June 12, 2018

Mr. Michel Forst
Special Rapporteur on the Situation of Human Rights Defenders
Office of the United Nations High Commissioner for Human Rights
8-14 Avenue de la Paix 1211
Geneva 10 Switzerland
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RE: Update/supplement to submission regarding Chevron Corporation attacks on human rights defenders in Ecuador and the United States

Dear Mr. Forst:

This petition follows upon an earlier petition we made to your office over a year ago, which, we understand, has not been acted upon. We represent certain Ecuadorians who won an environmental judgment in 2011 that ordered Chevron Corporation to pay for the remediation of hundreds of toxic oil pits the company left in our communities after decades of operations there. Since 2011, Chevron has refused to pay and instead attacked our clients and their judgment with a massive campaign of retaliatory litigation and other pressure, involving literally dozens of collateral lawsuits and culminating in a private "civil RICO" lawsuit, selectively filed with a judge who had shown favor to Chevron in prior proceedings, and accusing our clients of criminal "racketeering" and fraud.[1] The result is that, despite 24 years of litigation and having won a final judgment affirmed by Ecuador's highest court, their lives remain at risk. Today, their children are being exposed to the same toxins that have taken the lives of so many of their family members and neighbors.[2]

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[1] A perilous fact about "civil RICO" actions in the United States is that it allows private parties to accuse each other of criminal conduct, but requires only a minimal level of proof far below the standard usually required to establish criminal charges.

[2] *See, e.g.*, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/ V.II.96 (1997), *at* http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm ("Conditions of severe environmental pollution [from operations managed by Texaco, the predecessor to Chevron], which may cause serious physical

The specific individuals who make this petition, by and through undersigned counsel (and listed by name at Annex A), were "named plaintiffs" in the Ecuadorian environmental lawsuit. They are unquestionably "human rights defenders." At great personal risk (and, notably, for no promise of personal gain), they signed onto a lawsuit against one of the most powerful entities on the planet—one whose power in Ecuador, especially in 1993 when the lawsuit began, was immense. By initiating this process and demanding a clean-up of the waste pits, they sought to protect the environmental and human rights (including the right to live in a healthy environment) of their entire communities. The claims were explicitly raised in a representative capacity—the plaintiffs claimed on their own behalf only as members of larger community they represented. As described herein, they have since been personally targeted for harassment by Chevron, and targeted indirectly through attacks on their legal and political representatives.

We understand that the conduct which we challenge—the abuse of purportedly legitimate civil proceedings to inflict reprisals and undermine the work of human rights defenders, also often called Strategic Litigation Against Public Participation (SLAPP)—is often seen as difficult to challenge because, at least when practiced by governments or wealthy corporations, it carefully uses the legitimate procedures of law to accomplish illegitimate and rights-depriving ends. We seek your attention because your office is uniquely situated to look past the insidious "defense" of compliance with domestic law to consider the actual effect of such conduct on internationally-protected human rights. Although we are not aware of any particular investigations your office has conducted involving similar facts, we are appreciative that you highlighted the problem in general terms in your recent report:

> The use of "strategic litigation against public participation" (SLAPP) lawsuits silences [Environmental Human Rights Defenders], effectively denying them both their rights to freedom of expression and participation in public affairs. EHRDs require support in their defence against such lawsuits, the financial and psychological burdens of which are often so great that they distract and demobilise defenders.[3]

Our claim is that the United States, through its judicial institutions, has facilitated and as such is complicit in the violation of fundamental rights (as outlined in Part III of this letter) by the abusive use of said institutions by Chevron to, in its own words, "taint" the Ecuadorian environmental judgment and "demonize" those individuals who brought it about. We submit that Chevron's conduct has worked a grave injustice and that the time to act is now. As we note below, we are not the only human rights and environmental defenders who have faced these kinds of purportedly lawful reprisals. It is a serious and

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illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.")

[3] "They Spoke Truth To Power And Were Murdered In Cold Blood" (adaptation of the official report A/71/281), United Nations Special Rapporteur on The Situation Of Human Rights Defenders at 32 (2016) ("Truth to Power"), at https://goo.gl/r8G8Bg.

growing threat, and we hope to work with your office to better understand it and develop strong rights-compatible responses to it.

