INTERNATIONAL COOPERATION AGAINST TRANSNATIONAL ORGANIZED CRIME: CRIMINALISING PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP[1]

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I. INTERVENING IN CONSPIRACIES AND ORGANIZED CRIMINAL GROUPS

Let us assume that the competent law enforcement authorities in three countries, Japan, the United States and Mexico, are informed of the existence of a wiretap of a telephone discussion between A and B. In this, B informs A that he has talked with C, who has said that he can supply B with cannabis in Mexico for a good price. During the same telephone call, A tells B that he knows of a good way to smuggle the cannabis from Mexico to Japan, and that he also knows of people who would be interested in buying cannabis. Has a crime been committed, and can the authorities intervene in any of the three countries?

In responding to 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 organisations and apprehend the offenders. Ideally, 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.

Here, however, there is a difficulty. In the case described above, no actual purchase of drugs has been made, much less has there been any overt attempt to smuggle the drugs into Japan. The criminal laws of many countries would even hold that, since there has been no act other than the first contact between A and C, and the telephone call between A and B, there has not even been an attempt at any offence (such as an attempt at purchasing illegal drugs). If indeed no offence has been committed, then the authorities would not have the right to make any arrests. The law enforcement authorities would have to wait and, in the worst-case scenario, would lose the trail of A and B, and the drugs will be successfully smuggled into Japan.

A second concern has to do with proving complicity in an offence in connection with crimes undertaken by a large, well-structured organized criminal group. Trafficking in persons, for example, may involve a number of offenders, acting in different capacities. Some may seek to identify the persons to

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be trafficked, others will forge the papers needed to cross borders, others will see if key authorities can be bribed, yet others will take care of transport and lodging, and finally some people will look after the placement of the people in the destination country, and perhaps will continue to control their movement. Each activity may involve a different individual crime (fraud, forgery, corruption, illegal border crossing, extortion and so on), and some activities may in fact not involve a crime at all (transport within a country). Proving complicity in trafficking in persons, or in any other organized criminal activity, may be difficult.

A third concern has to do with procedural economy. If a large number of persons agree to commit crimes, and these are in fact committed at different times by different people (as is often the case, for example, with extortion carried out by large organized criminal groups), it may be difficult to obtain sufficient evidence to convict all of them of the substantive offences. However, it may be easier to prove that they have been acting as conspirators, or as members of an organized criminal group.

A fourth concern has to do with international co-operation. In our case, each of the three persons is located in a different country. Of all the fields of law, criminal law is perhaps most closely tied to the essential values of a country. Over the centuries, considerable variety has emerged in what is criminalised and what is not in the different jurisdictions. From the point of view of domestic legal systems, this does not cause any particular difficulties, since the legal systems almost invariably apply their own criminal law.

From the point of view of international co-operation, however, the existence of different criminal laws has caused, and will continue to cause, considerable difficulties. One of the greatest difficulties in practice is caused by the principle of double criminality. International agreements on extradition and mutual legal assistance almost invariably require that the offence in question is a crime in both the requested and the requesting State. The requested State will presumably not extradite a suspect to the requesting State if the conduct in question is not criminal under its laws. However, even if the two countries agree that the conduct is criminal, the details of the definition may vary to such an extent that the requested country may well decide not to co-operate.

It is against this background of domestic and international concerns that the United Nations Convention against Transnational Organized Crime (the Palermo Convention) requires States Parties to criminalise either conspiracy or participation in an organized criminal group. Both concepts require some explanation.

II. CONSPIRACY

The concept of conspiracy arose at common law during the early 1600s in England, from where it spread to other common law countries.[2] At English common law, if an offence was not completed, it was not punishable.

This, of course, was not considered satisfactory. The concept of "inchoate crime" arose. Inchoate crimes are crimes

[2] The leading decision was that of the Star Chamber in the *Poulterer's Case* in 1611. See Glanville Williams, Criminal Law. The General Part, second edition, Stevens and Sons Limited, London 1961, p. 663, and the literature cited in footnote 1 therein.

that are committed by an act done with the purpose of effecting some other crime (called the substantive crime or the consummated crime).[3] The three types of inchoate crimes are attempt, conspiracy and incitement. By and large, attempt of, conspiracy to commit, and incitement to commit any offence is punishable.

