RICO AS A CASE-STUDY IN WEAPONIZING DEFAMATION AND THE INTERNATIONAL RESPONSE TO CORPORATE CENSORSHIP

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The emergence of the Racketeer Influenced and Corrupt Organization Act (RICO) as a corporate weapon against critical advocacy represents an aggressive new phase in the evolution of Strategic Lawsuits Against Public Participation (SLAPPs) in the United States. RICO enables corporations to act as surrogates for federal prosecutors and smear critics with spurious criminal allegations. As such, it provides a vivid example of how corporations in the USA and beyond are increasingly able to operate in a way analogous to governments, using heavy-handed legal tactics as a means of privatized censorship. In this Article, we will detail the corrosive impact SLAPPs have on free speech, explain how international human rights law has direct and immediate implications for the use of SLAPPs by corporations, demonstrate how existing human rights instruments can be interpreted and applied to meet this new challenge, and highlight where further action is needed by human rights institutions.

I. INTRODUCTION

In recent years, a discernible growth in Strategic Lawsuits Against Public Participation (SLAPPs)[1] have been reported by human rights groups around the world. In India, Amnesty International recognized an "increasing

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[1] SLAPP is "a strategic lawsuit against public participation – that is a suit brought by a developer, corporate executive, or elected official to stifle those who protest against some type of high-dollar initiative or who take an adverse position on a public-interest issue (often involving the environment)". *SLAPP*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See* GEORGE PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8-10 (1996).

use of strategic civil defamation lawsuits" – a practice referred to in the United States as SLAPPs – in its 2014 submission to the Law Commission of India,[2] while separately noting a similar trend in the Philippines.[3] Thai academics and human rights lawyers have called for legal reform to stop a rising tide of SLAPPs.[4] In South Africa, Otto Saki from the Ford Foundation recently noted that 'the use of SLAPP suits in South Africa is becoming a trend',[5] while Earth Rights has described the SLAPP tactics used in Ecuador as being "the most extreme" example of a "rise in SLAPP . . . suits by corporate defendants against the human rights attorneys and NGOs that have advocated against them."[6] In Canada, meanwhile, EcoJustice pointed to the "worrisome trend of SLAPP suits" in a report detailing the "urgent need for anti-SLAPP legislation in Ontario."[7] While less has been written about European SLAPPs, a number of European countries have seen a similar trend: a recent article in the *Malta Independent* noted a "new menace of SLAPP lawsuits being faced by the Maltese media," with "Malta's three English language newspapers [all being] SLAPPed with potentially financially crippling lawsuits to the tune of tens of millions of Euros."[8]

While global in nature, the SLAPP trend is particularly pronounced in countries that lack procedural safeguards, legal aid or otherwise affordable legal services, and measures to sanction abusive legal practices. The USA suffers various degrees of these deficiencies and is therefore particularly fertile ground for SLAPPs. For example, the "American rule" of costs

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[2] *See Amnesty Int'l India Submission to the Law Commission of India*, 7 (June 20, 2014), https://www.scribd.com/document/231925192/Amnesty-International-India-Submission-on-Media-Laws-With-Summary.

[3] *Amnesty International Report 2010 - Philippines* (Mar. 19, 2011), http://www.refworld.org/docid/4c03a80946.html.

[4] Pratch Rujivanarom, *When Freedom of Speech is SLAPPED By law Enforcement*, SUNDAY NATION (Aug. 6, 2017), http://www.nationmultimedia.com/detail/politics/30322931.

[5] Otto Saki, *How Companies are Using Lawsuits to Silence Environmental Activists—and How Philanthropy Can Help*, FORD FOUND. EQUAL CHANGE BLOG (June 13, 2017), https://www.fordfoundation.org/ideas/equals-change-blog/posts/how-companies-are-using-law-suits-to-silence-environmental-activists-and-how-philanthropy-can-help.

[6] Katie Redford, *Corporate Rights or Human Rights?*, EARTHRIGHTS INT'L BLOG (Oct. 16, 2013), https://earthrights.org/blog/corporate-rights-or-human-rights.

[7] EcoJustice & Can. Envir. Law Ass'n, *Breaking the Silence: The Urgent Need for Anti-SLAPP Legislation in Ontario*, ECOJUSTICE 11 (2010), https://www.ecojustice.ca/wp-content/uploads/2014/11/Breaking-the-Silence_the-need-for-anti-SLAPP-legislation.pdf.

[8] David Lindsay, *SLAPP lawsuits: Parliament Cannot Prevent Foreign Lawsuits but Maltese Courts Could Limit Damages*, MALTA INDEP. (Dec. 31, 2017), http://www.independent.com.mt/articles/2017-12-31/local-news/SLAPP-lawsuits-Parliament-cannot-prevent-foreign-lawsuits-but-Maltese-courts-could-limit-damages-6736183102.

apportionment limits judicial discretion to penalize abusive plaintiffs,[9] while an absence of legal aid combined with eye-wateringly high legal fees makes it prohibitively expensive for SLAPP victims to defend themselves.[10] Although some form of anti-SLAPP legislation exists in 28 states (along with the District of Columbia and Guam), no procedural safeguards exist on a federal level to protect against SLAPPs.[11]

Public watchdogs are also likely to be more exposed to SLAPPs in jurisdictions with loosely worded laws targeting speech, allowing SLAPP litigants to disguise or "camouflage" their attacks as standard civil disputes.[12] Given the ambiguity inherent in definitions of "opinion" and "fact," defamation lawsuits are unsurprisingly the most common vehicle for SLAPPs.[13] This Article, however, focuses on the corporate exploitation of the more aggressive Racketeer Influenced and Corrupt Organizations Act (RICO), whose broadly worded provisions have been the subject of controversy since its passage into law in 1970. Over the last ten years, the USA's federal racketeering law has developed into a powerful instrument to shut down the speech of advocacy groups. Today, its abusive application provides a stark illustration of the dangers of unfettered corporate power.

II. THE FEDERAL ABUSE OF RICO

Enacted as Title IX of the Organized Crime Control Act of 1980, the stated purpose of RICO was for "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[14] It would advance its objectives – described in a Justice Department training memo as being "to hit organized crime in the

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[9] *See* Clara Jeffrey & Monika Bauerleinoct, *Why We're Stuck With $650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us*, MOTHER JONES (Oct. 23, 2015), http://www.motherjones.com/politics/2015/10/why-wont-we-get-our-legal-fees-back.

[10] *See* Leaders, *America's Lawyers: Guilty as Charged*, ECONOMIST (Feb. 2, 2013), https://www.economist.com/news/leaders/21571141-cheaper-legal-education-and-more-liberal-rules-would-benefit-americas-lawyersand-their ("During the decade before the economic crisis, spending on legal services in America grew twice as fast as inflation.").

[11] Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 436 (2017).

[12] The term "camouflage" was used in this context by George Pring, who described SLAPPs as "masquerad[ing]" legally and entering the system "camouflaged as one of six ordinary torts." *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989).

[13] *Id.* Pring describes how in the 228 cases he and Penelope Canan studied, 53% were defamation. The others were business torts (32%), judicial torts (20%), conspiracy (18%), constitutional/civil rights violations (13%), and nuisance/other (32%).

[14] S. REP. NO. 91-617, at 76 (1969), https://www.justice.gov/usam/usam-9-110000-organized-crime-and-racketeering#9-110.100.

pocketbook" – with "enhanced sanctions and new remedies."[15] As mafia boss Gennaro Angiulo once boasted under federal surveillance, RICO "was only written for people like [me]."[16]

As the *Wall Street Journal* put it, RICO ties "the big bosses to the crime of their underlings" by claiming they were all part of a "criminal enterprise."[17] Given the focus on organized crime, the "enhanced sanctions and new remedies" provided in the Organized Crime Control Act were designed to be severe and punitive.[18] Criminal measures include 20 years imprisonment,[19] a fine of up to twice the gross profits derived from the racketeering,[20] the confiscation of legitimate businesses if purchased with illegally obtained money,[21] and the seizure of funds and property before the trial.[22] Meanwhile, in civil cases, treble damages and attorney's fees can be levied.[23] These penalties were deemed so severe that, even as the measure was being approved and signed into law, experts were expressing doubt as to its constitutionality.[24] Testifying against the bill in a 1970 subcommittee hearing, Lawrence Speiser of the American Civil Liberties Union (ACLU) warned that the language of the bill was so broad that "offenses of the kind [that] resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill."[25] President Nixon nonetheless signed the bill into law on October 15, 1970, declaring that the new law would "launch a total war against organized crime[, a]nd we will win this war."[26]

Despite this bold rhetoric, today RICO is only occasionally put to use against organized crime.[27] This has been attributed to the "[last-minute

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[15] Karla Spaulding, *Hit Them Where it Hurts*, NW. U. PRITZKER SCH. L. 96. (1989).

[16] *Proposed Rico Reform Legislation: Hearing on S. 1523 Before the H. Comm. Judiciary*, 100th Cong. (1989) (statement of William Weld, Assistant Attorney General, Criminal Division).

[17] Nathan Koppel, *They Call it RICO, and it is Sweepin*g, WALL ST. J. (Jan. 20, 2011), https://www.wsj.com/articles/SB10001424052748704881304576094110829882704.

