



JOINT PUBLIC STATEMENT

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USA: MISUSE OF THE JUSTICE SYSTEM AGAINST HUMAN RIGHTS LAWYER WHO SUED CHEVRON MUST END

The US authorities must put an end to the way in which the justice system is being misused to target and harass Steven Donziger, one of the main lawyers representing victims of oil dumping in an emblematic case against Chevron Corporation, a group of human rights and environmental organizations said in advance of Donziger's trial scheduled for 10 May.

Steven Donziger has been under pre-trial house arrest since August 2019 after he refused to comply with a court order to hand over his electronic devices, arguing that such a disclosure could compromise the confidentiality of the communications with his clients and put them at risk. The detention follows a long-running campaign of intimidation and harassment against Donziger and other human rights defenders by the oil giant Chevron.

The organizations have expressed concern over the conduct of the trial, including an apparent lack of impartiality of the court, a disproportionate interference with Steven Donziger's right to liberty imposed as a means of circumventing attorney/client privilege, and a deprivation of liberty that has continued beyond the maximum period foreseen by the charges laid against him.

MISUSE OF THE JUSTICE SYSTEM TO TARGET AND HARASS A HUMAN RIGHTS LAWYER

Steven Donziger was one of the main lawyers representing victims of oil dumping in an emblematic case against Chevron Corporation in Ecuador, following accusations that the corporation was responsible for what is widely considered one of the worst oil-related environmental disasters in contemporary history. In February 2011, following years of litigation, a court in Lago Agrio, Ecuador, found Chevron liable for causing serious environmental and health damage to the Amazon rainforest and the communities who lived in the region between 1964 and 1992. Among other findings, the court determined that Chevron had deliberately discharged billions of gallons of oil waste over a period of decades onto Indigenous ancestral lands as a cost-saving measure.¹ Chevron was ordered to pay \$19 billion to remediate the damages, later reduced to \$9.4 billion on appeal to Ecuador's Supreme Court.² The judgment against Chevron has since been confirmed on the merits and for enforcement purposes by three appellate courts in Ecuador and three in Canada, including the highest courts of both countries.

Just days before the impending decision of the Lago Agrio court in February 2011, Chevron filed a lawsuit in the United States District Court for the Southern District of New York (SDNY) under the Racketeering and Corrupt Organizations Act ("RICO" - 18 U.S.C. §§ 1961–68) against all plaintiffs named in the Ecuador lawsuit, all their lawyers (including Steven Donziger), the main NGO representing the communities, and a number of experts and other supporters.³ A wider array of NGOs were also named in the complaint as alleged "co-conspirators". In the complaint, Chevron accused the defendants of using fraudulent and corrupt means during the trial in Ecuador.

¹ Provincial Court of Sucumbios - Judgment of Case No. 2003-0002, 14 Feb 2011 [English translation of decision issued by the Provincial Court of Sucumbios, Ecuador] available <https://chevroninecuador.org/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf>

² Sentencia de la Corte Nacional de Justicia de Ecuador, Juicio No. 174-2012, 12 November 2013 available at: <https://chevroninecuador.org/assets/docs/2013-11-12-final-sentence-from-cnj-de-ecuador-spanish.pdf>

³ The Racketeer Influenced and Corrupt Organizations (RICO) Act is a United States federal law that provides for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization.

Numerous activists, civil society organizations and legal experts have since characterized Chevron's lawsuit as a particularly aggressive example of a Strategic Lawsuit Against Public Participation (SLAPP).⁴ In 2017, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed her concern over a "worrying new approach" in the USA of SLAPP litigants using the RICO Act to "intimidate advocacy groups and activists".⁵

The organizations issuing this statement express concern that the judicial proceedings against Steven Donziger follow a pattern documented by UN experts and civil society organizations in which corporations misuse the justice system to target and harass human rights defenders, as in this case, where it appears to be intended to obstruct Steven Donziger's work defending the rights of victims of human rights abuses.