The concepts of attempt and incitement are universally recognised, and need no further introduction in this connection. It is the third concept, conspiracy, which is of interest here. Under common law, mere thought did not constitute a crime. A person could think of doing evil deeds, but would remain unpunished for this. However, should he or she agree with another person about the commission of a crime, this was regarded as increasing the direct risk to the community of criminal activity in two ways. First, it increased the likelihood of success of the crime. Secondly, it makes the commission of other crimes more likely. Because of this increased risk, it was deemed useful to bring such conduct into the scope of criminal law even before it reached the stage of attempt. The concept of conspiracy was born.[4]

The first statutory definition of conspiracy in the United Kingdom did not come until with the Criminal Law Act 1977.[5] As subsequently amended by the Criminal Attempts Act 1981, section 1(1) of this law states:

> *"Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either:*
>
> *a. will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or*
> *b. would do so but for the existence of facts which render the commission of the offence or any offences impossible,*
>
> *he is guilty of conspiracy to commit the offence or offences in question."*

The corresponding provision in, for example, the Canadian criminal code (section 423(2) avoids defining conspiracy, and merely states that "Every one who conspires with any one (a) to effect an unlawful purpose, or (b) to effect a lawful purpose by unlawful means, is guilty of an indictable offence."[6]

A few particulars about conspiracy:[7]

1. In its basic form, the mere agreement to commit an offence constitutes conspiracy (see, however, below).
2. Negotiating the commission of an offence is insufficient to constitute

[3] Glanville Williams, Textbook of Criminal Law, Stevens and Son Limited, London 1978, p. 349.

[4] Regarding the justification of the law on conspiracy, see Williams 1961, op.cit., pp. 710–713.

[5] Outside the realm of statutory conspiracy are for example conspiracy to defraud and conspiracy to corrupt public morals. See Williams 1961, op.cit., pp. 686–710 and Mike Molan, Denis Lanser and Duncan Bloy, Bloy and Parry's Principles of Criminal Law, Fourth Edition, Cavendish Publishing Limited, London 2000, pp. 152–154 and 162–168. Regarding US law, see for example Robert W. Ferguson and Allen H. Stokke, Concepts of Criminal Law, Holbrook Press, Boston 1976, p. 136.

[6] See, for example, Alan Mewett and Morris Manning, Criminal Law, second edition, Butterworths, Toronto 1985, pp. 179–189.

conspiracy. There must be a concluded agreement, even if the agreement leaves open the method and time of commission is left open (for example, the conspirators agree to act "as and when the opportunity arises").

3. The agreement can be manifested by word or conduct.
4. There must be two or more parties. However, a person may still be convicted of conspiracy even if none of the other co-conspirators are apprehended or even identified.[8]
5. The conspirators must be knowledgeable of the elements of the conduct that amount to the offence. This means that each must know or believe he or she knows the facts that will make the conduct criminal when done. (For example in the case of fraud, if one person agrees only to deliver an invoice, without knowing that the invoice is for goods that have not been delivered, this person would not be guilty of conspiracy to fraud.)
6. Any act done by any of the conspirators in the furtherance of the conspiracy is an act of all, even if this act was not planned or contemplated by all.
7. It is not necessary that the offence is in fact consummated, and may indeed lie in the indefinite future.
8. A person who supplies a necessary weapon or service, even if he or she knew that this would be used for an unlawful purpose, can be convicted of conspiracy only if he or she somehow promotes the unlawful conduct itself.
9. Even if the conspiracy falls apart almost immediately (for example a key conspirator backs out), the conspiracy exists. The withdrawing conspirator remains guilty of conspiracy and of any acts committed in furtherance of the conspiracy up to that point.
10. An offender can be convicted of both conspiracy and the actual offence.[9]

By its very nature, conspiracy may be difficult to prove. A conspiracy may be inferred from conduct (in other words from overt acts). The testimony of a co-conspirator regarding the existence of the

[7] Regarding English law, and in addition to Williams 1961, and Molan et. al., see for example Richard Card, Card, Cross and Jones. Criminal Law, twelfth edition, Butterworths, London 1992, pp. 479–500, J.C. Smith and Brian Hogan, Criminal Law, seventh edition, Butterworths, London 1992, pp. 269–304, and D.W. Elliott and Michael Allen, Elliott and Wood's Casebook on Criminal Law, sixth edition, Sweet & Maxwell, London 1993, pp. 451–473.

