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A Study on Mutual Legal Assistance in Criminal Matters to TRANSNATIONAL THREATS in Northeast Asia

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Abstract

Technological and economic development after the World War II promoted the increase of the free movement of goods, services and people, which led to globalization. Contrary to positive expectations for the globalization, it has brought negative side effects such as globalization of crime and international disorder by illegal subnational actors. The phenomenon of international disorder as a dysfunctional element in the process of globalization is expected to increase more rapidly in the future.

One of these threats is transnational crime. Transnational crime refers to crimes related to two or more sovereign states, such as the subject, object, act, the benefit, and outcome of a crime. As these transnational crimes increase, closer cooperation with foreign countries is required for prevention, investigation, prosecution, trial and punishment of crime.

However, it is questioned whether the traditional system of mutual legal assistance in criminal matters can be played as an effective countermeasure against transnational crimes becoming globalized and widened both quantitatively and qualitatively. Therefore, it is emphasized that the need to reorganize the existing system of mutual legal assistance in criminal matters to be effective. Based on these problems, the purpose of this study is to find ways to build international cooperation on police activities in Northeast Asia for transnational threats, focused on transnational crimes.

Due to the various problems inherent in the traditional legal mutual assistance in criminal matters, actual cooperation on mutual legal assistance in criminal matters is not often achieved. Moreover, the new type of mutual legal assistance in criminal matters as bilateral treaties has not been joined in Northeast Asia, and cooperation through international criminal police organizations may concern about violation in human rights.

Therefore, it is necessary to discuss how to prevent and suppress these crimes while promoting free movement of individuals and exchange and cooperation. In this article, one of these problematic situations was discussed the international cooperation plan of police activities and suggested the recommendations for improvement.

[Keywords] *National Security, Transnational Threat, Transnational Crime, Mutual Legal Assistance in Criminal Matters, National Security in Northeast Asia*

1. Introduction

Technological and economic development after the World War II promoted the increase of the free movement of goods, services and people, which led to globalization of the international society[1]. Unlike

the positive expectation for the globalization phenomenon, the globalization of the international society has brought negative side effects such as globalization of crime, greatly increased various kind of crimes due to the free movement of people, and international disorder by illegal subnational actors. The concept of disorder is not caused

by traditional issues of the twentieth century, such as arms race, security dilemma, and military conflict, but emerged from new issues of the 21st century such as terrorism, organized crime, money laundering, corruption and environmental pollution. The phenomenon of international disorder as a dysfunctional element in the process of globalization is expected to increase more rapidly in the future[2].

Thus, the State is challenged by terrorism, the proliferation of weapons of mass destruction(WMD, transnational threats such as crime, drugs and environmental pollution[3]. One of these threats is transnational crime. Transnational crime refers to crimes related to two or more sovereign states, such as the subject, object, act, the benefit(Rechtgut), and outcome of a crime. As these transnational crimes increase, closer cooperation with foreign countries is required for prevention, investigation, prosecution, trial and punishment of crime.

However, it is questioned whether the traditional system of mutual legal assistance in criminal matters can be played as an effective countermeasure against transnational crimes becoming globalized and widened both quantitatively and qualitatively. Therefore, it is emphasized that the need to reorganize the existing system of mutual legal assistance in criminal matters to be effective. Based on these problems, the purpose of this study is to find ways to build international cooperation on police activities in Northeast Asia for transnational threats, focused on transnational crimes.

2. Theoretical Background

2.1. Definition of transnational crime

Transnational crime has brought attention from academic fields and practitioners since 1990s, when they underwent significant political and economic development in the international system[4]. The collapse of the Soviet Union caused a structural change in the world politics, economy and security order by dismantling the huge anthropomorphic structures of the US-Soviet bipolar

system that dominated the post-war world order and the East-West Cold War system[5].

One of these changes is globalization. The globalization has increased concerns about the vulnerability of countries to cross-border criminal activities[4].

