U.S. v. Donziger: Contempt of Court or International Law?

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I. Introduction

"I'm like a corporate political prisoner," says Steven Donziger,[1] "the target of what is probably the most well-funded corporate retaliation campaign in U.S. history."[2] Donziger is the "star lawyer" who has worked tirelessly to hold Chevron responsible for despoiling the Amazon rainforests of Ecuador, the advocate-David

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1 Sharon Lerner, *How the Environmental Lawyer Who Won a Massive Judgment Against Chevron Lost Everything*, INTERCEPT (Jan. 29, 2020), https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger/ [https://perma.cc/P4AL-C6H4].

2 Joe Nocera, *Behind the Chevron Case*, N.Y. TIMES (Sept. 22, 2014), https://www.nytimes.com/2014/09/23/opinion/joe-nocera-behind-the-chevron-case.html [https://perma.cc/KLH6-97EU].

who took on corporate-Goliath.[3] He has defended the rights of the indigenous people who live there for coming on three decades.[4] At long last, in 2011, Donziger's clients received a $9.5 billion judgment in Ecuador's courts.[5]

Chevron responded by not only moving its assets out of Ecuador, but also hiring hundreds of lawyers from sixty firms as part of a long-term strategy to "demonize" Donziger.[6] It vowed to fight "until Hell freezes over, and then . . . fight it out on the ice."[7] This strategy had less to do with pollution in Ecuador than with the potential repercussions should the gas and oil industry admit defeat.[8] Defeat would open the door to more of the same sort of class actions, brought by sophisticated lawyers and global finance on behalf of indigenous plaintiffs.[9] In an attempt to "discourag[e] poor communities and their advocates from trying to hold corporations accountable," Chevron initiated a racketeering suit against Donziger.[10] In the end, the Southern District of New York found a pattern of racketeering activity and held the Ecuadorian judgment unenforceable in 2014.[11] The Second Circuit Court of Appeals affirmed in 2016.[12]

Meanwhile, although Ecuador's highest court upheld the $9.5 billion judgment,[13] several other courts have held it unenforceable. Chevron reported that courts in Argentina and Brazil would not

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3 *See* Joe Nocera, *An Environmental Hero or Outlaw? Can It Be Both?*, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2021/11/06/business/dealbook/steven-donziger.html [https://perma.cc/R8KL-TRDE].

4 *See id.*

5 *See id.*

6 Lerner, *supra* note 1.

7 Alexander Zaitchik, *Sludge Match: Inside Chevron's $9 Billion Legal Battle with Ecuadorean Villagers*, ROLLING STONE (Aug. 28, 2014), https://www.rollingstone.com/culture/culture-news/sludge-match-inside-chevrons-9-billion-legal-battle-with-ecuadorean-villagers-71779/ [https://perma.cc/UB5A-JLJ5].

8 *Id.*

9 *See id.*

10 *Id.*

11 Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 599–600, 644 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016) [hereinafter Donziger Racketeering Case].

12 Chevron Corp. v. Donziger, 833 F.3d 74, 151 (2d Cir. 2016).

13 Nancy Gertner & Mark Bennett, *Criminal Contempt Charges in Donziger Case Are Excessive*, LAW360 (July 13, 2020), https://www.law360.com/articles/1290825/criminal-contempt-charges-in-donziger-case-are-excessive [https://perma.cc/SQP7-3B5M].

allow the plaintiffs to enforce the judgment in 2017.[14] The Court of Appeal for Ontario ruled Chevron's assets could not be seized in 2017, and the Supreme Court of Canada denied leave to appeal in 2019.[15] A tribunal administered by the Permanent Court of Arbitration in the Hague held the judgment was procured through fraud in 2018[16] and, according to Chevron, the Supreme Court of the Netherlands dismissed attempts to annul the arbitration tribunal's decision in 2019.[17]

And yet, outside of the ensuing litigation, it was as if the alleged fraud and corruption of the Ecuadorian trial "never happened."[18] The Ecuadorian judgment was deemed a legitimate victory, and Donziger an environmental hero.[19] Rather than "the lawyer who broke the rules to win a case," Donziger became "the lawyer who stood up to Big Oil."[20] Anyone who criticized Donziger was clearly "corrupted by the evil Chevron."[21] If Donziger made mistakes along the way, if his decisions were a disservice to his clients, they were (in Donziger's words) "nothing as egregious as Chevron's 'horrendous actions in Ecuador.'"[22]

Donziger's martyr status reached new heights in 2019 when he was charged with criminal contempt of court, and lawyers from private firms were then appointed as special prosecutors—an "extraordinarily rare" occurrence.[23] Awaiting trial, Donziger was

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14 Press Release, Chevron, Fraudulent Ecuadorian Judgment is Unenforceable Against Chevron's Canadian Subsidiary (Apr. 4, 2019), https://chevroncorp.gcs-web.com/news-releases/news-release-details/fraudulent-ecuadorian-judgment-unenforceable-against-chevrons [https://perma.cc/3XBT-ZY3G].