[8] Some limitations exist regarding who can be deemed a co-conspirator. At English law, no conspiracy exists if the only other conspirator is the spouse of the first conspirator, or under the age of criminal responsibility, or the intended victim of the offence (section 2 of Criminal Law Act 1977). The law in some other common law jurisdictions may vary somewhat; for example, in the United States a husband and wife can now constitute a conspiracy. Ferguson and Stokke, op.cit., pp. 138–139. On this point, Canadian legal practice follows that of England; Mewett and Manning, p. 183.

A special case arises when one of the two co-conspirators is a law enforcement officer who is an undercover officer trying to break up drug trafficking. For example in England, the officer himself or herself can, technically, be convicted of conspiracy although the court will probably hold that his or her "mental reservation" against the conspiracy meant that he or she had not in fact agreed. The other co-conspirator, however, can be convicted. See the *Yip* case cite in Molan et al, op.cit., pp. 159–160. Under Canadian law, however, the fact that the second conspirator was a police agent provocateur led to the acquittal of the first conspirator of conspiracy; O'Brien [1954] S.C.R. 666, cited in Mewett and Manning, p. 181.

conspiracy may also be taken and used as evidence. This latter rule (which has been construed somewhat differently in different common law jurisdictions) means in practice the allowing of hearsay evidence.[10]

At English law, the mere agreement to commit an offence constitutes conspiracy. In some other jurisdictions, however, statutes have added a requirement of an overt act committed in the furtherance of the agreement. This overt act may be comparatively slight, but nonetheless such an additional element is thus required.[11]

English law has also explicitly addressed the question of jurisdiction. The courts in England are deemed to have jurisdiction both when a conspiracy in England is directed towards an offence to be committed in another country, and when a conspiracy abroad is directed towards an offence to be committed in England.

In the United States, it was decided to build on the concept of conspiracy to come to grips specifically with organized crime, and its attempt to infiltrate into the legitimate economy. This was done with the 1970 Racketeer Influenced and Corrupt Organisations Statute (18 USCA § 1961), commonly referred to as the RICO statute. This statute criminalised participation in or conducting of the affairs of an enterprise involved in racketeering.[12] The definition of "racketeering" is rather complex, but essentially it is based on a list of offences that are commonly associated with organized criminal activity. The definition of "enterprise" is based on the definition of conspiracy, and involves an "association in fact" of two or more people. A refinement to the definition of conspiracy is that the racketeering activity must involve at least two racketeering acts committed within ten years of each other (as opposed to the fact that a conspiracy may be designed to commit only one wrongful act).[13]

RICO allows not only stiff punishment for the offences within its scope, but also civil remedies such as treble damage actions, corporate dissolution and reorganisation. This aspect has been deemed to be particularly useful in coming to grips with organized crime.

Canada has enacted the concept of "enterprise crime offence" (art. 462(3) of the Criminal Code), which is based on a list of offences that is more limited than the RICO statute in the United States.

[9] The Federal Model Penal Code in the United States, however, holds that where the conspiracy has only one object or crime as its purpose, the conspirators may not be punished for both the crime and the conspiracy. Myron Hill, Howard Rossen and Wilton Sogg, Smith's Review. Criminal Law, West Publishing Company, St. Paul 1977, p. 133.

[10] See Williams 1961, op.cit., pp. 681–682.

[11] Ferguson and Stokke, op.cit., pp. 135–136.

[12] See Norman Abrams, Federal Criminal Law and Its Enforcement, West Publishing Company, St. Paul 1986, pp. 167–270.

