

What Russia Must Do to Fight Organized Crime

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Abstract: Most analysts explain the persistence of organized crime in Russia as a result of corrupt government officials who protect major crime bosses and hinder law enforcement attempts to investigate and prosecute criminal organizations. Although official corruption is undoubtedly a major factor, such analyses ignore other, no less important, obstacles, many of which are embedded in the Russian legal system itself. This article examines various gaps in Russian law, such as inadequate mechanisms for introducing wiretap evidence and cooperating witness testimony in court proceedings, which hinder the investigation and prosecution of organized crime in Russia.

Key words: criminal procedure, operational search activity, organized crime, Russian criminal law

Most analysts explain the persistence of organized crime in Russia as a result of corrupt government officials who protect major crime bosses and hinder law enforcement attempts to investigate and prosecute criminal organizations. Although official corruption is undoubtedly a major factor, such analyses ignore other, no less important, obstacles, many of which are embedded in the Russian legal system itself. Beginning with the passage of the Organized Crime Control and Safe Streets Act of 1968, the United States has developed a complex legal structure which, by providing law enforcement with the tools needed to investigate and prosecute organized crime, has resulted in the weakening of La Cosa Nostra. Russia, however, lacks corresponding laws.

On the basis of the U.S. experience, Kenneth Lowrie, deputy chief of the United States Department of Justice Organized Crime and Racketeering Section, has identified five elements necessary to an effective antiorganized crime

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program. These are (1) criminal statutes that allow for the prosecution of a criminal enterprise as a whole, (2) laws that allow for the use of confidential informants and undercover operations, (3) laws that facilitate the use of cooperating witness testimony in court proceedings, (4) laws that permit electronic surveillance and the use of wiretap evidence in court proceedings, and (5) an effective witness protection program.¹ A comparative analysis of relevant Russian laws in light of these elements reveals that Russia's legal base is woefully inadequate to combat organized crime and is likely as much of an obstacle to the eradication of organized crime in Russia as is official corruption.

Enterprise Theory of Prosecution

The U.S. Racketeering Influenced and Corrupt Organizations Act (RICO), Title 18, U.S.C. § 1961 et seq., passed in 1970, facilitates the prosecution of organized crime by allowing prosecutors to join multiple defendants and multiple crimes in a single case if the defendants and crimes are all connected to the same criminal enterprise. Without such a law, defendants in a single criminal organization would be prosecuted separately for separate crimes. By contrast, joining defendants and crimes in a single case allows prosecutors to present to judges and juries a complete picture of the defendants' criminal activity.

In 1996, Russia added Article 210 (Organization of a Criminal Society) to its Criminal Code, which, like RICO, purports to facilitate "enterprise" prosecutions. Specifically, Article 210 criminalizes the creation of or participation in "a criminal society ('criminal organization') [established] for the commission of serious or especially serious crimes." However, very few cases are actually prosecuted under this statute. The ineffectiveness of Article 210 appears to be the result of several factors.² First, Article 210 is poorly drafted and fails to provide a workable definition of "criminal society." RICO defines a racketeering enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity," engaged in a "pattern of racketeering activity" [18 U.S.C. § 1961(4)]. RICO further specifies that "a pattern of racketeering activity requires at least two acts of racketeering activity" within a ten-year period and provides a list of crimes that constitute "acts of racketeering activity" [18 U.S.C. § 1961(1) and 1961(4)]. By contrast, Article 210 provides no definition of "criminal society." A commentary to Article 210 refers to Article 35, the general definitional section of the Russian Criminal Code.³ However, Article 35 provides little help and states only that "a crime is considered to have been committed by a criminal society ('criminal organization') if it is committed by a unified criminal group (organization), which has been created for the commission of serious or especially serious crimes. . . ." In other words, the Russian Criminal Code's definition of "criminal society" is entirely circular. It is no wonder that the statute is difficult to use.⁴

Even if Article 210 did provide a clear definition, prosecuting criminal organizations under this statute would still be difficult because Russia's Law on Operational-Search Activity does not provide investigators with the tools necessary for conducting the long-term investigations necessary to collect evidence

establishing the existence of a criminal organization and the connections between its members and crimes. This problem is aggravated by Article 162 of Russia's Code of Criminal Procedure's strict deadlines for the completion of all criminal investigations. Aside from "exceptional cases," these deadlines cannot be extended beyond twelve months, far short of the time U.S. investigators often take to conduct a thorough investigation of a criminal organization.⁵

Despite the adoption of Article 210, Russian investigators, like their Soviet predecessors, continue to focus on solving individual crimes and prosecuting individual defendants rather than pursuing a broader, long-term approach, focused on the entire criminal organization.