15 Nia Williams, *Canadian Court Dismisses Ecuador's $9.5 Billion Claim Against Chevron Canada*, REUTERS (Apr. 4, 2019), https://www.reuters.com/article/us-chevron-canada-ecuador/canadian-court-dismisses-ecuadors-9-5-billion-claim-against-chevron-canada-idUSKCN1RG2GP [https://perma.cc/RF7B-JUYL].

16 *International Tribunal Rules in Favor of Chevron in Ecuador Case*, REUTERS (Sept. 7, 2018), https://www.reuters.com/article/idUSL3N1VT4NB [https://perma.cc/2BL3-BS8P].

17 *Chevron Says Dutch Supreme Court Rejects Ecuador's $9.5 Billion Claim*, REUTERS (Apr. 16, 2019), https://www.reuters.com/article/idUSL3N21Y1HR [https://perma.cc/9YJU-5JCG].

18 *An Environmental Hero or Outlaw?*, *supra* note 3.

19 *Id.*

20 *Id.*

21 *See Behind the Chevron Case*, *supra* note 2.

22 *See id.*

23 Adam Klasfeld, *When Feds Demur, Judge Charges Ecuador Crusader Himself*,

put on house arrest with an ankle bracelet and an $800,000 bond.[24] The house arrest continued for twenty-one months, even though contempt carries a maximum sentence of only six months.[25]

In October of 2021, the United Nations Working Group on Arbitrary Detention ("Working Group") released an opinion on Donziger's pretrial detention ("Report").[26] The Report found that the house arrest was arbitrary under international law.[27] The Working Group based its legal conclusions on facts communicated to it by an unnamed source, as the U.S. government declined to provide its own account.[28]

This note will attempt to corroborate the Working Group's findings, and so determine whether Donziger's house arrest conformed with international law. It will apply the international standards identified in the Report to the court record in the Southern District of New York, with the court record serving as a proxy for the account the U.S. government could have provided to the Working Group. Part II will provide the factual and procedural background. Part III will explain the relevant international standards and apply them to the record. Part IV will conclude by briefly considering the implications of the case for the Working Group and the U.S. court system.

II. *United States v. Donziger*

A. The Ecuadorian Judgment

It all started with Texaco's three decades of drilling on the lands

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COURTHOUSE NEWS SERV. (Aug. 13, 2019), https://www.courthousenews.com/when-feds-demur-judge-charges-ecuador-crusader-himself/ [https://perma.cc/R3RN-SAPQ]. Donziger's appeal to the Second Circuit was unsuccessful. Donziger v. United States, 28 F.4th 290 (2d Cir. 2022), *petition for cert. filed*, No. 21-2486 (U.S. Sept. 20, 2022). He has since filed a cert petition in the Supreme Court challenging the district court's power to appoint private special prosecutors. Petition for Writ of Certiorari, *Donziger* (No. 22-274).

24 Klasfeld, *supra* note 23.

25 Sharon Lerner, *Steven Donziger Describes Contempt Case as a "Charade" as Trial Comes to a Close,* INTERCEPT (May 17, 2021), https://theintercept.com /2021/05/17/chevron-steven-donziger-trial/ [https://perma.cc/GC2H-8V9G].

26 Hum. Rts. Council, Opinions Adopted by the Working Group on Arbitrary Detention at Its Ninety-first Session**,** ¶ 66, U.N. Doc. A/HRC/WGAD/2021/24 (Oct. 1, 2021) [hereinafter Report].

27 *Id.* ¶ 88.

28 *See id.* ¶ 62.

of Ecuadorian tribes and migrant farmers.[29] The drill sites produced an estimated sixteen billion gallons of toxic waste, which Texaco channeled into shallow pits or directly into local rivers and the jungle floor.[30]

A three-person legal team, including Donziger, filed a class action suit against Texaco in New York in 1993.[31] Ten years later, after Texaco and Chevron had merged and adamantly defended the quality of Ecuador's court system, the case was moved from New York to Ecuador.[32] After another eight years of litigation, the Ecuadorian courts held Chevron liable.[33] Donziger, by that point the head of the legal team, had done the impossible: he won a $9.5 billion judgment against Chevron for his clients ("Ecuadorian judgment").[34]

B. The RICO Judgment

In response, Chevron filed suit against Donziger in the Southern District of New York.[35] Chevron alleged that Donziger had used fraudulent and corrupt means to obtain the Ecuadorian judgment.[36] After a three-year trial and a procedural history of "galactic proportions,"[37] District Judge Lewis A. Kaplan decided in favor of Chevron and entered judgment against Donziger ("RICO judgment")[38] in a 329-page opinion with over 1,842 endnotes.[39] The RICO judgment (1) enjoined Donziger from trying to enforce or profit from the Ecuadorian judgment and (2) directed Donziger to transfer to Chevron all property traceable to the Ecuadorian judgment.[40] Five years later, once the Second Circuit had affirmed

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29 *See* Zaitchik, *supra* note 7.

