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## Retrofitting Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations

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**RETOOLING LAW ENFORCEMENT TO INVESTIGATE  
AND PROSECUTE ENTRENCHED CORRUPTION: KEY  
CRIMINAL PROCEDURE REFORMS FOR INDONESIA AND  
OTHER NATIONS**

BENJAMIN B. WAGNER\* & LESLIE GIELOW JACOBS\*\*

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## 1. INTRODUCTION

Public corruption is *the* development issue of the twenty-first century. A broad consensus has emerged in recent years that corruption retards development by slowing economic growth, weakening government institutions, and exacerbating poverty. Uprooting the systemic, entrenched government corruption that plagues so many developing countries requires a long-term, multi-faceted strategy, but a wide range of players on the international stage agree that effective criminal prosecution—jailing the bad guys—must be a cornerstone of the global anti-corruption campaign. Convictions of corrupt officials not only disrupt corrupt networks, but also shake up the environment in which corruption is allowed to flourish, and increase deterrence by “making it clear to public officials that if they engage in corrupt conduct they will lose their offices, forfeit illegally acquired wealth, and go to

prison.”<sup>1</sup> Investigations and prosecutions which yield quick and tangible results, resulting in attention-grabbing headlines and the potential for deterrence and galvanizing public will, can have a broad and immediate impact on society that no administrative reform plan can match. While broad structural measures addressing the root causes of corruption must be the core of sustainable reform, the day-to-day presence and pressure of credible, effective criminal law enforcement is what stimulates and sustains the momentum of an anti-corruption campaign.<sup>2</sup> Or at least that is the ideal. To act as the catalyst that it is supposed to, however, law enforcement must be equipped to succeed.

In all countries, public corruption is more difficult than most other illegal acts to investigate and prosecute. It is a secret crime, carried out by powerful and often sophisticated perpetrators intent on silencing potential witnesses and retaining access to the spoils. Investigative techniques geared toward violent crime and other single-instance illegalities do not work in the context of entrenched corruption, where multiple players, often integrated hierarchically, operate through self-sustaining networks. To be effective against active, complex public corruption networks, law enforcement cannot simply examine a few suspected corrupt transactions, but must deploy a range of criminal statutes and evidence-gathering procedures to build prosecutable cases. In many countries, including the United States, criminal investigators and prosecutors

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<sup>1</sup> Larry Diamond, *Diplomacy: Institutions of Accountability*, 3 HOOVER DIG. (1999), available at <http://www.hoover.org/publications/digest/3512991.html>.

<sup>2</sup> See Hans-Joachim Rieger, *Prevention – A Key Factor in Fighting Corruption: The Role of a New Training Concept*, 8 MOSCOW ST. U. SCH. OF PUB. ADMIN. ELECTRONIC J. (2005) (Russ.), [http://www.spa.msu.ru/e-journal/10/101\\_1.php](http://www.spa.msu.ru/e-journal/10/101_1.php) (“[L]aw enforcement has an important preventive effect: it may even be considered a prerequisite for prevention, in that it points at specific corruption problems, thus helping create the necessary awareness. . . . Without the prosecution of high-level corruption, the chances of success of specific prevention measures may be fairly slim.”); Susan Rose-Ackerman, *Corruption and the Criminal Law*, 2 F. ON CRIME & SOC’Y at 3, U.N. Sales No. E.03.IV.2 (2002) (“[T]he criminal law can play a role as a backstop lying behind the needed structural changes.”); Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT’L LAW. 717, 728 (2005) (“In order to effectively combat corruption, it is necessary to focus on the workings of institutions, not individuals. Penal law is therefore of less importance than one might think. This is not to deny, however, that the criminal prosecution of corrupt activities—and associated activities, such as money laundering—may give the business community a strong signal. . . . To charge high-level individuals, whether in business, public institutions or politics, with collusive corruption increases the trust of ordinary people in the system and consequently their support in the fight against corruption.”).

make productive use of these multi-faceted legal weapons.<sup>3</sup> But investigators and prosecutors in most developing countries still struggle, amidst the many other obstacles that impede the fight against corruption, with outdated criminal procedures that do not support a proactive corruption investigation strategy.<sup>4</sup>

Both regional anti-corruption conventions and the United Nations Convention Against Corruption (“UNCAC”) recognize the vital role of law enforcement agencies, and contain provisions which promote legal reforms to better equip them to combat corruption. While many legal reforms have occurred in recent years, most of this change has been directed at establishing new substantive corruption crimes. Still missing in most countries, and likely to be neglected in the efforts toward comprehensive legal reform despite their inclusion in the UNCAC, are criminal procedure revisions necessary to enable law enforcement to effectively detect, investigate, and prosecute violations of substantive corruption crimes. Without an infrastructure of procedural provisions supporting law enforcement’s case-making activities, the many new corruption crimes added to the statute books in developing countries may well remain mere window-dressing. The next step to enable law enforcement is a concise, coherent package of revisions drawn from and beyond the UNCAC, which, as a unit, deliver more than the parts could alone. We recognize that legal systems vary greatly, and that a single set of legal reform prescriptions will not fit all countries. But a model legislative agenda, focused on proven law enforcement tools only, can provide the template many developing countries need to address the circumstances that impede corruption eradication efforts everywhere.

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<sup>3</sup> Federal prosecutors in the United States boast very high conviction rates in public corruption cases. David M. Luna, Bureau of Int’l Narcotics and Law Enforcement Affairs, *Strategies to Fight Kleptocracy* (Sept. 26, 2007), available at <http://www.state.gov/p/inl/rls/rm/92911.htm> (claiming an 85% conviction rate in 5749 individual public corruption offense suits between 2001 and 2005); see also DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION (2006), available at <http://www.usdoj.gov/criminal/pin/docs/arpt-2006.pdf> (detailing operations of the Public Integrity Section).

<sup>4</sup> ADB/OECD Anti-Corruption Initiative for Asia & the Pacific, *Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Frameworks in 25 Countries*, at xvii, Doc. 060106 (2006), available at <http://www.oecd.org/dataoecd/32/31/36832820.pdf> (noting “the low conviction rate in this area of crime in various countries”).

We present our recommendations in the context of Indonesia—the world’s fourth largest country and consistently ranked as one of the most corrupt.<sup>5</sup> Having recently rid itself of its long-term kleptocratic leader, and with a reform-minded president advancing corruption convictions as a demonstration of the administration’s anti-corruption resolve, the nation teeters on the brink of real, sustainable change.<sup>6</sup> Many forces press against the anti-corruption effort in Indonesia, and there are many obstacles to uncovering and effectively prosecuting corruption crimes. Criminal investigative procedures are but one of them, but they are something that can change relatively easily. Despite the fact that Indonesia ratified the UNCAC in 2006, we observed that many in law enforcement are not aware of its provisions nor realize how changes to their antiquated criminal procedure code and other laws could boost their success rates in corruption cases.<sup>7</sup> Our proposed package of changes provides both a guide for legislative action and a focus for educating the enforcers to succeed, in Indonesia and in other developing countries.

We begin this article in Section 2 with a brief discussion of the problem of corruption in the developing world and the many elements of a successful anti-corruption strategy. We identify an effective prosecution capability as an essential part of the broader

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<sup>5</sup> Although its score has improved somewhat over the past few years, Indonesia has consistently ranked near the bottom of Transparency International’s annual corruption perceptions index. See J. GRAF LAMBSDORFF, *TRANSPARENCY INTERNATIONAL, 2008 CORRUPTION PERCEPTIONS INDEX*, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2008](http://www.transparency.org/policy_research/surveys_indices/cpi/2008) (ranking Indonesia 126 out of 180); see also *Indonesia Rated Asia’s Most Corrupt*, ONENEWS, Mar. 8, 2005, [http://tvnz.co.nz/view/news\\_world\\_story\\_skin/478317%3Fformat=html](http://tvnz.co.nz/view/news_world_story_skin/478317%3Fformat=html) (citing rankings of the Political and Economic Risk Consultancy Ltd., which polled over 900 expatriate respondents across Asia).

<sup>6</sup> SOREN DAVIDSEN ET AL., *CURBING CORRUPTION IN INDONESIA 2004–2006: A SURVEY OF NATIONAL POLICIES AND APPROACHES 20* (2006), available at [http://www.usindo.org/publications/reports/pdf/korupsi\\_web.pdf](http://www.usindo.org/publications/reports/pdf/korupsi_web.pdf) (citing 2004 comments from Indonesian President Susilo Yudhoyono that approvingly refer to prosecutions as “shock therapy”).

<sup>7</sup> Indonesia ratified the UNCAC by adopting Law Number 7 of 2006, in April of that year. Indonesia’s independent Corruption Eradication Commission (known in Indonesia as the KPK) has analyzed its legal code to identify where changes need to be made to conform to UNCAC’s requirements. CORRUPTION ERADICATION COMMISSION, *GAP ANALYSIS STUDY REPORT: IDENTIFICATION OF GAP BETWEEN LAWS/REGULATIONS OF THE REPUBLIC OF INDONESIA AND THE UNITED NATIONS CONVENTION AGAINST CORRUPTION* (1st ed. 2006), available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Publications/E-Book-UNCAC-Gap-Analysis-3.pdf> [hereinafter *KPK GAP REPORT*].

strategy, and then discuss that need in the context of Indonesia's efforts to battle entrenched corruption. In Section 3, we discuss the major criminal enforcement challenges in the investigation and prosecution of public corruption. We point out the difficulties inherent in investigating and prosecuting corruption crimes and identify the tools and techniques necessary to address them—measures that Indonesia and many other developing countries lack and critically need. In Section 4, we identify gaps in the Indonesian criminal and procedure codes with respect to these important tools and techniques. We set out a proposed legislative agenda in Section 5, tailored to respond to our observations in Indonesia, but a helpful model for the many other developing countries seeking to hone their criminal procedures to meet the challenges that public corruption presents.

## 2. LAW ENFORCEMENT AND THE BATTLE AGAINST ENTRENCHED CORRUPTION

### 2.1. *The Crucial Role of Enforcement in a Comprehensive Anti Corruption Campaign*

Public corruption<sup>8</sup> can take many forms, including bribery, embezzlement, theft, fraud, extortion, abuse of discretion, favoritism or nepotism, conflict of interest, and influence peddling.<sup>9</sup> Its magnitude may vary as well, ranging from “grand” or “political,” which involves the highest levels of national

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<sup>8</sup> In its 1997 Anti-Corruption Strategy, the World Bank defined public corruption as “the abuse of public office for private gain.” World Bank, Poverty Reduction and Economic Management, *Helping Countries Combat Corruption: The Role of the World Bank*, at 8 (Sept. 1997), available at <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>. Others employ broader definitions, which include corruption by private actors as well as public employees. See Transparency International, Frequently Asked Questions About Corruption, [http://www.transparency.org/news\\_room/faq/corruption\\_faq](http://www.transparency.org/news_room/faq/corruption_faq) (last visited Oct. 20, 2008) [hereinafter TI FAQs] (defining corruption as the “misuse of entrusted power for private gain”).

<sup>9</sup> Petter Langseth, *Measuring Corruption*, in MEASURING CORRUPTION 7, 10–14 (Charles Sampford et al. eds., 2006) (describing the different techniques and categories of corruption); see also U.N. Econ. & Soc. Council [ECOSOC], U.N. Dev. Programme, *Tackling Corruption, Transforming Lives: Accelerating Human Development in Asia and the Pacific*, at 19, U.N. Sales No. E.08.III.B.2 (2008), available at [http://www.undprcc.lk/ext/crhdr/crhd\\_report/RHDR\\_Full%20Report\\_Tackling\\_Corruption\\_Transforming\\_Lives.pdf](http://www.undprcc.lk/ext/crhdr/crhd_report/RHDR_Full%20Report_Tackling_Corruption_Transforming_Lives.pdf) [hereinafter U.N. Dev. Programme Report] (focusing on corruption in the Asian and Pacific countries from a human development perspective).

government and results in distortion of central government functions, to “petty” or “bureaucratic,” which involves the exchange of small amounts of money or favors and exists within the established government framework.<sup>10</sup> Corruption can be episodic or entrenched. Entrenched corruption is *pervasive*—few alternatives to dealing with corrupt officials exist; *organized*—corrupt officials coordinate, vertically or horizontally to sustain the system; and *monopolistic*—extensive corruption faces little political or social opposition.<sup>11</sup> This kind of systemic, embedded corruption can exist anywhere, but it is most common in developing countries, where the institutional structures of lawmaking and public service delivery are weak, or captured, and run by the will of a corrupt head of state.

Observers have differed on the degree of damage that corruption wreaks on developing governments and economies. “Revisionists” in the 1960s countered the traditional view that public corruption impedes modernization, arguing that corruption is a positive force in development, promoting economic efficiency and enhancing political participation, trust, and stability.<sup>12</sup> More recent empirical studies challenge these conclusions generally, even as a number of them confirm an “East Asian paradox,” whereby in a number of developing nations in that area, including Indonesia, systemic corruption coexisted with high levels of economic growth.<sup>13</sup> But the Asian financial crisis of the late 1990s,

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<sup>10</sup> Michael Johnston & Alan Doig, *Different Views on Good Government and Sustainable Anticorruption Strategies*, in CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY 13, 15 (Rick Stapenhurst & Sahr J. Kpundeh eds., 1999) (explaining the difference between political and bureaucratic corruption); U.N. Dev. Programme Report, *supra* note 9, at 20 (explaining the difference between grand and petty corruption).

<sup>11</sup> Johnston & Doig, *supra* note 10, at 13–14.

<sup>12</sup> See SAUMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 69 (1968) (offering the “grease” hypothesis, under which the ability of government employees to levy bribes makes them work harder); ROBERT MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (4th ed. 1968); David Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719, 719 (1967) (arguing that bribery is a development stage with positive and negative effects); Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8, 10–11 (1964) (offering the “speed money” hypothesis, under which corruption makes economic transactions easier by eliminating bureaucratic delay); Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681, 681 (1995) (“The debate on the effects of corruption is particularly fervent. . . . [S]ome authors have suggested that corruption might raise economic growth . . .”).

<sup>13</sup> J. Edgardo Campos et al., *Corruption and Its Implications for Investment*, in



caused at least in part by the market distortions wreaked by widespread corruption, took the luster off the regional exceptionalism.<sup>14</sup> Most recently, expert opinion across a wide range of sources—including academics,<sup>15</sup> government officials, international organizations, nongovernmental organizations (“NGOs”), the media, and business interests—has coalesced around the conclusion that public corruption is a malign factor<sup>16</sup> that negatively impacts effective government,<sup>17</sup> economic growth,<sup>18</sup>

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CORRUPTION: THE BOOM AND BUST OF EAST ASIA 11 (J. Edgardo Campos ed., 2001) (describing the “East Asian puzzle”); Andrew Wedeman, *Development and Corruption: The East Asian Paradox*, in POLITICAL BUSINESS IN EAST ASIA 34 (Edmund Gomez ed., 2001); Seung-Hyun Lee & Kyeungrae Kenny Oh, *Corruption in Asia: Pervasiveness and Arbitrariness*, 24 ASIA PAC. J. MGMT. 97, 98–100 (2007) (noting that “many Asian countries with quite high levels of corruption show high levels of economic development as well,” and offering the hypothesis that high economic development can exist where corruption is pervasive, but not arbitrary).

<sup>14</sup> U.N. Dev. Programme Report, *supra* note 9, at 32–33; Sandgren, *supra* note 2, at 718 (“Even in Asia, which has traditionally had a high level of acceptance of corruption, a new view has emerged. . . . [In light of the 1997 financial crisis], [t]he previous view that corruption facilitated decision-making and thus helped economic progress in the region is no longer viable.”).

<sup>15</sup> Daniel Kaufman, *Anticorruption Strategies: Starting Afresh? Unconventional Lessons from Comparative Analysis*, in CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY, *supra* note 10, at 35, 39 (offering an empirical challenge to the “grease” and “speed money” arguments); Eric C. C. Chang & Yun-han Chu, *Corruption and Trust: Exceptionalism in Asian Democracies?*, 68 J. POL. 259, 269 (2006) (finding that “the level of citizens’ perceptions of corruption decreases their trust toward political institutions”); Johann Graf Lambsdorff, *Corruption in Empirical Research—A Review*, 9th International Anti-Corruption Conference (Dec. 10–15, 1999) at 2 (surveying the literature and finding a correlation between corruption and adverse economic effects).

<sup>16</sup> U.N. Dev. Programme—Oslo Governance Centre, Democratic Governance Fellowship Programme, *The Impact of Corruption on the Human Rights Based Approach to Development*, at 9 (Sept. 2004) (prepared by Thusitha Pilapitiya) [hereinafter Oslo Report] (“The negative impact of corruption on development is no longer questioned.”).

<sup>17</sup> Chang & Chu, *supra* note 15, at 259 (Corruption “recklessly violates the fundamental principles of democracy—such as accountability, equality, and openness”); see TI FAQs, *supra* note 8 (“[C]orruption—misusing publicly entrusted power for private gain—is inherently contradictory and irreconcilable with democracy.”).

<sup>18</sup> See, e.g., J. Eduardo Campos et al., *The Impact of Corruption on Investment: Predictability Matters*, 27 WORLD DEV. 1059, 1065 (1999) (concluding that empirical evidence shows corruption impedes growth); Daniel Kaufmann et al., *Measuring Corruption: Myths and Realities*, DEV. OUTREACH, Sept. 2006, available at <http://www1.worldbank.org/devoutreach/september06/article.asp?id=371> (stating that many falsely believe there is no need to monitor countries with high corruption, as they also have high economic growth; however, studies have shown that corruption adversely affects growth in the long term); Mauro, *supra*

and the protection of public and individual human rights in developing countries.<sup>19</sup>

Wide recognition of the devastating effects of corruption on economics, political stability, and human rights globally has led to the emergence of a broad-based and increasingly powerful international anti-corruption movement.<sup>20</sup> Its many efforts to

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note 12, at 705 (discussing studies that show corrupt countries with high growth would have even more growth without corruption); Andrew White, *The Paradox of Corruption as Antithesis to Economic Development: Does Corruption Undermine Economic Development in Indonesia and China and Why are the Experiences Different in Each Country?*, 8 ASIAN-PAC. L. & POL'Y J. 1 (2006) ("While nearly all participants in the debate appear to agree that corruption ultimately is antithetical to long-term economic development, the extent to which it positively or negatively affects economic development in the short term depends upon highly contextual factors.").

<sup>19</sup> The Secretary-General, Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption (Oct. 31, 2003), available at <https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> ("Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid."); Oslo Report, *supra* note 16, at 9 ("The Seoul findings [from the 11<sup>th</sup> International Anti-Corruption Conference, Seoul, May 2003] declared that large scale corruption should be designated a crime against humanity, as for many around the world it falls into the same category as torture, genocide and other crimes against humanity that rob humans of human dignity . . . and confirmed the conviction that all human beings have a basic human right to live in a corruption-free society."); see also Alan Doig & Stephen Riley, *Corruption and Anti-Corruption Strategies: Issues and Case Studies from Developing Countries*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 45, 50 (U.N. Dev. Programme ed., 2002), available at [http://www.undp.org/governance/contactcdrom-contents/CONTACT\\_doc/Corruption\\_report/Content.pdf](http://www.undp.org/governance/contactcdrom-contents/CONTACT_doc/Corruption_report/Content.pdf) ("There is growing international consensus in development discourse on the damage that corruption can do to the poor, to economic growth, and to public integrity."); Press Release, Transparency International, *Corruption Still Rampant in 70 Countries Says Corruption Perceptions Index 2005* (Oct. 18, 2005) (citing TI Chairman Peter Eigen who stated, "Corruption is a major cause of poverty as well as a barrier to overcoming it. The two scourges feed off each other, locking their populations in a cycle of misery."); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT [USAID], USAID ANTICORRUPTION STRATEGY, at 5, USAID Doc. PD-ACA-557 (Jan. 2005) ("A strong global consensus has emerged that addressing corruption and building good governance is essential for the development of people, markets, and nations."); Ben W. Heineman, Jr., & Fritz Heimann, *The Long War Against Corruption*, FOREIGN AFF., May-June 2006, at 75, 76 ("[Corruption is] a major barrier to international development—systemic misappropriation by kleptocratic governments harms the poor.").

<sup>20</sup> Entities active in supporting corruption-reduction efforts include international organizations, governments of developed and developing countries, development banks and international financial institutions, multinational corporations, business associations, NGOs, the media, and civil society bodies

address the problem—the failures, the successes, and the results in between—have illustrated how difficult the objective of corruption reduction is to achieve. Systems of entrenched corruption are complex, have many causes and symptoms, and are often self-reinforcing. To succeed, a strategy to reduce systemic corruption must be multi-faceted.

A comprehensive anti-corruption strategy includes measures aimed at prevention—reforming electoral, legislative, civil service, and administrative procedures to reduce the opportunities for corruption<sup>21</sup>—measures aimed at promoting public awareness and stimulating civil society opposition to the culture of corruption,<sup>22</sup> and measures aimed at detecting and punishing acts of corruption.<sup>23</sup> Both intuition and evidence suggest that anti-

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within developing countries. BUREAU OF INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, U.S. DEP'T OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT (2001), <http://www.state.gov/p/inl/rls/rpt/fgcrpt/2001/3154.htm> (describing how “[m]any international organizations have been making strides in addressing international bribery in business transactions, official public corruption, and transparency issues.”).

<sup>21</sup> See, e.g., Jeremy Pope, *Elements of a Successful Anticorruption Strategy*, in CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY, *supra* note 10, at 97 (stating that measures include simplifying procedures to remove gatekeepers; reducing regulatory hurdles and limiting administrators’ discretion to reduce the opportunities to exact bribes; implementing systems to make public procurement competitive and transparent; establishing oversight procedures, including safe avenues through which whistleblowers can report illegal activity; and enforcing appropriate conflict-of-interest rules); U.N. Dev. Programme Report, *supra* note 9, at 113–24 (describing civil service reforms and freedom of information reforms); Heineman & Heimann, *supra* note 19, at 75 (discussing measures that various organizations and nations have enacted to mitigate corruption).

<sup>22</sup> Gerald E. Caiden, *A Cautionary Tale: Ten Major Flaws in Combating Corruption*, 10 SW. J. L. & TRADE AM. 269, 286 (2004) (“[A]n organized public, triggered by outrageous scandal or prompted by unimpeachable leaders and other impeccable sources, is a force to be reckoned with . . . [C]ivic culture has to be stirred first for without its support corruption fighters will not get far.”); see also U.N. Dev. Programme Report, *supra* note 9, at 131–46 (describing the role of the media and civil society organizations); Sandgren, *supra* note 2, at 726 (“To make progress there must be pressure from below. Popular acceptance of corruption is a powerful ally of corruption.”).

<sup>23</sup> Pope, *supra* note 21, at 99–104 (listing prevention, enforcement, public awareness, and institution building); see also Jon S.T. Quah, *Comparing Anti-Corruption Measures in Asian Countries: Lessons to be Learnt*, 11 ASIAN REV. PUB. ADMIN. 71, 77 (1999) (quoting C.V. Narasimhan, a former director of the Central

Bureau of Investigation in India, as grouping anti-corruption measures into

corruption efforts will likely fail without at least a credible threat of prosecution and punishment for corrupt acts. Persons in the developing world rate criminal prosecution at the top of the list of necessary corruption countermeasures, and may use this gauge to evaluate governments' anti-corruption efforts.<sup>24</sup> Criminal convictions make the most visible statement that corruption will not be tolerated. In countries with an active press, major corruption prosecutions are big news, and successes have the potential to raise public awareness, dissipate cynicism, galvanize civil society groups, and encourage other witnesses to come forward.<sup>25</sup> Effective law enforcement can supply short-term political capital necessary to sustain public support for long-term corruption reduction actions, while a failure to deliver can sap public support, allowing anti-corruption campaigns to atrophy.

One product of the expanding anti-corruption consensus has been a series of major corruption reduction conventions adopted by international organizations. These documents manifest the new intolerance for public corruption, condemning it in various forms and directing signatories to implement reform measures.<sup>26</sup> All the

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"preventative, punitive, and promotional").

<sup>24</sup> Daniel Kaufmann surveyed 165 high-level officials in 63 developing countries in 1996. The rating was about the same for civil society representatives and all respondents. Kaufmann, *supra* note 15, at 47-49.

<sup>25</sup> See Rieger, *supra* note 2, at 10 ("Successful law enforcement can generate a momentum and mobilise [sic] society against corruption.").

<sup>26</sup> World Bank, Poverty Reduction and Econ. Mgmt. Network, *Helping Countries Combat Corruption: The Role of the World Bank*, at 58-61 (1997), available at <http://www.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf> (stating that conventions adopted by members of various international and regional organizations have directed member states to enact corruption reform measures); see, e.g., African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505, Europ. T.S. No. 173 (criminalizing certain corrupt acts); Organization for Economic Cooperation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, S. TREATY DOC. No. 105-43 (introducing measures to help member states combat corruption); Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, S. TREATY DOC. No. 105-39 (providing OAS members with resources to combat local corruption); ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *Anti-Corruption Action Plan for Asia-Pacific* (2001), at 2, available at <http://www.oecd.org/dataoecd/38/24/35021642.pdf> (recommending a course of action to combat corruption in Asian countries); cf. U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1-78dd-3 (2000) (comparing an analogous corruption criminalization provision in U.S. Code).

conventions include provisions directed at law enforcement reform. The United Nations Convention Against Corruption (“UNCAC”), which entered into force in September 2005, is the global articulation of the anti-corruption legal reform movement. Its comprehensive strategy includes provisions aimed at preventing corruption, promoting civil society activity, and enhancing law enforcement.

