14-0826-cv(L),

14-0832-cv(CON)

United States Court of Appeals
for the
Second Circuit

CHEVRON CORPORATION,

Plaintiff-Appellee,

– v. –

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, DONZIGER & ASSOCIATES, PLLC,

Defendants-Appellants,

(Caption Continues on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS AND ANTI-CORRUPTION JURISTS IN PARTIAL SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST,

Defendants-Counter-Claimants,

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TRANGUIL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIA ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT, KEMPERI BAIHUA HUANI, AHUA BAIHUA CAIGA, PENTIBO BAIHUA MIIPO, DABOTA TEGA HUANI, AHUAME HUANI BAIHUA, APARA QUEMPERI YATE, BAI BAIHUA MIIPO, BEBANCA TEGA HUANI, COMITA HUANI YATE, COPE TEGA HUANI, EHUENGUINTO TEGA, GAWARE TEGA HUANI, MARTIN BAIHUA MIIPO, MENCAY BAIHUA TEGA, MENEMO HUANI BAIHUA, MIIPO YATEHUE KEMPERI, MINIHUA HUANI YATE, NAMA BAIHUA HUANI, NAMO HUANI YATE, OMARI APICA HUANI, OMENE BAIHUA HUANI, YEHUA TEGA HUANI, WAGUI COBA HUANI, WEICA APICA HUANI, TEPAA QUIMONTARI WAIWA, NENQUIMO VENANCIO NIHUA, COMPA GUIQUITA, CONTA NENQUIMO QUIMONTARI, DANIEL EHUENGEI, NANTOQUI NENQUIMO, OKATA QUIPA NIHUA, CAI BAIHUA QUEMPERI, OMAYIHUE BAIHUA, TAPARE AHUA YETE, TEWEYENE LUCIANA NAM TEGA, ABAMO OMENE, ONENCA ENOMENGA, PEGO ENOMENGA, WANE IMA, WINA ENOMENGA, CAHUIYA OMACA, MIMA YETI,

Defendants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents.

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INTEREST OF *AMICI CURIAE*

Amici are international jurists whose careers have been devoted in large part to the protection of human rights or to efforts to combat public corruption. They believe that national and international legal actions should contribute to the advancement of human rights, environmental protection, corporate accountability, and economic justice. At the same time, *Amici* share the conviction that corruption in the judicial process violates human rights, both directly—by denying due process of law and a fair trial—and indirectly—by undermining the position of courts as guarantors of legitimate human rights claims and defenses. Moreover, *Amici* are well-positioned to draw this Court's attention to the widespread international consensus in treaties and other international instruments that reflects the same understanding.[1]

Amici express no view on the merits of the underlying litigation in Ecuador, the accuracy of the facts as found by the District Court below, or the issues of law raised in this appeal. Instead, they share a single, central concern: If the District

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[1] Pursuant to Fed. R. App. P. 29(c)(5) *Amici* certify that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties to this appeal have been requested to consent to the filing of this brief, and counsel for Plaintiff-Appellee and Defendants-Appellants consent.

Court's factual findings are accurate in whole or significant part, the corruption of the judicial process in Ecuador undermined human rights and corroded the rule of law. Thus, *Amici* categorically reject any suggestion that human rights ends can justify corrupt means.

Amici are the following:[2]

Allan Brewer-Carías is a Venezuelan jurist and specialist in comparative constitutional law. He has been a long-serving member of the Board of Directors of the Inter-American Institute of Human Rights in Costa Rica, and Vice President of the International Academy of Comparative Law in The Hague. A former Director of the Public Law Institute of the Central University of Venezuela, he has also taught at Cambridge, Panthéon-Assas University in Paris (Paris II), Columbia Law School, the University of Rosario, and the University Externado of Colombia. His many publications include the recent books, *Authoritarian Government v. the Rule of Law: Lectures and Essays (1999-2014)* (2014), and *Judicial Review: Comparative Constitutional Law Essays, Lectures, and Courses (1985-2011)* (2014).

Thomas Buergenthal is Lobingier Professor of Comparative Law & Jurisprudence at the George Washington University Law School. Among other positions during his career, he has served as a Judge and President of the Inter-

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[2] *Amici* are listed in alphabetical order; affiliations are for identification only.

American Court of Human Rights, a member of the United Nations Commission on the Truth for El Salvador, a member of the United Nations Human Rights Committee, and a Judge of the International Court of Justice in The Hague.