[18] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose). The legislative history indicates that 'the forfeiture provision was intended to serve all the aims of the RICO statute, namely, to "punish, deter, incapacitate, and . . .directly to remove the corrupting influence from the channels of commerce." 116 Cong. Rec. 18,955 (1970).

[19] 18 U.S.C. § 1963(a) (2009).

[20] *Id*. § 1963(a)(3).

[21] *Id*. § 1963(a)(2)(d).

[22] *Id*. § 1963(c).

[23] 18 U.S.C. § 1964(c).

[24] Spaulding, *supra* note 15.

[25] Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 832 (1996).

[26] Remarks on Signing the Organized Crime Control Act of 1970, PUB. PAPERS 846 (Oct. 15, 1970).

[27] *See* GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 2-3 (2000).

inclusion] of a civil remedy not confined to governmental plaintiffs,"[28] but the abuse of RICO by federal prosecutors long precedes its abuse by corporations and other private plaintiffs. The problem can better be attributed to the law's vaguely defined scope. Despite the stated purpose of the law, the words "organized crime" were omitted from the statute due to fears that cases would be blocked due to definitional difficulties.[29] Some in Congress recognized at the time that this could cause problems given the inclusion of civil remedies: Representative Abner J. Mivka, for example, noted that "[W]hatever [RICO's] motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrible examples of overreach."[30] Helped along by "vaguely worded predicates and . . . a plain meaning that departs from the intention of some of its authors,"[31] the result is what the *Wall Street Journal* has called "one of the nation's most powerful and sweeping laws."[32] An editorial in 1989 was even more blunt; it concluded that RICO "is very possibly the single worst piece of legislation on the books."[33]

RICO's elastic criminal provisions were always reliant on a disciplined exercise of prosecutorial discretion to prevent overreach. This was conceded by Justice Souter in *N.O.W. v. Schiedler*, where he noted that "conduct alleged to amount to Hobbs Act extortion, . . . or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity."[34] The elasticity of these predicate crimes, coupled with the high damages available, created what the RICO scholar Paul Batista called an "in terrorem effect"[35] – "ironically arming plaintiffs for mob-like, strong-arm tactics."[36]

Prosecutorial discipline was in notoriously short supply during the mafia wars of the 1970s, and it was not long before federal authorities were accused of abusing their powerful new prosecutorial toy. Referring to the transformation of RICO as a "legal monstrosity," William Safire summarized the problem in the *New York Times*: "politically ambitious prosecutors in

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[28] *Id.* at 3.

[29] *See, e.g.*, PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL 2-24 (3d ed. Supp. 2014)

[30] 116 CONG. REC. 35204 (1970) (statement of Rep. Mikva) (discussing implications of Organized Crime Control Act of 1970).

[31] *Application of the RICO Law to Nonviolent Advocacy Groups: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105 Cong. 59-932 (1998) [hereinafter *RICO Law Hearing*] (statement of Rep. Martin Meehan).

[32] Koppel, *supra* note 17.

[33] Editorial, *Second Thoughts on RICO*, WALL ST. J., 319 (May 19, 1989).

[34] N.O.W., Inc. v. Scheidler, 510 U.S. 249, 264 (1994) (Souter, J., concurring).

[35] *See* BATISTA, *supra* note 29, § 1.02.

[36] *Id.*

New York, Chicago and elsewhere, ignoring Justice Department guidelines, have been making themselves famous by misapplying RICO to targets who have nothing to do with organized crime."[37]

It was Rudy Giuliani's crackdown on Wall Street white-collar crime in the 1980s that really marked RICO out as amenable to abuse.[38] Giuliani was accused in an op-ed penned by the New York Civil Liberties Union's Richard Emery of resorting to "an array of extreme measures that threaten the presumption of innocence and the right to an adequate defense in six criminal trials."[39] Giuliani "saw RICO's amorphous language as a potent weapon to rubber-hose and coerce guilty pleas and punish those who refused to cooperate."[40] In particular, Giuliani used RICO's sanctions to freeze the assets of the accused (thereby restricting their ability to pay for attorneys) and used "carefully orchestrated press conferences, news releases and luridly phrased indictments" to convict them in the court of public opinion. After indicting investment firm Princeton/Newport Partners on allegations of tax fraud, for example, Giuliani demanded pretrial forfeitures worth tens of millions of dollars – "prompting spooked investors to abandon the firm, which was consequently liquidated."[41] The firm's conviction was later overturned on appeal, with the IRS finding it had actually overpaid its taxes.

III. THE GROWTH OF CIVIL RICO

With the growth of civil RICO in the 1980s, the aforementioned abuse spread nationwide. According to an American Bar Association study in 1990, for example, "more than 90 percent of the private civil cases alleging RICO violations are not brought against organized crime, but against legal businesses, labor unions, spouses, and in one case, feuding rabbis."[42] As L. Gordon Crovitz quipped, "The law is ensnaring people whose only connection with a racket is the occasional encounter with a screaming baby."[43]

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[37]William Safire, ESSAY; The End of RICO, N.Y. TIMES (Jan. 30, 1989), http://www.nytimes.com/1989/01/30/opinion/essay-the-end-of-rico.html.

[38] See William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 INDEP. REV. 85, 86 (2004).

[39] Branko Marcetic, *The Long, Cruel Career of Rudy Giuliani*, JACOBIN MAG. (Dec. 13, 2016), https://www.jacobinmag.com/2016/12/rudy-giuliani-trump-cabinet-secretary-state-mayor.

[40] DANIEL R. FISCHEL, PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION (1995).

[41] Marcetic, *supra* note 39.

[42]L. Gordon Crovitz, *RICO and the Man*, REASON MAG. (Mar. 1, 1990), http://reason.com/archives/1990/03/01/rico-and-the-man.

[43] *Id.*

Given this abuse, it is perhaps surprising that RICO's civil remedies went "virtually unnoticed and unused" in the 1970s and early 1980s.[44] It wasn't long, however, before potential became a reality. "By 1978 there were only two reported cases involving RICO claims; by 1981, only 13 cases were reported."[45] By 1984 however, over 100 decisions were published on the matter.[46] By 1985 RICO had become the "weapon of choice for civil plaintiffs who perceived in the broad language of the statute a means for articulating novel or creative claims and escalating the potential for the litigation equivalent of terror—the availability of treble damages."[47]

This explosive growth was soon recognized by Supreme Court justices. In the 1985 case of *Sedima, S.P.R.L. v. Imrex Co.*, Justice White wrote in his majority opinion that, while the liberal construction advanced by the plaintiffs should be upheld, "we nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."[48] In his chapter for the 1989 book, "The RICO Racket," Justice William Rehnquist noted that "civil filings under [RICO] have increased more than eight-fold over the last five years to nearly a thousand cases during calendar year 1988" and that "most of the civil suits filed under the statute have nothing to do with organized crime."[49] Rehnquist made similar arguments in a 1985 *Wall Street Journal* editorial entitled, quite bluntly, "Get RICO Cases Out of My Courtroom."[50]

Despite this plea the use of civil RICO continued to balloon. "From 2001 to 2006 alone, civil RICO plaintiffs filed, on average, 759 private civil claims each year."[51] However much judges were concerned by the proliferation of civil RICO, in many cases they were just "hold[ing] that a federal statute meant exactly what it said."[52] Its latent potential as a tool for SLAPP litigants was therefore becoming clear: As Justice Thurgood Marshall noted in his dissenting judgment in *Sedima S.P.R.I v. Imrex Co*., "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no

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[44] A. Darby Dickerson, *Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. § 1965*, 75 NEB. L. REV. 476, 485 (1996).

[45] *Id*.

[46] James A. Doering, *Civil RICO: Before and After Sedima*, 69 MARQ. L. REV. 395, 398 n.17 (1986).

[47] BATISTA, *supra* note 29, at 1-3.

[48] Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 500 (1985).

[49] William Rehnquist, *Reforming RICO, in* THE RICO RACKET (1989)

[50] William Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J. (May 19, 1989).

[51] Caroline N. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning Rico to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 3 (2008).

[52] Craig M. Bradley, *N.O.W. v. Scheidler: RICO Meets the First Amendment*, SUP. CT. REV. 129, 130 (1995).

merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."[53]

IV. TURNING RICO AGAINST ADVOCACY GROUPS

RICO appears to have first emerged as a tool against advocacy groups in a series of cases against anti-abortion activists, culminating with the Supreme Court decision in *N.O.W. v. Scheidler*. The path was cleared for *Scheidler* by the refusal of the Supreme Court in October 1989 to consider an appeal of a $43,000 RICO verdict against 27 activists who demonstrated against a Philadelphia abortion clinic. Edward Tiryak, the attorney for the clinic, said at the time that the "political objective" of including the RICO charge was to "expose these people as not just Mom and Pop demonstrating in front of a clinic and trying to express their views."[54]

The sole predicate crime cited as the basis for the RICO suit in *Scheidler* was extortion.[55] Crucially, while the plaintiffs attached an appendix to the complaint listing a series of crimes such as arson and bombing committed in the last 15 years, none were committed by the named defendants and no link with the arsonists and bombers was alleged.[56] Instead, acts such as sit-ins and blocked entrances (and even "trying to gain media attention") were treated in the complaint as being extortive conduct.[57]

In response to the *Scheidler* decision, a subcommittee of the House of Representatives in 1998 held a hearing on the "Application of the RICO law to Nonviolent Advocacy Groups." Bill McCollum, a Republican Representative from Florida, said he was "concerned that some judges may interpret speech which strongly asserts a point of view on an important subject to be extortion simply because some who hear it may believe it to be threatening."[58] Perhaps more authoritatively, the author of RICO – George Robert Blakey – warned about the use of RICO against protesters:

> Until the applicability of RICO to protests is definitively decided . . . this kind of litigation will unconstitutionally chill political and social protests, of all types, not just anti-abortion demonstrations . . . Few who desire to bring about meaningful social or political change will lightly risk their jobs, homes or pocketbooks to join a group of protesters if they may be named in a RICO suit based on "extortion," forced to submit to extensive civil

[53] *Sedima*, 473 U.S. at 506.
[54] Crovitz, *supra* note 42.
[55] Bradley, *supra* note 52, at 136-37.
[56] *Id.* at 136.
[57] *Id.* at 137.
[58] *RICO Law Hearing*, *supra* note 31 (statement of Chairman McCollum).

