Supplementing the Pitfalls of Japan-EU MLA Agreement on Death Penalty

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1. Introduction

From 1999 to 2008, more than 150 cases of mutual legal assistance (MLA) had been conducted between Japan and the European Union (EU) without a clear legal agreement.¹ In 2009, Japan and the EU finally concluded an agreement on mutual legal assistance in criminal matters (Agreement between Japan and the European Union on Mutual Legal Assistance in Criminal Matters, hereinafter: Japan-EU Agreement)². The requested state (Japan and the member states of the EU) is obliged to provide MLA to the requesting state in accordance with the provisions of the agreement (Article 1 of Japan-EU Agreement). Japan-EU Agreement is limited to the mutual legal assistance in stricto sense and does not regulate extradition, transfer of proceedings and enforcement of sentences (Article 1 (2)). Japan and other EU member states do not have treaties on these subjects. Therefore, the agreement is the only one legal instrument that binds these states to cooperate in criminal matters.³

While Japan-EU Agreement would contribute to the effective crime prevention and prosecution, a very controversial legal problem remains: the issue of death penalty. The EU and its member states have abolished death penalty and guarantee that individuals under their jurisdiction would not be condemned to the

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¹ Summary, Ministry of Foreign Affairs, Japan, 
² 2009 Agreement between Japan and the European Union on Mutual Legal Assistance in Criminal Matters, 2860 UNTS 223.
³ There are many universal conventions on certain international crimes to which both Japan and the EU are the parties. However, these conventions merely provide to incorporate the crimes into national legislation and cooperate with other state parties in accordance of existing obligations under international law among them.

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death penalty or executed. By contrast, Japan is one of the small number of the countries which has and practices the death penalty as the most severe and legal punishment. In Japan, the death penalty is applicable to 19 types of crimes. Those includes the crimes to which transnational cooperation is called upon such as organized homicide or terrorist bombing. The conclusion of Japan-EU Agreement would trigger the case where the EU is requested to cooperate to realize death penalty in Japan. Article 11 of Japan-EU Agreement sets out the grounds for refusal of assistance. Although the grounds include those that are important from the human rights’ perspectives including protection against death penalty, the article only provides that the requested state “may” refuse assistance. Should not it the grounds for refusal be the basis of parties’ obligation not to cooperate in cases of alleged human rights violation?

This paper discusses possible international regulation on the issue of Japan-EU Agreement and death penalty. “May” the EU refuse the cooperation in accordance with the simple reading of the text of Japan-EU Agreement, or “shall” it? It examines first the applicable laws on MLA between Japan and EU member states. The second part discusses the possibility to oblige the EU members to refrain from providing assistance to Japan in cases where death penalty would be imposed.

4 The Penal Law of Japan provides the death penalty on 11 serious crimes, namely insurrection (Article 77 of), instigation of foreign aggression (Article 81), assistance to the enemy (Article 82), arson of inhabited buildings (Article 108), damage to inhabited buildings by flood (Article 109), overturning of trains which causes the death (Article 106 (3)), detonating of explosives (Article 107), pollution of water supplies with poisonous materials and causing death thereby (Article 146), homicide (Article 199), robbery causing death (Article 240), rape at the scene of robbery causing death thereby (Article 241). Beside these, the crimes that may often have transnational features are also listed as those on which death penalty can be imposed: organized homicide (Article 3 of Act on Punishment of Organized Crimes and Control of Crime Proceeds), homicide of hostage (Article 4 of Act on Punishment of Compulsion and Other Related Acts Committed by Those Having Taken Hostages), hijack causing death (Article 2 of Act on Punishment of Unlawful Seizure of Aircraft), crashing aircraft and causing death thereby (Article 2 (3) of Act on Punishment of Conduct that Endangers Aircraft), piracy causing death (Article 4 of Act on Punishment of and Response to Piracy), use of explosives (Article 1 of the Criminal Regulations to Control Explosives).
2. The Applicable Laws

2.1. Japan-EU Agreement

The protection of human rights of the suspect, the accused or the persons who are involved in investigations is not included in the preamble or the “object and purpose” of Japan-EU Agreement. Its purpose is to oblige requested state to provide MLA in connection with investigations, prosecutions and other proceedings in criminal matters (Article 1). Therefore, the agreement has almost no provision on the obligation of requesting state, especially on human rights protection.

