note 158, at 168 n.40 (“Should they [the police] make an illegal arrest, however, that illegality itself will not necessarily bar any evidence or confession obtained”).

tion for any confession is constitutionally required, as the Constitution forbids punishment or conviction solely based on a confession. However, the concern in conspiracy cases is that one conspirator's confession might be admitted against other conspirators, thus basically avoiding the constitutional corroboration requirement.

C. Criticisms of a Criminal Conspiracy Law

The conspiracy bill has met with protest and sparked considerable debate. Three substantive points are debated. First is whether the conspiracy bill is truly necessary for ratification of CATOC. A second area of debate is the scope of criminal liability and police investigation that will result from a conspiracy law. In particular, the possibility of abuse of the law by police is a concern. Finally, the motives behind the bill are debated.

As the debate regarding the conspiracy bill is taking place across a wide spectrum of Japanese society, criticism of the conspiracy bill is sometimes extreme or poorly considered. Opponents of Japan's proposed criminal conspiracy law sometimes conflate issues of proof with

220. Supra note 202, at 6–7 (arguing that the requirement that confessions be corroborated is present in other European legal systems).

221. See KENPÔ, art. 38, para. 3 (explaining there may be no conviction solely based on confession).

222. See Shinya, supra note 141, at 56, 60; see also 12 KEISHÔ 1718, summary para. 7 (Sup. Ct., May 28, 1958) (commenting that the use of joint-principle conspirators' statements against each other has happened).

223. See, e.g., Activists protest over plan to introduce conspiracy law, JAPAN ECONOMIC NEWSWIRE, October 17, 2006 (voicing concern about freedom of speech); P.E.N. club expresses opposition to conspiracy bill, JAPAN ECONOMIC NEWSWIRE, May 15, 2006; Civic groups oppose conspiracy bill prior to Diet deliberations, JAPAN ECONOMIC NEWSWIRE, April 19, 2006; Tokyo Shimbun wins JCI grand prize for conspiracy features JAPAN ECONOMIC NEWSWIRE, July 27, 2006 (extensive coverage of conspiracy issue due to popular concern); Just contemplating crime may soon be punishable, THE JAPAN TIMES, January 3, 2004 (noting lawyer's concerns that a conspiracy law might be used against labor unions, and noting that "the federation also challenged the government's basis for pushing the legislation—the legitimacy of the U.N. convention against transnational organized crime, noting it was passed without thorough examination of its human rights ramifications"); NICHIBENREN HA KYÔBÔZAI NI HANTAI SHIMASU [JAPAN FED'N OF BAR ASS'NS OPPOSES CONSPIRACY LAW], supra note 137; NIHON BENGOshi RENgÔKAI [JAPAN FED'N OF BAR ASS'NS], supra note 59; KAIDÔ & HOSAKA, supra note 56; YAPPARI ABANAI 20! KYÔBÔZAI (Kinohana 2006); Tokushu: "KYÔBÔZAI wo takakuteki, hinannteki ni kento suru, HÔRITSU JIHÔ, Sept. 2006, 4-62.

224. See Tokushu, supra note 223 (addressing the substantive points).

225. See Tokushu, supra note 223, at 13.

226. See Tokushu, supra note 223, at 20.

227. See Tokushu, supra note 223, at 56.

228. See Tokushu, supra note 223, at 4.

229. See Editorial, supra note 95.
substantive conspiracy law. Critics ignore the bills’ limitations to serious crimes and the requirement of an overt act, discussing nightmare scenarios which are outside of the scope of application of the conspiracy bill. Some citizen groups even fear that failure to intervene to stop a friend from assaulting someone would be punishable as a conspiracy. Also, although inchoate crimes are well-established in the penal code, the inchoate nature of conspiracy looms large for some critics.

This misunderstanding of the conspiracy bill may be a result from generally unfavorable media coverage of issues related to criminal conspiracy law. For example, the story of one Japanese citizen arrested for a drug-related conspiracy in the United States and sentenced to two years imprisonment was turned into a television drama in Japan. By contrast, prior to successfully implemented anti-smoking legislation, Japanese saw first-hand the benefits of anti-smoking laws when visiting such places as Hawaii, California, and New York.

