



September 25, 2018

Dr. Paulo Abrão  
*Executive Secretary*  
Inter-American Commission on Human Rights  
1889 F Street, NW  
Washington, DC 20006

**Thematic Hearing Request re: “Civil RICO” Lawsuits Against Human Rights and Environmental Defenders in the United States**

Dear Executive Secretary Abrão:

In accordance with Article 64 of the Rules of Procedure for the Inter-American Commission on Human Rights, we respectfully submit this request for a thematic hearing at the upcoming 170th Period of Sessions of the Commission on the issue of the rapidly growing incidence of the use of private “civil RICO” or “racketeering” lawsuits in the United States by corporations against human rights and environmental defenders (HRDs) as a response to the HRDs public advocacy against the interests of those corporations.

This practice is legal in the United States. It is controversial and has been discussed to a limited extent in the context of U.S. litigation policy. At root, this thematic hearing request is based on the conviction that this practice seriously implicates human rights concerns (free association, free expression, due process) and must be examined and contextualized within the framework of human rights guarantees in the hemisphere and at international law. A thematic hearing would raise public and policy-maker awareness and begin the process of shifting perspectives, priorities, and policy debates in a human rights-compatible direction.

**Background on Human Rights Defenders and SLAPPs**

The work of HRDs is widely understood to be essential to increasing global respect for and development of human rights for all persons. Respect for human rights does not happen on its own. Without the work of “frontline defenders,” the high-minded principles articulated in the confines of Geneva or New York, or elaborated in decisions issued from San Jose or Strasbourg, do not move out into the real world to improve lives and to empower individuals and communities to confront conflicting but entrenched interests. Threats and pressure on HRDs are thus properly understood not just as unacceptable attacks on the individual rights of HRDs themselves, but as

more profound attacks on HRDs' role in larger systems and practices of protection and human rights advancement.<sup>1</sup>

Attacks on HRDs are growing at an alarming rate.<sup>2</sup> Two features of this growth must be highlighted. First, UN Special Rapporteur on the Situation of Human Rights Defenders Michel Forst and others have “identified defenders working on the issue of business and human rights”—*i.e.*, those advocating in opposition to business-backed interests— “as one of the most vulnerable groups of defenders.”<sup>3</sup>

[D]efending and promoting human rights in the context of business is dangerous, and even deadly, work. For defending human rights over profit, privilege and prejudice, ordinary people, communities, workers and trade unionists face stigmatization, criminalization, physical attacks and sometimes death. In many situations, such courageous people are being deprived of their most fundamental rights for the mere fact of their having opposed powerful interests. The Special Rapporteur is deeply concerned that these defenders are suffering attacks by business actors overpowering and silencing them, which exerts a chilling effect on their work. This worrying trend is compounded by a lack of State action in response to such attacks.

Second, the Forst Report found that “judicial harassment” or “criminalization,” in the form of outright criminal charges brought by State authorities or defamation and similar lawsuits brought by companies, is the most common form of attack on HRDs globally.<sup>4</sup> In understanding the nature of the threat posed by these types of lawsuits, it has been important to appreciate the dynamics highlighted by the long-standing, but still struggling, effort against “Strategic Lawsuits Against Public Participation” (SLAPPs).

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<sup>1</sup> See generally UN Declaration on Human Rights Defenders, UN Doc. A/RES/53/144, 8 March 1999, <http://undocs.org/A/RES/53/144>.

<sup>2</sup> Many civil society organizations have done important work to document and raise global public awareness of this problem, including Frontline Defenders, see <https://www.frontlinedefenders.org/>; Global Witness, see <https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth/>; the International Service for Human Rights (ISHR), see <http://www.ishr.ch/news/supporting-human-rights-defenders>; the International Federation for Human Rights (FIDH), see <https://www.fidh.org/en/issues/human-rights-defenders/>; Amnesty International, see <https://www.amnestyusa.org/campaigns/human-rights-defenders/>; and the Business & Human Rights Resource Centre (BHRRC), see <https://www.business-humanrights.org/en/bizhrds>, among others.

<sup>3</sup> See Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/72/170, 19 July 2017, <http://undocs.org/A/72/170> (“Forst Report”); see also “Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders,” BHRRC/ISHR (Aug. 2018) at [https://www.ishr.ch/sites/default/files/article/files/shared\\_space\\_under\\_pressure\\_-\\_business\\_support\\_for\\_civic\\_freedoms\\_and\\_human\\_rights\\_defenders.pdf](https://www.ishr.ch/sites/default/files/article/files/shared_space_under_pressure_-_business_support_for_civic_freedoms_and_human_rights_defenders.pdf).

<sup>4</sup> Forst Report at ¶ 15.

