Implementation of Multilateral Treaties by Adopting Domestic Law: Some Japanese Cases

SHIOTA Tomoaki

Public Administration and Judicial Affairs Research Service, Research and Legislative Reference Bureau, National Diet Library

Abstract

Domestic implementing legislation is the domestic legislation required to fulfill treaty obligations. Upon entering treaty agreements, Japan typically develops domestic implementing legislation without omission, which can result in a delicate tension between legislation development and adherence to treaty terms. This paper discusses this tension using illustrative examples. First, this paper examines Japan's failure to treat the crime of genocide as an independent category of crime under its domestic legislation upon joining the Rome Statute of the International Criminal Court in 2007. Second, this paper discusses Japan's 1986 domestic legislation regarding the determination of the applicable law concerning child maintenance obligations under two treaties, whereby entirely new provisions were included to avoid conflict with these treaties. Finally, in preparation for Japan's ratification of ILO Convention No. 105 concerning the Abolition of Forced and Compulsory Labor in 2023, this paper discusses relevant domestic implementing legislation developed in 2022, and reviews drafting and potential issues in this regard.

Introduction

On June 9, 2021, the 204th session of the National Diet passed the Bill on Coordinating the Relevant Acts to Ratify the Convention concerning the "Abolition of Forced Labor, 1957 (No.105)" (204th Diet House of Representatives Bill No.23), which had been submitted by a multipartisan group of the House of Representatives. The bill was subsequently promulgated on June 16, and came into effect on July 6, 2021. In order for Japan to ratify the Convention on the Abolition of Forced and Compulsory Labor (No.105), which had been adopted by the International Labor Organization (ILO) in 1957, it was necessary to establish relevant laws pertaining to provisions for penalties that may be

applicable to forced labor prohibited by the Convention.[(1)] Based on Article 73, item 3 of the Constitution of Japan, when concluding a treaty, the Cabinet typically submits a legislative bill to fulfill Japan's obligations under the treaty. As such, the submission and enactment of this legislative bill as a member's bill marked a particular milestone in domestic law for the implementation of treaties in Japan.[(2)]

This paper uses the passage of the foregoing law as an opportunity to discuss the domestic implementing legislation (i.e., the domestic law required to fulfill obligations under a treaty) accompanying the conclusion of a treaty and examines the tension that can emerge from the obligation to comply with treaties when drafting domestic implementing legislation (Article 98, paragraph 2 of the Constitution of Japan). This paper prefaces this discussion with an examination of the relationship between international and domestic law.

I The Relationship between International and Domestic Law

1 *The Relationship between the International and Domestic Legal Order*

(1) Monism and Dualism

International law is a set of rules whose primary purpose is to regulate relations

* All information sourced from the Internet in this paper were available as of October 3, 2022.

(1) 強制労働の廃止に関する条約（第百五号）の締結のための関係法律の整備に関する法律（令和 3 年法律第 75 号）第 1 条 Act on Coordinating the Relevant Acts to Ratify the Convention Concerning the Abolition of Forced Labor, 1957 [No.105])[Act No.75 of 2021] Article 1).

(2) One of the few instances in which domestic laws for the implementation of treaties were amended through legislation submitted by members of the House of Representatives is the Act Partially Amending the Act on Management of National Government Assets upon the Enforcement of the Executive Agreement under Article III of the Treaty of Mutual Cooperation and Security between Japan and the United States of America (Act No.243 of 1953). This Act added a provision (Article 7 of the Act on Management of National Government Assets upon the Enforcement of the Executive Agreement under Article III of the Treaty of Mutual Cooperation and Security between Japan and the United States of America [Act No.110 of 1952]) stating that when the Minister (Prime Minister in the initial enactment, Minister of Defense in the current act) intends to permit the use of national property specified by Cabinet Order, they shall first obtain opinions from the heads of relevant administrative organizations, heads of relevant prefectures and municipalities, and persons with relevant knowledge and experience. 第 16 回国会衆議院大蔵委員会議録第 16 号　昭和 28 年 7 月 7 日　p.8.（岡良一議員発言）(*Minutes of the 16th Session of the Diet, House of Representatives, Committee on Finance*, No.16, July 7, 1953, p.8. [Statement by Ryoichi Oka, Member of the House of Representatives])

between equal sovereign nations.(3) International law largely comprises codified treaties(4) and customary international law. There is no unified legislative body in the international community to enact codified treaties, which are drawn up among nations.(5) Every treaty in force is binding upon the parties to it(*Pacta sunt servanda*),(6) but a treaty does not bind a third State without its consent.(7) Moreover, the international community does not have a well-established mechanism for law enforcement agencies to detect violations of international law, or for judicial agencies to clarify the interpretation and application of international law and pursue state responsibility (e.g., obligations for *ex post facto* relief such as restoration, compensation for damages, and apology) against the violating state.(8) Thus, the international legal order governing the international community and the domestic legal order governing the domestic community differ greatly. Two major schools of thought have emerged regarding the relationship between these two legal orders.

(i) Monism

Monism is the view that international law and national law together form a universal legal order.(9) The question then becomes which of the two constitutes the higher legal order, with international law typically considered to prevail over domestic law because it is international law that makes it possible for states to exist—without international law, there can be no states.(10) According to this view, there is no need to take special measures for the

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(3) 中谷和弘ほか『国際法─International Law─ 第 4 版』（有斐閣アルマ）有斐閣, 2021, p.2.（中谷和弘執筆）(NAKATANI Kazuhiro, et al., International Law, 4th edition, [Yuhikaku Arma] Yuhikaku, 2021, p.2. [written by NAKATANI Kazuhiro]).

(4) For the definition of treaty, see Article 2.1(a) of the Vienna Convention on the Law of Treaties (Treaty No.16 of 1981).

(5) Article 9.1 of the Vienna Convention on the Law of Treaties.

(6) Article 26 of the Vienna Convention on the Law of Treaties.

(7) Article 34 of the Vienna Convention on the Law of Treaties. In contrast, customary international law is binding on all states. NAKATANI et al., *op.cit.* (3), p.2. (Written by NAKATANI Kazuhiro)

(8) *ibid*., pp.2-3. (Written by NAKATANI Kazuhiro) As the International Court of Justice, the main judicial organ of the United Nations, requires the consent of the parties to a dispute (i.e., consensual jurisdiction) in order for a case to be heard, there is no guarantee that violations of international law will always be judged by the court. Indeed, only a small percentage of all international disputes have been dealt with by this court. *ibid*., p.3.

(9) *ibid*., p.120. (Written by UEKI Toshiya); Jan Klabbers, *International Law*, Cambridge: Cambridge University Press, 2013, p.290. Hans Kelsen theorized the “basic norm” (*Grundnorm* in German) to explain that a constitution at the highest level of a country’s legal system has normative force (normativity of constitution). Based on the monism of the supremacy of international law discussed below, the basis of constitutional validity is to be found in international law, and a basic norm for a country’s legal system is not required. However, explaining the validity of international law requires the basic norm of international law. 瀧川裕英ほか『法哲学』有斐閣, 2014, p.199 (TAKIKAWA Hirohide, et al., Philosophy of Law, Yuhikaku, 2014, p.199.)

(10) Klabbers, *ibid*. In the past, it has been argued that international law is subordinate to national law; however, this monistic view of the supremacy of national law finds little support today. 浅田正彦編著『国際法　第 3 版』東信堂, 2016, p.24. (ASADA Masahiko, ed., *International Law*, 3rd Edition, Toshindo, 2016, p.24. [Written by ASADA Masahiko])

domestic implementation[11] of international law.[12] The theory of monism has been criticized as not necessarily corresponding to reality insofar as it holds that domestic laws in conflict with international law are invalid.[13]

(ii) Dualism

In contrast, dualism understands international and domestic law are regarded as two distinct legal orders that have very little to do with one another.[14] In other words, international and domestic law govern different spheres of law, with domestic law considered to prevail over a conflicting rule of domestic law when there are aspects that overlap, providing it relates to individuals or groups located within the country.[15] Moreover, according to this view, in order for international law to be implemented domestically, it must be modified to fit the domestic legal order.[16] However, as the relationship between countries' domestic legal orders and international legal norms is closer than ever before, critics of dualism argue that this theory can no longer adequately explain reality in the twenty-first century.[17]

(2) Coordinative theory

Amid the opposing monistic and dualistic views, a third view has emerged, arguing that both views face a number of difficulties in adequately theorizing the reality of the relationship between international and domestic law in the international community. Such theorists argue that a "conflict of obligations" can arise between the international and domestic legal order, and that insofar as adjustments are made to avoid such conflicts of obligations through the pursuit of state responsibility under international law, the two are in an equal relationship. This is known as coordinative theory.[18] While coordinative theory is thought to have "been gaining ground in recent years,"[19] a major criticism is that it "basically falls outside the bounds of conventional dualism,"[20] and "is generally

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(11) The domestic incorporation of international law and the realization of its regulatory content within a state; see 3(1). 竹内真理「国際条約の国内実施―国内諸機関の権限行使の観点から―」『法学教室』444 号, 2017.9, pp.126-127. (TAKEUCHI Mari, "Domestic Implementation of International Treaties: How do they provide Domestic Organs with the Legal Authority?" Hougaku-Kyoshitsu, 444, 2017.9, pp.126-127.)
(12) Klabbers, *op.cit.* (9), p.290.
(13) NAKATANI et al., *op.cit.* (3), p.121. (Written by UEKI Toshiya)
(14) *ibid.*; Klabbers, *op.cit.* (9), p. 289.
(15) Klabbers, *ibid.*
(16) *ibid.*
(17) NAKATANI et al., *op.cit.* (3), p.122. (Written by UEKI Toshiya)
(18) *ibid.*
(19) 大石眞『憲法概論　I』有斐閣, 2021, p.30. [OISHI Makoto, *Introduction to Constitutional Law I*, Yuhikaku], 2021, p.30.
(20) NAKATANI, et al., *op.cit.* (3), pp.122-123. (Written by UEKI Toshiya)

considered to lapse into either dualism or monism."(21)

(3) Discussion in Japan

According to Jan Klabbers, a professor of international law at the University of Helsinki, "It is, normally, the state itself which decides whether it wants to be dualist or monist. In that particular (and limited) sense, all states are dualist. International law does not, and cannot, order states to be monist—this remains a prerogative of the sovereign state."(22) In view of this assertion, let us examine the discussions that have taken place in Japan.

(i) Government response

On May 11, 1981, at the 94th session of the Diet, in response to a question from Doi Takako, a member of the Committee on Foreign Affairs of the House of Representatives, Kuriyama Shoichi, then Senior Deputy of the Ministry for Foreign Affairs, asserted:(23)

> There are the so-called monistic and dualistic theories regarding the relationship between treaties and domestic law, and there have been various academic opinions in Japan as well; in the government's thinking, as I have already touched on, domestic law and international law, or treaties as a part of international law, are naturally of different dimensions, or in academic terms, a dualistic perspective as mentioned by Professor Doi.

If this reply is taken literally, as will be discussed in the next section, it is difficult to find a consistent explanation for the fact that Japan has adopted an "incorporation system"—that is, the assumption that a concluded treaty has domestic legal effect as is—toward the domestic incorporation of treaties.(24) However, it is widely held that a properly concluded treaty has domestic validity based on the provision of Article 98, Paragraph 2 (Obligation to Observe Treaties) of the Constitution, which states that "The treaties concluded by Japan and established laws of nations shall be faithfully observed."(25)

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(21) Klabbers, *op.cit.* (9), p.290. (note 11)
(22) *ibid.*, pp.290-291.
(23) 第 94 回国会衆議院外務委員会議録第 13 号　昭和 56 年 5 月 11 日 p.4. (*Minutes of the Committee on Foreign Affairs of the House of Representatives during the 94th Session of the Diet*, No.13, May 11, 1981, p.4.). Underline added by the author.
(24) This is because, as explained in (1)(ii), under dualism, which considers international law and domestic law to be separate and independent legal orders, it is inherently necessary for a concluded treaty to be transformed into domestic law in order for it to have domestic legal effect.
(25) See, for example, 芹沢斉ほか編『憲法』(別冊法学セミナー no.210. 新基本法コンメンタールシリーズ) 日本評論社, 2011, p.512.（江島晶子執筆） (SERIZAWA Hitoshi et al. (eds.), The Constitution [Bessatsu Hōgaku Seminā No.210. New Basic Law Commentary Series] Nippon Hyoronsha, 2011, p.512. [Written by EJIMA Akiko]; ASADA, *op.cit.* (10), p.27. (Written by ASADA Masahiko)

(ii) Theory

In terms of academic theory, (1) scholarship on Japanese constitutional law takes the view that "a monistic orientation can be strongly observed"[(26)] regarding the relationship between international law and domestic law, while (2) scholars of international law explain that "as long as we assume the current state of international society, where the system for pursuing state responsibility under international law is not as complete as in domestic society, there are many areas in which the relationship between international and domestic law can be understood on the basis of dualism."[(27)]

2 *The Incorporation of International Law into the Domestic Legal Order*

(1) Two methods of incorporation

In principle, international law has no effect in domestic law,[(28)] and it is up to each state to decide how to give effect to international law. A domestic constitution decides on the way in which international law may enter the domestic legal order.[(29)] There are two main systems: the incorporation system and transformation system.

(i) Incorporation System

The incorporation system holds that international law that is valid and binding on a country is naturally recognized as effective in domestic law in its original form, without the need for special measures.[(30)] In Japan, there is no explicit provision in the current constitution that adopts the incorporation system. However, a constitutional practice has been established in continuation of the practice under the Meiji Constitution, whereby treaties are comprehensively accepted by their promulgation in the same manner as other laws and cabinet orders (Article 7, Item 1 of the Japanese Constitution).[(31)]

(ii) Transformation System

The transformation system holds that in order for international law to have effect in domestic law, it must be transformed into some form of domestic law.[(32)] In this case, transformation is not uniform. For example, (1) amending existing domestic laws to reflect

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(26) OISHI, *op.cit.* (19), p.31.
(27) NAKATANI et al., *op.cit.* (3), p.123. (Written by UEKI Toshiya)
(28) *ibid.*, p.124. (Written by UEKI Toshiya)
(29) Klabbers, *op.cit.* (9), p.291. An important exception to this principle is the European Union (EU) insofar as Article 288, paragraph 2 of the Treaty on the Functioning of the European Union provides that EU Regulations apply directly to its Member States.
(30) NAKATANI, et al. *op.cit.* (3), p.124. (Written by UEKI Toshiya)
(31) OISHI, *op.cit.* (19), pp.31-32.
(32) NAKATANI et al., *op.cit.*, p.124. (Written by UEKI Toshiya)

the new treaty[33] will require a great deal of time and effort if the new treaty is large in scale and covers a large number of legal fields. Moreover, while (2) enacting a law with the new treaty as an annex, after stipulating in the main provisions that "the treaty, as annexed, shall have the force of law within the domestic legal order,"[34] is easier than approach (1), it may cause linguistic compatibility issues around whether the new treaty in the annex is translated into the country's local language, or the original text is kept as is (i.e., discrepancies between the translated and original text, or disadvantage to those who cannot understand the original text).