These efforts are an impressive start. Most developing countries now have a range of substantive provisions prohibiting bribery and other acts of public corruption, although serious obstacles to effective enforcement of those anti-corruption laws exist in many of those countries. One such obstacle is the lack of political will. All too frequently, governments enact laws that simply list more illegal acts, or increase penalties, without genuinely committing to enforcing them. Other impediments include the lack of resources, a lack of training and expertise, a lack of independence, and the lock that entrenched corruption has on the criminal justice institutions themselves.<sup>27</sup> These problems of resolve and infrastructure are formidable and must be addressed in order to create a credible and sustainable law enforcement capacity. But there is also a fundamental element missing in most of the developing world, which undermines effective anti-corruption enforcement: law enforcement generally lacks an updated arsenal of procedural weapons it needs to successfully investigate and prosecute public corruption. Unless remedied, this deficiency will continue to blunt the ameliorative effect of all other enforcement-enhancing reforms.

Through many of its provisions, the UNCAC acknowledges this crucial deficit. With respect to enforcement, the convention not only directs state parties to adopt legislation establishing corruption crimes—the focus of the preexisting regional conventions—but also recommends the implementation of important anti-corruption law enforcement tools and techniques.<sup>28</sup>

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<sup>27</sup> See ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *Effective Prosecution of Corruption: Report on the Master Training Seminar*, Doc. 100403 (2003), available at <http://www.oecd.org/dataoecd/37/41/35023374.pdf> (finding various impediments to successful anti-corruption reform by analyzing several case studies of failed reforms).

<sup>28</sup> These anti-corruption law enforcement tools include: (1) anti-money laundering laws, United Nations Convention Against Corruption art. 14, Dec. 11, 2003, 43 I.L.M. 37 [hereinafter UNCAC]; (2) witness protection measures, *id.* arts. 25(a), 32; (3) whistleblower protection laws, *id.* art. 33; (4) laws authorizing

Many international organizations, developed nations, and NGOs offer ongoing assistance and monitoring to support implementation of the UNCAC's many reforms.<sup>29</sup> To date, however, implementation of the convention's provisions is spotty.<sup>30</sup> The convention's directives and the recommendations in its lengthy legislative guide,<sup>31</sup> while appropriate, are thin on context and rationale, and largely stated generally and provisionally. No monitoring mechanism yet exists.

Additionally, and particularly with respect to the enforcement objective, the tools and techniques most crucial to building a credible and sustainable prosecutorial capacity are scattered throughout the UNCAC's eight chapters and seventy-one articles, a presentation that fails to highlight the potentially powerful and immediate impact of a handful of law enforcement reforms. If those with the power to sway the legislature and those in law enforcement who could most use them fail to appreciate these key law enforcement tools, these crucial procedural reforms will likely get lost in the long process of pushing for comprehensive reform, or will be enacted in partial or piecemeal fashion, thereby diluting their potency as a unit. Thus, the next step in aid of the anti-corruption enforcement effort is a concise legislative package drawn from the on-the-ground experiences of nations facing anti-corruption enforcement challenges similar to those currently faced by many developing countries. If understood and implemented as a coherent system of interrelated parts, such a package of reforms could lay the groundwork for effective anti-corruption

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undercover operations and the admission into evidence of undercover tapes, *id.* art. 50(1); (5) laws authorizing timely access to bank account records and other financial data, *id.* art. 40; and (6) immunity and cooperation mechanisms, *id.* art. 37.

<sup>29</sup> The United Nations has established a Global Programme Against Corruption to assist in implementation of the UNCAC. See U.N. Office on Drugs & Crime, UNODC and Corruption, <http://www.unodc.org/unodc/en/corruption/index.html> (last visited Oct. 20, 2008).

<sup>30</sup> Abid Aslam, *Corruption: World Bank, U.N. Target Kleptocrats*, INTER PRESS SERV., Sept. 17, 2007, available at <http://ipsnews.net/news.asp?idnews=39291> ("As with many international pacts, the corruption convention has not been high among many parliaments' priorities.").

<sup>31</sup> See U.N. Office on Drugs & Crime [UNODC], Div. of Treaty Aff., *Legislative Guide for the Implementation of the United Nations Convention Against Corruption*, U.N. Sales No. E.06.IV.16 (2006), available at [http://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf).

enforcement both in the short term and over the long haul as other reinforcing institutional reforms take hold.

2.2. *The Problem of Entrenched Public Corruption in Indonesia: History, Reformasi, and the Challenges to Building a Competent, Credible Enforcement Capability*

"It is difficult to overstate the seriousness of the problem of corruption in Indonesia," begins a report assessing the status and success of anti-corruption initiatives implemented in Indonesia during recent years.<sup>32</sup> Corruption is deeply embedded in the fabric of society and institutions. And, typically, it is highly organized. Corruption appears to be endemic in the bureaucracy, in State Owned Enterprises ("SOEs") and in government-business intercourse. It is also a serious problem in the police, Attorney General's Office ("AGO") and judiciary. "Political parties, parliamentarians, civil society groups and the media are not immune either."<sup>33</sup>

Corruption occurs in local, day-to-day transactions, as teachers exact bribes for children's report cards, principals pocket exorbitant "registration fees," petty bureaucrats require cash to remove the hurdles on the path to a "free" government ID card, traffic stops for non-existent violations result in release after payment of a "peace offering," and securing a civil service post depends on a sufficient monetary "show of appreciation" to those processing the application.<sup>34</sup> Corruption pervades the nation's tax

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<sup>32</sup> DAVIDSEN ET AL., *supra* note 6, at 9.

<sup>33</sup> *Id.*; see also Transparency Int'l, Pol'y & Res. Dep't., *Report on the Transparency International Global Corruption Barometer 2007*, at 22 tbl.4.2 (Dec. 6, 2007), available at [http://www.transparency.org/content/download/27256/410704/file/GCB\\_2007\\_report\\_en\\_02-12-2007.pdf](http://www.transparency.org/content/download/27256/410704/file/GCB_2007_report_en_02-12-2007.pdf) (reporting Indonesian perceptions that the police are the most corrupt of 14 sectors in society, followed closely by the legal system/judiciary and the legislature). A survey of over 1800 businesses in Indonesia, carried out in 2001-2002, showed that over 75% of the firms reported paying bribes to local officials. J. Vernon Henderson & Ari Kuncoro, *Corruption in Indonesia 2* (Nat'l Bureau of Econ. Research, Working Paper No. 10674, 2004), available at <http://www.nber.org/papers/w10674>; see also Suwardiman, 'Kompas' Polling: Soot in the Face of Law Enforcement Institutions, KOMPAS, Mar. 17, 2008 (unpublished U.S. Embassy translation on file with author) (describing a poll on corruption by Kompas newspaper in which over 73% of respondents believed that no government institution was free of corruption, and an even higher percentage viewed law enforcement as tainted).

<sup>34</sup> PARTNERSHIP FOR GOVERNANCE REFORM, *THE POOR SPEAK UP: 17 STORIES OF CORRUPTION* 18, 59, 65, 84 (Ratih Hardjono & Stefanie Teggemann eds., 2002)

system, with desk clerks pocketing cash in exchange for “adjusting” the tax that must be paid,<sup>35</sup> and occurs on a grand scale, as layers of government bureaucrats skim government and donor funding of public works projects. The country’s anti-corruption agency recently estimated that corruption in government procurement contracts alone costs the Indonesian government a whopping \$4 billion a year.<sup>36</sup>

Indonesia’s recent history contributes to corruption’s stranglehold on the country. A sprawling archipelago in South East Asia, Indonesia is a nation of about 237 million people, the fourth largest nation in the world, and the most populous Muslim-majority state.<sup>37</sup> It is a vibrant country in which people of different religions, ethnicities, and languages intermingle, and modern pop cultural influences—western clothes, hip-hop music, and television talk shows—coexist with more traditional garb and practices. Serving at first as a base for the Dutch East India Company’s lucrative spice trade, the Indonesian islands gradually came under Dutch rule, which extended until Japan occupied them during World War II. Indonesian nationalists led by Sukarno declared independence in 1945, and achieved it after a four-year guerilla war against the returning Dutch. A fragile parliamentary democracy crumbled in 1959. Under the rubric of “Guided Democracy,” President Sukarno oversaw a tightly controlled nation. In the mid-1960s, a military leader, Major General Suharto, seized control after a bloody purge of Communist Party members aligned with Sukarno.<sup>38</sup> Suharto thereafter ruled as Indonesia’s president from 1967 to 1998. His thirty-year “New Order” regime saw major foreign investment and economic growth sustained alongside massive and widespread corruption perfected and

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(compiling firsthand accounts of corruption from impoverished Indonesian citizens).

<sup>35</sup> An Indonesian friend recounted that a desk clerk in the tax office told him, when he sought a tax return form, that for a fee he could determine the tax he would like to pay.

<sup>36</sup> Irawaty Wardany, *Procurement Bribery Costs RI ‘Rp 36t a Year’*, JAKARTA POST, Nov. 6, 2007, <http://www.thejakartapost.com/news/2007/11/06/procurement-bribery-costs-ri-039rp-36t-year039.html>.

<sup>37</sup> U.S. Department of State, Bureau of East Asian and Pacific Affairs: September 2008, Background Note: Indonesia, <http://www.state.gov/r/pa/ei/bgn/2748.htm> (last visited Oct. 20, 2008). While 86% of Indonesia’s population is Muslim, it is not an Islamic state. *Id.*

<sup>38</sup> Like many Indonesians, Sukarno and Suharto went by only one name.



entrenched from the Dutch colonial legacy.<sup>39</sup> In fact, “hierarchical, systemic corruption became one of the central features of the New Order political economy.”<sup>40</sup>

Suharto centralized state authority, and ran the government according to “an elaborate system of franchises.”<sup>41</sup> He sold the state’s policy-making role to cronies, who became rich operating monopolies, fulfilling lavishly overpriced government contracts, and avoiding taxes. Many foreign investors participated willingly in the pay-to-play system, and Suharto’s openly corrupt Indonesia was one of the “Asian paradox” examples used by those who argued that authoritarian and corrupt government structure may not impede, and, in fact, may often facilitate, economic growth.<sup>42</sup> In turn, Indonesia’s financial collapse in 1997, more severe and more sustained than in other Asian economies, revealed the long-term toll of Suharto’s crony capitalism.<sup>43</sup> In 1998, Suharto resigned in the wake of violent student demonstrations, and a fitful process of reform and multi-party democratization began. Suharto left office with millions of dollars in assets. In 2007, the Attorney General’s Office brought a civil suit against Suharto in an effort to recover over \$400 million in state assets.<sup>44</sup>

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<sup>39</sup> World Bank, E. Asia Poverty Reduction & Econ. Mgmt. Unit, *Combating Corruption in Indonesia: Enhancing Accountability for Development*, at 6 (Oct. 20, 2003) (“From this [colonial] period, Indonesia inherited such practices as paying for positions in government, expecting employees to cover all non-salary costs from their salaries, and a general blurring of lines between public and private resources.”); see also Dwight Y. King, *Corruption in Indonesia: A Curable Cancer?*, 53 J. INT’L AFF. 603 (2000) (charting the history of corruption in Indonesia from the tenth century through Suharto’s “New Order”).

<sup>40</sup> DAVIDSEN ET AL., *supra* note 6, at 9; see also THEODORE FRIEND, *INDONESIAN DESTINIES* 250-53 (Harvard Univ. Press 2003) (describing how Suharto created “foundations” imposing mandatory donations on taxpayers, from which billions were channeled to himself and his family).

<sup>41</sup> World Bank, *supra* note 39, at 6; see also Jared Levinson, *Indonesia’s Odyssey: A Nation’s Long, Perilous Journey to the Rule of Law and Democracy*, 18 ARIZ. J. INT’L & COMP. L. 103, 112 (2001) (“Suharto centralized all power in Jakarta with himself as the supreme leader.”).

<sup>42</sup> World Bank, *supra* note 39, at 7-8 (summarizing arguments of Goodpaster, McLeod, and McIntyre).

<sup>43</sup> U4 Anti-Corruption Resource Centre, *Anti-Corruption Policy Making in Practice: What Can Be Learned for Implementing Article 5 of UNCAC?* 87-88 (Karen Hussman ed., 2007), available at <http://www.u4.no/themes/uncac/report.cfm> [hereinafter U4 Report].

<sup>44</sup> Peter Gelling, *Indonesian Prosecutors File Civil Suit Against Suharto for \$441 Million*, INT’L HERALD TRIB., July 9, 2007, <http://www.iht.com/bin/print.php?id=6570502>; *Soeharto Stole Millions from Charity: Witness*, VOICE OF INDONESIA,

Suharto left behind not only the remnants of economic and environmental plunder, but also government structures, a business community, and civil society accustomed to what Indonesians refer to by the acronym KKN—corruption, collusion and nepotism—as an everyday fact of life. Since the fall of Suharto, a raucous and energetic media and a spate of new civil society organizations has kept the spotlight on public corruption and helped ensure that fighting corruption remains a high-profile political issue for candidates competing for votes.<sup>45</sup> In the period of reform, or *Reformasi*, since Suharto's departure, Indonesia has had four presidents, all of whom have—under international pressure and with substantial international, private business, and NGO assistance—undertaken efforts to address the rampant corruption. Each has put forth law enforcement as a centerpiece of the campaign—a crucial part of the “shock therapy,” which, according to the current president, the country needs to eradicate corruption both structurally and culturally.<sup>46</sup>

But transforming the aspiration of clean, effective anti-corruption law enforcement into a reality in an environment of entrenched corruption like Indonesia's is a formidable undertaking. As in many other developing countries, a fundamental problem with relying upon the criminal justice system as an instigator of corruption reform is that corruption runs through the very institutions with law enforcement responsibility: the National Police,<sup>47</sup> the Attorney General's Office, and the judiciary, including the Supreme Court.<sup>48</sup> Observers claim that

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Nov. 21, 2007, <http://www.voi.co.id/news/9/tahun/2007/bulan/11/tanggal/21/id/586>; see also ROBIN HOESS, TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2004, 13 tbl.1.1 (2004), available at [http://www.transparency.org/publications/gcr/download\\_gcr/download\\_gcr\\_2004#download](http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2004#download) (listing recent corrupt leaders and estimated amounts of embezzled funds).

<sup>45</sup> U4 Report, *supra* note 43, at 95–96, 102–103; *Media Reports Help Uncover Corruption Cases: KPK Chief*, JAKARTA POST, Jan. 23, 2008, [http://kbribeirut.org/index.php?option=com\\_content&task=view&id=86&Itemid=80](http://kbribeirut.org/index.php?option=com_content&task=view&id=86&Itemid=80).

<sup>46</sup> “We Need Shock Therapy,” TIME, Nov. 1, 2004, <http://www.time.com/time/magazine/article/0,9171,501041108-749480,00.html>; see also U4 Report, *supra* note 43, at 91–92 (describing the history of anti-corruption initiatives in post-Suharto Indonesia).

<sup>47</sup> World Bank, *supra* note 39, at 84–86; Reh Atemalem, *Survey: Police Most Corrupt Institution in Indonesia*, TEMPO, Dec. 7, 2007 (on file with author).

<sup>48</sup> World Bank, *supra* note 39, at 88–90; SEBASTIAN POMPE, THE INDONESIAN SUPREME COURT: A STUDY IN INSTITUTIONAL COLLAPSE 416 (2005) (“It is currently common knowledge that the Supreme Court is affected by corruption, and judges in private conversation have referred to it for many years as a routine matter.”);

investigation results,<sup>49</sup> prosecution decisions,<sup>50</sup> and court verdicts<sup>51</sup> have been bought.

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see also Atemalem, *supra* note 47; U4 Report, *supra* note 43, at 89; Abdul Khalik, *Corrupt Legal Institutions Impede Graft Reforms: NGOs*, JAKARTA POST, Jan. 29, 2008, <http://www.thejakartapost.com/news/2008/01/28/corrupt-legal-institutions-impede-graft-reforms-ngos.html>; Andreas D. Arditya, *Court Chief Suspended for 'Mischievous' Conduct*, JAKARTA POST, July 12, 2008, <http://www.thejakartapost.com/node/174576>.

<sup>49</sup> Saldi Isra, *Getting Rid of Corruption in Indonesia: The Future*, JAKARTA POST, Dec. 31, 2004, <http://www.thejakartapost.com/news/2004/12/31/getting-rid-corruption-indonesia-future.html> (noting that “[i]t is widely believed that the issuance of an SP3 [Letter for the Termination of an Investigation] often depends on a bribe.”).

<sup>50</sup> *Indonesian A-G Signals Crackdown on Corrupt Prosecutors*, ABC NEWS ONLINE, May 14, 2007, <http://www.abc.net.au/news/stories/2007/05/14/1922751.htm> (“Indonesia’s new Attorney-General has admitted four out of five prosecutors in Indonesia are open to corruption but says he will root out the wrongdoers.”); see also PRICEWATERHOUSECOOPERS [PWC] & BRIT. INST. OF INT’L & COMP. LAW [BIICL], FOCUS ON PEOPLE: THE FINAL REPORT OF THE GOVERNANCE AUDIT OF THE PUBLIC PROSECUTION SERVICE OF THE REPUBLIC OF INDONESIA 38-40 (July 2001) [hereinafter PWC & BIICL REPORT]. In March 2008, shortly after the Attorney General’s Office announced that it was terminating a major investigation, the lead prosecutor in the matter was arrested in Jakarta by the Corruption Eradication Commission as he accepted a payment of over \$600,000. See generally *Prosecutor Held for Alleged Bribery*, JAKARTA POST, Mar. 4, 2008, <http://www.thejakartapost.com/news/2008/03/03/prosecutor-held-alleged-bribery.html>; Lilian Budianto, *Question of Integrity for Prosecutors*, JAKARTA POST, Mar. 6, 2008, <http://www.thejakartapost.com/news/2008/03/06/question-integrity-prosecutors.html>; *Bribery Case Puts AGO Officials [sic] in the Spotlight*, JAKARTA POST, June 13, 2008, <http://www.thejakartapost.com/news/2008/06/13/bribery-case-puts-ago-officals-spotlight.html>. The prosecutor was subsequently convicted and sentenced to 20 years in prison. Irawaty Wardany, *Disgraced Urip Gets 20 Years*, JAKARTA POST, Sept. 5, 2008, <http://www.thejakartapost.com/news/2008/09/05/disgraced-urip-gets-20-years.html>.

<sup>51</sup> An assessment of justice sector integrity in two Indonesian provinces, conducted by the U.N. Office of Drugs and Crime, found that high percentages of lawyers, prisoners, court users and business people were aware of instances in which bribes had been paid to judges, prosecutors, police and court staff. UNODC, *Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces: Technical Assessment Report*, 27-37 (Mar. 2006) available at [http://www.unodc.org/pdf/corruption/publications\\_indonesia\\_e\\_assessment.pdf](http://www.unodc.org/pdf/corruption/publications_indonesia_e_assessment.pdf) (reporting statistics indicating a perception of corruption); see also Adrian Verity, *Skewed Justice in Indonesia’s Tainted Courts*, ASIA SENTINEL, Aug. 21, 2006, [http://www.asiasentinel.com/index.php?option=com\\_content&task=view&id=97&Itemid=31](http://www.asiasentinel.com/index.php?option=com_content&task=view&id=97&Itemid=31) (“[A]ccording to Asep Rahmat Fajar, head of the Indonesian Judicial Monitoring Society . . . ‘buying court verdicts has been a systematic and organized crime in the country’s legal system. It involves people from the highest levels, such as high court judges, down to the lowest levels, such as administrative staff in the Supreme Court.’”). See also Levinson, *supra* note 41, at 114-15 (describing some of the corruption in Indonesia’s legal system).

The structures and traditions of the investigatory and prosecutorial services do not facilitate effective anti-corruption enforcement. Both the police and the prosecution service in Indonesia are managed through a highly centralized, hierarchical chain of command.<sup>52</sup> In the AGO, which includes Indonesia's prosecution service,<sup>53</sup> the effect of this top-down management system is that most serious measures require multiple levels and review and approval,<sup>54</sup> reducing the ability of prosecutors to act quickly or innovate. This institutional rigidity reinforces the inherited Dutch civil law tradition that accords little discretion to prosecutors to follow the evidence to find new crimes and suspects. Concern that prosecutors in Indonesia might misuse greater discretion for corrupt purposes, however, means that internal reforms, at least in the short term, are not likely to focus on changing this aspect of how prosecutors function.

Additionally, laws adopted during the Suharto era explicitly separated the investigatory and prosecutorial functions between the National Police and the AGO, so that prosecutors cannot oversee investigations by the police, and the Attorney General has a limited ability to establish policy that binds investigators outside his office.<sup>55</sup> Under the procedure code, the police may obtain

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<sup>52</sup> See PWC & BIICL REPORT, *supra* note 50, at 30–31 (describing the history of Indonesia's hierarchical system); World Bank, *supra* note 39, at 86–87 (noting the "excessive hierarchical layers" of which there are seven). The police and prosecution service were militarized during the Suharto era. Although both were separated from the armed forces after the fall of Suharto, vestiges remain. Prosecutors wear uniforms and salute their superiors.

<sup>53</sup> In Indonesia, as in many civil law countries, the prosecution service is part of the Attorney General's Office, and is separate from the Ministry of Law, which is under the direction of the Minister of Law and is responsible for drafting legislation, developing legal policy, and overseeing various functions including prisons and the customs service.

<sup>54</sup> PWC & BIICL REPORT, *supra* note 50, at 30–31; World Bank, *supra* note 39, at 87.

<sup>55</sup> At the time, the compartmentalization was viewed as a reform which created checks and balances and avoided excessive concentration of criminal enforcement powers. PWC & BIICL REPORT, *supra* note 50, at 27–29. Now, with prosecutors widely regarded as having operated as instruments of an authoritarian government, and with rampant corruption within the prosecution service openly acknowledged, the notion that prosecutors should have greater discretion in charging and resolving cases to enhance the anti-corruption effort is viewed with skepticism. Indeed, the 2002 law which created the Corruption Eradication Commission and gave it prosecutorial authority in corruption cases specifically divested the agency of the authority to terminate an investigation or a prosecution once one had been initiated. Law Number 30 of 2002 on the

warrants to search, seize, and arrest without the necessity of contact with prosecutors, and may question witnesses and take other investigative actions.<sup>56</sup> Once an investigation is complete, both the investigative file and responsibility for custody of the suspect passes to the prosecution, and police generally have no further role in the process.<sup>57</sup> The lack of close coordination between the police and the AGO, and the turf jealousies that arise from the compartmentalization of their functions, impede effective preparation and presentation of cases across the entire spectrum of law enforcement, and create particular problems in the corruption area, where the separation of functions makes it nearly impossible for prosecutors to employ the highly effective strategy of pursuing a series of investigations simultaneously to dismantle a network of corruptors.<sup>58</sup> Some greater investigatory authority exists, and some investigators are employed, within the AGO's Special Crimes division, which handles public corruption cases. The division of the AGO into the Special Crimes and General Crimes departments, with different and potentially overlapping jurisdictions, however, presents enforcement impediments of its own.<sup>59</sup> The dispersal of prosecutorial jurisdiction means that prosecutions of public corruption in Indonesia are rarely combined with prosecutions of related crimes, such as tax and customs offenses, illegal logging, and money laundering, which in turn means that law enforcement forfeits the opportunity to bring multiple criminal charges to bear

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Commission to Eradicate Criminal Acts of Corruption (Indon.). While these concerns are legitimate, in the longer term only more discretion, not less, will transform Indonesian prosecutors into effective instruments against corruption. This concept is gaining ground in the country; a draft of a new criminal procedure code includes some provisions which strengthen prosecutorial discretion. See generally Robert Strang, "More Adversarial But Not Completely Adversarial": *Reformasi of the Indonesian Criminal Procedure Code*, 32 *FORDHAM INT'L L.J.* (forthcoming 2008).

<sup>56</sup> Law Number 8 of 1981 Concerning the Law of Criminal Procedure, arts. 16–24, 32–49, & 106–33 (Indon.) (setting forth the rules for arrest, search, seizure, and investigation).

<sup>57</sup> *Id.* arts. 25, 137–44 (detailing rules for prosecution).

<sup>58</sup> PWC & BIICL REPORT, *supra* note 50, at 28–29. Our own discussions with Indonesian prosecutors indicated that they usually had little knowledge of corruption investigations prior to a completed dossier being delivered by the police, and that the prosecutors were often dissatisfied with steps that had been taken during the investigative stage.

<sup>59</sup> The Special Crimes division handles the prosecution of public corruption and human rights crimes, while the General Crimes division handles all other criminal prosecutions. PWC & BIICL REPORT, *supra* note 50, at 33–35.

on corruption defendants.

