

GROUP 2
PHASE 2

**CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED
CRIMINAL GROUP AND CONSPIRACY, IMMUNITY SYSTEM,
AND WITNESS AND VICTIM PROTECTION PROGRAMMES**

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I. INTRODUCTION

Nulla poena sine lege (no person may be punished except in pursuance of a statute which prescribes a penalty)¹ is a well established criminal law concept which is followed by the majority of the world community. However, to bring the members of organized crime groups to justice is more difficult than one can expect. Organized criminal groups do exist in some countries for a certain period of time, and the authorities in such countries try every effort to cope with them. Efforts have been made by applying the concept of “conspiracy” and/or creating the new offence of “participation in an organized criminal group” in order to get the culprits to justice. Once the suspect has been

arrested, the legal proceeding then begins, and, the final stage of criminal proceeding is to prove beyond reasonable doubt that such crimes have been committed by certain defendants.

Against this background, the United Nations Convention against Transnational Organized Crime (hereinafter “TOC Convention”) requires State Parties to ensure that their laws criminalize either conspiracy or participation in an organized criminal group, or both in Article 5 (see appendix). It is basically understood that this provision offers the State Parties two options and comes from the preceding arguments and practices of the European Union.

In addition, organized criminal groups’ activities are not easy to detect. Generally, the witness may be an insider

¹ Jerome Hall, *General Principles of Criminal Law*, 2nd edition, Bobbs-Merrill Company, Inc. 1960.

or accidentally witness the crime. However, they have the tendency to avoid involvement in any legal proceedings for fear of their safety. Therefore, special tools, namely an Immunity System and Witness and Victim Protection Programmes, carefully constructed to ease this obstacle is indeed important. Hence, this report is the production of efforts of the members of Group 2 to try and explore some difficulties in applying the concept of “conspiracy” and “participation” as well as making these two tools available in the members’ jurisdictions.

II. CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP AND CONSPIRACY

In effectively tackling the threat of transnational organized crime, in particular, criminal justice authorities have a need to intervene as soon as possible in order to prevent crime, break up criminal organizations and apprehend the offenders. It is ideal that they should be able to arrest offenders before an offence has been committed. Otherwise, there is the considerable risk that the offenders will be able to carry out the offence and escape across national borders, thus evading justice.²

In civil law countries, the concepts of attempt and incitement are widely recognized, but conspiracy is not. The general position in civil law countries is that mere planning of an offence, without an overt act to put the plan into operation, is not criminal. For example, mere planning of a robbery, and even

such preliminary stages as an examination of the premises, arrangement for a getaway car or the recruiting of assistants, do not constitute criminal conduct. The offenders may be arrested and brought to trial only when they have gone so far.

The concept of conspiracy arose in common law during the 1600s in England, from where it spread to other common law countries. According to English common law, the mere agreement to commit an offence constitutes conspiracy. In addition, several civil law countries have enacted legislation directed at more tightly defined forms of participation or conspiracy in the case of particularly serious offences. Finally, several civil law countries have enacted legislation that criminalizes active participation in an organized criminal group.

It was this joint action which contributed to the definition adopted in the TOC Convention.

A. TOC Convention

Article 5 is one of only four criminalization obligations contained in the TOC Convention adopted at Palermo, Italy. As mentioned above, it requires State Parties to ensure that their laws criminalize either conspiracy or participation in an organized criminal group, or both.

Conspiracy is thus defined as:

- Intentionally agreeing with one or more other persons,
- To commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and,
- Where required by domestic law, involving an act undertaken by one of

² Group 2 is much indebted to visiting expert, Dr. Matti Joutsen. He contributed greatly to our discussion by participation in our group discussion as well as giving us lectures and papers.

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the participants in furtherance of the agreement or involving an organized criminal group.

Participation is defined as:

- Conduct by a person who,
- With knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question,
- Intentionally takes an active part in: Either the criminal activities of the organized criminal group or Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

B. Analysis of Current Situation

In Laos, Malaysia, Pakistan and Uganda, the concept of conspiracy has been adopted. In addition to that, under the Pakistan Penal Code, participation in an offence in any capacity is criminalized under Section 34, 149, 120 and 120A of the Pakistan Penal Code. Moreover, according to Section 120B of the Malaysia Penal Code, whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of 2 years or upwards, shall be punished in the same manner as if he had abetted such an offence.

