

STRENGTHENING RULE OF LAW APPROACHES TO ADDRESS ORGANIZED CRIME:

Capacity Issues, Consequences and Complicity

The United States Agency for International Development (USAID) and Management Systems International (MSI) are hosting a series of roundtable discussions to better understand key dynamics between rule of law (ROL) and organized crime. The first roundtable examined ROL capacity issues, consequences of criminal justice responses to organized crime, and complicity of criminal justice actors and senior leaders. It brought together roughly 30 participants from USAID, the interagency, donors, research organizations, and implementing partners. This white paper captures key points from the discussion.

The U.S. government identifies transnational organized crime as a threat to national security in its 2017 National Security Strategy. It also explicitly lays out the issues of transnational organized crime in its 2017 Executive Order 13773 on Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking and the 2011 Strategy to Combat Transnational Organized Crime. As these documents recognize, transnational organized crime has expanded dramatically in size, scope, and influence in the 21st century and poses multiple threats to U.S. interests. It subverts political and security institutions through corruption; fuels violence and instability; undermines competition in world markets; destabilizes global trading, transportation, and financial systems; and harms communities and individuals.

To address these threats, the U.S. government has established the U.S. Council on Transnational Organized Crime. Its goal is to maximize information sharing and coordination among federal agencies and recommend any funding needs or changes in practices to identify, interdict, and dismantle transnational organized crime networks. Alongside this domestic focus, the U.S. government is helping partner countries strengthen governance and justice systems and sever state-crime alliances. Several agencies are engaged in this effort, including USAID. Key considerations in supporting these efforts are presented below.

ROL Capacity Issues

Capacity gaps impede the investigation, prosecution, and prevention of organized crime in many countries. This white paper

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focuses on the first two of these. Primary capacity gaps for the investigation and prosecution of organized crime include inadequate or absent:

- legislation to address criminal activity, such as laws on money laundering, asset seizure, or inchoate offenses, which include conspiracy and attempts to commit a crime (e.g., the U.S. Racketeer Influenced and Corrupt Organization [RICO] Act);
- forensics, including biological (e.g., fingerprints, DNA), cyber, and financial tools;
- crime scene exploitation;
- witness protection programs;
- management of informants and plea bargaining;
- surveillance and undercover police;
- regulations and government recordkeeping pertaining to birth, licensing, shipping, border control, banking, property, tax, insurance, criminal, and other records; and
- cooperation between government institutions, especially police and prosecutors.

More generally, a proactive rather than reactive approach to law enforcement is absent in many judicial systems, reflecting both the historical model in a country and gaps in capacity for building a case. Reactive investigations commence after a crime is committed and rely on eyewitness testimony, defendants' confessions, and sometimes forensic evidence. While they work well for singular, spontaneous, or limited criminal acts, they do not work well to combat crime groups.

Proactive investigations, by contrast, collect information over time to build a case against criminal organizations. They draw on informants, undercover police, and surveillance tools as well as financial investigations and international cooperation. Often,

they make creative use of ancillary charges, such as possession of weapons, immigration violations, or tax evasion. In building a case, they recognize the strength of circumstantial evidence such as associations, communications, travel, finances, and education. In fact, summary charts, tables, and graphs are indispensable in many U.S. trials of criminal organizations. Proactive investigations are not limited to activities before a crime occurs; rather, proactive investigations after a crime should take place as well.

The availability of these tools has allowed governments to effectively tackle organized crime, such as the U.S. government's prosecution of La Cosa Nostra in the 1970s. Kleinfeld argues that surveillance, informants and witness protection, and asset seizures are the most critical tools in the arsenal. Surveillance from such devices as wiretaps, bugs, or hidden cameras is indispensable where people are afraid to talk and kingpins rarely carry out crimes themselves (Kleinfeld, 2018). Informants and witness protection complement the intelligence gleaned from surveillance and help law enforcement understand what it is seeing and hearing. Cooperation agreements, a form of plea bargaining that offers criminals more lenient sentences for becoming informants against other criminals, often provide key information in organized crime trials (Kleinfeld, 2018). In addition, the ability to seize assets used in criminal offenses provides an important weapon. Organized criminals may be resigned to prison time, but may react strongly to the prospect of losing their wealth.

Development assistance to address these capacity gaps should have a dual objective of improving the justice system overall and countering organized crime. Rather than overreact to singular or limited

events with quick fixes, assistance should develop responses that build stable, just, and transparent societies. In addition, ROL practitioners should scrutinize planned assistance with a “do no harm” lens, and avoid potentially undermining human rights (e.g., wiretaps without judicial approval), overwhelming absorptive capacities, or creating “white elephants” that require more skills or resources than are available (e.g., electronic court records).