Since the fall of Suharto, various efforts have been and are being made to address these problems of institutional corruption and structure. Anti-corruption legislation was passed in 1999,<sup>60</sup> 2001,<sup>61</sup> and again in 2002.<sup>62</sup> In line with other nations facing deeply entrenched corruption and with the directives of numerous anti-corruption conventions,<sup>63</sup> the latter statute created the Corruption Eradication Commission, or KPK (*Komisi Pemberantasan Korupsi*), an independent corruption-fighting agency equipped with its own investigators and prosecutors, authority to independently investigate and prosecute major corruption cases, and a new Anti-Corruption Court to hear its cases.<sup>64</sup> These structures together establish a route for public corruption investigations and prosecutions to circumvent the existing criminal justice apparatus.<sup>65</sup> Although their jurisdictions overlap, the KPK has the authority to take over investigations or prosecutions from the police or AGO if there is delay, bias, obstructive influence asserted by another government branch, or other circumstances indicating the police or AGO are not handling the case responsibly.<sup>66</sup>

The KPK's responsibilities extend well beyond criminal enforcement, but its prosecutions have been most visible. Its

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<sup>60</sup> Law Number 28 of 1999 on a Corruption-free State Administration (Indon.); Law Number 31 of 1999 on Eradication of Corruption Offenses (Indon.).

<sup>61</sup> Law Number 20 of 2001, Amendment to Law Number 31 of 1999 on Eradication of Corruption Offenses (Indon.).

<sup>62</sup> Law Number 30 of 2002 on the Commission for the Eradication of Criminal Acts of Corruption (Indon.).

<sup>63</sup> *E.g.*, UNCAC, *supra* note 28, art. 6 (directing parties to establish preventative anti-corruption bodies). Singapore, Hong Kong, Botswana, and other countries have long had independent anti-corruption agencies. Other countries have formed similar units in recent years. See U.N. Dev. Programme, Democratic Governance Practice Team, Institutional Arrangements to Combat Corruption: A Comparative Study, 3-10 (2005), available at [http://regionalcentrebangkok.undp.or.th/practices/governance/documents/Corruption\\_Comparative\\_Study-200512.pdf](http://regionalcentrebangkok.undp.or.th/practices/governance/documents/Corruption_Comparative_Study-200512.pdf) (comparing the anti-corruption efforts of other southeast Asian countries).

<sup>64</sup> Law Number 30 of 2002, Commission for the Eradication of Criminal Acts of Corruption, arts. 53-62 (Indon.).

<sup>65</sup> The preamble to the 2002 law which created the KPK specifically observes that existing government agencies had not been effective in handling corruption cases, and the law itself states that the KPK is to operate "independently, free from any and all influence," with the "primary purpose of improving the effectiveness and efficiency of efforts to eradicate criminal acts of corruption." *Id.* pmbl, arts. 3-4.

<sup>66</sup> *Id.* arts. 8-10, 42, 68.

leadership, five commissioners selected by the legislature from a list submitted by the president, sees investigations and prosecutions as “the cutting edge for implementing broader institutional reforms . . . .”<sup>67</sup>

The KPK served notice early on that attacking corruption in law enforcement and the judiciary was a priority,<sup>68</sup> and the agency has posted a number of prosecutorial accomplishments during its first several years of operation.<sup>69</sup> Still, criticism of the agency’s

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<sup>67</sup> DAVIDSEN ET AL., *supra* note 6, at 48; *see also* U4 Report, *supra* note 43, at 92 (noting that while the KPK has a mandate to implement preventive measures, “at the moment the emphasis of KPK is more focused on investigation and prosecution.”).

<sup>68</sup> DAVIDSEN ET AL., *supra* note 6, at 48. The KPK arrested five clerks at the Supreme Court and charged them with extorting defendants. The investigation led to the execution of a search warrant in the chambers of the Chief Justice himself, although the KPK was not able to prove that the Chief Justice was part of the extortion activity. Muningsari Sri Saraswati, *Antigrift Team Raids Supreme Court*, JAKARTA POST, Oct. 28, 2005, <http://www.thejakartapost.com/news/2005/10/28/antigrift-team-raids-supreme-court.html>; *New Judges to Hear Probo Case*, JAKARTA POST, Nov. 5, 2005, <http://www.thejakartapost.com/news/2005/11/05/new-judges-hear-probo-case.html>.

<sup>69</sup> DAVIDSEN ET AL., *supra* note 6, at 53–54 (crediting the KPK with “[i]nitiating a growing number of investigations and prosecutions . . . (which resulted in the convictions of former Aceh Governor Puteh and members of the KPK”); *see also* Tim Lankester, *Reform of Indonesia’s Governance: Myth or Reality?*, STRAITS TIMES, Apr. 9, 2007, <http://www.ytlcommunity.com/commnews/shownews.asp?newsid=28804> (“The [KPK] has held hundreds of investigations and prosecuted former ministers, business leaders, judges, governors and legislators.”).

There has been steady growth in the number of corruption cases brought by the KPK. In 2004, the year the Court came into existence, one single case was filed. Sixteen new cases were filed in 2005, and 25 new cases were filed in 2006. ANTI-CORRUPTION COURT, CENT. JAKARTA DIST. COURT, ANNUAL REPORT 14 (2006); *see also* KPK, ANNUAL REPORT 2006, 4.5–4.12 (2006), *available at* [http://www.kpk.go.id/modules/wmpdownloads/files/Annual\\_Report\\_2006\\_4.pdf](http://www.kpk.go.id/modules/wmpdownloads/files/Annual_Report_2006_4.pdf). [hereinafter KPK ANNUAL REPORT] (noting an increase in the court’s caseload). Notable recent cases have included the convictions of a former national police chief, and the arrests of the governor of the central bank and several members of the national legislature. *See, e.g.*, Andra Wisnu & Andreas D. Arditya, *DPR Warns KPK over Targeting Lawmakers*, JAKARTA POST, July 4, 2008, <http://www.thejakartapost.com/news/2008/07/04/dpr-warns-kpk-over-targeting-lawmakers.html>; Andreas D. Arditya, *Lawmaker Admits Receiving Bribes*, JAKARTA POST, July 16, 2008, <http://www.thejakartapost.com/news/2008/07/16/lawmaker-admits-receiving-bribes.html>; *Ex-Police Chief Sentenced for Graft*, JAKARTA POST, June 12, 2008, <http://www.thejakartapost.com/news/2008/06/12/expolice-chief-sentenced-graft.html>; *Graft Body Finally Detains BI Chief*, JAKARTA POST, Apr. 11, 2008, <http://www.thejakartapost.com/news/2008/04/11/graft-body-finally-detains-bi-chief.html>; *KPK Arrests Lawmaker for Alleged Bribery*, JAKARTA POST, Apr. 10, 2008, <http://old.thejakartapost.com/detailweekly.asp?fileid=20080410.@01>.

efforts include perceived failures to set its sights up the hierarchy to capture “big fish” corruptors<sup>70</sup> and to reach out of the capital and into the nation’s many widespread provinces where corruption flourishes after the decentralization that occurred post-Suharto.<sup>71</sup> A more recent complaint is that the agency’s investigations have the appearance of political targeting in the lead-up to the 2009 elections.<sup>72</sup> In December 2007, a new board of five KPK Commissioners was selected following the end of the statutory four-year term of the initial team.<sup>73</sup>

Other efforts to step up the battle against corruption, both in terms of short-term prosecutions and long-term institutional reform, gained significant momentum after the election of President Susilo Bambang Yudhoyono in October 2004.

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<sup>70</sup> Abdul Khalik, *KPK Accused of Half-Hearted Fight*, JAKARTA POST, May 5, 2008, <http://www.thejakartapost.com/news/2008/05/05/kpk-accused-halfhearted-fight.html>; see also *Suharto Scion’s Channel Islands Treasure Hunt*, ASIA SENTINEL, Mar. 12, 2007, [http://www.asiasentinel.com/index.php?option=com\\_content&task=view&id=417&Itemid=31](http://www.asiasentinel.com/index.php?option=com_content&task=view&id=417&Itemid=31) (“[C]ritics say the only big fish that have been netted and delivered all the way to the dock so far are those connected to his political opponents . . .”).

<sup>71</sup> See DAVIDSEN ET AL., *supra* note 6, at 35 (“SBY’s shock therapy on corruption . . . is only happening in Jakarta.”) (quoting Eryvn Kaffah, National Coalition of NGOs Against Corruption).

<sup>72</sup> See *Politics Still a Factor in Graft Probes, Say Observers*, JAKARTA POST, Nov. 17, 2007, <http://www.suedostasiportal.de/thread.php?postid=27853&sid=aa81ea871b7d35b7a91e58290d723202#post2785> (noting that critics state “political power still comes into play” in the KPK’s corruption enforcement); see also Bill Guerin, *Politics of Corruption in Indonesia*, ASIA TIMES, Mar. 29, 2007, [http://www.atimes.com/atimes/Southeast\\_Asia/IC29Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/IC29Ae01.html) (noting “[g]rowing opposition complaints of discriminatory justice” being aimed at the KPK).

<sup>73</sup> The KPK is run by a board of five commissioners, selected by the president from a pool suggested by a selection committee. Law Number 30 of 2002, Commission for the Eradication of Criminal Acts of Corruption, arts. 21(1), 26(1), 30 (Indon.). They may serve a term of four years, with the possibility of being reappointed to one additional term. *Id.* art. 34. The initial board was appointed in late 2003, and the candidates for the new board were submitted in late 2007. Desy Nurhayati, *Review KPK Candidates: NGOs*, JAKARTA POST, Oct. 3, 2007, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20071003.H05>; see also *Azhar Vows to Fight Graft*, THE POINT, Dec. 19, 2007 (on file with author); *No ‘Angels’, Ten Names of Corruption Eradication Commission Head Candidates Have Been Submitted to the President*, TEMPO, Sept. 18–24, 2007, [http://fcpp-indonesia.org/eng/news\\_and\\_events/current\\_issues/no\\_angels](http://fcpp-indonesia.org/eng/news_and_events/current_issues/no_angels); Peter Gelling, *Indonesian Corruption Fighters under Question*, INT’L HERALD TRIBUNE, Nov. 28, 2007, <http://www.iht.com/articles/2007/11/28/asia/indo.php> (noting the appointment of new KPK commissioners).



Yudhoyono campaigned on an anti-corruption platform.<sup>74</sup> His government's approach to the formidable task of fighting entrenched corruption has been both comprehensive and incremental. Measures implemented address multiple aspects of corruption reform, including prevention, state-building, and civil society education. The "most noticeable thrust," however, "has been in the realm of prosecutions."<sup>75</sup> A 2005 presidential order created a Coordinating Team for the Eradication of Criminal Corrupt Acts (known by its Indonesian acronym as *Timtas Tipikor*), a temporary interdepartmental anti-corruption task force that brought together police investigators, auditors, and prosecutors from the AGO to develop and prosecute corruption cases against government officials.<sup>76</sup> Although now disbanded, during its two years of existence it successfully prosecuted the former Minister of Religious Affairs, a judge, and others for public corruption.<sup>77</sup> Within the AGO, prosecutions of corruption cases have increased,<sup>78</sup> and the formation of an elite anti-corruption team was recently announced.<sup>79</sup> A recent report by a foreign donors' organization

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<sup>74</sup> DAVIDSEN ET AL., *supra* note 6, at 17 (discussing the significant problems that follow from running (and winning) on an anti-corruption platform).

<sup>75</sup> *Id.* at 2.

<sup>76</sup> Presidential Decree Number 11 of 2005 (Indon.); Eva C. Komandjaja & Muninggar Sri Saraswati, *Antigraft Teams May Overlap*, JAKARTA POST, May 7, 2005, <http://www.thejakartapost.com/news/2005/05/07/antigraft-teams-may-overlap.html>.

<sup>77</sup> DAVIDSEN ET AL., *supra* note 6, at 20, app. 4; Ridwan Max Sijabat, *Former Religious Affairs Minister Faces Life in Jail*, JAKARTA POST, Oct. 7, 2005, <http://www.thejakartapost.com/news/2005/10/07/former-religious-affairs-minister-faces-life-jail.html> (describing prosecution of former minister); L.R. Baskoro et al., *The Sting at Chamoe-Chamoe*, TEMPO, Jan. 17-23, 2005 (on file with author) (chronicling the events of a government sting against a corrupt judge); M. Taufiqurrahman, *Govt Disbands Anti-graft Team*, JAKARTA POST, June 12, 2007, <http://www.thejakartapost.com/news/2007/06/12/govt-disbands-antigraft-team.html>.

<sup>78</sup> *E.g.*, U4 Report, *supra* note 43, at 90 (noting that in 2006 prosecutors across Indonesia were handling 265 corruption cases involving local legislators and 46 involving provincial or district heads, an "unprecedented phenomenon in Indonesia"); *see also* Lankester, *supra* note 69 ("The special crimes case load of the Attorney-General has increased by nearly six times over the past five years."); *Scores of Officials Grilled, Tried for Graft*, JAKARTA POST, Aug. 4, 2008, <http://www.thejakartapost.com/news/2008/08/04/scores-officials-grilled-tried-graft.html> (noting that almost 78 officials were being tried or investigated for alleged corruption).

<sup>79</sup> *Special Team is Not Set up Because the District Attorney's Office Lost a Step from the Corruption Eradication Commission*, KOMPAS, June 6, 2008 (unpublished U.S. Embassy translation on file with author); *see also* U.S. *Pledges to Help Eradicate*

observed that “[l]aw enforcement seems to have made some impact in Indonesia. The punitive measures are sending a strong message that corruption is not risk-free, and some Indonesian commentators are claiming that these measures are changing the way bureaucrats behave.”<sup>80</sup> Many other watchdogs complain, however, that the government remains hampered by official foot-dragging and corruption,<sup>81</sup> and that with respect to enforcement, investigations still proceed too slowly<sup>82</sup> and too many defendants receive light sentences or walk free.<sup>83</sup>

Efforts to prevent corruption in the justice sector have been somewhat less noteworthy,<sup>84</sup> but some progress has been made in reforming the existing criminal justice institutions. Oversight commissions have been established for the judiciary, the police, and the prosecution service to investigate complaints of corruption and to pursue disciplinary actions.<sup>85</sup> The current president’s

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*Corruption*, JAKARTA POST, June 10, 2008, <http://www.thejakartapost.com/news/2008/06/10/us-pledges-help-eradicate-corruption.html> (discussing the U.S. pledge of support in the context of the newly created anti-corruption unit within the AGO).

<sup>80</sup> U4 Report, *supra* note 43, at 109.

<sup>81</sup> DAVIDSEN ET AL., *supra* note 6, at 1-2 (“[T]here also are real political and bureaucratic constraints on the pace and scope of reform. Because the president’s cabinet is essentially a coalition government, his ability to push (or punish) his Ministers and other senior officials is limited.”); *see also* Lankester, *supra* note 69 (“President Susilo Bambang Yudhoyono would like to take action. But his hands appear to be tied due to opposition from the Chief Justice (who recently extended his own term until 2008) and from some leading members of his Cabinet. . . . [I]t is disappointing that Parliament, instead of acting as a check on corruption, has become part of the problem.”).

<sup>82</sup> Desy Nurhayati, *Graft Probes Are “Too Slow”*, JAKARTA POST, Oct. 9, 2007, <http://old.thejakartapost.com/detailweekly.asp?fileid=20071009.@01> (noting that corruption probes took on average two and a half years to complete and were “too slow” during the first half of 2007).

<sup>83</sup> Fabio Scarpello, *Reversing Indonesia’s Anti-Corruption Drive*, ASIA TIMES, Mar. 6, 2007, [http://www.atimes.com/atimes/Southeast\\_Asia/IC06Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/IC06Ae01.html) (“According to ICW [Indonesia Corruption Watch], of the 125 corruption cases heard last year at the Administrative Court, 40 of the defendants were released without sanction, and of those convicted, most received light sentences.”); Verity, *supra* note 51 (“ICW notes that 142 defendants were exonerated in 77 corruption cases from 1999 to 2006.”).

<sup>84</sup> DAVIDSEN ET AL., *supra* note 6, at 6 (“The Yudhoyono government’s emphasis on prosecution, commendable as it is, has not been matched to date by a comparably vigorous effort to prevent corruption from occurring within the bureaucracy. Until meaningful checks on corruption and collusion are introduced into the civil service, the threat of punishment will have, at best, only a limited deterrent effect.”).

<sup>85</sup> Law Number 22 of 2004 Establishing Judicial Commission (Indon.);

appointees as National Police Chief and Attorney General are generally viewed as improvements over appointees from prior administrations.<sup>86</sup> Reforms are underway in both the Indonesian National Police and the AGO, and in both agencies a process of incremental change has resulted in the weeding out of a number of dishonest officials.<sup>87</sup> The Partnership for Governance Reform, an

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Presidential Decree Number 17 of 2005 Establishing Police Commission (Indon.); Presidential Decree Number 18 of 2005 Establishing Prosecution Commission (Indon.); *Judicial Commission Hears Call for More Aggressive Action*, JAKARTA POST,

Nov. 30, 2007, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20071130.D11>; *Corruption Body Busts Judicial Commission Member*, JAKARTA POST, Sept. 27, 2007, <http://old.thejakartapost.com/detailweekly.asp?fileid=20070927.@05> (proving that even those charged with rooting out corruption may themselves be tainted, a Judicial Commission member was arrested by the KPK in connection with a procurement kickback scheme); *Prosecutors Demand 6 Years for Irawady in Graft Trial*, JAKARTA POST, Feb. 23, 2008, <http://www.thejakartapost.com/news/2008/02/22/prosecutors-demand-6-years-irawady-graft-trial.html>.

<sup>86</sup> DAVIDSEN ET AL., *supra* note 6, at 20; Budi Setyarso et al., *Sutanto's Promises*, TEMPO, Aug. 29–Sept. 4, 2006 (on file with author) (reviewing National Police Chief Sutanto's reforms in his first year). An expert on Indonesia recently wrote that Yudhoyono's appointment of "a strong reformist Attorney-General, Hendarman Supandji, probably strengthens the counter-corruption fight, lending credibility to SBY's popular counter-corruption campaign." Douglas E. Ramage, *A Reformed Indonesia*, AUSTRALIAN FIN. REV., Oct. 12, 2007, at 1.

<sup>87</sup> See *AGO Told to Get Tough on Crooked Prosecutors*, JAKARTA POST, July 24, 2006, <http://www.asia-pacific-solidarity.net/southeastasia/indonesia/netnews/2006/ind27v10.htm>; Ramage, *supra* note 86, at 9 (discussing reform efforts in the police and customs service, and noting that public perceptions of the police have been improving in recent years); Robert La Mont, *The AGO's Fight Against Corruption*, JAKARTA POST, Dec. 14, 2007, <http://www.ppatk.go.id/berita.php?nid=2634> (discussing internal reforms being carried out by Attorney General Supandji).

The arrest of a senior prosecutor by the KPK on bribery charges in early March 2008 substantially increased pressure on Supandji to take action against corrupt prosecutors. Abdul Khalik, *Rid AGO of Corrupt Officials: MPs*, JAKARTA POST, June 17, 2008, <http://www.thejakartapost.com/news/2008/06/17/rid-ago-corrupt-officials-mps.html>; Adianto P. Simamora, *Kalla Wants Tough Action Against AGO Corruption*, JAKARTA POST, June 14, 2008, <http://www.thejakartapost.com/news/2008/06/14/kalla-wants-tough-action-against-ago-corruption.html>; Adianto P. Simamora, *VP Rejects Calls to Dismiss Hendarman*, JAKARTA POST, June 21, 2008, <http://www.thejakartapost.com/news/2008/06/21/vp-rejects-calls-dismiss-hendarman.html>. In response, Supandji pledged full cooperation with the KPK, made administrative changes, opened his own internal investigation, and pledged that "[t]here's no forgiveness . . . for anyone involved." *Attorney's Arrest a Blow for Hendarman*, JAKARTA POST, Mar. 4, 2008, <http://www.thejakartapost.com/news/2008/03/03/attorney039s-arrest-a-blow-hendarman.html>; Dewi Indriastuti, *Reorganizing the Public Prosecutor's Office, the Homework is Not Yet Finished*, KOMPAS, June 4, 2008 (unpublished U.S. Embassy translation on file with author); *AGO Begins Investigation of Top Prosecutors*,

Indonesian NGO funded by the UNDP, has been assisting the Attorney General and others in the justice sector with institutional reforms,<sup>88</sup> and several agencies, including USAID, AusAID, the U.S. Millennium Challenge Corporation, and the U.S. Justice Department's Office of Overseas Prosecutorial Development Assistance and Training, are sponsoring multi-year projects, which include supporting institutional reform in the AGO and the courts.<sup>89</sup>

Yudhoyono is viewed as personally clean, and most see him as trying to do the right thing, but hampered by holdovers from the Suharto regime in Parliament, in the judiciary, and within his own administration.<sup>90</sup> Surveys conducted by Transparency International show improvement from 2006 to 2007 in how Indonesians rate their government's effectiveness in fighting corruption.<sup>91</sup> Nevertheless, many Indonesians are increasingly

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JAKARTA POST, June 18, 2008, <http://www.thejakartapost.com/news/2008/06/18/ago-begins-investigation-top-prosecutors.html>; Dian Kuswandini, *Hendarman Admits AGO is in 'Crisis of Credibility'*, JAKARTA POST, July 23, 2008, <http://www.thejakartapost.com/node/175580>; Wardany, *supra* note 50.

<sup>88</sup> The Partnership was active in assisting the AGO in compiling the Agenda of Attorney General's Office Reform (2005), a booklet outlining areas for study and internal reform with the assistance of donors. The Partnership for Governance Reform, <http://kemitraan.or.id> (last visited Oct. 20, 2008).

<sup>89</sup> See USAID/Indonesia: Democracy and Governance, <http://indonesia.usaid.gov/en/Program.3a.aspx> (last visited Oct. 20, 2008) (describing the Justice Sector Reform program); Indonesia Australia Legal Development Facility, <http://www.indo.usaid.gov.au/projects/legaldevprg.html> (last visited Oct. 20, 2008) (providing a generic overview of the Indonesia Australia Legal Development Facility); Millennium Challenge Corporation [MCC], Indonesia, <http://www.mcc.gov/countries/indonesia/index.php> (last visited Oct. 20, 2008) (describing the MCC's two-year, \$55 million program of assistance); Department of Justice Office of Overseas Prosecutorial Development, Assistance and Training, DOJ/OPDAT Asia Pacific Programs, <http://www.usdoj.gov/criminal/opdat/asia-pacific/asia-pacific-prgs.html> (last visited Oct. 20, 2008) (describing OPDAT programs in Indonesia).

<sup>90</sup> DAVIDSEN ET AL., *supra* note 6, at 1 ("President Yudhoyono is committed to punishing corruption, and there is a small but significant constellation of reform-minded actors inside and outside the government who have the potential to make a difference."); Abdul Khalik, *Soeharto Loyalists 'Thwart War on Graft'*, JAKARTA POST, Jan. 25, 2008, <http://www.thejakartapost.com/news/2008/01/24/soeharto-loyalists-thwart-war-graft039.html> (reporting on issues leading up to the conference of State Parties to the UNCAC); see generally Lankester, *supra* note 69.

<sup>91</sup> Compare Transparency Int'l, Pol'y & Res. Dept., *Report on the Transparency International Global Corruption Barometer 2006*, at 19 tbl.5 (2006), available at [http://www.transparency.org/content/download/12169/115654/version/1/file/Global\\_Corruption\\_Barometer\\_2006\\_Report.pdf](http://www.transparency.org/content/download/12169/115654/version/1/file/Global_Corruption_Barometer_2006_Report.pdf) (indicating for 2006 that only 29% of Indonesians rated their government's efforts to fight corruption as

critical of the Yudhoyono administration's record in eradicating corruption after over three years in office, and are questioning its commitment to take the steps needed to generate results matching his anti-corruption rhetoric.<sup>92</sup> Indonesia's anti-corruption campaign is thus at a crucial crossroads, with the efficacy and integrity of corruption prosecutions at its center. Demonstrating success in detecting and prosecuting corruption crimes will be necessary to stave off apathy and cynicism and maintain the political will and patience necessary to sustain more long-term changes.

A police corps, prosecutor's office, and judiciary reasonably free from corruption are prerequisites for obtaining criminal convictions that can gain public respect, and in Indonesia these things will be a challenge to achieve. But even clean and efficient law enforcement institutions cannot make headway against entrenched public corruption without the appropriate legal tools in their arsenals to investigate and prosecute those crimes. There have been legal reforms implemented in the post-Suharto era, but with respect to law enforcement, these efforts have been directed primarily at creating the KPK and amending the criminal code to create substantive corruption crimes. The Indonesian penal code, inherited from the Dutch, already included several anti-corruption provisions.<sup>93</sup> Many more far-reaching anti-corruption laws were enacted during the burst of legal reform following the fall of Suharto. These include laws prohibiting bribery and bribe-

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"effective" or "very effective", while 50% rated those efforts as "not effective," and a further 18% reported that the government did not combat corruption at all or actually encouraged it) *with* Transparency Int'l, *supra* note 33, at 24 tbl.4.4 (indicating that 37% of Indonesians rated their government's efforts to fight corruption as "effective", while 47% rated those efforts "ineffective."); *see also* Abdul Khalik, *Survey Sees Progress in Graft Fight*, JAKARTA POST, Sept. 24, 2008, <http://www.thejakartapost.com/news/2008/09/24/survey-sees-progress-graft-fight.html> (discussing the Transparency International report).