> discovery, and have to pay the huge attorneys fees and costs generated by aggressive litigators.[59]

At the time, a number of advocacy groups warned about the precedent that *N.O.W. v. Scheidler* would set: "a spokesman for ACT-UP, a gay rights organization, declared that not only his organization but environmentalists and animal rights activists would now be vulnerable to RICO suits."[60] Meanwhile, People for the Ethical Treatment of Animals (PETA) filed an amicus brief on behalf of the petitioners arguing for the *Scheidler* decision to be reversed on appeal, warning that "this loose application of federal anti-racketeering laws to political advocacy groups threatens PETA's aggressive advocacy for the benefit of animals."[61]

Within three years, the fears of PETA and others had materialized. In 1997, according to the Civil Liberties Defense Center, PETA became the first non-anti-abortion advocacy group sued under RICO after Huntingdon Life Sciences (HLS) was publicly exposed by the group and charged with 23 counts of violating the Animal Welfare Act.[62] HLS sued PETA on the basis that undercover investigations and the "subsequent transportation of documents for use in press releases and direct mailings" were sufficient to constitute racketeering crimes.[63] The case was eventually settled out of court after the judge denied PETA's motion to dismiss, finding that HLS had – in treating undercover investigations as "extortionate" – sufficiently pled predicate acts under RICO.[64]

Within two years, a second RICO lawsuit had been filed against animal rights advocates. This time filed by furrier Jacques Ferber Inc., the lawsuit alleged that the animal rights groups in question had "interfer[ed] with his legitimate business enterprise" by, among other things, holding weekly protests and disseminating "defamatory stickers and signs" outside of the store.[65] While vandalism and threats of violence were also alleged, none of the named defendants were criminally charged with perpetrating the alleged vandalism or harassment.[66] The case was eventually dismissed, but only after

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[59] *Id.* (statement of G. Robert Blakey Esq., Professor of Law, Notre Dame Law School).

[60] Bradley, *supra* 52.

[61] *Scheidler*, 510 U.S. at 251.

[62] Civil Liberties Defense Center, *RICO* (Apr. 24, 2014), http://www.cldc.org/rico.

[63] Huntingdon Life Scis., Inc. v. Rokke, 986 F. Supp. 982, 988 (E.D. Va. 1997).

[64] *Id.* at 992.

[65] Civil Liberties Defense Center, *supra* note 62.

[66] Jaime I. Roth, *Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate*, 56 U. MIAMI L. REV. 467, 480 (2002).

the activists had accepted a number of demands to soften their protest activity.[67]

V. *CHEVRON V. DONZIGER*

In 2011, Chevron lost an 8-year legal battle in Ecuador and was hit with an $18 billion USD liability judgment. The legal case, *Aguinda v. ChevronTexaco*, began in October 2003 in Lago Agrio, Ecuador, after it was transferred from a U.S. federal court at Chevron's request (the case was originally brought in November 1993 in the Southern District of New York against Texaco, which Chevron bought in 2001).[68] The plaintiffs, consisting of some 30,000 people from five indigenous groups and dozens of communities in Ecuador's Amazon, alleged massive oil contamination of their ancestral lands and waters – including the deliberate dumping of over 18.5 billion gallons of toxic "formation waters" into Amazon waterways.[69]

Instead of paying the damages, Chevron sold its assets in Ecuador to avoid seizure, left the country, and promised the indigenous groups they would face a "lifetime of litigation" if they "dare pursue their claims."[70] Chevron's General Counsel, Charles James, told an audience of law students at Berkeley that while he expected to lose the case, Chevron "would fight until hell freezes over – and skate it out on the ice."[71] After the indigenous groups started enforcement actions in the USA and Canada, Chevron took an innovative approach to making good on these promises: it turned to RICO.

Chevron argued, in short, that the $18 billion USD judgment had been procured "fraudulently" by the defendants. The basic logic for invoking RICO was simple: while courts are split on whether equitable relief is available in civil RICO claims, Chevron could argue that they were entitled to injunctive relief to prevent the defendants from profiting off their "criminal enterprise." Chevron's RICO strategy, however, went much further than just capitalizing on the law's provisions for sanctions and remedies. Chevron took full advantage of RICO's public relations opportunities. While the RICO lawsuit was brought against approximately 50 lawyers and activists, (with advocacy groups Rainforest Action Network (RAN) and Amazon Watch named as "non-party co-conspirators") Chevron put a strong focus on Steven Donziger, the New York lawyer who had worked on the Lago Agrio litigation

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[67] Civil Liberties Defense Center, *supra* note 62.

[68] Earthjustice, *Understanding Chevron's "Amazon Chernobyl": Background of the Landmark Legal Case over Chevron's Environmental Contamination in Ecuador*, p3/12 (Spring 2009).

[69] *Id.*

[70] Pet. for Writ of Mandamus, *In re: Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje.*, No. 11-cv-0691-LAK, at 12 n.8 (S.D.N.Y. June 6, 2011).

[71] *Id.*

as a legal consultant for the Amazon Defense Front. An internal email from 2009 from a Chevron strategist described their public relations strategy as: "demonize Donziger,"[72] which they proceeded to do through an online newspaper called the "Amazon Post," a litany of social media accounts in multiple languages, a series of slickly-produced YouTube videos,[73] and at least eight public relations firms.[74] As well as targeting Donziger, Chevron took advantage of RICO to "cast its victims and virtually anyone who has supported their campaign, or been critical of Chevron – including NGOs, journalists, and responsible investors – as criminals."[75]

As with earlier RICO cases targeting advocacy, Chevron also used an expansive reading of RICO to treat advocacy as extortive or otherwise criminal. Chevron's complaint alleged that advocates colluded with attorneys to "create enough pressure on Chevron to extort it into paying to stop the campaign against it,"[76] including through hard-hitting press releases as well as lobbying.[77] Chevron further stretched the notion of a "criminal enterprise" to encompass the wider movement behind the Lago Agrio litigation. It filed discovery lawsuits against the original Ecuadorian plaintiffs and their consultants in over two dozen U.S. courts and subpoenaed the emails of about 100 environmental activists and other supporters not directly associated with the lawsuit.[78] Through the discovery process, Chevron attempted to force these groups to turn over all internal planning and strategy documents as well as the identities of their supporters.[79]

Chevron's RICO litigation is estimated to have cost up to $2 billion USD in legal fees (even before ancillary costs such as PR firms are factored in), with the company using more than two thousand legal professionals from

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[72] Chevron's lead PR consultant Chris Gidez in a 2009 email to company officials obtained by Steven Donziger.

[73] *See* Justin Ling, *Meet the Lawyer Chevron Tried to Destroy*, VICE NEWS (Jan. 23 2015), https://www.vice.com/en_ca/article/av4m5k/meet-the-lawyer-chevron-tried-to-destroy-112.

[74] James North, *Ecuador's Battle for Environmental Justice Against Chevron*, NATION (June 2, 2015), https://www.thenation.com/article/ecuadors-battle-environmental-justice-against-chevron.

[75] *Institutions, Organizations and Individuals Advocating for Corporate Accountability Condemn Chevron's Retaliatory Attacks on Human Rights and Corporate Accountability Advocates and See it as a Serious Threat to Open Society and Due Process of Law*, AMAZONWATCH.ORG, http://amazonwatch.org/assets/files/2014-chevrons-threat-to-open-society.pdf

[76] Chevron Corp. v. Steven Donziger et al., No. 11. Civ. 0691 (S.D.N.Y. Apr. 11, 2011).

[77] *How Big Oil is Trying to Tar Lobbying and PR as Extortion*, LAW 360 (Feb. 21, 2014), https://www.law360.com/articles/511117/how-big-oil-is-trying-to-tar-lobbying-and-pr-as-extortion.

[78] *Advocacy Groups Blast Chevron for Retaliation Tactics Against Ecuador Villagers and Their Supporters*, AMAZONWATCH.ORG (JAN. 23, 2014), http://amazonwatch.org/news/2014/0123-advocacy-groups-blast-chevron-for-retaliation-tactics.