[13] Further refinements in the United States include the Continuing Criminal Enterprise Statute, which is targeted at large-scale drug trafficking, and the Violent Crime Control and Law Enforcement Act of 1994, which in turn is targeted at street gangs. See Sabrina Adamoli, Andrea Di Nicola, Ernesto U. Savona and Paola Zoffi, Organized Crime Around the World, HEUNI publication no. 31, Helsinki 1998, p. 136.

III. THE OFFENCE OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP

The concept of conspiracy has been developed on the basis of common law. In civil law countries, the concepts of attempt and incitement are widely recognised, 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. (As noted, some statutes in some common law jurisdictions have taken this very same position.) 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 as to, for example, enter the premises with weapons.

In Italy, which has long had difficulties in coming to grips with organized criminal groups, this was regarded as unsatisfactory. Groups such as the Mafia and the Camorra may be highly organized, and it may be difficult for the law enforcement authorities to show how individual members of the group, and in particular the leadership, have participated in actual criminal activity. The Italian legislature therefore decided, in 1982, to adopt special legislation that was directed not at individual criminal acts, but at the role of the member in the organized criminal group. The assumption was that members of criminal organisations commit crimes. For this reason mere membership was regarded as a crime, and persons suspected of this could be arrested.[14]

Article 416*bis* of the Italian criminal code thus criminalises "participation in a Mafia-type unlawful association".[15] Such an association is said to exist "when the participants take advantage of the intimidating power of the association and of the resulting condition of submission and silence to commit criminal offences, to manage, at all levels, control, either directly or indirectly, of economic activities, concessions, authorisations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for others, or with a view to preventing or limiting the freedom to vote, or to get votes for themselves of for others on the occasion of an election."

If the participants have firearms or explosives at their disposal, the punishment is higher. The punishment is also higher if the economic activities that the participants intend to control are funded even in part by the price, product or proceeds of criminal activities.

The assessment of the impact of this legislation has been that it is effective. The prosecutor no longer needs to prove that, for example, a leader of an organized criminal group has in some way participated in a criminal offence. It is enough to demonstrate that such a person is a member of a certain type of organisation.

The Italian definition can be regarded as quite broad, since even a person who is a passive member of an organized criminal group can be punished. Other civil law countries have been reluctant to follow suit. Portugal has been one country that has adopted somewhat similar

[14] See Adamoli et al, op.cit., p. 133.

[15] Other provisions in Italian criminal law deal with "common association crime" and "drug-trafficking association crime". See Adamoli et al, op.cit., pp. 132–133.

legislation. Portugal has criminalised the founding of a group for the purpose of committing crimes, becoming a member of such a group, or providing such groups with help, particularly in the form of weapons or ammunition, or seeking to recruit further members. Among Central and Eastern European countries that have enacted somewhat similar legislation are Estonia, Lithuania, Moldova and Poland.[16]

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. For example, the respective criminal codes of Denmark and Finland contain provisions regarding conspiracy to commit treason. Furthermore, several civil law countries regard commission of an offence as a member of an organized criminal group to be an aggravating factor to be considered in sentencing.

Finally, several civil law countries have enacted legislation that criminalises active participation in an organized criminal group. Germany, for example, criminalised the formation of a group whose goals are the commission of offences, [active] participation in the group, soliciting for the group, and providing support for the group.

In 1997, the European Union adopted an Action Plan against organized crime. One of the key elements of this Action Plan called for the adoption of a joint action requiring all fifteen Member States of the European Union to criminalise participation in an organized criminal group. Such a joint action was indeed adopted in December 1997.

In the discussions leading up to the joint action, there was considerable controversy over its formulation. The two Member States with a common law system, the United Kingdom and Ireland, noted that they already use the concept of conspiracy, and were not prepared to change their law in this regard. Italy strongly advocated legislation that would follow its model in criminalising "participation in a Mafia-like unlawful association". Countries that did not have either option were adverse to adopting them, in particular on the grounds that both options (conspiracy and "participation") were rather vague, and in this respect were seen to be in violation of the principle that conduct to be criminalised should be defined explicitly (the "legality principle").