<sup>92</sup> *See, e.g.*, Dicky Christanto, *Officials Using 'Backroom Deals' to Tackle Corruption*, JAKARTA POST, Dec. 26, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20071226.M01>; *Government 'Not Serious' in Graft Fight*, JAKARTA POST, Dec. 27, 2007, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20071227.E04>; *SBY-JK Assessed to Have Failed in Eradicating Corruption*, KOMPAS, Dec. 28, 2007 (unpublished U.S. Embassy translation on file with author); *2007 a 'Gloomy Year' for Corruption Fight*, JAKARTA POST, Dec. 29, 2007, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20071229.F01>.

<sup>93</sup> *See, e.g.*, PENAL CODE, arts. 209 (bribery of public officials), 210 (bribery of judges), 415 (embezzlement by public officials), 418 (public officials accepting bribes), 419 (judges accepting bribes), 425 (extortion by public officials) (Indon.).

taking,<sup>94</sup> and creating rudimentary restitution and forfeiture provisions and a corporate liability provision.<sup>95</sup> A few substantive criminal laws which are part of most modern, comprehensive corruption-investigation legal regimes have successfully made their way into the flurry of reform. These include provisions establishing new obstruction of justice and false statement offenses for corruption cases,<sup>96</sup> and criminalizing the offenses that constitute money laundering.<sup>97</sup>

However, far less legislative attention has been directed at updating the supporting procedural apparatus that would allow law enforcement to effectively investigate and prosecute the newly added and revamped corruption crimes. The provisions of the Indonesian criminal code and criminal procedure code fail in numerous respects to provide anti-corruption law enforcement the support it needs. Many provisions critical to discovering and investigating the networks of corruption that permeate the government bureaucracy, such as undercover operations, the obtaining of bank records, and the use of immunity and sentence reduction agreements in exchange for testimony, are missing entirely.<sup>98</sup>

In fact, Indonesia's narrow and rigid evidence rules affirmatively impede effective anti-corruption investigation and deter prosecutors from building a case on evidence derived through modern techniques. Under the Indonesian procedure code, only five types of evidence are considered legally valid means of proof at trial.<sup>99</sup> They are: (1) testimony of a witness; (2)

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<sup>94</sup> New offenses included unjust enrichment by public officials at the expense of the state, and bribery of civil servants. Law Number 31 of 1999 on Eradication of Corruption Offences, arts. 3, 13 (Indon.). For provisions increasing penalties, see *id.* arts. 5-12.

<sup>95</sup> *Id.* arts. 18, 20. A 2001 amendment to the 1999 act elaborated and expanded on the offenses created in the earlier law. See Law Number 20 of 2001, Amendment to Law Number 31 of 1999 on Eradication of Corruption Offences arts. 5 (bribing a civil servant), 6 (corruptly influencing a judge), 7 (government procurement fraud), 8 (embezzlement by a civil servant), 9 (falsifying official books and records), 10 (destruction of public records), 11 (gratuities to civil servants), 12 (other corrupt acts by civil servants) (Indon.).

<sup>96</sup> Law Number 31 of 1999 on Eradication of Corruption Offences, arts. 21-22 (Indon.).

<sup>97</sup> Law Number 15 of 2002 Concerning the Crime of Money Laundering, as amended by Law Number 25 of 2003 (Indon.).

<sup>98</sup> See *infra* Section 4.

<sup>99</sup> Prosecutors in Indonesia draft extremely detailed indictments which

testimony of an expert; (3) a “document,” which is somewhat narrowly defined to consist of public records, written testimony, or other documents which have a connection to the contents of another means of proof; (4) an “indication,” that is, testimony or documentary evidence of an act that tends to establish that an offense has occurred or the identity of the perpetrator; and (5) testimony of the defendant.<sup>100</sup> To secure a conviction, there must be testimony from at least two witnesses or evidence in at least two of the five categories of proof.<sup>101</sup> Evidence that does not fit within the parameters of the five statutorily defined types of legally cognizable proof is nugatory, regardless of its relevance or reliability.<sup>102</sup> The rules do not expressly contemplate the admission of undercover audio or video tapes, for example, or the admission of electronic evidence, both of which may be crucial in corruption prosecutions.<sup>103</sup>

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summarize the police dossier that describes the investigation and the evidence against the defendant. As in many civil law countries, the dossier plays a central role in Indonesian criminal procedure since it is the primary basis on which the judge, the key participant in the process, performs his inquisitorial function. See Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 14 (2004) (“In the inquisitorial system, a written dossier is the backbone of the whole process and one of its main case-management tools, from the first stage of the proceeding in which the police intervene, to the phase of appeals against the verdict.”). Trials are held before panels of three judges. The head judge takes the lead in examining the defendant and other witnesses. Indonesian Criminal Procedure Code arts. 153, 159 & 163 (Indon.). Prosecutors may also examine, at the discretion of the judge. *Id.* art. 164(2). The prosecution has the burden of proof, and the judge is prohibited from making statements during the trial indicating his view of the guilt or innocence of the accused. *Id.* arts. 66, 158. Defendants have the right to counsel, the right to compel the attendance of witnesses, and the right to a public trial, but there is no right equivalent to the American right against self-incrimination. *Id.* arts. 64, 65, 69–74. Defendants, therefore, nearly always testify at their trials.

<sup>100</sup> Indonesian Criminal Procedure Code arts. 184, 185–189 (Indon.).

<sup>101</sup> *Id.* art. 185(2)–(3).

<sup>102</sup> Recognizing the inflexibility of this approach, a drafting committee of legal experts is now working on draft revisions to the Criminal Procedure Code which would, among other things, expand the scope of admissible evidence, and define admissibility by reference to relevance rather than the narrow categories. See generally Strang, *supra* note 55.

<sup>103</sup> In a few recent laws relating to specific crimes, additional provisions have been added which slightly broaden the scope of legal evidence. Electronic communications evidence is admissible in money laundering cases, for example, and the 2001 amendments to the 1999 corruption law also made electronic communications evidence admissible in many corruption cases. See Law Number 15 of 2002 Concerning the Crime of Money Laundering, as amended by Law

Because Indonesia follows the continental civil code system, in which all legal authority flows from statutes, the opinion of one court as to the proper interpretation of an evidence rule has no utility as legal precedent and therefore is of limited predictive value in assessing the position of other courts on the same question. Thus, even with rulings as to admissibility in one trial, prosecutors cannot be secure that they will be able to use the same type of evidence in a subsequent trial before a different set of judges. A recent decision by the Constitutional Court, which ruled that the use of wiretaps by law enforcement must be specifically regulated by law, reinforces this point.<sup>104</sup> Without express authorization to engage in a particular investigative technique, and a basis to admit the resulting evidence through the narrow avenues of the Indonesian procedure code, law enforcement is understandably reluctant to use it, even if it would be the most effective way to build a case. Instead, Indonesian investigators continue to rely on suspect interrogation as their primary evidence-gathering technique, which means that investigations are historical and focused on the single target identified, rather than penetrating into an ongoing corruption network, with the potential to catch multiple perpetrators engaged in numerous criminal acts over a period of time.

The UNCAC supports the notion that procedural reform is critical to an effective law-enforcement regime, and the Indonesian legislature has taken a few limited steps in that direction. The 2002 law which formed the KPK created a few new procedures and conferred authority on the KPK to use some additional investigative techniques,<sup>105</sup> but the statutory provisions describing

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Number 25 of 2003, art. 38(b) (Indon.) (permitting electronic evidence to be admitted in money laundering cases); Law Number 20 of 2001 Concerning the Law of Criminal Procedure, art. 26(A) (Indon.) (permitting electronic evidence to serve as the basis of an "indication" under the Criminal Procedure Code). None

of those laws expressly authorize the admission of undercover audio or video tapes.

<sup>104</sup> Mulyana Wirakusumah et al. v. Indonesia, Constitutional Court Decision No. 012-016-019/PUU-IV/2006 (Dec. 18, 2006) (Indon.) (ruling that the police need express authorization for the use of undercover contacts, in which one party to a conversation consents to police monitoring, and illustrating Indonesia's strict oversight of law enforcement).

<sup>105</sup> See, e.g. Law Number 30 of 2002 of the Commission for the Eradication of Criminal Acts of Corruption, art. 12 (Indon.) (granting authority to KPK to use wiretaps, to ban persons from traveling abroad, to request financial and tax



these procedures are not well-developed, leaving substantial ambiguities as to what the KPK is authorized to do, and how it can do it.<sup>106</sup> Even more importantly, the law applies only to the 100 or so investigators and prosecutors in the Jakarta-based KPK, and so is of no assistance to the thousands of prosecutors with the AGO, who will necessarily handle most of Indonesia's corruption and related prosecutions across the country's vast expanse.<sup>107</sup>

It is not clear that forces pressing for broad anti-corruption reform, or even those with the enforcement objective as a priority, recognize how important it is to the overall corruption-reduction goal to enact laws supporting the national law enforcement's evidence-gathering infrastructure. Despite its centrality to effective anti-corruption enforcement, criminal procedure is a somewhat arcane subject, not well understood outside criminal justice circles. Even within criminal justice institutions, because of the many limitations of the current system, we found that investigators and prosecutors in Indonesia have little experience designing comprehensive investigatory strategies or implementing numerous and complimentary evidence-gathering techniques in

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records); *id.* art. 15 (obliging KPK to protect witnesses and whistleblowers).

<sup>106</sup> As noted in the text, under the civil law system a decision by one judge about the use by law enforcement of a particular statutory mechanism is of limited predictive value concerning how other judges might treat the same question. Ambiguity in the statute, therefore, can paralyze law enforcement, a situation only rectified with new legislation. While the KPK has been successful in recent cases in introducing intercepted conversations into evidence through its wiretap authority, this authority does not extend to consensually monitored (undercover) contacts, or to other investigative agencies.

<sup>107</sup> The KPK is based in the capital city of Jakarta, and it has no physical presence in the rest of the sprawling archipelago. At the end of 2006, the KPK had fewer than 100 investigators and prosecutors. KPK ANNUAL REPORT, *supra* note 69, at 3.6 (showing figures for employees in the "Repression Unit"). Moreover, the KPK's authority is specifically restricted to cases involving significant state losses, law enforcement, or other high government officials, and cases which have otherwise achieved widespread notoriety. Law Number 30 of 2002, Commission for the Eradication of Criminal Acts of Corruption, art. 11 (Indon.). By contrast, Indonesia's prosecution service has at least 5600 prosecutors stationed in dozens of offices around the country. See PWC & BIICL REPORT, *supra* note 50, at 49 (discussing the total number of public prosecution services throughout Indonesia). Its mandate is not limited to large corruption cases, but can include money laundering and other related crimes. Only the prosecution service, which is represented in every province and has access to local witnesses and evidence, can reach corruption by judges, governors, mayors, local legislators, police officers, tax collectors, customs officials, and the petty but entrenched corruption in various administrative bureaucracies across the republic which directly affects the lives of Indonesian citizens.

compiling a case, both of which are crucial to effectively prosecuting a public corruption case. A recent report produced by the KPK, which identified gaps between Indonesian law and the UNCAC's directives as a prelude to legislative reform, overlooks several of the critical criminal procedure law deficiencies.<sup>108</sup> This pattern of neglecting legal reforms that enhance law enforcement's ability to actually investigate and prosecute corruption cases is likely to be common in developing nations that most need reform.

### 3. ELEMENTS OF EFFECTIVE ANTI-CORRUPTION ENFORCEMENT

#### 3.1. *The Need for a Proactive Investigatory Strategy*

Public corruption crimes pose unique evidence-gathering challenges to law enforcement everywhere. Unlike many other crimes, crimes of corruption are carried out in secret. The essence of the crime is a covert deal struck by two satisfied parties who have no incentive to report it, with no independent witnesses.<sup>109</sup> Its means are outwardly unremarkable—typical dealings between businesses or members of the public with individuals in their official capacities, which become suspicious only when viewed with a sophisticated eye as part of a scheme of corrupt activity.

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<sup>108</sup> The KPK's 2006 report on the gaps in Indonesian law compared to the UNCAC consists of a thoughtful 52-page report and an attached matrix. *KPK GAP ANALYSIS*, *supra* note 7. While it discusses nearly every major article in the UNCAC and the need for conforming Indonesian laws, the absence of any useful discussion of either investigative techniques including undercover operations, as called for in UNCAC art. 50(1), or immunity and sentence reduction mechanisms, as called for in UNCAC art. 37, is surprising, since these are two of the most critical law enforcement tools for investigating corruption. The omission is likely attributable to the fact that the authors, a group of lawyers and consultants from Indonesia and a governance think tank based in Switzerland, were all from civil law countries which have little experience with such tools, and whom appear to have had relatively little prosecutorial experience. *Id.* at Annex II. *See also* Basel Institute on Governance, Homepage, <http://www.baselgovernance.org> (last visited Oct. 20, 2008) (describing the form and function of the Basel Institute on Governance, a Swiss non-profit think tank that worked on the KPK's 2006 report).

<sup>109</sup> *See* Tony KWOK Man-wai, *Investigating Corruption*, in United Nations Asia & Far East Institute for the Prevention of Crime and Treatment of Offenders [UNAFEI], Annual Report for 2005 & Resource Material Series No. 69, at 191 (July 2006), available at [http://www.unafei.or.jp/english/pdf/PDF\\_rms\\_all/no69.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms_all/no69.pdf) (listing difficulties of investigating corruption gleaned from the author's experience working within Hong Kong's independent corruption commission). Participants in corrupt networks are often linked by professional, ethnic or regional ties of loyalty.

The results—official influence or benefits indirectly delivered—are not readily apparent. There is no crime scene to study, no victim to interview, no fingerprints or trace evidence to examine. Financial documents, which form a primary source of evidence, are often protected by law or difficult to obtain, and require resources and expertise to decipher. Witnesses are likely complicit or concerned about retaliation from superiors if they file a report.<sup>110</sup> Perpetrators, especially of high-level corruption, are often savvy politicians, business people and financiers who understand how to bury the evidence of their misdeeds, and have the connections and means to call on other professionals—lawyers, accountants, computer experts—to help execute the deed and launder the proceeds.<sup>111</sup> These criminals, with their hired help, can take advantage of jurisdictional boundaries and identify loopholes that hide their activities.<sup>112</sup>

They may be in a position to influence public opinion, threaten the careers of investigators or prosecutors, interfere with the investigation, or prolong the proceedings through various tactics.<sup>113</sup> All of these factors may drain the will of dedicated investigators and prosecutors, and the public support on which they depend.<sup>114</sup>

The primary investigative technique employed in many civil law countries and across much of the developing world—long, detailed interrogation of suspects—is often ineffective in meeting the challenges that public corruption investigations present.

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<sup>110</sup> See Johnston & Doig, *supra* note 10, at 14 (“Organized corruption closes off clients’ political or bureaucratic alternatives, giving the organization more corrupt leverage” and “creates a network of operatives sharing not only rewards but also risks; they thus have a stake in protecting corruption, increasing its proceeds, and freezing out critics and holdout agents and clients.”).

<sup>111</sup> See ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *supra* note 27, at 2 (“High-level corruption mobilizes extensive resources to camouflage ‘levies,’ ‘commissions,’ and ‘kickbacks’ and to transfer the acquired assets to safe financial havens.”).

<sup>112</sup> Man-wai, *supra* note 109, at 191.

<sup>113</sup> See, e.g., U.N. Dev. Programme Report, *supra* note 9, at 50–51 (describing the belief of a former anti-corruption prosecutor in Fiji that political interference, delay, and threats directed at prosecutors undermined a major corruption prosecution).

<sup>114</sup> ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *supra* note 27, at 2–3 (“Rather than being able to conduct their investigations as they themselves see fit, [law enforcement agencies which investigate high-level corruption cases] are often obliged to follow orders from superiors who are close to the political power structure and might try to influence the course of prosecution.”).

Perpetrators alerted to an investigation proceeding by means of interrogation usually have ample time to coordinate their stories and to destroy or remove evidence. The essence of public corruption is deceit, so lying to investigators is the norm, not the exception. And without financial documents, recorded statements, or other evidence with which to confront suspects, who are often powerful individuals and well represented by counsel, prying loose admissions is an uphill struggle. Interrogation oriented toward discovering evidence of past acts is a poor tool to penetrate a corrupt relationship, or web of relationships, which is usually still vital at the time of the investigation. Effective investigation and prosecution of corruption requires a more proactive evidence-gathering strategy geared to the stealth, complexity, and ongoing, interrelated nature of the crime.

An effective public corruption investigatory strategy has many parallels to that employed in the investigation of organized crime. First, rooting out corruption, like dismantling organized crime syndicates, requires a strategy that penetrates the association of criminals in order to gather information from the inside. It is the secret agreement between the participants to engage in a certain transaction or series of transactions, such as when an elected official agrees to trade his vote for private financial gain, which constitutes the crime. Evidence of the relationship between the participants itself lays the foundation for the prosecution's theory of the crime, and evidence of communications between the participants in the course of implementing the criminal scheme supplies the direct proof of motive, intent, and implementation that is often at the core of a public corruption case. Such communications may be contemporaneous with the investigation, and captured on audio or videotape with the help of an informant or undercover investigator, or may be historical, as recounted from the witness stand by a whistleblower or a participant who has subsequently agreed to testify for the prosecution. In either scenario, the standard approach is to start near the bottom of the organization and work up the chain of command. In prosecutors' parlance, lower level participants are "flipped" or "rolled" to provide evidence against higher level participants in the scheme.

Second, as Deep Throat famously instructed Bob Woodward and Carl Bernstein, in corruption cases, as in organized crime

cases, investigators must “follow the money.”<sup>115</sup> Money is the lifeblood of corrupt networks, just as it is with criminal enterprises.<sup>116</sup> Both exist primarily in order to extract a profit from illicit activities. In cases of entrenched bureaucratic corruption, proceeds flow upward from lower level participants to higher level figures just as they do in an organized crime enterprise. Since proving receipt of the money (or some similarly valuable benefit) is the key to proving the crime, a failure to follow the money is usually fatal to a corruption prosecution—like a murder case without a body or a weapon.

Third, law enforcement must be able to secure the cooperation of witnesses with knowledge of the crime. Without witnesses who can testify at a public trial, there can be no prosecution. In corruption cases, as in organized crime cases, witnesses who can provide direct evidence of the crime generally have no incentive to report it or fear the consequences of coming forward. These consequences may include threats, harassment, workplace or professional retaliation, economic and social isolation by other members of the witness’ industry, business or social group, and in many countries, violent retribution.

To most experienced public corruption prosecutors, the importance of these strategies is readily apparent. Following a 2003 international conference on the effective prosecution of corruption cases in Asia and the Pacific, conference organizers reported the key findings of the conference to be that corruption suspects continue to benefit from banking secrecy laws and the lack of whistleblower protection laws to encourage reporting. Nevertheless, they reported, “[t]he strategies of ‘starting at a low level, and working one’s way up’ and ‘following the money’ have proven particularly efficient even in corruption cases involving high-ranking, influential perpetrators and international transactions.”<sup>117</sup>

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<sup>115</sup> ALL THE PRESIDENT’S MEN (Warner Bros. Pictures 1976).

<sup>116</sup> See Bruce G. Ohr, *Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes*, in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders [UNAFEI], Resource Material Series No. 58, 40, 55 (Dec. 2001), available at [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no58/58-05.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no58/58-05.pdf) (“It cannot be overstated that making money is the primary goal of organized crime and transnational criminal activities.”).

<sup>117</sup> ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *supra* note 27, at xii.

### 3.2. Key Investigative Tools and Techniques

Proactive corruption investigation requires tools and techniques that permit investigators to “get inside” the corrupt networks, “follow the money,” and secure trial witnesses and other evidence. These include both laws that authorize law enforcement activities that facilitate evidence-gathering, and laws that allow prosecutors to pursue criminal conduct that supports the criminal enterprise. Long experience in the United States has proven the effectiveness of these mechanisms for attacking corruption.<sup>118</sup> The key evidence-gathering tools are laws that (1) protect witnesses who offer evidence of the corruption crimes from workplace retaliation; (2) authorize undercover operations; (3) authorize access to financial documents, including bank records; and (4) establish mechanisms by which prosecutors can offer immunity or sentencing leniency to those who provide valuable evidence against others in a corrupt network. Another key strategy is the targeting of associated criminal conduct. Investigators and prosecutors in many other countries use similar tools, and the UNCAC encourages the adoption of each of these procedures.

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<sup>118</sup> In comparing U.S. laws to those in Indonesia, we focus on federal criminal law and procedure rather than the laws of the fifty states. This is partly out of convenience, since the laws of the states vary in detail, although many state laws and procedures are similar to the federal procedures discussed here. It is also because, since at least the early 1970s, federal investigators and prosecutors have been a primary law enforcement weapon against public corruption, even at the state and local level, and there is therefore a long and tested track record of the use of federal criminal laws and procedures in the area of corruption eradication. See U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2006, at 44–46 tbls.1 & 2, available at <http://www.usdoj.gov/criminal/pin/docs/arpt-2006.pdf> (showing that 407 federal officials and 241 local officials were convicted on federal corruption charges in 2006, and presenting data for multiple years); see also Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1171–72 (1977) (discussing federal prosecutors' decision whether to retain jurisdiction or hand a case over to the local authorities when the case involves violations of both federal and state laws); Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 699–700 (2000) (discussing federal prosecutors' use of federal statutes to prosecute state and local government officials for corruption).

3.2.1. *Whistleblower Protection Laws*

A specific form of witness interference particularly relevant to public corruption cases is workplace retaliation against those who report corruption or fraud that comes to their attention in the course of their employment. Protecting “whistleblowers” and thereby encouraging them to come forward is critical to effective detection of public corruption.<sup>119</sup> These persons often provide the initial lead for investigators, and may subsequently become undercover informants or important trial witnesses for the prosecution. As noted above, public corruption, such as corruption involving the misuse of public resources, often involves a small circle of participants and conduct that is carried out away from public view. Employees who observe criminal conduct in the workplace by colleagues and superiors are uniquely situated to expose that conduct and to assist investigators, but they are also uniquely vulnerable to workplace retaliation and harassment. The assurance of legal protection against retaliation is an important factor in promoting disclosure of corrupt activity and preventing efforts to cover up the crime or interfere with the reporting party’s efforts to assist law enforcement.<sup>120</sup> Article 33 of the UNCAC urges

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<sup>119</sup> In 2001, a whistleblower in the California Commissioner of Insurance’s Office revealed information that led to the resignation of the Commissioner and the prosecution of persons associated with the embezzlement and diversion of public funds in the Commissioner’s office. See *State Bar Exonerates Quackenbush Whistleblower*, CAL. B.J., Jan. 2001, available at <http://calbar.ca.gov/calbar/2cbj/01jan/page24-1.htm> (noting that leaking of confidential client information by state attorney whistleblower was not considered unethical conduct because it was protected by California’s whistleblower law).

<sup>120</sup> At least three federal whistleblower protection statutes are expressly dedicated to the protection of persons who report potential criminal activity. One provision, enacted as part of the Sarbanes-Oxley Act, makes it a crime punishable by up to ten years to retaliate against whistleblowers who provide information to law enforcement relating to the possible commission of a federal offense. 18 U.S.C. § 1513(e) (2006). Another provision of the Act provides for restraining orders to prevent retaliation against whistleblowers, and another allows whistleblowers to recover compensatory damages and other remedies for persecution. *Id.* §§ 1514, 5328. A plethora of other federal, state, and local laws provide whistleblower protection. Some federal whistleblower laws apply to categories of government employees, such as federal employees generally. Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)-(b)(9) (2006). Others apply specifically to military employees, military contract workers, members of the Coast Guard, and foreign service employees: Military Whistleblower Protection Act, 10 U.S.C. § 1034(b) (2006); Contractor Employees of the Armed Forces Act, 10 U.S.C. § 2409 (2006); Protection of Seamen Against Discrimination Act, 46 U.S.C. § 2114 (2006); and the Foreign Service Act, 22 U.S.C. § 3905(b)(2) (2006). Other laws

parties to enact laws providing “protection against any unjustified treatment” for whistleblowers.<sup>121</sup>

Typically, whistleblower protection laws prohibit workplace retaliation such as termination, suspension, demotion, or discriminatory treatment, on account of the employee’s action in reporting suspected unlawful or unsafe conduct to a superior, or to an administrative, regulatory or investigative government agency. The protections may be enforced through civil or administrative remedies against the employer<sup>122</sup> or through criminal sanctions.<sup>123</sup>

### 3.2.2. *Undercover Operations*

The term “undercover operation” covers a broad spectrum of covert investigative scenarios, from operations that may last for years, involving undercover agents infiltrating an organized criminal network, to a single telephone call between a cooperating witness and a target.<sup>124</sup> In all cases, however, undercover activity

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protect private sector employees who report various types of unlawful acts or conditions. *E.g.*, Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2006); Mine Health and Safety Act, 30 U.S.C. § 815(c) (2006); Clean Water Act, 33 U.S.C. § 1367 (2006); Clean Air Act, 42 U.S.C. § 7622 (2006). All fifty states have enacted whistleblower protection statutes. *See* National Conference of State Legislatures, State Whistleblower Laws, <http://www.ncsl.org/programs/employ/whistleblower.htm> (last visited Oct. 20, 2008). Many local and municipal governments have also enacted such laws.

