

Extending Prosecutors' Reach Through Transnational Civil Society Collaboration



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Overview

- Prosecutors face tremendous obstacles when pursuing powerful figures and multinational corporations for complex transboundary crimes, including scarce resources, corporate form/evasion, lack of expertise, and political opposition.
- One under-utilized solution may be for prosecutors to coordinate efforts with transnational civil society groups.
- There are concrete, low-cost ways in which civil society groups can extend prosecutors' reach and multiply their forces.

Why work with Civil Society on prosecution or investigation of multinational enterprises and networks?



- They may be allied with host country prosecutors even when their governments are not.
- They may not be faced with the same political obstacles that prosecutors face.
- They may have sources of funding or expertise that prosecutors lack.
- They may be grateful to be able to coordinate with government allies.

Why is it difficult for Prosecutors to work with Civil Society?



Options for Civil Society Collaboration (I): Evidentiary Assistance

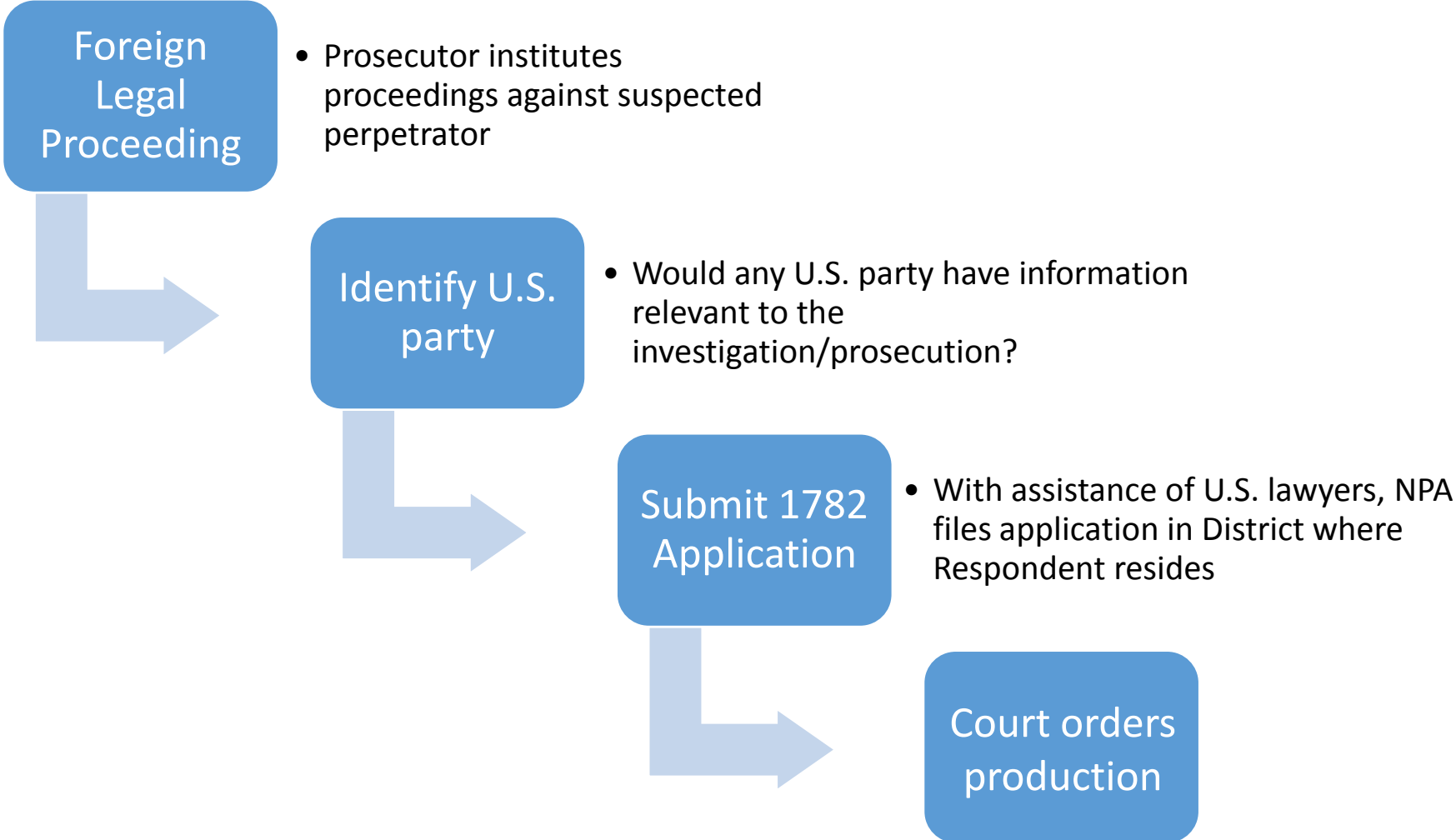
- U.S. legal organization such as EarthRights International and U.K. public interest lawyers can help foreign prosecutors *pro bono* by filing actions in their home countries to compel disclosure of relevant evidence.
- These actions do NOT depend on the assistance of the U.S. or U.K. governments.