Rather than develop blueprints for reform, practitioners should think and work politically and analyze criminal justice as a system embedded in a larger political economy. The corollary to this approach is adaptive management that pivots toward what works. This approach embraces innovation but with a clear eye to evidence. Moreover, practitioners should engage and empower citizens in ROL reforms.

Consequences of Criminal Justice Responses

ROL practitioners should also consider the possible unintended consequences of criminal justice responses to organized crime. Although intended to serve as a deterrent, criminal justice systems may unintentionally contribute to organized crime.

The certainty of apprehension and severity of punishment are the main aspects of deterrence. Potential offenders respond to both aspects with differing degrees of responsiveness. They respond more to the certainty of apprehension, which reflects the size and quality of the police force and initiatives such as community policing and crime “hot spots.” They show a smaller response to the severity of punishment

with rapidly diminishing returns for more severe punishments. What this means is that short and certain sentencing is likely to yield the largest reduction in crime (Chioda, 2017).

Excessive punishment can also have the unintended consequence of escalating the severity of the offense. For example, the so-called “three strikes” laws impose a zero marginal cost on the gravity of crime after the second offense as the punishment for the third offense does not depend on its gravity. While research shows that three strikes laws may have a deterrent effect overall, they also may change the composition of the crimes committed. In one study of California’s law, criminals who offended for the third time were more likely to commit more violent offenses: the likelihood of the crime being violent rose by nine percentage points (Iyengar, 2010).

Focusing on youth specifically, research suggests that more severe approaches to criminal offenses are largely ineffective. “Scared straight” programs designed to raise awareness of the consequences of delinquency or discipline-based boot camps have shown little success or have been counterproductive, possibly because of their antagonistic approach (Chioda, 2017). Moreover, detention centers and adult prisons for youth are not effective deterrents and, instead, may act as schools for crime. For youth, incarceration increases the likelihood of re-offending and the severity of future offenses. It also reduces youths’ accumulation of human capital. By contrast, alternatives to prison sentences, such as court deferral (completing a probationary period without incident) and electronic monitoring, reduce re-offense and generate significant savings on prison costs.

More generally, zero-tolerance policies have unintended consequences for the fight against organized crime. Known as tough-on-crime policies, they may be popular and win votes, but increase criminal violence in response to law enforcement violence, harden first-time offenders, and strengthen gangs in prisons as they fill with gang members. Such policies also prompt criminal groups to use younger people to carry out criminal activities to avoid members serving time in prison.

Legalization of organized crime may also have unintended consequences as criminal groups infiltrate politics and the legal economy. In Japan, the government legalized organized crime de facto by allowing the Yakuza to operate so long as they did not kill civilians. But with the economic boom of the 1980s, the Yakuza's tentacles grew into business and the government, leading to an erosion of legitimacy in these institutions. This situation prompted the government to change course and, as the police started fighting the Yakuza, violence increased.

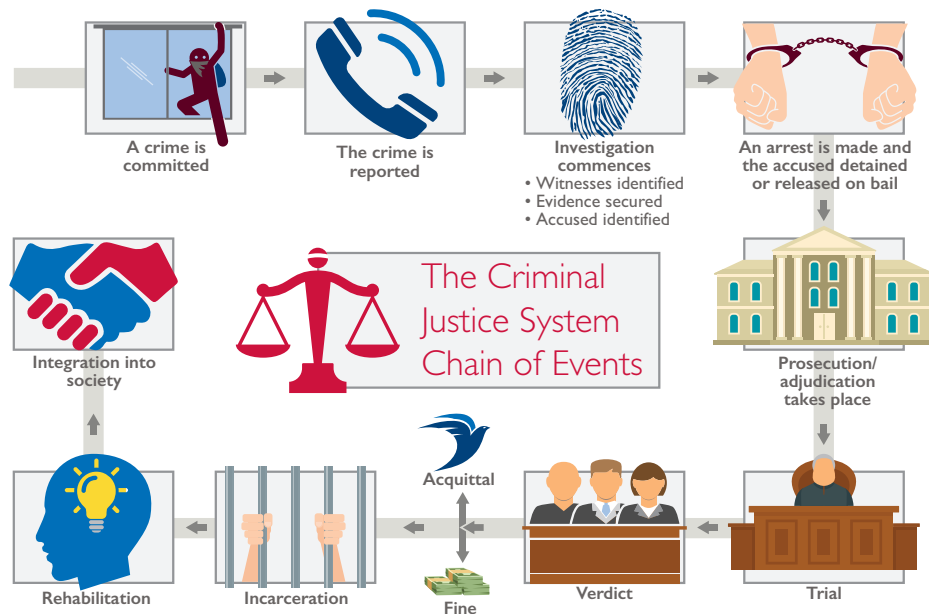
Complicity of Criminal Justice Actors and Other Government Officials

While weak justice and security institutions may reflect capacity deficits, they may also reflect complicit governments that deliberately starve offices of funds, interfere with meritocratic staffing, or limit the power of laws and prosecutorial tools. Building the capacity of the criminal justice system in the presence of government complicity may have no real impact, as assistance is sidelined or, worse, could provide a political tool for those in power to target rivals from criminal activities and/or politics.