<sup>121</sup> UNODC, *supra* note 31, at 120, 146.

<sup>122</sup> Remedies may include reinstatement, back pay with interest, costs, damages, attorney fees, and other measures.

<sup>123</sup> In cases of retaliation against whistleblowers in a criminal investigation, of course, there may also be criminal sanctions under obstruction of justice laws. Such laws cover threats and harassment of potential witnesses, which could include workplace retaliation. *See infra* notes 148–51 and accompanying text.

<sup>124</sup> *Ohr*, *supra* note 116, at 48. In the United States, there is no single statute which sets forth the nature and scope of law enforcement authority to conduct undercover operations. The use of undercover strategies, and the admissibility into evidence of statements of the defendant captured on audio or videotape, has become a well-established feature of American criminal law. *See* 18 U.S.C. § 2511(2)(c) (2000) (stating that it is not unlawful “for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”); *United States v. White*, 401 U.S. 745 (1971) (admitting testimony of governmental agents regarding conversation they overheard via a radio transmitter carried by an informant). Some criminal statutes, such as the “sting money laundering” provision in section 1956(a)(3) of Title 18, specifically contemplate undercover operations. 18 U.S.C. § 1956(a)(3) (2000).



involves monitored communication between a law enforcement officer or a person acting at the direction of law enforcement, and a person suspected of engaging in criminal activity.<sup>125</sup> Undercover operations are generally used to gather firsthand information from the targets about their involvement in past or future offenses, or about a crime while it is underway. The term includes what are commonly called “sting” operations, in which members of law enforcement offer the target an opportunity to commit a crime, intending to gather evidence of the defendant’s attempt to do so. Another undercover tactic is a “controlled delivery” in which a prearranged delivery of money or contraband is made to the suspect in a monitored setting, after which the suspect is arrested.

Sometimes such operations involve a law enforcement agent going undercover, that is, using an assumed identity for purposes of the operation. At other times, an informant or cooperating witness is used, who takes direction from law enforcement. In all undercover operations, law enforcement aspires to record the targets themselves as they discuss, plan, or implement criminal behavior.<sup>126</sup> UNCAC’s article 50(1) requires that parties shall, to the extent permitted by domestic law, take measures to permit the use by appropriate authorities of controlled delivery operations, electronic surveillance, and undercover operations, “and to allow for the admissibility in court of evidence derived therefrom.”<sup>127</sup>

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<sup>125</sup> Undercover operations, therefore, are distinct from activities involving the interception of communications between persons where no participant in the communications has consented to monitoring by law enforcement. That type of evidence gathering, commonly called a wire tap, requires court authorization, and is a more cumbersome investigative tool, used with far less frequency in public corruption investigations. See 18 U.S.C. §§ 2516–22.

<sup>126</sup> See, e.g., *United States v. Montoya*, 945 F.2d 1068, 1071, 1076–77 (9th Cir. 1991) (discussing evidence of \$3,000 bribe paid by undercover FBI agent to State Senator); see also Allan Lengel, *FBI Says Jefferson Was Filmed Taking Cash: Affidavit Details Sting on Lawmaker*, WASH. POST, May 22, 2006, at A1 (discussing investigation of Congressman William J. Jefferson, who was filmed taking a briefcase with \$100,000 from a person who was cooperating with the FBI); Dan Eggen, *Alaska Senator’s Calls Were Secretly Taped*, WASH. POST, Sept. 21, 2007, at A10 (discussing an Alaska corruption investigation and an oil industry figure’s role in recording calls with various elected officials).

<sup>127</sup> UNODC, *supra* note 31, at 210. In its legislative guide, the U.N. Office of Drugs and Crime observes that “[t]hese techniques are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions,” and that less intrusive methods will often not prove effective. *Id.* at 211.

Of course, the conduct of undercover operations by law enforcement raises serious questions of inducement, intent, and interference with individual rights. Both substantive<sup>128</sup> and procedural protections<sup>129</sup> are necessary to cabin the use of this powerful investigative technique to appropriate boundaries. But when gathered under supervised conditions, evidence from

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<sup>128</sup> In the United States, legal doctrines that have emerged through case law in the course of the development of undercover investigations have also served to define the boundaries of appropriate undercover operations. Constitutional individual rights define the limits to law enforcement conduct. Additionally, a common defense raised in “sting” cases, in which law enforcement facilitates the defendant’s conduct in attempting to commit a crime in the course of the monitored communications, is entrapment. *Jacobson v. United States*, 503 U.S. 540 (1992) (finding entrapment where defendant, charged with purchasing child pornography, had been targeted by law enforcement agents who had mailed dozens of solicitations to the defendant offering to sell child pornography). Under federal law, law enforcement may “afford opportunities or facilities for the commission of the offense.” *Id.* at 548. But entrapment is a valid defense where it can be shown that the government agent induced an innocent person to commit a crime. *See id.* at 542 (reversing conviction “[b]ecause the Government overstepped the line between setting a trap for the ‘unwary innocent’ and the ‘unwary criminal’”). An informant who pushes too hard, or who essentially hounds an innocent target until the target ultimately agrees to a criminal course of action, will be found to have entrapped the target. An entrapment defense is defeated, however, if it can be shown either that the defendant was already disposed to commit the crime prior to being contacted by the government agent, or that the government agent did not induce him to commit the crime. Accordingly, most law enforcement agencies will not authorize an undercover operation unless there is sufficient “predication,” that is, a documented, pre-existing basis to believe that the target has already committed, or is willing to commit, a particular type of crime. Under federal law, where a defendant is predisposed to commit the crime, there can be no valid entrapment defense. Such basis could be established by evidence of similar prior conduct by the target, or reliable reports about the target’s current activities. Predication serves to ensure both that the target selection is based on factual criteria and not arbitrary or irrelevant factors, and that a defense of entrapment is unlikely to succeed.

<sup>129</sup> These may include intra-agency rules as to how to conduct undercover operations to ensure they are consistent with constitutional rights and requirements that instigation of undercover operations be approved by a coordinating entity. The FBI, for example, requires approval from a federal prosecutor before an agent may authorize the recording of any conversations involving informants, and undercover operations are subject to careful review. *See* JOHN ASHCROFT, U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS, available at <http://www.usdoj.gov/olp/fbiundercover.pdf>. In addition, the U.S. Department of Justice requires written authorization from the Office of Enforcement Operations in the Criminal Division in Washington before certain types of in-person contacts may be monitored. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY MANUAL §9-7.302, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/7mcrim.htm#9-7.302](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/7mcrim.htm#9-7.302).

undercover operations often provides the most compelling evidence of a defendant's guilt. Such evidence portrays the defendant himself, in his own words, without the benefit of coaching, the filter of a witness's memory, or the spin of an attorney's argument. Video or audio tapes that capture the defendant's quotidian behavior in his own office, home, or car, have an authenticity and immediacy that no other type of evidence can match. Public corruption prosecutions are often built around undercover evidence, and it may be the high point of the government's presentation at trial. Defendants in public corruption cases often argue that they lacked corrupt intent, that their words were misinterpreted, or that the prosecution is motivated by extraneous factors. A videotape of an official pocketing cash from an undercover agent, however, or a recorded telephone call in which the defendant promises to exercise his influence in exchange for money, can be extremely powerful evidence that sweeps such defenses away.<sup>130</sup>

Undercover operations provide a powerful investigative advantage, allowing law enforcement to get inside a network of criminal players and gather evidence over time. A standard feature of corruption investigations is the introduction of an undercover agent or informant who conducts extensive undercover activity with numerous targets. Such investigations typically start with a small number of identified targets as to whom there is predication—that is, a basis for suspecting those targets' involvement in corrupt activity. More targets may be added to the investigation as the undercover agent is introduced to additional participants or referred to other persons involved in similar criminal activity. Likewise, those who are approached and who emphatically decline an opportunity to participate in corrupt conduct are dropped as targets. The undercover operation may continue for as long as it can still effectively gather evidence of criminal corruption. While the undercover operation is underway, law enforcement agents may take other investigative measures that do not endanger the undercover operation, such as surveillance or

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<sup>130</sup> As a matter of evidence, a defendant's statements, if relevant, are always admissible in federal criminal trials. FED. R. EVID. 801(d)(2)(A). A statement by a defendant's agent is also admissible. FED. R. EVID. 801(d)(2)(C)-(D). Statements of co-conspirators, made during and in furtherance of a conspiracy, are also admissible. FED. R. EVID. 801(d)(2)(E). These rules give ample room for the use of evidence gathered in undercover operations.

obtaining grand jury subpoenas for bank account records. At some point, when the operation has run its course (or is in danger of being exposed), investigators and prosecutors will plan a “take-down,” a coordinated operation that usually involves the execution of multiple arrest warrants and search warrants. At that point, the “covert” stage of the investigation is over, and the “overt” stage begins, during which prosecutors may interview witnesses, obtain

official records, and gather other evidence necessary to make the case.

### 3.2.3. *Access to Financial Records*

Access to bank account and other financial records is another critical aspect of corruption investigations. In the United States, federal investigators and prosecutors have ready access to financial records through the use of subpoenas issued through an investigating grand jury.<sup>131</sup> The heart of almost any public corruption case is the pecuniary benefit flowing to the corrupt official. If the benefit can be documented in the hands of the official, the case is half won. Conversely, if the flow of the money to the defendant or his family or associates cannot be tracked and then proven at trial, a public corruption prosecution has little prospect of success. The UNCAC, article 40, takes specific aim at the barrier that bank secrecy laws can pose to the investigation and prosecution of public corruption. The article states simply that parties to the Convention “shall ensure that, in the case of domestic criminal investigations of offenses established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.”<sup>132</sup>

Bank records are often obtained at the outset of an

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<sup>131</sup> The grand jury, an outgrowth of medieval English law, is an unusual feature of U.S. criminal procedure with few parallels in other countries. The federal government and several states still rely on grand juries as an integral part of the system for investigating and charging felony offenses. In its modern form under federal law, grand juries in each federal district consist of between sixteen and twenty-three persons selected from the public, who meet periodically to hear testimony, issue subpoenas, and vote on indictments. FED. R. CRIM. P. 6.

<sup>132</sup> UNODC, *supra* note 31, at 123. The Legislative Guide notes that the Article is intended to address the inability of investigators to access financial records, a “major hurdle” to the investigation of crimes with financial aspects. *Id.* at 153.

investigation to corroborate information from a whistleblower or other informant, or to provide predication for an undercover operation. During the covert stage of an investigation, bank accounts related to persons who receive money from an undercover agent may be subpoenaed in order to help track the movement of the money, or to help identify other persons who have made payments to the same person. Later in an investigation, bank records may establish probable cause for a search warrant. Once the investigation is overt, witnesses may be required to produce bank records or other documents relating to the financial activity that is the focus of the investigation. Analysis of records for one bank account often points to other accounts or businesses, as incoming deposits or outgoing checks or transfers draw the attention of investigators and prosecutors. Such an analysis may also lead to the identification of additional conspirators, the location of assets purchased with proceeds of the offense, or to the development of prosecution theories based on anti-money laundering laws. In a lengthy investigation, the relatively prompt production of business records by banks, credit card companies, escrow companies, retail establishments, and similar businesses is often what drives the investigation forward.

Many countries, including Indonesia, have enacted laws requiring public officials to disclose assets or certain transactions.<sup>133</sup> Many countries have also criminalized illicit enrichment, that is, the “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.”<sup>134</sup> Investigation of this crime, clearly,

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<sup>133</sup> UNCAC, *supra* note 28, art. 8(4) (“Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.”); Law Number 30 of 2002, art. 13(a) (Indon.) (authorizing the KPK to construct lists and conduct checks on reports on the wealth of government executives); Law Number 30 of 2002, art. 16 (Indon.) (requiring civil servants and government officials to report any gratification they have received); Law Number 28 of 1999 on a Corruption-free State Administration, art. 5 (Indon.); *see* KPK GAP REPORT, *supra* note 7 (noting that Japan, Korea and Thailand have laws which only require high level officials to report their assets, while Belgium, Nepal and the Philippines extend the reporting duties to the families and relatives of public officials).

<sup>134</sup> UNCAC, *supra* note 28, art. 20. *See* UNODC, *supra* note 31, at 103 & 103 n. 56 (noting that several jurisdictions have found such a statute to be helpful, including France, Kenya and the Netherlands). Such statutes are particularly powerful in combination with burden shifting laws, such as one in Indonesia,

cannot even begin without effective access to bank records and other documents relating to assets, in order to allow investigators and prosecutors to gauge a public official's wealth.

Bank records or other records of financial transactions are often the key documents presented in evidence at trial in a public corruption prosecution. Such documents may provide details about the possession and movement of money on specific dates, information that is key to proving most corruption charges. Bank account records, or records of normal real estate or other financial transactions, are largely unassailable as evidence; as documents created in the normal course of business, their accuracy is usually undisputed. Because business records don't lie, they provide ideal corroboration to the testimony of an informant, whose motives, veracity, or recollection of events will be vigorously challenged by defense attorneys.

#### 3.2.4. *Immunity and Sentence Reduction Mechanisms*

As with dismantling crime syndicates, a key strategy in exposing and eradicating hidden networks of corruption is to turn one participant in the enterprise against others. Prosecutors generally start with lower level figures and work "up the chain," offering inducements—either immunity or sentence reduction—to the underlings to produce evidence that will incriminate the critical players.

The legal authority to grant immunity in exchange for a witness's sworn testimony is a valuable tool in executing this strategy. Under the United States model, a prosecutor may seek a court order compelling a witness to testify, and granting that witness "use" immunity for his testimony, meaning that the government cannot use the evidence he provides against him in a subsequent trial.<sup>135</sup> Failure to testify once an immunity order is issued can lead to civil or criminal contempt-of-court charges.<sup>136</sup>

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which shifts to the public official the duty to disclose legitimate sources of wealth. Law Number 30 of 2002, art. 48 (Indon.).

<sup>135</sup> In obtaining Department of Justice approval to offer a witness immunity, federal prosecutors must demonstrate that (1) "the testimony or other information from such individual may be necessary to the public interest" and (2) the individual "has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003(b).

<sup>136</sup> A less formal mechanism for inducing cooperation frequently used early in a federal investigation with respect to persons who had minimal involvement

A more common tool by which U.S. prosecutors secure the testimony of “insiders” in public corruption cases is a cooperation agreement. Cooperation agreements are usually negotiated as part of a plea bargain, in which the defendant is required to admit guilt to one or more criminal offenses, and to incur some type of criminal liability. As part of the agreement, the defendant agrees to fully and truthfully cooperate with the prosecution, including disclosing information and providing testimony in court. If the defendant provides truthful and substantial cooperation, the prosecutor agrees to file a motion at the time of sentencing requesting that the judge reduce the defendant’s sentence to reflect the nature and value of the defendant’s cooperation.<sup>137</sup>

The Convention endorses the use of both sentence reduction mechanisms and grants of immunity in corruption cases to induce the cooperation of participants in the crime. Article 37(1) requires that states “take appropriate measures to encourage persons who participate or have participated” in corruption offenses “to supply information useful to competent authorities for investigative and evidentiary purposes,” and to provide other factual help.<sup>138</sup> Article 37 then goes on to specifically urge states to enact measures

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in the criminal activity, is a “non-target” letter. A “non-target” letter is simply a letter provided by a prosecutor to a potential witness (or the witness’s attorney), assuring the witness that, based on information currently in the prosecutor’s possession, the witness is not considered a “target” of the investigation. A “target” is someone whom the prosecutor believes has committed a criminal act, and as to whom the prosecutor believes he will have sufficient evidence to charge with a crime. In cases involving many participants, witnesses with some knowledge of the crime, however minor or innocent, may be reluctant to cooperate with law enforcement for fear of becoming ensnared in the prosecution. “Non-target” letters are extremely helpful in encouraging such witnesses to come forward with information. This procedure is based on the concept of prosecutorial discretion, a concept well-developed in U.S. law, but which is largely non-existent in Indonesia and many other countries.

<sup>137</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007); Ohr, *supra* note 116, at 54. See, e.g., Matt Apuzzo, *Former Ney Aide Gets No Prison Time*, USA TODAY, Aug. 16, 2007, [http://www.usatoday.com/news/washington/2007-08-16-ney-corruption\\_N.htm](http://www.usatoday.com/news/washington/2007-08-16-ney-corruption_N.htm) (describing sentencing of William Heaton, a former aide to Congressman Robert Ney, who cooperated with investigators and taped telephone calls and a meeting with Ney); Karen Tumulty, *The Plot Thickens*, TIME, Dec. 5, 2005, at 40–41 (describing guilty plea of Michael Scanlon, former associate of Jack Abramoff, and Scanlon’s agreement to testify against Abramoff and Ney); Larry Welborn & Peggy Lowe, *Jaramillo Cooperates with Feds Over Investigation*, ORANGE COUNTY REGISTER, Oct. 30, 2007, at B1 (describing assistant sheriff’s guilty plea and agreement to cooperate against his former boss, the elected county sheriff, who was subsequently indicted).

<sup>138</sup> UNODC, *supra* note 31, at 121, 149.

permitting “mitigating punishment of an accused person” and/or the “granting of immunity from prosecution to a person,” if the person “provides substantial cooperation in the investigation or prosecution” of corruption crimes.<sup>139</sup>

The information provided by an immunized witness or cooperating defendant can be a tremendous evidence-gathering tool, both in strengthening the government’s case against known targets, or in initiating new investigations. They may be asked to produce documents, lead investigators to other evidence, and if it is still feasible, they may be directed to make recorded telephone calls or to meet with other targets of the investigation and record those meetings. The cooperation agreement mechanism not only yields valuable evidence, but gives prosecutors critical leverage within the criminal network. Since a participant in a corrupt relationship is usually in a position to provide highly incriminating evidence against other participants, the knowledge that an “insider” is cooperating with the prosecution is often enough on its own to convince other defendants to plead guilty. Because the first person to cooperate in an investigation often provides the most valuable information to investigators, that defendant often gets the largest reduction in sentence. Thus, once an investigation becomes overt and the scope of the investigation becomes known, or after indictment, lesser targets or defendants often “race” to be the first one in the case to cooperate, cracking the corrupt network wide open.

The concepts of conferring immunity on an individual with potential culpability, and of striking an agreement with a defendant to recommend a lesser sentence in exchange for testimony or other assistance, are foreign to the civil law tradition that includes Indonesia’s system. Many civil law countries have introduced reforms in recent years which borrow and modify various features of the Anglo-American tradition, however.<sup>140</sup> Procedures for enlisting the assistance of criminal suspects or defendants through immunity or sentence reductions are among those concepts which have increasingly taken root in civil law countries. Peru, one of the “French family” of civil law countries like Indonesia, adopted an immunity procedure for corruption

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<sup>139</sup> *Id.*; UNCAC, *supra* note 28, arts. 37(2)–(3).

<sup>140</sup> Langer, *supra* note 99, at 39–62 (discussing emergence of various forms of plea bargaining in Germany, Italy, Argentina, and France).



cases which was later extended to other types of criminal cases.<sup>141</sup> Italy has a similar immunity and sentence reduction mechanism for kidnapping crimes.<sup>142</sup> The Philippines, Nepal and Mongolia have provisions which allow for immunity for those who bribe public officials, so that they can be free to testify.<sup>143</sup> South Korea allows courts to mitigate the sentences of whistleblowers that come forward with information about a crime in which the whistleblower was involved.<sup>144</sup>

### 3.2.5. Prosecuting Associated Crimes

A common and effective strategy for targeting public corruption is to integrate the investigation of those crimes with the investigation of other closely related conduct under other criminal statutes. These statutes are not the anti-corruption laws themselves, but statutes that provide investigators with the jurisdictional latitude needed to gather the relevant information bearing on corrupt conduct and provide prosecutors with the evidence and legal theories to convert that information into criminal convictions. Evidence of other criminal violations can lead investigators to evidence of corruption, or can be used to pressure targets or their associates into providing information about corruption crimes. In the United States, prosecutors are authorized to simultaneously investigate multiple crimes, and can employ a variety of criminal statutes, depending on the conduct under investigation. Several substantive criminal laws are invaluable tools for U.S. investigators and prosecutors in public corruption cases.

One group of statutes regularly used in prosecuting corruption cases is the anti-money laundering laws.<sup>145</sup> Both public corruption

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<sup>141</sup> See Nelly Calderón Navarro, *Fighting Corruption: The Peruvian Experience*, 4 J. INT'L CRIM. JUST. 488, 493–500 (2006) (describing Peruvian Act No. 27378 which enables negotiated justice).

<sup>142</sup> Gherardo Colombo, *Investigating and Prosecuting Large-scale Corruption*, 4 J. INT'L CRIM. JUST. 510, 512 (2006) (describing Italy's sentence reduction mechanism). Italy also has a plea bargaining procedure that borrows from the American system. Langer, *supra* note 99, at 46–53.

<sup>143</sup> ADB/OECD Anti-Corruption Initiative for Asia & the Pacific, *supra* note 4, at 50.

<sup>144</sup> *Id.*

<sup>145</sup> 18 U.S.C. §§ 1956–1957. See, e.g., *United States v. Lazarenko*, 476 F.3d 642, 645 (9th Cir. 2007) (referencing money laundering conviction of former Ukrainian Prime Minister for laundering proceeds of foreign corruption); *United States v.*

and money laundering offenses usually entail the concealment of financial transactions, and a money laundering theory can broaden the scope of a corruption investigation beyond the corrupt act itself to the ultimate disposition of the proceeds. Charging the crimes together has several benefits as a matter of prosecution strategy. In a trial where evidence of both a corrupt transaction and the subsequent laundering of the proceeds can be presented, the totality of the evidence is often much more compelling. Money laundering evidence frequently will include documentation of expenditures by the defendants and evidence of concealment, which can support a motive theory and allow a fuller presentation of the defendants' corrupt conduct. Recognizing the connection between corruption and money laundering, article 14 of the UNCAC mandates that parties institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions.<sup>146</sup> Because proceeds of corruption are rarely reported to taxing authorities, criminal tax evasion laws are also a useful weapon against corruption.<sup>147</sup>

A second group of useful substantive statutes are obstruction of justice laws, including statutes protecting witnesses.<sup>148</sup> Statutes

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Jackson, 72 F.3d 1370, 1385-86 (9th Cir. 1995) (affirming convictions in a corruption case, including money laundering); *United States v. Montoya*, 945 F.2d 1068, 1075-77 (9th Cir. 1991) (affirming money laundering conviction of a state senator); Second Superseding Indictment, *United States v. Warner*, No. 02-CR-506 (N.D. Ill. 2002) (public corruption case against former Illinois Governor, including money laundering and structuring charges); David M. Herszenhorn, *Grand Jury Indicts Arizona Congressman*, N.Y. TIMES, Feb. 23, 2008, at A9 (reporting corruption and money laundering charges against Congressman).

<sup>146</sup> UNODC, *supra* note 31, at 43-51.

<sup>147</sup> See, e.g., Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, Nov. 29, 2005, at A1 (discussing Congressman Randy Cunningham's guilty pleas to tax evasion and bribery charges); Jerry Bier, *Setencich Convicted in Tax Case: Ex-Assembly Speaker is Found Guilty on a 1996 Charge but is Acquitted of a '97 Count*, FRESNO BEE, June 30, 2000, at A1 (describing the conviction of former California Assembly Speaker on tax evasion charge); Paula McMahon, *Jenne Weeps at Sentencing - Former Broward Sheriff Jailed Year and a Day, Fined \$3,000*, SOUTH FLORIDA SUN-SENTINEL, Nov. 17, 2007, at 1A (discussing the sentencing of sheriff on tax evasion and corruption charges).

<sup>148</sup> Federal prosecutors frequently include obstruction of justice charges in indictments in public corruption cases. See, e.g., Indictment, *United States v. Ford*, No. 05-20201B (W.D. Tenn. 2005) (indicting state legislator for various crimes, including three counts of witness intimidation); Fourth Superseding Indictment, *United States v. McFall*, Cr. S-02-468 MCE (E.D. Cal. 2004) (public corruption case involving five defendants, including local and state officials, and charging various defendants, in addition to corruption offenses, with perjury, false statements to investigators, and witness tampering); Indictment, *United States v. Traficant*, No.

criminalizing the deliberate destruction of documents, lying to investigators, and perjury are also frequently utilized by anti-corruption prosecutors.<sup>149</sup> Witness protection laws have become key weapons in corruption cases in the United States,<sup>150</sup> and the importance of these laws in corruption cases is also recognized in the UNCAC.<sup>151</sup> Witness tampering and intimidation is a common feature of public corruption investigations. Undetected, it greatly diminishes the chances for a successful prosecution. When such acts can be charged along with the corruption crimes and evidence of them can be gathered and presented in court, however, it greatly enhances the prospects for a conviction, both on the obstruction and the underlying offense. Testimony of a witness, forensic evidence of an email sent from the defendant's computer, or, best of all, a surreptitiously recorded telephone conversation with a defendant, which establishes that the defendant attempted to influence another's testimony or intimidate a witness, can be devastating to a defendant's case. Such conduct is materially

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01-CR-207 (N.D. Ohio 2001) (indicting a congressman on various charges including obstruction of justice for attempting to persuade another person to provide false testimony and destroy evidence).