Robert Kogod Goldman is Professor of Law and Louis C. James Scholar at the American University Washington College of Law in Washington D. C. He is a former member and President of the Inter-American Commission on Human Rights. He also served as the United Nations' Independent Expert on Human Rights and Terrorism. He currently is a Commissioner and Vice President of the International Commission of Jurists.

Lucinda A. Low is a partner in the law firm of Steptoe & Johnson LLP, where she is a member of the International Department, heads the firm's FCPA/Anti-Corruption practice, and serves on the firm's Executive Committee.[3] Her practice focuses on U.S. and international anti-corruption laws, advising clients on matters ranging from preventive work to representation in internal investigations and enforcement matters worldwide. She is a widely recognized authority on the U.S. Foreign Corrupt Practices Act and related international anti-corruption conventions from the OECD, OAS, United Nations, and European

[3] Steptoe & Johnson is counsel for Chevron Corporation in certain matters. However, the firm has done no work related to the litigation in Ecuador or the RICO case in New York.

Union. She serves on the Board of Directors of Transparency International - USA, and is a past Chair of the ABA Section of International Law, as well as a past recipient of the William Ray Vallance Award, presented by the Inter-American Bar Foundation to an individual who has made a significant contribution toward improving the law and jurisprudence of the Western Hemisphere.

Kaveh Moussavi is an Associate Fellow and former Head of the Public Interest Law Programme at the Centre for Socio-Legal Studies of Oxford University. He is also an Associate Research Fellow of Wolfson College at Oxford. Originally from Iran, where he was called to the Bar in 1978, he has served as an expert in numerous human rights cases, the most well-known of which is *Kazemi v. Iran et al.*, before the Superior Court of Quebec in Montreal, Canada in 2009. He is active in the Oxford branch of Amnesty International. Although he signed a civil society statement in 2013 calling on Chevron to comply with the Ecuadorian judgment in the Lago Agrio case, Mr. Moussavi is appalled by the attorney and judicial misconduct detailed by the March 2014 findings of the District Court below.

Pedro Nikken is a former Judge and President of the Inter-American Court of Human Rights. A Venezuelan jurist, he served as a founder and President of the Inter-American Institute of Human Rights in Costa Rica, and is now its Honorary President. He has also served as President of the International Commission of

Jurists, based in Geneva. Among other positions, he was appointed as the United Nations Independent Expert to assist El Salvador on Human Rights, and was the UN Special Envoy to Burundi on the establishment of a Truth Commission. He is an Emeritus Professor of Civil and International Law at the Universidad Central de Venezuela, where he was formerly Dean of the Juridical and Political Sciences Faculty.

INTRODUCTION

The District Court below found that lawyers and other representatives of plaintiffs in a lawsuit brought against Chevron in Lago Agrio, Ecuador—led by New York-based attorney Steven Donziger—employed corrupt means in the Ecuadorian action in the purported service of their clients' environmental damage claims. Appellants are Donziger and two of the Ecuadorian plaintiffs who appeared at trial below. They argue that the District Court's findings are a sideshow, a distraction from the environmental claims of the Ecuadorian plaintiffs. *See infra* 10–11. In effect, Appellants ask this Court to overlook their corruption of the judicial process in Ecuador because of the importance of the Ecuadorian plaintiffs' human rights claims.

Amici take no position on the accuracy of the District Court's factual findings, but, if those findings are accurate, Appellants' plea to look the other way in the name of human rights must be rejected. Advocates for human rights do not

advance human rights by violating them, and the corrupt pattern of fraud, extortion, and bribery described by the District Court, if accurate, denies the fundamental human rights to due process of law and a fair trial. Under international law, according to distinct legal regimes that have developed on parallel but mutually reinforcing tracks, states are not only responsible for the protection of human rights but also are required to take steps to combat corruption and address its consequences, including through remedial action. The critical point, reflected in treaties to which Ecuador and the United States are both party, and the work of international organizations of which both countries are members, is that corruption itself infringes on human rights. Human rights ends, in short, cannot be promoted through corrupt means.

This principle rests on more than solicitude for the party against whom a judgment is procured by fraud. On the contrary, the claims of the Ecuadorian plaintiffs in this case—and the cause of human rights in general—have not been well-served by the sorts of misconduct found by the District Court. The judicial system is a critical forum for human rights claimants, but it cannot fulfill its function if the judgments it produces fail to merit respect. It is not enough to cloak claims in the clothing of human rights—the facts must be reliably determined and the law even-handedly applied to those facts. That is what a fair trial and due process of law are about. And if the District Court's findings of fact are accurate

in whole or substantial part, the Ecuadorian plaintiffs' lawyers and representatives have denied that legitimate adjudication to their own clients. As this case demonstrates, corrupt means are apt to subvert even noble ends.