30 *Id.*

31 *Id.*

32 *See id.*

33 *Id.*

34 *See id.*

35 *See* United States v. Donziger, No. 19-CR-561, 2021 WL 3141893, at *3 (S.D.N.Y. July 26, 2021) [hereinafter Donziger Contempt Case].

36 *Id.*

37 *See* Order at 2, Donziger Contempt Case, *supra* note 35, ECF No. 68, 2020 WL 2216556, at *1.

38 Donziger Contempt Case, *supra* note 35, at *3.

39 *See* Donziger Racketeering Case, *supra* note 11.

40 Donziger Contempt Case, *supra* note 35, at *7–8.

the decision and the Supreme Court had denied cert, Judge Kaplan entered a money judgment against Donziger, awarding Chevron $813,602 in attorney's fees and costs ("money judgment").[41]

C. The Contempt Charges

Chevron then began post-judgment discovery to find assets that it could use to enforce the money judgment.[42] Most relevant were Chevron's requests for documents showing any profit from the Ecuadorian judgment, as well as a standard instruction to produce a privilege log for any information withheld.[43]

Donziger refused to comply with the discovery requests or provide a privilege log, instead asserting across-the-board objections.[44] This "stonewalling" led Judge Kaplan to order Donziger to hand over all electronic devices so that a third party could identify the documents requested.[45] Donziger said he would be unable to comply due to attorney–client privilege,[46] even though repeatedly failing to produce a privilege log in response to discovery requests "waive[s] or forfeit[s] any claim of attorney–client privilege" over the documents and information requested.[47]

Judge Kaplan then established a protocol to govern the handling of Donziger's devices.[48] The protocol instructed Donziger to (1) send a list of his devices and accounts to two forensic experts, one neutral, court-appointed expert and another retained by Chevron, and (2) provide the devices and access to his accounts to the neutral expert.[49] Donziger did not comply, arguing that his prior motion regarding Chevron's proposed protocol had to be decided first so he could seek appellate review.[50] He would "voluntarily go

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41 *See id.* at *12–13.

42 *See id.* at *24–25.

43 *Id.* at *25.

44 *See id.* at *26.

45 *See id.* at *34, *86 n.316.

46 Donziger Contempt Case, *supra* note 35, at *35.

47 *Id.* at *65. The party withholding information or documents has the burden of proving the materials should be considered privileged and must do so "in a timely and proper manner." Robert J. Nelson, *The Importance of Privilege Logs*, 11 PRAC. LITIGATOR 27, 28 (2000).

48 Donziger Contempt Case, *supra* note 35, at *39.

49 *Id.*

50 *See id.* at *37, *40.

into civil contempt" in order to appeal.[51]

Judge Kaplan, having already rejected these arguments, pressured Donziger by imposing escalating "coercive fines" and "coercive sanctions" that required the surrender of Donziger's passport.[52] Judge Kaplan would remove the fines and release Donziger's passport as soon as he complied with the court orders.[53] When Donziger requested a stay pending his appeal of the contempt order, Judge Kaplan granted the motion in part, subject to two conditions—that Donziger file his brief and reply in good time, and that he not oppose any motions to expedite.[54] Donziger still had to comply with the protocol and surrender his passport.[55] Donziger filed his brief over a month late (without requesting an extension), did not comply with the protocol, and did not surrender his passport.[56]

Finally, given Donziger's noncompliance with the RICO judgment and his continued noncompliance with Judge Kaplan's orders arising from the money judgment—even with "coercive" fines and sanctions—Judge Kaplan charged Donziger with six counts of criminal contempt.[57] By that time, the U.S. attorney had declined to take the case due to lack of resources, and as a result, Judge Kaplan appointed three attorneys from a private law firm to prosecute Donziger on the charges.[58]

D. The Transfer to Judge Preska

Donziger moved to dismiss the contempt charges, on one of several occasions, because Judge Kaplan had (as Donziger argued) expressed bias both against him and in favor of Chevron.[59] For example, Judge Kaplan allegedly praised Chevron as "a company of considerable importance to our economy" that supplies fuel "on

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51 *Id.* at *40.

52 *See id.* at *42–44.

53 *See id.* at *44–45.

54 *See* Donziger Contempt Case, *supra* note 35, at *45–46.

55 *Id.* at *46.

56 *Id.*

57 *See id.* at *3.