28 U.S.C. § 1782

Assistance to foreign and international tribunals and to litigants before such tribunals.

(2) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a

How does Section 1782 work?



What must you show to win a Section 1782 application?

- You are an *interested party*.
- Non-U.S. legal proceedings are underway or are within reasonable contemplation.
- The information you want is in the hands of a U.S. party (and, ideally, physically located within the United States).
- The information you want is relevant to the foreign proceeding.
- Your application is stronger if a) the target is *not* the defendant in your prosecution, b) you can show that the court would probably accept the evidence, and c) you're not trying to avoid discovery limitations in your own country.

Why bother with Section 1782?

- You can get discovery without having to go through cumbersome and political mutual legal assistance processes (especially if the applicant is someone other than the NPA).
- You benefit from the relatively broad scope of U.S. discovery.
- You can reach anyone in the U.S. who might have relevant information.
- Section 1782 applications are routinely granted, especially when a foreign government is asking for assistance.
- The request may tip off the target, so it may not be a useful tool where you don't want the defendant to know of the investigation.

How has Section 1782 been used?

- Companies have used it against governments – Chevron in Ecuador
- We're using it on behalf of communities and individuals to support litigation and criminal proceedings in Africa and South America
 - Gas flaring in Nigeria
 - Land-grabbing in Tanzania
 - Police violence against mining protesters in Peru
- Prosecutors have used it for investigations that are likely to go to trial



Credit: *Nature* News Blog 2009



Illustration: Spooner



Credit: FT.com beyondbrics blog 2011

Options for Civil Society Collaboration (II): Asset Recovery

- Legal and non-legal organizations in France and the U.S. have spearheaded efforts to recover assets looted by former African heads of state and family members of heads of state



Credit: Alexsmolik (*The Guardian* 2012)



Credit: Reuters 2011



Credit: AFP 2009

Civil Party Actions in France

- French NGOs first estimated the amount of assets stripped from African countries by their ruling families in 2007
- Asso-SHERPA, TI France, and other French NGOs filed criminal complaints under France's AML and "recel" laws
- Citizens of Gabon and EG filed parti civil petitions to participate in the proceedings
- Prosecutors dismissed requests, and lower courts refused civil party petitions
- 2010 – French Cour de Cassation declared petitions admissible
- 2011 – Amazing asset seizures begin
- 2012 – International arrest warrant for Teodorín Obiang

Proceedings in the United States

- In the U.S., forfeiture proceedings are in the sole discretion of the prosecutors, so civil society groups could not play a similar role.
- However, civil society groups did extensive fact-finding and submitted it to the Dept. of Justice.
- In 2011, the DOJ moved to seize Obiang's Malibu mansion, sports cars, \$38.5M Gulfstream jet, and \$1.8M in Michael Jackson memorabilia.
- October 2014: DOJ announces civil settlement with Obiang in which requiring forfeiture of over \$30M in assets, including the Malibu mansion and Ferrari (but not the jet or the MJ memorabilia).

Why work with civil society on asset recovery?

- Legal expertise on tracking stolen assets and using legal systems to recover them
- NGOs may be able to act as civil parties by virtue of their citizenship
- NGOs do not stand to gain from asset recovery and therefore may be seen as more credible civil parties or sources of evidence

Options for Civil Society Collaboration (III): Investigating Transnational Networks

- Certain groups specialize in fact-finding on transnational criminal behavior, particularly on human rights, corruption, and the environment.
 - Civil society groups investigated OPL 245 bribery scandal in Nigeria, prompting Italian corruption investigation including frozen assets
 - OSI, TRIAL Switzerland trace conflict gold from DRC to Swiss refiners and trigger criminal investigation; Society for Threatened Peoples traces illegally mined gold from Peru to Swiss, Italian, U.S., and UAE refiners
- Important to coordinate to ensure that NGO investigation “checks all the boxes.” Most civil society advocates aren’t lawyers.

Options for Civil Society Collaboration (IV): Transnational Litigation

Litigation in another country can be an important force multiplier for local prosecutors.

- Foreign litigation may turn up useful evidence
- Foreign litigation could assist with jurisdictional problems
- Foreign litigation can keep a case alive while it is blocked in the host country
- Foreign litigation may provide a realistic option for remedy for the victims where domestic prosecution does not.

Thank You!

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