The rise of transnational crimes in the early 1990s and the subsequent discussion in the international security dimension ultimately led to the conclusion of the UN Convention against Transnational Organized Crime, which is the first international regime for organized crime in 2002. The objective of this Convention is to eliminate the differences in the legal framework between countries that have been obstacles to existing international mutual cooperation to combat organized crime and to establish the standards of domestic law and in particular to ratify the Convention for the establishment of Act on money laundering and anti-corruption[2].

However, the problem is that transnational crime is a term widely used not only by criminologists but also by policy-makers, law-enforcement agencies, and the general public. As transnational crime is not a legal concept, the term lacks of exact legal definition.

In the case of the United Nations, transnational crime is defined as “the commencement and prevention of crime and the direct and indirect effects of crime in more than two countries”[6]. Passas refers to transnational crime as “an injury against a society which is unnecessary and can be avoided, which is serious enough to justify intervention by the State, and which is similar to the types of acts defined as crime in the relevant country or international law” and “the offender(s) and the victim(s) are affected by separate jurisdiction”[7].

2.2. Types of transnational crime

Types of transnational crimes can be divided into weapons trafficking, money laundering, organized crime, drug trafficking, forgery of currencies, forgery and alteration of passport, and terrorism. In this article,

four major type of transnational crime will be discussed.

First, illegal arms trafficking by transnational criminal organizations not only promotes national and political disputes and civil war in many parts of the world, but also, if these weapons are in the hands of terrorist groups, plays a critical risk factor to national security. In addition, as the possibility of nuclear material smuggling by international criminal organizations has been raised recently, the concern of the international community is increasing due to the possibility that terrorist groups may obtain nuclear materials or strategic nuclear weapons. In case of Republic of Korea, the authorities have uncovered smuggling of plastic pistols, lighter-type pistols and key-chain pistols[8].

Second, money laundering is the act of converting illegally created funds into legitimate funds through financial institutions. The term refers to a series of process that conceals the importing rights, source of the money, and its use. transnational criminal organizations can eliminate the traces of illegal activities such as drug trafficking, drug trafficking, corruption, smuggling, tax evasion, abduction, and gambling by money laundering in effort to transform the illegal profits into legitimate ones[8].

Third, the concept of organized crime is not unified, so it has slightly different definitions by different research institutes and researchers. However, the characteristics of organized crime are common[8]. Defining transnational crime, it means that it is a criminal act which is linked directly or indirectly with two or more countries in characteristics of organized crime[2][6]. Organized crime is also related to corruption, including the purchase of public servants as a means to avoid investigation by the authorities[8].

Fourth, drug trafficking is a major source of revenue for transnational criminal organizations, and the tremendous revenues have been the basis for intervening in organizational forces and other crimes. In addition, drug abuse has been pointed out as a major factor not only deteriorating individual

health but also causing a great harm to society[9]. International drug organizations are strengthening their links with drug organizations around the world by securing skilled drug-making technology and advanced equipment and means of transport to avoid interference, and in some jurisdictions[8].

2.3. Necessity for police international cooperation in countering transnational crime

Since the early 1990s, the issue of criminal organizations committing transnational crimes has been actively discussed in terms of economy and security. Transnational crime organizations are not only influencing the informal economy through criminal activities such as drug trafficking, weapons trafficking, and human trafficking, but are also expanding into the formal economy, such as the stock market or real estate market. Many countries that recognize the growth and development of the official economy as one of the important factors of national security in the 21st century have continued to discuss countering transnational crime organizations not only in the economy but also in the security dimension.

Moreover, after 9.11, it is found that some Islamic terrorist groups have intervened in drug trafficking, which is the activity area of transnational criminal organizations, through which they are also involved in trafficking of weapons, including nuclear weapons. Therefore, transnational criminal organizations have become a matter of national security as well as international security.

3. Challenges in Mutual Legal Assistance in Criminal Matters

3.1. Definition of mutual legal assistance in criminal matters

In general, mutual legal assistance in criminal matters in the narrow sense refers to the cooperation of another country at the request of a State in connection with criminal investigations, prosecutions and

proceedings in criminal cases. It is the process of acquiring certification or physical certification for the purpose of proving the non-existence of the offense at the stage of trial, except for the extradition of the offender. It also deals with the cooperation of the countries in collecting data, exchanging information and sending documents related to the lawsuits.