On a substantive level, a major point of debate is whether the conspiracy bill is required by CATOC. Opponents claim that the bill is

230. See Remarks of Fukushima Mizuho, chair of Social Democratic Party of Japan, Japan Diet House of Councilors session of 5/18/2006, http://www.mizuhoto.org/01/04back_n/060518.html (“Without having actually done anything, a person can be sentenced, with respect to 620 different criminal offenses, just on the basis of something they have agreed to or on the basis of something they have said. How do you present findings in court about something that you did not actually do? ... A person can be convicted of a criminal offense for trying to drive up stock value by making their company’s data look better, even if they never actually carried out any actions. In terms of contemporary criminal law, I don’t know how you can substantiate this kind of allegation in court.”).

231. Lawmakers Split on Time Line for Criminalizing Conspiracy, DAILY YOMIURI, (Japan) May 2, 2006, available at 2006 WLNR 14764411 (relaying a citizen group’s fears that telling someone in a pub “I’m going to punch that guy for what he did to me” could result in a conspiracy charge).

232. See id.

233. See KEIHO art. 43-44.

234. E.g., ABANAI zo! KYOBOSAI (Ogura Toshimaru & Kaido Yuuchi eds., Kinohanasha 2006); NIHON BENGOSHI RENGOKAI [JAPAN FED’N OF BAR ASS’NS], supra note 59, at 3 (considering conspiracy as a thought crime, as the point of punishment is moved far earlier in the crime).

235. See e.g., Wakabayashi Manami, “Purizun Guru” wo enshutsu: Jijitu no motsu chikara hikidasu [Shooting “Prison Girl:” Power of a True Story], YOMIURI SHINBUN, Apr. 10 2006. For an example of other media presentations, see Oded Lowerheim, Transnational Criminal Organizations and Security: The Case Against Inflating the Threat, 57 Int’l J. 513 (2002).

236. See Manami, supra note 236 (describing the arrest and sentencing of a Japanese exchange student for a drug-related conspiracy charge, and plans to create a television drama based on the true story).


238. MINISTRY OF JUSTICE SUMMARY, supra note 44; Ministry of Justice Website, http://www.moj.go.jp/KEJU/keiji35-1.html; Kiriyama Takanobu, Kokusai soshiki hanzai boshi fyoyaku no hijyun to kokunai hoka no kadai [The Subject of CATOC Ratification and Domestic
unnecessary because Japan’s current criminal laws, such as the similar judicially-developed doctrine of joint principal conspiracy, already meet the requirements of CATOC. Proponents of the bill note that CATOC requires that a conspiracy be made a crime through explicit legislative action to create a crime conforming to the treaty’s requirements. Opponents counter that Japan need not strictly adhere to this requirement, and may proceed to ratify the convention without making any changes. It is true that although CATOC requires adherence to its terms, there are no particular penalties for failure to do so.

Proponents of the bill also advocate it as a practical necessity, since group crime continues to increase in Japan. Crime by foreign groups and groups with international ties taking place inside of Japan is increasing. Indeed, the general rise in transnational crime is the very reason for the adoption of CATOC, because weakness in any one country’s


239. See Nihon Bengoshi Rengōkai [Japan Federation of Bar Associations Opposes Conspiracy Law], supra note 137 (website text noting that CATOC compliance can be accomplished without the conspiracy bill based on current law); see also Kaido & Hosaka, supra note 56, at 10; Ministry of Justice Website, supra note 239.


241. See Nihon Bengoshi Rengōkai [Japan Fed’n of Bar Ass’ns], Kyōbōzai shinsetsu nī kan suru ikensho [Opinion Paper on the New Conspiracy Bill], 5 (Sept. 14, 2006), http://www.nichibenren.or.jp/ja/opinion/report/data/060914.pdf (noting that Saint Christopher and Nevis ratified CATOC after creating a domestic crime of conspiracy which included as an element of the crime that it must be transnational. CATOC explicitly requires that there be no transnational element to the crime of conspiracy due to the difficulty of proving such a crime. See infra note 252. The article seems to imply that Japan may thus also ratify CATOC without Japan’s domestic law being in strict compliance.).


criminal law or enforcement capability "translates itself into an overall weakness in the international regime of criminal justice cooperation," and because group criminal activity reduces the personal liberties of citizens. Proponents also note that other countries have taken more aggressive or expansive measures to combat transnational crime.

