Report of monitors: *United States v. Steven Donziger*, No. 19-CR-561 (LAP); 11-CIV-691 (LAK), United States Federal Court, South New York Trial Division

Pilot Project to establish
International Monitoring Panels to Evaluate Trials in the United States (IMPETUS)

Donziger Criminal Contempt Proceedings Violated International Human Rights Law and Standards

Final Observations and Conclusions on the Criminal Contempt Proceedings against Steven Donziger in the Trial Division, 2019-2021

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International Monitoring Panels to Evaluate Trials in the United States (IMPETUS), *Donziger Criminal Contempt Proceedings Violated International Human Rights Standards: Final Observations and Conclusions on the Criminal Contempt Proceedings against Steven Donziger in the Trial Division, 2019-2021* (IMPETUS, 24 January 2022).

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Acronyms and abbreviations used in this report

IACHR:	Inter-American Commission on Human Rights
ICCPR:	International Covenant on Civil and Political Rights
IMPETUS:	International Monitoring Panels to Evaluate Trials in the United States
OAS:	Organization of American States
OHCHR:	Office of the High Commissioner on Human Rights
OSCE:	Organization for Security and Co-operation in Europe
RDB:	Rules for the Division of Business Among District Judges
RICO Act:	Racketeering Influenced and Corrupt Organizations Act
SDNY:	United States District Court, Southern District of New York
	"States" refers to countries.
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
US:	United States of America
WGAD:	UN Working Group on Arbitrary Detention

Executive summary

This executive summary presents an overview of key findings of an international group of legal scholars and practitioners who conducted impartial monitoring of the case of *United States v. Steven Donziger*, No. 19-CR-561 (LAP); 11-CIV-691 (LAK) (*US v. Donziger*). This summary sets out a brief background, the principle findings of the monitoring group and the Panel's recommendations. The summary contains no footnotes; references to relevant sections of the fully-footnoted report are provided.

The Panel has determined that the conduct of judges and prosecutors in Steven Donziger's case has led to numerous and serious violations of his rights with respect to liberty, arbitrary detention and fair trials under international human rights law, in particular Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, ratified by the United States in 1992. The Panel has recommended that by way of remedy he be immediately released from custody and be compensated for the violations he has experienced.

International Monitoring Panels to Evaluate Trials in the United States (IMPETUS)

In September 2020, several international human rights practitioners and academics from the United States (US) and Canada formed a working group to develop International Monitoring Panels to Evaluate Trials in the United States (IMPETUS). The group identified a need to assess implementation of international human rights laws, norms, and standards within the US justice system. The US is bound by customary international law and various international treaties that it has ratified, including the ICCPR, which sets out fundamental human rights for fair trials, which have been further elaborated through General Conclusions, Concluding Observations and Views on Individual Petitions from the UN Human Rights Committee, the expert UN treaty body charged with overseeing implementation of the ICCPR.

Pilot Project: US vs. Donziger

The IMPETUS working group chose the criminal contempt prosecution of a New York lawyer, Mr. Steven Donziger, as its pilot project because of the timeliness and relevance of the case. The Donziger proceedings had garnered international attention among human rights lawyers in several countries. The scope of the Panel's observations in this case is limited to the proceedings in *US v. Donziger*, over which Judge Loretta A. Preska presided from 6 August 2019 to 27 October 2021. Information about IMPETUS and its working methods are set out in Chapter 1.

Background of the case

The criminal contempt charges against Steven Donziger arose in the context of his work as a lawyer representing Indigenous Peoples and local communities in Ecuador beginning in 1993. In February 2011, a court in Ecuador awarded Mr. Donziger's clients a US$19 billion judgment against Chevron for damages and clean-up costs related to pollution of the environment and communities in the Ecuadorian Amazon by Chevron's predecessor company, Texaco. Ecuador's

Supreme Court upheld the judgment in 2013, but reduced the award to US$9.5 billion for clean-up costs.

In February 2011, Chevron commenced an action in the US Federal Court against Mr. Donziger under the *Racketeer Influenced and Corrupt Organizations Act (*RICO) claiming that the Ecuadorian judgement had been obtained by fraud. In 2014, Judge Lewis A. Kaplan issued a civil judgment against Mr. Donziger ordering that the defendants not be allowed to benefit from the Ecuadorian judgement. Mr. Donziger was unsuccessful in his appeal to have the RICO decision overturned.

The criminal contempt case against Mr. Donziger is an extension of the civil RICO case of *Chevron Corp. v. Donziger*, 11-CV-691 (SDNY), over which Judge Kaplan continues to preside for post-judgement discovery and enforcement purposes. On 30 July 2019, Judge Kaplan charged Mr. Donziger with six counts of criminal contempt after civil contempt rulings had failed to secure Mr. Donziger's compliance with post-judgment discovery orders in the RICO matter. Included were discovery orders to provide documents that Mr. Donziger argued was subject to lawyer-client privilege.

New York federal prosecutors declined to prosecute Mr. Donziger, citing lack of resources. Judge Kaplan then appointed the private law firm of Seward & Kissel LLP to prosecute the criminal contempt charges. The appointment of the special prosecutor is discussed Chapter 2. The special prosecutor's conduct is discussed in Chapter 3.

Judge Kaplan appointed Judge Loretta A. Preska to preside over the criminal contempt case. On 27 July 2021, Judge Preska convicted Mr. Donziger of all six counts of criminal contempt. On 1 October 2021, Judge Preska sentenced Mr. Donziger to six months imprisonment, the maximum available sentence, and denied release pending appeal. The appointment of Judge Preska is discussed in Chapter 2, and her conduct is discussed in Chapters 2, 3, and 4.

Principal findings of the IMPETUS Panel in *US vs. Donziger*

After review of transcripts and relevant laws and standards, the Panel's unequivocal assessment of the criminal contempt proceedings against Steven Donziger is that he has been subject to multiple violations of his internationally protected human rights, including his right to a fair trial by an independent and impartial tribunal and his right to the presumption of innocence. These violations have resulted in prolonged arbitrary detention of Mr. Donziger.