In Nepal, neither the concept of conspiracy nor participation has been adopted so far. In Japan, the situation is the same as Nepal in principle, although there are several conspiracy provisions exceptionally as regards some extremely serious offences in the Penal Code and some laws such as Subversive Activities Prevention Act and Explosive Control Act, and only preparation is also punishable regarding some serious

offences. In addition, in Japan, Anti Boryokudan Law prohibits designated criminal organization from coercing people to join the Boryokudan and obstructing voluntary withdrawal from membership, or demand money for withdrawal. If a member of designated organization violates the prohibition, the police may issue an order not to do so. They can be punished if they do not obey the order.

In Thailand, the concept of participation has been adopted.

C. Benefits

As expected, the application of the above mentioned concepts has brought lots of benefits as follows:³

- a. The criminal justice authorities would have the possibility of intervening at an earlier stage of the criminal activity;
- b. All people concerned could be charged with conspiracy or participation even if their roles had been marginal;
- c. The prosecutor need not prove complicity in each and every act of crime;
- d. The concepts of conspiracy and participation allow, in effect, double punishment: one for conspiracy or participation, and one for the offences committed in furtherance of the conspiracy or participation;
- e. Legislation referring to conspiracy and organized criminal groups could provide the framework for the use of civil measures in addition to punishment;
- f. The citizens could be kept away from criminal acts and organized criminal groups (deterrent effect).

³ Dr. Matti Joutsen's lecture (except f)

D. Drawbacks

Through the experience and practice of EU countries, drawbacks are pointed out as follows:⁴

- a. The concepts are ambiguous and confusing, in particular if juries are involved. The legal practice has shown that the concepts can be confusing even to trained lawyers;
- b. There is a possibility that the concepts might violate the principle of legality, which requires definition of precisely what acts or omissions constitute criminal conduct;
- c. This ambiguity raises concerns regarding legal safeguards, such as ensuring that the defendant knows exactly what conduct he or she is charged with having committed;
- d. The ambiguity also raises concerns that the concepts will be used to expand the scope of criminal behavior to an unacceptable extent; and
- e. The concept of conspiracy has been used, in the view of some, to “convert innocent acts, talk and association into felonies”. The discussion within the European Union regarding the joint action requiring Member States to criminalize participation in an organized criminal group shows that these same qualms exist regarding this latter concept. The concern here is that the concepts may be abused by over-zealous prosecutors.

III. IMMUNITY SYSTEM

Effective investigation and successful prosecution play an important role in the system of criminal justice administration. Evidence is the most important factor to convict the criminals and the court will always seek concrete evidence to convict a criminal which plays a significant role in

the court of law. So the testimony of some persons such as police, general witnesses, the victims and sometimes the accused also is essential to prove the charge to other accused or a suspect or a member of a criminal group. In general, immunity refers to the process of exempting or omitting from prosecution of some accused.

A. TOC Convention

Article 26 of the TOC Convention (see annex) is particularly encouraged with the measures to enhance co-operation of the accused with law enforcement authorities. There are various reasons why immunity is suggested. Principally, the statement of a person who is involved in crime is very reliable because of his relationship with his co-accused. If any statement obtained from him has the credibility and materiality, it can always strengthen a case. At the time of investigation, a state witness can reveal the identity of other suspects which leads to further investigation to arrest the criminal, seize and forfeiture of crime proceeds, etc. In such a situation his statement can also assist the investigator for investigation.

B. Analysis of Current Situation

In Pakistan and India (according to the Penal Code), this system has been provided by law in the High Court and Court of Sessions according to the tenure of imprisonment.

In Pakistan, according to Sec. 337 of the Penal Code, in the High Court or in the Court of Sessions, the tender of pardon can be given as to any offence punishable with imprisonment extending to 10 years or any offence punishable under Sec. 211 of the Code with imprisonment extending to 7 years.

⁴ Dr. Matti Joutsen's lecture

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Likewise, in India, Sec. 306 of the Code of Criminal Procedure 1973 provides for obtaining evidence of an accomplice by tender of pardon subject to his voluntarily making a full disclosure of the facts and circumstances relevant to the offence for which the accomplice and co-accused are being charged with or investigated for. This provision is applicable for an offence punishable with imprisonment of 7 years or more.