<sup>149</sup> See, e.g., 18 U.S.C. § 1510(a) (obstruction of criminal investigations); *id.* § 1516 (obstruction of federal audits); *id.* §§ 1517–1518 (obstruction of examinations of financial institutions and criminal health care investigations); *id.* § 1519 (destruction of records); *id.* § 1001 (false statements); *id.* §§ 1621–1623 (perjury).

<sup>150</sup> In the United States, a wide variety of federal statutes are available to charge persons who attempt to improperly influence, intimidate, or injure witnesses. Tampering with witnesses, victims, or informants through physical force, threats, or corrupt persuasion is a serious crime. 18 U.S.C. § 1512. Punishments range from the potential death penalty for killing a witness, and a maximum of 20 years for attempted use of force against a witness, down to a maximum of a year for harassing a witness and thereby hindering or delaying her testimony. *Id.* § 1512(a)(3) & (d). A general obstruction statute prohibits the use of bribery to obstruct, delay, or prevent the communication of information concerning a federal crime to a criminal investigator. *Id.* § 1510(a). Threatening, intimidating, or corruptly influencing a juror is a crime. *Id.* § 1503.

<sup>151</sup> Article 25(a) of the UNCAC mandates that parties to the convention criminalize not only the use of force, threats and intimidation against witnesses, but also the “promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony . . . .” UNODC, *supra* note 31, at 80, 94–95. Thus the obligation under the convention “is to criminalize the use both of the corrupt means, such as bribery, and of coercive means, such as the use or threat of violence.” *Id.* at 94. Article 32 requires that parties enact measures to provide effective protection for witnesses from potential retaliation or intimidation. These measures can include programs for physical protection of the witnesses, evidentiary rules to protect their identity, and rules to ensure the safety of witnesses while testifying. *Id.* at 119, 141–46.

inconsistent with a defense based on the notion that the defendant had no criminal intent in committing the underlying act and has nothing to hide.

Prosecutors in the United States also commonly make use of the general conspiracy law, which criminalizes agreements to commit other federal criminal offenses, and can be used to broaden the scope of almost any investigation. Because conspiracy offenses can last for months or even years, and can include the conduct of a variety of actors with varying levels of culpability, they are ideal weapons for targeting the networks that engage in illegal corruption.<sup>152</sup> Search warrants and other investigative techniques predicated on conspiracy laws may legitimately gather evidence not only of a specific corrupt transaction, but of the nature and history of the relationships that gave rise to the transaction.<sup>153</sup> Accordingly, prosecutors can make use of conspiracy laws to target and “flip” peripheral players who may provide incriminating evidence against the primary targets.<sup>154</sup> While the UNCAC does not call expressly for enactment of a conspiracy law, it advocates the enactment of criminal laws targeting persons who participate in, instigate, or are accomplices to, the criminal conduct.<sup>155</sup>

### 3.3. *The Use of Key Procedural Tools to Investigate and Prosecute Public Corruption*

Collectively, the statutes and procedures described above are the key tools which investigators and prosecutors use in almost all

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<sup>152</sup> 18 U.S.C. § 371. Some other commonly used federal anti-corruption statutes include their own conspiracy provisions. See, e.g., *id.* § 1951(a) (conspiracies to commit extortion under color of official right); *id.* § 1956(h) (money laundering conspiracy); *id.* § 286 (conspiracy to submit fraudulent claims to the government).

<sup>153</sup> The Federal Bureau of Investigation frequently utilizes an “enterprise theory of investigation,” which focuses on targeting, diagramming, and dismantling whole criminal networks, rather than simply gathering evidence to prove a particular crime by a particular individual. Richard A. McFeely, *Enterprise Theory of Investigation*, 70 FBI L. ENFORCEMENT BULL. 19 (May 2001), available at <http://www.fbi.gov/publications/leb/2001/may01leb.pdf>. Under a conspiracy theory, culpability extends beyond the principals in the corrupt transactions at the heart of the investigation to other persons who facilitated or concealed the corrupt activity, or those who knowingly assisted or benefited from the crime. *Id.*

<sup>154</sup> Co-conspirator statements, that is, statements made in furtherance of a criminal scheme are admissible in evidence in federal cases as exceptions to the hearsay rule. FED. R. EVID. 801(d)(2)(E).

<sup>155</sup> UNCAC, *supra* note 28, art. 27; UNODC, *supra* note 31, at 114–15.

major corruption investigations and prosecutions in the United States. Indeed, the classic pattern for corruption investigations led by the FBI makes use of all of these procedures to get on the inside of corrupt networks, follow the money, and secure witnesses and evidence: a whistleblower or other informant helps to initiate a lengthy undercover operation, the information gathered in that operation is corroborated and supported by the gathering and analysis of relevant financial records, the covert phase of the investigation concludes with a takedown in which multiple persons are charged, and prosecutors then negotiate guilty pleas and cooperation agreements with those defendants who are essentially caught red-handed. The information provided by cooperating defendants snagged early in the investigation, together with analysis of more financial records and other investigation, is used to develop cases against additional defendants. Even after the investigation has gone overt, cooperating defendants sometimes can gather information in an undercover capacity—particularly evidence of obstruction of justice offenses by new targets of the investigation. Statutes used in the ensuing prosecution typically include money laundering, tax evasion, obstruction of justice, or conspiracy.

Examples of successful corruption investigations following this methodology are legion: the Abscam investigation in the late 1970s, in which sixteen persons, including six congressmen and a U.S. senator were convicted after a two year investigation;<sup>156</sup> Operation Greylord, a lengthy investigation of payoffs and kickbacks in the Cook County judicial system in Illinois in the 1980s, which led to the conviction of dozens of judges, attorneys, law enforcement officials, and a state legislator;<sup>157</sup> Operation Rocky Top, a 1980s corruption investigation which resulted in the conviction of numerous state legislators and others in Tennessee;<sup>158</sup> the BRISPEC investigation of corruption in the state legislature in

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<sup>156</sup> Robert D. McFadden, *Williams's Trial Is the Last of 8 Major Abscam Cases*, N.Y. TIMES, May 3, 1981, at 40 (describing Abscam investigation and resulting convictions).

<sup>157</sup> Federal Bureau of Investigation, *Investigations of Public Corruption: Rooting Crookedness Out of Government*, March 15, 2004, [www.fbi.gov/page2/march04/greylord031504.htm](http://www.fbi.gov/page2/march04/greylord031504.htm) (summarizing Operation Greylord on the 20th anniversary of the conviction of a court clerk convicted of collecting bribes for Cook County judges).

<sup>158</sup> Sandra Roberts, *Before Tennessee Waltz, There Was Rocky Top*, TENNESSEAN, June 5, 2005, at 13A (describing the Rocky Top investigation and prosecutions).

California in the late 1980s, in which a number of assemblymen, state senators, staffers, and lobbyists were convicted after a long undercover operation;<sup>159</sup> Operation Lost Trust, an early 1990s investigation into corruption in the South Carolina legislature which resulted in the conviction of a state legislator and others;<sup>160</sup> Operation Silver Shovel, a 1990s investigation of Chicago municipal elected officials, city employees, and others that netted multiple convictions;<sup>161</sup> Operation Safe Road, a long-term investigation of corruption in Illinois state government, commenced in the late 1990s, which led to the convictions of scores of persons, including the former governor;<sup>162</sup> Operation Lively Green, an investigation into corruption among military and law enforcement personnel in Arizona;<sup>163</sup> Operation Tennessee Waltz, a recent investigation into corruption in the Tennessee legislature which resulted in convictions of a dozen state officials;<sup>164</sup> the

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<sup>159</sup> United States v. Jackson, 72 F.3d 1370, 1373-74 (9th Cir. 1995); United States v. Freeman, 6 F.3d 586, 588-92 (9th Cir. 1993); Robert Reinhold, *U.S. Agents Seize Files In California Statehouse*, N.Y. TIMES, Aug. 26, 1988, at A12.

<sup>160</sup> United States v. Blanding, 250 F.3d 858 (4th Cir. 2001); United States v. Derrick, 163 F.3d 799 (4th Cir. 1998); *3 Carolina Politicians Are Indicted for Bribery*, N.Y. TIMES, Feb. 22, 1991, at A16.

<sup>161</sup> Don Terry, *An Admission Of Corruption Probably Isn't Chicago's Last*, N.Y. TIMES, Apr. 19, 1996, at A17 (reporting that a city councilman who had pleaded guilty to taking bribes had agreed to cooperate by wearing a listening device in the federal investigation and introducing a federal informant to other corruption targets); FBI Chicago Div., FBI Major Investigation—Operation Silver Shovel, <http://chicago.fbi.gov/silvershovel/silvershovel.htm> (last visited Oct. 20, 2008).

<sup>162</sup> U.S. ATTORNEY'S OFFICE, N. DIST. OF ILL., U.S. DEPT. OF JUSTICE, OPERATION SAFE ROAD: SUMMARY OF CASES 1 (2006), <http://www.usdoj.gov/usao/iln/osr/osrcasesummary.pdf>; Matt O'Connor & Rudolph Bush, *Ryan Gets 6 Years*, CHI. TRIB., Sept. 7, 2006, at 1.

<sup>163</sup> Press Release, Dept. of Justice, Three Current and Former U.S. Soldiers Plead Guilty to Participating in Bribery and Extortion Conspiracy (Mar. 24, 2006), [http://www.usdoj.gov/opa/pr/2006/March/06\\_crm\\_168.html](http://www.usdoj.gov/opa/pr/2006/March/06_crm_168.html); *Final Two Defendants in 'Operation Lively Green' are Sentenced*, REUTERS, Mar. 24, 2008, <http://www.reuters.com/article/pressRelease/idUS174693+24-Mar-2008+PRN20080324>; see also DEP'T OF JUSTICE, *supra* note 3, at 30.

<sup>164</sup> Bonna Johnson, *As Ford Goes to Prison, Ethics Laws on Trial*, TENNESSEAN, Aug. 29, 2007, <http://m.tennessean.com/detail.jsp?key=91387&full=1>; *Tennessee Waltz One Dozen Down*, MEMPHIS COMMERCIAL APPEAL.COM, Jan. 11, 2008, <http://www.commercialappeal.com/news/2008/Jan/11/tennessee-waltz-one-dozen-down/>; Press Release, FBI, Tennessee Waltz, The Dance is Over (May 2, 2008), [http://www.fbi.gov/page2/may08/tennesseewaltz\\_050208.html](http://www.fbi.gov/page2/may08/tennesseewaltz_050208.html).

investigation of Congressman William Jefferson;<sup>165</sup> an ongoing investigation of corruption in Alaska which has resulted in seven convictions to date including three legislators and an aide to the former governor and in the indictment of a U.S. senator;<sup>166</sup> and Operation Broken Boards, an investigation of corruption among state officials in New Jersey that resulted in a takedown in September 2007 involving the arrest of eleven officials, including two state assemblymen.<sup>167</sup> A twenty-seven month FBI investigation of municipal corruption in Dallas, which included the use of informants, consensually recorded undercover telephone calls, and the analysis of records for over two hundred bank accounts, led recently to the indictment of sixteen persons, including several public officials.<sup>168</sup>

The coordinated use of criminal statutes such as money laundering, conspiracy, and obstruction of justice, and of investigative procedures involving whistleblowers, undercover operations, gathering and analysis of financial records, and cooperation agreements with defendants, is not limited to large scale corruption investigations. Such tools were used effectively in a local investigation of corruption in the area of Fresno, California, dubbed Operation Rezone, involving payoffs by developers to local officials. A series of prosecutions arising from that investigation led to convictions of city councilmen, developers, and others.<sup>169</sup> In another corruption case, a single multi-defendant case

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<sup>165</sup> Jerry Markon & Allan Lengel, *Lawmaker Indicted on Corruption Charges*, WASH. POST, June 5, 2007, at A1; Lengel, *supra* note 126.

<sup>166</sup> *Federal Agents Raid Legislative Offices*, ANCHORAGE DAILY NEWS, Sept. 5, 2006, <http://dwb.adn.com/news/politics/fbi/story/8428723p-8036832c.html>; Karl Vick, *'I'll Sell My Soul to the Devil'*, WASH. POST, Nov. 12, 2007, at A01; Press Release, Dept. of Justice, Former Alaska State Representative Victor Kohring Sentenced on Public Corruption Charges (May 8, 2008), <http://anchorage.fbi.gov/doj/pressrel/2008/publiccorruption050808.htm>.

<sup>167</sup> David W. Chen, *New Jersey Officials Arrested in Corruption Scandal*, N.Y. TIMES, Sept. 7, 2007, at B1.

<sup>168</sup> Rudolph Bush, *Cash Flowed Through Circle of Corruption, Prosecutors Allege*, DALLAS MORNING NEWS, Oct. 2, 2007, [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-whathappened\\_02met.ART.State.Edition.2.42998e9.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-whathappened_02met.ART.State.Edition.2.42998e9.html); Dave Levinthal et al., *City Hall Bribery Indictments 'A Sad Day or Dallas'*, DALLAS MORNING NEWS, Oct. 2, 2007, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/100207dnmetindictments.129b687ca.html>. The main indictment in that case included multiple conspiracy charges, including money laundering conspiracy. *Indictment, United States v. Donald Hill*, No. 3:07-CR 289-R (N.D. Tex. 2007).

<sup>169</sup> Mark Arax & Mark Gladstone, *Leading Fresno Developer is Indicted on*

prosecuted in the Eastern District of California in 2003–05, investigators and prosecutors used an undercover investigation, an extensive analysis of bank account records, and numerous plead-and-cooperate agreements to secure guilty pleas from ten defendants involved in a bribery ring that was making payments to two U.S. State Department employees to obtain nonimmigrant

visas.<sup>170</sup> In addition to bribery charges, the indictment in that case included conspiracy and money laundering charges.

As noted above, the major obstacles to investigating and prosecuting public corruption cases are universal in nature, and similar mechanisms have repeatedly been used with great success in other countries. In countries that have criminal procedures allowing the use of investigative strategies similar to those employed in the United States, the same methodology has had equally impressive results. In the United Kingdom, Operation Othona, a four year investigation into corruption in London's Metropolitan Police Service in the mid-1990s, led to the conviction of numerous police officers.<sup>171</sup> Investigators and prosecutors worked together in the course of the investigation, using informants, undercover operations, and the cooperation of defendants to build their prosecutions.<sup>172</sup> In Italy, a civil law country like Indonesia, the multi-year Clean Hands investigation of corrupt political officials in the 1990s employed similar tools—the use of informants or whistleblowers, undercover operations, the analysis of financial records, and bargaining with defendants to secure their cooperation against other participants in the corrupt network.<sup>173</sup> Hundreds of persons were charged in the course of that investigation, which profoundly shook Italian politics.<sup>174</sup>

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*Corruption Charges*, DAILY REPUBLICAN, Feb. 21, 1998, [http://www.dailyrepublican.com/fresno\\_developer\\_indicted.html](http://www.dailyrepublican.com/fresno_developer_indicted.html). See also *United States v. Smith*, 196 F.3d 1034 (9th Cir. 1999) (affirming conviction for corruption-related offenses committed during tenure as city councilman).

<sup>170</sup> Indictment, *United States v. Johnson*, CR. No. S-03-202 GEB (E.D. Cal. 2004); Denny Walsh, *Two Plead Guilty to Bribery for Visas*, SACRAMENTO BEE, May 1, 2004, at A7.

<sup>171</sup> John Dempsey-Brench, *Investigation and Prosecution of Police Corruption: Operation Othona*, in ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *supra* note 27, at 52–60.

<sup>172</sup> *Id.* at 53–58.

<sup>173</sup> Colombo, *supra* note 142, at 520.

<sup>174</sup> John Moody, *Sick of It All*, TIME, Mar. 8, 1993, at 48.



The effectiveness of the criminal procedures described above in rooting out public corruption has been demonstrated in the United States and many other countries over the last thirty years. Unfortunately, investigators and prosecutors in many countries in the developing world, including Indonesia, are hamstrung by the unavailability of such tools under the antiquated criminal procedure regimes that define their authority.

#### 4. EQUIPPING LAW ENFORCEMENT TO SUCCEED: PROGRESS AND REMAINING GAPS IN INDONESIA

In only a few years, Indonesia has made substantial progress in addressing multiple aspects of comprehensive anti-corruption reform. As noted above, various steps are being taken to address the widely recognized need for institutional reform and greater law enforcement coordination. Criminal code reform has occurred to update and define the core corruption crimes. But less attention has been directed at modernizing the laws that enable law enforcement to investigate and prosecute these cases effectively. To the extent legislative reform has enhanced law enforcement's investigatory abilities, it has largely been directed at the KPK, a short-term focus that leaves the nation's primary law enforcement institutions ill-equipped to sustain the anti-corruption effort over the long term. Below we briefly assess the status of the Indonesian criminal code with respect to the tools and techniques necessary to investigate and prosecute public corruption effectively.

##### *4.1. Whistleblower Protection Laws*

Some Indonesian laws provide some types of protections to whistleblowers, but none effectively shields them from the injury they are most likely to suffer, which is professional or workplace retaliation.<sup>175</sup> In at least one instance, with respect to a state

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<sup>175</sup> Some rudimentary whistleblower provisions have been inserted into recently enacted laws. Indonesia Corruption Watch, Protecting Whistle-blowers in Corruption Cases, Aug. 28, 2006, [http://www.antikorupsi.org/eng/index.php?option=com\\_content&task=view&id=475&Itemid=2](http://www.antikorupsi.org/eng/index.php?option=com_content&task=view&id=475&Itemid=2). The 1999 anti-corruption law contained an article requiring that the identity of a reporting person not be

auditor who became a witness for the KPK, the KPK was able to physically protect the witness with the assistance of the police, but could not protect him from workplace retaliation.<sup>176</sup> Corruption in Indonesia is often entrenched in government agencies where it is vertically integrated, in which lower level officials take in illegal “fees” and commissions at the direction of higher officials, with the proceeds flowing up the chain of command. Without adequate, enforceable whistle-blower protection laws, lower level employees in a position to observe and report corruption directed by higher level officials as part of the vertically integrated corruption typical in Indonesia are unlikely to come forward.

#### 4.2. Undercover Operations

As described above, another impediment to effective anti-corruption prosecution is the narrow and rigid structure of current Indonesian evidence rules, which list the types of evidence

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disclosed at trial, but there is no anti-retaliation provision in the law, or any enforcement mechanism. Law Number 31 of 1999 on Eradication of Corruption Offences, art. 31(1) (Indon.). The 2002 anti-money laundering law, amended the following year, is slightly better, although the scope of the protection afforded in that statute is narrow—it appears to be intended to protect bank employees and similarly situated persons who are mandated to report suspicious transactions, similar to the U.S. statute which protects financial institution employees who make reports. 31 U.S.C. § 5328 (2006). In the anti-money laundering law, investigators, prosecutors, and judges are also required to keep the identity of a reporting party secret, and the law contains a provision authorizing a suit for damages by the reporting party if her identity is revealed in violation of the statute. Law Number 15 of 2002 Concerning the Crime of Money Laundering, as amended by Law Number 25 of 2003, art. 39 (Indon.). Parties making reports concerning money laundering or suspected money laundering are immune from prosecution and civil suit for making such reports, and are entitled to “special protection” against threats, although the nature of such protection is not specified. *Id.* arts. 40, 42, 43. The law that created the KPK also obliged the KPK to “provide protection to witnesses or whistle-blowers providing reports and information regarding corrupt acts.” Law Number 30 of 2002, art. 15(a) (Indon.). The nature of the “protection” to be provided is not specified, however, and there is no enforcement mechanism to prevent workplace retaliation. The new witness protection law includes a provision that purports to confer civil and criminal immunity for witnesses or victims who testify. Law Number 13 of 2006 on Protection of Witness and Victim, art. 10(1) (Indon.). While this is a significant improvement, it still does not shield a whistleblower from professional or workplace retaliation.

<sup>176</sup> Erry Riyana Hardjapamekas, “We Will Protect the Witness,” TEMPO, Apr. 19–25, 2005 (on file with author); *Informant Law a Must*, JAKARTA POST, April 25, 2005, <http://www.thejakartapost.com/news/2005/04/25/informant-law-must.html>. The case is described below in more detail in the text accompanying footnotes 180–81.

admissible in a criminal case.<sup>177</sup> The evidence code does not explicitly authorize undercover operations or list audiotapes as admissible, which means that prosecutors cannot rely on being able to use the fruits of such an investigation at trial. Additionally, due both to distrust of law enforcement born of rampant corruption and an outlook shaped by the non-adversarial civil law system there, Indonesian judges remain suspicious of the undercover technique and often view any interaction between law enforcement and investigation targets as unlawful or inappropriate entrapment.<sup>178</sup>

Because of the lack of express statutory authority, most prosecutors are unfamiliar with the technique and it has been tried in only a few cases.<sup>179</sup> In one, the newly staffed KPK arranged a sting operation in which a state audit agency official agreed to act undercover and to wear a recording device. The auditor met with a member of the General Elections Commission, who had planned to bribe him to rig the audit of the Elections Commission. The two met in a hotel room, and the discussion and payment of cash was recorded on audiotape and videotape.<sup>180</sup>

The Elections Commission official was arrested at the scene and subsequently convicted. The investigation that unfolded following that arrest led to the conviction of several additional members of the elections commission on corruption charges. This

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<sup>177</sup> See *supra*, Section 2.2.

<sup>178</sup> There are several reasons why the use of undercover techniques such as sting operations are more easily accepted in common law countries. First, in common law countries members of law enforcement are generally presumed to be able to engage in any conduct that is not illegal or unethical. By contrast, in many civil law countries members of law enforcement are expected to take only those actions for which they have express authorization. Second, in the common law conception of criminal conduct, a crime involves both an act (*actus reus*) and criminal intent (*mens rea*). Since law enforcement and those operating under their direction have no criminal intent, but rather are attempting to enforce the law, their conduct is not criminal. In many civil law countries, where crimes are often defined purely by the nature of the act at issue, this distinction is less meaningful.

<sup>179</sup> Among prosecutors with whom we discussed undercover techniques, there was little understanding of the concepts of predication and the defense of entrapment. Indeed, prosecutors sometimes used the word “entrapment” to mean a valid undercover contact.

<sup>180</sup> Tony Hotland, *KPK Determined to Uncover Graft in KPU*, JAKARTA POST, April 12, 2005, <http://www.thejakartapost.com/news/2005/04/12/kpk-determined-uncover-graft-kpu.html>; *KPU ‘Tactical Funds’ Were for BPK: Treasurer*, JAKARTA POST, April 14, 2005, <http://www.thejakartapost.com/news/2005/04/14/kpu-039tactical-funds039-were-bpk-treasurer.html>.

operation was one of the early successes of the KPK.<sup>181</sup>

In another, investigators with Timtas Tipikor were investigating a complaint by a witness in a trial in south Jakarta that the judge in the trial had been attempting to extort him. The witness agreed to record a meeting with the judge's clerk at a restaurant, at which the witness was to hand over the money. After the money was handed over, investigators confronted the clerk, who then agreed to call the judge. The telephone call from the clerk to the judge confirming the payment was recorded by investigators. Satellite message system messages were also taken as evidence. The judge was subsequently arrested, and later convicted.<sup>182</sup>

But even these instances—apparent successes—illustrate how undercover activity is not yet widely understood or accepted in Indonesia. The powerful undercover evidence in the KPK's high-profile investigation of the elections commission was accepted by the new Anti-Corruption Court, although it might not have been by other courts. The KPK's cooperating auditor, however, was criticized and then fired by the audit agency for his role in uncovering the scandal, because his acts in discussing the bribe with the elections commission official were deemed a violation of the audit agency's ethics code.<sup>183</sup> In the Timtas Tipikor case, although the recorded telephone call with the judge was tantamount to a confession, prosecutors were unsure until the middle of trial whether the court would accept the evidence of the call. In each case, the undercover operation consisted of only a single contact. To our knowledge, more elaborate undercover operations have hardly ever been attempted in public corruption investigations in Indonesia.<sup>184</sup>

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<sup>181</sup> *Supreme Court Cuts Ex-KPU Chief's Jail Sentence*, JAKARTA POST, Jan. 17, 2008, [http://www.ppatk.go.id/berita\\_eng.php?nid=2786](http://www.ppatk.go.id/berita_eng.php?nid=2786) (discussing convictions and appeals of four Elections Commissions officials).

<sup>182</sup> Baskoro et al., *supra* note 77, at 4.

<sup>183</sup> Hardjapamekas, *supra* note 176; *Informant Law a Must*, *supra* note 176.

<sup>184</sup> See Abdul Khalik, *KPK's Month-Long Secretive Probe Pays Off*, JAKARTA POST, June 2, 2008, <http://www.thejakartapost.com/news/2008/06/02/kpk039s-monthlong-secretive-probe-pays.html> (describing a KPK raid on a customs service office in Jakarta, and reporting that KPK investigators went undercover, posing as import-export business owners to conduct transactions with corrupt customs officials. If accurate, this would be one of the first such operations in the country).