In the observations of the Panel, the proceedings were conducted without reference, formal acknowledgement, or deference either to international human rights law or the US Constitutional guarantees of an independent and impartial tribunal or the fundamental principle of equality before the law guaranteed by the ICCPR.

Reasonable appearance of judicial bias

The Panel finds a reasonable appearance of judicial bias. First, there was a confluence of multiple roles taken by Judge Kaplan; he presided over all the underlying litigation, laid the criminal contempt charges, appointed the special prosecutor, appointed Judge Preska to hear the

charges, and retains conduct over enforcement proceedings in the underlying RICO case. There was no appearance of independence and impartiality in the process of appointments of the special prosecutor and the judge, in violation of international law and related standards.

The Panel notes that the *Federal Rules of Criminal Procedure* regarding criminal contempt and the Southern District of New York (SDNY) court rules regarding appointment of judges and special prosecutors provide latitude for legal interpretations and rulings that violate the requirement of independent and impartial tribunals. Any such application of these rules violates international human rights legal standards, which allow no exceptions to the requirement of fair trial rights. See section 2.2 of this report.

SDNY Rules for the Division of Business Among District Judges contains no language affirming the obligation to ensure actual or perceived independence and impartiality of judicial assignments. However, this omission does not obviate the requirement to ensure the appointment of judges who are, and are seen to be, impartial and independent.

The appearance of bias resulting from Judge Kaplan's method of appointment of the judge and prosecutor might have been ameliorated or allayed by the exercise of strict judicial impartiality on the part of Judge Preska from the outset of her involvement in the case. However, Judge Preska, too, demonstrated an appearance of bias. Throughout the pre-trial proceedings and the trial, the Panel observed that Judge Preska appeared to give latitude and deference to the prosecutor without equally ensuring full and respectful attention to defence counsel's submissions and cross-examination. During the trial, the Panel noted that Judge Preska took an aggressive and interruptive demeanour towards the defendant and defence counsel, which appeared to impede the right of the accused to make full answer and defence to the charges against him.

Equality of arms

Equality before the law is a fundamental principle of international human rights law found in the ICCPR. The international principle of "equality of arms" guarantees procedural fairness to all parties to proceedings. See more in Chapter 3.

The criminal contempt proceedings against Mr. Donziger have been marked by violations of the principle of equality of arms. Since 2019, Mr. Donziger has relied on a series of pro bono lawyers, stating that his resources have been exhausted by Chevron's civil litigation to resist the Ecuador court ruling.

In marked contrast, there appears to be an extraordinarily high level of resources available to the special prosecutors. Filings on the docket indicate that the special prosecutor has billed hundreds of thousands of dollars to prosecute the case and spent hundreds of hours of time preparing for the trial with Chevron lawyers. At the 1 October 2021 sentencing of Mr. Donziger, defence counsel noted Chevron's "endless resources and abilities to dispatch endless lawyers, fueled by endless dollars" to resist the underlying civil action against them, and quoted from a 1993 email in which Chevron promised "to fight them [the Ecuadorian plaintiffs] until hell freezes over and then fight them on the ice." (See Chapter 3)

The behaviour of the special prosecutors during the criminal contempt proceedings has been more in keeping with the zealousness of partisan counsel against Mr. Donziger than that of an impartial, disinterested prosecutor as required by international and national standards (see below section 2.3.1.1. and 3.3).

Further, the Panel has been unable to discern with certainty whether there was any transparent or effective oversight of the prosecution by the Department of Justice or by any judicial authorities after the special prosecutors were appointed. The Panel is concerned by an appearance that no transparent procedural safeguards were implemented to ensure a fair prosecution as required by international or domestic standards.

Pre-trial home confinement violated the presumption of innocence

The Panel also concludes that the pre-trial home confinement of Mr. Donziger was not grounded in evidence of necessity, but on speculation about possible flight risk. Judge Preska failed to recognize that the prosecutor had the onus to prove flight risk on the preponderance of evidence and that at international and national law, restrictions on liberty must be the least restrictive means possible to assure attendance at trial. In multiple hearings, Judge Preska accepted the special prosecutor's assertions of flight risk that had little or no basis in evidence and were contradicted by the defendant's evidence of lack of motivation to flee or means to cross multiple borders with no passport. Mr. Donziger was required to surrender his travel documents and was subject to a Personal Recognizance Bond of $800,000. Home confinement with an ankle bracelet was made unnecessary by these other conditions.

Mr. Donziger's pre-trial home confinement for 25 months on charges attracting a maximum six-month sentence was unreasonable. The Panel concludes that the lengthy period of home confinement did not serve the purpose of prevention of flight; rather it appears to have been punitive in nature and purpose. The Panel finds that Mr. Donziger's detention constitutes prolonged arbitrary detention in serious violation of the right to liberty and the presumption of innocence. (See in Chapter 4).

Conclusions

In the Panel's observations, the judges, special prosecutors and defence counsel are all highly skilled and knowledgeable of the domestic law, rules, and technical procedural requirements. However, the Panel unequivocally is of the view that the conduct and outcome of proceedings are dismaying. In instance after instance, when a procedural rule could be deployed against the defendant, the special prosecutor and judge did so.

In the case of *US v. Donziger*, Judge Kaplan and Judge Preska consistently interpreted and applied laws and rules in ways that gave a "rule by law" air of legitimacy to proceedings that aimed toward seemingly predetermined conclusions while disregarding fundamental principles of the rule of law.

After reviewing the transcripts and relevant laws and standards, the Panel's unequivocal assessment of the criminal contempt proceedings against Steven Donziger is that he has been subjected to multiple violations of his internationally protected human rights, including his right

to a fair trial by an independent and impartial tribunal and his right to the presumption of innocence. These violations have resulted in prolonged arbitrary detention for Mr. Donziger in violation of his right to liberty.

Mr. Donziger is entitled to an enforceable remedy for violation of his internationally protected rights pursuant to Article 2 of the ICCPR. The Panel recommends immediate and unconditional release from detention as well as compensation for all violations of his right to liberty.