(2) Effect of incorporated international law on domestic law

When international law is incorporated into the domestic legal order, the next issue that arises is what level of legal potency is granted to the incorporated international law under domestic law. As with (1), it is up to the constitutional order of each state to determine this, and there is wide variety in practice.[35] This section focuses on conventions among international law.

(i) Domestic legal effect of treaties in countries adopting the incorporation system

In countries that adopt the incorporation system, it is necessary to determine the superiority of the accepted treaty in relation to the state's constitution and laws (acts of parliament). Consider the following three schematically representative countries. In the United States, treaties are considered equivalent or inferior to federal law.[36] Meanwhile, in Japan, treaties that have been entered into domestic law through procedures such as Article 61 of the Constitution and Article 73, item 3 (conclusion, approval by the Diet) are generally considered to have the same or greater formal force as laws, but are simultaneously considered inferior to the Constitution.[37] In contrast, in the Netherlands,

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(33) Klabbers, *op.cit.* (9), p.295.

(34) *ibid.*, p.296.

(35) ASADA, *op.cit.* (10), pp.28-29. (Written by ASADA Masahiko); Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*, Ninth Version, London: Routledge, 2022, pp.64-69; Anthony Aust, *Modern Treaty Law and Practice*, Third Edition, Cambridge: Cambridge University Press, 2013, pp.159-177.

(36) 上原有紀子「日米英における条約の国内実施―議会の役割と国内法秩序の在り方―」『レファレンス』840 号, 2021.1, p.90. (UEHARA Yukiko, "National Implementation of Treaties in Japan, the US and the UK: The Role of Parliament and Treaties in the National Legal Order," *The Reference*, No.840, 2021.1, p.90.)

(37) OISHI, *op.cit.* (19), p.14. In addition, the Japanese government is of the view that (1) in the relationship between treaties and laws, treaties prevail; (2) in the relationship between treaties and the Constitution, treaties prevail with respect to a) established international law and b) matters such as those pertaining to the security of the country; and c) the Constitution prevails with respect to bilateral political and economic treaties. 第 33 回国会参議院予算委員会会議録第 4 号 昭和 34 年 11 月 17 日 p.16.（林修三内閣法制局長官答弁）(*Minutes of the Committee on*

"the poster child for monism,"(38) treaties are considered as outranking conflicting domestic laws, including the Constitution.(39) However, a two-thirds majority in both houses is required to approve a treaty in conflict with the Constitution.(40)

(ii) Choice of national legal form in countries adopting the transformation system

In countries that adopt the transformation system, it is not necessary to consider the domestic legal effects of the treaty itself. That said, they face the problem of which domestic legal form to choose for the variant of the treaty:(41) namely, whether to (1) transform it into an act of parliament, or (2) transform it into an executive order. Each option has its own issues. In (1), there are issues concerning the handling of conflicts with other laws,(42) while (2) faces the issue of treaties being inferior to laws.

3 *Approaches to Domestic Applicability of Treaties and Domestic Law for Implementation of Treaties*

(1) Domestic applicability of treaties

Even in a country that adopts the incorporation system, not all treaties are necessarily applicable within that country.(43) In other words, the fact that a treaty has domestic effect does not mean that it is being applied in the country in its original form (i.e., without any domestic measures).(44)

The provisions of treaties that have national effect can be categorized into those that

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Budget of the House of Councillors during the 33rd Session of the Diet, No.4, 1959.11.17, p.16. (Statement of HAYASHI Shuzo, Commissioner of the Cabinet Legislation Bureau)

(38) Klabbers, *op.cit.* (9), p.296.

(39) 衆議院憲法調査会事務局『「憲法と国際法（特に、人権の国際的保障）」に関する基礎的資料』（衆憲資 50 号）2004, pp.20-23. [Secretariat of the Commission on the Constitution, The House of Representatives, "Basic Materials about Constitution and International Law, especially International Protection of Human Rights," Shu-Ken-Shi 50, 2004, pp.20-23]; 国立国会図書館調査及び立法考査局『各国憲法集(7)　オランダ憲法』（調査資料 2012-3-c）2013.3.29. (Research and Legislative Reference Bureau, National Diet Library of Japan, Constitutions of the World (7) Constitution of Netherlands, (Research Materials 2012-3-c) 2013.3.29.).

(40) The House of Representatives Secretariat of the Commission on the Constitution, *ibid.*, p.22.

(41) Klabbers, *op.cit.* (9), p.296.

(42) For example, the conflict in this case could be resolved using the "later in time" rule (*ibid*., p. 296). Similar conflicts may arise in the United States, which uses the incorporation system, and the "later in time" rule may come into play where there is a conflict between federal law and a treaty of equivalent effect. See Uehara, *op.cit.* (36), p.90.

(43) ASADA, *op.cit.* (10), p.27. (Written by ASADA Masahiko) Note, "application" means to make the provisions of a law work for a specific person, case, and so on. 角田禮次郎ほか編『法令用語辞典　第 10 次改訂版』学陽書房, 2016, pp.571-572. [TSUNODA Reijiro, et al., eds., Dictionary of Japanese Legal Terminology, 10th Edition, Gakuyo-Shobo,] 2016, pp.571- 572.

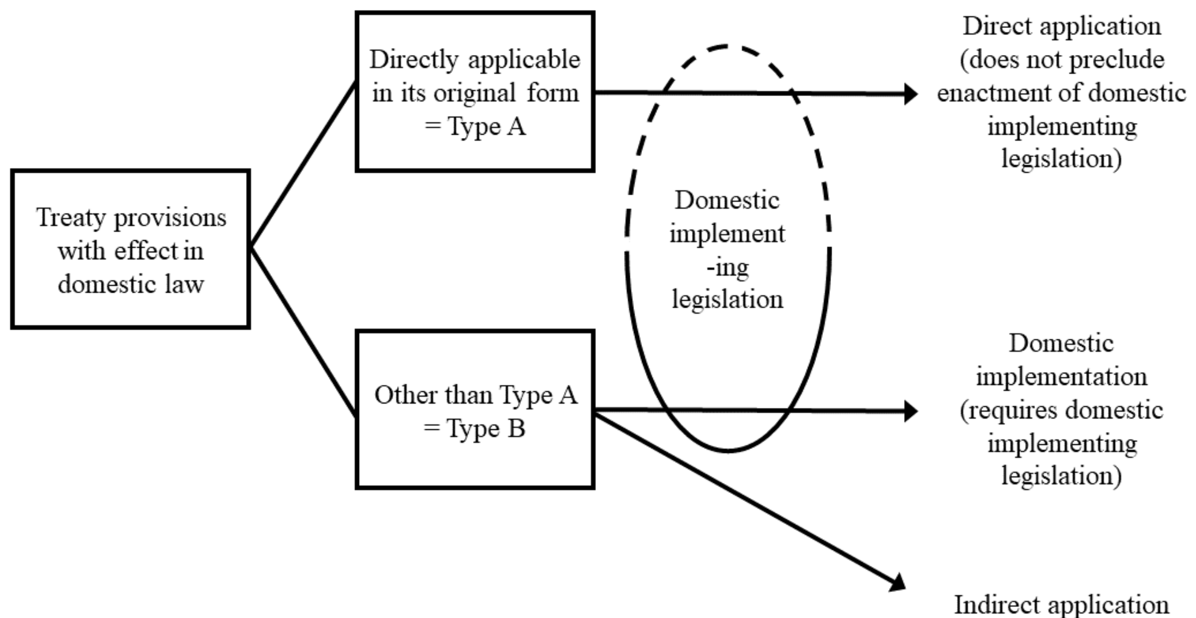
(44) Yuji Iwasawa, "The Relationship between International Law and National Law: Japanese Experiences," *British Year Book of International Law*, 64(1), 1993, p.349.

are directly applicable, that is, those that can be applied domestically in their original form (hereinafter, Type A), and those that cannot (hereinafter, Type B).(45) While the criteria used to classify this depend on the domestic laws of the country in question, they are generally similar. Subjective criteria include (1) the parties' intentions, and (2) the intention of state legislators; objective criteria include (3) whether the content of the norm is clear and whether the institutions and procedures for its realization are defined fully and in detail (Type A, if applicable), (4) whether it provides for matters which are to be provided for by an act of parliament and not by treaty (Type B, if applicable), and (5) whether the dispute settlement procedures provided for by the treaty are political or flexible and are not subject to judicial review (Type B, if applicable).(46) Figure 1 illustrates the application of treaty provisions classified in this way.

(45) While some argue that, in theory, only treaties that are directly applicable can be accepted and given effect domestically, this paper follows the opinion of Judge Iwasawa Yuji of the International Court of Justice, whereby the "domestic validity of a treaty shall be considered a prerequisite for its domestic applicability." 岩沢雄司「国際法の国内適用可能性—小寺教授と対話しながら—」岩沢雄司ほか編著『国際法のダイナミズム—小寺彰先生追悼論文集—』有斐閣, 2019, p.10. (IWASAWA Yuji, "Domestic Applicability of International Law: Dialogue with Prof. Kotera," IWASAWA et al., eds., *The Dynamism in Interpretation and Application of International Law: In Memory of Prof. Akira Kotera, Yuhikaku*, 2019, p.10.).

(46) *ibid.*, pp. 14-21. Disagreeing with the notion that most domestic precedents and theories assume that treaties cannot be applied directly, Iwasawa argues that treaties with domestic effect should be presumed to be directly applicable, as is the case with other domestic laws, and these criteria should be considered to eliminate that presumption. *ibid.*, p.13. A Ministry of Foreign Affairs official with practical experience in concluding treaties provided his personal view on the matter, "In Japan's case, we try to ensure that domestic law for implementation is fully in place, that is to say, that domestic law for implementation is fully in place for any and all treaties. [...] there is little direct application of treaties without the development of domestic law for their implementation." 松田誠「実務としての条約締結手続」『新世代法政策学研究』Vol. 10, 2011.2, p.313. (MATSUDA Makoto, "A Practical Guide to Conclusion of Treaties," *Hokkaido Journal of New Global Law and Policy*, Vol.10, 2011.2, p.313.)

Figure 1: Domestic application of treaties in countries adopting the incorporation system.



(Source: Created by the author based on several sources, including 浅田正彦編著『国際法　第 3 版』東信堂, 2016, p. 27.（浅田正彦執筆）[ASADA Masahiko, ed., International Law, 3rd Edition, Toshindo, 2016, p. 27. (Written by ASADA)]

By definition, Type A can be applied directly,(47) although this does not preclude the enactment of domestic law for its implementation.(48) In contrast, for Type B, the domestic law-applying body (court or executive branch) refers to the provisions of the treaty as the standard of interpretation of domestic law and interprets domestic law to conform to the treaty.(49) This is called indirect application. However, a domestic legislator may define the contents of Type B in detail in domestic implementing legislation and further develop an implementation system to achieve its domestic implementation. Domestic laws(50) necessary for the domestic implementation of treaties are discussed in greater detail below.

(47) Conventionally, such treaties are called “self-executing treaties” (ASADA, *op.cit.* (10), p.27. [Written by ASADA Masahiko]) However, Iwasawa argues that the concept of “self-executing” (*jidou-shikkou-jouyaku*) is used in a variety of ways, creating confusion, and that the concept of “direct applicability” (*chokusetsu-tekiyou-kanou-sei*) should be used instead. Yuji Iwasawa, “Domestic Application of International Law,” *Recueil des Cours: Collected Courses of The Hague Academy of International Law*, Vol. 378, 2016.6, p.138.

(48) IWASAWA, *op.cit.* (45), p.7.

(49) *ibid.*, p.21.

(50) In this case, domestic law for implementation of treaties (*kokunai-tanpo-ho*) is sometimes referred to as “domestic law for implementation” (*kokunai-jisshi-ho*) or “implementing legislation” (*jisshi-rippo*). (2) ASADA, ed., *op.cit.* (10), p.27. (Written by ASADA Masahiko); IWASAWA, *ibid.*, p.22.

(2) Effect of incorporated international law on domestic law

(i) What kind of legislation is domestic implementing legislation?

The purpose of enacting domestic implementing legislation is to provide a basis for the realization of the regulatory content of a treaty in order for the states party to the treaty to fulfill their primary obligation of complying with that treaty.[51] Using real examples from Japan, this section explains the specific contents of legal allowances[52] for the development of such a basis.

(a) Creation of a basis for the exercise of state authority over treaty obligations

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Convention No. 7 of 2003; hereinafter, the Cartagena Protocol) contains the following provisions:[53]

> Article 8 Notification
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> 1. The Party of export shall notify, or require the exporter to ensure notification to, in writing, the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism […]. The notification shall contain, at a minimum, the information specified in Annex I.

Article 8, Paragraph 1 of the Cartagena Protocol appears to obligate signatory states to certain measures. More specifically, the signatory state can decide between two measures: either the signatory state make notification, or the exporter is obliged to make notification. Therefore, in order to fulfill the obligations in that paragraph of the convention, the domestic implementing legislation, the Act on the Conservation and Sustainable Use of Biological Diversity through Regulations on the Use of Living Modified Organisms (Act No.97 of 2003; hereinafter, the Cartagena Act) provides the following:

> (Notification of Export)
>
> Article 27 A person who wishes to export living modified organisms must, as stipulated by Order of the competent ministries, notify the importing country of the names of the types of living modified organisms to be exported, and other particulars stipulated by Order of the competent ministries […].

In order to ensure the effectiveness of this provision, the Cartagena Act recognizes the authority of the competent minister, etcetera, to collect reports, conduct on-site inspections,

[51] TAKEUCHI, *op.cit.* (11), pp.127-128.
[52] MATSUDA, *op.cit.* (46), pp.313-317.
[53] 「生物の多様性に関する条約のバイオセーフティに関するカルタヘナ議定書」[The Cartagena Protocol on Biosafety to the Convention on Biological Diversity.]

and so on, and provides for penalties.[54] Therefore, the first pillar of the "development of a basis" through domestic implementing legislation by which to fulfill treaty obligations involves imposing obligations on citizens, granting authority to certain administrative organs, and developing penalties.