APPARENT LACK OF IMPARTIALITY OF THE COURT

From the beginning of the RICO lawsuit, there have been concerns about perceived bias of the presiding judge who made his personal opinion of Steven Donziger's character public before the RICO lawsuit had been filed, stating that the human rights lawyer was "trying to become the next big thing in fixing the balance of payments deficit. I got it from the beginning... The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it... [T]he name of the game is... to persuade Chevron to come up with some money".⁶ In addition to his comments about Steven Donziger, the judge also made inappropriate remarks about the villagers in Ecuador who sued Chevron, referring to them as the "so-called" plaintiffs and calling Donziger's work in Ecuador a "not bona-fide litigation".⁷

By contrast, the judge referred to Chevron as a "company of considerable importance to our economy that employs thousands all over the world, that supplies a group of commodities, gasoline, heating oil, other fuels and lubricants on which every one of us depends every single day", and postulating that "I don't think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and finds that there isn't any gas there because these folks [the Ecuadorians] have attached it in Singapore or wherever else [as part of enforcing their judgment]".⁸ Concerns over the judge's perceived bias did not stop him from assigning the RICO case in 2011 to his own court, instead of letting it be randomly assigned to a judge as is customary in the US federal judiciary.⁹

Initially, Chevron brought claims for roughly \$60 billion damages against Steven Donziger and the other defendants that granted them the right under the US Constitution to a jury trial.¹⁰ Two weeks before the trial was scheduled to begin, Chevron dropped its claims for damages, thus removing the legal basis for an entitlement to a jury and the decision was left to the sole responsibility of the judge.¹¹

Further, during the trial, the judge denied the defendants the opportunity to present scientific evidence of Chevron's pollution and corrupt activities in Ecuador, and refused to examine or consider the evidence used by Ecuador's courts to reach their

⁴ Business & Human Rights Resource Centre, *USA: Activists argue lawsuits and criminal proceedings against Steven Donziger are a form of SLAPP*, 11 Aug 2020.

⁵ Info Note of the UN Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association, Annalisa Ciampi, 'SLAPPs and FoAA rights': https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_ICS_USA_33403_E.pdf

⁶ Donziger v. Chevron, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, page 8 available at: https://www.eenews.net/assets/2017/04/07/document_gw_01.pdf and Huffington Post, *Will the Supreme Court Strike Down Chevron's Facially Corrupt RICO Case?*, available at: <https://www.chevroninecuador.com/2017/05/will-supreme-court-strike-down-chevrons.html>

⁷ Patrick Radden Keefe, *Reversal Of Fortune: The Lago Agrio Litigation*, *Stanford Journal Of Complex Litigation*, Vol. 1:2 (2013) 199. Page 211 available at: <https://law.stanford.edu/wp-content/uploads/2018/05/keefe.pdf>

⁸ *Chevron v. Donziger*, S.D.N.Y., Case No. 1284CHEC, Transcripts of hearing on February 8, 2011, pages 49-50, via Southern District Reporters, P.C.

⁹ Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rules for the Division of Business Among District Judges, Rule 50.2(b), https://www.nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf. See also Legal Team for the Ecuadorian Communities, *Chevron's Mockery of Justice*, April 2014, available at: <https://chevroninecuador.org/assets/docs/2014-chevrons-mockery-of-justice.pdf>

¹⁰ *The Intercept*, *How the Environmental Lawyer who won a Massive Judgment Against Chevron Lost Everything*, January 29 2020, available at: <https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger/>

¹¹ Gizmodo, *Chevron Is Trying to Crush a Prominent Climate Lawyer—and Maybe the World*, August 11, 2020, available at: <https://earth.gizmodo.com/chevron-is-trying-to-crush-a-prominent-climate-lawyer-a-1844685508> and Gowen Group Law Office, *Judge In Chevron's Ecuador Case Suppresses Evidence of Oil Giant's Environmental Abuses*, May 25, 2013 available at: <https://chevroninecuador.org/news-and-multimedia/2013/1125-judge-in-chevrons-ecuador-case-suppresses-evidence-of-oil-giants-environmental-abuses>

conclusions against Chevron. However, the judge allowed Chevron to present witnesses whose identities were not disclosed and could not be effectively investigated or cross-examined due to alleged security threats.¹²

Steven Donziger was found liable in 2014 for having committed acts that fell within the RICO definition of “racketeering activity”, including “extortive” efforts to pressure Chevron through “celebrity advocacy”, government lobbying, a disinvestment campaign, and an NGO-driven media strategy. The judge ruled in favour of Chevron, enjoined enforcement of the Ecuadorian judgement in the United States and prohibited Steven Donziger from attempting to profit from it. In order to comply with the ruling, Steven Donziger was ordered to transfer to Chevron all property that he had or might later obtain that could be traced to the Ecuadorian judgement.¹³

The right to an impartial tribunal, a corollary of the right to a fair trial, requires that judges have no interest or stake in the particular case, do not have pre-formed opinions about it, and do not act in ways that promote the interests of one of the parties.¹⁴ In light of these standards, the judge’s statements and actions raise serious questions about his impartiality to rule on the RICO case, which itself may amount to a form of reprisal against Donziger’s human rights work.

