Japan’s Response to the Guiding Questions regarding Agenda Item 4

Question 1:
Japan believes that we should strive for “a free, fair and secure cyberspace” and enhance our capability to prevent and combat cybercrime all over the world by making the new international convention universal, practical and agreeable to all Member States. As with other chapters, the provisions on international cooperation should avoid duplication with existing international instruments and established frameworks, and should be discussed in terms of provisions that need to be included in the Convention in the context of combating cybercrime.

From this perspective, considering that the transfer of sentenced persons is not directly related to crime prevention or investigation and that its main purpose is to improve the rehabilitation environment for prisoners after their conviction, it is not appropriate to include it in a convention created in relation to specific types of crimes, and we are against its inclusion in the new convention.

With regard to the transfer of criminal proceedings, there are various cultural and social backgrounds in judicial systems among Member States, and we oppose establishing it as proceedings in this Convention because it aims to enable as many countries as possible to conclude the Convention.

We recognize that joint investigation is already utilized as a useful means to investigate cross-border cybercrime, and we support the inclusion of an article to that effect as a trigger to conduct a joint investigation while ensuring flexibility. We believe that a provision similar to Article 19 of UNTOC and Article 49 of UNCAC, which provides that joint investigations can be considered with the procedures and conditions left to the agreements of the relevant Parties.

On the one hand, international cooperation for purposes of confiscation and for the return and disposal of confiscated assets is considered one of the most important countermeasures against money laundering that uses cryptocurrency and extortion against companies by using ransomware, which are newly arising from the development of cyberspace and causing significant damage to society. On the other hand, given that confiscation of assets or their disposal restricts the property rights of private individuals and that safeguards for this purpose differ from country to country, it may not be always easy to implement confiscation as required by another Party. Therefore, it should be considered to establish provisions similar to Articles 13 and 14 of UNTOC, on the premise that specific measures to be taken can be determined in accordance with the domestic laws of each Party.
Question 2:
While we are aware that many UN Member States want the new convention to be able to deal with as many crimes as possible, it is important to focus the negotiation on important and fundamental issues in order to achieve consensus. At past sessions, many Member States called for speedier and more efficient international cooperation, including MLA. In this regard, we believe that an approach that broadens the scope of international cooperation such as MLA while narrowing the scope of criminalization will address many Member States’ concerns.

With this in mind, to promote international cooperation, Japan believes that the collection of evidence in electronic form could be the object of international cooperation beyond crimes stipulated in the Convention, subject to appropriate safeguards. We could support limiting its scope to, for example, “serious crimes” under UNTOC.

However, the content of the international cooperation provisions is linked to the content of the criminalization provisions and should be re-examined as future discussions on the criminalization provisions take place.

Question 3:
It is important that the drafting process is based on the experience of implementing established existing international agreements including UNCAC and UNTOC.

Question 4:
The relations and division of roles between criminal procedures and civil and administrative procedures vary according to the legal system of each Member State. We thus oppose obliging international cooperation in the investigation and proceedings of civil and administrative cases, and support stipulating it to the extent that the provision leaves room for cooperation at the discretion of each Party as in Article 43, paragraph 1 of UNCAC.

Question 5:
Taking into consideration the human rights safeguards and the procedural burden on the extraditing Party, extradition should be permissible only for criminal offenses punishable under the laws of both Parties concerned by imprisonment for a maximum period of at least one year or by a more severe penalty.

Question 6:
As proposed by the written submissions from the UK and the EU, not only the chapter on procedural measures and law enforcement, but also the chapter on international cooperation could provide a general principle that each Party should ensure that the establishment, implementation and application of the powers and procedures are subject to conditions and safeguards provided for under its domestic law, which should provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations under applicable international human rights instruments, and which should incorporate the principle of proportionality.

In addition, each international cooperation provision should include appropriate safeguards. For example, with regard to extradition and mutual legal assistance, a provision should be made that allows a request to be denied if the request is considered to be made for prosecution or punishment on the grounds of sex, race, religion, nationality, ethnic origin, or political opinion, or if the request does not satisfy dual criminality.

**Question 7:**
Since the evidence collected through MLA often involves personal information, privacy and personal data need to be protected. For example, a Party that has received personal information should not further process it for purposes that cannot reasonably be considered to be related to the initial purpose and when this is not permitted under its domestic legal framework.

**Question 8:**
Extradition has the serious effect of extraditing the offender to the requesting Party. Given the consequences of extradition, diplomatic channels should be the principal channels of communication for extradition. However, in order to facilitate communication, it would be useful to have a provision that Parties communicate to the Secretariat of the Convention the name and address of each authority responsible for making or receiving requests for extradition or provisional arrest in the absence of a bilateral extradition treaty and that the Secretariat keep a register of authorities updated.

**Question 9:**
Considering that the speed of damage escalation and evidence dissipation of cybercrime is much faster than traditional types of crimes, mutual legal assistance should be available directly through the communications between the central authorities of the Parties.