The tendency of absence of human rights clause in the treaty of MLA is widely seen and criticized.\(^{5}\) Even though the Resolution of the United Nations General Assembly that adopted the Model Treaty on Mutual Legal Assistance (hereinafter: Model Treaty) put emphasis on the value of legal guarantee of human rights, the actual provisions of Model Treaty seem to have no room for such protection.\(^{6}\)

Following Model Treaty’s attitude, Japan-EU agreement characterizes the clause for the grounds for refusal as permissive. The relevant provision in

\(^{5}\) It has been pointed out that MLA does not involve such a “direct and far-reaching intrusion into the personal liberty of the individual” as extradition. J. Sheedy, International legal obligations under human rights instruments, in International Co-Operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement 6 (Oxford Conference Papers, 1998), p. 11. Still, International law Association warned that “have not received the attention they deserve despite the key role they play in international co-operation in the suppression of crime.” International Law Association, Committee on Human Rights and Extradition, Helsinki Conference: Second Report (1996).

\(^{6}\) The 9\textsuperscript{th} paragraph of the Resolution refers that the General Assembly is “Conscious the need to respect human dignity and recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,” United Nations General Assembly, UN Doc. A/RES/45/117 (14 December 1990).
Article 11 reads as follows:

1. Assistance may be refused if the requested State considers that:
   (b) the execution of a request is likely to prejudice its sovereignty, security, ordre public or other essential interests. For the purpose of this sub-paragraph, the requested State may consider that the execution of a request concerning an offence punishable by death under the laws of the requesting State or, in the relations between Japan and one Member State, set out in Annex IV to this Agreement, an offence punishable by life imprisonment under the laws of the requesting State, could prejudice essential interests of the requested State, unless the requested State and the requesting State agree on the conditions under which the request can be executed;

The main difference between the state interest provision (sovereignty, security, ordre public or other essential interests) in Model Treaty and Japan-EU Agreement is that the latter includes the situation of death penalty as one of the situation to which this provision is to be applied. The insertion of this clause was strongly desired by the EU side. Not only crimes that might amount to death penalty but also the crimes on which life imprisonment may imposed can be the exception for the member states listed in Annex VI.

    Practical treatment would be as follows. According to paragraph 4 of Article 11:

4. Before refusing assistance pursuant to this Article, the requested State shall consult with the requesting State when the requested State considers that assistance may be provided subject to certain conditions. If the requesting State accepts such conditions, the requesting State shall comply with them.

Thus, if the EU countries would not wish the death penalty to be sentenced to the case to which it provides assistance, it can consult with Japan and set out the condition that Japan would not sentence death (or in cases of states in Appendix

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7 中内康夫「欧州 27 か国への刑事共助ネットワークの拡大～日・EU刑事共助協定～」『立法と調査』No.303 (2010年)24 頁。
8 Portugal’ declaration
VI, life imprisonment). Upon such consultation, the EU must grant assistance when Japan has promised not to impose death penalty. If Japan does not agree with such arrangement, the request from Japan can be refused, but the EU has to provide the reasons for refusal (Article 11 (5)).

However, this formulation does not ensure that the EU or member state always refuse such request from Japan. It is also unknown that Japan would agree with the condition to exclude death penalty as an option. From Japan’s perspective, it is substantially unfair that the case that required the EU’s assistance is treated differently from other similar serious cases. It is unfair for both the victims and the accused persons. As long as the result of the trial is unforeseen, the EU assistance should not provide such predictability. In these criminal justice policy perspectives, it is unlikely that Japan make such arrangement in cases of serious crimes that might amount to death penalty.