ARGUMENT

I. THE DISTRICT COURT FOUND THAT THE ECUADORIAN LITIGATION WAS CORRUPTED, LACKING BOTH DUE PROCESS OF LAW AND FAIR ADJUDICATION

Chevron brought this action against, among others, Appellants, who had brought suit against it in Ecuador for alleged harm to the environment. Chevron claimed that the Ecuadorian litigation was part of an extortionate scheme against the company. Following a seven-week bench trial during which the District Court was presented with the testimony of dozens of witnesses and considered thousands of exhibits, the Court concluded that "[Donziger] and the Ecuadorian lawyers he led corrupted the [Ecuadorian] case." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014). The Court awarded Chevron injunctive and other equitable relief to prevent Appellants from profiting from their misconduct. *Id.* at 639–42.

In its detailed opinion, the District Court found that Appellants committed an escalating series of misdeeds designed to manipulate and predetermine the adjudication of the Ecuadorian plaintiffs' claims, including:

- **Forged Reports of the Ecuadorian Plaintiffs' Expert**: The Ecuadorian plaintiffs' representatives affixed the signature of one of their American environmental experts to a report purporting to find pollution at two inspection sites. They then filed the report in the Ecuadorian action. The expert later testified, however, that he did not write the report and that, in fact, he had *not* found "that any site posed a health or environmental risk." *Id.* at 412–14.
- **Coerced a Judge to Appoint a "Global" Expert**: The Ecuadorian plaintiffs' representatives coerced the Ecuadorian judge, by threatening to file a complaint against him, so that he would cancel a previously agreed-upon set of site inspections and instead appoint a single, supposedly independent expert to make a "global" assessment of damages. Although the judge initially refused to cancel the inspections, he later changed that ruling after the plaintiffs' representatives threatened him. *Id.* at 420–24.
- **Bribed the Court-Appointed "Global" Expert Through Money-Laundering**: The Ecuadorian plaintiffs' representatives funneled covert, illegal payments to the supposedly independent, global damages expert from funding sources in the United States, and provided other assistance to the expert, in order to ensure that the expert "would totally play ball with" the plaintiffs' team. *Id.* at 431–36.

- **Secretly Wrote the Court-Appointed "Global" Expert's Report**: The Ecuadorian plaintiffs' representatives then arranged for their U.S. consultants and others to secretly write most or all of the global expert's report, which the expert then filed under his own name. Once the report was made public, the plaintiffs then attacked (their own) report for not coming up with a high enough damages figure in a submission written by their consultants. Those same consultants then also secretly wrote the expert's reply to (their own) critique. The principal Appellant personally directed this entire charade. *Id.* at 423–30, 439–48.
- **Obtained Orders in Their Favor Through Bribery**: The last judge who presided over the Ecuadorian action, before the case was assigned to him, was secretly paying an associate to ghostwrite his orders in certain cases. As documented by photocopies of deposit slips (and other evidence), once this last judge took over their case, the Ecuadorian plaintiffs' representatives bribed the ghostwriter to write orders that would favor them. The court then issued the ghostwritten orders as its own decisions. *Id.* at 505–07, 508–11.
- **Bribed the Judge to Issue a Judgment that They Secretly Wrote**: Finally, the Ecuadorian plaintiffs' representatives promised the judge a cut of the proceeds from the enforcement of a judgment in their favor, in

exchange for which the judge permitted them to secretly ghostwrite the judgment against Chevron, which the judge then issued as the judgment of the court. *Id.* at 491–99, 533–35.

Amici have no direct knowledge of the facts found in the District Court's opinion and defer to this Court as to the sufficiency of each of the trial court's findings. But if those findings are true in whole or significant part, they reveal a judicial proceeding characterized by fraud, bribery, and other misconduct that is fundamentally inconsistent with due process or fair adjudication. Such corruption can neither be disregarded nor justified on the ground that it was purportedly carried out in the service of a human rights cause. Indeed, if evidence was fabricated, and the judge and a critical court-appointed expert were bribed and coopted, there is no reliable judicial record on which to evaluate any environmental claims. As the District Court aptly put it, "Justice is not served by inflicting injustice." *Id.* at 385.