**Question 10:**
Considering that the speed of expansion of damage and dissipation of evidence of cybercrime is much faster than conventional types of crimes, we may consider establishing a provision that requests for MLA or related reporting which could be made through means such as e-mail under certain conditions, such as when an appropriate level of security and confidentiality is ensured.

**Question 1:**
In general, we consider the following information important in a request for international cooperation:
- the authority making the request;
- the subject matter and nature of the criminal proceedings to which the request relates and the name of the authority conducting such criminal proceedings;
- a summary of the relevant facts;
- a description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed;
- where possible, the identity of any person concerned;
- the purpose for which the evidence, information or action is sought; and
- the text or a statement of the relevant laws and regulations, including applicable penalties, of the requesting Party.

However, since the information necessary for the requested Party to cooperate depends on the content of the request, there should be a provision that the requested Party may ask for information necessary to cooperate.

Japan’s submission proposes the creation of a template for requests and other forms to facilitate and expedite international cooperation regarding the implementation mechanism. It would be useful in facilitating cooperation that the Convention stipulates the minimum necessary information to be provided as part of a request and to share a common understanding among the parties.

**Question 2:**
In general, a Party receiving a request for assistance should determine, in as transparent and timely a fashion as possible and respecting the urgency and sensitivity of the request, whether it has the capabilities, capacity and resources to provide the assistance requested, and then respond to the request. On that basis, cybercrimes include those that pose a significant and imminent risk to the life or safety of individuals, and Japan considers urgent circumstances where such a risk exists an “emergency.” Japan believes that a fast-track procedure clause, which states that Parties may request prompt mutual legal
assistance if they are of the view that an emergency exists and that the requested Party
must respond to the request as quickly as possible, is necessary to respond to ongoing
emergencies caused by a cybercrime.

Besides, in order to ensure prompt assistance, we believe it would be useful to
have a provision designating 24/7 contact points for the purpose of facilitating or directly
implementing the provision of technical advice, the preservation of data, the collection of
evidence, the provision of legal information and locating suspects, and to allow requests
for assistance through that channel. With regard to communications between 24/7 contact
points, we should consider the effective use of networks based on existing international
instruments and other frameworks. However, this is not intended to preclude the use of
the current cooperation framework through INTERPOL, rather than communication
between 24/7 contact points, depending on the case.

Question 13:
The Convention should specify the grounds for refusing an extradition request, and the
requested Party should be allowed, at a minimum, to refuse extradition if it believes that
the request has been made for the purpose of prosecuting or punishing a person on account
of that person’s sex, race, religion, nationality, ethnic origin or political opinions or the
case does not meet dual criminality, in a way similar to Article 44, paragraphs 1 and 15
of UNCAC and Article 16, paragraphs 1 and 14 of UNTOC. It may also be possible to
stipulate that an extradition request may be refused if the request is considered to be made
for prosecution or punishment on the basis of sexual orientation, mental or physical
disability, or language.

Question 14:
The Convention should specify the grounds for refusing a request for mutual legal
assistance, and the requested Party should be allowed to refuse MLA, at least, if it has the
same grounds for refusal as those set forth in Article 46, paragraph 9, item (b) and
paragraph 21 of UNCAC or if it believes that the request is being made because of
prosecution or punishment on grounds of race, religion, nationality, ethnic origin, sexual
orientation, mental or physical disability, language or political opinion.

Question 15:
In order to make the Convention in a manner that ensures respect for human rights, at
least the requirements mentioned in the answers to 13 and 14 should be clarified in the
Convention. Besides, the Convention should ensure the effectiveness of MLA and
extradition by providing, for instance, that the Parties may not refuse a request for extradition or mutual legal assistance on the sole ground that the offense is also considered to involve fiscal matters.

**Question 16:**
Our answer is no. The Convention should allow Parties to refuse international cooperation when they are requested to do so on political offenses. When it comes to relative political offenses, in which crime is committed in relation to a political act, their interpretation of each country is not always in agreement, and even within a particular country, their interpretation and the scope of political offenses fluctuate with the times. Therefore, some crimes under the Convention may constitute political offenses if their purpose is political, depending on the interpretation and the scope of recognition of political offenses in each country.

Non-extradition of political offenders is a fundamental principle to protect human rights, such as freedom of expression and political activity, which are the foundations of a democratic state, and exceptions to such a principle should be carefully considered. Examples that stipulate that the offenses established in accordance with the treaty are not considered political offenses include treaties on extremely serious crimes such as terrorism and hijacking, and the UNCAC on corruption, which is easily distinguished from political offenses. While it is still under discussion as to which crimes the Convention will criminalize, we do not believe that we are in a situation where only crimes with significance or nature that justifies the exception of political offenses are being discussed. Besides, it is essential for respect for human rights to ensure the discretion to refuse extradition when it is considered that a request for extradition is made for investigation or prosecution on the basis of political opinion. We strongly oppose a provision that the offenses established in accordance with the Convention shall not be considered a political offence because such a provision could be an obstacle to making the Convention acceptable for many Member States.