Recommendations

The Panel recommends that all relevant US authorities and bodies:

- Review and amend laws, rules, decrees, and policies to prevent arbitrary applications that side-step or violate fundamental norms and principles of international human rights law and standards related to the administration of justice, including independence and impartiality of judges and prosecutors and fair trial principles.

- Implement measures to guarantee that Special Prosecutors are accountable to uphold the same rules, guidelines, standards, oversight, and budgetary restraints applicable to public prosecutors in like cases.

- Conduct an independent and impartial investigation into the conduct of Judge Lewis A. Kaplan and Judge Loretta A. Preska related to all proceedings against Mr. Donziger.

- Ensure that in no case can convicted persons be sentenced to punishment that fails to take into account and give the convicted person credit for all forms of de jure and de facto pretrial confinement, regardless of the type of offence on which the person is convicted.

- Ensure that judges and lawyers in the US have education in international human rights law and standards binding on the US, in particular with regard to criminal proceedings.

- Accept the recommendations of the UN Working Group on Arbitrary Detention (WGAD) concerning Mr. Donziger and seek follow up technical assistance from the WGAD and other relevant Special Procedures of the UN Human Rights Council such as the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on human rights defenders. In this regard, the Panel welcomes the fact that on 21 October 2021, the US issued a standing invitation for country visits to the Special Procedures of the Human Rights Council. The Panel further notes that a proposed visit from the UN Special Rapporteur on the independence of judges and lawyers has been outstanding since 2014, and recommends that the visit be arranged on an urgent basis.

1 Introduction: The rule of law and the right to a fair trial

1.1 International definition of the "rule of law"

The "rule of law" is the cornerstone of international human rights laws, norms, and standards, which includes fair trial rights. The United Nations (UN) defines the rule of law as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[1]

The rule of law is distinguished from "rule by law" which "connotes the instrumental use of law as a tool of political power" or the arbitrary application of laws, rules, or decrees in ways that side-step or violate fundamental principles of international human rights laws, norms, and standards.[2]

1.2 About IMPETUS

In 2020, a group of international human rights practitioners and academics from the United States (US) and Canada formed a group for the purpose of developing International Monitoring Panels to Evaluate Trials in the United States (IMPETUS). The group convened because of an identified need to address international concerns about the administration of justice in the US. Such concerns were highlighted by a resolution of the UN Human Rights Council on 19 June 2020[3] that was triggered by severe social conflicts in the US regarding systemic racism, violence, and human rights violations by law enforcement personnel against people of African descent. Debate both within the US and internationally about these social conflicts also engaged broader critiques of the US implementation of its international human rights obligations, including the administration of justice by US courts. There has been ongoing and widespread international concern and associated social unrest related to the capacity of US courts to ensure that US citizens accused of extrajudicial killings and other forms of violence against people of African descent, Indigenous Peoples, and other racialized or marginalized persons or groups in the US are held legally accountable for their actions.

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[1] *What is the Rule of Law*, UNITED NATIONS, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ [https://perma.cc/AVL9-MXSD] (emphasis added).

[2] *See* Jeremy Waldron, *Rule of Law and Rule by Law*, STAN. ENCYC. PHIL. (June 22, 2016), https://plato.stanford.edu/entries/rule-of-law/#RuleLawRuleLaw.

[3] Human Rights Council Res. 43/1, U.N. Doc. A/HRC/43/1, The Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Police Brutality and Other Violations of Human Rights (June 19, 2020), https://digitallibrary.un.org/record/3876063?ln=en.

The IMPETUS group identified a need to assess allegations of oversights and miscalculations in the US implementation of international human rights laws, norms, and standards within the US justice system. Accordingly, it developed an impartial trial monitoring process to assess trials according to international human rights laws, norms, and standards that are binding upon the US.

The IMPETUS group convened on 1 September 2020 and resolved to conduct a pilot trial monitoring project in the US. The case of Steven Donziger was chosen as the pilot project because of the timeliness and relevance of the case. Specifically, the IMPETUS group noted the opportunity to send trained monitors to observe the trial, notwithstanding the extraordinary circumstances posed by the COVID-19 pandemic. Further, the proceedings had garnered international attention among human rights lawyers due to the range of important questions posed by the case under international human rights laws and related standards for the administration of justice.

1.3 **Why focus on international law, norms, and standards?**

The US is bound by customary international law and various international treaties that it has ratified, including the *International Covenant on Civil and Political Rights* (ICCPR)[4] ratified on 8 June 1992. The ICCPR sets out fundamental human rights for fair trials, which have been further elaborated through General Conclusions, Concluding Observations and Views on Individual Petitions from the UN Human Rights Committee, the expert UN treaty body charged with overseeing implementation of the ICCPR.

The *Vienna Convention on the Law of Treaties* provides in Article 26 that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith.[5] Further, Article 27 stipulates that a State party "may not invoke the provisions of its internal law as justification for its failure to perform." As a result, multilateral treaties, including human rights treaties, entail that every State that is party to a treaty is obligated to every other State Party and therefore must comply with its undertakings under the treaty.[6]

The US ratified the ICCPR with several reservations, declarations, and understandings, including a declaration that the ICCPR is not "self-executing."[7] This means that the ICCPR is not directly justiciable in US courts unless it has been implemented by domestic laws.[8] However, the *US*

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[4] International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [hereinafter ICCPR].

[5] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[6] U.N. Hum. Rts. Comm., *General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶ 3, 80th Sess., adopted Mar. 29, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004), https://www.refworld.org/docid/478b26ae2.html.

[7] ICCPR, Declarations and Reservations: United States of America, International Covenant on Civil and Political Rights, Reservation 1, *deposited on* June 8, 1992, 1676 U.N.T.S. 543 (*status as at* Dec. 29, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec.