2.2. Conventions on Human Rights

2.2.1. Japan with Death Penalty

Japan’s system of death penalty has been criticized for long. Whereas Japan maintains the use of death penalty, it is a party to most of the universal human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC).\(^9\)

Article 6 of the ICCPR provides right to life. However, its second paragraph allows sustaining death penalty:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the

\(^9\) Japan is also party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.\textsuperscript{10}

Although Article 6 of the ICCPR left the issue of death penalty at the discretion of the member states, the following United Nations decision-makings clearly showed the will to promote abolition of death penalty. In 1984, the United Nations Economic and Social Council adopted Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.\textsuperscript{11} In 1989, the General Assembly adopted the Second Optional Protocol to the ICCPR on death penalty (the Second Optional Protocol).\textsuperscript{12} Member states to this protocol agree not to execute anyone within their Jurisdiction and to take all necessary measures to abolish the death penalty (Article 1 of the Second Optional Protocol). The General Assembly repeatedly adopted series of resolutions to call for respect international standards to protect the rights of inmates facing death penalty and to reduce the number of crimes on which death penalty can be imposed.\textsuperscript{13}

Japan has not signed or ratified the Second Optional Protocol. Japan defends itself before the Human Rights Committee, by reporting that:

In actual cases, the application of the death penalty is carried out in an extremely strict and prudent manner, as described in the judgment rendered by the Second Petty Bench of the Supreme Court (July 8, 1983): “It is allowed to choose the death penalty, when it is found inevitable to impose the ultimate penalty from the standpoint of balanced punishment, as well as from the standpoint of general deterrence because the criminal responsibility is

\textsuperscript{10} The process for seeking amnesty must be established: “4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.” The exception of death penalty is limited: “5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”


\textsuperscript{12} UN Doc. A/RES/44/128 (15 December 1989).

determined as immensely serious, after comprehensively considering the following matters: the nature, motive, and manner of the crime, especially the relentlessness and cruelty of the murder method; the severity of the consequences, especially the number of murder victims; feelings of victimization on the part of the bereaved family; social impacts; the offender’s age and criminal history; the circumstances after the crime was committed; and all other circumstances”. As a matter of fact, for the period of five years from 2006 to 2010, the number of persons sentenced to death whose death penalty judgment has become final and binding is 80 in total. All of these cases were either cruel murders or murders on the occasion of robbery, and no case that does not involve murder is found here.\textsuperscript{14}

However, the Human Rights Committee expressed its concern that, whereas in practice, the death penalty is only imposed for offences involving murder, the number of crimes punishable by the death penalty has still not been reduced and that the number of executions has steadily increased in recent years.\textsuperscript{15} It remains concerned that several of the 19 capital offences do not comply with the Covenant’s requirement to limit death penalty to the “most serious crimes”.\textsuperscript{16}

Not only the death penalty system, but also the way of execution and treatment of death row inmates is claimed to be violating other rights under ICCPR. For the conditions of the inmates, Japan explains that their treatment is “nearly equivalent to that for unsentenced persons”.\textsuperscript{17} However, the Human Rights Committee claimed repeatedly that the treatment of inmates would be the violations of Article 6, 7 and 10 of the ICCPR. In 2008, it concluded that:

It is also concerned that death row inmates are kept in solitary confinement, often for protracted periods, and are executed without prior notice before the

\textsuperscript{14} Sixth Periodic Report of States Parties, Japan, UN Doc. CCPR/C/JPN/6 (26 April 2012), para. 103.
\textsuperscript{15} Concluding observations of the Human Rights Committee Japan, UN Doc. CCPR/C/JPN/CO/5 (18 December 2008), para. 16.
\textsuperscript{16} Concluding observations on the sixth periodic report of Japan, UN Doc. CCPR/C/JPN/CO/6 (20 August 2014), para. 13.
\textsuperscript{17} Sixth Periodic Report of States Parties, Japan, UN Doc. CCPR/C/JPN/6 (26 April 2012), para. 107.
day of execution and, in some cases, at an advanced age or despite the fact that they have mental disabilities. The non-use of the power of pardon, commutation or reprieve and the absence of transparency concerning procedures for seeking benefit for such relief is also a matter of concern (art. 6, 7 and 10).