[79] *Id.*

sixty law firms.[80] Nonetheless, it eventually achieved its aim. In March 2014, U.S District Judge Kaplan issued an injunction against Donziger and two Ecuadorean co-defendants, prohibiting them from attempting to enforce the judgment in any U.S. court and creating a constructive trust for Chevron's benefit to hold any proceeds they obtained elsewhere in the world.[81] Whether or not this result was worth the time and expense (the *New Yorker* reported that the case could have been settled for $140 million in 2001)[82] remains arguable: Chevron's CEO John Watson was challenged in three shareholder resolutions in May of this year for "materially mishandling" the Ecuador litigation,[83] and an announcement followed a few months later that Watson would be stepping down.[84] Crucially, however, the result was successfully presented as an unqualified victory in the media.[85] As such, Gibson Dunn – Chevron's lead law firm (who had 114 attorneys working on the case)[86] – was able to fully capitalize on this perceived success. At an Energy Litigation Conference in November 2014, a Gibson Dunn partner presented a PowerPoint entitled "A RICO Guide for Energy Litigators" and described it as a means of responding to "fraudulent lawsuits" to the industry representatives present.[87]

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[80] Michael D. Goldhaber, *A Costly Battle: Chevron is Spending $400 Million a Year in Legal Fees in its Ecuadorian Oil Spill Fight*, AMERICAN LAWYER (May 1, 2013), http://www.americanlawyer-digital.com/americanlawyer/lit2013spring?article_id=1232008.

[81] Daniel Fisher, *Appeals Court Upholds Sanctions Against Donziger Over $9.5 Billion Chevron Judgment*, FORBES (Aug. 8, 2016), https://www.forbes.com/sites/danielfisher/2016/08/08/appeals-court-upholds-sanctions-against-donziger-over-chevron-litigation-in-ecuador.

[82] Patrick Radden Keefe, *Why Chevron Will Settle in Ecuador*, NEW YORKER (Jan. 4, 2012), https://www.newyorker.com/news/news-desk/why-chevron-will-settle-in-ecuador.

[83] CSR News, *Shareholders Criticize Chevron CEO Watson for "Materially Mishandling" $12 Billion Ecuador Environmental Liability*, CSRWIRE.COM (May 30, 2017), http://www.csrwire.com/press_releases/40039-Shareholders-Criticize-Chevron-CEO-Watson-for-Materially-Mishandling-12-Billion-Ecuador-Environmental-Liability.

[84] Michael Scheetz, *Chevron CEO John Watson to Step Down: Report*, CNBC (Aug. 22, 2017), https://www.cnbc.com/2017/08/22/chevron-ceo-john-watson-to-step-down-report.html.

[85] Michael I. Krauss, *Chevron's (And The Rule of Law's) Triumph: The Supreme Court Declines to Hear Donziger's Appeal*, FORBES (Jun. 20, 2017), https://www.forbes.com/sites/michaelkrauss/2017/06/20/chevrons-and-the-rule-of-laws-triumph-the-supreme-court-declines-to-hear-donzigers-appeal; *see also Chevron Shakedown Rout: Steven Donziger suffers another legal humiliation*, WALL ST. J. (Aug. 8, 2016), https://www.wsj.com/articles/chevron-shakedown-rout-1470698287; John Shu, *How Chevron's Watson Fought Landmark Legal Battle — And Won*, INVESTOR'S BUSINESS DAILY (Oct. 25, 2017), https://www.investors.com/politics/commentary/how-chevrons-watson-fought-landmark-legal-battle-and-won; Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, N.Y. TIMES (Mar. 4, 2015), https://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html.

[86] Goldhaber, *supra* note 80.

[87] PowerPoint slides obtained from conference participant.

VI. WEAPONIZING DEFAMATION – THE NEW RICO SLAPP SCRIPT

The Chevron litigation made RICO's potential as a weapon against advocacy seductively clear to corporations. Whether or not they were directly influenced by Gibson Dunn's presentations, the decision certainly did inspire and embolden other companies and industry insiders to try their own luck.

Perhaps the first copycat case came on March 27, 2015, courtesy of the Alabama-based coal company Drummond Co. Inc. The lawsuit was filed after the relatives of dozens of slain Colombians sued Drummond, accusing it of making millions in payments to the paramilitary group *Autodefensas Unidas de Colombia* (AUC).[88] Drummond responded with a RICO lawsuit alleging that several lawyers, an advocacy group, and a Dutch competitor were involved in a criminal campaign to extort money.[89] Straight from the Chevron playbook, Drummond claimed that "fraudulent lawsuits" had been filed, and that "advocacy groups" were used to spread a "false message" that Drummond collaborated with AUC.[90]

In many of the above cases, RICO's application was a stretch by the plaintiffs, but the required predicate acts were still generally substantiated. [91] This was the case even if, as in the *Chevron* case, the evidence used to substantiate these acts has since been discredited, with new evidence emerging that Chevron's "star witness"[92] in the RICO trial was fundamentally dishonest.[93] A pernicious new phase in the evolution of RICO SLAPPs therefore came the following year when, Resolute Forest Products (RFP) filed a RICO lawsuit against Greenpeace USA,[94] Greenpeace International, Standearth, and five individual defendants.[95] While a few vague and unsupported allusions were made to criminal activity (e.g., "cyber-

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[88] Melo et al. v. Drummond Company, No. 2:13-cv-00393-RDP (N.D. Ala., Feb. 26, 2013).

[89] Drummond Company Inc. and Drummond Ltd. v. Terrence Collingsworth et al., No. 2:15-cv-00506-JHH (N.D. Ala., Mar. 27, 2015).

[90] *Id.* at 2.

[91] *Id.*

[92] Eva Hershaw, *Chevron's Star Witness Admits to Lying in the Amazon Pollution Case*, VICE NEWS (Oct. 26, 2015), https://news.vice.com/article/chevrons-star-witness-admits-to-lying-in-the-amazon-pollution-case.

[93] *See* Chevron Corp., PCA Case No. 2009-23 (Apr. 24, 2015) (Grigera Naón, Vaugan Lowe, and Veeder, Arbs.) (stating that the former Ecuadorian judge, Alberto Guerra, admitted under oath in an international arbitration proceeding to having lied to Chevron in order to extract a better deal in exchange for his testimony as well as $432,000 in monthly payments to Guerra, payment of a housing allowance, a car, and health insurance for Guerra and his extended family, and the payment of Guerra's income taxes).

[94] *See generally* Resolute Forest Prod., Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005 (N.D. Cal. 2017) (consisting of Greenpeace Inc., a nonprofit formed under section 501(c)(4) of the U.S. Internal Revenue Code, and Greenpeace Fund, Inc., a nonprofit formed under 501(c)(3) of the Internal Revenue Code).

[95] *Id.*

hacking") the complaint relied almost entirely on treating advocacy as inherently criminal in nature.

Resolute's main contention was that Greenpeace was a "global fraud" whose campaigns used "materially false and misleading" claims to induce donations and extort concessions from its targets.[96] In essence, the lawsuit was a garden-variety defamation complaint disguised as a racketeering complaint.[97] Resolute had already sued Greenpeace Canada in a $7 million defamation lawsuit in Ontario: the forests at issue and the company's headquarters were located in Quebec, but Ontario had enacted anti-SLAPP legislation.[98] When the Ontario legislature subsequently tabled its own anti-SLAPP law, Resolute retained six individuals or companies to lobby the Ontario government and organize opposition to the Bill.[99] In an email, Resolute's CEO, Richard Garneau seemingly admitted that the Ontario government's proposed anti-SLAPP legislation, passed as originally written, "would put [Resolute's case against Greenpeace Canada] in grave peril."[100]

In focusing the complaint on defamation, the enquiry of Resolute's Canadian lawsuit was limited to the Canadian Boreal campaign run by Greenpeace Canada campaigners. While Resolute attempted to amend its complaint to encompass the 45 year history of the organization and its international campaigns, in 2016 the Ontario Superior Court of Justice found that this attempt "to expand the proceedings into an inquiry [around] the entire Greenpeace movement" was impermissible.[101] However, by recasting its defamation complaints as RICO allegations in the USA, Resolute was able to avoid these limitations.[102] All Greenpeace entities were now presented as part of the same "criminal enterprise," allowing Resolute to justify their inclusion by arguing they had formed an "association in fact" with the defendants in question.[103]

Invoking RICO in this way allowed Resolute to secure the benefits described above. Most conspicuously, it was able to claim treble damages for the harm it purported to have suffered: as such, a C$100 million claim was inflated to C$300 million.[104] Secondly, it was able to use the cloak of fair

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Sean Craig, *Wynne Waters Down Own Bill, Benefiting Own Libel Suit*, CANADA LAND SHOW (Mar. 24, 2015), http://www.canadalandshow.com/wynne-waters-down-own-bill-benefiting-own-libel-suit.

[101] *See supra* note 93.

[102] *Id.*

[103] *Id.*

[104] *Id.*.

report privilege to launch a PR offensive against Greenpeace based on the criminal allegations made in its complaint.[105] As with Chevron before it, Resolute constructed a dedicated website (www.ResolutevGreenpeace.com) and Twitter handle (@RFPvGP), using developments in the legal proceedings as material.

There was only one problem with this legal strategy: defamation is not a predicate act of RICO.[106] Resolute therefore tested the elasticity of RICO predicate acts such as fraud and extortion by stretching their application to cover Greenpeace's advocacy activities. What was once said to be evidence of *defaming* was now held up as evidence of *defrauding.*[107] What was once said to be evidence of economic interference was now presented as evidence of extortion.[108] By threading this narrative together with conclusory allegations of fabricating evidence and cyber-attacks, Resolute constructed a complaint with a superficial conformity to RICO.