#### 4.3. Access to Financial Records

While there are several Indonesian statutes that, in theory, permit law enforcement access to bank records in corruption cases, these provisions are limited, cumbersome, and ineffective. The Indonesian banking laws permit the police, prosecutors, and judges to request records from banks, but only for the accounts of identified suspects or defendants themselves.<sup>185</sup> In order to request the records, the chief of the National Police, the attorney general, or the chief justice of the Supreme Court must send a letter of request to the central bank, the Bank of Indonesia, which in turn may request production of the records from the relevant bank.<sup>186</sup> Aside from the lengthy delays inherent in such a request, a more problematic issue is that the production of records under the banking law is not mandatory. As a result, no enforcement mechanism exists if the bank turns down the request. Resistance by banks and banking authorities often results in a failure to obtain any records under this provision.<sup>187</sup> The 1999 anti-corruption law<sup>188</sup> and the 2002 law creating the KPK<sup>189</sup> only marginally

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<sup>185</sup> Law Number 7 of 1992 Concerning Banks, amended by Law Number 10 of 1998, art. 42 (Indon.).

<sup>186</sup> *Id.*

<sup>187</sup> For example, one prosecutor with whom we spoke about the use of this mechanism indicated that it is rarely used, in part because the Bank of Indonesia sometimes did not respond, or did not do so in a timely manner, and that it often questioned the law enforcement agency's need for the records, or would deem the stated reasons given by law enforcement as insufficient to overcome considerations of bank secrecy.

<sup>188</sup> Under the 1999 law, corruption cases are investigated under already existing procedures unless otherwise indicated in the 1999 law. Law Number 31 of 1999 on Eradication of Corruption Offences, art. 26 (Indon.). The 1999 law authorized an investigator, prosecutor or judge to ask for bank records, avoiding the necessity for a letter from the Chief of the National Police, the attorney general, or the chief justice of the Supreme Court. *Id.* art. 29(1). The authority to request records under the 1999 law, however, continues to be limited to information concerning an identified suspect or defendant, and does not extend to family members, businesses or business partners, associates, or others whose accounts might be holding corruption proceeds or whose account records may yield evidence of a corruption crime. The request authority also appears to be limited to the investigation of corruption offenses, and cannot be used for the investigation of related crimes. As under the banking law, the 1999 law directs that a request for banking information be routed to the Bank of Indonesia, and states that the information is "subject to the prevailing laws and regulations." *Id.* art. 29(2). Although the 1999 law required the Bank of Indonesia to respond to a request within three business days, it did not mandate that the Bank of Indonesia actually compel the production of records. As with the banking law, the 1999 law merely authorizes law enforcement to request certain records, and does not

improved the procedure for obtaining bank records in corruption cases. In its late 2006 study of the gaps between Indonesian law and the UNCAC, the KPK indicated that since it has no ability to compel compliance with requests for financial information on suspects or defendants, “compliance by banks with requests for the lifting of bank secrecy is said to still be rather low.”<sup>190</sup>

Existing law does not allow investigators or prosecutors to even seek bank records relating to accounts held in the name of front companies, or of relatives or associates of the corruption target or defendant. Since corruption cases commonly involve indirect payoffs, or proceeds hidden in the names of others, this limitation on the availability of bank records is a serious constraint on law enforcement.

The Indonesian money laundering law, enacted in 2002 and amended the next year, also contains a provision for accessing

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require banks to produce them. Neither the banking law procedure nor the 1999 law procedure requires that a bank maintain in confidence the fact that a request for records has been received from law enforcement. The 1999 law also contained a new provision authorizing an investigator, prosecutor or judge to ask a bank to block a bank account owned by a suspect that is believed to contain proceeds of a corruption offense. *Id.* art. 29(4). The law again only authorizes requests, however, and does not mandate responses from the relevant financial institution. In any event, absent a way of obtaining documentation concerning activity in a bank account in a timely and confidential manner, the ability to block that account is largely meaningless.

<sup>189</sup> Under the 2002 law, the KPK is to conduct investigations and prosecutions in accordance with the Indonesian Criminal Procedure Code and the 1999 law, unless the 2002 law provides otherwise. Law Number 30 of 2002, arts. 38–39 (Indon.). The new KPK was given authority to request information from banks or other financial institutions, but as with the 1999 law, such requests are limited to an identified suspect or defendant, and again there is no requirement that the banks comply with the request. Law Number 30 of 2002, art. 12(1)(c) (Indon.). The KPK was awarded stronger authority than existed under the 1999 law to order banks and other financial institutions to block accounts, and that authority extended not only to suspects and defendants, but to “other connected parties.” Law Number 30 of 2002, art. 12(1)(d) (Indon.). Since the KPK cannot request banking information concerning other parties, however, and cannot compel the production of information concerning suspects and defendants, this authority is somewhat illusory. The KPK was also authorized to temporarily halt financial transactions where there was evidence connecting the transaction to a corruption case under investigation, but there is no corresponding seizure and forfeiture authority. Law Number 30 of 2002, art. 12(1)(g) (Indon.).

<sup>190</sup> KPK GAP REPORT, *supra* note 7, at 39; *see also* U.N. Dev. Programme, *supra* note 63, at 52 (noting the imbalance in the 2002 law between the authority conferred on the KPK to request documents from state institutions and the lack of a provision requiring that those institutions comply with KPK requests).

bank records.<sup>191</sup> The law allows an investigator, prosecutor or judge to request records from financial services providers through a letter signed by the chief of the National Police or a regional chief, the attorney general or the head of a provincial prosecutor's office, or the chief justice of the Supreme Court or the head of a panel of judges hearing a criminal case.<sup>192</sup> Importantly, the money laundering law specifically states that "the provisions of laws stipulating bank secrecy and the secrecy of other financial transactions shall not be applicable" to such requests.<sup>193</sup> This is the most permissive provision in Indonesian law with respect to law enforcement access to bank records. Such requests are still limited in scope, however, and in this case it is limited to the assets of persons identified as a suspect, named as a defendant, or referred to law enforcement by the Indonesian financial intelligence unit, known as the PPATK. Also, such a request is an available law enforcement tool only in money laundering investigations. Neither the KPK nor the Special Crimes branch of the AGO—the two agencies with prosecutorial authority over public corruption crimes—have authority to prosecute money laundering crimes. As a practical matter, therefore, the somewhat stronger authority to obtain bank account records under the money laundering law is of little assistance in combating public corruption.

Because of this lack of timely access to financial records, most investigators and prosecutors have little experience in tracing and analyzing financial data, and are often forced to assemble cases without recourse to the most basic evidence of the crime. As the KPK has observed, "the 'follow the money' approach to investigation is not yet well understood and used within Indonesian law enforcement agencies."<sup>194</sup>

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<sup>191</sup> Law Number 15 of 2002 Concerning the Crime of Money Laundering, as amended by Law Number 25 of 2003, art. 33 (Indon.). The money laundering law also provided that investigations should be undertaken in accordance with the Indonesian Criminal Procedure Code unless otherwise indicated in the money laundering law. *Id.* art. 30.

<sup>192</sup> *Id.* art. 33(3)–(4).

<sup>193</sup> *Id.* art. 33(2).

<sup>194</sup> KPK GAP REPORT, *supra* note 7, at 31 (illustrating that although the PPATK is not a law enforcement agency, its expertise is available to the KPK and AGO on a case-by-case basis).

#### 4.4. Immunity and Sentence Reduction Mechanisms

There are no immunity or sentence reduction mechanisms in Indonesia to induce or reward persons who cooperate with law enforcement in criminal cases. Indeed, far from rewarding those who come forward with information, prosecutors with whom we spoke felt duty-bound to prosecute such persons, and the law does not provide for relief in most cases.<sup>195</sup>

The law setting forth the authority of the attorney general includes a clause permitting him to “terminate cases in the public interest.”<sup>196</sup> Within Indonesia, however, this provision is understood not as an immunity mechanism to be used in exchange for useful information, but rather as authority to dismiss cases on humanitarian grounds in instances where the defendant is elderly or ill, or in other extraordinary circumstances. There have been discussions with the AGO and with civil society groups about the possibility of promulgating a regulation that would define “the public interest” to include situations in which defendants in corruption cases agreed to cooperate and return their ill-gotten gains, but, perhaps fearing the appearance of a concession to high profile corruption defendants, no such regulation has been issued. In any event, such a regulation might not be feasible in light of Article 4 of the 1999 anti-corruption law, which specifically states that restitution to the state shall not nullify the sentence of a perpetrator convicted of corruption crimes under that law.<sup>197</sup>

A type of informal charge bargaining is sometimes used by the police to induce cooperation. The police may charge a suspect with a single crime, withholding other or more serious charges to see if the suspect cooperates. If he refuses, additional charges may ensue. This may sometimes be effective, although the lack of any

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<sup>195</sup> In the KPK case involving an investigation of Supreme Court clerks who allegedly extorted litigants, the criminal defendant who came forward with information that led to the prosecution hoped for leniency in his own case, but received none. In fact, the press speculated that the defendant’s sentence, as imposed by the Supreme Court, was harsher than it otherwise would have been. See also Eva C. Komandjaja, *Probosutedjo Seeks Graft Case Review*, JAKARTA POST, Dec. 5, 2005, <http://www.thejakartapost.com/news/2005/12/05/probosutedjo-seeks-graft-case-review.html>.

<sup>196</sup> Law Number 16 of 2004 Concerning the Prosecution Service, art. 35(c) (Indon.).

<sup>197</sup> Law Number 31 of 1999 on Eradication of Corruption Offences, art. 4 (Indon.).



written or recognized procedure means that the process lacks transparency and accountability, and suspects cannot be confident that cooperation will actually result in a benefit. Neither police, prosecutors, nor judges are bound by such an agreement. Moreover, unless the police forego charging a crime with a much higher penalty, such charging decisions may or may not have a material impact on the ultimate sentence imposed.

The new witness protection law includes a single-sentence provision that appears to be the farthest Indonesia has yet come towards contemplating some type of express legal recognition of the value of testimony from cooperating defendants. The new provision states that a suspect who testifies cannot be acquitted on account of his testimony if he is legally guilty, but that the judge may take his testimony into account in reducing his sentence.<sup>198</sup> How the provision will function in practice is not yet clear, but it is far from the sort of express sentence-reduction mechanism that would be likely to induce a defendant to turn on his criminal associates and to be of substantial assistance to investigators or prosecutors. The provision does not authorize prosecutors to seek a lower sentence, and does not identify how much of a sentence reduction might be appropriate. The provision also does not require that the cooperator provide substantial cooperation to law enforcement, that his information/testimony be found to be truthful and complete, or that the cooperator identify or return ill-gotten gains in order to qualify for a sentence reduction. Without an effective legal mechanism to turn lower-level defendants against more culpable figures up the chain, investigators and prosecutors will continue to have difficulty exposing and dismantling networks of corruption, since those most likely to be caught red-handed—the front counter functionaries, clerks, and delivery men—have no incentive to cooperate against their more powerful superiors.

#### *4.5. Prosecuting Associated Crimes*

Indonesia has in place some of the criminal statutes that are commonly used in conjunction with the enforcement of anti-corruption laws. In 2002, Indonesia enacted a comprehensive scheme addressing the crimes that constitute money laundering, a

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<sup>198</sup> Law Number 13 of 2006 on Protection of Witness and Victim, art. 10(2) (Indon.).

reform highly significant to the effort to update anti-corruption law enforcement.<sup>199</sup> The law also created a national financial intelligence unit called the Financial Transaction Reports and Analysis Center, known by its Indonesian acronym as the PPATK.<sup>200</sup> The agency has become the leading resource in Indonesia for educating law enforcement and the judiciary about the crime of money laundering, and has become a key player in efforts to detect and prosecute public corruption and embezzlement crimes in the country. Nevertheless, there have been few money laundering prosecutions.<sup>201</sup> We found that there was relatively little understanding of the money laundering crimes among most police, prosecutors, and judges with whom we had contact with in Indonesia, but with the provisions firmly embedded in the criminal code, and given the active role the PPATK has staked itself out to play, this will likely change in time.<sup>202</sup>

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<sup>199</sup> Like its U.S. counterpart, the Indonesian law criminalizes transactions involving proceeds of certain types of crimes. Law Number 15 of 2002 Concerning the Crime of Money Laundering, as amended by Law Number 25 of 2003, art. 3 (Indon.). The predicate offenses include crimes of corruption, bribery, embezzlement, and fraud. *Id.* arts. 2(1)(a), (b), (p), (q). The law also includes reporting requirements for large cash transactions similar to the Currency Transaction Report reporting requirements in U.S. law, and criminal provisions for evading the reporting requirements. *Id.* arts. 8, 9, 13, 16.

<sup>200</sup> *Id.* arts. 18-29b. This unit is similar to the Financial Crimes Enforcement Network in the United States. The PPTAK, like its U.S. counterpart, has the authority to receive and analyze transaction reports from financial institutions, make referrals to law enforcement, and provide data to law enforcement. *Id.* arts. 26-27, 33. The PPATK, staffed in part by former members of law enforcement agencies, has supplied expert witnesses for use by prosecutors as forensic accountants in fraud and corruption prosecutions. It has been reported that reports by the PPATK on suspicious banking transactions by high level officials in the Indonesian National Police have played a role in efforts to root out police corruption. DAVIDSEN ET AL., *supra* note 6, at 57-58 (discussing instances of collaboration between the police and the PPATK). USAID is currently implementing a project, called the Financial Crimes Prevention Project, aimed at building capacity at the PPATK and assisting it in training officials at other agencies about the new anti-money laundering regime. A set of amendments to the money laundering law which would broaden the scope of the anti-money laundering crimes, increase reporting requirements from financial entities, and strengthen the PPATK, is currently under consideration by the Indonesian legislature.

<sup>201</sup> Recently, prosecutors in Jakarta charged a money laundering offense together with a bank fraud scheme involving the loss of public funds.

<sup>202</sup> Although the crime itself was not well understood, most were aware of the new money laundering law, and there was general familiarity with the concept of, or at least the term, money laundering. The PPATK is rapidly

As noted above, the 1999 anti-corruption law created obstruction of justice and false statements crimes relating to corruption.<sup>203</sup> There is no criminal witness tampering law in Indonesia, however. Although there are ample criminal statutes relating to, for example, murder, kidnapping, and assault,<sup>204</sup> and a new witness protection law is intended to provide a type of witness security program to protect witnesses from physical harm,<sup>205</sup> no laws proscribe bribery of a witness, suborning perjury, corruptly persuading a witness to give false evidence, or harassing or retaliating against a witness.

The Indonesian criminal code has no general conspiracy provision, but it does have statutes that extend criminal liability on an aiding and abetting or accomplice theory.<sup>206</sup> There are statutes criminalizing illegal logging, smuggling, and other crimes that are commonly associated with public corruption in Indonesia.

Indonesia is thus relatively well-equipped with substantive criminal laws that could be brought to bear in the context of public corruption prosecutions. A serious problem there, however, is the fragmentation of authority to use these substantive laws. In the civil law tradition, prosecutors have little discretion over target selection and charging decisions.<sup>207</sup> While prosecutors in the United States, working with investigators, are free to follow the evidence wherever it leads and to charge any criminal conduct that is uncovered, prosecutors in Indonesia are typically assigned to

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developing expertise and experience, and the agency itself, although small, has a high public profile, and has been vigorously raising consciousness of money laundering and promoting the use of anti-money laundering laws. The number of suspicious financial transactions reported to the PPATK each year by financial institutions has been rising steadily. Abdul Khalik, *Suspicious Transactions Up Ahead of 2009 Polls: Center*, JAKARTA POST, Feb. 2, 2008, <http://www.thejakartapost.com/news/2008/02/02/suspicious-transactions-ahead-2009-polls-center.html>.

<sup>203</sup> Law Number 31 of 1999 on Eradication of Corruption Offences, arts. 21-22 (Indon.).

<sup>204</sup> PENAL CODE arts. 333-60 (Indon.).

<sup>205</sup> Law Number 13 of 2006 on Protection of Witness and Victim (Indon.).

<sup>206</sup> PENAL CODE arts. 55-56 (Indon.). There are also accessory statutes that apply to some crimes. *Id.* arts. 164-65. The 1999 anti-corruption law also has a provision which criminalizes aiding and abetting or conspiring to commit a corruption offense, although the statute does not appear to encompass a conspiracy theory as it is understood in common law countries. Law Number 31 of 1999 on Eradication of Corruption Offences, art. 15 (Indon.).

<sup>207</sup> Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J. L. & TRADE AM. 323, 338-41 (1998).

handle a particular alleged crime, with their authority limited accordingly. Within the AGO, public corruption crimes are investigated by the police and/or the Special Crimes Division, and prosecuted by the Special Crimes Division. Most other crimes, however, are handled by the General Crimes Division, which lacks investigative authority. The two divisions generally handle their prosecutions separately.<sup>208</sup> The KPK does not appear to have any authority to charge money laundering or other non-corruption offenses in cases it brings before the Anti-Corruption Court.

There has been some recognition of this problem of “stove-piped” law enforcement authority. The KPK has signed Memorandum of Understanding (MoUs) with the AGO and the National Police to enhance coordination.<sup>209</sup> But the inability to utilize all substantive criminal laws to leverage efforts against public corruption continues to be an impediment to effective enforcement.

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While Indonesia has a panoply of basic laws that criminalize public corruption and related activity such as money laundering, its lack of an adequate investigative infrastructure established in the criminal procedure code impedes enforcement of violations of those laws. Despite real political will, new anti-corruption institutions, and numerous new or revised substantive anti-corruption laws, the current Indonesian criminal provisions relating to detecting and investigating offenses allow law enforcement to do little more than gather rumors and interrogate suspects—a wholly ineffective strategy in corruption cases. In order to equip law enforcement with the tools it needs to penetrate corrupt networks, follow the money, and secure the necessary witnesses and other evidence to really become a credible weapon against corruption, Indonesia (like many other developing countries) needs legislative reform that goes beyond simply enacting substantive corruption crimes.

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<sup>208</sup> In any event, given the limited prosecutorial involvement in investigations conducted by the police, charging decisions are often shaped by the nature of the police investigation.

<sup>209</sup> DAVIDSEN ET AL., *supra* note 6, at 54.

5. A SHORT LEGISLATIVE AGENDA TO EQUIP DEVELOPING  
COUNTRY LAW ENFORCEMENT FOR THE LONG TERM

5.1. Preliminary Considerations

5.1.1 The Timing of Legal Reform in Indonesia

The distance from reform proposal to enacted statute can be daunting. As in many countries, the legislative process in Indonesia is fraught with uncertainty, plagued with delays, and buffeted by conflicting domestic political winds. In addition to these standard features of the legislative process, the current political environment in Indonesia is not conducive to rapid law making, since previous elections have resulted in a number of political parties securing significant representation in the legislature, resulting in a multi-polar power structure in which no one party or coalition of parties is capable of scripting a legislative agenda.

Despite these obstacles, various factors suggest that now is an auspicious time for criminal procedure reform in Indonesia. "We have to acknowledge that the public is really fed up with the conventional legal system," a judge of the Anti-Corruption Court recently told a public forum in Jakarta.<sup>210</sup> Public pressure for more demonstrable progress in the struggle against entrenched corruption has not abated, and with the approach of Presidential elections in 2009, both the incumbent and challengers are likely to seek to demonstrate commitment to that effort.<sup>211</sup> Any president

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<sup>210</sup> *Independent Taskforce Drafts New Anticorruption Court Law*, JAKARTA POST, Dec. 1, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20071201.H03>.

<sup>211</sup> See generally Irawaty Wardany, *Faith Groups Demand Corruption Court Law*, JAKARTA POST, Oct. 23, 2008, <http://www.thejakartapost.com/news/2008/10/23/faith-groups-demand-corruption-court-law.html>; *Clean up the Judicial Commission from Cronies*, KOMPAS, Oct. 17, 2007 (unpublished U.S. Embassy translation on file with author); *Graft Has 'No Roots in Our Culture'*, JAKARTA POST, Dec. 10, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20071210.A05>; *Kalla Says Fight Against Corruption Still Slow*, JAKARTA POST, Dec. 6, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20071206.A04>; J. Kristiadi, *Optimize Momentum to Fight Corruption*, KOMPAS, Oct. 2, 2007 (unpublished U.S. Embassy translation on file with author); Desy Nurhayati, *Don't Rest On Laurels, Says Yudhoyono*, JAKARTA POST, June 13, 2008, <http://www.thejakartapost.com/news/2008/06/13/don039t-rest-laurels-says-yudhoyono.html>; Ridwan Max Sijabat, *Graft Watchdog Says No Quick Fix*, JAKARTA POST, Oct. 16, 2007, <http://www.ppatk.go.id/berita.php?nid=2287>; *VP Kalla Warns Against Taking Bribes*, JAKARTA POST, Sept. 29, 2007,

elected in 2009 is likely to have campaigned, at least in part, on a platform that includes stronger measures to eradicate corruption.

The current Police Chief and the Attorney General both appear to be committed to taking stronger action against corruption.<sup>212</sup> The KPK, now over four years old, has become a force not only in prosecuting corruption but in advocating administrative and legal changes to prevent and detect corruption. New leadership has taken the helm at the agency, which is giving it new energy and impetus; it has already moved aggressively in bringing charges against legislators, top officials at the central bank, Bank Indonesia, and others.<sup>213</sup> Indonesia helped found a new international grouping of anti-corruption enforcement agencies, and sponsored the second annual conference of the organization in Bali, Indonesia, in November 2007.<sup>214</sup> The second session of the Conference of States Parties of the UNCAC met in Bali in late January 2008, helping to ensure continued visibility and political impetus to efforts to implement anti-corruption reforms.<sup>215</sup>

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<http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20070929.@02>.

<sup>212</sup> See Poernomo Gontha Ridho & Erwin Dariyanto, *The General's Broom*, TEMPO, Aug. 29–Sept. 4, 2006, [http://www.infid.be/general\\_broom.htm](http://www.infid.be/general_broom.htm) (describing Inspector General's efforts to clean house within the National Police). The current Attorney General, Hendarman Supandji, was formerly the Junior Attorney General in charge of the Special Crimes Division, which investigates and prosecutes corruption, and was also head of Timtas Tipikor, the inter-agency anti-corruption team. He is viewed as a reformist committed to taking on corruption. Ramage, *supra* note 86, at 9; La Mont, *supra* note 87; *KPK to Prioritize Cases in '08 with Strong Evidence*, JAKARTA POST, Jan. 4, 2008, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20080104.@01>. The pressure to reform the AGO is particularly acute following the conviction of a senior prosecutor on corruption charges. See *supra* note 87 and accompanying text (discussing the recent crackdown on corrupt officials within the AGO).

<sup>213</sup> See Gelling, *supra* note 73 (commenting on the selection of new KPK members, and detailing a number of their successful prosecutions); Abdul Khalik, *KPK Vows To Go After Lawmakers in BI Case*, JAKARTA POST, Feb. 8, 2008, [http://www.ppatk.go.id/berita\\_eng.php?nid=2933](http://www.ppatk.go.id/berita_eng.php?nid=2933); Ridwan Max Sijabat, *Controversial Prosecutor Selected as KPK Chief*, JAKARTA POST, Dec. 6, 2007, <http://old.thejakartapost.com/detailweekly.asp?fileid=20071206.@01>. See also *supra* note 69 and accompanying text (describing some of the early prosecutorial accomplishments of the KPK).

<sup>214</sup> IAACA, International Association of Anti-Corruption Authorities, <http://www.iaaca.org> (last visited Oct. 20, 2008).

<sup>215</sup> Desy Nurhayati, *UN Conference Aims to Curb Corruption*, JAKARTA POST, Jan. 18, 2008, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20080118.H02>. See United Nations Office on Drugs and Crime, Second Session of the Conference of the States Parties to the United Nations Convention Against Corruption, Second Session, Jan. 28–Feb. 1, 2008, <http://www.unodc.org/unodc>

Legislative action is underway on a number of fronts, each of which could help serve as a vehicle for changes in criminal procedure, or an impetus for further legislative reform. Soon after Indonesia ratified the UNCAC in April 2006, a drafting committee was formed to work on legislation to conform Indonesia to the requirements of the Convention, and the committee is currently active in advocating such legislation.<sup>216</sup> The Constitutional Court recently issued a decision ruling that the independent Anti-Corruption Court was not organized in accordance with constitutional principles. Rather than shut down the Anti-Corruption Court, however, the Constitutional Court ruled that legislators should rectify the problem through new legislation within three years, and the pressure is on the legislature to get that accomplished.<sup>217</sup> A separate committee is now drafting legislation in response to that decision, and recent drafts of the proposed legislation contemplate a significant expansion of the Anti-Corruption Court.<sup>218</sup> An Indonesian drafting committee is also working on a comprehensive revision to the Indonesian Criminal Procedure Code. Drafts of the proposed new legislation include provisions which move the country toward a more adversarial-style system, which would be consistent with some of the needed procedural tools described above.<sup>219</sup> In addition, the drafting of a new substantive and comprehensive criminal code by a committee of experts which had been in progress for years has been completed and submitted to the legislature. All four of these draft laws involving substantial reforms in the country's criminal law system will soon be the subject of attention by national

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/en/treaties/CAC/CAC-COSP-session2.html (conference materials).

<sup>216</sup> U4 Report, *supra* note 43, at 92-93.

<sup>217</sup> Mulyana Wirakusumah et al. v. Indonesia, Constitutional Court, Decision No. 012-016-019/PUU-IV/2006 (Dec. 18, 2006) (Indon.); Harry Bhaskara, *Corrupt Could Walk Free Without New Law*, JAKARTA POST, July 3, 2008, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20080703.H05>.