ATTEMPTS TO CIRCUMVENT ATTORNEY/CLIENT PRIVILEGE

In response to the court ruling in the RICO lawsuit, and as Donziger and others were making progress enforcing the Ecuador judgment in other jurisdictions, Chevron sought post-judgment discovery in New York on the basis that it wanted to identify all assets of Steven Donziger and his spouse to determine whether he had complied with an \$800,000 costs order that was imposed after the RICO trial.¹⁵

Donziger was thereafter required by the judge to turn over all his electronic devices and accounts (including email, chat, social media accounts, cloud storage) to a forensic expert for ultimate review by Chevron. The judge ordered him to provide “both neutral and Chevron’s forensics experts via email a representation listing all devices he has used to access or store information or for communications since March 2012... and a list of all accounts - email, social media, messages platforms, clouds - that he has used since 2012”.¹⁶ Steven Donziger was thus required to surrender his computer and cell phone, together with his accounts and passwords.

The protocol created by the judge for the collection and examination of Steven Donziger’s electronic devices did not provide any safeguards to protect confidential information about the Indigenous and *campesino* (peasant) people he represents, including information related to core litigation strategies that the affected communities were using to enforce their judgment against Chevron in jurisdictions around the world. Instead, the protocol provided a backdoor for Chevron to virtually access all of the confidential information and attorney/client communications related to the Ecuador case, allowing the corporation to have access to information that they could not otherwise obtain legally.

In October 2018, Steven Donziger submitted a letter to the court explaining that he would be unable to comply with the judge’s orders since it would give Chevron “near wholesale access to confidential, privileged, and protected documents” and requested the court to go into contempt in order to appeal the order.¹⁷ Donziger explained that his ethical obligations towards his clients prevented him from turning over the devices prior to appellate review given that the order appeared to violate multiple legal protections under US and international law.

On 23 May 2019, the judge held Donziger in civil contempt for his refusal to comply with the order and his failure to transfer to Chevron the required fees and costs. Steven Donziger exercised his right to appeal this decision rather than surrender his devices and provide access to his accounts, which led the judge to draft extraordinary criminal contempt charges against him under Rule 42 of the Federal Rules of Criminal Procedure. The judge then referred the case to the US Attorney’s Office for the Southern District of New York, which declined to pursue prosecution. In response, the judge took the unusual decision to appoint a private law firm as special prosecutors in the criminal contempt case.¹⁸ The judge also personally

¹² Legal Team for the Ecuadorian Communities, *Chevron’s Mockery of Justice*, April 2014, available at: <https://chevroninecuador.org/assets/docs/2014-chevrons-mockery-of-justice.pdf>

¹³ *Chevron Corporation v. Donziger*, 833 F.3d 74 (2016). Donziger appealed the Court’s decision, but in 2016 the Court of Appeals confirmed the initial judgement

¹⁴ Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2

¹⁵ 11-cv-00691-LAK, Judge Kaplan Memorandum Opinion, available at: <https://theamazonpost.com/wp-content/uploads/2019/05/2019-05-23-Contempt-Opinion.pdf> page 11

¹⁶ 11-cv-00691-LAK, Judge Kaplan Memorandum Opinion, available at: <https://theamazonpost.com/wp-content/uploads/2019/05/2019-05-23-Contempt-Opinion.pdf> page 11

¹⁷ 11-cv-00691-LAK. Dkt. 2184 at 3-4, 11

¹⁸ *USA v. Donziger* 19 Cr. 561 (LAP) page 12

selected the judge to preside over the criminal contempt case, bypassing the rules that establish that the assignment of judges should be done by lot.¹⁹

On 6 August 2019, the judge presiding over the criminal contempt case ordered Steven Donziger to surrender his passport and submit to both GPS tracking and home confinement.²⁰ The judge justified the pre-trial house arrest on grounds of flight risk.²¹

The decision to hold Steven Donziger in pre-trial detention based on a criminal charge of contempt is of further concern to our organizations given that the deprivation of liberty stems simply from Steven Donziger's decision to uphold his professional duty to protect the confidentiality of the communications with his clients, and has been held in detention despite seeking further judicial review. The decision to deprive Steven Donziger of his liberty appears rather to be a punitive measure intended to force him to reveal the privileged communications between an attorney and his clients, and a punishment simply for upholding his professional duty to protect the confidentiality of such communications. It is even more troubling that the judge decided to charge Steven Donziger with criminal contempt, appoint a private prosecutor, and select a judge of his choosing to preside over the criminal contempt case.