Resolute's RICO camouflage was always tenuous and in October 2017 the case was dismissed.[109] Reframing a defamation complaint as a racketeering complaint, however, brought with it another advantage: Resolute was able to argue that the state anti-SLAPP law, with its mandatory award of attorneys' fees, was inapplicable to the federal RICO claims it had filed. Resolute had originally filed its RICO complaint in the state of Georgia, whose anti-SLAPP law was limited to statements to government bodies or related to official proceedings (the amended anti-SLAPP law, covering any speech "in connection with a public issue or an issue of public concern", came into force a month after Resolute filed its complaint).[110] In May 2016, the case was transferred to California, a state with a strong and well-established anti-SLAPP law, with the judge noting that the impugned activities in Georgia "at best support the inference that Defendants organized and held a protest in Augusta."[111] However, when Judge Tiger of the Northern District of California granted the defendants' motion to dismiss in October 2017, he declined to apply California's anti-SLAPP law to Resolute's federal RICO claims.[112] With no federal anti-SLAPP law in place, a crucial deterrent was lost. In the meantime, Resolute pursued its RICO

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[105] Kristen Murphy, *Fair Reporting*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, (2004), https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2004/fair-reporting.

[106] 18 U.S.C. § 1961(1).

[107] Resolute Forest Prod., Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005, 1012 (N.D. Cal. 2017).

[108] *Id.*

[109] *Id.*

[110]Cynthia Counts, *Anti-SLAPP Gets a Big Boost in GA*, L. COUNTS, https://www.lawcounts.com/blog/92-anti-slapp-gets-a-big-boost-in-ga.

[111] *Id.*

[112] *Id.*

SLAPP in an amended form, stretching out the shelf life of the claims for an additional fifteen months.[113]

As with all SLAPPs, the RICO SLAPP model achieves its purpose through the litigation *process*, not the outcome. As such, it can succeed in its objectives even if the lawsuit in question is eventually dismissed (particular when, as in the case of Resolute, such a dismissal is preceded by almost a year and a half of litigation and voluminous legal pleadings). Even before the California judgment, Resolute's abusive application of RICO had set a negative precedent. Indeed, over 100 groups warned that the lawsuit could embolden other corporations to try similar tactics, including 80 organizations who signed onto an advert in the *New York Times* arguing that "attempting to persuade U.S. courts to label environmental advocacy as a criminal enterprise sets a dangerous precedent."[114]

Such warnings turned out to be all too prescient when, in August 2017, a $300 million RICO lawsuit (inflated to $900 million under RICO's provision for treble damages) was filed by Energy Transfer Partners (ETP),[115] the owner and operator of the Dakota Access Pipeline (DAPL).[116] ETP's central allegation was that the defendants – consisting of Greenpeace US, Greenpeace International, the Dutch non-governmental organization (NGO) BankTrack, and the grassroots movement "Earth First!" – "directed and incited acts of ecoterrorism" during the protests against the construction of the controversial pipeline.[117] The complaint applied the same RICO SLAPP script to treat advocacy activity as inherently criminal in nature, and was filed by the same law firm, Kasowitz Benson Torres LLP – a law firm that has rolled out high-profile SLAPP tactics on behalf of Donald Trump, Bill O'Reilly, and Eric Bolling.

One of the most striking things about the lawsuit is how peripheral the stated role of Greenpeace is in the so-called "criminal enterprise." Although the criminal activity in the complaint was said to follow the "Greenpeace Model," the role of Greenpeace is only discussed in twenty-three of the complaint's 187 pages. It therefore appears that the lawsuit represents part of a coordinated attempt to shut Greenpeace down or severely cripple the NGO's capacity to campaign. In recent interviews with CNBC and Valley News Live, ETP CEO Kelcy Warren said he was "absolutely" trying to cease

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 8.

funding for Greenpeace,[118] and that his "primary objective" in suing Greenpeace entities was not to recover damages but to "send a message" to the NGO that they "can't do this in the U.S."[119] Meanwhile, Resolute and ETP's lead lawyer Michael Bowe told Bloomberg BusinessWeek that he was in touch with other companies that were considering filing their own RICO lawsuits against Greenpeace.[120]

Perhaps even more obvious than the Resolute and Chevron lawsuits, ETP's RICO lawsuit was clearly directed at the anti-DAPL movement as a whole. ETP's lawsuit names 10 other advocacy groups and 8 individuals as members of the "criminal enterprise," leaving the chilling prospect that others would be brought into the lawsuit (indeed, ETP sent document preservation notices to non-parties named in the lawsuit as members of the "criminal enterprise", threatening legal action if they didn't comply).[121] On August 6, 2018, ETP amended its complaint to do exactly that, bringing five new individuals into the lawsuit as defendants.[122] This included Charles Brown, a pipelines campaigner at Greenpeace USA, who had recently joined the organization on May 14, 2018 – a full year after the events that formed the focus of ETP's RICO complaint. The lawsuit conflates peaceful protest and advocacy with violent acts by claiming them to be part of the same "Greenpeace model"[123] and, as with the Resolute complaint, the specific allegations against Greenpeace involve quintessential advocacy work such as press releases and sign-on letters. As such, it could set a devastating precedent for advocacy groups if successful.

While Greenpeace, as a larger NGO, has the capacity and resilience to respond to these SLAPPs, poorly resourced groups would see little alternative but to retract any criticism and apologize in the face of this new RICO SLAPP. As Professor David Ardia of the University of North Carolina has noted, "what's filed is just the tip of the iceberg."[124] The most insidious impacts of the SLAPP phenomenon are generally left unreported, with

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[118] *We Were Greatly Harmed, Lost Millions of Dollars: Energy Transfer Partners CEO*, CNBC (Aug. 25, 2017), https://www.cnbc.com/video/2017/08/25/we-were-greatly-harmed-lost-millions-of-dollars-energy-transfer-partners-ceo.html.

[119] *Energy Transfer Partners CEO, Kelcy Warren, Says DAPL was About a Money Raise*, VALLEY NEWS LIVE (Aug. 31, 2017), http://www.valleynewslive.com/content/misc/Energy-Transfer-Partners-CEO-Kelcy-Warren-says-DAPL-was-about-a-money-raise-442409553.html..

[120] Paul Barrett, *How a Corporate Assault on Greenpeace is Spreading*, BLOOMBERG BUSINESS WEEK (Aug. 28, 2017), https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-greenpeace-is-spreading.

[121] *Id.*

[122] Energy Transfer Equity L.P and Energy Transfer Partners L.P v. Greenpeace International et al., No. 1:17-cv-00173-CSM (D.N.D. Aug. 6, 2018).

[123] *Id.*

[124] Peter Hayes, *Green Groups: Suits to Silence Them on the Rise*, BLOOMBERG LAW (Aug. 14, 2017), https://www.bna.com/green-groups-suits-n57982086728.

victims intimidated – or alternatively, bound by confidentiality clauses in settlement agreements – into staying silent. The consequences of this silence only emerge when the abuse of power it permits reaches a tipping point: whether it's the legal threats issued by Harvey Weinstein (including a personal threat against Ronan Farrow, which prompted NBC to drop his exposé of Weinstein's sexual harassment and Farrow to take it to the *New Yorker*),[125] the lawsuits filed by Catholic priests against their child sexual abuse accusers (including against the advocacy group Survivors Network of those Abused by Priests[126]),[127] or the "bevy of lawsuits" filed by Lance Armstrong in France and beyond (for which he was fined for abusing the judicial system),[128] the victims of this lack of transparency are everywhere. With its treble damages and criminal connotations, the RICO SLAPP model intensifies these effects and creates an even more poisonous environment for campaigners and public watchdogs to operate.

VII. RECOGNITION OF THE SLAPP CHALLENGE IN INTERNATIONAL HUMAN RIGHTS LAW

The scholars who first observed and coined the SLAPP phenomenon were focused on the situation in the United States, assuming SLAPPs to be a typically American phenomenon and a product of the country's litigious culture.[129] If that view was correct then, it no longer is. As noted previously, an upsurge in SLAPP cases has been reported in different parts of the world, posing a widespread threat to freedom of expression and peaceful assembly.

The fact that the U.S. First Amendment – commonly regarded as one of the strongest domestic constitutional protections of freedom of expression – has failed to stem the tide of SLAPPs bodes ill for other countries now confronted with this phenomenon. The question emerges whether international human rights law systems can play a role in halting the advance

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[125] Chris Ariens, *Why Did NBC News Hold Off Reporting Harvey Weinstein Story?*, TV NEWSER (Oct. 10, 2017), https://www.adweek.com/tvnewser/why-did-nbc-news-hold-off-reporting-harvey-weinstein-story/344678.

[126] *SNAP Apologizes to Accused Priest as Part of Settlement*, US NEWS (Nov. 24, 2017), https://www.usnews.com/news/best-states/missouri/articles/2017-11-27/snap-apologizes-to-accused-priest-as-part-of-settlement.

[127] Jean Guccione, *Some Priests Are Suing Their Accusers*, L.A. TIMES (Mar. 5, 2004), http://articles.latimes.com/2004/mar/05/local/me-priests5.

[128] Terri Thompson, Nathaniel Vinton, Michael O'Keeffe, & Christian Red, *Victims of Lance Armstrong's Strong-arm Tactics Feel Relief and Vindication in the Wake of U.S. Anti-Doping Agency Report*, N.Y DAILY NEWS (Oct. 26, 2012), http://www.nydailynews.com/sports/more-sports/zone-lance-armstrong-bully-downfall-article-1.1188512.