Organized crime can corrupt many aspects of government, but it has a particularly corrosive effect on the ROL. There are five elements of the ROL—the provision of order and security, a system of checks and balances, fairness in treatment, legitimacy of justice institutions, and effective application of the law—and state complicity in organized crime can undermine each of them.

Complicity between organized crime and state actors can corrupt decisions at many points along the chain of events in a criminal justice system (see Figure 1). This can begin with the decision by witnesses or victims to report a criminal act. If they lack confidence in the system or are otherwise intimidated, they may decide not to report the incident. Moving down the chain, if a crime is reported, the police then decide whether to investigate. If the decision is “no,” the case ends. If an investigation is opened, then a series of decisions confront investigators, prosecutors, judges, and corrections officials, beginning with whether there is enough evidence to warrant the arrest of one or more suspects. A decision must be made on whether to indict or lay formal charges, based on the facts gathered at the time of the arrest. An indictment or formal charge leads to the next decision point in the system: whether to hold the suspect in jail pending trial or release him or her on bail. In either case, a trial or formal proceeding follows, where a judge, jury, or some combination decides whether the suspect committed the crime. If the suspect is convicted of one or more crimes, a judge will decide what punishment to impose: probation, a fine, or imprisonment. State complicity can corrupt any of those decisions.

FIGURE I
Criminal
Justice System
Chain of Events



Addressing state complicity in organized crime entails efforts to strengthen accountability in government. Accountability operates through multiple channels. External accountability entails the checks and balances that other government institutions, such as ministries of finance, parliaments, and anti-corruption and ombudsman offices, can exert over justice institutions. Internal accountability entails internal managerial systems in justice institutions such as professional standards units, internal affairs departments, disciplinary committees, information management systems, inspector generals, and early intervention procedures. Social accountability entails efforts by citizens to hold government officials accountable for their actions through such mechanisms as oversight boards, complaint mechanisms, trial observation, citizen reporting and score cards, documentation and research, and investigative reporting. There is some evidence that engaging on a single dimension (external, internal,

or social) is less effective than bundling activities and working in two or more dimensions of accountability. The only real way to approach systemic corruption and complicity is to build systemic accountability.

In addition to these accountability mechanisms, mobilizing broad-based domestic support and aligning with international initiatives are important measures that may shore up the political capital for reformers to sustain this course. For example, the Open Government Partnership (OGP) may provide a platform for strengthening government commitment to ROL reform. Through the OGP, government and civil society develop action plans on open government that are publicly reviewed every two years. In contexts of significant government complicity, the International Commission against Impunity in Guatemala (CICIG) and the anti-corruption hybrid court in Ukraine represent possible models to consider. The CICIG example shows

the power of domestic support working in tandem with institutional accountability mechanisms. When CICIG identified a customs fraud network operating out of the Vice President's Office in 2015, only weekly protests by tens of thousands of citizens pushed the president to resign then face corruption charges himself.

Finally, political economy considerations are critical when seeking to address organized crime. Efforts to strengthen accountability may quickly stall if those involved have a

strong stake in the status quo and only engage in this type of programming to limit or take down their opponents. It is important to consider where there may be entry points for reform entrepreneurs who have an interest in curbing organized crime. The use of political economy analysis and "thinking and working politically" can help find openings and understand and navigate complex and shifting landscapes. Figure 2 shows the multiple levers for strengthening accountability in the face of organized crime.

FIGURE 2
Levers of Accountability



Conclusion

The first roundtable recommended several ROL approaches to address organized crime:

- Capacity building should support a proactive approach to law enforcement that draws on many types of evidence to build a case against criminal groups. Reactive law enforcement is not enough.
- Surveillance, informants, and asset seizures are critical tools in this proactive approach.

- Short and certain sentencing has the largest effect on deterrence, whereas tough-on-crime policies have unintended consequences for the fight against organized crime.
- Addressing state complicity in organized crime requires efforts to strengthen accountability using multiple institutional and political levers.

The second white paper in this series focuses more extensively on the complex topic of state complicity.

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