Whereas in Japan this system has not been adopted in legislation, in some cases the court has reduced the punishment on the accused by considering his/her willingness to co-operate with the prosecution. Moreover, in Japan, there is a precedent that a confession is not admissible if it was induced by the promise made by the authorities that they would not indict him/her. Thus, because the grant of immunity seems to be inconsistent with this rule, much consideration would be needed to introduce this system in Japan.

In Laos, Malaysia, Nepal, Thailand and Uganda, the immunity system has not been applied. In these countries only the mitigation of punishment for some accused persons can be considered if the accused assists the investigator to investigate the crime.

C. Benefits

Granting immunity from prosecution has actually led to solving many serious crimes. The victim may also benefit from this system if it is properly used. The investigator can investigate the crime easily. Organized criminal groups and organized crime may decrease from this world.

D. Drawbacks

The possibility the criminal can escape from his/her liability is very high in this

system. If prosecutors abuse his/her power to grant immunity, it may increase negative perceptions of criminal justice in the general public. It is also violation of equality and rule of law of the country. The citizen may not have confidence in the judiciary and law enforcement authorities of that country.

As for the unjust evasion of criminal responsibility, for example, the federal immunity statute in the U.S. is construed as "use and derivative-use immunity", that is to say, the federal government must be prohibited from making any use of immunized testimony and its fruits in any later prosecution against him/her, and therefore, as long as all evidence is wholly derived from legitimate independent sources, he/she may be subjected to future prosecution. In particular, in case the offence involved was heinous and some important evidence was found independently after he/she had given immunized testimony, it can be said that he/she deserves to be prosecuted and punished from the viewpoint of the interests of justice. In light of the effectiveness of immunity in obtaining credible testimony, there is some argument that witnesses are less willing to testify if immunity is not complete and he/she might be faced with subsequent prosecution. On the other hand, proponents of immunity say that such immunity can rather encourage the witnesses to provide as much detail as possible in order to make it difficult to prove that prosecutors make no use of that testimony in any subsequent prosecution.

Regarding the possibility of abuse of power, any appropriate procedure should be required. For example, in the U.S., the United States Attorney Manual describes some factors to be considered when granting immunity in order to make sure

it meets the public interest. On the other hand, as mentioned previously, in Pakistan, the role of judges in making such decisions is more active, which might also be advisable for other countries.

IV. WITNESS AND VICTIM PROTECTION PROGRAMMES

The courts go by evidence on record to establish the guilt of the accused. Because of the violent nature of organized crime/terrorism, witness intimidation is a significant problem as many witnesses are reluctant to testify in open court for fear of reprisal at the hand of criminal groups/terrorists. Cases of threat or criminal intimidation on potential witnesses are often recounted and in some instances, some of them have even been killed by related criminal organized groups/terrorists. In Thailand for example, every year, 20% of all criminal cases are dismissed because the prime witnesses are too afraid to take the stand.

A. Need for Reform

It is essential to protect witnesses from the wrath of criminal groups. Hence legal, physical and financial protection should be provided to important witnesses especially in sensitive cases so that they can feel comfortable without any fear in the court. It is not only to prevent threats/violence to the witnesses but also as a guarantee to gain the confidence of witnesses in supporting the prevention and detection of organized crime. Article 25 of TOC Convention (see annex) encourages nations to adopt measures which will guarantee the protection of witnesses from threats, intimidation, corruption or bodily injury in relation to testimony given in cases involving transnational organized crime.

B. Analysis of Current Situation

After discussion, Group 2 realized that the Witness Protection Programme could be categorized as:

- Countries with Witness Protection Programmes in their legislation
- Countries with Witness Protection Programmes annexed as a new article in an existing Act
- Countries that are still in the process of drafting the Bill
- Countries that are still considering the implementation of a Witness Protection Programme

The United States started their Federal Witness Security Programme in 1970 which sought to guarantee the safety of witnesses who agreed to testify for the government in organized crime cases. Witnesses are admitted to the programme when they are able to supply significant evidence in important cases and there is a perceived threat to their security. From 1970 to 1998, a total number of 6,818 witnesses with 8,882 of their families were given this protection and US\$75,000 per witness per year and US\$125,000 per family has been spent.⁵ Even though the programme is costly, the result has made it worth the cost. Over 10,000 defendants have been convicted through the testimony of witnesses and it is said that after the enactment of this Act, the authority could secure the conviction of several notorious mafia leaders.