<sup>218</sup> *The Formulation Team Reaches an Agreement Towards an Anticorruption Court*, KOMPAS, Jan. 12, 2008 (unpublished U.S. Embassy translation on file with author); *Independent Taskforce Drafts New Anticorruption Court Law*, JAKARTA POST, Dec. 1, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20071201.H03>; *The House of Representatives Put Priority in Discussing Anticorruption Courts*, KORAN TEMPO, Dec. 10, 2007 (on file with author); *Regional Corruption Courts Proposed*, JAKARTA POST, Dec. 21, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20071221.A04>; *Powerful New Corruption Court Proposed*, JAKARTA POST, May 6, 2008, <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20080506.H04>.

<sup>219</sup> Strang, *supra* note 55.

legislators.<sup>220</sup> The National Judicial Commission recently submitted recommendations to President Yudhoyono on several procedural measures intended to improve the efficiency of corruption investigations and prosecutions.<sup>221</sup> A national law commission has been promoting legal reform since it was created in 2000.<sup>222</sup> The fact that such efforts are already well-underway and have broad popular and political support makes it far more likely that a legislative proposal to enact procedural reforms designed to enhance an anti-corruption efforts will be accepted and adopted by host country constituencies.<sup>223</sup>

### 5.1.2. *The Breadth of Reform*

In addressing the need for legislative action to enact criminal procedure reform in Indonesia and elsewhere, it is crucially important to resist the temptation to pursue a narrow fix, authorizing the use of new tools and investigative techniques for use in corruption cases exclusively by the KPK. The KPK has observed that one of the deficiencies with current Indonesian law regarding access to bank records is that different law enforcement agencies have been granted different rights, creating confusion and inefficiency.<sup>224</sup> What is needed is not another patchwork fix, but reform focusing on a small set of important criminal code reforms that have broad applicability.

First, new investigative tools and techniques should apply

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<sup>220</sup> *Four Draft Bills to be Submitted to the House of Representatives*, MEDIA INDON., Feb. 20, 2008 (unpublished U.S. Embassy translation on file with author). In addition, the legislature is already considering a draft law that would significantly amend and strengthen the anti-money laundering law. Law of the Republic of Indonesia Concerning the Prevention and Eradication of the Crime Money Laundering (unpublished draft law), available at [http://www.ppatk.go.id/pdf/draft\\_pp\\_tppu\\_english\\_version.pdf](http://www.ppatk.go.id/pdf/draft_pp_tppu_english_version.pdf) (English version).

<sup>221</sup> *National Judicial Commission: Simplify the Long-Winding Handling of Corruption*, KOMPAS, Nov. 7, 2007 (unpublished U.S. Embassy translation on file with author).

<sup>222</sup> NATIONAL L. COMM'N OF THE REPUBLIC OF INDON., LAW REFORM POLICIES (RECOMMENDATIONS) (2003) (outlining a strategy of national legal reform).

<sup>223</sup> Jacques DeLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECO. L. 179, 289 (1999) (noting that "U.S. legal models are more likely to be emulated and U.S. providers' legal advice is more likely to be followed when the substance of the U.S. prescriptions or American templates is relatively compatible with the recipient nation's preexisting system or its agenda for legal reform.").

<sup>224</sup> DAVIDSEN ET AL., *supra* note 6, at 39.



beyond obvious corruption crimes. Although the prompt for legislative change is the need to enable law enforcement to investigate public corruption effectively, corruption is very often a symptom or cause of other criminal activity, such as tax evasion, customs violations, bank fraud, prostitution, money laundering, and (in Indonesia particularly) illegal logging.<sup>225</sup> Even if not apparent at the outset of an investigation, these links between criminal activity often lead investigators in corruption cases to evidence of other crimes, and vice versa. Leads in corruption investigations and new witnesses and testimony can arise out of the investigation of these and other substantive crimes. On a strategic level, part of an effective anti-corruption strategy involves taking steps to eradicate criminal activity that spawns corruption. Tactically, such crimes should be investigated and prosecuted together. Cases involving, for example, illegal smuggling and corrupt payments to customs officials are more effectively prosecuted when criminal charges relating to the full panoply of conduct can be brought against defendants in a single case. In any event, the same procedures that can be used effectively to pierce and dismantle networks of corruption can be equally effective against other types of complex or organized crime that plague Indonesia.<sup>226</sup>

Second, new legislation should not exclusively enable the KPK. Although in Indonesia and in other developing countries, forming and equipping an independent agency may be an appropriate solution to the problem of corruption within the existing law enforcement institutions, it cannot replace them, either geographically or jurisdictionally. The KPK, currently based in Jakarta, has limited reach and limited investigative and prosecutorial resources.<sup>227</sup> Only the national police and the AGO

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<sup>225</sup> Peter Gelling, *Forest Loss in Sumatra Becomes a Global Issue*, N.Y. TIMES, Dec. 6, 2007, at A14. ("There are a number of ongoing investigations into corruption that has allowed illegal loggers from all over Indonesia to go free," said Thomson Siagian, a spokesman for the attorney general.); *Down in the Woods*, ECONOMIST, May 23, 2006, at 73.

<sup>226</sup> Ohr, *supra* note 116, at 47-50, 53-57.

<sup>227</sup> As noted above, see *supra* note 107 and accompanying text, the KPK has fewer than 100 investigators and prosecutors, all stationed in Jakarta, while the Attorney General's Office has at least 5600 prosecutors distributed across the sprawling archipelago. The AGO can prosecute all types of corruption and related crimes, while the KPK, by charter, is specifically restricted to cases involving significant state losses, or law enforcement or other high government officials, or cases which have otherwise achieved widespread notoriety. Law

are represented all across the country and can attack corruption and related crimes on multiple levels, and only general criminal code reform that enables those institutions to function effectively will have broad and lasting effect in sustaining corruption reform.

### 5.1.3. *Issues of Legal Culture and History*

Proposed procedural reforms for Indonesia or any country, of course, must take account of that country's legal culture and history, which affects expectations and attitudes toward law enforcement. Because new procedural provisions must fit within the larger context of the country's criminal procedure, care must be taken to ensure that new measures do not disturb or conflict with extant procedures, justice sector institutional structures, and the norms under which actors in the criminal justice system operate. Failure to integrate new measures effectively in a manner which is "user-friendly" to the relevant actors could condemn them to practical irrelevance, even if legislatively successful.

To a much greater extent than substantive criminal laws, criminal procedures are a product of a particular country's overall legal system and legal culture. Some of the measures we propose were developed in the context of the Anglo-American "adversarial" legal tradition, in which the roles of prosecutors, judges, and defense attorneys are viewed very differently than in "inquisitorial" civil law traditions like the Dutch system that provided the foundation for Indonesia's criminal procedure code.<sup>228</sup> Nevertheless, over the last 20 years, civil law countries in many parts of the world have initiated reforms which incorporate features drawn from the American "adversarial" system.<sup>229</sup> Indonesia is itself in the process of reforming its criminal

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Number 30 of 2002 on the Commission for the Eradication of Criminal Acts of Corruption, art. 11 (Indon.). The new anti-corruption law may address this issue in part. The current draft would expand the KPK, including the establishment of regional offices.

<sup>228</sup> See Langer, *supra* note 99, at 35-38 (discussing how American plea bargaining assumes an adversarial conception of the players in the criminal process which is not easily transmitted to civil countries which embrace the inquisitorial model); see also Cousino, *supra* note 207, at 331-60 (discussing changing roles of Chilean prosecutors, defense attorneys, and judges in the context of legal reform from an inquisitorial system to a more adversarial system).

<sup>229</sup> Langer, *supra* note 99, at 1-3, 26-28. As Langer observes, this process of exporting legal concepts has led to a debate over the extent to which various legal systems have become "Americanized." *Id.* at 1-3.

procedure code, and is considering adopting some procedures that parallel those found in more “adversarial” systems.<sup>230</sup> The provisions we propose require adjustments, but not a wholesale transformation of the legal system, and so can be tailored to assist law enforcement in operating within both common law and civil law traditions. Moreover, although our recommendations are informed by the U.S. experience, our legislative agenda is based not on U.S. law, but on the UNCAC, which offers a more universal template.<sup>231</sup>

Several considerations apply to Indonesia more specifically. Indonesia’s history of authoritarianism and corruption among police and prosecutors has reinforced the view that they should have a limited ability to act unilaterally. This factor must be considered when framing new procedures based on the U.S. experience, where prosecutors have much greater freedom of action. A second, more recent feature of Indonesian legal culture, which must be acknowledged in the process for reform, is the post-Suharto emphasis on “transparency.” Criminal investigations generally are most effective when conducted out of the public eye, and public corruption investigations in particular require secrecy to succeed. But new criminal procedures will be acceptable in Indonesia only if there is sufficient oversight and accountability on their use. In addition, since there is no Fourth Amendment or other similar constitutional checks on law enforcement action, and no exclusionary rule to motivate law enforcement to give due attention to such rights, rules which protect the rights of suspects and defendants must be built into legislation authorizing new procedures.

#### 5.2. *A Concise Legislative Package of Law Enforcement-Enabling Reforms*

A handful of legislative reforms which enable Indonesian law enforcement agencies to deploy strategies and techniques which have proven effective elsewhere, and which are endorsed by the UNCAC, could have a tremendous impact on the effectiveness of law enforcement over the medium term. While the

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<sup>230</sup> Strang, *supra* note 55.

<sup>231</sup> Commentators have observed that legal concepts based on international norms are more readily accepted than “transplants” based on country-specific models. DeLisle, *supra* note 223, at 269; Catherine Walsh, *The “law” in Law and Development*, LAW IN TRANSITION, Autumn 2000, at 7, 12.

recommendations set forth below are tailored to Indonesia, because the legal provisions suggested address universal obstacles to effective anti-corruption enforcement, they should be applicable in many countries in the developing world.

#### 5.2.1. *Whistleblower Protection*

A separate whistleblower protection law is needed to encourage reporting to law enforcement by those who observe crimes in government offices—procurement kickbacks, embezzlements, illegal “fees” on the public, excessive “gifts” to official decision-makers, and other practices which are staples of entrenched corruption—and to protect those employees after the fact of the reporting becomes known. A typical law has several components: a definition of whistle blowing, including what sort of conduct is reported and to whom the reports are made, a definition for the types of workplace retaliation which are prohibited once a person has qualified as a whistle blower, and a process for sanctioning the retaliator and/or restoring the workplace benefits of the aggrieved whistle blower. An effective law, needed in Indonesia and many other developing countries, should focus on encouraging witnesses to expose corrupt criminal acts undertaken by public officials, and so it must provide for the initial confidentiality of the whistle blower’s identity, and require that she cooperate with law enforcement in subsequent investigation of the reported conduct.

The typical remedy provided for in most U.S. whistleblower laws—the ability to sue—is not likely to be viewed as a serious means of protection in Indonesia or in many other developing countries. With a limited bar of qualified civil attorneys, widespread corruption in the judiciary, and the inefficiencies of civil litigation, the courtroom is not viewed as the forum in which a civil servant can take on her superiors and other powerful figures. Instead, the police and prosecutors (including the KPK in Indonesia) should be authorized to investigate any potentially retaliatory action taken against a whistleblower, and to recommend to the Minister and/or President that a range of sanctions be imposed on the public officials responsible for the retaliation. In more severe cases which amount to witness intimidation, the police and prosecutors should be empowered to investigate and prosecute, seeking restitution for the victim in addition to a prison sentence for the offender.

5.2.2. *Undercover Authorization*

Criminal procedure codes must be revised to ensure that they contain no ambiguity as to both the legality of undercover operations and the admissibility at trial of evidence acquired in that manner. In Indonesia, this means that a new law, or an amendment to the criminal procedure code, should authorize the National Police, the KPK, and other law enforcement agencies with investigatory power such as the Special Crimes division of the AGO, to undertake undercover operations. These operations should be defined to include the use of informants, cooperating citizens or undercover officers to record contacts with criminal suspects. Such contacts should be defined to include telephone or in-person meetings, controlled deliveries, and other monitored transactions.<sup>232</sup>

In order to ensure that such special techniques are not abused, the relevant law enforcement agency should be required to establish predication before initiating an undercover operation against a target. That is, it should be required to document a legitimate pre-existing basis to suspect criminal activity by the target arising from other investigative leads, such as reliable reports by citizens, a whistleblower's report, observations by law enforcement, previous proven similar criminal activity by the target, or analysis of relevant records. Each undercover operation should be required to be authorized in writing by a senior law enforcement official, such as the chief of a provincial police unit or prosecutor's office, or by a designated unit at the investigatory authority's headquarters, which in Indonesia means the National Police headquarters or the AGO in Jakarta. Such records should be required to be maintained and provided to the defense attorney and trial judge in the event that charges are subsequently brought against the target. They should also be required to be available for inspection by appropriate government inspectors or auditors after the conclusion of the investigation.

In order to prevent entrapment of an innocent person, the statute should require that law enforcement officers participating in undercover operations, or informants or cooperators participating at their direction, cannot repeatedly target the same

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<sup>232</sup> Such measures are consistent with the UNCAC's requirement that parties take measures to allow such special investigative techniques consistent with the basic principles of its domestic law. UNCAC, *supra* note 28, art. 50.

person in successive operations, and cannot attempt to overcome the will of the target by excessive inducement. All recorded contacts with the target should be required to be preserved and made available to the defense attorney and trial judge in order to allow the defendant to evaluate an entrapment defense, and to ensure transparency and accountability in the use of undercover techniques.

Undercover evidence is only useful if admissible as evidence at trial. The undercover law should expressly permit the use of undercover evidence as a legal form of evidence to support a criminal conviction. Such evidence could be admitted in the form of audiotapes or videotapes of undercover contacts with the defendant, or of surveillance of the defendant's activities, or law enforcement testimony regarding the same. In order to ensure compliance with the above-described rules, however, the trial judge should be required to rule on the admissibility of the evidence after reviewing the documentation concerning predication and authorization of the undercover operation, and the substance of the evidence itself. Evidence that was fairly collected in accordance with the rules would be admitted; evidence that was not would be excluded.

### 5.2.3. *Authorizing Access to Financial Records*

Law enforcement agencies should be authorized to request account and other documentation from banks where the request is related to a legitimate, ongoing criminal investigation. Such a provision should expressly provide that bank secrecy laws must give way to legitimate requests from law enforcement. In Indonesia, this provision would be a broader version of the provision that currently appears in its money laundering law.<sup>233</sup> Moreover, the scope of persons whose financial documents may be requested must be broadened to include not only targets and defendants but any associate, relative, or business connected to such person or to the criminal activity under investigation or indictment.

Consistent with Indonesia's 1999 anti-corruption law, requests for financial documentation to a bank or other financial institution should be authorized through a written request from an

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<sup>233</sup> Law Number 15 of 2002 Concerning the Crime of Money Laundering, as amended by Law Number 25 of 2003, art. 32(2) (Indon.).

authorized supervising investigator, prosecutor or trial judge.<sup>234</sup> The authorization letter should certify that the request is part of a legitimate ongoing investigation or prosecution, and copies of the letters should be maintained and available for inspection by auditors to ensure that the authority is not used for indiscriminate snooping. One possible oversight mechanism would be an annual report to the legislature on how many financial requests were made by investigators from each relevant agency.

To be most effective, production of financial records, so long as the above safe-guards are observed, should occur without an intermediary. In Indonesia this means that rather than be routed through the Bank of Indonesia, such requests for records should be sent directly to the financial institution at issue, which should be required to respond and provide information within a reasonable period. A failure to comply with a reasonable request for records under the statute should be referred to a central authority—in Indonesia, the Bank of Indonesia—for the imposition of administrative and monetary sanctions on the institution. Repeated failures should lead to escalating sanctions including, in Indonesia, potential loss of the institution's status as an authorized financial institution.

#### 5.2.4. *Creating Immunity and Cooperation Mechanisms*

Of the measures proposed, immunity agreements and a mechanism to induce cooperation through sentence mitigation are likely to be the most difficult to reconcile to the existing legal systems in civil law countries such as Indonesia. In the United States, the use of such mechanisms is often intertwined with negotiations over guilty pleas as part of the plea bargaining system. In civil law countries, including Indonesia, neither guilty pleas nor plea bargaining exists.<sup>235</sup> Still, as noted above, some civil law countries have adopted measures that, although different in practice from their U.S. counterparts, appear intended to generally achieve the same objectives.<sup>236</sup> Thus, the law enforcement-enhancing benefits of immunity and sentence reduction

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<sup>234</sup> Law Number 31 of 1999 on Eradication of Corruption Offences, art. 29(1) (Indon.).

<sup>235</sup> The draft revisions to the Criminal Procedure Code would introduce the concept of the guilty plea and limited plea bargaining for certain less serious crimes. Strang, *supra* note 55.

<sup>236</sup> See *supra* notes 140–44 and accompanying text.

mechanisms, if the provisions are properly tailored to address particulars of the existing legal system, can be transplanted.

Specifically in Indonesia, a system for granting immunity for fewer witnesses in a case has been proposed as part of the draft revisions of its criminal procedure code. Under this proposal, the prosecution could be dismissed against a lesser defendant in a case who agrees to become a prosecution witness and testify against other more culpable defendants.<sup>237</sup> Such a provision would go far towards implementing a cooperating witness mechanism in the Indonesian system.

In Indonesia as well, an alternative or additional provision could be built on the basis of the authority that has already been discussed within the AGO—the Attorney General’s authority to terminate a case in the “interests of justice.”<sup>238</sup> Such authority presumes the pendency of a prosecution, and only provides an avenue for relief from conviction, not from prosecution. Like the proposed revision to the criminal procedure code discussed above, it would thus differ from a U.S.-style grant of immunity, which is typically issued prior to indictment.<sup>239</sup> While this would make scenarios in which an immunized person goes undercover less likely, it would still provide a powerful incentive for corrupt parties to turn on their co-conspirators and assist investigators in locating critical evidence.

Enabling legislation based on the Attorney General’s authority should define “interests of justice” to include a defendant’s conduct in providing substantial assistance to the government in the investigation and prosecution of others, together with a confession of his own criminal conduct and the location and repatriation of any ill-gotten gains or other restitution for harm done, such that the public’s interest in the defendant’s cooperation would outweigh its interest in his prosecution. These general requirements should apply to provisions enabling immunity grants in others countries as well. Importantly, the cooperation the defendant provides should not be allowed to constitute merely the

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<sup>237</sup> Strang, *supra* note 55.

<sup>238</sup> Law Number 16 of 2004 on the Prosecution Service of the Republic of Indonesia, art. 35(c).

<sup>239</sup> In any event, public suspicions about possible corrupt decision making by prosecutors and the lack of transparency in pre-indictment immunity negotiations would likely make a U.S.-style immunity system untenable in Indonesia at this juncture.



repayment of embezzled assets or other restitution, since that would allow wealthy defendants to buy their way out of a conviction. In Indonesia, legislation could define “interests of justice” to mean specific cooperative measures that law enforcement determines is of assistance in developing prosecutions against other criminally culpable persons, or a set of factors which the Attorney General must consider in exercising his authority.

The authority to grant immunity (or, more accurately, the authority to terminate a case), under either proposed provision should be discretionary with the prosecution, and not an entitlement or right of the defendant. Each case will be different. Some defendants may be reluctant to fully cooperate, and law enforcement must control the ultimate benefit if it is to be an effective inducement for defendants to come forward with meaningful information and evidence.

Provisions authorizing grants of immunity should also address the demand for transparency by the Indonesian public and likely by other developing country populations. If criminal charges are dismissed against a defendant who agrees to testify at trial against his co-defendants, the public’s need for transparency in the dismissal decision would likely be satisfied by the witness’s testimony itself and the announcement of the prosecutor that the dismissal of charges against him was in accordance with the provision allowing a lesser defendant to testify against more significant defendants. Under either that provision or an exercise of the prosecuting authority’s immunity authority, where dismissal is before trial, the prosecutor should be required to report to the court in each case, presumably at the conclusion of proceedings, in the form of a document that publicly discloses the scope, nature, and reliability of the cooperation provided by the defendant, and any other assistance, such as the return of secreted assets, relevant to the dismissal determination. Such a requirement would respond to the public need for transparency in such decisions, and would maintain pressure on prosecutors to ensure that the mechanism is not misused. The practice would be much more acceptable to the public, the media, civil society, and other observers if it were genuinely used to turn smaller players against more prominent ones than if it were perceived as an escape valve for powerful defendants.

Since there is no formal charge bargaining in the Indonesian system and most civil law systems, a separate cooperation mechanism would be limited to an avenue for sentence mitigation

under certain circumstances. In Indonesia, this mechanism would be a logical extension of the concept introduced in the new witness protection law, in which judges are allowed to consider a defendant's testimony in mitigation of his sentence.<sup>240</sup> The draft revisions to the criminal procedure code contain such a proposed procedure, under which a defendant may have his sentence reduced if he pleads guilty (if allowed under the proposed revised procedures), and helps disclose the role of more culpable suspects.<sup>241</sup> The new provision, if adopted, should expand the notion of cooperation to include pre-trial cooperation by a defendant. In order to render the provision a useful investigative weapon for prosecutors, the new law should specifically vest prosecutors with the authority to ask for a reduced sentence (perhaps to as low as half of the otherwise authorized sentence) if the defendant provides substantial cooperation. Again, "substantial cooperation" should be defined in the law, and the prosecutor's sentence reduction request should be done in the form of a written request, available to the public, which documents the defendant's satisfaction of that standard.

In the case of either dismissal of charges or a reduction in sentence for a cooperating defendant, there should be requirements for approval at the highest levels. In Indonesia, a dismissal under the Attorney General's authority pursuant to the 2004 prosecution law would likely have to be approved by the Attorney General himself or a senior assistant. Dismissal under the proposed new criminal procedure provision, or a request for a mitigation of sentence, should be required to be approved at least by the chief prosecutor in the province. Other measures intended to reassure the public as to the integrity of the process, and to provide maximum oversight and transparency, may also be required.

#### 5.2.5. *Authorizing the Integrated Use of Other Criminal Statutes*

As noted above, Indonesia has enacted a comprehensive set of provisions criminalizing money laundering activities, an essential support to corruption crime investigations. Amendments to the law intended to strengthen the country's anti-money laundering

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<sup>240</sup> Law Number 13 of 2006 on Protection of Witness and Victim, art. 10(2) (Indon.).

<sup>241</sup> Strang, *supra* note 55.

regime have already been proposed by the government. Indonesia also has some obstruction of justice laws, although a law prohibiting witness bribery or intimidation is needed.<sup>242</sup>

Legislation is also needed which would allow prosecutors handling public corruption matters to charge these and any other criminal acts discovered in the course of a public corruption investigation. Thus KPK prosecutors should be authorized to charge public corruption targets or their associates with other crimes, and the Anti-Corruption Court should be authorized to hear cases which include such charges. Similarly, prosecutors with the AGO should be authorized to bring charges designated as Special Crimes and those designated as General Crimes together in the same case, using the investigative authority of the Special Crimes Division as necessary in such matters.

## 6. CONCLUSION

Many have addressed the comprehensive measures of reform appropriate to effectively meet the problem of entrenched corruption in Indonesia and elsewhere. We address but one component—enforcement, and within that focus, just one slice—criminal procedure reforms necessary to enable law enforcement to effectively investigate and prosecute corruption crimes. We are under no illusion that the criminal reforms advocated here are the panacea for the deeply entrenched corruption problem in Indonesia. Even if enacted, it would take time for investigators and prosecutors to become familiar with these new tools and to determine how best to incorporate them into their investigative and prosecutive strategies. Moreover, legislative reform by itself will have little impact without continued reform and capacity-

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<sup>242</sup> Indonesian law enforcement agencies also should be given express authorization to take short-term measures to protect witnesses. Such a provision would be a logical extension of the new witness protection law, which creates an independent agency that administers a formal witness protection program. Law Number 13 of 2006 on Protection of Witness and Victim, arts. 1–22 (Indon.). While the existence of such a program is a positive step, it contemplates the admission of witnesses on the basis of formal applications, a cumbersome and expensive process applicable only in cases where long term protection is needed. *Id.* arts. 28–36. What is needed more commonly in public corruption cases is temporary protection—compensating a witness for staying away from home for a few weeks, moving a witness and her family to a secure location for a brief period, obtaining alternative identity documents for a witness, or taking extra protective measures during or just before trial. In civil law countries such as Indonesia, such activities must be explicitly authorized by law.

building within the law enforcement agencies at issue. But the limited set of procedural reforms we suggest is notable, we believe, specifically because it is compact and consists of measures of proven effectiveness which are endorsed by the UNCAC, to which Indonesia and many other countries are party. When understood and implemented together, as part of a comprehensive reform of the structure for investigating and prosecuting public corruption, these reforms have the powder keg potential to substantially boost the law enforcement component of corruption eradication in Indonesia and other developing countries.

Economists, diplomats, and other experts frequently wonder why investigators and prosecutors are not more effective in catching and convicting corrupt officials in many developing nations. While there are certainly many answers to this question, one obvious one is that investigators and prosecutors often do not have the authority to engage in the sort of tactics needed to tackle the unique challenges posed by complex public corruption cases. No amount of political support, increased resources, or foreign advice can make up for inadequate provisions in the domestic criminal procedure code authorizing law enforcement activities. The UNCAC articulates the aspiration of effective anti-corruption law enforcement in developing countries. We offer a legislative agenda to make it a reality.