(b) Translation of treaty obligations into obligations in the domestic legal system

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Treaty No.2 of 1999; hereinafter, the Convention against Bribery of Foreign Public Officials) sets out the following provisions:[55]

Article 1 The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

Article 1, paragraph 1 of the Convention Against Bribery of Foreign Public Officials requires signatory states to criminalize certain acts. However, using the wording of the same paragraph as it is (e.g., "undue pecuniary or other advantage" and "in relation to the performance of official duties") may cause confusion under domestic law because these differ from the "legal terminology" hitherto established in Japan. Therefore, the domestic implementing legislation (Article 18 of the Unfair Competition Prevention Act [Act No.47 of 1993])[56] translated the terminology of said paragraph into Japanese legal terminology and made the following provisions:

(Prohibition Against the Provision of Wrongful Gains to Foreign Public Officials)

Article 18(1) No person may give, offer or promise any money or other benefit to a foreign public official, etc. in order to have them act or refrain from acting in relation to the performance of official duties, or in order to have the foreign public officials,

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(54) ① A fine of up to JPY 500,000 for failure to notify and false notification (Article 42, Item 5 of the Cartagena Act); ② a fine of up to JPY 300,000 for refusal of the competent minister to collect notifications, refusal of on-site inspections, etcetera; and ③ a fine of up to JPY 300,000 for false notification or statements (Article 43 of the Cartagena Act).

(55) 「国際商取引における外国公務員に対する贈賄の防止に関する条約」[Convention on Combating Bribery of Foreign Public Officials in International Business Transactions].

(56) Domestic legislation for the implementation of treaties is not always enacted in the form of new statutes. Sometimes necessary provisions are developed in the form of partial amendments to existing laws depending on the purpose and objectives of the law. MATSUDA, *op.cit.* (46), p.313.

> etc., use their position to influence another foreign public official, etc. to act or refrain from acting in relation to the performance of official duties, so that the person in question can make any wrongful gain in business with regard to international commercial transactions […].

In cases where the wording of a treaty is too detailed, measures may be taken in light of Japan's domestic legal system, such as delegating part of it to administrative decree rather than writing it all down in law.(57) Thus, the second pillar of the "development of a basis" through domestic implementing legislation involves translating the wording of the treaty into the wording of Japan's domestic laws and constructing a legal structure compatible with the domestic legal system.

(ii) The necessity of domestic implementing legislation

In practice, Japan follows the basic concept of developing "implementing legislation without omission."(58) The reasons for this can be summarized in the following two points.

(a) Legislative policy imperative

First, given the sophistication of Japan's legal system, it would be "contrary to common sense practice" to leave treaties that might conflict with specific laws without any legal allowance and rely solely on the prevailing academic theory that treaties take precedence over laws.(59) As such, domestic implementing legislation is needed to make legal allowance for resolving conflicts between treaties and laws and to achieve "a state of affairs in which it is not necessary in principle to discuss the ranking of legal norms."(60)

(b) Legal imperatives

Second, (1) especially in the field of criminal law, treaties cannot be directly applied from the viewpoint of the principle of legality (*nulla poena sine lege*), necessitating domestic legislation.(61) Moreover, (2) when an administrative organ of the state takes measures to regulate the economic activities of private individuals based on a treaty, it is necessary to clearly stipulate the organ with regulatory authority, the requirements for invoking the regulation, and the content of the regulation in law in order to curb power and protect the rights and interests of private individuals.(62)

(iii) Approaches in case of conflict between treaties and their corresponding domestic implementation legislation

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(57) *ibid.*, pp.316-317.
(58) *ibid.*, p.318.
(59) *ibid.*, p.312.
(60) Takeuchi, *op.cit.* (11), p.127.
(61) Iwasawa, *op.cit.* (45), p.20.
(62) Matsuda, *op.cit.* (46), pp.317-318.

By reviewing what has been examined thus far, let us consider what would happen if a treaty conflicts with domestic implementing legislation corresponding to that treaty in Japan.

(a) When treaty provisions pertaining to domestic implementing legislation are directly applicable

In the case of Type A treaty provisions presented in (1), the conflict with the domestic implementing legislation pertaining to that treaty is resolved by the order of precedence between the treaty and the law, as can be seen in 2(2). In other words, domestic implementing legislation loses its effect to the extent that it conflicts with the treaty.(63)

(b) Where treaty provisions pertaining to domestic implementing legislation fall outside (a)

In contrast, where domestic implementing legislation pertains to the provisions of a Type B treaty, "it is natural that international law should be the standard of interpretation thereof,"(64) and the state organ must apply domestic implementing legislation in a manner that is consistent with, and not contrary to, the treaty in question.(65) In particular, courts have a secondary obligation to comply with treaties to remedy discrepancies between a treaty and their domestic implementation measures within the scope(66) of their jurisdiction.(67) More specifically, the appropriate judicial remedy becomes available by examining whether the discrepancy can be said to be a breach of the primary obligation to treaty compliance of the Diet or the Cabinet, that is, an abuse of their discretionary power.(68)

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(63) 第 12 回国会参議院平和条約及び日米安全保障条約特別委員会会議録第 14 号　昭和 26 年 11 月 9 日　pp.8-9.（大橋武夫法務総裁答弁）*(Minutes of the Special Committee on Peace Treaty and the Treaty of Security between Japan and the US of the House of Councillors during the 12th Session of the Diet*, No.14, 1951.11.9, pp.8-9. [Statement of OHASHI Takeo, Attorney General])

(64) IWASAWA, *op.cit.* (45), p.22. In other words, domestically implemented treaties are indirectly applicable with respect to domestic implementing legislation.

(65) *ibid.*

(66) Specifically, see, for example, 芦部信喜, 高橋和之補訂『憲法　第 7 版』岩波書店, 2019, p. 349. (ASHIBE Nobuyoshi, supplement by TAKAHASHI Kazuyuki, Constitutional Law, 7th Edition, Iwanami Shoten, 2019, p.349.)

(67) TAKEUCHI, *op.cit.* (11), p.128.

(68) 中川丈久「総括コメント―行政法からみた自由権規約の国内実施―」『国際人権』23 号, 2012, p.70. (NAKAGAWA Takehisa, "An Administrative Law Perspective on Domestic Process of the International Covenant on Civil and Political Rights," *Human Rights International*, No.23, 2012, p.70.)

II Tension between the Development of Domestic Implementing Legislation and the Obligation of Treaty Compliance

At the end of the previous section, we discussed cases of conflict between treaties and domestic implementing legislation. However, it is difficult to imagine such a situation occurring frequently in Japan.[69] Under the "legislative policy to adopt implementing laws for all ratified treaties,"[70] even if it does not produce conflict, the way domestic implementing legislation for treaties is developed can create tensions with treaty compliance obligations. This chapter examines two case studies in this regard.

1 *The Significance of Not Establishing Domestic Implementing Legislation for Treaties: Genocide*

(1) Background

(i) Basic Concept of the Rome Statute of the International Criminal Court

In 2007, Japan acceded to the Rome Statute of the International Criminal Court (Convention No. 6 of 2007; hereinafter, the Rome Statute).[71] The Rome Statute established a permanent International Criminal Court (ICC) in The Hague, the Netherlands, based on the fundamental principle that the most serious crimes in the international community should not go unpunished (i.e., the principle that perpetrators of serious crimes should not go unpunished). Two important features of the ICC are of interest to this paper.

(a) Crimes covered by the ICC

The ICC has jurisdiction over (1) the crime of genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression (Article 5, paragraph 1 of the Rome Statute).[72] The ICC has jurisdiction over natural persons pursuant to this Statute.

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(69) In response to the question of whether a law in conflict with a treaty could be enacted after the treaty has been entered into force in Japan, the government stated, "There is no reason why such a law could be enacted." 第 12 回国会参議院平和条約及び日米安全保障条約特別委員会会議録第 14 号　前掲注(63), p.9.（大橋法務総裁答弁）(*Minutes of the Special Committee on Peace Treaty and the Treaty of Security between Japan and the US of the House of Councillors during the 12th Session of the Diet*, No.14, *op.cit.* (63) p.9 [Statement of OHASHI Takeo, Attorney General]).

(70) The Namely, the idea that whatever treaty is concluded, domestic implementing legislation should be fully in place. MATSUDA, *op.cit.* (46), p.313.

(71) 「国際刑事裁判所に関するローマ規程」[Rome Statute of the International Criminal Court],

(72) The ICC's jurisdiction over crimes of aggression began on July 17, 2018. 三上正裕「侵略犯罪に関する国際刑事裁判所（ICC）の管轄権行使の開始決定―経緯、意義、問題点―」『国際法外交雑誌』117 巻 3 号, 2018.11, pp.572-595. (MIKAMI Masahiro, "The Decision to Activate the ICC's Jurisdiction over the Crime of Aggression: Its History, Significance, and Challenges," *Journal of International Law and Diplomacy*, Vol.117, No.3, 2018.11, pp.572-595.)

Immunities or special procedural rules which may be attached to the official capacity of a person do not bar the ICC from exercising its jurisdiction over a head of state or government, a member of a government or parliament, an elected representative or a government official (Article 25 and Article 27 paragraph 1 of the Rome Statute).

(b) Admissibility of cases to the ICC

The ICC complements the criminal jurisdiction of the state (hereinafter, the complementarity principle; Preamble to the Rome Statute, Paragraph 10 and Article 1). Consequently, the ICC shall determine a case is inadmissible where: (1) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution; (2) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state to genuinely prosecute (Article 17 paragraph 1 (a) and (b) of the Rome Statute). Moreover, in cases involving the crimes listed above, where (3) the person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the ICC is not permitted under *ne bis in idem* ((c) of the same item), or (4) the case is not of sufficient gravity to justify further action by the ICC ((d) of the same item),(73) the ICC will not accept the case.

(ii) Japan's approach to domestic implementing legislation in the case of the Rome Statute

From the perspective of combating impunity for serious crimes and strengthening the rule of law in the international community, the Japanese government holds that the ICC should be a court that represents the entire international community, and that it is important to obtain broad support from the international community for its activities.(74) At the same time, it has been necessary to: a) examine whether crimes within the purview of the ICC could be punished under Japan's criminal law, because the complementarity principle requires that crimes under the purview of the ICC first be punished under the laws of the

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However, as of October 1, 2022, Japan had not accepted the amended provisions of the Rome Statute defining crimes of aggression (Amendments to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010, C.N.651.2010.TREATIES-8.). Therefore, the ICC shall not exercise jurisdiction over crimes of aggression committed by Japanese nationals or within the territory of Japan pursuant to clause 2 of Article 121 paragraph 5 of the Rome Statute (MIKAMI, *ibid*., pp.593-594.).

(73) The English text of the Rome Statute positions the crimes covered by the ICC as "the most serious crimes" (*mottomo judaina hanzai*) (Preamble, paragraph 10 and Article 1), while the admissibility requirement is "sufficient gravity" (*jubunna judaisei*) (Article 17, Paragraph 1(d)).

(74) For example,「米国による対国際刑事裁判所（ICC）制裁解除について」（外務報道官談話）2021.4.3, ("Lifting of Sanctions by the United States Against the International Criminal Court" [Statement by Press Secretary YOSHIDA Tomoyuki], 2021.4.3.) Ministry of Foreign Affairs website.

country of origin; b) examine new domestic legislation stipulating procedures for cooperation with the ICC; and c) consider how to secure financial resources to pay the appropriate dues incurred upon joining the Rome Statute.(75)

As a result of these considerations, the draft domestic implementing legislation(76) submitted by the government in conjunction with the process of parliamentary approval of the Rome Statute primarily comprised: (i) procedural provisions for the provision of evidence, transfer of witnesses, service of documents, extradition, and cooperation in execution in order to fulfill the obligations stipulated in Part 9 of the Rome Statute (International Cooperation and Judicial Assistance) and (ii) provisions creating crimes of impairing the operation of the ICC (e.g., the crime of destruction of evidence, intimidation or acquisition of witnesses and others, perjury, and bribery of ICC officials). In this respect, only the results of the consideration of (b) were reflected in the draft domestic implementing legislation. Of the two remaining issues to be considered, c) is a budgetary matter and thus omitted from this paper, while the government's conclusion on a) (hereinafter, the ICC government view) was as follows:(77)

> Ⓐ The Rome Statute does not mandate the criminalization of targeted crimes such as in each signatory state. However, Ⓑ most crimes covered by the Rome Statute are already punishable under Japan's existing domestic laws.
>
> There is the theoretical possibility that some attempted crimes may not be punishable in Japan. However, since Ⓒ the ICC will only exercise its jurisdiction in cases of sufficient gravity, such a possibility cannot be assumed in practice.

(iii) Problems concerning Japan from the viewpoint of other countries' responses

Kevin L. Cope, Associate Professor of Law at the University of Virginia School of Law, divides countries' responses to the domestic implementation of the definitional provisions of the crimes covered by the ICC ((i)(a)1–3) as of 2016 into three categories: (i) countries that have adopted the same definition in their national laws as the Rome Statute, (ii) countries that have adopted broader definitions than the Rome Statute, and (iii) countries that have adopted a narrower definition than the Rome Statute and have not defined the crimes set forth in the Rome Statute.(78) Cope attributes the differences in the

(75) 正木靖「国際刑事裁判所（ICC）加入までの道のりとその意義」『ジュリスト』1343 号, 2007.10.15, pp.58-61. (MASAKI Yasushi, "Japan's Entry to the International Criminal Court and Its Significance," *Jurist*, 1343, 2007.10.15, pp. 58-61.)

(76) 国際刑事裁判所に対する協力等に関する法律案（第 166 回国会閣法第 48 号）(Bill on Cooperation with the International Criminal Court [Cabinet Act No. 48 of the 166th Session of the Diet]). This bill was passed and enacted in the 166th session of the Diet as originally proposed, and promulgated as Act No. 37 of 2007 on May 11, 2007.

(77) 第 166 回国会衆議院会議録第 15 号　平成 19 年 3 月 20 日　p.8.（麻生太郎外務大臣答弁）(*Minutes of the Plenary Sittings of the House of Representatives during the 166th Session of the Diet*, No.15, March 20, 2007, p.8. [Statement of Aso Taro, Minister for Foreign Affairs]) Underline and symbols added by the author.

(78) Kevin L. Cope, "Treaty law and national legislative politics," Wayne Sandholtz and Christopher

domestic implementation of the same treaty—that is, the Rome Statute—from country to country to the differences in countries' political climates. Of the countries mentioned in (3), Cope asserts, "notably, this lack of political will has manifested more in legislative than executive hesitance to embrace the ICC regime."[(79)]

As we saw in subsection (ii) above, Japan falls into category (iii) under Cope's classification. It is worth taking a closer look at what Cope regards as a lack of political will in Japan, focusing on genocide from among the crimes covered by the ICC.