In addition, the 2014 Concluding Observation noted that “the death penalty has been imposed on various occasions as a result of forced confessions, including in the case of Iwao Hakamada, are a matter of concern (arts. 2, 6, 7, 9 and 14).”

Japan Federation of Bar Associations continuously publishes its opinion papers requesting the government and legislation to abolish death penalty. In 1980’s, four cases on which death penalty had been sentenced was reviewed and overturned. The federation pointed out the problems of Japanese death penalty system, namely, the treatment of inmates violate the international human rights standards, the system to prevent misjudgment lacks, the criteria to sentence death is ambiguous, the execution is done secretly, and so on. It also demands to left the secrecy over the practice of death penalty. Without the information on how the death penalty system is administered, fruitful nation-wide debate on the issue would be impossible.

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18 Concluding observations of the Human Rights Committee Japan, UN Doc. CCPR/C/JPN/CO/5 (18 December 2008), para. 16.
19 Concluding observations on the sixth periodic report of Japan, UN Doc. CCPR/C/JPN/CO/6 (20 August 2014), para. 13.
20 See, e.g, Request to Achieve the Abolishment of the Death Penalty System Before the Next UN Congress on Crime Prevention and Criminal Justice Due to be Held in Japan in 2020 (Japan Federation of Bar Associations, 29 November 2017).
Despite the international and internal criticism, 80.3% of Japanese population is supporting maintaining the death penalty as an option. In July 2018, 7 inmates were executed. They were members of the Aum Shinrikyo cult that attacked the subway in Tokyo using sarin and killed 13 people and injured more than thousands people in 1995.

2.2.2. The EU and its Member States without Death Penalty

The EU has its own internal mechanism for human rights. The Lisbon Treaty has conferred legally binding status on the Charter of Fundamental Rights of the European Union (the Charter). “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” (Article 51 (1) of the Charter). Thus, the Charter oblige the institutions of the EU and member states when implementing EU Law to respect the human rights that it emanates.

The Charter provides explicitly that “No one shall be condemned to the death penalty, or executed.” (Article 2 (2)). As might be expected, however,

24 Japan Federation of Bar Associations, at https://www.nichibenren.or.jp/activity/criminal/deathpenalty.html (as of 29 October 2019).
26 Article 6(1) of Treaty on the Functioning of the European Union.
27 Other protections: torture and inhuman or degrading treatment or punishment (Article 4). It ensures right to liberty and security (Article 6), respect for private and family life (Article 7), and protection of personal data (Article 8). In relation to international cooperation in criminal matters, Article 19 clearly stipulates that: “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” Equality before the law (Article 20) and non-discrimination (Article 21) must be guaranteed, and every citizen of the EU is entitled to diplomatic protection of any member state (Article 46). For criminal justice, rights to an effective
the rights in the Charter is not without limitation. Article 52 provide in general that “Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

The EU under the obligation within the Charter keeps committing to realize the full protection of human rights under the Charter.\(^{28}\) However, the United Nations Office of High Commissioner for Human Rights (OHCHR) has noted that current methods of securing human rights within the EU do not provide the level of protection required of the Member States by the Charter of the United Nations and the human rights treaties.\(^{29}\) The EU as such has yet not ratified or acceded to the United Nations human rights treaties except for the Convention on the Rights of Persons with Disabilities (CRPD).\(^{30}\) EU is not even a party to the regional instruments. Although most of the member state to the EU have

remedy and to a fair trial (Article 47), presumption of innocence and right to defence (Article 48), principles of legality and proportionality (Article 49), and rights to ne bis in idem (Article 50) are ensured.


consented to the European Convention of Human Rights (ECHR), EU itself is not (yet) party to it.\textsuperscript{31}

The Charter, though, has certain room to accept the standard and interpretation of the ECHR. Article 52 (3) allows the Charter that

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

ECHR was adopted in 1953, but at the time it did not have a provision prohibiting death penalty. In 1985, Protocol No. 6 to the ECHR that abolish death penalty in peace time entered into force. Furthermore, in 2013, Protocol No. 13 to the ECHR entered into force. This protocol abolishes death penalty in all circumstances. All the members of the EU are party to the ECHR and the protocols.