Confidential Informants, Undercover Operations, and Cooperating Witnesses

The use of undercover agents or confidential informants to infiltrate criminal organizations has proven extremely valuable in U.S. organized crime prosecutions.⁶ Of course, such operations often require the agents or informants to commit crimes to ingratiate themselves with the targets of the investigation and protect their cover. Accordingly, the Department of Justice has developed elaborate guidelines to define what constitutes permissible "criminal activity" in the course of an undercover investigation.⁷ By contrast, nothing in Russia's Criminal Code, Criminal Procedure Code, or Law on Operational Search Activity explicitly protects undercover agents from criminal prosecution for crimes committed in the course of an undercover investigation.⁸ Consequently, Russian investigators have no assurance that they themselves will not be prosecuted if they commit even non-violent crimes in the course of an undercover investigation.⁹ Absent such legal protections, undercover investigations are almost impossible.

Even worse, Russian law actually creates a special obstacle to undercover operations in corruption cases. In the United States, corruption investigations often involve "stings" in which corrupt officials are captured on tape accepting "bribes" from undercover agents.¹⁰ Rather than authorizing such operations, Article 304 of Russia's Criminal Code specifically criminalizes the giving of a bribe for the purpose of setting up a prosecution of the recipient. Article 304 is clearly designed to address what in Russia is a serious problem—criminals setting up government officials to blackmail them. Although Article 304 does not apply if the target accepts the bribe, by creating the possibility of criminal prosecution in the event that the bribe is refused, it inhibits corruption investigations.

In addition to proactive measures, U.S. organized crime prosecutions almost always rely on historical testimony of cooperating witnesses. Indeed, it is hard to think of a single successful major organized crime prosecution in the United States that did not involve at least one cooperating witness taking the stand and testifying about crimes he or she committed together with the defendants. Cooperating witnesses are so important to U.S. law enforcement efforts that U.S. law provides specific mechanisms for conferring benefits on those who provide valuable assistance in important cases.¹¹ Such provisions provide a

strong incentive for defendants to provide testimony against other members of their criminal organizations and have proven invaluable in the U.S. war on organized crime.

By contrast, Russian law fails to create appropriate incentives for cooperation. For example, Article 75 of the Russian Criminal Code provides that a first-time offender who has committed a crime of minor or medium seriousness shall be exonerated from criminal liability if he or she voluntarily assists in the uncovering of the crime and provides the victim with complete compensation. Similarly, several other articles in the Criminal Code also provide for complete exoneration from criminal liability under various circumstances.¹² Article 210, Russia's criminal enterprise statute, provides that "an individual who voluntarily terminates his participation in a criminal society . . . is freed from criminal liability if his actions do not contain the elements of another crime."

Such provisions are a poor substitute for a well-developed set of rules governing the conferral of benefits on cooperating witnesses. For example, provisions like those contained in Articles 75 and 127, which are limited to first-time offenders who have not committed aggravated forms of the crime, ensure that only the lowest and least culpable members of an organization, who are also the least likely to have valuable information, will cooperate. The law provides no mechanism for obtaining the cooperation of higher-level members of the criminal enterprise. In addition, provisions such as those contained in Article 210 and 127, which limit the possibility of exoneration to those whose actions do not "contain the elements of another crime," are unworkable. For example, anyone who can be prosecuted under Article 210 will, almost by definition, have committed another crime. It is hard to imagine how one could organize or participate in a criminal society established for the purpose of committing serious crimes, without personally committing a serious crime. Thus, it is not clear who can take advantage of this provision or what crimes such a person could help prosecute. Moreover, by allowing criminals to escape criminal liability by providing assistance only with regard to the specific crime with which they are charged (all of the articles mentioned above refer specifically to "the crime"), such provisions fail to provide an incentive for cooperators to provide all the information they possess about criminal activity.