(2) Japan's response to genocide

(i) Relationship with the Genocide Convention

(a) State of countries' conclusion of the Genocide Convention and the Rome Statute

Daley J. Birkett, Senior Lecturer at Macquarie University Law School, examined the implementation of the Rome Statute by states in Asia. In this respect, Birkett notes, "A number of Asian States had already legislated to proscribe the crime of genocide in their national legal frameworks before they ratified or acceded to the Rome Statute. This can be explained by the fact that these States had already ratified or acceded to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)."[(80)]

Adopted by the United Nations General Assembly in December 1948 and entering into force in January 1951, the Genocide Convention condemns any person who participates in acts such as killing members of a national, racial, ethnic, or religious group with the intent to destroy the group in whole or in part, and establishes criminal liability for such individuals.[(81)] It also requires the enactment of domestic implementing legislation necessary to punish those who commit such acts.[(82)] A comparison of signatories of the Genocide Convention with the list of signatories to the Rome Statute[(83)] shows that 101 countries are signatories of the Genocide Convention—that is, 82.1% of the 123 signatories of the Rome Statute. It is worth noting that there are 153 signatory states to the Genocide

A. Whytock, eds., *Research Handbook on the Politics of International Law (Research Handbook in International Law)*, Cheltenham UK: Edward Elgar Publishing, 2017, pp.134-135.

(79) *ibid.*, p.136.

(80) Daley J. Birkett, "Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia," *Chinese Journal of International Law*, 18(2), 2019.6, pp.361-362.

(81) 稲角光恵「ジェノサイド条約第六条の刑事裁判管轄権（1）—同条約起草過程の議論を中心にして—」『名古屋大学法政論集』168 号, 1997.3, p.70. (INAZUMI Mitsue, "Criminal Jurisdiction in Article 6 of the Genocide Convention (1): Arguments During the Drafting Procedure," *Nagoya University Journal of Law and Politics*, 168, 1997.3, p.70.)

(82) *ibid.*, p.82.

(83) Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948. United Nations Treaty Collection Website; Rome Statute of the International Criminal Court, Rome, 17 July 1998. ibid.. Note, "Party" refers to a State that has agreed to be bound by a treaty and has put it into effect in its own country (Article 2.1(g) of the Vienna Convention on the Law of Treaties).

Convention.[84] However, as of March 1, 2022, although Japan is a party to the Rome Statute, it has not joined the Genocide Convention.[85]

(b) Government reply on the Genocide Convention

Since the 1950s, the Diet has held discussions about whether Japan should join the Genocide Convention.[86] The government first announced the issues to be examined in relation to the Genocide Convention in 1970, stating, "From the standpoint of domestic law and other factors, we have not yet joined the Convention, but we would like to examine this further and report accordingly."[87] A more detailed explanation was issued in 1981:[88]

> When trying to ensure the fulfillment of treaty obligations under domestic law, there is the issue of how to determine what constitutes a criminal act prohibited by the treaty under domestic law, and it cannot be denied that this is always clear, for this reason [Japan] did not join.

After Japan joined the Rome Statute, the Japanese government began to respond that "the necessity of signing the genocide treaty" was an issue to be considered alongside how domestic laws should be developed.[89] This appears to be due to a consideration of the history of the crimes covered by the ICC, including the crime of genocide, as detailed below.

(ii) Examination of genocide with a view to joining the Rome Statute

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(84) Convention on the Prevention and Punishment of the Crime of Genocide, *ibid.*

(85) As of October 1, 2022, there are 21 other countries that, like Japan, are non-parties to the Genocide Convention and Parties to the Rome Statute, namely, Botswana, Central Africa, Chad, Congo, Cook Islands, Djibouti, Grenada, Guyana, Kenya, Kiribati, Madagascar, Marshall Islands, Nauru, Niger, Samoa, Sierra Leone, Saint Kitts and Nevis, Saint Lucia, Suriname, East Timor, and Vanuatu.

(86) 第 26 回国会衆議院外務委員会議録第 24 号　昭和 32 年 5 月 15 日　p.8.（岸信介外務大臣答弁）(*Minutes of the Committee on Foreign Affairs of the House of Representatives during the 26th Session of the Diet*, No. 24, 1957.5.15, p. 8. [Statement of KISHI Nobusuke, Prime Minister])

(87) 第 63 回国会衆議院外務委員会議録第 12 号　昭和 45 年 4 月 27 日　p.16.（井川克一外務省条約局長答弁）(*Minutes of the Committee on Foreign Affairs of the House of Representatives during the 63rd Session of the Diet*, No.12, 1970.4.27, p.16. [Statement of IKAWA Katsuichi, Director General of Treaties Bureau, Ministry of Foreign Affairs])

(88) 第 94 回国会衆議院外務委員会議録第 17 号　昭和 56 年 5 月 28 日　p.25.（賀陽治憲外務省国際連合局長答弁）(*Minutes of the Committee on Foreign Affairs of the House of Representatives during the 94th Session of the Diet*, No. 17, 1981.5.28, p.25. [Statement of KAYA Harunori, Director General of United Nations Bureau, Ministry of Foreign Affairs])

(89) The government as a whole believes that it is necessary to consider the necessity of concluding a genocide convention [...] and the development of the domestic laws that would be necessary in the event of becoming a signatory to this Convention. 第 187 回国会衆議院法務委員会議録第 10 号　平成 26 年 11 月 12 日　p.19.（上川陽子法務大臣答弁）(*Minutes of the Committee on Justice of the House of Representatives during the 187th Session of the Diet*, No. 10, 2014.11.12, p.19. [Statement of KAMIKAWA Yoko, Minister of Justice])

After the adoption of the Rome Statute in 1998, Japan, participating as an observer in the conference of the signatory states, directed its ministries and agencies to carry out relevant studies with a view to joining the Rome Statute. More specifically, in terms of the types of crimes covered by the ICC, including genocide, it investigated (1) which of the crime types specified in Japan's Penal Code and other criminal laws would be applicable, (2) if applicable, what the statutory penalties would be, and (3) whether the results could be considered to guarantee the specific crime types specified in the Rome Statute.(90) As a result, it was confirmed that most types of crimes covered by the ICC are punishable under existing criminal laws, leading to the ICC government viewⒷ in subsection (1)(ii).(91)

Regarding the results of the internal government review above, it has been concluded that the introduction of the international crimes stipulated in the Rome Statute into Japan's Penal Code, which places great importance on theoretical integrity, would require an in-depth discussion of the structural transformation of that Penal Code. In order to avoid this, the substantive enactment of domestic legislation for the implementation of the treaty (e.g., an amendment to the criminal code creating a crime of genocide or a special law)(92) was postponed.(93)

(iii) Relationship between the Rome Statute and the punishment of genocide as an ordinary crime

(a) Relationship to the principle of complementarity

Some hold that the complementarity principle can only be fulfilled if the signatory states of the Rome Statute define all crimes covered by the ICC in their domestic laws, and that defining these crimes in domestic laws is integral to the good faith fulfillment of the treaty obligations by signatory states.(94) In fact, in consideration of the complementarity principle, a number of States Parties have adopted new legislative measures to punish crimes within the purview of the ICC in their own countries.(95) However, the majority view

(90) MASAKI, *op.cit.* (75), p.58.

(91) *ibid.* See also note (107) below.

(92) 多谷千香子「国際犯罪（ICC 管轄犯罪）と日本の刑事司法―手続面に絞った国内法整備にとどめて ICC に加入した意義―」『ジュリスト』1343 号, 2007.10.15, p.72.（注 8）(TAYA Chikako, "International Crimes (ICC Crimes) and Criminal Justice in Japan: Significance of Japan's Entry to the ICC by Adopting Domestic Implementation Law Only Regarding Criminal Procedure," *Jurist*, 1343, 2007.10.15, p.72. [Note 8]).

(93) Jens Meierhenrich and Keiko Ko, "How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan," *Journal of International Criminal Justice*, 7(2), 2009.5, p.245.

(94) Hugo Relva, "The Implementation of the Rome Statute in Latin American States," *Leiden Journal of International Law*, 16(2), 2003.6, pp.337-338; Meierhenrich and Ko, *ibid*., p. 246; Philipp Osten, "Rome Statute of the International Criminal Court and Domestic Legislation: On Drafting 'International Penal Code (Völkerstrafgesetzbuch)' in Germany," *Jurist*, 1207, 2001.9.1. pp.129-130.

(95) 松葉真美「国際刑事裁判所規程履行のための各国の国内法的措置」『レファレンス』640 号, 2004.5, pp. 37-63. (MATSUBA Mami, "The International Criminal Court and National

is that, under the Rome Statute, States Parties are not obliged to take domestic legal measures with respect to the punishment of crimes within the purview of the ICC.[96]
In Japan, the ICC government viewⒶ concurs with this position. As a result of a review based on this premise, Japan decided to investigate and prosecute the crimes covered by the ICC, including genocide, as ordinary crimes, as set out in subsection (ii) above.[97] However, in terms of emphasizing the principle of complementarity, there is a concern that, "In instances where States Parties adopt inadequate implementing legislation—i.e., legislation that makes provision for only a fraction of all conceivable scenarios of national prosecution—the number of admissible cases before the ICC would be inflated. This could lead to what might be described as adjudicative overstretch and thus be detrimental to the overall effectiveness of the ICC."[98] The ICC government viewⒸ was prepared in response to these concerns, and is supported by the "principle of sufficient gravity" (Article 17(1)(d) of the Rome Statute).

(b) Relationship with the principle of sufficient gravity

Around the time of the adoption of the Rome Statute in 1998, the principle of sufficient gravity, as an alternative to the complementarity principle, had been all but ignored.[99] However, during the 2006 DRC case, the ICC prosecutor, requesting an arrest warrant for a suspect, interpreted "sufficient gravity" as "being large-scale and systematic," whereas the ICC Pre-Trial Chamber, which has the authority to issue arrest warrants, took the position that a) the warrant must be "large-scale and systematic and cause social alarm" and b) "the suspect must be the highest ranking person to be held criminally responsible."[100] On appeal from the prosecutor, the ICC Appeals Chamber rejected both the prosecutor and the Pre-Trial Chamber's arguments as misinterpretations of the Rome Statute and remanded the case of the arrest warrant request to the Pre-Trial Chamber. However, the Appeals Chamber did not provide its interpretation of "sufficient gravity."[101]

Nonetheless, in his original, partly dissenting opinion, Judge Georghios M. Pikis of

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Implementing Legislation," *Reference*, 640, 2004.5, pp.37-63.); 真山全「国際刑事裁判所の対象犯罪と国内的対応」『法律時報』79 巻 4 号, 2007.4, p. 31 (MAYAMA Akira, "Rome Statute Crimes and National Criminal Justice," *Horitsu Jiho*, Vol. 79, No. 4, 2007.4, p.31.)

(96) 真山　同上 [MAYAMA, *ibid.*]; 石垣友明「ICC 規程締結に向けた日本の課題」『ジュリスト』1285 号, 2005.3.1, p. 114 (ISHIGAKI Tomoaki, "Challenges for Japan in Concluding the ICC Statute," *Jurist*, 1285, 2005.3.1, p.114.); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Commentaries on International Law), Oxford: Oxford University Press, 2010, p.342.

(97) As of 2019, Asian countries (based on the United Nations geographical division, see: https://unstats.un.org/unsd/methodology/m49) that, like Japan, are parties to the Rome Statute and have not defined the crime of genocide in their national laws are Afghanistan, Jordan, the Maldives, and Palestine. Birkett, *op.cit.* (80), p.363.

(98) Meierhenrich and Ko, *op.cit.* (93), p.246.

(99) Schabas, *op.cit.* (96), p.348.

(100) The Appeals Chamber, *Situation in the Democratic Republic of Congo*, ICC-01/04-168-US-Exp, 2006.7.13, pp.13-18.

(101) *ibid.*, pp.19-24.

the Appeals Chamber (Cyprus) interpreted "sufficient gravity" as follows:(102)

> Which cases are unworthy of consideration by the International Criminal Court? The answer is cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases. A crime is insignificant in itself if, notwithstanding the fact that it satisfies the formalities of the law, i.e. the insignia of the crime, bound up with the mens rea and the actus reus, the acts constituting the crime are wholly peripheral to the objects of the law in criminalizing the conduct. Both the inception and the consequences of the crime must be negligible. In those circumstances the Court need not concern itself with the crime nor will it assume jurisdiction for the trial of such an offence, when national courts fail to do so.

Japan joined the Rome Statute a year after these discussions took place at the ICC, and the ICC government view Ⓒ appears to have been made in light of the DRC case.

(c) Negative assessment of punishing genocide as an ordinary crime

The Rome Statute's failure to mandate that crimes covered by the ICC be incorporated into domestic law is thought to have been a policy consideration in order to increase the number of States Parties.(103) However, in accordance with the complementarity principle, the ICC's jurisdiction was initially exercised in cases where either a) "the Signatory State has no intention to investigate or prosecute" or b) "the Signatory State lacks the capacity to investigate or prosecute." Countries that did not wish to be subject to such assessments actively incorporated the crimes covered by the ICC into domestic law.(104)

In this respect, there have been criticisms that Japan's failure to incorporate crimes covered by the ICC, such as genocide, into domestic law means that the country "does not conform to the objectives of the Rome Statute."(105) For example, Japan does not pursue a charge of genocide for the crime of murdering a large number of people, because it does not convey that besides the individual victims, humanity is also attacked.(106)

(d) Positive assessment of punishing genocide as an ordinary crime

Conversely, the complementarity principle does not establish that the domestic courts of States Parties have priority over the ICC in all cases, but rather that they are free to submit certain cases to the jurisdiction of the ICC where the ICC is the "most suitable court

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(102) "Separate and partly dissenting opinion of Judge Georghios M. Pikis," *ibid.*, p.21 (paragraph 40).
(103) TAYA, *op.cit.* (92), p.70.
(104) Birkett, *op.cit.* (80), p.361.
(105) Meierhenrich and Ko, *op.cit.* (93), p.248.
(106) *ibid.*; 高山佳奈子「国際刑事裁判権（二・完）」『法学論叢』154 巻 2 号, 2003.11, p.53. (TAKAYAMA Kanako, "International Criminal Jurisdiction (2)," *Hogakuronso (Kyoto Law Review)*, Vol.154, No.2, 2003.11, p.53.)

(*forum conveniens*)."[107] Advancing this idea, some argue that in addition to (c) a) and b), the ICC has jurisdiction in cases where c) a Signatory State "withholds punishment, leaving and encouraging punishment to an international body."[108] From this perspective, Japan's refusal to incorporate crimes within the purview of the ICC into domestic law could be considered "active international collaboration through passivism."[109]

(3) Summary

Having outlined above the background of Japan's decision not to develop domestic implementing legislation for genocide, one of the crimes covered by the ICC, I would like to conclude with the following points.