PRE-TRIAL DETENTION EXTENDING BEYOND THE MAXIMUM PERMITTED PENALTY

Steven Donziger has now been under pre-trial detention for over 20 months, three times as much as the maximum penalty for a person held in criminal contempt.²² Yet, the judge presiding over the criminal contempt case has consistently claimed the precautionary measure is necessary to prevent him from leaving the country.

In his appeal of June 2020 against the precautionary measure, Steven Donziger argued that the pre-trial house arrest was excessive and disproportionate given that he had demonstrated he had no reason to abscond.²³ In this context, he submitted that he had complied with hundreds of court orders throughout a process under the RICO Act, including an order to submit to an unprecedented total of 19 days of pre-trial depositions under oath; that his travel to Ecuador was not nefarious, but a key part of his human rights work and representation of his Ecuadorian clients; that he had voluntarily returned from international travel to face the criminal contempt charges; and that it was implausible to claim that he would abandon his wife, young son, and life in the United States, and submit himself to felony abscondment charges and a life as an international fugitive, merely to avoid the petty misdemeanor charges he was facing in the pending case.

According to international human rights standards, pre-trial detention must be an exceptional measure and based on an individualised determination that it is reasonable and necessary, specified in law and without vague and expansive standards. The burden rests on the State to establish that it is necessary and proportionate to deprive individuals of their liberty pending trial and must pursue a legitimate aim, such as avoiding a substantial risk of flight or interference with the evidence or investigation, in a way that cannot be allayed by other means.²⁴ Moreover, if the length of time that the defendant has been held in pre-trial detention reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.²⁵

On 29 March 2021, the Court of Appeals for the Second Circuit upheld the decision by the District Court to retain the precautionary measure. While the Court of Appeals stated that Donziger's arguments "gave [them] pause",²⁶ they still supported the District Court's unjustified findings without providing further justification that the measure was necessary and proportionate.

¹⁹ Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rules for the Division of Business Among District Judges, Rule 16, https://www.nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf

²⁰ United States v. Donziger {11cv691} (1:19-cr-00561), District Court, S.D. New York, order of Judge Loretta A. Preska, August 6, 2019

²¹ United States of America v. Steven Donziger, 19 CR 561 (LAP), Telephone Conference, US District Court, Southern District Of New York, 18 May 2020

²² 42 U.S. Code § 1995. Criminal contempt proceedings.

²³ Frente de Defensa de la Amazonía, U.S. Judges Deny Freedom for U.S. Human Rights Attorney Steven Donziger After 10 Months of Record-breaking House Arrest on Questionable Misdemeanor Charges (2020), available at: <https://www.makechevroncleanup.com/press-releases/2020/5/20/us-judges-deny-freedom-for-us-human-rights-attorney-steven-donziger-after-10-months-of-record-breaking-house-arrest-on-questionable-misdemeanor-charges>

²⁴ Human Rights Committee, General Comment No. 35, para. 38

²⁵ Human Rights Committee General Comment No. 35, para. 38

²⁶ United States v. Donziger, United States Court of Appeals for the Second Circuit, 20-1710-cr, 29 March 2021

The pre-trial house arrest of Steven Donziger raises serious concerns as to the lawfulness of the detention, both in terms of the apparent lack of necessity and the requirement to release defendants pending trial when the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes charged.²⁷

Amnesty International
Global Witness
Human and Environmental Development Agenda (Nigeria)
Re: Common (Italy)
The Corner House (UK)
bourdon & associates (France)

²⁷ See, *United States v. Lofranco*, 620 F. Supp. 1324, 1325 (N.D.N.Y. 1985) (“[H]olding a defendant without bail for longer than he would serve if tried and convicted must [] violate due process.”). See also Human Rights Committee’s General Comment 35, para. 38