The scope of criminal liability under the proposed conspiracy law is another major point of contention. The conspiracy bill's requirement of some connection to an organization is attacked as vague. In response to the perceived vagueness of the conspiracy bill's organizational limitation, critics recommend adding provisions to the bill that would limit its application to international criminal groups in order to protect labor and domestic government groups from persecution. CATOC specifically forbids such limitations, as proving such additional elements of a con-
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spiriacy crime is cumbersome, and lack of uniformity reduces opportunities for extradition of transnational criminals.\(^\text{252}\)

Another attack on the vagueness of the conspiracy bills focuses on the type of act required to trigger liability.\(^\text{253}\) The Ministry of Justice interprets the terse language used in the original conspiracy bill to provide essentially the same protections as does the overt act requirement in American conspiracy law.\(^\text{254}\) But the critics feel that the specific language added to later versions of the bill to further solidify the act requirement may not even be considered by Japan’s courts as an element of the offense.\(^\text{255}\) As no bill has been adopted, which implementation will prevail in Japan’s courts is unclear.\(^\text{256}\)

The conspiracy bill’s “serious crimes” limitation is also attacked as overly expansive.\(^\text{257}\) Critics also point out that the limitation of conspiracy to “serious crimes” is a mild limitation, as over 600 crimes qualify under the definition in Japan.\(^\text{258}\) Yet CATOC specifies the definition of serious crime.\(^\text{259}\) CATOC’s purpose of enabling effective international cooperation against organized crime, through such activities as extradition, is helped by uniformity.\(^\text{260}\) Also, a much larger number of crimes qualify as serious crimes in countries such as the United States.\(^\text{261}\)

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252. See CATOC Legislative Guide, supra note 41, at 19 ("... drafters must not include [these elements] in the definition of domestic offenses ... any requirements of transnationality or organized criminal group involvement would unnecessarily complicate and hamper law enforcement. ... transnationality must not be an element at the domestic level."); see also Diane Marie Aman, Spotting Money Launderers: A Better Way to Fight Organized Crime?, 27 SYRACUSE J. INT’L L. & COM. 199, 199 (2000) (“Proving the existence of a criminal organization can be a complex and cumbersome task.”).

253. See NIHON BENGOshi Rengōkai [JAPAN FED’N OF BAR ASS’NS], supra note 59, at 14.

254. See NIHON BENGOshi Rengōkai [JAPAN FED’N OF BAR ASS’NS], supra note 59, at 15.

255. See NIHON BENGOshi Rengōkai [JAPAN FED’N OF BAR ASS’NS], supra note 59, at 15–16 (even LDP members have reached this conclusion); see Kobayakawa, supra note 6, at 42; Ito, supra note 8, at 78.

256. See NIHON BENGOshi Rengōkai [JAPAN FED’N OF BAR ASS’NS] supra note 42 (noting uncertainty of the proposals’ scope).

257. See NIHON BENGOshi Rengōkai [JAPAN FEDERATION OF BAR ASSOCIATIONS], supra note 242, at 3; NIHIBENREN WA KYŌBŌZAI WO HANTAI SHIMASU [JAPAN BAR FEDERATION OPPOSES CONSPIRACY LAW], supra note 137.

258. NIHON BENGOshi Rengōkai [JAPAN FEDERATION OF BAR ASSOCIATIONS], supra note 242, at 3.

259. See CATOC, supra note 1, art. 2(b).

260. See CATOC, supra note 1, art. 1; see also CATOC Legislative Guide, supra note 41, at para. 17.

In addition to the scope of criminal liability, the scope of investigation and enforcement of a conspiracy crime is a concern of critics.\(^\text{262}\) The combination of a conspiracy crime and the use of wiretapping and other surveillance could be particularly dangerous.\(^\text{263}\) An adverse impact on the freedom of speech is of particular concern.\(^\text{264}\) It is true that there have been abuses of wiretapping by Japanese police,\(^\text{265}\) and that citizen control of police is limited.\(^\text{266}\) Evidentiary rules offer limited protection, as there is no explicit requirement that co-conspirators’ statements must be made in furtherance of the conspiracy in order to be admissible at trial.\(^\text{267}\) The high conviction rate in Japan and limited number of lawyers available to defend the accused are cause for additional concern.\(^\text{268}\)

However, wiretapping by police is constrained by several statutory safeguards that will remain in place in a conspiracy investigation.\(^\text{269}\) For example, “all intercepts must be carried out in the presence of a neutral observer,” and a recording of the intercepted communication must be sent to the court that issued the warrant authorizing the intercept.\(^\text{270}\) Law enforcement officials point out that, in the context of investigations against organized crime groups, the very combination of wiretapping with the ability to charge conspiracy is one of the few weapons available

\(^{262}\) Nihon Bengoshi Rengōkai [Japan Federation of Bar Associations], supra note 59, at 29.