(i) Relationship with political motivation

In recent years, the most well-known hurdles to domestic implementation of the Rome Statute, besides lack of political will, have included (1) a legal system receptive to international criminal law (see part I), (2) potential conflicts with constitutional guarantees (e.g., the non-extradition clause, right of asylum, absence of life sentences), and (3) existing domestic legal provisions on criminal matters (e.g., statute of limitations, criminal immunity).[110] In Japan, successive governments have approached domestic implanting legislation on the basis that "the interpretation and application of treaties in the field of criminal law should be clear and unclouded, and that the principle of legality and legal consistency should be emphasized with respect to treaties in the field of criminal law."[111]

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(107) For instance, "taking measures intended to prevent births within a group" (Article 6(d) of the Rome Statute) is not considered a punishable act under domestic genocide law is because (1) such acts only occur in very rare circumstances, and (2) even if they did occur, Japan would meet its obligations under the Rome Statute by turning the perpetrators over to the ICC. Yasushi Masaki, "Japan's Entry to the International Criminal Court and the Legal Challenges it Faced," *Japanese Yearbook of International Law*, Vol.51, 2008, p.412. However, some Japanese scholars are proponents of the "most suitable court" theory, an argument developed to explain why crimes under the purview of the ICC should be incorporated into domestic law. TAYA, *op.cit.* (92), p.70.

(108) 田中利幸「国内刑法からみた「侵略犯罪」規定と国内法のあり方」『国際法外交雑誌』114 巻 2 号, 2015.8, p. 91. (TANAKA Toshiyuki, "The Provisions of 'Crime of Aggression' from a Domestic Criminal Law Perspective: How Should Domestic Law Respond to Them?" *Journal of International Law and Diplomacy*, Vol.114. No.2, 2015.8, p.91.) A professor at Hosei University at the time, TANAKA Toshiyuki based this interpretation on an examination of the revised provisions of the Rome Statute regarding the crime of aggression, which Japan has not accepted. It has been pointed out that the ICC's finding of a country as "unwilling to investigate and prosecute" ((c)a) or "incapable of investigating and prosecuting" ((c)b) is problematic in relation to countries that withhold investigation and prosecution in an effort to cooperate with the ICC. Schabas, *op.cit.* (96), pp.340-344.

(109) TANAKA, *ibid.*

(110) Case Matrix Network, *Implementing the Rome Statute of the International Criminal Court: Ratification, Implementation and Co-operation*, 2017.9, pp.13-14.

(111) 青山健郎「国際刑事裁判所に関するローマ規程の侵略犯罪に関する改正（侵略犯罪改正）―その受諾に関する主要論点―」『国際法外交雑誌』114 巻 2 号, 2015.8, p.109. (AOYAMA Takero, "Amendments to Rome Statute of the International Criminal Court on the

In the examination process for the domestic legislation of the definition of crimes covered by the ICC, emphasis was placed on items (2) and (3), as seen in subsection (2) above.

As such, it would be too sweeping to attribute, as Cope does in ((1)(iii)), the lack of domestic implementing legislation on the definition of crimes covered by the ICC solely to a lack of political will.

(ii) Domestic legislation for the implementation of treaties in terms of procedures

While maintaining the basic principle that crimes within the purview of the ICC are punishable as ordinary crimes, Japan enacted the Bill on Cooperation with the International Criminal Court (Act No.37 of 2007) as domestic implementing legislation for the procedural aspects of the Rome Statute. This legislation has been regarded as generous insofar as it involved the domestic implementation of all of the obligations imposed on States Parties as measures for cooperation with the ICC as stipulated in the Rome Statute.(112) However, if Japan is understood to have the freedom or discretion to refer certain situations to the ICC based on the "most suitable court" theory under the complementarity principle ((2)(iii)(d)), then the need to specify the criteria and procedures for referral in this law should be considered in the future.(113)

2 *Conflicts between Treaties and Domestic Laws for the Implementation of Treaties: Applicable Law on Child Maintenance Obligations*

(1) Background

(i) Importance of determining the applicable law concerning child maintenance obligations

The extent to which a relationship of rights and obligations(114) pertaining to claims for maintenance is recognized is premised on a kinship relationship based on lineal consanguinity between spouses, between parents and the child or other blood relations, or

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Crime of Aggression: Main Issues Related to the Acceptance of the Amendments," *Journal of International Law and Diplomacy*, Vol.114. No.2, 2015.8, p.109.)

(112) Birkett, *op.cit.* (80), p.387.

(113) Spain and Germany have stated that they can consult with the ICC on whether the ICC is the most suitable court on a case-by-case basis. TAYA, *op.cit.* (92), p.70.

(114) This paper addresses rights and obligations pertaining to maintenance arising under kinship relationships, but does not discuss rights and obligations pertaining to support arising by contract or obligations of support borne in tort. In addition, this paper understands that maintenance is provided as alimony (monetary payments), and withholds conclusion as to whether this includes so-called "hikitori maintenance." Regarding the latter, see: 櫻田嘉章・道垣内正人編『注釈国際私法　第 2 巻』(有斐閣コンメンタール) 有斐閣, 2011, pp.389-390. (早川眞一郎執筆) (SAKURADA Yoshiaki, DOUGAUCHI Masato, eds., *Private International Law Annotated*, Vol.2 [Yuhikaku Kommentar], Yuhikaku, 2011, pp.389-390. [Written by HAYAKAWA Shinichiro])

between collateral consanguine relatives or relatives by affinity. This is determined by the family law of each country, and the success or failure of such claims is clear for lineal consanguine descendants, but varies for collateral consanguinity and relatives by affinity, whose relationships are considered further apart.[115] These differences reflect the legal sensibilities and lifestyles of each country and society, and shape their family systems.[116]

Here, let us consider a claim for maintenance for a child against a lineal consanguine relative; with the exception of subsubsection (ii)(a) below, this paper defines a child as a person under 21 years of age who is not married. More specifically, the issue concerns whether a child can claim support from stepparents or step-grandparents when their lineal consanguine descendants have remarried. In this case, the nationality and permanent residence[117] of the child and the debtor may differ, with the question of which country's law is applicable emerging as a key issue.[118]

Generally, the law applied in an external legal relationship is called "applicable law," while the rules governing how to determine the applicable law are referred to as "private international law," "conflict of laws," or "conflict regulation."[119] In this case, the element that serves as the standard for selecting the applicable law in private international law is

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(115) In Japan, the obligation of mutual support is assumed between lineal consanguine relatives and siblings. Under special circumstances, the obligation of maintenance may also be assumed between other relatives within three degrees of kinship through a family court judgement (Article 877, Paragraphs 1 and 2 of the Civil Code).

(116) 秌場準一「扶養義務の準拠法に関する法律の制定と今後の課題」『ジュリスト』865 号, 1986.7.15, p.82. (AKIBA Junichi, "Adoption of the Act on the Law Governing Duty to Support and Upcoming Issues," *Jurist*, 865, 1986.7.15, p.82.)

(117) That is, the place where a person normally resides. This differs from "residence" in that it is not merely temporary and requires the person to have been in residence for a considerable period of time. 高橋和之ほか編『法律学小辞典　第 5 版』有斐閣, 2016, pp.646-645 (TAKAHASHI Kazuyuki, et al., eds., *The Dictionary of Law*, 5th Edition, Yuhikaku, 2016, pp.646-645). There is no standard for the recognition of a habitual place of residence, such as residing in a place for more than a certain number of months, thus requiring that it be determined on a case-by-case basis. However, in real-world cases, a person is generally considered to have a habitual place of residence if they have actually resided there for a certain period of time with the intention of residing, and whether they have a habitual place of residence is seldom disputed. 大谷美紀子「国際離婚に伴う法的諸問題」*Libra: The Tokyo Bar Association Journal*, 11 巻 11 号, 2011.11, p.15. (OTANI Mikiko, "Legal Issues Associated with International Divorce," *Libra: The Tokyo Bar Association Journal*, Vol.11, No.11, 2011.11, p.15.)

(118) In addition to the matters listed in the text, there are other issues involved in international claims for maintenance (maintenance across national borders), such as which country's court to file the case in (international jurisdiction) and how to proceed with the recognition and enforcement of judgments concerning maintenance issued in a foreign country; these issues are not covered in this paper. For more information on these matters, see 国際私法学会編『国際私法年報　20』信山社, 2018, pp.20-95. (Private International Law Association of Japan, ed., *Japanese Yearbook of Private International Law*, 20, Shinzansha, 2018, pp.20-95.)

(119) TAKAHASHI, et al. (eds.), *op.cit.* (117), pp. 413, 634; 櫻田嘉章・道垣内正人編『注釈国際私法　第 1 巻』（有斐閣コンメンタール）有斐閣, 2011, p.190.（中西康執筆）(SAKURADA Yoshiaki, DOUGAUCHI Masato, eds., *Private International Law Annotated*, Vol.1 [Yuhikaku Kommentar], Yuhikaku, 2011, p.190. [Written by NAKANISHI Yasushi])

termed the “connecting factor” (*Anknüpfungspunkt* in German)[120] and specifically includes home country (country of nationality), habitual residence, and place of action.

When a claim for child maintenance is filed across national borders, the question of how to determine the applicable law is directly related to the protection of the child. In the social turmoil following the Second World War (1939–1945), many children were abandoned and unable to support themselves, leading to the issue of child maintenance gaining greater attention in private international law.[121]

(ii) Japan’s response concerning applicable law regarding child maintenance obligations

(a) The Act of General Rules for Application of Laws (Act No.10 of 1898, *Horei*)

On this issue, the Act of General Rules for Application of Laws (Act No.10 of 1898, *Horei*), prior to its revision in Paragraph 3 of the Act on the Law Governing Duty to Support (Act No.84 of 1986),[122] stipulated:

> Article 20. The legal relationship between parents and their children is governed by the father’s national law (in cases where there is no father, the national law of the mother).
> Article 21. The duty to support is governed by the national law of support obligor.

These provisions were broadly understood to infer that (1) Article 20 applies to the maintenance obligation towards minor children as a legal relationship between parent and child, while (2) Article 21 applies to the duty to support children who have attained the age of majority.[123]

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(120) 法令用語研究会編『有斐閣法律用語辞典　第 5 版』有斐閣, 2020, pp.1186-1187. (Study Group on Legal Terminology, ed., *Yuhikaku Dictionary of Legal Terminology*, 5th Edition, Yuhikaku, 2020. pp.1186-1187.)

(121) 細川清「「子に対する扶養義務の準拠法に関する条約」の批准」『ジュリスト』649 号, 1977.10.1, p.102. (HOSOKAWA Kiyoshi, “Ratification of ‘Convention on the Law Applicable to Maintenance Obligations Towards Children’,” *Jurist*, 649, 1977.10.1, p.102.)

(122) This Act (*Horei*) was revised via the Act No.78 of 2016.

(123) Scholars holding the prevailing view at the time explained that the obligation of maintenance between husband and wife and between parents and minor children was “a so-called duty to preserve life, which is an essential element of the marital or parent-child relationship,” while the duty of maintenance between other relatives was “a so-called obligation to support life that does not require sacrifice of one's own life simply spare capacity if it available.” 折茂豊『国際私法（各論）新版』（法律学全集 60）有斐閣, 1972, p.399. (ORIMO Yutaka, *Private International Law: Specific Issues*, New Edition, [Yuhikaku’s Horitsugakuzenshu Collection of Legal Texts, 60], Yuhikaku, 1972, p.399.)

(b) Conclusion of the 1956 Convention

In view of the importance of determining the applicable law regarding child maintenance obligations as described in subsection (i) above, the Hague Conference on Private International Law, an international organization for the unification of private international law, adopted the Convention on the Law Applicable to Maintenance Obligations Towards Children (Convention No.8 of 1977; hereinafter, the 1956 Convention). Japan ratified the 1956 Convention in 1977, primarily to advance international cooperation for the unification of private international law to participate in the 1956 Convention, which contained appropriate content in terms of child protection.

The 1956 Convention was groundbreaking in that, compared to the previous legal precedent, it (1) established the law of the child's habitual residence as the applicable law for child maintenance obligations (Article 1, paragraph 1). In this respect, it signified a break with the principle of nationality (the principle of the nationality of the maintenance obligor in the case of maintenance obligation toward minor children), upon which Japan had based its kinship and inheritance law. The child's habitual place of residence was considered the connecting factor in (1) because it was determined that the issue of child maintenance is closely related to the socioeconomic status of the area where the child is currently residing, making the application of the law of that area the most fitting conclusion.[(124)]

If (2) the law of the child's habitual residence, which is determined as the applicable law per (1) above, does not recognize any right to support for such child, the applicable law designated by the private international law of the forum[(125)] shall be applied (Article 3). As discussed below, the interpretation of this provision creates tensions in relation to treaty compliance obligations.

It is also important to note, in relation to part I, that (3) upon ratification of the 1956 Convention, no measures were taken under domestic law (e.g., the amendment of old legal precedents), and the 1956 Convention was directly applied as a special provision of the old legal precedents.[(126)]

(c) Agreement of the 1973 Convention and development of domestic implementing legislation

Following the adoption of the 1956 Convention, the Hague Conference on Private International Law, which sought to unify private international law on the issue of alimony, adopted the Convention on the Law Applicable to Maintenance Obligations (Convention No.3 of 1986; hereinafter, the 1973 Convention) in 1973. The 1973 Convention differs

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(124) HOSOKAWA, *op.cit.* (121), p.103.

(125) Refers to countries with issues with its courts, etcetera. 松岡博編『国際関係私法入門　第 4 版補訂』有斐閣, 2021, p.18.（高杉直執筆）(MATSUOKA Hiroshi, ed., *International Civil & Commercial Law*, 4th Edition revised, Yuhikaku, 2021, p.18. [Written by TAKASUGI Naoshi])

(126) HOSOKAWA, *op.cit.* (121), p.102.

significantly in character from the 1956 Convention in that a) it not only regulates the child but the general applicable law governing maintenance obligations arising from kinship (Article 1) and b) the applicable law designated by the Convention is not subject to any condition of reciprocity and applies regardless of whether it is the law of a signatory state (Article 3).(127)

The 1973 Convention provides that, with respect to specific applicable law, (1) first, the law of habitual residence of the obligee (Article 4, paragraph 1); (2) if support cannot be received under (1), the common national law of the parties (Article 5); and (3) if support cannot be received under (1) or (2), *lex fori* (Article 6) shall be applied. However, (4) in the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation i) under the law of their common nationality or, ii) in the absence of a common nationality, under the internal law of the debtor's habitual residence (Article 7).