## I. The Ecuadorian Environmental Judgment

From 1993-2002, Chevron resisted attempts to have environmental claims regarding its operations in Ecuador litigated in U.S. courts, insisting that the proper forum was Ecuador. It succeeded in having the U.S. litigation dismissed, and hoped the case would disappear. Instead, the Ecuadorians re-filed their claims in Ecuador, and from 2003-2011, an Ecuadorian court presided over a rigorous trial that generated a voluminous record of 220,000 pages, containing more than 100 expert reports, over 64,000 lab results taken at dozens of court-supervised inspections, the testimony from dozens of witnesses, numerous independent public health studies, and reams of legal argument. In its final verdict of February 14, 2011, the court concluded that "natural water sources throughout the Concession have been contaminated by the defendant's hydrocarbon activities, and in light of the dangerousness of the discharged substances and all the possible methods of exposure, the contamination puts at risk the health and lives of persons in general and of the ecosystem."[4] One expert, Dr. Daniel Rourke, formerly of the RAND Corporation, concluded that more than 9,000 Afectados could contract cancer due to exposure to oil contamination.[5] As noted, petitioners here are the Ecuadorian "named plaintiffs" to that proceeding, although their participation was representative in nature and they sought damages and remedies on behalf of the larger community.

Although Chevron raised numerous claims of unfairness and due process problems (including its constant claims of "fraud" which began early in the case and have continued to this day), the Ecuadorian trial court fully addressed, and, on the merits, rejected, each of Chevron's claims, although in a few instances it responded by striking

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[4] Final Judgment of Feb. 14, 2011, *Aguinda v. Chevron Corp.*, at p. 147. For a copy of the judgment and appeals decisions, in both Spanish and English, as well as an English summary of the judgment's findings, *see* http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team.html.

[5] See Dr. Daniel Rourke, *Estimate of the Number and Costs of Excess Cancer Deaths Associated with Residence in the Oil-Producing Areas of the Sucumbíos and Orellana Provinces in Ecuador*, Sept. 12, 2010, in the Ecuadorian trial record at 1967:206,576-206,597; Dr. Daniel Rourke, Addendum Report, Sept. 15, 2010. *See also*, *inter alia*, A.K. Hurtig and M. San Sebastian, *Incidence of Childhood Leukemia and Oil Exploitation in the Amazon Basin of Ecuador*, Int'l J. of Occupational and Env'l Health (July/Sept 2004); M. San Sebastián, B. Armstrong, J.A. Córdoba and C. Stephens, *Exposures and cancer incidence near oil fields in the Amazon basin of Ecuador*, Occup. Environ. Med 58:517-522 (2001); A.K. Hurtig and M. San Sebastian, *Geographical differences in cancer incidence in the Amazon basin of Ecuador in relation to residence near oil fields*, Int'l J. of Epidemiology (2002); A.K. Hurtig and M. San Sebastian, *Gynecological and breast malignancies in the Amazon basin of Ecuador*, 1985-1998, Int'l J. of Gynecology & Obstetrics (2002).

contested (allegedly "fraudulent") evidence from the record to avoid even that appearance of due process issues in the proceeding. This did not slow Chevron from continuing and indeed increasing its "fraud" and due process claims on appeal, but these claims were rejected yet again by an intermediate Ecuadorian appellate court, which held, among other things, that Chevron's claims "go nowhere without a good dose of imagination."[6]

In November 2013, Ecuador's National Court of Justice, its highest civil court (cassation), affirmed Chevron's liability on the Ecuadorians environmental claims, affirmed the imposition of damages (although it struck out punitive damages that had been imposed by the lower courts), and again rejected Chevron's due process claims.[7]

## II. Chevron's "SLAPP" Retaliatory Litigation

Chevron's response to our clients' victory in the underlying environmental litigation (in a judgment that was affirmed on appeal and subsequently by Ecuador's highest civil court), has truly and unapologetically abominable. It refused to accept the judgment, instead promising, openly, a "lifetime of appellate and collateral litigation," and to "fight it out until hell freezes over, and then fight it out on the ice." What this looks like in practice has been astounding.[8] Using a team of over 2,000 lawyers and consultants (by the its own admission), Chevron filed ***literally dozens*** of civil, quasi-criminal, and privately-filed criminal lawsuits against our clients and the lawyers, experts, and activists who have supported them over the years, obtaining in the process hundreds of thousands of attorney-client privileged documents that should have been protected. Using shadowy corporate "investigations" and "solutions" consultancies, Chevron manufactured false allegations of bribery and fraud, including by paying corrupt individuals for "fact" testimony tailored to Chevron's narrative. Along the way, Chevron has used a range of tactics to keep up its self-described "L-T [long-term] strategy to demonize"[9] our clients and their representatives, including the filing of criminal complaints, the filing of professional disqualification complaints, and constant attacks on defenders in the press and on Chevron-sponsored blogs.