3. Obliging the EU Members to Refrain from Granting MLA to Japan

3.2. Application of Human Rights Law on Extradition to MLA

European Court of Human Rights (ECtHR) has not issued a decision on MLA to retentionist state. However, the \textit{Soering} case in 1989 declared that transnational handing over of persons may violate Article 6 of the ECHR if “the fugitive suffered or risks suffering a flagrant denial of a fair trial in the requesting country”.\textsuperscript{32} The \textit{Soering} case became a cornerstone for bringing new era for the

\textsuperscript{31} Although the Treaty of Lisbon provided for a duty of the EU to accede to the ECHR, the Court of Justice ruled that the agreement did not provide for sufficient protection of the EU’s specific legal arrangements in December 2015. The need for EU accession is widely understood, no new agreement has been reached for the time being (25 October 2019). EU accession to the European Convention on Human Rights (ECHR), at \url{http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282017%29607298} (as of 25 October 2019).

\textsuperscript{32} Soering v The United Kingdom, Judgment, application no. 14038/88 (7 July 1989),
relationship between extradition and human rights protection.\textsuperscript{33}

The following cases also formed the ECHR’s jurisprudence on prohibition of extradition to prevent death penalty to be executed. In \textit{Jabari v. Turkey}, the court ruled that deporting a woman who risked death by stoning to Iran would violate the prohibition of torture.\textsuperscript{34} In \textit{Bader and Kanbor v. Sweden}, the court ruled that deporting a man sentenced to death after an unfair trial in Syria would violate the right to life and the prohibition of torture.\textsuperscript{35} In \textit{A.L. (X.W.) v. Russia}, the court ruled that deporting a man to China, where he might be sentenced to death, would violate the right to life and the prohibition of torture and inhuman or degrading treatment.

In relation to extraordinary rendition program of the Central Intelligence Agency (CIA) of the United States, in \textit{Al Nashiri v. Poland}, the court ruled that Poland violated the rights of a CIA rendition victim by exposing him to a serious risk of facing the death penalty.\textsuperscript{36} In \textit{Al Nashiri v. Romania}, the court found several violations of the convention because of Romania’s knowledge of and involvement in an extraordinary rendition operation which enabled the CIA to bring the applicant illegally under United States jurisdiction, despite a real risk that he could face a flagrant denial of justice and the death penalty.\textsuperscript{37}

However, Gless points out that

it does not establish a blanket doctrine applicable to other cases of cooperation. When providing, for example, mutual legal assistance in the collection of evidence (to non-signatory states of the ECHR), Contracting Parties risk liability under the ECHR only if the facts satisfy the very strict ‘flagrant denial’ test.\textsuperscript{38}
Another point is that the requested State would not owe a human rights obligation to a person who is not physically within its jurisdiction.\textsuperscript{39} It is the general approach of the human rights conventions including the ECHR that a state cannot be responsible for acts committed by other States in another country.\textsuperscript{40} Therefore, analogy of Soering would not work for MLA especially when the requested state is party to such an instrument but the requesting state is not.\textsuperscript{41} Currie points out that if the requested state owes no obligation towards individuals outside its jurisdiction, then the human rights instrument is not engaged with the sending of MLA, and the potential for conflict between that instrument and the MLA treaty remains unrealized.\textsuperscript{42} The MLA treaty is thus the only instrument that governs relations between the parties.\textsuperscript{43}

3.2. International Law of State Responsibility

One might think that a state under international obligation to refrain from executing death penalty commits internationally wrongful act by granting mutual legal assistance to another state which executes death penalty,\textsuperscript{44} Article 16 of the International Law Commission (ILO)’s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) codifies that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the


\textsuperscript{41} Currie, p. 150.

\textsuperscript{42} Currie, p. 151.

\textsuperscript{43} Currie, p. 151.

\textsuperscript{44} Bharat Malkani, “The Obligation to Refrain from Assisting the Use of the Death Penalty,” \textit{International and Comparative Law Quarterly}, Vol. 63, No. 3 (2013)
internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State.