II. THE MISCONDUCT THE DISTRICT COURT FOUND VIOLATED NORMS OF HUMAN RIGHTS AND ANTI-CORRUPTION THAT ARE ENSHRINED IN INTERNATIONAL LAW

Appellants seek to trivialize the findings described above, implying that they are mere distractions from the human rights claims the Ecuadorian plaintiffs asserted in Ecuador. Appellants argue, for example:

- ". . . Chevron has sought to reduce this long-running controversy to allegations that an expert report was prepared improperly and that an

Ecuadorian trial judge was influenced inappropriately."[4]

- " . . . Chevron has shifted the focus from its own wrongdoing in the Amazon to trumped-up allegations of corruption and misconduct . . . ."[5]

- Chevron circumvented this Court's earlier ruling "by painting the rainforest communities' two-decade-long quest for justice as a RICO conspiracy."[6]

- ". . . [T]he litigation's current focus has been skillfully diverted from the central issue of Chevron's legal duty to remediate the ravaged land, to a distasteful sideshow featuring unremitting assaults on the integrity of Steven Donziger . . . ."[7]

But the District Court's findings cannot be so lightly brushed aside. To the contrary, Appellants' effort to sidestep those findings disrespects both international human rights and international anti-corruption law. Two distinct international legal regimes govern human rights and anti-corruption efforts. Each regime, which has developed on its own track, condemns fraud, bribery, and corruption of the sort the District Court found here, and directs States to take measures to address the consequences of such misconduct. In recent years, the two tracks have merged as

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[4] Corrected Brief for Defendants-Appellants Steven Donziger, The Law Offices of Steven Donziger, and Donziger & Associates PLLC at 2, *Chevron v. Donziger*, No. 14-826 (L), 14-832 (CON) (2d Cir. July 16, 2014).

[5] *Id.* at 1.

[6] *Id.*

[7] Brief for Defendants-Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje at 1, *Chevron v. Donziger*, No. 14-826 (L), 14-832 (CON) (2d Cir. July 1, 2014).

the international community has recognized that corruption endangers, if not directly violates, fundamental norms of human rights. Multiple treaties ratified by both the United States and Ecuador reflect this understanding. If the District Court's findings are substantially correct, therefore, they reveal grave violations of those norms by Appellants. And that the Court entered relief to remedy those violations is consistent with the international-law directive to redress corruption.[8]

Yet the implications of the District Court's findings reach farther. Advocates for human rights, including (perhaps especially) those sympathetic to the claims of the Ecuadorian plaintiffs, should not condone the misconduct the District Court found occurred here. For when a judiciary's integrity is corroded, human rights advocates pressing legitimate claims lose a critical forum for a resolution of those claims that will merit, and receive, international respect. In that sense, the misconduct Appellants ask this Court to ignore cannot be justified by the cause of human rights because it does not advance—it betrays—that cause.

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[8] *Amici* express no view on the proper interpretation of the RICO statute in this case. However, they note the well-established presumption that statutes must be interpreted, if at all possible, in a manner consistent with international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

A. Two Distinct Branches of International Law Recognize that Corruption of the Judiciary Violates Human Rights

1. Under International Law, States Are Responsible for Ensuring the Protection of Human Rights Through Fair Trials and Due Process of Law

U.N. and regional commitments and conventions establish that human rights must be respected, protected, and guaranteed by States, including through fair adjudication and due process of law. The 1948 Universal Declaration of Human Rights proclaims, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations."[9] Similarly, the 1966 International Covenant on Civil and Political Rights, a treaty to which both the United States and Ecuador are States Parties, provides that "[i]n the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[10]

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[9] Universal Declaration of Human Rights art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[10] International Covenant on Civil and Political Rights ("ICCPR") art. 14.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171. The United States joined the Covenant in 1992 and Ecuador in 1969. *See* United Nations Treaty Collection ratification table at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en (last visited Oct. 7, 2014).

The right to a fair trial applies in all determinations of "rights and obligations in a suit at law," including suits to vindicate human rights.[11] Thus, the "Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," adopted by the United Nations General Assembly in 2005, expressly preserve "internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process."[12]

Thus, international law is clear that human rights include the right to a fair trial conducted according to due process of law. The distinct, parallel track in international law that governs anti-corruption efforts mirrors this determination.

2. International Law Obligates States to Act to Combat and Remedy Corruption

Just as international human rights law recognizes the rights to a fair trial and due process of law as critical entitlements, so international anti-corruption treaties recognize the harms caused when judicial processes are subverted. Reflecting that recognition, those treaties insist that States take steps to combat and remedy such misconduct.