Other provisions of Russian law also make it difficult to use cooperating witness testimony in court proceedings. For example, Article 12 of the Law on Operational Search Activity defines the identity of informants and undercover agents and the information they provide as "state secrets,"¹³ the disclosure of which can be criminally prosecuted under Article 283 of the Criminal Code. In addition, Article 12 of the Law on Operational Search Activity prohibits the use of information provided by confidential informants and undercover agents in court unless the individual gives written consent. As one commentary to the Law on Operational Search Activity explains, this requires that the witness's security be guaranteed.¹⁴ Given that Russia is only beginning to establish a witness protection program, it is almost impossible for law enforcement to obtain the necessary consent.

Electronic Surveillance

Wiretap recordings have become almost as important to U.S. organized crime prosecutions as cooperating witnesses and are often used in conjunction with cooperating witness testimony to present a complete picture of a criminal organization's illegal activity.¹⁵ Wiretap evidence constitutes an unimpeachable record of the defendants' own conversations. It is especially valuable in organized crime cases, in which witnesses are often reluctant to testify and, even when they are willing to testify, are subject to serious cross-examination because of their own criminal conduct.

Russia's Code of Criminal Procedure provides that wiretap evidence (and other evidence developed through operational search activity) is admissible so long as the evidence was not obtained in violation of the Code of Criminal Procedure. However, Article 12 of the Law on Operational Search Activity also defines wiretap evidence, such as information provided by confidential informants and undercover agents, as a "state secret," the disclosure of which is criminally prosecutable. Thus, wiretap evidence, like cooperating witness testimony, is rarely used in Russian criminal prosecutions.

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Witness Protection

According to the U.S. Marshals, since the U.S. Witness Security Program (the "Program") was established in 1970, approximately 7,700 witnesses and 9,800 of their family members have been protected by the Program. The effectiveness of the Program in combating organized crime is clearly revealed by the fact that prior to the Program's establishment, only one member of La Cosa Nostra, Joseph Valachi, provided public testimony against the Mafia. Since the establishment of the Program, high-ranking members of all La Cosa Nostra families, including several bosses, have cooperated and testified in mob cases.¹⁶

In January 2005, Russia's first witness protection legislation, titled "A Federal Law on Government Protection of Victims, Witnesses, and Other Participants" took effect. Chapter 2, Article 6 of the law provides for a variety of protective measures for victims and witnesses, including "protection of home and property," "individual protection, communication, and security alarm devices," "relocation," "issuance of new documents," "change of appearance," "transfer to a new job or educational institution," and "temporary relocation to a secured shelter." Passage of the law is a necessary and important step in Russia's war on organized crime. However, it is still too early to evaluate its effectiveness. Nevertheless, it is clear that the law will not have any effect unless it is well funded and unless potential

witnesses believe that it can actually protect them. This, in turn, requires popular trust in law enforcement, something that is still lacking in Russia.

Conclusion

The infirmities of the Russian legal system discussed herein are largely the result of Russia's Soviet past. The Soviet government defined organized crime as a disease of advanced capitalism that could not exist in a socialist society. As a result, Soviet law never developed the modern legal tools necessary to combat organized crime. Of course, wiretapping, undercover investigations, and informants all existed in the Soviet era, but they were designed primarily to keep track of dissidents and political enemies of the regime, rather than for criminal prosecutions. Because these techniques were designed for political instead of legal purposes, the law treated their fruits as "state secrets" and provided no mechanism for their use in court proceedings.

Although the Russian Criminal Procedure Code, enacted in 2002, expressly permits the use of the results of operational search activity in court, the Criminal Code and Law on Operational Search Activity have not caught up and still contain provisions making the use of such evidence difficult, if not impossible. As a result, Russian investigators and prosecutors have never learned how to use such evidence effectively and still continue to view it as inadmissible. Until Russian legislators adapt their criminal justice system to current realities, Russian investigators will continue to be severely handicapped and organized crime will persist.

Specifically, Russia should, at a minimum, implement a full-scale witness protection program, develop standard procedures for the admission of operational-search evidence in court proceedings and provide training to prosecutors and investigators on the use of these procedures, amend Article 210 of the Criminal Code and the definitional section of the Criminal Code to provide a workable definition of "criminal society," and develop rules authorizing undercover agents to commit certain kinds of crimes in furtherance of an investigation.