In Brazil, the national programme for the protection of victims and witnesses took effect in August 1999. The persons who may benefit from this programme

⁵ Frank J. Marine, "Response to the Threats Posed by Transnational Crime and Organized Crime Group", Visiting Expert, 108th International Course.

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are those without decreed imprisonment and their relatives who live with them. The programme includes the following measures:

- Transferring the residence of the witness;
- Monthly financial aid for each witness;
- Supply of food and clothing;
- Police protection when traveling;
- Helping the witness find a job in the work market;
- Retention of benefits by a public employee who is removed from the service;
- Social, psychological and medical assistance; and
- Change of identity.

Italy has enacted legislation which specifically provides for witnesses protection and relocation.

In the Philippines, the Witness Protection, Security and Benefit Act (Republic Act No. 6981) was enacted on 21 April 1991, with the Department of Justice as the lead implementing agency. As a result of admission into the Witness Protection and Benefit Programme (WPP), which (in addition to the above mentioned benefits) has a substantial budgetary allocation, the witness shall enjoy the following benefits:⁶

- Secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or tolerable level;
- Travel expenses and subsistence allowance during the inquiry;
- Burial benefits, in case of death due to his participation in the WPP; and

- Free education for children, from primary to college level in any State or private school, college or university, if the witness dies or becomes permanently incapacitated to work.

The protection could be extended to any member of the witness' family.⁷ However, a witness admitted into the programme shall have the duties and responsibilities, such as, to testify before and provide information to all appropriate law enforcement officials concerning all appropriate proceedings in connection with or arising from the activities involved in the offense charged, to avoid the commission of a crime, to comply with legal obligations and civil judgments against him, etc.⁸

In Japan, the Witness Protection Programme has been embodied in the Code of Criminal Procedure (CCP), Rule of Criminal Procedure, Constitution, Penal Code and Anti-organized Crime Law. For example, exception to bail (a request for bail may be rejected when there are reasonable grounds for suspecting that the defendant may injure the body or damage the property of the witness or his relative, or threaten them as stipulated in Article 89(5) of the CCP; Order for the defendant to leave the courtroom (Article 281-2 of the CCP), Order for the spectator to leave the courtroom (Article 202 of the Rule of Criminal Procedure), Trials conducted privately (Article 82 Clause 2 of the Constitution), Intimidation of a witness (Article 105-2 of the Penal Code, Article 7(3) of the Anti-Organized Crime Law).

⁶ Section 8, the Witness Protection, Security and Benefit Act (Republic Act No. 6981)

⁷ Section 3, the Witness Protection, Security and Benefit Act (Republic Act No. 6981)

⁸ Section 5, the Witness Protection, Security and Benefit Act (Republic Act No. 6981)

A presiding judge may control any questions asked by persons concerned in the trial, if the questions relate to the dwelling or the office of a witness or his/her relative, where he/she or they are usually staying and there are reasonable grounds for suspecting that they or their property may be damaged (Article 295 Clause 2 of the CCP). However, the information to identify witnesses may be seen as the constitutional rights of the defendants, so he/she can have the full opportunity to examine all the witnesses, so it could be difficult to hide completely all information to identify the witness from the defendant.

Article 157-4 Clause 1(3) of the CCP provides that a court may, if it deems necessary, according to the circumstances of the crime and the witness, examine the witness with a video link system. The method involves taking the witness to another room and examining him by means of audio-visual tools.

Article 157-3 Clause 1 of the CCP provides the court may, where the court believes a witness would be unable to testify fully with the pressures of being before the defendant and according to the circumstances of the crime and the witness, order a screen to be set up between the witness and the defendant to make the witness invisible during the examination. Moreover, Clause 2 of the above article also provides that a court may order a screen to be set up between the witness and the public gallery.

Article 4 of the Law Concerning Measures Accompanied with Criminal Procedure for Protection of Victims provides that a victim can request the court in criminal cases to record the mutual consent between him/her and the defendant in the record of trial in order to obtain compensation.

The Law to Provide Compensation for the Victims of Crime provides that state compensation may be supplied to the victims of crime whose relatives have been killed, or who have suffered serious injuries from a criminal act.