As there is no difference between the 1956 and 1973 Conventions in the basic principle that the applicable law governing the obligation of maintenance is the law of habitual residence of the oblige, Japan, having already ratified the 1956 Convention, decided to ratify the 1973 Convention on the grounds that it was the next logical step.(128) Given that the 1973 Convention eliminates the application of the relevant provisions of the *Horei* in terms of (a) and (b) above,(129) it was decided to develop domestic implementing legislation and make the amendments necessary to retain *Horei* in this context: namely, the Act on the Law Governing Duty to Support (Act No. 84 of 1986; hereinafter, the 1986 Act), which stipulated the contents of the 1973 Convention, including (1)–(4) above. Consequently, (4) does "not apply to cases where the Convention on the Law Applicable to Maintenance Obligations Towards Children (Treaty No.8 of 1977) is applicable" (Article 3, paragraph 2 of the 1986 Act), was not included in the 1973 Convention. The following sections examine the "conflict" between the 1956 and 1973 Convention, on which Article 3 paragraph 2 of this 1986 Act is premised, in closer detail.

(iii) Issues concerning mutual "conflict" between the two conventions

Article 3 paragraph 2 of the 1986 Act is problematic when a child makes a claim for support against a relative by affinity (e.g., stepparents or step-grandparents), which is also

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(127) In addition to a) and b) listed in the text, it is important to eliminate the possibility of *renvoi*, a situation in which the private international law of each country is inconsistent, resulting in the law of Country A being governed by the law of Country B, but according to the private international law of Country B, the law of Country A is the applicable law; however, this issue lies beyond the scope of this paper. In this regard, see AKIBA, *op.cit.* (116), p.83; 石黒一憲『国際私法　新版』（有斐閣双書プリマ・シリーズ）有斐閣, 1990, p.409. (ISHIGURO Kazunori, *Conflict of Laws*, New Edition, [Yuhikaku Prima Collection] Yuhikaku, 1990, p.409.)

(128) 大内俊身「扶養義務の準拠法に関する法律の解説」『家庭裁判月報』38 巻 9 号, 1986.9, p.4. (OUCHI Toshimi, "A Commentary for the Act on the Law Governing Duty to Support," *Katei Saiban Geppo [Monthly Bulletin on Family Courts]*, Vol.38, No.9, 1986.9, p.4.)

(129) *ibid.*, p.8 (Note (9)).

exemplified in subsection (i) above. The child in this case is referred to herein as the "claimant child."

(a) Where the 1956 Convention applies

First, let us consider a case where the 1956 Convention is applied between states in a situation where the 1973 Convention exists. In this case, X denotes Signatory States to the 1973 Convention only, Y to Signatory States to the 1956 Convention only,(130) and Z to Signatory States to both treaties. It follows that, (α) between Z states, the 1973 Convention applies as a substitute for the 1956 Convention according to Article 18 paragraph 1 of the 1973 Convention; (β) between X and Y states, X applies the 1973 Convention within itself according to Article 3 of the 1973 Convention, while Y is under no obligation under either Convention; and (γ) between Z and Y states, the 1956 Convention is applied if the claimant child has a habitual residence in either country.(131) Here, Japan corresponds to category Z, and the 1956 Convention is applicable between Japan and Y states.

(b) The idea that it is necessary to avoid a "conflict" between the conventions

Now, let us consider case (a)(γ), specifically, cases where the claimant child filed a claim for support with the court of Japan, where the claimant child has habitual residence in State Y, and the debtor related by affinity has habitual residence in Japan. In accordance with Article 1(1) of the 1956 Convention ((ii)(b)①), the case in question is governed by the law of State Y, the habitual residence of the claimant child. However, if the claimant child was not entitled to any maintenance at all under the laws of State Y, then, according to Article 3 of the 1956 Convention ((ii)(b)(2)), the law applicable to this case will be determined by the international private law of Japan, in which the court is situated.

In this case, "Japanese private international law" is the 1986 Act, the domestic implementing legislation of the 1973 Convention. As maintenance is not available under the law of the habitual residence of the claimant child, the applicable law shall be determined in accordance with the proviso of Paragraph 1 of Article 2 or Paragraph 2 of

(130) According to the list of Signatory States to the Convention adopted at the Hague Conference on Private International Law, Y (Signatory States only to the 1956 Convention) are Liechtenstein and the Macao SAR of China as of 829, 2022. "HCCH Conventions: Signatures, Ratifications, Approvals and Accessions, Status on 29 August 2022." Hague Conference on Private International Law website.

(131) AKIBA, *op.cit.* (116), p.84. Article 30, Paragraph 4 of the Vienna Convention on the Law of Treaties (b), which was passed in 1969, but which represents conventional customary international law on this point. According to OUCHI Toshimi, then Counselor of the Civil Affairs Bureau of the Ministry of Justice, the 1956 Convention is applicable only to case (γ) in a "narrow interpretation," but the "broad interpretation" that the 1956 Convention is preferentially applied to case (α) when the claimant child has a habitual residence in one of the countries concerned can also be accepted. Moreover, the fact that Article 3, Paragraph 2 of the 1986 Act does not specifically stipulate the circumstances in which the 1956 Convention is applicable "can be interpreted as leaving the resolution of this point to interpretation of the Convention" (OUCHI, *op.cit.* (128), p.21). On why the "narrow interpretation" should be adopted, see SAKURADA and DOUGAUCHI, *op.cit.* (114), p.397. (Written by Shinichiro HAYAKAWA)

the 1986 Act ((ii)(c)②③), and against such determination, the debtor may not raise an objection under Article 3 paragraph 2 of the 1986 Act ((ii)(c)④).

The main question in this section is why Article 3 paragraph (2) of the 1986 Act prevents objection in this case. In this regard, the explanation of the drafters of the 1986 Act and those who argue in favor of it is that a) there is a "conflict" between the two treaties because a system of objection is only provided in the 1973 Convention and not in the 1956 Convention, and b) the 1956 Convention should apply to the case in question throughout,(132) so this paragraph was included so that no objection can be made.

(c) The idea that Article 3 paragraph 2 of the 1986 Act is unnecessary

An opposing view holds that there could be a passing of the baton from the 1956 Convention to the 1973 Convention in the case in question.(133) According to this argument, the obligation to comply with the 1956 Convention ends when the choice of applicable law is left to Japan's private international law in (b) above (marked with ★ in Figure 2), and the obligation to comply with the 1973 Convention subsequently arises. As the 1973 Convention does not contain a provision like Article 3 paragraph 2 of the 1986 Act (the domestic implementing legislation of the 1973 Convention), and because an objection from the debtor should be permitted in this case as well, it is argued that the restriction of the application of Article 3 paragraph 1 of the 1973 Convention by this paragraph 2 of the same article constitutes a breach of the obligation to comply with the 1973 Convention. As such, the conclusions of the 1956 and 1976 Conventions are in direct conflict on this issue. It thus seems unlikely that the Hague Convention on Private International Law, which adopted both the 1956 and 1976 Convention, would fail to address this discrepancy. The circumstances that led to this issue are examined below.

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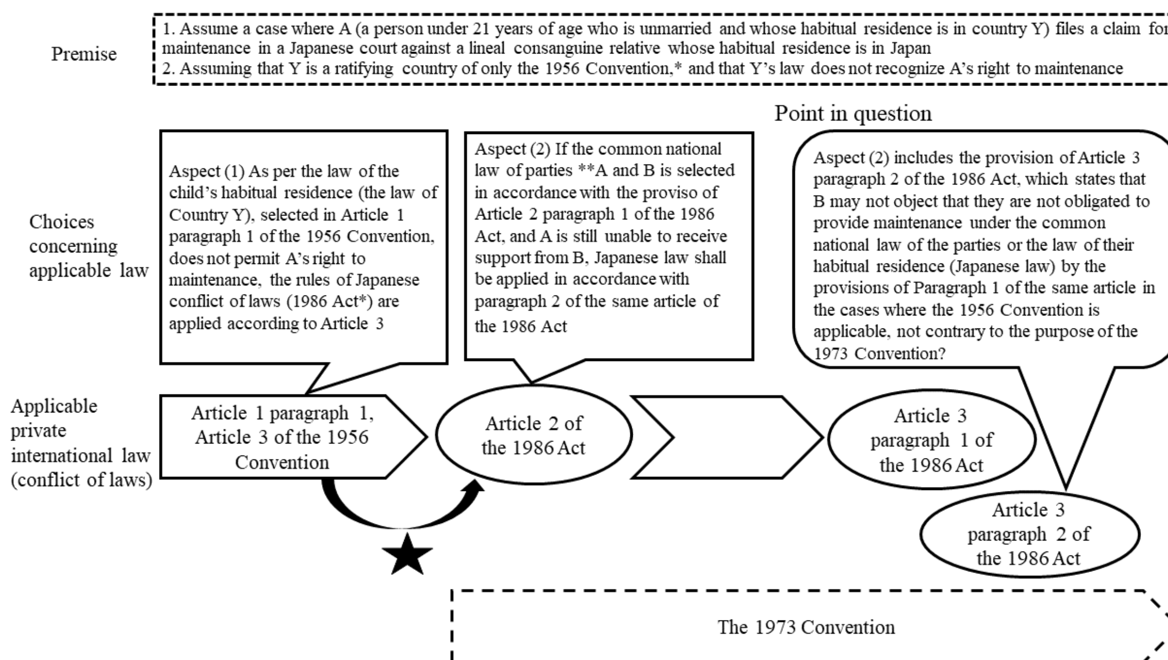
(132) As to why the 1956 Convention must be applied throughout, there are two schools of thought (OUCHI, *ibid*., p.21.). First, the 1956 Convention is a "general treaty" of the 1973 Convention, which is a "special treaty," and should prevail in accordance with "the lex specialis principle." Second, Article 19 of the 1973 Convention provides that "This Convention shall not affect <u>other international instruments</u> to which a Signatory State is or becomes a Party, including provisions <u>concerning matters governed by this Convention</u>" (underline added by the author). As the 1956 Convention also falls under "other international instruments" in the same Article, some hold that no objection should be recognized unless provided for in the 1956 Convention (SAKURADA and DOUGAUCHI, *op.cit.* (114), p.398. (Written by Shinichiro HAYAKAWA))

(133) 石黒　前掲注 (127), pp.407-411. (ISHIGURO, *op.cit.* (127), pp.407-411.); 同『国際私法 第 2 版』(新法学ライブラリ　16) 新世社, 2007, pp.405-407. (*idem*, *Conflict of Laws*, 2nd Edition [New Collection of Legal Texts 16], Shinseisha, 2007, pp.405-407.)

Figure 2: Relationship between the two conventions on child maintenance obligations and domestic implementing legislation.



(*) In the figure, "1956 Convention" refers to the Convention on the Law Applicable to Maintenance Obligations Towards Children (Convention No. 8 of 1977), "1973 Convention" refers to the Convention on the Law Applicable to Maintenance Obligations (Convention No. 3 of 1986) and "1986 Act" refers to the Act on the Law Governing Duty to Support (Act No. 84 of 1986).
(**) "Common national law of the parties" means the law of the place of nationality common to A and B. It is possible that there is no common national law of the parties.
Source: Created by the author.

(2) Discussions at the Hague Conference on Private International Law and its ripple effects

(i) Discussions at the eighth session regarding the 1956 Convention

According to the minutes of the eighth session of the Hague Conference on Private International Law, the following draft was prepared as a precursor to Article 3 of the 1956 Convention:[134]

> Notwithstanding the provisions of the preceding two Articles, the law declared applicable by the national conflict rules of the place where the court is situated shall be applied whenever the law would result in a more advantageous solution for the child.

[134] Conférence de La Haye de Droit International Privé, *Actes de la Huitième Session*, 3 au 24 Octobre 1956, La Haye: Bureau Permanent de la Conférence, 1957, p.175. Underline added in the quoted text added by the author.

(in French) Sera appliquée, contrairement aux dispositions qui précèdent, la loi déclarée applicable par les règles nationales de conflit du tribunal saisi, toutes les fois que celle-ci entraînerait une solution plus avantageuse pour l'enfant.

In response to this draft, Japan agreed to it as being in the best interest of the child,[135] although arguments were also made against it. According to the report of the committee that deliberated on the issue, they were of the opinion that it was sometimes difficult to determine which law would provide “a more advantageous solution.” Louis I. De Winter, the representative of the Netherlands, who prepared the report, added that, in some cases, the comparative laws contain a mixture of provisions favorable and unfavorable to the child, undermining the value of the 1956 Convention, which aims to ensure that the same substantive legal[136] provisions are applied as far as possible, regardless of the forum.

Article 3 ((1)(ii)(b)②), as amended by this process, reads as follows:[137]

Article 3 Notwithstanding the provisions of the preceding two Articles, the law declared applicable by the national conflict rules of the place where the court is situated shall be applied in the case where the law of the child’s habitual residence would refuse the child all rights to maintenance.

(in French) Contrairement aux dispositions qui précèdent, est appliquée la loi désignée par les règles nationales de conflit de l'autorité saisie, au cas où la loi de la résidence habituelle de l'enfant lui refuse tout droit aux aliments.

In relation to this amendment, De Winter pointed out:[138]

It follows that the court does not need to weigh up the pros and cons of different legal systems. There is only one case in which, under this provision, it is permitted to depart from the main rule of the Convention: namely, where, in the present case, application of the law of the child’s habitual residence would not recognize a right to maintenance.

(in French) Il s'ensuit que le juge n'a pas besoin de balancerle pour et le contre de différents systèmes de droit. Il n'y a qu'un seul cas où, suivant cette disposition, l'autorité saisie peut s'écarter de la règle principale de la Convention: à savoir lorsque, en l'espèce, l'application de la loi de la résidence habituelle de l'enfant ne reconnaîtrait pas un droit

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(135) *ibid.* Chihiro Tsuruoka, the then Minister Extraordinary and Plenipotentiary to the Vatican, spoke on behalf of Japan.

(136) In contrast to private international law, which is an indirect norm specifying the law of one of the jurisdictions, civil law, commercial law, and other laws directly regulate rights, obligations, and legal relationships. 澤木敬郎・道垣内正人『国際私法入門　第 8 版』有斐閣, 2018, p.7. [SAWAKI Takao and DOUGAUCHI Masato, *Introduction to Private International Law*, 8th edition, Yuhikaku, 2018, p.7.]

(137) Underline added by the author.

(138) Conférence de La Haye de Droit International Privé, *op.cit.* (134), p.312. Underlines added by the author.

aux aliments.

However, after Japan ratified the 1956 Convention, the following commentary on Article 3 was made in Japan by Associate Prosecutor of the Civil Affairs Bureau of Ministry of Justice, HOSOKAWA Kiyoshi:(139)

> If the law of the habitual residence of the child, as designated by the Convention, denies the right to maintenance while the law of the international private law of the place of jurisdiction recognizes the right to maintenance, the child will be adversely affected by the conclusion of the Convention, which is contrary to the purpose of the Convention to protect children, and this Article provides that in such a case the applicable law as designated by the international private law of the forum state shall apply.