The SLAPP label was conceived in 1989 a category of lawsuits that “succeeded” strategically irrespective of whether they succeeded in court.<sup>5</sup> This is because the mere filing and preliminary litigation of a lawsuit can achieve a range of deleterious effects on targeted defendants, including sapping resources for legal fees, drawing advocates’ attention away from their main advocacy, and vilifying targets in the media or even just muddying public perception of them and their work, but using the public’s trust in traditional legal process to do so.<sup>6</sup> A difficult additional dimension of SLAPPs is that advocates’ awareness of the “extra-legal” harms of SLAPPs, which judicial systems are typically not able to protect them from, leads advocates to “chill” their free expression against potential SLAPP aggressors even when a SLAPP fails or without any SLAPP even being initiated.

### **Background on Civil RICO**

Human rights advocates focused on protecting HRDs from the threats described above have already identified the use of private-party claims under the U.S. Racketeering Influenced and Corrupt Organizations (RICO) Act as “notoriously open to abuse.” As succinctly summarized by a coalition of leading human rights organizations who recently launched a “Protect the Protest” campaign<sup>7</sup> aimed at raising awareness of the threat posed by SLAPPs and RICO:

First introduced to tackle mafia activity, RICO is a powerful and sweeping law that allows civil parties (as well as federal prosecutors) to take action against racketeering activity. Since the law is directed at criminal acts, it is punitive in nature and allows civil parties to recover triple the amount of damages they suffered. RICO therefore provides a uniquely powerful means of intimidating advocacy groups and activists. It enables corporations to smear these groups as “criminal enterprises,” while claiming exorbitant damages for the “harm” they claim to have suffered.

Throughout the 1970s and early 1980s, RICO went virtually unused as a tool for bringing civil lawsuits. By 1985, however, Supreme Court judges had begun taken notice of the increasingly abusive way in which civil RICO was being applied. Justice Thurgood Marshall noted in the case of *Sedima S.P.R.I v. Imrex Co*: “many a prudent defendant, facing ruinous exposure, will settle even a case with no merit.

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<sup>5</sup> See, e.g., Protect the Protest: History of SLAPPS, at <https://www.protecttheprotest.org/history/>. The Protect the Protest coalition is discussed *infra*.

<sup>6</sup> That is, a SLAPP’s success can capitalize on the public’s overarching faith in the legal process and the notion that “a company wouldn’t bring a lawsuit unless there was a genuine basis to do so.”

<sup>7</sup> See <https://www.protecttheprotest.org/about/>; see also <https://twitter.com/SLAPPtaskforce>. Founding members of the campaign include Greenpeace International, Greenpeace USA, Human Rights Watch, Amnesty International, the American Civil Liberties Union (ACLU), the Center for Constitutional Rights (CCR), the Center for International Environmental Law (CIEL), the Electronic Frontier Foundation (EFF), the Natural Resources Defense Council (NRDC), EarthRights International (ERI), STAND.earth, the Rainforest Action Network (RAN), among others.

It is thus not surprising that civil RICO has been used for extortion purposes, giving rise to the very evils that it was designed to combat.”

Despite these warnings, the use of civil RICO suits exploded. Between 2001 and 2006, civil RICO plaintiffs filed an average of 759 private civil claims every year.

The potential use of civil RICO as a weapon against civil society organizations became seductively clear to corporations after Chevron was ordered to pay \$19 billion in compensation for dumping toxic wastewater, hazardous waste, and crude oil in Ecuador. Rather than pay the victims, Chevron used RICO to go after the affected communities’ American lawyer, Steven Donziger. In part by targeting Donziger, the company succeeded in blocking the judgment against it—the RICO judgment included an injunction against enforcement in the United States. In July 2018, Ecuador’s highest court upheld a \$9.5 billion judgement against Chevron. But Chevron has sold its assets in Ecuador and left the country, making it difficult to enforce that judgment, as well.

Chevron’s novel use of RICO rippled through to the boardrooms of other corporations facing criticism from civil society organizations. Recently, the law firm of Kasowitz Benson Torres LLP has been working with two companies—Resolute Forest Products and Energy Transfer Partners -- to bring RICO lawsuits against Greenpeace and other civil society organizations.<sup>8</sup>

### **Anticipated Testimony**

Testimony will tentatively be available for the proposed thematic hearing from at least the following individuals, who are able to speak to their personal experience as well as expertise:

- Steven Donziger, the U.S. attorney described in the passage quoted above, who has represented indigenous and other Ecuadorian Amazon communities in the historic environmental case against Chevron Corporation for over 25 years and was the main targeted defendant in Chevron’s retaliatory RICO case.
- Aaron Marr Page, managing attorney at Forum Nobis PLLC, an advisor to MR. Donziger and the Ecuadorian communities, and human rights professor at the University of Iowa College of Law.

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<sup>8</sup> See <https://www.protecttheprotest.org/history/> (citing, inter alia, William L. Anderson & Candice E. Jackson, Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law, 9:1 Independent Review (Summer 2004), at <http://www.independent.org/publications/TIR/article.asp?id=215>, and Caroline N. Mitchell et. al., *Returning Rico to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. S 1961(4)*, 13 Fordham J. Corp. & Fin. L. 1 (2008), at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1008&context=jcfl>.