The end result was, as so often in such a context, a compromise. All member states of the European Union were required to ensure that their legislation criminalised either conspiracy or participation in an organized criminal group, and the definition of participation was drawn to require an overt act, "active participation".[17]

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

IV. ARTICLE 5 OF THE PALERMO CONVENTION AND ITS IMPLICATION

A. The Text of Article 5

Article 5 is one of only four criminalisation obligations contained in the Palermo Convention. It requires States Parties to ensure that their laws criminalise either conspiracy or participation in an organized criminal

[16] Adamoli et al, op.cit., pp. 138–141.

group, or both. The article reads as follows:

Article 5
Criminalisation 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) Organising, 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.

B. The Criminalisation Obligation

2(a)Conspiracy

For the purposes of the Palermo Convention, conspiracy is thus defined as:

[17] In September 2001, the Commission of the European Union introduced a proposal for a Council framework decision on combating terrorism (12103/01 DROIPEN 81, 24 September 2001). If accepted, this framework decision would require that each of the fifteen Member States of the European Union (and, in time, the twelve candidate Member States) "take the necessary measures to ensure" that inter alia the following offences will be punishable:
- directing a terrorist group, and
- promoting of, supporting of or participating in a terrorist group.

The definition of a "terrorist group" is quite similar to that of an organized criminal group. It is "a structured organisation established over a period of time, or more than two persons, acting in concert to commit terrorist offences..:"

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

Certain key points emerge when this definition is compared with for example the statutory definition of conspiracy under English law.

First, however, a point of similarity: a conspiracy can be present even when there are only two conspirators. It may be recalled that art. 2(a) of the Palermo Convention defines an "organized criminal group" as a structured group of *three* or more persons.

One difference is that the conspiracy must be directed to the commission of a "serious crime". Art. 2(b) of the Palermo Convention defines serious crime as "conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". Thus, States Parties need not extend their definition of conspiracies to include those directed at less serious offences.

A second difference is that the purpose of the serious offence in question must be related "directly or indirectly to the obtaining of a financial or other material benefit". Also this is in line with the definitions given in article 2 of the Palermo Convention. States Parties need not extend the concept of conspiracy beyond offences that are basically covered by the Palermo Convention. (In this regard, the criminalisation obligation in article 5 is narrower than any of the other three criminalisation obligations.)

A third difference is that the State Party may, if its domestic law so requires, include the additional condition that one of the participants has undertaken an act "in furtherance of the agreement" *or* that the act involves an organized criminal group. This would be in line with statutory law in some common law jurisdictions that require an overt act in furtherance of the conspiracy. It is not enough to have a "meeting of the minds"; there must also be action. How substantive this additional act must be to fulfil the condition laid down in article 5(1)(a)(i) of the Palermo Convention is left open to the individual State Party.

Article 5(3) makes reference to the fact that some States Parties may wish to limit the scope of conspiracy to only a list of serious offences. In such case, the States Party must "ensure that their domestic law covers all serious crimes involving organized criminal groups", and must inform the Secretary-General of the United Nations accordingly.

Article 5(3) also requires that 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) so inform the Secretary-General.

2(b)Participation in an Organized Criminal Group

"Participation proper" is defined in article 5(1)(a)(ii) 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.

Here again there are key points of difference between the criminalisation requirement in art. 5 of the Palermo Convention, and such predecessors as art. 416*bis* of the Italian Criminal Code.

First, the person must know the aim and general criminal activity of the group in question, or of its intention to commit crimes.

Second, the person must take an active part in the organisation. The clearest form of such participation is in the criminal activities of the organisation. Here, it may be noted that if this option is taken, art. 5 requires criminalisation of such participation as *distinct* from the attempt or completion of the criminal activity itself. Let us assume that A joins an organized criminal group and intentionally takes part in robberies. This person, A, should then be held guilty of *both* the robbery *and* of participation in an organized criminal group that commits the robberies. (In this respect, the thinking behind this requirement is closer to that of conspiracy, since most common law jurisdictions hold that the offender could be convicted of both conspiracy and the offence in question.)