This strategy has subjected a wide range of individuals beyond the Ecuadorian plaintiffs—lawyers, activists, scientists—to severe intimidation, physical and emotional harassment, damage to reputation, financial burden to the point of bankruptcy, and even

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6 *See supra* note 4, appellate decision dated Jan. 13, 2012.

7 *See supra* note 4.

8 The most comprehensive account of this retaliation campaign is Alexander Zaitchik, *Sludge Match: Inside Chevron's $9 Billion Legal Battle With Ecuadorean Villagers*, Rolling Stone, Aug. 28, 2014, http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828.

9 A copy of the Chevron document discussing this strategy was posted here: http://j.mp/1N9qlXS.

fear of trumped-up penal consequences. Nonetheless we make this petition specifically on behalf of our Ecuadorian plaintiff clients. They are the core and most vulnerable human rights defenders in this overall scenario: poor rural farmers and indigenous persons who sought to defend the human and environmental rights of their communities by signing and assisting the environmental lawsuit, even though it meant putting themselves in the crosshairs of one of the world's most powerful corporations. The harm they have suffered ultimately lies in the fact that after 23 years of litigation (and three years after final affirmance of the Ecuadorian judgment by Ecuador's highest court), enforcement of the judgment has been stalled by Chevron's tactics and our clients still have been able to secure the promised protection of the law. For a more detailed look at the rights affected by the conduct described, see *infra* at [ ].

*Discovery Lawsuits*

A more complete background is set forth in the earlier submission of CETIM to the 29th Session of the Human Rights Council. *See* Doc. A/HRC/29/NGO/23. Among the most critical and illuminating background facts is that internal Chevron documents have revealed that as early as 2009, Chevron recognized that it was likely to face a significant adverse environmental judgment and appears to have decided to respond with what its own operatives referred to as a "***L-T [long-term] strategy to demonize***" the lawyers and community leaders behind the environmental case as a way of tainting the expected judgment and rendering it unenforceable.

Chevron began its retaliatory litigation campaign with a series of lawsuits under a U.S. law that allows a party to make "discovery" requests to a U.S.-based person in order to "aid" a foreign litigation. Chevron initiated "an extraordinary series of at least 25 [such] requests to obtain discovery from at least 30 different parties" in more than a dozen federal courts across the United States,[10] an effort one appellate court called "unique in the annals of American judicial history."[11] The lawsuits were aimed at lawyers, organizers, scientists, and others who had assisted the Ecuadorian communities in their environmental lawsuit over the years.[12] The filings initiating the lawsuits were loaded with inflammatory rhetoric about alleged "fraud" and "extortion." They demanded

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10 *In re Chevron*, 633 F.3d 153, 159 (3d Cir. 2011).

11 *In re Chevron*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

12 Individuals targeted by these lawsuits include the lawyers Cristobal Bonifaz, Steven Donziger, Laura Garr, Bern Johnson, Joseph Kohn, Aaron Page, Andres Snaider, Andrew Woods, and Alberto Wray; the scientists Douglas Allen, Lawrence Barnthouse, Douglas Beltman, Charles Champ, David Chapman, Ted Dunkelberger, Richard Kamp, Ann Maest, Carlos Picone, William Powers, Mark Quarles, Daniel Rourke, Robert Scardina, and Jonathan Shefftz; the former law firm Patton Boggs; the consulting firms Uhl, Baron, Rana & Associates and the Weinberg Group; the filmmaker Joe Berlinger; the environmental organizations Amazon Watch and ELAW; and others.

almost unlimited access to the respondents' computers, files, and email accounts, as well as demands that individuals subject themselves to videotaped depositions.

The lawsuits required respondents, at great personal expense, to hire counsel to seek to "quash" the request; lawyer respondents were also required to create a "log" of every single document or communication related to the Ecuadorian cause. The costs of these responsive efforts quickly went into the tens and even hundreds of thousands of dollars. One such lawsuit was reported to have cost the respondent more than $5 million in legal fees. For smaller respondents, Chevron would typically follow-up its filing with a threatening phone call in which lawyers would tell the respondent that the only way to avoid a crushing expense burden would be to hand over all their computers and files without any judicial oversight whatsoever.