58 Order of Appointment, Donziger Racketeering Case, *supra* note 11(No. 11-CV-0691), ECF No. 2277.

59 *See* Donziger Contempt Case, *supra* note 35, at *58.

which every one of us depends every single day."[60] The court rejected Donziger's argument, in part because he had provided no admissible evidence in support of his claims.[61] "Almost all" of his evidence was news articles and other hearsay statements.[62] Instead, his argument amounted to disagreement with Judge Kaplan's decisions.[63]

Judge Kaplan transferred the criminal contempt case to District Judge Loretta A. Preska, also in the Southern District of New York.[64] The transfer was made according to a court rule that allows judges to transfer a case directly, subject to the consent of the receiving judge.[65]

Donziger moved to disqualify Judge Preska, and all judges in the Southern District, because his case was not transferred "by lot" (i.e., random assignment), as prescribed by another court rule.[66] The court denied his motion, explaining that Donziger's rule only applies when a judge has been disqualified.[67] A judge is disqualified

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60 Lerner, *supra* note 1.

61 *See* Donziger Contempt Case, *supra* note 35, at *58.

62 *Id.* at *49.

63 *Id.* at *58.

64 *See id.* at *59. Neither Judge Kaplan nor Judge Preska has provided an explanation for the transfer. *See* Hon. Lewis A. Kaplan's Response to Petition for a Writ of Mandamus at 46–47, In re Donziger, No. 20-464 (2d Cir. May 13, 2020), ECF No. BL-15 ("Nor is there any mystery regarding the assignment of Judge Preska."); Order at 12 & n.3, Donziger Contempt Case, *supra* note 35, ECF No. 68, 2020 WL 2216556, at *4, *9 n.3 (declining Donziger's request for more information on the transfer and explaining only that there was no merit to the argument that the transfer was "somehow inappropriate").

65 *See* Order at 12 n.3, Donziger Contempt Case, *supra* note 35, ECF No. 68, 2020 WL 2216556, at *9 n.3 (citing Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rule 14 (Oct. 29, 2018), https://www.nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf [https://perma.cc/E3TG-CCUX]).

66 *See id.* at 10, 2020 WL at *9 (citing Local Rules, *supra* note 65, Rule 16). Donziger's team has told the media that Judge Kaplan knew he was "choosing the one judge in the Southern District, perhaps, who [wa]s going to go after Steven in the worst possible way." Lerner, *supra* note 25. The only support for this assertion was Preska's membership in the Federalist Society, an organization that has received substantial funding from Chevron. *See id.* The Federalist Society has broad influence on federal court judges. *See generally* David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/ [https://perma.cc/W23C-8X7E] (describing Federalist Society's role in judicial nomination process and ties to judges in federal appellate courts).

67 *See* Order at 10–11, Donziger Contempt Case, *supra* note 35, ECF No. 68, 2020 WL 2216556, at *4 (citing Local Rules, *supra* note 65, Rule 16).

when contempt charges involve "disrespect or criticism of" the judge.[68] In Donziger's case, the contempt charges did not flow from Donziger's view of Judge Kaplan, but rather his "willful disobedience" of Judge Kaplan's court orders.[69]

In the same motion, Donziger requested a jury trial should the case remain in the Southern District of New York.[70] The court denied this request as well, as those charged with contempt are not entitled to a jury trial unless sentencing could exceed six months in prison or a $5,000 fine, neither of which was the case for Donziger.[71]

E. The House Arrest

Pending trial, Donziger was put on house arrest on August 6, 2019.[72] Judge Preska imposed home detention with GPS monitoring.[73] Conditions would allow Donziger to observe his family obligations and participate in attorney–client meetings but required surrender of all passports and travel only by request.[74] Judge Preska acknowledged Donziger's community ties, but was troubled by (a) his failure to comply with court orders in the past, as well as the fact that he (b) was facing imprisonment for the first time and (c) had a history of travel to Ecuador, a country with an unreliable extradition process.[75]

Donziger protested his house arrest five times.[76] In December of 2019, for example, Judge Preska denied his request to modify conditions of his house arrest "[f]or the reasons on the record on November 25."[77] On November 25, Donziger's counsel argued that Donziger remained engaged with the contempt case and had dedicated over twenty-five years to the Chevron litigation, not to mention his significant ties to family, friends, and supporters.[78] The

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68 *See id.* at 11, 2020 WL at *4 (citing Fed. R. Crim. P. 42(a)(3)).

69 *See id.*

70 *Id.* at 9, 2020 WL at *4.

71 *Id.* at 9–10, 2020 WL at *4.

72 Bail Disposition, Donziger Contempt Case, *supra* note 35, ECF No. 3.

73 Transcript of Arraignment at 27, Donziger Contempt Case, *supra* note 35, ECF No. 18.

74 *Id.* at 27–28.

75 *Id.* at 27.