[8] The term "laws of nations" refers to international law. It is beyond the scope of this report to discuss the reception of international law in the United States. For a summary, see STEPHEN P. MULLIGAN, CONG. RSCH. SERV.,

Constitution provides in its Supremacy Clause (Article VI) that treaties are part of the "supreme Law of the Land." Moreover, it is well-settled in US jurisprudence that a statute "ought never to be construed to violate the laws of nations if any other possible construction remains."[9] International law is thus an important interpretive tool for US courts to consider when seeking to ensure that potentially ambiguous US domestic laws are consistent with existing US international obligations.

1.4 The pilot project: US vs. Donziger

The international IMPETUS monitoring panel (Panel) for the Donziger proceedings is composed of the following persons, whose biographies are found in the Annex on page 54 below.

- Stephen Rapp, J.D., United States Ambassador-at-Large (ret.), who headed the Office of Global Criminal Justice in the US State Department (2009-2015);
- Catherine Morris, J.D., LL.M, Executive Director and UN Representative, Lawyers' Rights Watch Canada;
- Etienne C. Toussaint, M.S.E., J.D., LL.M., Assistant Professor of Law, University of South Carolina School of Law;
- Nykeeba Brown, J.D, LL.M., New York (for the hearing of 5 October 2020); and
- Other monitors taking notes of hearings under the direction of the Panel.

1.4.1. Selection of monitors

Criteria for selection of the Panel ensure that:

All members of the Panel have:

- Working knowledge of international human rights law, including relevant United Nations (UN) and regional treaties, and other international legal instruments; and
- Reputation for fairness and impartiality in legal practice or scholarship.

Some members of the Panel have:

- Experience monitoring civil and political rights from an international human rights perspective;
- Experience monitoring criminal trials internationally or nationally; and

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RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (Sept. 19, 2018), https://sgp.fas.org/crs/misc/RL32528.pdf.

[9] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). It is beyond the scope of this report to discuss the US case law and literature on the scope of application of the "Charming Betsy canon." The purpose of mentioning it here is to indicate that it is open to the US courts to consider submissions from litigants that engage international human rights law.

- Knowledge of the US criminal justice system, generally, and the jurisdiction in which the proceedings are occurring.

1.4.2. Scope, focus and methods

1.4.2.1. Scope

The criminal contempt case against Stephen Donziger is an extension of the civil case of *Chevron Corp. v. Donziger*, 11-CV-691 (S.D.N.Y.), over which Judge Lewis A. Kaplan continues to preside. The scope of the Panel's observations in this case has been limited to the proceedings in *United States v. Steven Donziger*, No. 19-CR-561 (LAP); 11-CIV-691 (LAK) (*US v. Donziger*), over which Judge Loretta A. Preska presided from 6 August 2019 to 27 October 2021. Panel members acquainted themselves with judgements in related cases to familiarize themselves with the context necessary for an impartial assessment of the facts.

The Panel's observations and conclusions on the criminal contempt case are based on the in-depth study of court filings and transcripts of proceedings, as well as in-person or audio observations conducted by members of the Panel. All court materials and observations were evaluated using international laws, norms, and standards that are relevant to the US, including General Comments, Observations or Views of UN Treaty Bodies, and the opinions of Special Procedures of the UN Human Rights Council.

1.4.2.2. Focus

The focus of the Panel's observations of the criminal contempt proceedings was on the following international human rights issues:

- The rule of law and the right to a fair trial (Chapter 1);
- The right to a fair and public hearing before a competent, independent, and impartial tribunal (Chapter 2);
- The right to equality before the law: Equality of arms and legal counsel of choice (Chapter 3); and
- The right to liberty, the presumption of innocence, and pre-trial release (Chapter 4).

The Panel also provides overall conclusions and recommendations (Chapter 5).

1.4.2.3. Methods

The methods of the Panel included the following:

- Examination of relevant international treaties and instruments;
- Examination of relevant domestic laws and rules;
- Attendance at proceedings of a pre-trial hearing held 5 October 2020, a trial held during 10-17 May 2021, and a sentencing hearing held 1 October 2021, in each case either in person or by telephone audio access;

- Study of court transcripts of a number of pretrial hearings, including several bail hearings, a pre-trial hearing held 5 October 2020, the trial held 10-17 May 2021, and a sentencing hearing held 1 October 2021; and
- Study of numerous documents filed and rulings of the United States Federal Court, South New York Trial Division in the case of *US v. Donziger*.

1.4.3. **Documents produced by the Panel**

1.4.3.1. **Letter to the presiding judge 2 September 2020**

On 2 September 2020, the Panel sent a letter[10] to the presiding Judge Loretta A. Preska by courier both notifying the Court of the Panel's intention to monitor the proceedings and seeking the judge's assistance in facilitating attendance in the court room, either in person or electronically due to the COVID-19 pandemic-related restrictions. The letter was copied to the Chief Judge. The letter was delivered to the Court by hand. No response was received.

1.4.3.2. **Report of a pre-trial hearing 5 October 2020**

Members of the Panel monitored a hearing on 5 October 2020 via telephone audio access. The hearing was a pre-trial conference on representation issues and trial witnesses. The Panel's report, issued on 27 October 2021, is entitled:

"Report of Monitors: *United States v. Steven Donziger*, No. 19-CR-561 (LAP); 11-CIV-691 (LAK), United States Federal Court, South New York Trial Division. Monitors' report of hearing held 5 October 2020 at 11:30 am eastern, Southern District of New York, 500 Pearl Street, New York, NY 10007, Courtroom 12A."[11]

1.4.3.3. **Letter to the presiding judge 30 April 2021**

On 30 April 2021, the Panel sent a letter by courier to Judge Preska, making application for audio access to the trial scheduled to begin 10 May 2021.[12] This application was denied,[13] which meant that Panel members located in New York attended in person, and those outside New York

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[10] Letter from Stephen Rapp and Catherine Morris to Judge Loretta A. Preska, dated 2 April 2020, https://impetusmonitors.org/wp-content/uploads/2022/01/Monitors.USA_.Donziger.2September2020.pdf.