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[11] *Id.*

[12] G.A. Res. 60/147, ¶ 27, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

Both Ecuador and the United States are parties to the Inter-American Convention against Corruption, the first international treaty on the subject.[13] The Convention's Preamble begins by declaring, "[C]orruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples."[14] Implementing this understanding, the Inter-American Convention requires States Parties to criminalize the "offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, . . . in exchange for any act or omission in the performance of his public functions."[15]

The reach of this provision is broad. "Public function[s]" include any activity "performed by a natural person in the name of the State or in the service of

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[13] *See* Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39, O.A.S.T.S. No. B-58 (entered into force March 6, 1997) (hereinafter "Inter-American Convention"). Ecuador joined the Convention in 1997 and the United States in 2000. The Convention has been joined by 33 of the 34 States whose governments participate in the Organization of American States. *See* Organization of American States Department of International Law table at http://www.oas.org/juridico/english/Sigs/b-58.html (last visited Oct. 7, 2014).

[14] Inter-American Convention at pmbl.

[15] *Id.* arts. VI.1.b and VII.

the State or its institutions."[16] Thus, the Inter-American Convention's direction to criminalize acts of bribery and corrupt influence on the judiciary would cover not only the bribery of the judge in the Ecuadorian action, but also the secret payments the Ecuadorian plaintiffs' representatives made to the court-appointed "global" expert.

Moreover, the Inter-American Convention includes a review mechanism to ensure compliance.[17] Ecuador has undergone four reviews as part of that process.[18] The 2006 Report contains a detailed discussion of the Ecuadorian legislation implementing the criminalization provisions of the Convention, making

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[16] *Id.* art. 1.

[17] Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC), *see* http://www.oas.org/juridico/english/mesicic_intro_en.htm (last visited Oct. 8, 2014).

[18] *See* Organization of American States ("OAS") MESICIC, Ecuador Final Report, OEA/Ser. L, SG/MESICIC/doc409/13 rev.4 (Mar. 21, 2014) (hereinafter "2014 Report"), available at http://www.oas.org/juridico/PDFs/mesicic4_ecu_en.pdf (last visited Oct. 7, 2014); OAS MESICIC, Ecuador Final Report, OEA/Ser. L, SG/MESICIC/doc.249/09 rev.4 (Mar. 25, 2010), available at http://www.oas.org/juridico/english/mesicic_III_rep_ecu.pdf (last visited Oct. 7, 2014); OAS MESICIC, Ecuador Final Report, SG/MESICIC/doc.185/06 rev.4 (Dec. 15, 2006) (hereinafter "2006 Report"), available at http://www.oas.org/juridico/english/mesicic_II_rep_ecu.pdf (last visited Oct. 7, 2014); and OAS MESICIC, Ecuador Final Report, SG/MESICIC/doc.75/03 rev.4 (Feb. 6, 2004), available at http://www.oas.org/juridico/english/mec_rep_ecu.pdf (last visited Oct. 7, 2014).

clear that the requirements of the Convention were in place at the time the events described in the District Court's opinion occurred.[19]

The United Nations Convention Against Corruption ("U.N. Convention") follows and broadens the approach of the earlier Inter-American Convention. One hundred and seventy-two nations are parties to the U.N. Convention, including Ecuador and the United States.[20] In order to ensure an independent judiciary to enforce the rule of law, the U.N. Convention obligates States to "take measures to strengthen integrity and to prevent opportunities for corruption among members of

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19 *See* 2006 Report, *supra* note 18, at 24–30. The 2014 Report discusses ongoing problems of corruption in the Ecuadorian judiciary and the recommended measures to address them. *See, e.g.*, 2014 Report, *supra* note 18, ¶¶ 188–89. In addition, the current Ecuadorian constitution, adopted in 2008, imposes on the State certain "prime duties" including "[g]uaranteeing its inhabitants the right . . . to live in a democratic society free of corruption." Constitution of the Republic of Ecuador, art. 3(8) (Oct. 20, 2008), available at http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html (last visited October 7, 2014).

20 Ecuador joined the U.N. Convention in 2005. The United States joined in 2006. *See* United Nations Treaty Collection ratification table at https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-14&chapter=18&lang=en (last visited Oct. 7, 2014). The U.N. Convention, like the Inter-American Convention, has a review mechanism in place to monitor the progress of signatories' in implementing its directives. *See* Convention Against Corruption Res. 3/1, Rep. of Conference of the States Parties to the U.N. Convention, Nov. 9–13, 2009, 3rd Sess., CAC/COSP/2009/15 (Dec. 1, 2009), available at https://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3-resolutions.html. Review of Ecuador remains pending.

the judiciary."[21] States are directed to make it a crime for anyone, including attorneys, to seek to influence judicial officers by "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage . . . in order that the official act or refrain from acting in the exercise of his or her official duties."[22] "[P]ublic official" includes "any person holding a … judicial office of a State Party" as well as "any other person who performs a public function . . . ."[23] Thus, as with the Inter-American Convention, this treaty would appear to cover not only judges but also court-appointed experts such as the "global" damages expert appointed by the Ecuadorian court.