76 Donziger Contempt Case, *supra* note 35, at *51.

77 Order at 1, Donziger Contempt Case, *supra* note 35, ECF No. 41.

78 Transcript of Oral Argument at 3–4, Donziger Contempt Case, *supra* note 35, ECF

prosecution reminded the court of its prior reasoning, including Donziger's relationship with "high-level government officials" in Ecuador and a history of noncompliance with court orders.[79] Moreover, his finances were tied up in the ongoing litigation, and he faced the risk of losing his law license plus jail time.[80] Judge Preska agreed with the prosecution that Donziger remained a flight risk.[81] The Second Circuit affirmed the decision in a one-sentence opinion, finding no clear error.[82] Six months later, Judge Preska denied Donziger's request to "roam his neighborhood for several hours" a day.[83] She explained that, in addition to her previous findings, Donziger had not given a specific reason for the request and had already failed to comply with the conditions of his release.[84]

F. The Contempt Verdict

In July of 2021, almost two years since Donziger was put on house arrest, Judge Preska rendered a verdict.[85] Her 86-page opinion began with an explanation of what the case was about: not Chevron's responsibility for oil pollution in Ecuador, but the principle that parties in a legal action risk criminal sanctions if they do not follow court orders, no matter how much they believe in their cause.[86] She chose not to exercise her discretion and decline to impose sanctions, given Donziger's "extensive and continuous laundry list of past violations" of court orders.[87] Judge Preska found Donziger guilty of all six charges "for one reason and one reason

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79 *Id.* at 6–8.

80 *Id.* at 8.

81 *See id.* at 8–9, 12–13.

82 Order, Donziger Contempt Case, *supra* note 35, ECF No. 57.

83 Order at 1, 3, Donziger Contempt Case, *supra* note 35, ECF No. 90.

84 *Id.* at 2–3. Namely, Donziger had been given permission to attend an event in Madison Square Garden but instead "went someplace in Brooklyn instead." *Id.* at 2.

85 Donziger Contempt Case, *supra* note 35.

86 *See id.* at *1.

87 *Id.* at *85. Judge Preska cited to Judge Kaplan's Order to Show Cause, highlighting the time period of noncompliance for each contempt charge. *See id.* at *86 n.831 (citing Order to Show Cause Why Defendant Steven Donziger Should Not Be Held in Criminal Contempt ¶ 3 (82 days), ¶ 6 (82 days), ¶ 9 (50 days), ¶ 14 (almost 4.5 years), ¶ 18 (over 1.5 years), ¶ 21 (1 day), Donziger Racketeering Case, *supra* note 11 (No. 11-CV-0691), ECF No. 2276)).

only"—because he "did that with which he was charged."[88]

G. The Working Group Report

In its Report, the Working Group determined that Donziger's house arrest was an arbitrary deprivation of liberty on three grounds.[89] These grounds were (1) a lack of legal basis, (2) a violation of Donziger's right to a fair trial, and (3) discrimination.[90] The Group requested that the U.S. government act in accordance with international standards and recommended Donziger's immediate release.[91]

The Working Group is made up of impartial human rights experts appointed by the United Nations Human Rights Council.[92] The Group investigates whether deprivations of liberty have been imposed in a manner that is arbitrary or otherwise inconsistent with international legal instruments.[93] More specifically, the Working Group upholds the international standards established in the Universal Declaration of Human Rights ("Declaration") and the International Covenant on Civil and Political Rights ("Covenant"),[94] both of which state that "[n]o one shall be subjected to arbitrary arrest [or] detention."[95] The Working Group's opinions are not binding, and the Group does not have any direct enforcement power.[96] But it does encourage the flow of information, raise awareness, improve accountability and, in some cases, lead to the release of detainees.[97]

An investigation typically proceeds as follows: a concerned

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88 *Id.* at *86.

89 Report, *supra* note 26, ¶ 88.

90 *See id.* ¶¶ 3, 88.

91 *Id.* ¶¶ 89–90.

92 Working Grp. on Arbitrary Det., Revised Fact Sheet No. 26, pt. III (Feb. 8, 2019), https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf [https://perma.cc/2XSV-VK94].

93 *Id.*

94 *Id.*

95 G.A. Res. 217 (III), Universal Declaration of Human Rights, art. 9 (Dec. 10, 1948) [hereinafter Declaration]; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 9(1) (Dec. 16, 1966) [hereinafter Covenant].

96 Jared M. Genser & Margaret K. Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice*, 39 COLUM. HUM. RTS. L. REV. 687, 690 (2008).

97 *Id.*

party brings a matter to the Working Group's attention in writing; the Group sends the allegations to the government in question, offering it sixty days to respond or request an extension; if the government does not reply in good time, the Group may then issue an opinion and make recommendations based on the information provided.[98] If necessary, the Working Group may instead keep the case open until further information is received.[99] The Group does not review evidence or weigh the merits of a case, to avoid substituting itself for domestic tribunals,[100] and the concerned party (or "source") remains anonymous both to the government and the public.[101]

III. Donziger's House Arrest Under International Law

The Declaration establishes a common standard by which its parties "promote respect for [human] rights and freedoms" and "secure their universal and effective recognition and observance."[102] All are entitled to "the rights and freedoms" set forth in the Declaration.[103] As a resolution of the United Nations General Assembly, the Declaration does not create a binding legal obligation, but it does reflect norms that, if accepted over time, become customary international law.[104]

The Covenant recognizes civil and political rights deriving from the "inherent dignity of the human person."[105] Each state party to the Covenant promises "to respect and to ensure" the rights therein for all individuals within its territory and legal authority.[106] As a treaty, the Covenant is legally binding on the state parties that have signed and ratified it.[107] The United States became a party to the Covenant in 1992.[108]

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98 Working Grp. on Arbitrary Det., *supra* note 92, pt. V(A).