[11] IMPETUS, Report of Monitors: *United States v. Steven Donziger*, No. 19-CR-561 (LAP); 11-CIV-691 (LAK), United States Federal Court, South New York Trial Division. Monitors' report of hearing held 5 October 2020 at 11:30 am eastern, Southern District of New York, 500 Pearl Street, New York, NY 10007, Courtroom 12A. 27 October 2021, https://impetusmonitors.org/wp-content/uploads/2022/01/ObserversReport.USvDonziger.Hearing.5October2020.FF_.pdf.

[12] Letter addressed to Judge Laura Taylor Swain and Judge Loretta A. Preska, from Stephen Rapp and Catherine Morris dated 30 April 2021 re: Mr. Rapp and Ms. Morris writes to request audio access to trial, https://www.docketbird.com/court-cases/USA-v-Donziger-11cv691/nysd-1:2019-cr-00561-520592/page/2.

[13] Memo endorsement as to Steven Donziger on re: 286 Letter by Steven Donziger addressed to Judge Laura Taylor Swain and Judge Loretta A. Preska, from Stephen Rapp and Catherine Morris dated 30 April 2021 re: Mr. Rapp and Ms. Morris writes to request audio access to trial. Endorsement: The Court adheres to its Orders of 6 April 2021 (dkt. no. 254) and April 30, 2021 (dkt. 275). (Signed by Judge Loretta A. Preska on 4 May 2021)

audited court transcripts and notes from Panel members attending in person. See more at 2.4.1 below.

1.4.3.4. **The current report**

On 24 January 2022, IMPETUS issued this public report of its findings, entitled "Donziger Criminal Contempt Proceedings Violated International Human Rights Law and Standards. United States v. Steven Donziger, No. 19-CR-561 (LAP); 11-CIV-691 (LAK), United States Federal Court, South New York Trial Division: Final Observations and Conclusions on the Criminal Contempt Proceedings in the Trial Division, 2019-2021, 24 January 2022"[14]

1.4.4. **Orientation, applicable standards, and guidance for monitors attending hearings**

Prior to the proceedings, the Panel members reviewed the following:

- OSCE standards for trial monitoring;[15]
- Orientation to relevant international laws, norms, and standards, such as:
    - Treaties, including the ICCPR, and other international law instruments,
    - Customary international law and general principles, and
    - Domestic law, rules, and policies as they relate to international law standards; and
    - TrialWatch[16] orientation documents.

1.4.4.1. **Monitoring standards**

The Panel monitored the proceedings according to standards set out in the OSCE Trial Monitoring manual.[17] The Panel's findings are based on international laws, norms, and standards, including the *Universal Declaration of Human Rights* (UDHR), adopted by the UN General Assembly with a positive vote by the US on 10 December 1948,[18] the *International Covenant on Civil and Political Rights* (ICCPR)[19] ratified by the US on 8 June 1992, applicable

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[14] IMPETUS, United States v. Steven Donziger, No. 19-CR-561 (LAP); 11-CIV-691 (LAK), United States Federal Court, South New York Trial Division: Final Observations and Conclusions on the Criminal Contempt Proceedings in the Trial Division, 2019-2021, 24 January 2022, https://impetusmonitors.org/wp-content/uploads/2022/01/IMPETUS.Donziger.FinalReport.January2022.pdf.

[15] ORG. FOR SEC. & CO-OPERATION IN EUROPE (OSCE), OFF. FOR DEMOCRATIC INST. & HUM. RTS. (ODIHR), TRIAL MONITORING: A REFERENCE MANUAL FOR PRACTITIONERS (revised ed. 2012) [hereinafter OSCE MANUAL], https://www.osce.org/odihr/94216.

[16] *TrialWatch Resources*, CLOONEY FOUND. JUST., https://cfj.org/resources/ [https://perma.cc/FCH4-LSYT].

[17] OSCE MANUAL, *supra* note 15.

[18] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (UDHR) (Dec. 10, 1948) [hereinafter UDHR], https://www.un.org/en/universal-declaration-human-rights/. The US voted to adopt the UDHR. *See Voting Summary*, U.N. DIGIT. LIBR., https://digitallibrary.un.org/record/670964?ln=en&p=Resolution+217%28III%29+A [https://perma.cc/52YX-5UJV].

[19] ICCPR, *supra* note 4.

customary international law binding on all States, and other applicable international human rights norms and standards.

1.5 Background to the criminal contempt proceedings against Steven Donziger

The criminal charges against Steven Donziger arose in the context of his work as a lawyer representing Indigenous Peoples and local communities in Ecuador beginning in 1993. Panel members familiarized themselves with the following background information to ensure that they understood the information discussed or mentioned during the criminal contempt proceedings.

1.5.1. 2011–2013: Ecuador court judgment against Chevron

In February 2011, an Ecuadorian court awarded Mr. Donziger's clients a US$19 billion judgment against Chevron for damages and clean-up costs related to pollution of the environment and communities in the Ecuadorian Amazon by Chevron's predecessor company, Texaco. Ecuador's Supreme Court upheld the judgment in 2013 but reduced the award to US$9.5 billion for clean-up costs.

1.5.2. March 2011–13: US Federal Court injunction

US Federal Court Judge of the Southern District of New York (SDNY), Lewis A. Kaplan, granted Chevron's application for a global injunction against the enforcement of the Ecuador court's judgment.[20]

In 2012, the US Court of Appeals overturned the global injunction, ruling that the plaintiffs were entitled "to seek to enforce that judgment in any country in the world where Chevron has assets."[21]

1.5.3. 2011–2014: Chevron's RICO case against Steven Donziger

In February 2011, Chevron commenced an action in the US Federal Court against Mr. Donziger under the Racketeer Influenced and Corrupt Organizations Act (RICO) claiming that the Ecuadorian judgement had been obtained through fraudulent evidence and bribery of the judge. In 2014, Judge Kaplan issued a 485-page judgment against Mr. Donziger in a non-jury civil trial ordering that the defendants not be allowed to benefit from the Ecuadorian judgement.[22] Mr.

[20] Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), https://casetext.com/case/chevron-corporation-v-donziger-2, *as discussed in* Chevron Corp. v. Yaiguaje, 2015 SCC 42, para. 7, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do.