The U.S. Foreign Corrupt Practices Act ("FCPA") implements the United States' treaty obligations to criminalize bribery.[24] The FCPA prohibits bribery of "foreign officials," a term that not only incorporates members of the judiciary but also any person "acting in an official capacity" for a foreign government.[25] The principal Appellant, as a U.S. citizen, is fully subject to the FCPA as a "United

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[21] U. N. Convention, art. 11.1, Oct. 31, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41. This obligation is imposed "[b]earing in mind the independence of the judiciary and its crucial role in combating corruption." *Id.*

[22] U.N. Convention, art. 15(a) (bribery of national public officials).

[23] U.N. Convention, art. 2(a)(i), (ii).

[24] 15 U.S.C. §§ 78dd-1, 78dd-2, *amended by* Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (1998) (adding a new § 78dd-3 for "any person").

[25] *See* 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

States person."[26] The statute applies to his conduct regardless of any territorial link to the United States.[27]

The international-law directive to redress corruption includes civil relief as well as criminal prosecution. The U.N. Convention, for example, directs States not only to combat corruption through criminal laws, but also "to address consequences of corruption."[28] The treaty permits States to "consider corruption a relevant factor in legal proceedings to . . . *take any* . . . *remedial action*."[29] As explained further below, the international-law emphasis on providing remedies for corruption bears on the evaluation of the District Court's opinion here.

Other treaties on bribery and corruption, including from the OECD, Council of Europe, the European Union, and the African Union Convention, further evidence the strong international consensus that corruption must be combatted

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[26] 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

[27] His actions as a lawyer in seeking to further his clients' interests would be "business" activity under the FCPA. *See United States v. Kay*, 513 F.3d 432, 441 (5th Cir. 2007). *Amici* understand that the District Court found he stood to gain hundreds of millions of dollars from collection of an award in return for his services rendered to plaintiffs. 974 F. Supp. 2d at 504, 522.

[28] U.N. Convention, art. 34.

[29] *Id.* (emphasis added). This should be done "in accordance with the fundamental principles of [each State's] domestic law." *Id.*

through criminalization, international cooperation, and other tools.[30] Like the U.N. and Inter-American Conventions, all cover corruption in the judicial branch.

3. The International Community Emphasizes that Corruption Endangers and Violates Human Rights

Although instruments of international human rights law and international anti-corruption law both condemn corruption by attorneys and judicial officers in litigation (including human rights litigation), as seen above, originally these two lines of jurisprudence developed on separate tracks. In recent years, however, the two tracks have come together, as international bodies and States have arrived at the express recognition that corruption—especially the corruption of the judiciary found by the District Court here—endangers and even violates human rights.

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30 *See* Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43 (1998), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last visited Oct. 8, 2014); Council of Europe, Criminal Law Convention on Corruption (Jan. 27, 1999), ETS No. 173, available at http://conventions.coe.int/Treaty/EN/CadreListe Traites.htm; Council of Europe, Civil Law Convention on Corruption (Nov. 4, 1999), ETS No. 174, available at http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm (last visited Oct. 7, 2014); European Union, Convention Against Corruption Involving Officials, May 26, 1997, 1997 O.J. (C195) 1, available at http://www.ejtn.eu/PageFiles/7682/B_3_7_Fight_Corruption_Officials.pdf (last visited Oct. 7, 2014); African Union, Convention on Preventing and Combating Corruption (July 11, 2003), available at http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf (last visited Oct. 7, 2014).