99 *Id.* It is unclear what sort of conditions would cause the Working Group to keep a case open.

100 *Id.*, pt. IV(B).

101 *Id.*, pt. V(A).

102 Declaration, *supra* note 95, preamble.

103 *Id.*, art. 2.

104 Genser, *supra* note 96, at 700.

105 Covenant, *supra* note 95, preamble.

106 *Id.*, art. 2(1).

107 Genser, *supra* note 96, at 701.

108 *Treaty Body Database*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR

A. Deprivation of Liberty

Deprivation of liberty takes many forms, including detention.[109] Because detention does not in itself violate an individual's rights, international law has sketched a boundary beyond which detention becomes "arbitrary."[110] The term *arbitrary* does not mean "against the law"; rather, it incorporates the wider principles of inappropriateness, injustice, and unpredictability.[111] Detention is arbitrary when its legal basis is "incompatible with respect for the right to liberty and security of person."[112]

Deprivation of liberty is a question of fact.[113] House arrest in particular requires a case-by-case assessment.[114] House arrest may amount to a deprivation of liberty when the person under house arrest is confined to closed premises and not allowed to leave.[115] Relevant factors include limitations on the person's ability to move freely, receive visitors, and communicate with the outside world, as well as security measures imposed on the place of detainment.[116] The Working Group found that Donziger's house arrest was a deprivation of liberty because, under the terms of the court order, he was required to stay in his apartment, wear an ankle bracelet, and surrender his passport.[117]

The record in the Southern District of New York corroborates the Working Group's finding. Donziger was confined to his home, he was only allowed to leave the premises or travel with permission of the court, and his movements were monitored electronically.[118]

&Lang=en [https://perma.cc/2TAJ-F8YN] (last visited Nov. 25, 2022).

109 Working Grp. On Arbitrary Det., *supra* note 92, pt. IV(A).

110 *Id.*, pt. II.

111 Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT'L L. 709, 713 (1991).

112 U.N. DEP'T OF ECON. & SOC. AFFAIRS, STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE, ¶ 23, U.N. Sales No. 65.XIV.2 (1964); *see also* Declaration, *supra* note 95, art. 3 ("Everyone has the right to life, liberty and security of person.").

113 *See* Hum. Rts. Council, Rep. of the Working Grp. On Arbitrary Det., ¶ 56, U.N. Doc. A/HRC/36/37 (July 19, 2017).

114 Comm'n on Hum. Rts., *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, at 9, U.N. Doc. E/CN.4/1993/24 (1993).

115 *Id*.

116 Report**,** *supra* note 26, ¶ 66.

117 *Id.* ¶ 67.

118 *See supra* notes 68–70 and accompanying text.

These factors—more substantial than Donziger's ability to receive visitors or communicate with the outside world—point to a deprivation of liberty.

B. Lack of Legal Basis

The Covenant provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody."[119] The Working Group found that Donziger's house arrest violated this provision in that it lacked a legal basis.[120]

The Working Group reached this conclusion based on three principles. First, a court must make "an individualized determination that [pretrial detention] is reasonable and necessary."[121] A court must consider alternatives to pretrial detention, such as bail or electronic bracelets.[122] Next, judicial authority must be "independent, objective and impartial" to the issues.[123] Lastly, detention must not continue longer than the maximum sentence for the crimes charged.[124] The Group found that these requirements were not met in Donziger's case because (1) the court repeatedly rejected his appeals, and did so in a one-sentence judgment entered on February 18, 2020; because (2) Judge Kaplan bypassed court rules by "personally" selecting Judge Preska to preside over the contempt proceedings, and Judge Preska was the one who dismissed Donziger's challenge to her own appointment; and because (3) at the time of the opinion, Donziger had been detained for four times the maximum penalty for criminal contempt of court.[125]

The Southern District's record corroborates this finding in part. As for whether the detention was reasonable and necessary, the court gave three reasons for why Donziger was a flight risk: he had a history of not complying with the courts, he was facing imprisonment for the first time, and he had ties to a foreign country

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119 Covenant, *supra* note 95, art. 9(3).

120 Report, *supra* note 26, ¶ 77.

121 *See id.* ¶ 73.

122 Hum. Rts. Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, ¶ 38, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

123 Report, *supra* note 26, ¶ 75.

124 *Id.* ¶ 76.

125 *Id.* ¶¶ 73–76.

that might not extradite.[126] Three months later, the court heard arguments from both parties on appeal and concluded that conditions had not changed; Donziger remained a flight risk.[127] Conditions had still not changed when Donziger appealed again only one month later (affirmed in the one-sentence judgment cited in the Report).[128] Although the court did not explicitly consider the possibility of lifting home confinement or the ankle bracelet, it did make "individualized determination[s]" that they were reasonable and necessary.