Using these lawsuits, Chevron obtained hundreds of thousands if not millions of confidential and often attorney-client privileged documents and communications, as well as 600 hours of outtakes from a renowned documentary filmmaker who had been allowed to film the communities and their representatives for an award-winning 2008 film on the case, *Crude: The Real Price of Oil*. Although these materials reflected nothing incriminating or improper when reviewed fairly in their actual context, Chevron lawyers and PR strategists took snippets of the material out-of-context to weave a fabricated narrative suggesting that parts of the environmental trial process were problematic. Chevron went so far as to snip words out of the middle of video clips, professionally editing the result so that it would appear "seamless"—but mean something completely different.

Indeed, evidence has come to light that Chevron used public relations and private investigations firms for far more, and even more disturbing, intrusive, and intimidating conduct. Chevron hired firms including Kroll and Investigative Research Inc. to prepare dozens reports on individuals assisting the Ecuadorians (including reports on their family members), to offer money to individuals for obviously false testimony (see below), and to implement a vast corporate espionage scheme against the Ecuadorians and their lawyers. One of Chevron's main targets, Steven Donziger, at one point hired his own private investigator and discovered that individuals were surreptitiously following him everywhere he went.[13] Chevron itself occasionally submitted evidence drawn from its espionage operations in court. In at least one instance, it submitted surreptitious photos taken of a meeting between lawyers that would be covered by the attorney-client privilege. Overall, Chevron admitted in court filings that it deployed over 2,000 lawyers, PR consultants, and investigators in assembling its case against the Ecuadorians.

With all its manufactured material in hand, Chevron then took its retaliatory litigation to an even more extreme level.

*"Racketeering" (RICO) Lawsuit*

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13 *See* Declaration of Denis Collins, dated May 31, 2013, at http://j.mp/1Mmnk2T.

In February 2011, Chevron launched a civil "racketeering"[14] lawsuit against under the U.S. "RICO" statute accusing the individual Ecuadorians who had sued it for contamination, along with some of their attorneys and scientific advisers, for alleged "fraud" and "extortion" in bringing the environmental case in Ecuador, which, Chevron claimed was "sham litigation."[15] What followed was a true travesty of justice. The facts are far too voluminous to address comprehensively here, but the following points illustrate some of the disturbing aspects of the process (and subsequently, the result):

- Chevron used a mechanism to maneuver the RICO case to a judge who had previously expressed both open contempt for the Ecuadorian cause, which he maligned as a product of "the imagination of American lawyers" who wanted so much money they would "fix the balance of payments deficit" between the U.S. and Ecuador, as well as outright favoritism toward Chevron, who he thought should be protected so that the American consumer wouldn't "pull his car into a gas station to fill up and find that there isn't any gas there because these folks [the Ecuadorians] have attached it in Singapore or wherever else." This judge even publicly suggested that Chevron bring the RICO case before Chevron actually brought it.
- The U.S. court subjected the Ecuadorians and their attorneys to massive discovery and pre-trial briefing obligations, burning through their limited funds to the point that all the lawyers (except one solo practitioner) were forced to withdraw six months before trial, and the main target of the case, Donziger, spend months representing himself *pro se*. Just before trial, two lawyers agreed to represent the Ecuadorian side in court without compensation, but did so almost completely ignorant of the facts, given they had just joined the case. The Ecuadorian side was assisted by a band of law students and recent unemployed law graduates who worked for free and all slept in a tiny

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[14] "Racketeering" is an intentionally broad term that the drafters of the U.S. statute selected in order to allow prosecutors (who were supposed to be the main users of the law, not private parties) to reach conduct by organized crime that prosecutors until that time had had difficulty challenging in court.

[15] As set forth in the original CETIM submission, the *bona fides* of the Ecuador litigation could not be more obvious. Countless news organizations have documented the massive toxic waste pits at the center of the lawsuit, *see, e.g.*, Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, New York Times, May 14, 2009, at http://j.mp/1OdRPbH, as well as the individuals who have suffered the consequences, *see, e.g.*, Lou Dematteis, *Chevron Says These People Don't Matter*, Huffington Post, Apr. 12, 2012, at http://j.mp/1OdRV32. Recently, videos have come to light showing Chevron's own technical field staff darkly laughing over their inability to find clean soil to present to the Ecuador court as a pretense that the environment was clean and safe. *See, e.g.*, Robert S. Eshelman, *The Chevron Tapes: Video Shows Oil Giant Allegedly Covering Up Amazon Contamination, Vice News*, Apr. 8, 2015, at http://j.mp/1OdRTZ6.

apartment near the courthouse, but the team lacked sufficient funds to obtain transcripts, make sufficient copies of trial materials, and see to countless other trial expenses.