According to Article 16, in order for a MLA provided by the EU to Japan in cases of death penalty, both the assisting state and assisted state has to be bound by the international law that prohibits death penalty.

For the assisting state, ILC, in the commentary, explains that “the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.”\(^45\) For the reason for this requirement, ILC explains as follows:

An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State vis-à-vis third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State vis-à-vis third States.

For the assisted state, Article 16 regulates the situation of assisting “in the commission of an internationally wrongful act by the latter”. In order for an act to amount to internationally wrongful act, Article 2 of the ARSIWA sets out that:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State.

Because of this requirement, Malkani is of the view that the article stipulates that it is necessary that the direct actor is under obligation to refrain from doing the act:

States that have ratified a treaty that prohibits the death penalty would fulfil this criterion if they were to impose the death penalty. However, related to this is a problematic fourth criterion: under Article 16, responsibility only arises if the State committing the allegedly ‘wrongful’ act is prohibited from doing so. It follows that an abolitionist State cannot be held responsible for assisting executions in, for example, the United States of America, because there is no rule of general international law that prohibits the death penalty.”

3.3. Interpretation of the Provision on the Prohibition of Death Penalty

Neither the application of the Soering doctrine or the law of state responsibility would make the assisting Japan’s execution of death penalty illegal. Is it then legal to provide full assistance and send all the relevant personal data and records to Japan when the person is alleged to have committed serious crime which would amount to death penalty? There might be some vicious scenarios where one of the EU member state wishes Japan to execute death penalty on the person who endangers current government of that state. Or, for example, in a case of serious terrorism that has killed and infringed many people’s fundamental rights in an EU member state, the national state and the citizens may desire to sentence death to that person and uses Japan-MLA to avoid violation of ECHR.

Not only the evidence that prove the guilty of the accused, information about other personal history of the accused would play an important role in deciding the sentencing as being reported by Japan to the Human Rights Committee. In addition to the circumstances of the commission of the crime in question, “feelings of victimization on the part of the bereaved family; social impacts; the offender’s age and criminal history; the circumstances after the crime was committed; and all other circumstances” would matter in consideration to impose death penalty. What if, with intention to persuade Japanese court to sentence to death, a EU member state provide the record of criminal history of the accused?

46 Malkani, p. 527.
47 Sixth Periodic Report of States Parties, Japan, UN Doc. CCPR/C/JPN/6 (26 April 2012), para. 103.
The reason that such scenarios sound immoral stems from the promise that the EU members made by agreeing on the Protocol 13 of the ECHR. The EU states promised its citizens that they will never be targeted death penalty. This logic induces us to look at the provisions that prohibit death penalty once again. Article 2 (2) of the Charter provides that “No one shall be condemned to the death penalty, or executed.” Article 1 of the Protocol No. 13 of ECHR provides that “No one shall be condemned to such penalty or executed.” These strong statements of will leads to the duties of EU member states to take necessary measures to prevent realization of death penalty over which they have some control.

The obligation to refrain from supporting Japan to conduct death penalty seems to be deprived directly from the prohibition of death penalty on the EU member states. This interpretation is justified from the perspective of principle of estoppel and good faith. It is also explained from the treaty law’s perspective. Assisting other state to commit an act which would amount to a violation if committed by another state will undermine the object and purpose of prohibition.

4. Conclusion

This paper examined the legal issue whether the EU member states obliged to refrain from assisting Japan to execute death penalty under Japan-EU MLA regime. The conclusion of this paper is that while neither Japan-EU Agreement, Soering doctrine nor the law of state responsibility would regulate such situations, wider interpretation of the provisions that prohibit death penalty would be the basis to regulate the EU member states to cooperate with Japan.

This conclusion might lead to a discussion of “obligation not to cooperate”. While MLA is a system to facilitate crime control and effective punishment, such facilitation should not undermine the already existing system of individual human rights. The balance between criminal justice and human rights have always been critical. However, the issue of death penalty in the MLA between two actors that have very different cultural and moral background might involve one of the most difficult question related to multiculturalism, diversity, and sovereignty.

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