Initially, the United Nations Commission on Human Rights approached the subject as the role of "good governance" in the promotion of human rights.[31] The Commission gradually moved, however, toward explicitly incorporating anti-corruption efforts into its mandate. In 2004, it cautiously welcomed a U.N. seminar that focused on "essential elements of good governance" such as "combating corruption in the public and private sectors, including the judiciary."[32] A year later, the Commission requested the U.N. High Commissioner for Human Rights to convene another seminar "on the role of anti-corruption measures . . . in good governance practices for the promotion and protection of human rights."[33] In 2008, the U.N. Human Rights Council, which replaced the former Commission on Human Rights, welcomed the report on the seminar and invited States to consider

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31 *E.g.*, U.N. Commission on Human Rights Res. 2002/76, U.N. Doc. E/CN.4/RES/2002/76 (Apr. 25, 2002); U.N. Commission on Human Rights Res. 2003/65, U.N. Doc. E/CN.4/RES/2004/65 (Apr. 24 2003). Already in 2003, a subsidiary body of experts advising the Commission, namely the Sub-Commission on the Promotion and Protection of Human Rights, had appointed a Special Rapporteur with a mandate to prepare a comprehensive study on corruption and its impact on human rights. Office of the United Nations High Commissioner for Human Rights, The Human Rights Case Against Corruption 6 (2013), available at http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf (last visited Oct. 7, 2014).

32 U.N. Commission on Human Rights Res. 2004/70, ¶ 6, U.N. Doc. E/CN.4/RES/2004/70 (Apr. 21, 2004).

33 U.N. Commission on Human Rights Res. 2005/68, ¶ 5(c), U.N. Doc. E/CN.4/RES/2005/68 (Apr. 20, 2005).

joining the U.N. Convention Against Corruption; asked the High Commissioner to prepare a publication on "anti-corruption, good governance and human rights"; and resolved to continue its focus on "the fight against corruption in the promotion and protection of human rights."[34]

By 2012, the Council recognized the fusion of human rights norms with anti-corruption efforts in international law. It highlighted:

- "the increasing awareness in the international community of the detrimental impact of widespread corruption on human rights, through both the weakening of institutions and the erosion of public trust in government, as well as through the impairment of the ability of Governments to fulfill their human rights obligations";
- that "the fight against corruption at all levels plays an important role in the promotion and protection of human rights"; and
- that "effective anti-corruption measures and the protection of human rights . . . are mutually reinforcing."[35]

The same year, some 134 States, including the United States and Ecuador, presented a joint statement on "corruption and human rights."[36] The joint statement declared:

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34 U.N. Human Rights Council Res. 7/11, ¶¶1–4, U.N. Doc. A/HRC/RES/7/11 (Mar. 27, 2008).

35 U.N. Human Rights Council Res. 19/20, pmbl., U.N. Doc. A/HRC/RES/19/20 (Apr. 25, 2012).

36 Office of the U.N. High Commissioner for Human Rights, *supra* note 31, 17–19 (reproducing statement).

- "Corruption constitutes one of the biggest obstacles to the effective promotion and protection of human rights. . . ."
- "For too long, the anticorruption and human rights movements have been working in parallel rather than tackling these problems together. . . ."
- "Experience shows that [the] fight against corruption can contribute significantly to the promotion of fundamental principles of human rights and the rule of law . . . ."[37]

In 2013, the Council changed the title of its resolutions from the standing "good governance" formulation to "[t]he negative impact of corruption on human rights."[38] "Deeply concerned about the increasing negative impact of widespread corruption on the enjoyment of human rights," the Council recognized that "corruption constitutes one of the obstacles to the effective promotion and protection of human rights." It pointed to the "link between anti-corruption efforts and human rights" and asked its Advisory Committee to study and report on the threat corruption poses to human rights.[39]

Moreover, corruption in the judiciary is especially inimical to human rights. In the 2006 U.N. seminar on corruption and human rights, the former Special Rapporteur on the Independence of Judges and Lawyers declared, "The purity of

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37 *Id.* at 17–18.

38 U.N. Human Rights Council Res. 23/9, U.N. Doc. A/HRC/23/9 (June 13, 2013).

39 *Id.* at pmbl. and ¶¶ 2–4 (emphasis removed).

the justice system is essential and must be maintained for effective human rights protection and [to] combat corruption."[40] And, in 2014, the U.N. Human Rights Council's Advisory Committee added, "If there is corruption in the judiciary, the right to access to court and the right to a fair trial can be violated."[41]

These developments confirm the consensus in the international community that corruption, particularly in the judiciary, jeopardizes human rights and that this threat is a present danger today. As the High Commissioner for Human Rights starkly told the Council, "Corruption violates human rights."[42]

These developments also make clear, as a matter of international law, that corruption of the judiciary cannot be excused in the name of human rights. As mentioned above, the U.N. Convention requires States "to address [the] consequences of corruption," including by "tak[ing] . . . remedial action."[43] Based

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40 U.N. Special Rapporteur on the Independence of Judges and Lawyers, Integrity and Ethics: Statement to the U.N. Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw (November 8–9, 2006), available at http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Cumaraswamy.pdf (last visited Oct. 7, 2014).