[21] Chevron Corp v Naranjo, 667 F.3d 232 (2d Cir. 2012), *as quoted in Yaiguaje*, 2015 S.C.C. 42, para 7.

[22] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), https://casetext.com/case/chevron-corp-v-donziger-8.

Donziger was unsuccessful in his appeal to have the RICO decision overturned.[23]

The proceedings and judgment in the RICO trial were criticized by lawyers and bar associations in several countries.[24] Mr. Donziger and others have repeatedly raised concerns about an appearance of bias by Judge Kaplan against both the Ecuadorian defenders and Mr. Donziger in favour of Chevron.[25]

In an opinion dated 9 May 2011 denying a recusal motion, Judge Kaplan rejected arguments by counsel that he lacked impartiality.[26] Mr. Donziger has emphasized ongoing concerns that one of the foundations of Judge Kaplan's RICO judgement was the dishonest testimony of a witness who later admitted that he had lied about his claims of bribery and fraud committed by Mr. Donziger.[27] However, Judge Kaplan stated in a "memorandum opinion" dated 2 February 2018 that "the testimony of [the impugned witness] Guerra was far from indispensable to the judgment rendered in this case . . . this Court would have reached precisely the same result in this case even without the testimony of Alberto Guerra."[28]

Judge Kaplan's findings in the RICO case, including the finding that Mr. Donziger bribed the Ecuadorian judge, formed the basis of US courts' use of the doctrine of "collateral estoppel."[29] The use of this legal doctrine has precluded Mr. Donziger from rebutting Judge Kaplan's findings in subsequent proceedings (see below under disbarment in Section 1.5.5 below and the Panel's discussion of the criminal contempt proceedings in Chapter 2).

1.5.4. **2012–2019: Ecuadorian plaintiffs' enforcement actions against Chevron**

From 2012, the plaintiffs were engaged in actions to enforce the judgment in Canada and other countries. From 2012 to 2019, Mr. Donziger attempted to enforce the judgment in Canada, because Chevron Canada, a wholly-owned subsidiary of Chevron, has assets in Canada.[30] In 2015, the Supreme Court of Canada (SCC) ruled that the court in the Province of Ontario had jurisdiction to adjudicate the recognition and enforcement action against Chevron Canada. The

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[23] Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016), https://www.govinfo.gov/content/pkg/USCOURTS-ca2-14-00832/pdf/USCOURTS-ca2-14-00832-0.pdf.

[24] *E.g.*, Charles Nesson, *Collateral Estoppel*, HARV. L. REC. (Dec. 6, 2019), https://hlrecord.org/collateral-estoppel/.

[25] Chevron Corp. v. Donziger, 783 F. Supp. 2d 713 (S.D.N.Y. 2011), https://casetext.com/case/chevron-corporation-v-donziger-3.

[26] *Id.*

[27] Memorandum and Order, Chevron v. Steven Donziger, No. 11-cv-0691 (LAK) (May 17, 2013). See the transcript in which witness Guerra states he lied, Transcripts Track 2 Hearing—Volumes 1 to 13 from 21 April 2015 to 8 May 2015, Chevron Corp. & Texaco Petroleum Corp. v. Ecuador (II), PCA Case No. 2009-23 (Apr. 21, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4437.pdf.

[28] Chevron Corp. v. Donziger, 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 28, 2018), https://casetext.com/case/chevron-corp-v-donziger-29.

[29] For explanation of the doctrine of "collateral estoppel," see Comment, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3227&context=uclrev.

[30] Chevron Corp. v. Yaiguaje, 2015 SCC 42.

SCC stated that action for enforcement could proceed based on "a real and substantial connection existed between the foreign court and the underlying dispute."[31] The case was returned to the Ontario Court of Appeal to be heard on the merits.

In 2018, the Ontario Court of Appeal found that "through no fault of their own, the appellants have suffered lasting damages to their lands, their health, and their way of life," but declined to enforce the Ecuador court's judgment against Chevron Canada on the grounds that Chevron Canada was a completely separate legal entity from Chevron.[32] In April 2019, the SCC refused leave to appeal the Ontario Court of Appeal's 2018 decision. However, no Canadian court has suggested that the US RICO judgement or any other US court decision invalidates the Ecuadorian judgment against Chevron.

1.5.5. **July 2018–present: Mr. Donziger's disbarment**

In July 2018, the New York State Bar Association (NY Bar) suspended Mr. Donziger's licence to practice law in the US State of New York. The suspension was issued in a summary court proceeding without an oral hearing based on a 2 December 2016 letter by the Chair of the SDNY Grievance Committee, Judge P. Kevin Castel, to the Chair of the Attorney Grievance Committee for the First Department, Mr. Jorge Dopico, seeking disciplinary action against Mr. Donziger on the basis of Judge Kaplan's 2014 RICO decision. Judge Castel's salutation is "Dear Jorge," and the letter expressed "sincere hope" that the matter would be pursued, and suggested the availability of collateral estoppel.[33]

The NY Bar's Attorney Grievance Committee did not interview Mr. Donziger prior to undertaking the summary suspension proceedings which Mr. Donziger argued was in breach of the principle of *audi alteram partem* (the right to be heard).[34] However, the Court accepted the Committee's argument that the doctrine of "collateral estoppel" precluded Mr. Donziger from contesting the suspension, because Judge Kaplan's RICO decision was deemed to provide "uncontroverted evidence of serious professional misconduct [by Mr. Donziger] that immediately threatened the public interest."[35]

Two years later, Mr. Donziger obtained a hearing before a referee, Mr. John Horan, who, after hearing from witnesses, recommended in February 2020 that Mr. Donziger's license to practice

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[31] *Id.*

[32] Yaiguaje v. Chevron Corp., 2018 ONCA 472 (CanLII), http://canlii.ca/t/hs4mz.

[33] Affirmation in Support of Motion for Permission to Appeal at 4, In the Matter of Steven R. Donziger, 128 N.Y.S.3d 212 (N.Y. App. Div. 2020), https://images.law.com/contrib/content/uploads/documents/292/Donziger-Affirmation-of-J.-Supple-in-Support-of-Motion-09-17-2020.pdf.