- The court refused to allow the defense (the Ecuadorian side) to conduct any discovery or make any arguments referencing Chevron's massive contamination in Ecuador, *i.e.* the fundamental basis of the Ecuador lawsuit and the motivations of the defendants. Just before trial, the judge indicated that he would impose sanctions on any defense lawyer who even mentioned the word "contamination."
- Just before trial, the U.S. court allowed Chevron to ***drop all its damages claims yet still proceed with the case***. The tactic allowed the court to deny the defense their right to have the case be heard by an impartial jury. In the U.S., all criminal cases and all civil cases demanding more than $20 must be heard by a jury. With this tactic, Chevron was allowed to thread the needle and have the notoriously biased judge described above decide the case by himself. (After trial, the judge allowed Chevron to reinstate a damages claim for $32 million in attorneys fees against the defendants.)
- At trial, the U.S. court allowed Chevron to continue with tactics designed to crush the defense with brute force alone. For example, Chevron was allowed to submit over 2,000 exhibits in one day, and when the defense didn't object to each exhibit individually in four days time, all objections were waived.
- The U.S. court allowed Chevron to submit testimony from secret "John Doe" witnesses; from witnesses who were deposed *ex parte* (i.e. without the other side's lawyers being present); and, most problematically, from a disgraced former Ecuadorian judge named Alberto Guerra, who admitted to taking and paying bribes his entire career, admitted to approaching Chevron offering to sell his testimony, and to whom Chevron indeed paid millions of dollars in cash and benefits, all in flagrant violation of ethical principles against paying "fact" witnesses. Mr. Guerra was Chevron's "star" witness—he was the ***only*** witness who testified (falsely) to alleged bribery in the environmental case.[16]

Given the unbalanced nature of the proceeding, it is no surprise that the U.S. court rendered a RICO judgment in Chevron's favor in March 2014. A powerful appeal was presented, but unfortunately the appellate court in August 2016 affirmed the district court judgment in all respects, without seriously engaging the jurisdictional and legal challenges. Worse, because the Ecuadorian side chose to ground its appeal on the profound legal and jurisdictional problems in the case, the appellate court deployed yet another surprise tactic and pretended that the Ecuador side had conceded the accuracy of

[16] Guerra later admitted that he had indeed lied under oath during the RICO case. *See, e.g.*, Adam Klasfeld, *Ecuadorean Judge Backflips on Explosive Testimony for Chevron*, Courthosue News Service, at http://j.mp/1OdS32J.

the "facts" found by the district court—a ridiculous and plainly disingenuous holding given that the Ecuador side dedicated over 70 pages of the limited space in the briefing to explanations of how and why the district court findings were wrong.[17]

While the Ecuadorian side is requesting that the U.S. Supreme Court review the appellate decision, such review is highly unlikely for a number of technical reasons. Thus the final judgment of U.S. courts—rendered in favor of a U.S. defendant in a proceeding rife with inequities—will likely be allowed to stand as purportedly legitimate and binding against Mssrs. Camacho and Piaguaje (and could later be held to apply to the remainder of the Ecuadorian plaintiffs, against whom default judgments were entered). While Chevron strategically dropped all its money damages in order to avoid a jury, as noted above, it has indicated that it may yet seek an order of legal fees in the tens of millions of dollars. And the U.S. judgment as it stands purports to enjoin Mssrs. Camacho and Piaguaje from receiving anything of value from the Ecuadorian judgment, an injunction which fundamentally misunderstands the purely collective nature of the relief ordered in the Ecuador case, but that nonetheless could be used by Chevron for future mischief. Ultimately, the most problematic result of the U.S. proceedings is that the RICO case has been and will be used by Chevron to "taint" the Ecuadorian judgment in the eyes of more impartial courts in other countries where the Ecuadorians have taken their environmental judgment for enforcement (after Chevron illegally refused to pay it in Ecuador and removed all its assets from the country). While the RICO case should not ultimately block enforcement, because fair-minded countries like Canada will be troubled by the procedural flaws outlined above and make their own assessment of the Ecuadorian judgment, which we are confident will be upheld, nonetheless Chevron's leverage of the RICO case in Canada and other countries likely will (indeed already has) slow down the enforcement process tremendously. This compounds violations of the Ecuadorians right, as described below.