As to the second requirement, it remains unclear whether Judge Kaplan and Judge Preska were "independent, objective and impartial." At first glance, the fact that Judge Kaplan selected Judge Preska to preside over the contempt proceedings appears suspicious. But Donziger did little to prove Judge Kaplan's bias in the first place, supporting his allegations with news articles and other inadmissible evidence,[129] and there are good reasons for judges to coordinate a transfer. Namely, in this case, the racketeering decision spanned over three hundred pages and had a docket of 2,280 entries at the time of transfer,[130] a record requiring more time and resources than just any receiving judge would be able to allocate. As for Judge Preska's decision to dismiss the challenge to her appointment, that was within her judicial authority (the alternative would have far-reaching effects on judicial efficiency).[131] No part of her decision—which was well-reasoned, though the bottom line leaves plenty of room for disagreement—suggests a lack of independent judgment.[132]

For the third requirement, that the detention last no longer than the maximum possible sentence, Donziger did remain on house arrest for almost two years (from August 2019 until Judge Preska's verdict in July 2021)[133] despite facing charges with a maximum

126 *See supra* note 71 and accompanying text.

127 *See supra* notes 74–77 and accompanying text.

128 *See supra* note 78 and accompanying text.

129 *See supra* notes 55–59 and accompanying text.

130 See docket for Donziger Racketeering Case, *supra* note 11 (No. 11-CV-0691). The racketeering decision was based on the 188-page Ecuadorian judgment, which in turn was based on over 200,000 pages of evidence. *See id.* at *487.

131 *See supra* notes 60–65 and accompanying text.

132 *See id.*

133 *See supra* notes 68 and 81 and accompanying text.

sentence of only six months.[134] Again, his house arrest amounted to four times the maximum penalty for contempt.

On the one hand, the record suggests there was a legal basis for Donziger's house arrest. The court drew its conclusion that his detention was "reasonable and necessary" from sound, if arguable, reasoning, and nothing in the evidence suggests Judge Preska was not an impartial arbiter. On the other hand, the record does not give any explanation for why the house arrest was "reasonable and necessary" for the entire two years' duration, especially when the decision to continue enforcing the order went against the principle that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody."

C. Lack of a Fair Trial

Both the Declaration and the Covenant recognize the right to "a fair and public hearing" by an "independent and impartial tribunal."[135] The Working Group found that Donziger's house arrest violated this right, as Donziger did not receive a fair trial.[136]

For a trial to be fair, it must occur "within a reasonable time frame" and "without undue delay."[137] The right to be tried without undue delay is meant to prevent the accused from being detained and burdened with uncertainty for longer than is necessary.[138] It also serves the interests of justice.[139] Prolonged pretrial detention in particular may threaten the presumption of innocence.[140] The reasonableness of delay depends on the circumstances, including the complexity of the case, the conduct of the accused, and the government's management of the case.[141] Generally, a court's lack of resources does not justify delay, while the need to complete an investigation might.[142] If a delay becomes necessary, the judge must

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134 *See supra* notes 24–25 and accompanying text.

135 Declaration, *supra* note 95, art. 10; Covenant, *supra* note 95, art. 14(1).

136 *See* Report, *supra* note 26, ¶ 82.

137 *Id.* ¶ 79.

138 Hum. Rts. Comm., *General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to a Fair Trial)*, ¶ 35, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

139 *Id.*

140 Hum. Rts. Comm., *General Comment No. 35*, *supra* note 122, ¶ 37.

141 Report, *supra* note 26, ¶ 78.

142 Hum. Rts. Comm., *General Comment No. 35*, *supra* note 122, ¶ 37.

"reconsider alternatives to pretrial detention."[143]

For Donziger, the Working Group noted his "exceptional level of cooperation" and said that the court must consider alternatives given his over two years' detention.[144] The Group identified two additional factors relevant to a fair trial. First, the decision to impose pretrial detention must be reasoned.[145] Second, the tribunal must be objective and impartial.[146] The Group again pointed to the court's one-sentence decision and Judge Kaplan's bias, and also noted that Donziger was denied his right to be tried by jury.[147]

The record again corroborates the Working Group's finding in part. As explained above, *see* discussion *supra* Section III.B, the court made a "reasoned" decision to impose pretrial detention and sustain it on appeal, and allegations of bias on the part of Judge Kaplan were not supported by admissible evidence. Donziger was, however, detained for an unreasonably long time, given the misdemeanor charges against him.