In Thailand, the Witness Protection Bill proposed by the Ministry of Justice is under discussion at the Parliament. Under the draft bill, the protection will be the responsibility of the police to carry out this task until the Witness Protection Office is established. There shall be general and special measures for witness protection. In general cases, the investigator or prosecutor, with the request from the witness, may ask the Witness Protection Office to order the protection for up to 30 days subject to the necessity of the case. However, in an emergency situation, the investigator or prosecutor would be empowered to order the police protection for their witness for up to 5 days at a time. The special measures are designed to apply to cases involving trading in narcotics, women and children. The Minister of Justice may order the use of special measures for witness protection. The measures include relocation of witness residence, changing of witness identity and record, as well as providing living allowances and job training for up to 2 years. Both general and special measures can be extended to the witness's spouse, parent, children and person in close relationship with such witness. Although there is the worry about the shortage of budget, this witness protection programme is inevitably necessary to combat organized crimes. Moreover, to reduce the fear of witnesses in taking the witness stand and having to confront the defendant whom may be an influential person or a member of an organized crime group, the use of video conferencing where a witness testifies in front of the video camera in a room

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separately from the trial room is also introduced. This should make the witness feel more relaxed and comfortable to tell the whole truth. The proposed bill to amend the Thai Criminal Procedure Code for allowing the use of video conferencing is being scrutinized by the Office of the Council of State.

We learned that Nepal is now considering utilizing the Witness Protection Programme. Anyhow there are still many countries that do not have this programme.

C. Benefits

Witness and Victim Protection Programmes will encourage the co-operation of people in the fight against transnational organized crimes, since they are assured that in giving evidence their life, property or that of their family will be safe from the criminal organization in question. The protection can be given during the time of investigation, proceeding or thereafter. Therefore the witness may be either the accused who is granted immunity, the victim or a third party.

D. Drawbacks

Due to the large amount of finances required and human resource constraints to devise or even implement this programme, many countries may fail to adopt it.

It is also difficult to define the scope of the witness protection. It is not clear as when and for how long the witness should be provided with this protection programme. A question also arises as to whether the protection should be limited only to the witness or should be extended to his family. It is also not clear as to how much assistance should be provided.

V. CONCLUSION

All states should be required to ensure that their legislation criminalizes conspiracy and/or participation in an organized criminal group. The definition of participation was drawn to require 'active participation.' It was this joint action which contributed to the definition adopted in the TOC Convention in Article 5.

Furthermore, in responding to the threat of transnational crime, criminal justice authorities have felt it necessary to intervene as soon as possible in order to prevent crime, break-up criminal organizations and apprehend offenders before they make good their escape. States parties are also required to carefully choose the best options, keeping in mind their domestic legal and social systems.

Immunity generally refers to the process of exemption from prosecuting a person accused of a crime. It seems that immunity from prosecution has actually led to the solving of many serious crimes in countries such as Pakistan and India. Detailed immunity systems of other countries like Malaysia, Uganda and Thailand were also discussed. In Japan the system is not legislated. The absence or existence of an immunity system depended on a country's culture, history, national sentiment and their domestic laws.

Regarding witness and victim protection, we identified participant states into 4 categories as above mentioned. It was appreciated that the statement of accomplices has proved useful in prosecution involving organized crime cases, as it helps law enforcement agencies to penetrate such gangs. In response to this, some countries have

found it advantageous to enact legislation to protect witnesses and/or oblige witnesses to testify truthfully, and provide sanctions if they refuse to do so.

It was identified that although some countries currently have no serious problems with transnational organized crime, the state of affairs may change in view of the rapid and continuing spread of it. It is therefore important to establish lines of communication and shared understanding of common goals throughout the world.

These strategies have been endorsed by the TOC Convention since the year 2000. Since the TOC Convention provides and covers all effective countermeasures against transnational organized crime for us, it is imperative to ratify and implement the Convention as soon as possible, taking into due account harmony with the domestic legal system of each country.

APPENDIX

Article 5

Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
 - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
 - (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
 - a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
 - (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of

serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 25

Assistance to and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.
2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented

and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 26

Measures to enhance cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
 - (a) To supply information useful to competent authorities for investigative and evidentiary purposes on such matters as:
 - (i) The identity, nature, composition, structure, location or activities of organized criminal groups;
 - (ii) Links, including international links, with other organized criminal groups;
 - (iii) Offences that organized criminal groups have committed or may commit;
 - (b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.
2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.
3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or

prosecution of an offence covered by this Convention.

4. Protection of such persons shall be as provided for in article 24 of this Convention.
5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.