[129] Douglas W. Vick & Kevin Campbell, *Public Protests, Private Lawsuits, and the Market: The Investor Response to the McLibel Case*, 28 J.L. & SOCIETY 204, 205 (2001).

of corporate censorship, particularly in those countries where human rights treaties are directly effective in the domestic legal system.

The term "SLAPP" has only recently begun to enter the international legal lexicon. An early mention occurred in 2015, when the United Nations Working Group on Business and Human Rights recommended "[e]nact[ed] anti-SLAPP legislation to ensure that human rights defenders are not subjected to civil liability for their activities," as part of its Guidance on National Action Plans on Business and Human Rights, without further elaboration.[130] Within the United Nations (UN) system, the Special Rapporteurship on the rights to freedom of peaceful assembly and of association (UNSR FoAA) has been the most cognizant of the SLAPP phenomenon. A 2016 report on the proper management of assemblies, issued jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, commends the anti-SLAPP legislation in twenty-eight US States and the Australian Capital Territory as good practice in ensuring business enterprises respect human rights in the context of assemblies.[131] In 2017, the UNSR FoAA published an "Info Note" specifically on "SLAPPs and FoAA Rights," warning that SLAPPs are an international trend, and recommending States to adopt anti-SLAPPs legislation "allowing an early dismissal (with an award of costs) of such suits and the use of measures to penalize abuse."[132] The Info Note also calls on private companies to "refrain from the use of civil lawsuits as a means of shutting down public participation and critical advocacy."[133] At the regional level, the Council of Europe (CoE) recently published a Recommendation draft on the roles and responsibilities of internet intermediaries, which calls on State authorities to consider the adoption of "appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries."[134] The Recommendation was elaborated by an expert group and awaits adoption by the CoE's Committee of Ministers.

Although specific discussion of the SLAPP phenomenon at the international level is still in its infancy, the potential for civil lawsuits – whether brought with abusive intent or not – to have an unacceptable chilling effect on legitimate criticism and advocacy has long been recognized.

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[130] U.N. WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS VERSION 2.0, at 29 (2015).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Eur. Council: Committee of experts on internet intermediaries, Draft Recommendation *CM/ Rec (2017) of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries*, at 7/14, MSI-NET (2016) (Sept. 19, 2017).

International human rights mechanisms have interpreted global and regional treaties as imposing obligations on States to prevent such a chilling effect by enacting various substantive and procedural safeguards.

VIII. STATE OBLIGATIONS RELEVANT TO COMBATING SLAPPS

There are many cases in which persons engaged in social criticism or advocacy have complained to international human rights bodies about a failure by the domestic justice system to protect their freedom of expression in civil proceedings. The typical fact pattern involves a successful defamation or privacy suit brought by an influential individual or corporation against a journalist, campaigner, media outlet or NGO. The resulting body of precedent points to a number of measures that States must take to prevent civil remedies from stifling legitimate criticism. Most relevant to the phenomenon of SLAPP suits are the following requirements: (A) to establish a higher defamation threshold in cases involving public figures, including leading business figures and corporations; (B) to ensure damage awards are proportionate; (C) to provide legal aid to defendants in free speech cases if they would otherwise be at an unfair disadvantage; and (D) to protect the freedom of expression of "public watchdogs," including NGOs, at a high level.

A. *Suits by Public Figures Seeking to Protect Their Reputation Must Meet a Higher Threshold*

There is clear recognition within the UN, as well as the three regional human rights systems, that domestic law should impose a higher threshold for lawsuits by public figures seeking to defend their reputation.

A pertinent UN precedent is *Bodrožić v. Serbia and Montenegro*,[135] a case brought before the Human Rights Committee (HRC) by a Serbian a journalist and magazine editor. The HRC is responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR),[136] to which a vast majority of States are parties.[137] Bodrožić had criticized the manager of a factory who was also a well-known former politician, leading to legal proceedings in which domestic courts had found him liable for defamation.[138] In agreeing that this outcome was incompatible with the right to freedom of expression as guaranteed under Article 19(2) of

[135] Bodrožić v. Serbia and Montenegro, Comm. 1180/2003; UN Doc.Bodrozic v. Serbia and Montenegro, Comm. 1180/2003, U.N. Doc. A/61/40, Vol. II, at 288 (2005).

[136] Int'l Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

[137] As of December 22, 2017, there were 169 States Parties to the ICCPR, out of 193 UN Member States. *Id.*

[138] *Id.*

the ICCPR, the HRC emphasized that "in circumstances of public debate in a democratic society . . . concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high."[139] The Committee's reference to "figures in the political domain" might leave some doubt as to whether politically unconnected business figures are included. However, in its subsequent General Comment No. 34 on the freedoms of opinion and expression, the HRC states more generally that "all public figures . . . are legitimately subject to criticism and political opposition."[140] It adds that, "with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice."[141]

At the regional level, the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights states that domestic defamation laws must conform to the principle that "public figures shall be required to tolerate a greater degree of criticism."[142] In the case *Media Rights Agenda and Others v. Nigeria*, the Commission explained that "people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether."[143] This holding was later cited with approval by the African Court of Human Rights.[144]

The Inter-American system presents a similar picture. In 2000, the Inter-American Commission on Human Rights adopted a Declaration of Principles on Freedom of Expression[145] which recommends stringent conditions when a "public official, a public person or a private person who has voluntarily become involved in matters of public interest" seeks a civil remedy for defamation.[146] Relief should only be granted if "the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."[147] The Inter-American Court of Human Rights has concurred that a "different threshold of protection for public officials . . . public figures and individuals" must apply in civil

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[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Afr. Comm'n on Hum. and Peoples' Rights, Res.62(XXXII)02, Resolution on the Declaration of Principles on Freedom of Expression in Africa (Oct. 23, 2002).

[143] *Id.*

[144] Lohé Issa Konaté v. The Republic of Burkina Faso, Application No. 004/2013.

[145] *Id.*

[146] *Id.*

[147] *Id.*

disputes concerning privacy or reputation,[148] "due to the fact that they have voluntarily exposed themselves to a stricter scrutiny."[149]

The European Court of Human Rights (ECtHR) made its earliest statement on the matter in the celebrated case of *Lingens v. Austria*, holding that the "limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual," because a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed . . . and he must consequently display a greater degree of tolerance."[150] In the UN, African and Inter-American systems, there is a dearth of precedent on the question of who qualifies as a public figure subject to heightened criticism. By contrast, the ECtHR, thanks to an abundant number of subsequent cases, has been able to define varying degrees of tolerance required from different categories of plaintiffs.[151]

Importantly, the Court has had the opportunity to address the position of major corporations and their managers. In *Steel and Morris v. United Kingdom*, to which we will return later, the Court equated such plaintiffs to politicians, insofar that "large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies."[152] In the subsequent case of *Timpul Info-Magazin and Anghel v. Moldova*,[153] the Court opined that a smaller company should, in principle, "enjoy a comparatively increased protection of its reputation,"[154] although if it "decides to participate in transactions in which considerable public funds are involved, it voluntarily exposes itself to an increased scrutiny by public opinion."[155]

Taken together, these authorities leave little doubt that States which have subscribed to one of the relevant human rights treaties will be breaching their obligations if they enable public figures to sue for reputational damage under conditions that are no stricter than those facing private individuals. If the European jurisprudence is taken as a guide, the duty to set a higher threshold

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[148] Fontevecchia and d'Amico v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 238, at 59 (Nov. 29, 2011); *see* Herrera Ulloa v. Costa Rica, Inter-Am. Ct. H.R. (Ser. C) No. 107, at 129 (Jul. 2, 2004).

[149] *Id.*

[150] Lingens v. Austria, 103 Eur. Ct. H.R. (Ser. A) at 42 (1986).

[151] Tarlach McGonagle, FREEDOM OF EXPRESSION AND DEFAMATION – A STUDY OF THE CASE LAW OF THE EUR. COURT OF HUM. RIGHTS, Chapter 2.2 (2016).

[152] Steel and Morris v. United Kingdom, 41 Eur. Ct. H.R. (pt. 3) at 94 (2005); *see* Fayed v. the United Kingdom, 294 Eur. Ct. H.R (ser. A) at 75 (1994).

[153] Timpul Info-Magazin and Anghel v. Moldova, Application No. 42864/05 (2007).

[154] *Id.* at 34.

[155] *Id.*

for such suits extends to leading business figures and corporations, particularly those involved in public works.