**Questions 17 and 18:**
The Ad Hoc Committee may consider establishing specific provisions for mutual legal assistance on provisional measures with respect to the expedited preservation of stored computer data and the expedited disclosure of preserved traffic data. The Ad Hoc Committee may also consider establishing specific provisions for mutual legal assistance on investigative powers with respect to access to stored computer data and real-time collection of traffic data. On the other hand, mutual legal assistance with respect to
interception of content data requires particularly careful consideration in relation to the secrecy of communications. Even if a provision is to be established, it should leave room for the domestic legislation of each Party, and it is essential to include a reservation phrase such as “to the extent permitted under treaties applicable to the Party and domestic laws.”

In addition, Japan proposes that the Convention stipulates that necessary procedures under such mutual legal assistance should be initiated without undue delay, and States Parties shall make reasonable efforts to process the requests within a timeframe set out in the Convention.

Question 20:
Money laundering using crypto assets and extortion of companies using ransomware are new phenomena arising from the development of cyberspace and can cause great damage to society. International cooperation in the recovery of proceeds of crime is considered to be crucially important in combating and tackling these crimes. Therefore, it is worth considering a provision on the recovery of proceeds of crime like UNTOC and UNCAC.

In the meantime, given that confiscation of assets or their disposal restricts the property rights of private individuals and that safeguards for this purpose differ from country to country, it may not be always easy to implement confiscation as required by another Party. Therefore, it should be considered to establish provisions similar to Articles 13 and 14 of UNTOC, on the premise that specific measures to be taken can be determined in accordance with the domestic laws of each Party.

Question 21:
Certain types of cybercrimes can pose a significant and imminent risk to the life or safety of individuals. It will be beneficial that the Convention stipulates that each Party shall designate a 24/7 point of contact in order to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offenses related to computer systems and data, or for the collection of evidence in electronic form of a criminal offense.

The 24/7 network of points of contact is envisioned to facilitate or directly implement the provision of technical advice, the preservation of data, the collection of evidence, the provision of legal information and locating of suspects. Existing 24/7 networks of points of contact in wide use include one based on the Principles and Action Plan to Combat High-tech Crime formulated at the 1997 G8 Justice and Interior Ministers’ meeting. Contact points based on the Action Plan have already been established in about 90 countries and territories. Article 35 of the Budapest Convention was built on this
experience. With regard to communications between 24/7 contact points, we should consider the effective use of networks based on existing international instruments and other frameworks without undermining them.

**Question 22:**
We do not believe that it is essential at this time to establish a provision for special investigative techniques similar to those in Article 20 of UNTOC and Article 50 of UNCAC. Criminal investigation methods are likely to be subject to restrictions imposed by fundamental legal principles that cannot be easily changed in domestic legislation, such as the constitutional principles of each country, and criminal investigations must be conducted in a way that respects the fundamental human rights, which are guaranteed by the constitution of each country. Thus, the provision for special investigative techniques should include such wordings as “to the extent permitted by the basic principles of its domestic legal system,” “in accordance with the conditions prescribed by its domestic law,” or “within its means” as Article 50, paragraph 1 of UNCAC stipulates.

**Question 23:**
As for the hearings held by video or telephone conference for the taking of evidence, we can support an article similar to Article 46, paragraph 18 of UNCAC. In order for many Member States to conclude the Convention, taking into account the differences in the legal system of each Member State, it is necessary to ensure the discretion of each Party, as in the UNCAC, as to whether or not and how to conduct the hearings.

We oppose the establishment of a provision that allows the requesting Party’s diplomatic missions such hearings of their own nationals on a voluntary basis as part of consular functions. The mission of the consulate is to protect the interests of the nationals in the country of assignment. It is not appropriate to provide a provision on the missions to be carried out by diplomatic missions in the Convention, which is meant to be a criminal treaty to combat cybercrime.

**Additional guiding questions on international cooperation 1:**
Japan is of the view that careful consideration should be given to whether it is possible to transmit evidence in digital form, and in what cases and under what conditions it is permissible to submit requests in digital form. On this basis, Japan recognizes that secure platforms and communication channels should continue to be examined as technology develops and that a common international understanding has not yet been formed on the concept and format of digital signatures, seals or stamps. Therefore, this negotiating
session is not the appropriate forum to discuss such matters. Furthermore, in general, even if not provided for in a convention, it is possible to take any measures upon consultation and agreement between the requesting and requested Parties for respective mutual legal assistance to the extent permitted under domestic law of both Parties. In light of the above, Japan believes that establishing detailed provisions on these matters should be avoided in order to make the Convention useful over the long term.

Additional guiding questions on international cooperation 2:
It is not appropriate to make exceptions not to apply procedures and safeguards for mutual legal assistance, including grounds for refusal, because of the nature of the information. Information sharing, which has already been done to a certain extent through INTERPOL channels, should be effectively utilized. Furthermore, as we recognize the diversity of views on the secrecy of communications and privacy among Member States, it is not desirable to establish provisions for expedited sharing of non-content data/metadata because this Convention should be a treaty to which as many Member States as possible can accede.