In this respect, De Winter contends that it is unnecessary to ascertain the content of the applicable law as designated by the private international law of the forum state when Article 3 of the 1956 Convention applies. In response, Hosokawa clarified that the Article was relevant when the applicable law recognized the right of the child to receive maintenance (referred to as the Hosokawa Opinion in (3)).

(ii) Discussions at the twelfth session and subsequent Special Committee on the 1973 Convention

Held in 1972, the twelfth session of the Hague Conference on Private International Law was scheduled to develop a Convention on the Law Applicable to Maintenance Obligations for adults, but was unable to complete the work within the session.(140) In 1973, the Special Committee revised its original policy and began working on a comprehensive treaty on law governing support obligations that included children (i.e., the 1973 Convention).(141)

From the outset, time was devoted to the “conflict” between the 1956 and 1973 Conventions and reconciling the two,(142) albeit with no success. In his report, the Belgian delegate, Michel Verwilghen, explained that he did not mention the need for a provision equivalent to Article 3 paragraph 2 of the 1986 Act, which reads as follows:(143)

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(139) HOSOKAWA, *op.cit.* (121), p.104. Underline added by the author.
(140) Conférence de La Haye de Droit International Privé, *Actes et documents de la Douzième Session*, 2 au 21 Octobre 1972, Tome IV Obligations alimentaires, La Haye: Bureau Permanent de la Conférence, 1975, p.276.
(141) *ibid.*, pp.295-298 (Procès-verbal No.3).
(142) *ibid.* pp.309-311 (Procès-verbal No.5), 331-332 (Procès-verbal No.8), 344-349 (Procès-verbal No.10).
(143) *ibid.*, pp.462-463 (Rapport Verwilghen). Text in square brackets is supplementary text provided by the author.

Thus, for instance, claims in respect of persons related by affinity (covered by the 1956 Convention) are resolved in a different manner in the 1973 Convention. Some States might have little interest in remaining bound by the earlier text in their relations with countries which are parties to that Treaty, but which do not ratify the 1973 Convention […]. In particular, they might regret that one of the aims of the Commission […], namely, to prevent there being more than one applicable system, would not be fully attained, since the parties, as well as courts, would in each case have to check on the status of ratifications of both Conventions.

(iii) Response of Japan and Germany

At the time of ratification of the 1973 Convention, Japan developed its domestic implementing legislation (the 1986 Act), as seen in subsubsection (1)(ii)(c). Japan also sought to negate the need for its judges to have to consider two treaties.[144] Like Japan, Germany ratified both the 1956 Convention and the 1973 Convention. However, where Germany developed Article 18[145] of the Act for Enforcement of the Civil Code, the country's private international law on alimony, prior to ratifying the 1973 Convention, there is no provision corresponding to Article 3, paragraph 2 of Japan's 1986 Act. Moreover, none of the commentaries published in the country have taken the view that there should be a provision equivalent to this paragraph.[146]

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[144] Yoichi Kikuchi, "Japan's Acceptance of the Hague Convention on the Law Applicable to Maintenance Obligations," *The Japanese Annual of International Law*, No. 30, 1987, p.42.

[145] Gesetz zur Neuregelung des Internationalen Privatrechts vom 25. Juli 1986 (BGBl. I S.1145-1146). However, as the EU later decided to apply internally the Protocol on the Law Applicable to Maintenance Obligations, adopted at The Hague Conference on Private International Law in 2007, across the region, Germany, as an EU member state, removed Article 18 of the Act for Enforcement of the Civil Code on 18 June 2011, in line with its coming into force. See BGBl. 2011 I S.917,

[146] The following statement was made regarding the relationship between the 1956 and 1973 Conventions: ① "When the child (until the expiration of the age of 21 years) has his habitual residence [...] in Liechtenstein […], the 1956 Convention, not the 1973 Convention, shall be applied." Indeed, this Convention is in principle linked to the law of the habitual residence of the obligee, as is the 1973 Convention (Article 1, Paragraph 1). Unlike the 1973 Convention, however, where a child cannot obtain alimony under the primary applicable law of maintenance, the Convention specifies neither the law of the common national law of the parties nor—subsidiarily—lex fori, but the law of the state to which the office in which the petition is filed is based by its domestic conflict of laws provisions (Article 3, 1956 Convention). But since Germany's domestic conflict of laws is now identical to the 1973 Convention, even in cases involving children living in [...] Liechtenstein [...] it is permissible to rely on the common national law of the parties as an auxiliary, and finally lex fori" (Dieter Henrich, *Internationales Familienrecht*, Frankfurt am Main: Verlag für Standesamtswesen, 1989); (2) "Article 3 of the [1956 Convention] makes clear that 'the laws declared applicable by the national conflict rules of the place where the court is situated' specify the law applicable to such maintenance claims. This is generally understood to refer to the autonomous right of the forum state of each case to designate the [applicable law.] But if, [a party to the 1956 Convention] has replaced its own independent private international law on maintenance obligations with the 1973 Hague

(3) Summary

In light of the discussion in section (2), it can be inferred that Article 3 paragraph 2 of the 1986 Act was included because the purpose of Article 3 of the 1956 Convention was interpreted based on Hosokawa's view. According to the Hosokawa Opinion, the application of Article 3 of the 1956 Convention in the case in question in (1)(iii)(b) is premised on the claimant child being entitled to maintenance under the law governed by the private international law of the forum state. This notwithstanding, if the objection from the debtor is accepted according to Article 3 paragraph 1 of the 1986 Act (1973 Convention), the rights of the claimant child would be denied and the purpose of Article 3 of the 1956 Convention would not be achieved. Therefore, it is understood that Article 3 paragraph 2 of the 1986 Act was put in place in order to avoid this "conflict."

In the methodology of private international law, the idea that the applicable law should be chosen in such a way that the substantive legal objective (in this section, "protection of the child") can be realized is termed "result-selectivism."(147) In contrast, the traditional methodology of private international law involves considering what is objectively the legal order most familiar to the parties and following its actual treatment regardless of the outcome.(148)

De Winter's view in subsection (2)(i) appears to argue that Article 3 of the 1956 Convention was result-selectivist before the amendment, while his argument for the same Article post-amendment is based on traditional methodology. However, the Hosokawa Opinion considers Article 3 of the 1956 Convention, as amended, to be a result-selectivist provision as well. The existence of Article 3 paragraph 2 of the 1986 Act, which was established through this process, still poses a difficult question regarding the obligation to comply with treaties, and seems to paper over the cracks in the methodology of private international law.

Convention on Maintenance Obligations [the 1973 Convention], the 'states conflict rule' will refer to the 1973 Convention, and the 1973 Convention will apply in full in those countries, apart from the earlier agreement [the 1956 Convention], which preceded it" (Kurt Rebmann und Franz-Jürgen Säcker (Hrsg.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 7: Einführungsgesetz zum Bürgerlichen Gesetzbuch, Internationales Recht, München: C.H. Beck, 1983, p.1222. (Kurt Siehr)). Note, underline added by the author.

(147) 石黒一憲『現代国際私法　上』東京大学出版会, 1986, p.61. (ISHIGURO Kazunori, *Contemporary Private International Law* Vol.1, University of Tokyo Press, 1986, p.61.)

(148) The traditional methodology, which has also been called a "jump into darkness" because it does not question the outcome after specifying the applicable law, is based on the idea of tolerance for foreign laws that are different from one's own and the notion of the essential equality of foreign legal orders. *ibid.*

III Enactment of the Act for the Preparation of Relevant Acts for the Conclusion of ILO Convention No. 105

1 *Chronology and Background*

(1) Resolution on the commemoration of the centenary of the foundation of ILO

On June 26, 2019, the House of Representatives and the House of Councillors unanimously passed the “Resolution Concerning Japan’s Further Contribution to the International Labour Organization (ILO) on the Commemoration of the Centenary of its Foundation” (hereinafter, the Centenary Resolution) at the plenary session of the 198th session of the Diet.[(149)] In the Centenary Resolution, the ILO, founded in 1919 after the First World War (1914–1918), was recognized for its efforts to improve and enhance working conditions and the employment environment and to establish fundamental rights related to work through activities, such as the formulation of international labor standards and development cooperation, based on the universal principle in the preamble to its charter that “universal and lasting peace can be established only if it is based upon social justice.” The Centenary Resolution also pointed out that the ILO Declaration on Fundamental Principles and Rights at Work,[(150)] adopted by the ILO in 1998, sets forth four fundamental rights principles to be respected and observed by member states, and that while international efforts are underway to ratify and implement the corresponding eight Fundamental Conventions, Japan has yet to approve some of these Fundamental Conventions. Table 1 details the Fundamental ILO Conventions (hereinafter, Fundamental Conventions) that have yet to be ratified.

(149) 第 198 回国会衆議院会議録第 33 号（一） 令和元年 6 月 26 日 pp.1-2. (*Minutes of the Plenary Sittings of the House of Representatives during the 198th Session of the Diet*, No.33-1, 2019.6.26, pp.1-2.); 第 198 回国会参議院会議録第 30 号 令和元年 6 月 26 日 pp.1-2. (*Minutes of the Plenary Sittings of the House of Councillors during the 198th Session of the Diet*, No.30, 2019.6.26, pp.1-2.)

(150) “ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up,” 18.6.1998. ILO Japan Office website.

Table 1: ILO Fundamental Conventions not ratified by Japan as of June 2019

Convention	Year established	Ratifying countries*	Summary	Japan's reasons for not ratifying it**
Convention concerning the Abolition of Forced Labor (No. 105)	1957	176/187 (94.1%)	Commits ratifying countries to the abolition of any form of forced or compulsory labor as a sanction for expressing political opinions, as a means of labor discipline, or as a sanction for participating in general strikes.	It is necessary to examine the consistency of the Convention with the fact that Japan has established penalties of imprisonment with work for certain political acts by national public officials; conspiracy, incitement, or instigation of acts of dispute by national and local public officials; and violation of labor discipline by persons engaged in certain types of work.
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	1958	175/187 (93.6%)	That no discriminatory treatment shall be made in employment and occupation on the basis of race, color, sex, religion, political opinion, or family origin.	It is necessary to examine the consistency of the Convention with Japan's provisions on restrictions on the expression of political views by public officials and on sex-based protection of employment and working conditions.

(*) The number of ratifying countries as of October 15, 2021, is expressed as [number of ratifying countries]/[number of member countries] and percentage of ratifying countries among member countries. Note, the number of ratifying countries includes those that have given notice of their annulment; therefore, according to the Ministry of Foreign Affairs, the number of States Parties to the Convention concerning the Abolition of Forced Labor (No.105) was 174 as of February 1, 2022. 外務省「強制労働の廃止に関する条約（第百五号）の説明書」(Ministry of Foreign Affairs, Explanatory Notes to the Convention Concerning the Abolition of Forced Labor [No.105]).

(**) 第 204 回国会参議院厚生労働委員会会議録第 23 号　令和 3 年 6 月 8 日　p.30.（井内雅明厚生労働省大臣官房総括審議官答弁）(*Minutes of the Committee on Health, Labor and Welfare of the House of Councillors during the 204th Session of the Diet*, No.23, 2021.6.8, p.30. [Reply by the Director-General of the Minister's Secretariat of Ministry of Health, Labor, and Welfare, IUCHI Masaaki]].

(Source) Created by the author based on ILO 駐日事務所『国際労働基準—ILO 条約・勧告の手引き—2022-2023 年版』2022.1, pp.33, 38. (ILO Office in Japan, *International Labor Standards: A Guide to ILO Conventions and Recommendations 2022–2023*, 2022.1, pp.33, 38).

(2) Issues due to the Fundamental Conventions not being ratified

As the Centenary Resolution makes clear, Japan is one of the original members of the ILO, having been a permanent member since 1954. As a country that has played an important role in the ILO for many years and actively led the promotion of ILO activities in Japan and abroad, Japan is required to resolve the situation of having unratified fundamental conventions. The Centenary Resolution further states, "We must continue to make efforts to ratify those treaties that have not yet been ratified, and we must also work

with the international community to ensure the implementation of the treaties that have already been ratified."[151]

Moreover, some of the economic partnership agreements that Japan has already concluded stipulate that efforts to ratify the Fundamental Conventions are an obligation of the signatory countries,[152] and the international labor standards established by the ILO are emphasized in the selection criteria for ESG investments.[153] Compliance with the Fundamental Conventions has become important for Japanese companies to attract both domestic and foreign investment, and ratification of the Fundamental Conventions has become essential for the facilitation of international economic activities.[154]

(3) History of enactment

Amid the situation described above, the Japanese Parliamentarians' League on ILO Activities drafted a bill to improve the provisions of domestic laws for the ratification of the fundamental conventions not yet approved by Japan, the first of which was the Convention Concerning the Abolition of Forced Labor (hereinafter, ILO Convention No. 105). The bill was submitted to the House of Representatives on May 31, 2021, by Diet members of the ruling and opposition parties, led by the League, and approved by the House of Representatives Health, Labor and Welfare Committee on June 2, 2021. It was passed by the House of Representatives on the following day, passed by the House of Councillors on June 8, and passed and enacted by the House of Councillors plenary session

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(151) *op.cit.* (149)

(152) A keyword search for Japan in the ILO's Labor Provisions in Trade Agreements Hub (https://www.ilo.org/LPhub/) shows that 7 of the 18 regional trade agreements concluded by Japan contain labor provisions (i.e., provisions requiring the protection and promotion of workers' rights through various forms of cooperation and dialogue among trade unions, business organizations, and the general public. Of these, two—Article 16.3.3 of the Japan-EU Economic Partnership Agreement and Article 16.3.3 of the Japan-UK Comprehensive Economic Partnership Agreement—include provisions to pursue the ratification of the fundamental Conventions.

(153) ESG investment refers to investments that take into account not only traditional financial information but environmental, social, and governance factors ("ESG Investment," Ministry of Economy, Trade and Industry website). In ESG investments, whether the investee complies with international labor standards is one of the matters to be evaluated from the perspective of "S (society)," and the interpretation and evaluation of international labor standards indicated by the ILO are referred to in this context. See Bernd Waas, "The 'S' in ESG and International Labor Standards," *International Journal of Disclosure and Governance*, 18(4), 2021.12, pp.403-410.