41 Human Rights Council Advisory Comm. on the Negative Impact of Corruption on the Enjoyment of Human Rights, Progress Rep. on its 26th Sess., Jun. 10–27, 2014, ¶12, U.N. Doc. A/HRC/26/42 (May 14 2014).

42 Office of the U.N. High Commissioner for Human Rights, *supra* note 31 at 9 (reproducing statement).

43 U.N. Convention, art. 34.

on the facts the District Court found, that is what the relief the Court entered below aims to do.[44] For if the Court's findings are true in whole or substantial part, they reveal a pattern of corruption the international community—including both the United States and Ecuador—is committed to combat and redress exactly because it strikes at the heart of human rights.

B. Corruption in the Judiciary Harms Legitimate Human Rights Claimants

This case is about more than the right of a company sued in Ecuador to a fair trial and due process. Whatever may be the claims in Ecuador, one cannot justify the kind of misconduct that the District Court found occurred in the Ecuadorian action. At bottom, Appellants' contention, that judicial review of their conduct of the Ecuadorian litigation is a distraction from the Ecuadorian plaintiffs' claims for relief, implies that corrupt means are justified in order to obtain a court decision that ostensibly protects the human rights of those on whose behalf those means are employed. That notion is backwards: Corrupting a court to obtain a result favorable to human rights ends by undermining human rights.

Claims based on human rights, like any legal claim, must be proven; the assertion of the claim is not enough. And if a given human rights claim can be proven, then a judiciary resistant to corruption is the essential forum in which to do

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[44] *Amici* do not take any position regarding the propriety of the relief the District Court entered as a matter of U.S. law.

so. Indeed, a judgment in favor of a human rights claimant will only receive just recognition if it is the product of a fair and impartial judicial process. *Cf. Hilton v. Guyot*, 159 U.S. 113, 202 (1895) (A foreign judgment should be recognized "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings . . . and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment . . . .").

International law recognizes the key role judiciaries play in safeguarding human rights. Thus, the former U.N. Special Rapporteur on the Independence of Judges and Lawyers singled out the judiciary as "one institution pivotal to deal with corruption and human rights violations."[45] He further explained that, "If the justice system"—which "includes not just the judges but the prosecutors and lawyers too"—"is perceived as corrupt and wanting in integrity there is no hope whatsoever for combating corruption and [the] protection of human rights."[46]

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[45] U.N. Special Rapporteur on the Independence of Judges and Lawyers, *supra* note 40, at 11.

[46] *Id*. at 13.

Improper means thus subvert even just ends. As the U.N. High Commissioner for Human Rights explained in the 2013 report, *The Human Rights Case against Corruption*, "In countries where corruption pervades governments and legal systems, law enforcement and legal reform are impeded by corrupt judges, lawyers, [and] prosecutors." Such corruption "can compromise the right to equality before the law and the right to fair trial, and especially undermine[s] the access of disadvantaged groups to justice." At the end of the day, "corruption in the rule-of-law system weakens the very accountability structures which are responsible for protecting human rights."[47] Similarly, Transparency International explained, in a 2007 annual report devoted to corruption in the judiciary, that "[j]udicial corruption undermines citizens' morale, violates their human rights, harms their job prospects and national development and depletes the quality of governance. A government that functions on behalf of all its citizens requires not only the rule of law, but an independent and effective judiciary to enforce it to the satisfaction of all parties."[48]

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[47] Office of the U.N. High Commissioner for Human Rights, *supra* note 31, at 4.

[48] Transparency International, Global Corruption Report 2007: Corruption in Judicial Systems xvi (2007), *available at* http://archive.transparency.org/misc/migrate/publications/gcr/gcr_2007 (last visited Oct. 8, 2014).

In short, advocates for human rights causes must also be opponents of judicial corruption; the fair application of the law is the ultimate human rights guarantee. This is one reason why the international community is committed to establishing judicial systems around the world capable of protecting legitimate human rights claims. That effort is undermined—especially in countries whose judiciaries are already susceptible to corruption—if lawyers claiming to advance the cause of human rights bribe and coerce judges, manipulate court experts, and tamper with evidence.

CONCLUSION

Corruption of the judiciary is unacceptable in any litigation, including lawsuits purporting to vindicate human rights. If the facts regarding attorney and judicial misconduct as found by the District Court are accurate in whole or significant part, the conduct of the litigation in Ecuador cannot be excused in the name of human rights. On the contrary, it has done that cause a grave disservice, and it should be remedied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,779 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2013.

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/s/Richard J. Holwell
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