Notes

1. Presentation at International Law Enforcement Academy (ILEA), April 2004.
2. V. V. Koryakovtsev and K. V. Pitul'ko, *Commentary to the Criminal Code of the Russian Federation* (St. Petersburg: Piter, 2004), 494. "Prosecution of the leaders of criminal organizations is relatively rare and implementation of Article 210 of the Criminal Code, which addresses criminal societies, is extremely difficult."
3. *Ibid.*
4. Determining what constitutes a criminal society under Russian law is further complicated by the immediately preceding article, 209, titled "Banditism." Article 209, which has its roots the Soviet Criminal Code of 1922, criminalizes the "creation of an ongoing armed group (band) for the purpose of attacking citizens or organizations." It is hard to imagine that any armed criminal group formed "for the purpose of attacking citizens or organizations" would not also qualify as a "criminal society" under Article 210. However, the presence of Article 209 suggests that such armed groups should be prosecuted under Article 209, rather than Article 210, thus raising even more confusion about what constitutes a "criminal society" for purposes of Article 210.
5. For example, see *United States v. Ruggiero*, 726 F.2d 913, 915 (2d Cir. 1984), noting the six-year FBI investigation of the Bonnano crime family of La Cosa Nostra; *Unit-*

ed States v. Smith, 580 F. Supp. 1418, 1431, noting the six-year investigation of labor racketeering in New Jersey; and *United States v. DiBernardo*, 775 F.2d 1470, 1472 (11th Cir. 1985), noting the two-year FBI investigation into a Mafia-controlled pornography ring.

6. For example, see *United States v. Ruggiero*, discussing the infiltration of the Bonnano crime family by an undercover FBI agent and *People v. Association of Trade Waste Removers of Greater New York*, 701 N.Y.S.2d 12, 14–15 (App. Div., 1 Dep’t. 1994), discussing the New York City Police Department’s undercover investigation and infiltration of a Mafia-controlled garbage hauling association.

7. For example, see *United States v. Salemm*, 91 F. Supp. 2d 141, 219 (D. Mass. 1999), discussing attorney general guidelines regarding authorized criminal conduct on the part of confidential informants.

8. *Organizovannaya Prestupnost’: Zakonodatel’niye, ugovovno-protsessual’niye, kriminaliticheskiye aspyekti* (St. Petersburg: Piter, 2002), 70, 76.

9. *Ibid.*

10. For example, see *United States v. Myers*, 527 F.Supp. 1206, 1210 (E.D.N.Y. 1981), discussing the “Abscam” investigation, which involved sting payments to numerous government officials, including six members of the House of Representatives; the mayor of Camden, New Jersey; an immigration official; two members of the Philadelphia City Council; and a member of the New Jersey Casino Control Commission.

11. For example, see the United States Sentencing Guidelines (U.S.S.G.) Section 5K1.1, which states that defendants who provide “substantial assistance” to law enforcement may be sentenced below the otherwise applicable sentencing range.

12. See, for instance, Article 127 (human trafficking), which provides that a human trafficker who voluntarily frees a victim and facilitates the exposure of the crime, if his actions do not include the elements of another crime, shall be exonerated from criminal liability, and Article 205 (terrorism), which provides that someone who participates in the preparation of a terrorist attack is exonerated from criminal liability if he warns law enforcement about the terrorist attack before it takes place.

13. Article 12 provides that the results of Operational–Search Activity can be disclosed upon application of the director of the law enforcement agency responsible for conducting the investigation. However, Russian law enforcement officials whom I have interviewed have informed me that such applications are almost never made because most law enforcement officials are unfamiliar with the necessary procedures and fear being accused of disclosing secret information.

14. M. P. Smirnov, *Commentary on Operational-Search Law of the Russian Federation and Foreign Countries* (Moscow: Ekzamen, 2002), 396–97.

15. For example, see *United States v. LoCascio*, 6 F.3d 924, 930 (2d Cir. 1993), which notes the evidentiary importance of electronically intercepted conversations in the Gambino family headquarters in the RICO prosecution of John Gotti and other members of the administration of the Gambino crime family.

16. For example, see *United States v. Merlino*, 349 F.3d 144, 150 (3rd Cir. 2003), noting the testimony of the former boss of the Philadelphia La Cosa Nostra (LCN) family and *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999), noting the testimony of the former acting bosses of the Luchese and Colombo families.