We can certainly provide your office with more details on the factual and legal problems with the U.S. proceeding as necessary. For purposes of the present petition, we submit that the RICO lawsuit can and should be seen in the broader context: a powerful multinational, dissatisfied with an environmental rights judgment in Ecuador, was able to

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[17] Ironically, the falsity of Chevron's allegations and the district court findings has increasingly revealed in the last several years as a result of other collateral litigation Chevron initiated against the Republic of Ecuador itself, which Chevron sought to use to force the Republic to quash the environmental case. The Republic's vastly better-resourced legal team was able to dig deeper into Chevron's allegations and produce a powerful series of rebuttals, which can be provided as necessary. Moreover, the Republic was able (indeed, it was forced by Chevron) to produce the hard drive of the computer on which the Ecuadorian judge wrote the environmental judgment, and a subsequent forensic analysis of the drive revealed that judge did indeed write it, in his office, saving it day by day, in the months leading up to its issuance—thus completely destroying Chevron's bribery allegation that claimed that the Ecuadorian side wrote the judgment and gave it to the judge on a flash drive only days before it was issued. *See, e.g.*, [ ].

use U.S. courts in abusive fashion (relying *inter alia* on nationalistic judicial favoritism and its massive resource advantage) to retaliate against the protagonists behind the environmental case and obtain a U.S. judgment tailored to the task of breathing life into the "fraud" claims that Chevron will use to resist paying for environmental damage for years to come. It was able to use the U.S. civil justice system as a powerful weapon against human rights defenders. Exactly how this happened and what it means are questions that call out for inquiry from your office.

*Ecuador Criminal Complaint*

Chevron has also sought to intimidate representatives of the plaintiffs in the Ecuadorian environmental litigation by pressuring prosecutorial authorities in Ecuador to open an investigation (Indagación Previa 235-2010) and potentially pursue criminal charges for alleged "falsification of documents," a charge the representatives categorically deny. Chevron wrote letters to the Fiscalía General del Estado on at least four occasions in 2010-2011, and filed a more formal charges on several occasions in 2012.[18] In response, the Fiscalía has indicated that it has opened a file and it has received testimony from some of the representatives so accused, but otherwise makes no information available regarding the status of any investigation or its considerations regarding the merits or justifications of any investigation.

## III. Rights Affected

The juridical and normative details of how Chevron's abusive RICO strategy should be assessed and addressed under the international human rights rgeime is a complicated question beyond the scope of this letter; indeed it is precisely the question on which we seek your office's expertise by way of this petition. Nonetheless, from our perspective we can quickly identify a number of fundamental rights are implicated. They are violated most directly by the conduct of Chevron Corporation, an important point given that the status of corporations as subjects of both rights and obligations at international law has been growing rapidly in recent international legal practice.[19] Simultaneously, under established international precedent, the United States bears responsibility at the international level for the violation of rights by private individuals that violate rights using its institutions and procedures. The rights violations described below are also twofold in that they each work to effect a violation of our clients rights as defendants or impacted third-parties to the U.S. RICO and litigations, and effect a violation of our clients rights in Ecuador, both guarantees of effectiveness related their environmental trial and guarantees of substantive norms such as rights to life, physical integrity, and health. Some of the rights we see affected include:

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[18] *See* http://j.mp/1SZaABI.

[19] *See, e.g.*, Holding Investors Accountable for Human Rights Violations, JDSupra (legal blog), Feb. 9, 2017, at http://www.jdsupra.com/legalnews/holding-investors-to-account-for-human-59713/.

- The right to a fair trial as guaranteed in Article 14(1) of the ICCPR[20] and Article 8(1) of the American Convention[21], both in respect of the unfairness of the U.S. SLAPP lawsuits in themselves, and their effect on the Ecuadorians' fair trial rights arising from their environmental case. The fair trial right under the American Convention, for example, includes a right to have a determination of one's claim "within a reasonable time"—a commitment that was already stretched to the breaking point when Chevron delayed the environmental trial to over eight years, and that is clearly violated by Chevron's self-serving refusal to pay and its "taint" strategy that could delay enforcement by another decade.