- Todd Paglia, Executive Director at Stand.earth, a civil society organization that was sued for defamation and under civil RICO by Resolute Forest Products over Stand’s advocacy opposing destructive logging in the Boreal Forest. Resolute is also suing Todd Paglia personally with the same \$300 million damages demand.
- Greenpeace USA and Greenpeace International have expressed interest in providing a representative to testify to their experience regarding the civil RICO lawsuits they have faced from Resolute Forest Products in response to advocacy opposing logging in the Boreal Forest and from Energy Transfer Partners in response to advocacy opposing the Dakota Access Pipeline (DAPL).
- Paul Paz y Miño, Associate Director at Amazon Watch, a civil society organization that was forced into protracted (albeit successful) litigation to resist an intrusive and harassing subpoena served by Chevron in connection with its RICO case.
- Ginger Cassidy, Campaign Director at Rainforest Action Network, an organization that has not been directly targeted or affected by a civil RICO lawsuit but is keenly aware of such lawsuits and must be conscious to resist any “chilling” effect on RAN’s advocacy that knowledge of the availability of civil RICO might impose.

To the extent of available time, undersigned (and other defendant witnesses) would also be interested in presenting the testimony of legal experts who have examined civil RICO litigation in a human rights context.

The human rights issues expected to be raised by the testimony are many. The most prominent concern, reflected in the background discussions above, is the impact of civil RICO litigation on freedom of expression and association broadly across U.S.—and global—civil society.<sup>9</sup> The particular nature of the civil RICO claim, which must be built on an allegation of an “enterprise” or “conspiracy” between actors, arguably pushes RICO litigation in directions that undermine the “right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature,” as protected by Article XXII of the American Declaration (and Article 16 of the American Convention). Additionally, the recent use of civil RICO against HRDs has been structured and focused in ways

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<sup>9</sup> A critical point is that HRDs and civil society organizations around the world face the threat of civil RICO litigation in U.S. courts. One defendant in the RICO lawsuit regarding advocacy against the Dakota Access Pipeline is located in the Netherlands and the only conduct by the defendant alleged to be “racketeering” was the sending of letters—from the Netherlands—opposing the pipeline. The defendant was ultimately dismissed from the lawsuit, but still had to endure protracted litigation in the United States. Similarly, while the discussion of the Chevron RICO lawsuit above focuses on the impact on U.S. attorney Steven Donziger, in fact there were more than 40 defendants named in that case and the majority of them were Ecuadorian. The U.S. court recently issued a “default judgment” applying the same sanctions in earlier imposed on Donziger against all those Ecuadorian parties, even though those parties never appeared in the U.S. proceeding. More details on these cases can be provided to the Commission separately or at the requested thematic hearing.

that arguably raise profound free-expression concerns under the American Declaration and Convention and the Inter-American system jurisprudence thereto.

Additional human rights issues of due process linked to civil RICO (for example, the fact that civil RICO cases involve “quasi-criminal” claims yet are allowed to proceed under a low standard of proof, without any public assistance of counsel, and without the usual guarantee of a jury in the U.S. common law system) may also be explored at the proposed hearing.

### **Importance of a Thematic Hearing**

A thematic hearing would allow the Commission, participants, and observers to begin an essential conversation, examining with precision the threats to and/or tensions with human rights guarantees posed by civil RICO practice as it has developed in recent years, and the actual experience of HRDs with these threats and with the problem of “chill,” all in a context of due respect for the human rights commitments of the United States and operative throughout the hemisphere. A hearing would allow the Commission to add its unique expertise on these human rights obligations to the discussion, and to promote a more sophisticated awareness by U.S. policy and judicial authorities, and the general public, as to the human rights dimensions of the civil RICO debate.

It may be important to note that anticipated participants do not necessarily expect to present a single concrete understanding of civil RICO or possible reforms thereto. Many individuals and organizations committed to defending HRDs still actively support the existence of civil RICO as a litigation tool that is potential important to their respective advocacy work (or even to defending HRDs against coordinated attacks in future litigation). Others think that civil RICO is inherently subject to abuse by private parties with the most access to legal resources, and thus will inevitably be used to the detriment of those who fight for less powerful communities and unpopular causes. A thematic hearing could also serve an important role in bringing together all these views, each grounded in respect for human rights and the public interest, to work on these hard differences of perspective.

### **Conclusion**

For all the foregoing reasons, undersigned respectfully requests that the Commission schedule a thematic hearing at the upcoming 170th Period of Sessions on the issue of civil RICO lawsuits against human rights defenders in the United States. Please contact Aaron Page at 202-618-2218 ([aaron@forumnobis.org](mailto:aaron@forumnobis.org)) for any needed additional information.

Sincerely,



Steven R. Donziger  
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**Frente de Defensa  
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/s/

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**STAND.earth**  
FORMERLY FORESTETHICS

/s/

Paul Paz y Miño  
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/s/

Ginger Cassady  
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