\(^{263}\) Chokanshi Shakai to Jiyu—Kyōbōzai kao ninshō shisutemju jyukinetto to [Observation Society and Freedom—Conspiracy, Face Recognition Systems, and the Juku Network] (Tajima Yasuhiro & Saitou Takaos eds., Kadensha 2004); Takada, supra note 70, at 5; Chokanshishakai to Jiyu—Kyōbōzai, kaōninga shisutemju, jyukinetto wo tou, supra (expressing concern about Japan as an “observation society”). See Crimes in Japan in 2005, supra note 244, at 16 (identifying the first use of wiretapping in the investigation of a conspiracy murder case).


\(^{265}\) See Mark D. West, Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion, 92 Colum. L. Rev. 684, 700 (1992).

\(^{266}\) Ames, supra note 200, at 7–8.

\(^{267}\) See Kobayakawa, supra note 6, at 42 (discussing possible application of American evidentiary rules to Japan’s criminal law).

\(^{268}\) See John O. Haley, Authority Without Power: Law and the Japanese Paradox ch.6 (1991), reprinted in The Japanese Legal System, supra note 46, at 445 (noting conviction rate drops to 90% if uncontested guilt cases are removed). Nihon Bengoshi Rengōkai [Japan Fed’n of Bar Ass’ns], supra note 47, at para. 88 (“In practice, the vast majority of suspects do not benefit from legal counsel (There are not even any official statistics on this. It is estimated that of all suspects, around 10% have lawyers.)”); Kazuhiro Yamamoto, The Shimane Bar Association: All Twenty-One Members Strong, 25 Law in Japan 115 (1995), reprinted in The Japanese Legal System, supra note 46, at 87–96.

\(^{269}\) See Hill, supra note 245, at 260.

\(^{270}\) Hill, supra note 245, at 260.
against the leadership of such organizations who are not otherwise directly involved in criminal acts.\textsuperscript{271} One possible response to critics’ concerns in Japan would be to codify a specific evidentiary rule applicable to conspiracies, similar to the hearsay rule related to conspiracy in the United States.\textsuperscript{272}

A final substantive point of debate regarding the conspiracy bill is the true motivation behind it.\textsuperscript{273} The LDP has been accused of using CATOC as an excuse to impose a criminal conspiracy law.\textsuperscript{274} Since conservative political parties, the generally conservative police,\textsuperscript{275} and public prosecutors have generally been considered strong supporters of CATOC,\textsuperscript{276} protestors see a conspiracy law as part of a general trend toward the right in Japanese society.\textsuperscript{277} Proponents of the bill do not go beyond the need to ratify CATOC, the fact that many other countries both have conspiracy laws and have implemented CATOC, and the need to fight crime as the motivations behind the conspiracy bill.\textsuperscript{278}

V. CONCLUSION

Japan is one of the few remaining countries without a statutory general conspiracy law. After signing CATOC in 2000, Japan may be obligated to adopt such a law. Conspiracy bills proposed in Japan have been similar to, and in some ways more limited than, comparable conspiracy under the Model Penal Code and common-law conspiracy. Yet the attempt to criminalize conspiracy in Japan has met great resistance,


\textsuperscript{272} For example, FED. R. EVID. 801(d)(2)(E) applies in particular to co-conspirators; see also KADISH, supra note 3, at 677.

\textsuperscript{273} See Kaido, supra note 72, at 20.

\textsuperscript{274} See Kaido, supra note 72, at 20.

\textsuperscript{275} See Ames, supra note 200, at 9; see generally PARKER, supra note 198, at 40–196.

\textsuperscript{276} See Kobayakawa, supra note 200, at 6; see generally KOBYAKAWA, supra note 6, at 42. See also U.N. GAOR, 55th Sess., 62d plen. mtg., at 2, 3, U.N. Doc. A/55/PV.62 (Nov. 15, 2000) (giving Japan special mention twice by the Chairman of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, once for financial contributions, and once for an active and excellent delegation); Q&A Related to the Group Crime of Conspiracy, http://www.moj.go.jp/HOUAN/KYOUBOUZAI/refer06.html (explaining and advocating the bill).


\textsuperscript{278} See HōMUSHO [MINISTRY OF JUSTICE], Soshikitekina hanzai no kyōbōzai ni kan suru Q&A [Q&A RELATED TO THE GROUP CRIME OF CONSPIRACY], available at http://www.moj.go.jp/HOUAN/KYOUBOUZAI/refer06.html.
and all proposed bills have failed in the Diet. The necessity, scope, and motivation behind the conspiracy bill continues to be debated seven years after adoption of CATOC in Japan. The debate in Japan is a rare modern discussion in which a wide spectrum of society considers the need for, and proper scope of, criminal conspiracy law.