- The right to judicial protection, or "simple and prompt recourse, or any other effective recourse . . . for protection against acts that violate [one's] fundamental rights" as provided in Article 25(1) of the American Convention. Again, this applies both to the lack of recourse for rights violations within Chevron's SLAPP litigations and the undermining effect the same have had on the effective recourse that should be provided by the Ecuadorians' environmental case.[22]

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[20] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Article 14(1) provides rights to fairness and independence in legal proceedings, including in the determination of "rights and obligations in a suit at law."

[21] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

[22] We note that Ecuador's obligations with respect to a fair trial, judicial protection, and remedies are even more profound with respect to indigenous persons and communities, such as the Cofán, Secoya, Siona, Kichwa, and Huaorani among the Ecuadorian plaintiffs. Ecuador has ratified the 1989 Convention Concerning Indigenous and Tribal Peoples, which requires it to ensure that indigenous peoples are "safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through representative bodies, for the effective protection of these rights." ILO Conv. No. 169, 72 ILO Official Bull. 59, art. 12. Under that Convention, Ecuador has further committed to adopting "[s]pecial measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned." *Id.*, art 4(1). Customary international law increasingly provides for similar obligation on Ecuador and other states, as exemplified in the 2007 UN General Assembly Declaration on the Rights of Indigenous Peoples, which provides that "indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes . . . as well as to effective remedies for all infringements of their individual and collective rights" and that States shall "provide effective mechanisms for prevention of, and redress for . . . [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources." G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), arts. 40, 8.

- The specific right to determination and enforcement of remedies, *i.e.* to "have [one's] rights determined by the competent authority provided for by the legal system of the state," and the requirement that such "competent authorities shall enforce such remedies when granted." Article 25(2). When U.S. courts are used as tools to ***block*** the enforcement of duly-ordered remedies, a violation of rights has occurred, at least in this case.

- The right to equal protection of the law without discrimination in Article 26 of the ICCPR and Article 24 of the American Convention. We submit that this this norm, central to the human rights regime, is deeply implicated and has been egregiously violated in this case, although we recognize that establishing this may require a careful and equitable approach that emphasized the importance of the practical effect of procedures rather than a limited inquiry into what procedures were used and whether they were lawful on their face.

- The right to life, physical integrity, and health, as provided in Article 6 of the ICCPR, Articles 4 and 5 of the American Convention, Articles I and XI of the American Declaration, and many other international instruments. As described in the background section above, and as exhaustively detailed in the 188-page Ecuadorian trial court verdict and the appellate court decision (cited above), numerous independent health studies (cited above), and the work of countless independent journalists and filmmakers,[23] the health, integrity, and lives of the Ecuadorians and their communities have been under continuous threat and actual violation for almost 50 years. To occasion further delay in any process that would begin to remedy these violations would be a complete violation of Ecuador's human rights commitments, including its commitment under the Protocol of San Salvador, ratified by Ecuador in 1993, which in addition to the right to health specifically guarantees "the right to live in a healthy environment" and commits Ecuador to the protection, preservation, and improvement of the environment.[24]

## IV. Growing Threat

Finally, we want to briefly note that, unfortunately, the abuse of purportedly legitimate civil proceedings to attack and undermine the work of human rights defenders is not confined to this case, but is on the rise, particularly in U.S. courts. While there has been some attention to the use of defamation litigation as a weapon against defenders,[25] RICO lawsuits, at least in the United States, may be the next frontier. One concerned U.S.

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[23] *See, e.g.*, "The Amazon's Toxic Mess," *Sunday Night*, Australia Channel 7, Oct. 9, 2011, *at* http://au.news.yahoo.com/sunday-night/video/watch/26872380/; "Amazon Crude," *60 Minutes*, CBS News, May 8, 2009, at http://www.cbsnews.com/stories/2009/05/01/60minutes/main4983549_page3.shtml; [ more—newer ]

[24] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S. Treaty Series No. 69 (1988), *entered into force* Nov. 16, 1999.

judge noted that commercial litigants used the RICO statute for its "stigmatizing" and even "terrorizing" effects and "to score a tactical edge or to deal the heaviest possible vengeful blow to the defendant's personal reputation."[26] Another called RICO "the litigation equivalent of a thermonuclear device."[27] Now that Chevron has shown that this weapon can be successfully deployed against environmental and human rights defenders, other companies may take an interest.