(154) 原田悠希「未批准の ILO 基本条約の批准に向けた取組について―「強制労働の廃止に関する条約（第一〇五号）の締結のための関係法律の整備に関する法律」の制定―」『地方公務員月報』697 号, 2021.8, p.36. (HARADA Yuki, "Towards Ratification of the ILO Fundamental Convention Which Japan Has Not Ratified Yet: Enactment of the Act on Coordinating the Relevant Acts to Ratify the Convention Concerning the Abolition of Forced Labor, 1957 [No.105]," *Chiho Komuin Geppo (Monthly Local Public Employee)*, No.697, 2021.8, p.36.)

on June 9.(155) This can be regarded a landmark case in which Diet members themselves made efforts to fulfill Japan's constitutional obligation to comply with treaties by meticulously interpreting the treaties necessary for the development of domestic laws for the implementation of said treaties.

During the Diet's deliberations, the proposing members argued that, in order to enable the ratification of ILO Convention No. 105, the proposed law change the penalty of imprisonment with work, which is prohibited by the Convention, to imprisonment without work, without entering into the individual propriety of such penalties.(156) The Japanese Communist Party opposed the proposed bill, arguing that while they agreed with the need to promptly ratify ILO Convention No. 105, it should do so by eliminating the provisions prohibiting political acts by state civil servants and restrictions on the basic labor rights of public servants,(157) which were in violation of the Constitution and the Convention.(158)

This Act was enacted on June 16, 2021, by the Act on Coordinating the Relevant Acts to Ratify the Convention Concerning the Abolition of Forced Labor, 1957 (No.105) (Act No.75 of 2021; hereinafter, the Act). The Act was subsequently promulgated and entered

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(155) 相原康伸「ILO 第 105 号条約締結のための整備法案の可決・成立に対する談話」2021.6.9. (AIHARA Yasunobu, "Statement of General Secretary of the Japanese Trade Union Confederation [RENGO] on the enactment of the Act to ratify ILO Convention No.105," 2021.6.9, RENGO website.).

(156) 第 204 回国会衆議院厚生労働委員会議録第 24 号　令和 3 年 6 月 2 日　p.49.（中川正春議員答弁） (*Minutes of the Committee on Health, Labor and Welfare of the House of Representatives during the 204th Session of the Diet*, No.24, 2021.6.2, p.49. [Statement of Rep. NAKAGAWA Masaharu])

(157) Regarding a) On the Restriction on Political Acts under the provision of Article 102, Paragraph 1 of the National Public Service Act (Act No.120 of 1947), (1) the minority opinion in the so-called Sarufutsu decision of the Supreme Court, Grand Bench, November 6, 1974 (Keishu 28(9), 393) held that the said paragraph uniformly delegated prohibited acts as duties and burdens in the public service relationship and prohibited acts subject to punishment as a single unit, without distinguishing them, and that such a delegation, insofar as it related to delegation of criminal punishment, violated the Constitution; and (2) in the so-called Horikoshi decision of the Tokyo High Court, March 29, 2010 (Keishu 66(12), 1687)—in which a Ministry of Health, Labor and Welfare official who was in charge of duties which did not allow his discretion, who was assigned to a local branch office, and who was not in a managerial position, did nothing but silently distribute the political party-issued newspaper and the political documents into the mailboxes of other people's houses and offices, etcetera, on his days off, independent of his workplace or duties, in the area around his residence, which was away from his workplace or service district, without identifying himself as a public official—the application of penalties, including those of the same section, were found to violate the Constitution. Note, the Horikoshi decision of the Supreme Court, the Second Petty Bench, December 7, 2012 (Keishu 66(12) 1337), found the abovementioned part of the judgment in prior instance stating about unconstitutionality as applied "is invalid". Moreover, on b) The relationship between the restrictions on basic labor rights of civil servants and the ILO Conventions, see 人事院『年次報告書　平成 23 年度』2012.6.15, pp.71-74. (National Personnel Authority, FY2011 Annual Report, 2012.6.15, pp.71-74.)

(158) 第 204 回国会衆議院厚生労働委員会議録第 24 号　前掲注(155), p.51.（宮本徹委員討論）(*Minutes of the Committee on Health, Labor and Welfare of the House of Representatives during the 204th Session of the Diet*, No.24, 2021.6.2, p.49. [Statement of Rep. MIYAMOTO Toru])

into effect on July 6 of the same year.[159]

2 *Overview*

(1) Penalties that may constitute forced labor prohibited by ILO Convention No.105

The scope of "any form of forced or compulsory labor" as referred to in ILO Convention No.105 is quite broad, and includes prison labor or other forms of compulsory labor exacted as a consequence of a conviction in a court of law.[160] However, forced labor subject to prohibition is limited to those means, sanctions, or methods listed in the left column of Table 2. According to the Committee of Experts on the Application of Conventions and Recommendations (hereinafter, the Committee)[161] established by the ILO, "while convict labor exacted from common offenders such as robbery, kidnapping, bombing or other acts of violence or acts or omissions that have endangered the life or health of others, or numerous other offences, is intended to reform or rehabilitate them, the same need does not arise in the case of persons convicted for their opinions or for having taken part in a strike."[162]

Forced labor as a "means of labor discipline" is one of the most sensitive judgments of forced labor prohibited by ILO Convention No.105. In this respect, the Committee noted that while most countries do not currently have provisions allowing imprisonment as a means of labor discipline, imprisonment is often imposed as a sanction for breaches of labour discipline and merchant shipping settings.[163] The Commission went on to clarify its view that imprisonment with work as a sanction for an act that endangers the essential functions of the public utility or the safety or health of persons in the case of employees of the public utility, or the safety of ships or the safety or health of crew and passengers in the case of merchant seamen, is not forced labor prohibited by ILO Convention No. 105.[164]

This Act, with reference to the observations by the Committee above, provides for penalties that may constitute forced labor prohibited by ILO Convention No. 105, and are presented in the right-hand column of Table 2.

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(159) The effective date of this Act is "the date on which 20 days have elapsed from the day of its promulgation" (Paragraph 1 of the Supplementary Provisions).

(160) *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008,* Report III (Part 1B), Geneva: International Labor Office, 2012.7.1, p.131.

(161) ILO 駐日事務所『国際労働基準—ILO 条約・勧告の手引き—2022-2023 年版』2022.1, pp.14-16. (ILO Office in Japan, *International Labor Standards: A Guide to ILO Conventions and Recommendations, Edition 2022-2023*, 2022.1, pp.14-16.)

(162) *Giving Globalization a Human Face*, *op.cit.* (160).

(163) *ibid*., p.136.

(164) *ibid*., pp.136-137.

Table 2: Penalties that may constitute forced labor prohibited by ILO Convention No.105

Forced labor prohibited by ILO Convention No. 105	Relevant provision before amendment [after amendment]*
(1)(a) Forced or compulsory labor as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system	・Article 110, paragraph (1), item (xix) of the National Public Service Act (Act No.120 of 1947) [Article 111–2, paragraph (2)] ・Article 119, paragraph (1), item (i) of the Self Defense Forces Act (Act No.165 of 1954) [Article 119–2]
(2) Forced or compulsory labor as a method of mobilizing and using labor for purposes of economic development	
(3) As a means of labor discipline	・Article 128, item (iv) of the Mariners Act (Act No.100 of 1947) [Article 128–2] ・Article 79, paragraph (1) of the Postal Act (Act No.165 of 1947) [No alteration] ・Article 19 of the Act on Consignment of Mail Delivery (Act No.284 of 1949) [No alteration] ・Article 34, paragraph (3) of the Heat Supply Business Act (Act No.88 of 1972) [No alteration] ・Article 178 of the Telecommunications Business Act (Act No.86 of 1984) [Article 180–2] and Article 180, paragraph (2) of said Act [No alteration] ・Article 65 of the supplementary provisions of the Act Partially Amending the Electricity Business Act (Act No.47 of 2015) [No alteration]
(d) Forced or compulsory labor as a punishment for having participated in strikes	・National Civil Service Act, Article 110, paragraph 1, Item 17 [Article 111 paragraph 2, Item 1] ・Article 61, item (iv) of the Local Public Service Act (Act No.261 of 1950) [Article 62–2]
(e) Forced or compulsory labor as a means of racial, social, national or religious discrimination	

(*) Before and after amendment by the Act on Coordinating the Relevant Acts to Ratify the Convention concerning the Abolition of Forced Labor, 1957 (No.105) (Act No.75 of 2021).
Source: Created by the author.

(2) Change of sentence types

The Committee stated that compliance of penal laws as stated above, with the Convention No.105 can be ensured at different levels: [165]

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[165] *ibid.*, p.132.

①At the level of civil and social rights and liberties when, in particular, political activities and the expression of political views, the manifestation of ideological opposition, breaches of labour discipline and the participation in strikes are beyond the purview of criminal punishment;
②at the level of the penalties that may be imposed, when these are limited to fines or other sanctions that do not involve an obligation to work;
③at the level of the prison system, when the law confers a special status on prisoners convicted of certain political offences, under which they are free from prison labour imposed on common offenders (although they may work at their own request).

The Act adopted the method described in ② above, and specifically changed the term "imprisonment with work" to "imprisonment without work" in the penalties listed in the right-hand column of Table 2.

3 ***Trends Since Enactment***

(1) Integration of the two categories of imprisonment

In June 2022, the 208th session of the Diet passed an act abolishing the categories of imprisonment with work and imprisonment without work from Japan's types of penalties, and established a new category: integrated imprisonment.(166) Under this law, those given sentences of integrated imprisonment can be detained in penal institutions and made to perform necessary work or be given guidance necessary for their reformation and rehabilitation. In response to the question of what relationship this law has with ILO Convention No. 105, the government responded:(167)

> We understand that "when it is inappropriate to assign work to inmates" in the proviso of Article 93 of the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees, partially amended by this Bill, when it is deemed inappropriate, includes cases where consideration is required to impose work in relation to the ILO Convention No.105, the so-called Convention on the Abolition of Forced Labor […]
>
> With regard to prisoners who have been sentenced to integrated imprisonment for committing acts protected by the Convention, even if it is deemed necessary to have

(166) Specifically, the Act Partially Amending the Penal Code and Other Acts (Act No.67 of 2022) and The Act on the Arrangement of Related Acts to Accommodate the Entry into Force of the Act Partially Amending the Penal Code and Other Acts (Act No.68 of 2022). With the exception of some provisions, these laws came into effect on the date specified by Cabinet Order within a period not exceeding three years from the day of the promulgation (June 17, 2022).

(167) 第 208 回国会参議院法務委員会会議録第 15 号　令和 4 年 6 月 2 日　p.10.（佐伯紀男法務省矯正局長答弁） (Minute of the Committee on Justice of the House of Councillors during the 208th Session of the Diet, No.15, 2022.6.2, p.10. [Statement of SAEKI Norio, Director-General of the Correction Bureau of Ministry of Justice])

them work in order to improve and rehabilitate them […] taking the Convention into consideration, work will not be imposed on them.

However, this government reply does not clarify whether ILO Convention No.105 is a Type A Convention or a Type B Convention as indicated in section I3(1).(168) Nonetheless, it can be understood as indicating that at least the provision(169) of the proviso of Article 93 of the Act on Penal Detention Facilities and the Treatment of Inmates and Detainees (Act No.50 of 2005) amended in association with the integration of imprisonment with and without work plays the role of domestic implementing legislation for ILO Convention No.105 by way of 2(2)③.

(2) Ratification of ILO Convention No.105

Meanwhile, in the 208th session of the Diet, the government submitted an agenda item concerning approval of the Convention Concerning the Abolition of Forced Labor, 1957 (No.105) (Approval of Treaty No.5, the 208th Session of the Diet), which was approved on June 8, 2022. Japan ratified the treaty on July 19 of the same year, and it entered into effect on July 19, 2023.(170)

Conclusion

As discussed above, the drafting of domestic implementing legislation in connection with the conclusion of treaties is inextricably tied to the task of interpreting that treaty. In the practice of concluding treaties in Japan, when domestic implementing legislation is required, we usually consult closely with the ministry responsible for the negotiation of that treaty from the outset, and negotiate together.(171) Once the treaty text is finalized, the Japanese text of the articles, the interpretation of the articles, and the draft of the domestic implementing legislation are prepared through review by the Cabinet Legislation

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(168) For an argument that ILO Conventions are the most representative Type A Convention, see 高野雄一「国際労働条約の国内法的効力」『法律時報』34 巻 9 号, 1962.9, pp.32-33 (TAKANO Yuichi, "Domestic Legal Force of International Labor Standards in the Form of Conventions," *Horitsu Jiho*, Vol.34, No.9, 1962.9, pp.32-33.)

(169) The text reads, "Provided, however, that this does not apply to cases when it is inappropriate to assign work to inmates."

(170) 「強制労働の廃止に関する条約（第百五号）」の批准書の寄託」2022.7.19. ("Deposit of the Instrument of Ratification of the Convention Concerning the Abolition of Forced Labor [No.105]," 19.7.2022.), Ministry of Foreign Affairs website.

(171) MATSUDA, *op.cit.* (46), pp.325-326.

Bureau.[172]

The treaties discussed in this paper are multilateral treaties. The final agreed-upon text of multilateral treaties are known to suffer ambiguous terms and expressions, making them unclear in their meaning.[173] In addition, several "emotional factors" influenced the thoughtful and balanced judgments in the process of establishing the Rome Statute discussed in chapter II1,[174] and there were major last-minute revisions to the focal article in the process of establishing the 1956 Convention on child maintenance obligations discussed in chapter II2. The manner of domestic implementation of the respective treaties in Japan has already been discussed, but the question in II1 was whether that implementation was consistent with the purpose of the treaty as a whole, while II2 focused on whether the provisions of subsequent domestic implementing legislation were consistent with the wording of the treaty. As this discussion indicates, when Japan drafts domestic implementing legislation in connection with the conclusion of a treaty, the careful and precise interpretation of the relevant treaty is essential to fulfilling the obligation to comply with the treaty.

In the legislative process of the Diet Members' Bill discussed in part III, the Diet Members who drafted the bill provided a detailed interpretation of the articles with a focus on harmonizing domestic legislation with the Convention, the text of which had already been finalized but not yet ratified by Japan. Attention should be paid to how the passage of this landmark legislation by lawmakers will affect trends surrounding the treaties that Japan has not ratified.[175]

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(172) *ibid.*, p.326.
(173) *ibid.*, p.317.
(174) 小和田恆・芝原邦爾「〔対談〕ローマ会議を振り返って―国際刑事裁判所設立に関する外交会議―」『ジュリスト』1146 号, 1998.12.1, pp.18-19. (OWADA Hisashi, SHIBAHARA Kuniji, "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: A Talk," *Jurist*, 1146, 1998.12.1, pp.18-19.)
(175)『わが国が未批准の国際条約一覧　2013 年 1 月現在』(調査資料 2012-3-d) 国立国会図書館調査及び立法考査局, 2013.3.29. (*List of International Conventions not yet ratified by Japan, as of January, 2013* [Research Materials 2012-3-d], Research and Legislative Reference Bureau, National Diet Library. 2013.3.29.)