[34] The principle of *audi alteram partem* is a well-established fair trial standard grounded in the presumption of innocence set out in ICCPR, Article 14, as well as US domestic law. *See, e.g.*, 3 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 174 (Hum. Rts. Comm'n, 2002), https://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf.

[35] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1240.9 (2020) (Interim suspension while investigation or proceeding is pending), https://govt.westlaw.com/nycrr/Document/Iee4fd1dcb14f11e6b16798a968a6bf07?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

law in the State of New York be restored.[36] Mr. Horan described Chevron's "pursuit" of Mr. Donziger as "extravagant . . . unnecessary and punitive."[37]

A subsequent hearing by the New York Appellate Division on 13 August 2020 invalidated Mr. Horan's recommendations on the ground that Mr. Horan improperly considered evidence that was barred by the doctrine of collateral estoppel regarding the findings in the RICO matter. Mr. Donziger was disbarred.[38] On 22 September 2020, Mr. Donziger appealed the disbarment decision to the highest appeal court in New York State, the Court of Appeals, on the grounds that the lower court denied his due process rights by refusing to allow him a hearing. At the time of preparing this report, the appeal on Mr. Donziger's disbarment is pending.

1.5.6. **July 2019–26 October 2021: Criminal contempt proceedings and pre-trial home confinement**

On 30 July 2019, Judge Kaplan charged Mr. Donziger with six counts of criminal contempt[39] after his civil contempt rulings had failed to secure Mr. Donziger's compliance with post-judgment discovery orders in the RICO matter. Among the discovery orders was a requirement that Mr. Donziger submit his phone, computer, and other electronic devices to a Neutral Forensic Expert.[40] Mr. Donziger stated that this discovery order insufficiently protected his clients' right to attorney-client privilege, and further argued that submission of privileged documents would put his Indigenous clients in Ecuador at risk. Judge Kaplan issued a number of civil contempt rulings to attempt to secure compliance with his orders.[41]

After New York federal prosecutors declined to prosecute, citing lack of resources, Judge Kaplan subsequently appointed the private law firm of Seward & Kissel LLP (Seward), as special prosecutor to prosecute the criminal contempt charges. The appointment of the prosecutor is further discussed in Chapter 2, and the prosecutor's conduct is discussed in Chapter 3.

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[36] Referee's Report and Recommendation, Matter Donziger, RP No. 2018.7008, 128 N.Y.S.3d 212 (N.Y. App. Div. 2020), https://www.courthousenews.com/wp-content/uploads/2020/02/Donziger-Report-02.24.20-complete.pdf.

[37] *Id.*

[38] *Matter of Donziger*, 128 N.Y.S.3d 212 (N.Y. App. Div. 2020), *leave to appeal denied*, 168 N.E.3d 1152 (N.Y. App. Div. 2021), *reargument denied*, 174 N.E.3d 696 (N.Y. App. Div. 2021), https://law.justia.com/cases/new-york/appellate-division-first-department/2020/2020-ny-slip-op-04523.html.

[39] The charges are listed below, *infra* note 62.

[40] Forensic Inspection Protocol, Chevron Corp. v. Donziger, No. https://www.docketbird.com/court-documents/Chevron-Corporation-v-Donziger-et-al/FORENSIC-INSPECTION-PROTOCOL-Appointment-of-a-Neutral-Forensic-Expert-By-order-of-March-5-2019-the-Court-has-appointed-a-Neutral-Forensic-Expert-for-the-purposes-of-this-Forensic-Inspection-Protocol-The-Neutral-Forensic-Expert-shall-send-his-invoices/nysd-1:2011-cv-00691-02172.

[41] Chevron Corp. v. Donziger, 990 F.3d 191 (2d Cir. 2021), https://law.justia.com/cases/federal/appellate-courts/ca2/18-855/18-855-2021-03-04.html.

Judge Kaplan selected Judge Preska to preside over the case, thereby bypassing SDNY guidelines calling for the random assignment of judges to cases.[42] Judge Kaplan remains seized of the RICO proceedings. The selection of Judge Preska is discussed in Chapter 2.

Judge Preska denied pre-trial release, placing Mr. Donziger under home confinement at an arraignment hearing on 6 August 2019, affirming this order on numerous subsequent occasions. The issue of pre-trial release is discussed in Chapter 4.

Mr. Donziger's trial was scheduled to begin in August 2019 but was adjourned until June 2020. On 18 May 2020, Judge Preska adjourned the trial until 9 September 2020. After further adjournments, the trial proceeded from 11-17 May 2021. The various reasons proffered for trial adjournments and their associated impacts are discussed in Chapter 4.

On 27 July 2021, Judge Preska found Mr. Donziger guilty on all six counts of criminal contempt, providing reasons in a 245-page opinion.[43] On 1 October 2021, Judge Preska sentenced Mr. Donziger to six months imprisonment, the maximum available sentence, and denied release pending appeal. See discussion in Chapter 4.

On 4 October 2021, Mr. Donziger filed an appeal of Judge Preska's order denying bail pending appeal in the US Court of Appeals Second Circuit.[44] On 12 October 2021, Judge Preska denied Mr. Donziger's application for bail pending appeal but renewed the existing order for home confinement, stating that if the Court of Appeals denied a stay, Mr. Donziger would be required to surrender to the US Marshal at 500 Pearl Street, New York, no later than 24 hours after the Court of Appeals' order was placed on the court's docket.[45]

The monitoring Panel's findings about the criminal contempt proceedings are set out in Chapters 2-5 below.

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[42] RULES FOR THE DIVISION OF BUSINESS AMONG DISTRICT JUDGES, S.D.N.Y. (Sept. 29, 2021), https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-09-29%20SDNY%20Rules%20for%20the%20Division%20of%20Business.pdf.