On the other hand, mutual legal assistance in criminal matters in the broad sense includes extradition, and the definition of the broadest term refers to the transfer of proceedings in criminal matters which allows crimes committed in one country to be sought in another and the executing foreign criminal sentences which is a system for executing foreign criminal sentences in Korea upon foreign request. Normally, the term means the mutual legal assistance in criminal matters in narrow sense. Mutual legal assistance in criminal matters are joined based on bilateral or multilateral treaties and its scope varies depending on each treaty joined[1].

As of 2017, Korea has concluded a bilateral treaty on criminal justice and conciliation with 30 nations. Among them, all the treaties are in effect. Korea has concluded a treaty with five countries including China, Hong Kong, Mongolia, and Japan to conclude the Criminal Justice Cooperation Treaty with Northeast Asian countries.

3.2. Definition of extradition

Extradition is a system to bridge the territorial limits of criminal enforcement jurisdiction. It is a system that allows a person to escape to another country after the person has committed a crime or before completed the execution of a sentence. Since crime is against the common interests of mankind, it is necessary to judge criminals in the countries with close interests such as the country where the crime occurred or the nationality of the criminal for the punishment of the offender. For this reason, extradition is a system for punishing criminals who have escaped to arrest and guilty of extradited offenders. As extradition differs from mutual legal assistance in criminal

matters which are based on agreement by requested country and relate individuals, both treaties are joined separately[10].

3.3. Challenges in implantation of mutual legal assistance in criminal matters

Most countries in Northeast Asia, including China and Japan, have domestic laws that make it difficult to implement the mutual legal assistance in their countries. Even though Republic of Korea has also been able to provide more efficient and systematic cooperation in response to requests for assistance from foreign countries in accordance with the enactment of Act on Mutual Legal Assistance in Criminal Matters, act on mutual legal assistance in criminal matters in each country in Northeast Asia has some drawback that makes it difficult to implement the mutual legal assistance.

First, mutual legal assistance in criminal matters doesn't have a prompt procedure in providing the assistance, which makes it harder to combat the transnational criminal activities in the region. Moreover, it is an operation system that intervenes only after the crime has committed. Thus, it cannot obtain any information or intelligence beforehand. However, the essential thing in combatting transnational crime should be to focus on proactive responses such as obtaining proactive terror information to carry out or exchanging information on illegal drug distribution[1].

Second, the activities of officers from foreign governments is limited in Korea. There are two kinds of mutual legal assistance that one State cooperates with foreign lawsuit: active mutual legal assistance and passive mutual legal assistance. Mutual legal assistance in Republic of Korea is regarded as an active mutual legal assistance, but countries whose legal system is based on Anglo-Saxon law have passive mutual legal system. In cooperating with countries with Anglo-Saxon legal system, mutual legal assistance may have obstacles, making it difficult to be effective.

Third, there is a matter of strict requirements in double criminality. In order to make mutual legal assistance effective in

cooperation with a specific crime, double criminality is a basic principle in international mutual legal assistance. However, considering the diversity of criminal laws and punishment in each country, strict application of the requirements of double criminality may hinder the mutual legal assistance. In recent years, there has been a tendency not to require double criminality in the international mutual legal assistance in criminal matters, and to appear domestic laws or international agreements not requiring actual double criminality in exception of legal disposition.

Fourth, it is the problem of the request channel. Judging from the judicial nature of international mutual legal assistance in criminal matters, it is most desirable for mutual legal assistance in criminal matters to be conducted directly between the requesting State and the investigating authority or court of the requested State. Also, it is necessary for the realization of prompt and effective cooperation.

However, cooperation with foreign countries is in principle required to go through the Ministry of Foreign Affairs(Article 11 of the International Criminal Justice Act). In the case of a request for assistance to a foreign country, the Minister of Foreign Affairs has to consult with the Minister of Justice if he/she finds that the request for diplomatic encounters is not worthwhile(Article 31 of the same Act).