The alternative form of participation can be in "other activities of the organized criminal group". However, here there is the additional condition that the person in question is aware that "his or her participation will contribute to the achievement of the above-described criminal aim". It is left to the State Party to determine how substantive this contribution should be. Presumably an accountant knowingly working for an organized criminal group would fulfil this definition, even if he or she in no way engages in illegal accounting practices or in money laundering; merely helping the group with its accounts would seem to be sufficient. A driver who drives the leader of the group from place to place—especially where none of the meetings would appear to be related to the planning or commission of illegal activities—would be a more doubtful case. And going to the other extreme, persons who work for members of the group as, for example, gardeners, cooks or custodians would presumably not be seen to "contribute to the achievement of the ... criminal aim," although this would ultimately depend on the individual case.

C. Attempt and Forms of Participation

As noted, under the Palermo Convention either conspiracy or participation in an organized criminal group are to be criminalised as distinct from attempt or completion of the criminal activity in question.

Article 5(1)(b) makes the further point that States Parties are also to criminalise certain specific forms of participation in the commission of serious crime involving an organized criminal group. The forms themselves (organising, directing, aiding, abetting, facilitating and counselling) are fairly well recognised in criminal law, although the construction placed on the words may well vary from one legal system to the next.

Presumably most, of not all, legal systems of the world are already in compliance with this requirement, in that e.g. aiding and abetting in the

commission of any serious crime is punishable. Although art. 5(1)(b) makes reference to e.g. aiding and abetting "the commission of serious crime *involving an organized criminal group*," it can be argued that a State Party need not separately enact such a qualified criminalisation. Nothing, however, would prevent States Parties from adopting a statute that does define an organized criminal group, and sets a special tariff of punishment for various forms of participation in its criminal activities. This has, indeed, already been done by several states around the world.

D. Evidence of Conspiracy and Participation

Art. 5(2) very briefly states that "the knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances." This is basically a rule for interpreting the evidence of guilt. States Parties can, alternatively, provide that their courts may look at the totality of evidence, thus giving courts much more leeway in construing possible guilt.

E. Coda: Applying the Convention to the Case Study, and Assessing its Utility

The case cited at the outset involves three persons, A, B and C. How would this be dealt with under the two definitions in article 5 of the Palermo Convention?

Under the heading of conspiracy, art. 5(1)(a)(i), all three suspects could be found guilty of conspiracy, since A and B, and B and C, had apparently agreed on the (illegal) purchase of cannabis, and A and B had further agreed on its import into Japan.

Under the heading of participation in an organized criminal group, the prosecutor would have to show that A, B and C constituted a structured group existing for a period of time. If this can successfully be done, then all three can be convicted of participation.

Would either or both approach add anything to the arsenal of the investigator and the prosecutor, and would there be any drawbacks?

To summarise on the basis of the foregoing,

- the criminal justice authorities would have the possibility of intervening at an earlier stage of the criminal activity,
- all three could be charged with conspiracy or participation even if their role had been more marginal than in the case used as an illustration;
- should the three suspects continue their activity, the prosecutor need not prove complicity in each and every act of drug trafficking;
- the concepts of conspiracy and participation allow, in effect, double punishment: one for the conspiracy or participation, and one for the offences committed in furtherance of the conspiracy or participation;
- legislation referring to conspiracies and organized criminal groups could provide the framework for the use of civil measures in addition to punishment.

There has also been significant criticism of the concepts of conspiracy and participation in an organized criminal group:

- 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;

- some critics have said that the concepts violate the principle of legality, which requires definition of precisely what acts or omissions constitute criminal conduct;
- 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;
- the ambiguity also raises concerns that the concept will be used to expand the scope of criminal behaviour to an unacceptable extent; and
- the concept of conspiracy has been used, in the view of some, to "convert innocent acts, talk and association into felonies".[18] The discussion within the European Union regarding the joint action requiring Member States to criminalise 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.

Even so, the experience that has been collected in the growing number of countries applying one or the other of these concepts shows that, in the hands of trained investigators and prosecutors, they can be highly useful tools in the constant efforts of the criminal justice system to come to grips with organized crime. The drafters of the Palermo Convention have seized this opportunity, and are requiring States Parties to act accordingly.

[18] Ferguson and Stokke, op.cit., pp. 140–141. The authors cite the use of the concept in the United States against, for example, union organisers, members of the Communist Party, and conscientious objectors during the Vietnam War.