As for trial by jury, Donziger was not denied his rights under the standards of the U.S. court system. He faced charges with a maximum sentence that did not pass the threshold that would entitle him to a jury trial: six months imprisonment or a $5,000 fine.[148]

D. Discriminatory Grounds

Both the Declaration and the Covenant recognize the right to equal protection of the law "without any discrimination."[149] The Working Group found that Donziger's house arrest violated this right because it rested on discriminatory grounds.[150]

One form of discrimination includes detaining an individual based on their activities as a human rights defender.[151] The Working Group has specified that human rights defenders are a protected

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143 *Id.*

144 Report, *supra* note 26, ¶ 78.

145 *See id.* ¶ 80.

146 *See id.* ¶ 81.

147 *Id.* ¶¶ 80–81.

148 *See supra* notes 66–67 and accompanying text.

149 Declaration, *supra* note 95, art. 7; Covenant, *supra* note 95, art. 26.

150 Report, *supra* note 26, ¶ 86.

151 Hum. Rts. Council, *Arbitrary Detention*, ¶ 48, U.N. Doc. A/HRC/48/55 (Aug. 6, 2021).

class under this provision.[152] It has also expressed concern that those defending the rights of marginalized people face a heightened risk of detention.[153] In this case, the Working Group was "appalled" that the charges against Donziger may have come in retaliation for his representation of indigenous communities, and that he may have been detained because he refused to disclose confidential communications with his clients.[154] Lawyers must act according to the law and ethics of the legal profession, the Group explained, while governments must respect the confidentiality of all communications between lawyers and clients within the scope of their relationship.[155] The Group did emphasize, however, that its finding was "strictly limited to the[se] very specific circumstances," with the "exceptional length" of the detention a likely factor.[156]

The record does not corroborate this finding. Donziger was not detained in his capacity as a human rights defender. The contempt charges, at least on their face, were not a form of retaliation for his representation of indigenous communities; they arose from his noncompliance with court orders. And, as noted in the Report, "it was not [the racketeering] proceedings, but rather the criminal contempt of court charges that lead [*sic*] to Mr. Donziger's deprivation of liberty."[157]

Second, Donziger was not detained because he was protecting client communications. Donziger was asked to produce a privilege log that would protect any documents or information holding attorney–client confidences.[158] Instead, he issued a blanket refusal to comply with the discovery requests or turn over his electronics to a third party.[159] That Donziger would not produce a privilege log reflects his own views of the ethics of the legal profession, not the government's respect for confidentiality.

Although the "exceptional length" of Donziger's house arrest was at best highly unusual, it likely resulted from his "contempt"

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152 *Id.*

153 *Id.* ¶ 49.

154 Report, *supra* note 26, ¶ 84.

155 *Id.* (citing G.A. Res. 45/121, *Basic Principles on the Role of Lawyers*, ¶¶ 14, 22 (Dec. 14, 1990)).

156 *Id.* ¶¶ 87, 82.

157 *Id.* ¶ 70.

158 *See supra* note 43 and accompanying text.

159 *See supra* note 44 and accompanying text.

toward the courts, not the courts' discrimination against him.

IV. Conclusion

In sum, Donziger's detention was arbitrary under international law, but not for many of the reasons stated in the Working Group's Report. The record in the Southern District of New York does not convincingly show that the decision to impose house arrest was not reasoned, or that the tribunal failed to be impartial. Nor does it show that Donziger was discriminated against for defending the people of Ecuador. What it does show is that Donziger was detained for an unreasonable amount of time—an amount of time so unreasonable that it would rise to inappropriateness, injustice, and unpredictability.

This disparity raises concerns for the Working Group. While the Group does represent the views of impartial experts on issues of international law, it still relies on a closed universe of facts. It is certainly the responsibility of the government in question to defend its actions, but the Working Group undermines its legitimacy when it releases opinions without any information from the government and, more importantly, without making any effort to review (not investigate) any evidence from the case. The Group cannot raise awareness or improve accountability if it makes one-sided recommendations based on information cherrypicked by one litigant.

That said, the Report casts equal doubt on the U.S. court system. It questions the fairness of U.S. courts on two grounds: (1) whether a judge should be able to select who will receive his case, as Judge Kaplan did, and (2) whether a judge should be able to dismiss a party's motion to dismiss her, the very same judge deciding the motion, as was the case for Judge Preska. The Report also draws attention to a person's reduced right to a jury trial in the United States, as Donziger was not entitled to a jury based on the sentence he faced, up to six months in prison, even though he was detained under house arrest for twenty-one months.

The Report exposes the arbitrary nature of pretrial detention in the United States, as those awaiting trial are detained as a "general rule" in violation of international law.[160] Note that the United States has not ratified any optional protocols that would enable treaty

160 Report, *supra* note 26, ¶ 72.

bodies to review complaints against it.[161] As a result, individuals whose rights have been violated have only a few procedures they may rely on, the Working Group's being one among them.[162] But for recent detentions the Working Group has found arbitrary, the United States has rarely released individuals following or with reference to the Working Group's opinions.[163]

161 David S. Weissbrodt & Brittany Mitchell, *The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence*, 38 HUM. RTS. Q. 655, 663 (2016).

162 *Id.* at 663–64.

163 *See id.* at 664.