Although these provisions are based on the recognition that the Ministry of Foreign Affairs should be a public window because mutual legal assistance in criminal matters is broadly part of the foreign relations of a country, it is very likely that the request for assistance and the provision of requested data will be made very frequently. Whenever the mutual legal assistance in criminal matters is requested, request by diplomatic channel may hinder prompt and effective assistance.

4. Recommendations

While transnational crimes such as drug trafficking and illegal immigration are increasing in Northeast Asia, countermeasures are only dependent on traditional mutual legal assistance in criminal matters. Since traditional mutual legal assistance in criminal matters has various problems in itself, it is necessary to conceive a new strategy to respond effectively to transnational crimes.

4.1. Improvement of traditional mutual legal assistance in criminal matters

Enhancing the existing system of mutual legal assistance in criminal matters means that the traditional mutual legal assistance in criminal matters should be more flexible and appropriate to the contemporary times. These include relaxation of double criminality and building of mutual trust among Northeast Asian countries. In order to enhance traditional system, it is necessary to review various factors that limit the scope of mutual legal assistance in criminal matters in the first place, which is to ease the principle of double criminality.

However, in order to ease the application of double criminality, it is necessary to cooperate with the requested country, which requires mutual understanding and trust between the two countries. Unlike Europe, which has been showing a centripetal tendency since the end of the Cold War, the geopolitical situation in Northeast Asia is characterized by the overlapping of 'integration' and 'division', which are in conflict with each other.

If there is a lack of understanding of the law of the other country in such a situation, it will be impossible to accumulate the experiences of mutual legal assistance in criminal matters as it has been so far. Therefore, there is a need for formal and informal efforts to expand the understanding and awareness of the legal system between countries in Northeast Asia for the effective operation of mutual legal assistance in criminal matters[1].

4.2. Introduction of a new type of judicial assistance system and multilateral treaties

Although there are only mutual legal assistance in criminal matters in the narrow sense and extradition in Northeast Asian countries, a new type of mutual legal assistance emerged, like the enforcement of foreign criminal decisions, the transfer of criminal prosecution and the transfer of foreign prisoners. The new type of mutual legal assistance system does not focus on direct investigation or securing criminals, unlike the traditional mutual legal assistance in criminal matters. Therefore, Northeast Asian countries do not have to hurry to join a new type of treaty, but it is highly recommended to consider new forms of mutual legal assistance as there is a growing need for the protection of human rights and the punishment of serious crimes.

It is desirable to join multilateral treaties on mutual legal assistance in criminal matters between countries in Northeast Asia. Current legal systems for combating transnational crime are pursued on the basis of bilateral treaties, but not based on multilateral treaties. In the long term, it is necessary to develop East Asian multilateral Criminal Justice Cooperation Treaty covering all of Southeast Asia[1].

5. Conclusions

Due to the various problems inherent in the traditional legal mutual assistance in criminal matters, actual cooperation on mutual legal assistance in criminal matters is not often achieved. Moreover, the new type of mutual legal assistance in criminal matters as bilateral treaties has not been joined in Northeast Asia, and cooperation through international criminal police organizations may concern about violation in human rights[1].

The best way to jointly respond to transnational crimes is to create an independent body that collects and investigates information to counter regional transnational crime in the region. However, this kind of

coordination is premised on the partial transfer of sovereignty of individual states, and even if such a method is valid, it cannot be realized immediately. Furthermore, since conflicts and conflicting factors exist in Northeast Asia such as the remnants of the Cold War system, arms race, nationalism, historical distortions, and territorial disputes, it is unlikely that certain political issues related to Northeast Asia will be easily solved.

Transnational crime has been accelerating since the 1990s, with changes in the international community. Therefore, it is necessary to discuss how to prevent and suppress these crimes while promoting free movement of individuals and exchange and cooperation. In this article, one of these problematic situations was discussed the international cooperation plan of police activities and suggested the recommendations for improvement.

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