For present purposes, we will highlight the recent development in which the logging giant Resolute Forest Products brought a RICO lawsuit against the environmental organization Greenpeace—and against particular Greenpeace employees that it sued in a personal capacity and aggressively demonized in its complaint. The lawsuit claims that, in its own words, "'Greenpeace' is a global fraud"; Greenpeace's use of aggressive advocacy such as claiming that Resolute is a "destroyer" of forests is objectively false such that its distribution of such statements amounts to mail fraud, wire fraud, extortion, and "interference with commerce"; and that Greenpeace's fund-raising for such advocacy amounts to money laundering. While Greenpeace has moved to have the case dismissed at a preliminary stage, it has nonetheless had to numerous law firms and prepare, at last count, [●] lengthy briefs.

While Greenpeace's dedication of significant resources (likely in excess of $500,000) hopefully means that the case will go away soon, it is easy to see how a smaller organization (much less a sole defender or disorganized group without any resources, like the Ecuadorian side in the RICO case) could get overwhelmed. And even if Greenpeace prevails in the case, the process has likely been personally traumatic for the individual employees named and attacked in the lawsuit, and may well lead them, and

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[25] *See, e.g.*, Front Line Defenders, at https://www.frontlinedefenders.org/en/violation/defamation ("in many countries, defamation laws have a become a tool to silence human rights defenders and journalists"); "On Dangerous Ground: The Killing And Criminalization Of Land And Environmental Defenders Worldwide," Global Witness (2016), at https://goo.gl/dMBDbL (describing several civil prosecutions against defenders); "Rights groups call for end to harassment of rights defenders citing 'worrying' trend of defamation charges against activists," Business & Human Rights Resource Centre (BHRRC), at https://goo.gl/iwuE6B; "French court hears defamation lawsuit brought by Vinci against Sherpa NGO after it alleged forced labour in Qatar," BHRRC, at https://goo.gl/QZ8AAN; "Mining company Delco files defamation suit against writer for essay about a fish lamenting the destruction of a creek," BHRRC, at https://goo.gl/GGXzQO; Carolyn Fortuna, "ACLU Lawsuit Forces Landfill Company to Agree to Free Speech and Environmental Protections," Planetsave.com, at https://goo.gl/Hw1D3y ("defendants [four community activists] were sued for $30 million by a Georgia-based waste company for their vocal opposition to the hazardous coal ash that the company keeps in a landfill in a residential area").

[26] *Gross v. Waywell*, 2009 U.S. Dist. LEXIS 52599 (S.D.N.Y. June 16, 2009).

[27] *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996).

perhaps Greenpeace generally, to lessen the intensity of their advocacy—as the result of what we hope is a transparently abusive use of U.S. civil justice procedures.[28]

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Attention to the plight of human rights defenders has historically and appropriately focused on violations that defenders suffer that threaten their lives and result from obvious violations of the law. In this letter we hope we have drawn you attention to the somewhat more complicated problem of when defenders are threatened by the strategic use of lawful civil justice procedures to achieve rights-abusing ends. While, as noted, we are appreciative of the mentioning of the issue in your recent report, we also note that none of the reports recommendations regarding legal frameworks or recommendations directed at States or business appeared to address the issue.[29] We believe it is time that the issue, despite its difficulties and complications, be further drawn into public discussion and investigation.

On the basis of the facts set out above, and any additional facts your office may require, we respectfully call on the Office of the Special Rapporteur on the Situation of Human Rights Defenders to take a stand in defense of the human rights principles and the defenders under attack by way of Chevron's abusive civil litigation strategy. We are available to enter into a dialogue, including with our Geneva-based partner, CETIM, how this might best be achieved given the unique complexities of this case. At a minimum, we think your Office should use any available channels to communicate to U.S. diplomatic and human rights officials that there are serious human rights implications to how U.S. courts have been handling Chevron's claims, and that safeguards may be required to prevent legitimate civil justice processes from being manipulated to intimidate or inflict reprisals at the cost of the freedom of expression and other human rights.

Sincerely,

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[28] In another case, the circus conglomerate Ringling Brothers Barnum & Bailey brought a lawsuit against animal rights groups such as the Humane Society based on their advocacy on behalf of circus animals. The animal rights groups ultimately agreed to settle the case and even make a payment to Ringling Bros. to avoid the enormous cost of going to trial. *See, e.g.*, Thomas Heath, "Ringling Circus prevails in 14-year legal case," Washington Post, May 16, 2014, at http://j.mp/1OdRZQm.

[29] Truth to Power, *supra*, at 35, 45-47.

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