B. *Domestic Law Must Ensure Damage Awards Are Proportionate*

The limitations clauses of the ICCPR and the regional human rights treaties stipulate that any domestic measures which interfere with freedom of expression must be "necessary" or "necessary in a democratic society" for the attainment of a legitimate aim.[156] This implies a requirement of proportionality,[157] which is also applicable to damages awarded in domestic civil proceedings.[158]

The ECtHR addressed the appropriateness of high damages for an infringement of reputation in *Tolstoy Miloslavsky v. United Kingdom*.[159] The applicant was the author of a widely-circulated pamphlet accusing Lord Aldington of war crimes.[160] Libel proceedings before domestic courts had resulted in a £1.5 million damage award, about three times the largest amount previously awarded by an English libel jury.[161] The defamatory character of the pamphlet was not in issue before the ECtHR; the applicant's challenge centered on the amount of damages, amongst others on the grounds that the sizeable award was disproportionate to the aim of protecting Lord Aldington's reputation.[162] The Court held that "under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered."[163] Citing the Court of Appeal's own observation that English law gave "almost limitless discretion to a jury" to award damages,[164] the Court found that the high level of the award in conjunction with the lack of adequate safeguards against a disproportionate award violated the applicant's right to freedom of expression.[165]

The ECtHR has recently re-emphasized the importance of foreseeability of damages, holding that "unpredictably high damages in libel

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[156] *See* International Covenant on Civil and Political Rights, *supra* note 136.
[157] *Id.*
[158] Fontevecchia and d'Amico v. Argentina, *supra* note 148, at 51.
[159] Tolstoy Miloslavsky v. United Kingdom, 20 Eur. Ct. H.R (Ser. A) (1995).
[160] *Id.* at 8.
[161] *Id.* at 12.
[162] *Id.* at 38, 46.
[163] *Id.* at 12.
[164] *Id.* at 50.
[165] *Id.* at 51.

cases are considered capable of having a chilling effect and they therefore require the most careful scrutiny and very strong justification."[166]

C. *Legal Aid Should Be Available Where Necessary to Ensure a Measure of Equality of Arms*

The most paradigmatic SLAPP litigation to end up before an international human rights court was the so-called "McLibel" case.[167] It arose from an anti-McDonald's campaign launched in the mid-1980s by a small campaign group, London Greenpeace (not connected to Greenpeace International), which included the distribution of a six-page leaflet entitled "What's wrong with McDonald's?" accusing the fast food of a range of ills, such as driving economic inequality, deforestation, poor nutrition and the exploitation of workers.[168]

In response, McDonald's deployed seven private investigators to infiltrate the unincorporated group and identify its members. It brought libel proceedings against five of them, claiming damages of up to £100,000 GBP.[169] The claims against three members were withdrawn after they apologized, but the remaining defendants – Helen Steel, a part-time bar worker, and David Morris, a single parent on income support – decided to defend the case. They were forced to represent themselves, as legal aid was not available for defamation proceedings.[170] McDonald's proceeded to put them through the longest trial in English legal history, which included 313 days in court, about 40,000 pages of evidence and 130 witnesses.[171] The Court of Appeals ultimately found that a number of the leaflet's claims had not been substantiated, and awarded a total of £76,000 GBP against the defendants,[172] a fraction of McDonald's estimated £10 million GBP in legal expenses.[173]

Before the ECtHR, Steel and Morris argued, amongst others, that the lack of legal aid constituted a violation of the right to a fair trial under Article 6 section 1 of the European Convention on Human Rights (ECHR), given the

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[166] Independent Newspapers (Ireland) Limited v. Ireland, Application No. 28199/15 (2017), http://hudoc.echr.coe.int/eng?i=001-174419.

[167] Steel and Morris v. United Kingdom, 41 Eur. Ct. H.R. (pt. 3) (2005).

[168] *Id.*; *see* Paul Lewis and Rob Evans, *McLibel Leaflet was Co-written by Undercover Police Officer Bob Lambert*, GUARDIAN (Jun. 21, 2013) https://www.theguardian.com/uk/2013/jun/21/mclibel-leaflet-police-bob-lambert-mcdonalds.

[169] Steel and Morris v. United Kingdom, 41 Eur. Ct. H.R. (pt. 3) (2005).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

resulting gross inequality of arms.[174] The Court held, while "it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms," it must nevertheless ensure that in civil cases, "each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage."[175] Although the applicants had benefited from some pro bono legal assistance, the Court concluded that the disparity between the parties "was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness."[176] Moreover, the Court agreed with the applicants that the lack of procedural fairness and equality also gave rise to a violation of the right to freedom as guaranteed under Article 10 of the ECHR, noting the "general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling' effect on others."[177]

D. *Public Watchdogs Should be Protected at a High Level*

While the *Steel and Morris* judgment turned on the issue of legal aid for indigent campaigners, the ECtHR expressed a wider preoccupation with the need for governments effectively to protect campaign groups against corporate censorship. It compared the role of such groups in a democracy to that of the media:

> The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.[178]

The Court had already drawn a similar parallel a year earlier in *Vides Aizsardzības Klubs v. Latvia*,[179] a case concerning an environmental pressure group that had been ordered to pay compensation after publishing a resolution accusing a local politician of illegally authorizing construction

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[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] Vides Aizsardzības Klubs v. Latvia, Application No. 57829/00 (2004), http://hudoc.echr.coe.int/eng?i=001-66349.

work in a dune area. In that judgment, the Court described the NGO in question as a watchdog ("*chien de garde*") and observed that the participation of such groups in public debate was "essential for a democratic society" and "similar to the role of the press as defined in its constant jurisprudence."[180] In *Társaság a Szabadságjogokért v. Hungary*, the Court took the next step, confirming that not only are watchdog NGOs and the press comparable in social function – their activities also "warrant similar Convention protection."[181] This view has been upheld by the Court's Grand Chamber.[182]

The HRC, presumably influenced by the European case law, has similarly begun to acknowledge the special position of NGOs, using the same watchdog terminology. In *Toktakunov v. Kyrgyzstan*,[183] the author was a legal consultant for the Youth Human Rights Group, who complained about a refusal by various public officials to disclose information on the number of death sentences and individuals on death row upon request.[184] The Committee recalled its earlier holding that the right to freedom of expression, as protected under Article 19 of the ICCPR, includes a right of the media to have access to information on public affairs, and of the general public to receive media output.[185] However, the role of informing the public based on information obtained from the government could also be exercised by public associations or private individuals.[186] Accordingly, the Committee held that "[w]hen, in the exercise of such 'watchdog' functions on matters of legitimate public concern, associations or private individuals need to access State-held information . . . such requests . . . warrant similar protection by the Covenant to that afforded to the press."[187]

The HRC's finding has a limited scope. It recognizes the equivalence between NGOs, individual campaigners and the press in the specific area of access to State-held information without confirming that similar Covenant protection applies across the board. Nevertheless, such a ruling may only be a matter of time. The HRC, in its General Comment No. 34, had already rejected a narrow approach to enjoyment of the safeguards developed for the media, stating that it understands journalism as "a function shared by a wide

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[180] *Id.*

[181] Társaság a Szabadságjogokért v. Hungary, Application No. 37374/05 (2009), http://hudoc.echr.coe.int/eng?i=001-92171.

[182] Magyar Helsinki Bizottság v. Hungary, Application No. 18030/11 (2016), http://hudoc.echr.coe.int/eng?i=001-167828.

[183] Human Rights Comm., *International Covenant on Civil and Political Rights*, Communication No. 1470/2006, 101st Sess., UN Doc. CCPR/C/101/D/1470/2006.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id*.

range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication."[188]

In the European context, the ECtHR's ruling that NGO activities "warrant similar Convention protection" has unlocked access to the Court's wide-ranging jurisprudence on the protections that States must afford to the media. For example, NGOs facing SLAPP suits designed to frighten off their sources of information[189] are now likely able to invoke the right to protection of confidential journalistic sources.[190]

IX. ARE EXISTING STATE OBLIGATIONS SUFFICIENT TO ADDRESS THE SLAPP THREAT?

The national implementation of international human rights standards is, at the best of times, a slow process, and frequently an incomplete one. But if a government were to put in place all the substantive and procedural safeguards set out in the previous section, would they constitute an effective barrier to SLAPP suits?

SLAPPs are characterized by an intention to harass and intimidate the defendant, often along with a wider group of critics, to drain its resources or a combination thereof. A domestic law imposing the required higher recovery threshold for public figures, even if it covers major corporations and business figures, is unlikely to eliminate suits brought in order to harass. They are, after all, not intended to succeed at law. This fear is borne, to an extent, by the U.S. experience. Corporate defamation plaintiffs in the US have long had to contend with the risk – but not the certainty – of being held to the heightened "actual malice" standard of proof for public figures established by the Supreme Court in *New York Times Co. v. Sullivan*[191] and subsequent cases.[192] Indeed, much of this case law predates the coining of the term SLAPP, demonstrating the standard's ineffectiveness in preventing the

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[188] Int'l Covenant on Civil and Political Rights, *supra* note 136.

[189] *See* Peter Lockley, *Campaigning Journalism is Still Journalism: Global Witness and s.32 DPA*, PANOPTICON INFORMATION LAW BLOG (2014), https://panopticonblog.com/2014/12/23/campaigning-journalism-is-still-journalism-global-witness-and-s-32-dpa.

[190] In *Goodwin v. United Kingdom*, Application No. 17488/90 (1996), the ECtHR recognized that the ECHR implies a presumptive right of journalists to protection of sources, such a measure "cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest." The case arose from an attempt by a UK company called Tetra Ltd. to compel a journalist to disclose his notes and sources, after he had reported that the company was in the process of raising a loan and was in financial difficulties.

[191] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[192] For an overview of the development of the "actual malice" standard and its application to corporations, see D. Mark Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491, 496-500 (2001).

emergence of the phenomenon. The applicants in *Steel and Morris v. United Kingdom* envisaged a more drastic option to prevent corporate harassment: entirely denying multinational companies access to civil remedies against reputational harm. While such a measure would be effective, the ECtHR rejected it on economic grounds.[193]

The heightened threshold for public figures may have some value in blunting the deterrent effect of SLAPP suits by convincing defendants that the prospects of success are sufficient to risk contesting a claim. The manner in which the threshold is implemented in domestic law is important: if it is applicable only to defamation suits, plaintiffs may simply dress their claim up as a different cause of action, as the recent corporate embrace of RICO illustrates.

Clear guidance in domestic law on how damages are calculated, written with the ECtHR's antipathy to "unpredictably high damages in libel cases"[194] in mind, would further reduce the ability of SLAPP plaintiffs to intimidate, as defendants would have more confidence that the astronomic claims often advanced against them were bound to fail. This would far more truthful if "predictably high" damages were also disallowed. The ECtHR's insistence on a "reasonable relationship of proportionality to the injury to reputation suffered"[195] seems to rule out exemplary or punitive damages. To be effective, this too would need to apply to any claim arising out of advocacy activities. The RICO SLAPPs show how plaintiffs can otherwise maximize the intimidating effect of their suit by selecting a cause of action that enables multiple damages.

Establishing a system providing legal aid to certain SLAPP defendants, as required in light of the *Steel and Morris* ruling,[196] might to an extent discourage attempts to harass impecunious defendants. The McLibel litigation stands as a cautionary tale of how a SLAPP can turn into a PR disaster for the plaintiff if the defendants are able to carry on the fight.[197] The availability of legal aid might increase corporate apprehension of protracted "David v. Goliath" legal battles. At the same time, it is inevitable that publicly funded legal aid will pale in comparison to the resources a determined major corporation can bring to bear. Moreover, legal aid would be of little use against SLAPPs designed to drain resources, seeing as a common defendant in a SLAPP suit is a campaign or advocacy group that is

[193] Steel and Morris v. United Kingdom, 41 Eur. Ct. H.R. (pt. 3) (2005).

[194] Independent Newspapers (Ireland) Limited v. Ireland, *supra* note 166.

[195] Tolstoy Miloslavsky v. United Kingdom, 20 Eur. Ct. H.R (Ser. A) (1995).

[196] Steel and Morris v. United Kingdom, 41 Eur. Ct. H.R. (pt. 3) (2005).

[197] *See* Vick & Campbell, *supra* note 129.

capable of paying for its legal defence, but does so at the expense of activities that are part of its core mission.

Overall, it is reasonable to say that these international safeguards – the heightened threshold for public figure plaintiffs, the requirement to ensure proportionate and predictable damages, and the duty to provide legal aid – act more as a hindrance than a barrier to plaintiffs bent on SLAPPing their critics, even if diligently implemented at the national level. Their thrust is to ensure plaintiffs in freedom of expression cases are denied inappropriate relief, and that both sides have legal representation along the way. This leaves the central characteristic of SLAPPs unaddressed, namely that the intended effect is achieved through the litigation process, not the outcome of it. Accordingly, to effectively combat the SLAPP phenomenon, defendants must have procedural options to cut abusive litigation process short and to recover any costs they have incurred in the process.

It is entirely possible to argue, however, that a duty to enact "anti-SLAPP" legislation to this effect is already implicit in international law, at least in those countries where the phenomenon has manifested. By recognizing NGOs as "public watchdogs" comparable to the media, the HRC and the ECtHR have signalled, in the words of the latter, that participation of such groups in public debate is "essential for a democratic society."[198] It reasonably follows that it is incumbent on States to take appropriate measures when that participation is threatened.

The elaboration of anti-SLAPP legislation is undoubtedly a delicate task, touching as it does on the right to a fair and public hearing. There is a clear need for international human rights mechanisms to take up the task of developing appropriate guidance on how to identify SLAPPs and provide effective procedural safeguards against them.

X. THE FUTURE: SLAPPS AS A BREACH OF CORPORATE HUMAN RIGHTS OBLIGATIONS?

By one count, in 2015, sixty-nine of the top 100 economic entities in the world were corporations rather than States.[199] It has long been recognized that this state of affairs raises questions on whether States should remain the sole guarantors and enforcers of human rights, or if corporations should be

[198] Vides Aizsardzības Klubs v. Latvia, Application No. 57829/00 (2004), http://hudoc.echr.coe.int/eng?i=001-66349.

[199] Global Justice Now, *10 Biggest Corporations Make More Money than Most Countries in the World Combined* (Sept. 12, 2016), http://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined.

recognized as bearers of human rights obligations of their own.[200] Corporations increasingly possess censorship powers to rival those of the State, whether it be control over internet content or the capability to act as surrogates for federal prosecutors in RICO cases, as described in this article.

The phenomenon of SLAPP suits exposes the limitations of a model in which advocacy groups and individual advocates depend on the State to safeguard their freedom of speech vis-à-vis corporations. As has been observed, "what's filed is just the tip of the iceberg,"[201] meaning that in many instances, corporations are able to silence their critics through the mere threat of litigation without any opportunity for the State to intercede, even if it were willing.

The principal achievement to date in the drive to impose human rights duties on corporations are the UN Guiding Principles on Business and Human Rights,[202] the product of seven years of consultations by John Ruggie, the Special Representative of the UN Secretary General on the Issue of Human Rights and Transnational Corporations. While stopping short of imposing binding obligations, the Guiding Principles state that corporations must "avoid causing or contributing to adverse human rights impacts through their own activities,"[203] a requirement clearly violated when corporations threaten or pursue SLAPPs.

Enforcement mechanisms, while a necessity, remain a distant prospect. In 2014, the UN Human Rights Council adopted Resolution 26/9, establishing an open-ended working group tasked with elaborating an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises.[204] A "zero draft" of a treaty was published on July 16, 2018.[205] The proposal does not expressly address the SLAPP phenomenon, but Article 9 would require States' Parties to impose extensive due diligence obligations on persons engaged in transnational business activities. The required due diligence would include monitoring, identifying, and preventing human rights violations, not only in the relevant person's own operations, but also those of subsidiaries and other entities under direct or indirect control or directly linked to the operation in question. A corporate group would therefore need to assess the impact on freedom of expression of any proposed litigation against critics of a

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[200] Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in Int'l Human Rights Law*, 22 S. AFR. J. HUM. RT. 76, 80 (2006).

[201] Hayes, *supra* note 124.

[202] UN Secretary General, *The Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/17/31 (Mar. 21, 2011).

[203] *Id.*

[204] Human Rights Council Res. 26/9, UN Doc. A/HRC/RES/26/9 (Jul. 14, 2014).

[205] *Id.*

transnational operation, and a SLAPP suit undertaken by a joint venture partner or key supplier would arguably trigger an obligation to take preventive steps. Nevertheless, ultimate accountability would still lie with governments, as the treaty does not envisage any supranational mechanism to seek redress against corporations that fail to comply with these obligations and who aren't held to account.

XI. CONCLUSIONS

As corporate power grows in the USA and beyond, so too does the similarity between the operations of corporations and government. SLAPPs, a phenomenon which once may have resembled the nuisance of vexatious litigation, now increasingly resemble the menace of privatized censorship. Recent abuses of RICO, which allows corporations to stand in for federal prosecutors and harass critics with spurious criminal charges, provide a powerful example of the oppressive potential of a well-funded SLAPP.

SLAPPs do not just cost their victims time or money; they frequently cost them the opportunity to speak out and exercise their democratic rights. As is being increasingly recognized by international mechanisms on free speech and assembly rights, SLAPPs are therefore fundamentally a matter of human rights. They represent that awkward anomaly: a human rights violation committed by private actors rather than government parties. SLAPPs have therefore naturally attracted little attention within a human rights paradigm that mainly recognizes governments as able to control rights and freedoms.

As we have argued in this article, the rights to freedom of expression and assembly confer a number of obligations on governments that are relevant to SLAPPs: the need to require greater tolerance of criticism from public figures, the need to ensure civil awards for damages are not excessive and the need to ensure legal aid is available to ensure some measure of equality of arms are amongst the examples given. Even with all these measures in place however, the risk of corporations "camouflaging" their attacks as common torts and using the judicial system as a vehicle to silence criticism will remain.

The scope and reach of human rights instruments, long-since moving in a more horizontal direction, need to evolve to accommodate the unique challenge of SLAPPs. As the eye-wateringly expensive McLibel and *Chevron* litigations show, money is not a deterrence that matters to SLAPP litigants. The attorney's fees generally available under anti-SLAPP statutes are an aid to defendants, but major corporations can easily internalize these costs. Effective anti-SLAPP measures must include clear authority for courts to provide protection and redress at the earliest stage of proceedings, before

having a chance to wear down their critics. In the longer term, mechanisms must be developed that allow victims of privatized censorship to hold corporations directly responsible for the failure to respect free speech and assembly rights.

In the meantime, all relevant actors need to be vigilant against SLAPPs. Lawmakers must be cognisant of the risk of abuse when drafting laws that implicate speech, amend laws such as RICO that have shown themselves to be susceptible to abuse, and ensure both procedural and substantive protections are in place to guard against SLAPPs. Judges must learn to recognize SLAPPs and, where possible, sanction abusive behavior (e.g. through cost awards). Even bar associations and individual lawyers have a role to play in stigmatizing the use of the tactic in the legal profession. Ultimately, laws such as RICO can only be stretched to cover advocacy activities, because so few people are familiar with the SLAPPs they camouflage. That's something we can all do something about.