[43] United States v. Donziger, 19-CR-561 (LAP) (S.D.N.Y. July 26, 2021), https://casetext.com/case/united-statesn-v-donziger-2

[44] Motion for Release Pending Appeal or Stay of Execution of Sentence, United States v. Donziger, No. 21-2486, (2d Cir. Oct. 8, 2021), https://www.justsecurity.org/wp-content/uploads/2021/10/B1-Motion-for-Bail.pdf. See Appellee's Brief, United States v. Donziger, No. 21-2486 (2d Cir. Oct. 19, 2021), https://www.justsecurity.org/wp-content/uploads/2021/10/B2-Glavin-Response.pdf; Reply Brief, United States v. Donziger, No. 21-2486, (2d Cir. Oct. 24, 2021), https://www.justsecurity.org/wp-content/uploads/2021/10/B3-Reply-on-Bail.pdf.

[45] Order Summarizing Sentencing, United States v. Donziger, 19-CR-561 (LAP) (S.D.N.Y. Oct. 12, 2021), https://www.docketbird.com/court-cases/USA-v-Donziger-11cv691/nysd-1:2019-cr-00561-520592.

1.5.7. **8 October 2021–present: Proceedings in the US Second Circuit**

Mr. Donziger filed a motion for release pending appeal in the US Court of Appeals, Second Circuit on 8 October 2021.[46] On 26 October 2021, the Court of Appeals ordered that Mr. Donziger's appeal be expedited but declined to grant bail pending appeal. As a result, Mr. Donziger was required to report to jail to commence the sentence on 27 October 2021. See discussion on pre-trial release and release pending appeal in Chapter 4.

Mr. Donziger reported to the federal prison in Danbury, Connecticut, to begin his sentence on 27 October 2021. On 10 December 2021, after serving 25 percent of the sentence (45 days of imprisonment), US prison authorities released him to serve the remainder of his sentence under home confinement pursuant to the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act).[47] See discussion on sentencing in Chapter 4.

[46] Appellant Motion for Release Pending Appeal, United States v. Donzinger, No. 21-2486 (2d Cir. Oct. 8, 2021), https://www.justsecurity.org/wp-content/uploads/2021/10/B1-Motion-for-Bail.pdf.

[47] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 15002(b), 134 Stat 281, 528 (2020) [hereinafter CARES Act], https://www.congress.gov/116/plaws/publ136/PLAW-116publ136.pdf.

2 Right to a fair and public hearing by a competent, independent and impartial tribunal

International laws, norms, and standards, along with US laws, guarantee all accused persons the right to a fair trial. Fair trial rights include the right to be tried by a competent, independent, and impartial tribunal. After review of the record and careful consideration, the Panel concludes that Mr. Donziger has been denied the right to a fair trial. This determination is principally due to the Panel's reasonable apprehension of bias in the court's process of appointing the presiding judge and special prosecutors in Mr. Donziger's case. In addition, the Panel concludes that the court record reasonably demonstrates similar bias during both pre-trial and trial proceedings.

2.1 International laws, norms, and standards

The right to a fair trial by an independent and impartial tribunal is integral to both the right of equality before the law and the right to a fair trial guaranteed by customary international law[48] and general principles of international law,[49] which are binding on all States. Fair trial rights are also guaranteed by the UDHR and the ICCPR. The US voted to adopt the UDHR in the UN General Assembly on 10 December 1948.[50] The US ratified the ICCPR on 8 June 1992,

The UDHR states in Article 10, in relevant part: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[51]

The ICCPR, guarantees in Article 14.1 that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. . . ."[52]

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[48] For explanation, see U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE(CTITF), BASIC HUMAN RIGHTS REFERENCE GUIDE: RIGHT TO A FAIR TRIAL AND DUE PROCESS IN THE CONTEXT OF COUNTERING TERRORISM 4 (Oct. 2014), https://www.ohchr.org/en/newyork/documents/fairtrial.pdf.

[49] *See* James G. Apple, *Independence of the Judiciary*, INT'L JUD. MONITOR (May 2006), http://www.judicialmonitor.org/archive_0506/generalprinciples.html.

[50] UDHR, *supra* note 18.

[51] *Id.*

[52] ICCPR, *supra* note 4.

The UN Human Rights Committee, in its General Comment No. 32, provided an authoritative interpretation of ICCPR Article 14, as follows:

> "The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."[53]

General Comment 32 states that, "the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph," referring to Article 14.1, which provides for strict limitations on the basis of "morals, public order . . . or national security in a democratic society, or when the interest of the private lives of the parties so requires."[54]

UN *Basic Principles on the Independence of the Judiciary* provide, in relevant part, as follows:

> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> [. . .]
>
> 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
>
> [. . .]
>
> 6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[55]

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[53] U.N. Hum. Rts. Rights Comm. (UNHRC), *General Comment No. 32 Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial*, 90th Sess., Aug. 23, 2007, U.N. Doc. CCPR/C/GC/32, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F32&Lang=en [hereinafter General Comment 32] (emphasis added); U.N. Hum. Rts. Comm., Communication No. 1122/2002 §§ 30, 36, *Lagunas Castedo v. Spain* (Oct. 20, 2008).

[54] General Comment 32, *Id.*, at para. 3.

[55] U.N. Hum. Rts. Comm., Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, U.N. Doc. E/CN.4/RES/1996/34 (Apr. 19, 1996), https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx (emphasis added). These Basic Principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of

2.2 **National legislation**

US national laws incorporate international laws, norms, and standards on independence and impartiality of tribunals. The principles of independence and impartiality of the judiciary are well entrenched in US law.[56]

The *Code of Conduct for United States Judges*[57] sets out standards for judicial conduct, including independence, integrity, impartiality, and decorum. The Code confirms that the independence and integrity of the judiciary is "indispensable to justice in our society."[58]

However, *Federal Rules of Criminal Procedure*[59] regarding criminal contempt, as well as the SDNY court rules regarding appointment of judges and special prosecutors, provide opportunities for legal interpretations and rulings that violate the requirement of independent and impartial tribunals. Specifically, such rules permit the complaining judge to preside over or appoint those prosecuting, trying, and punishing a defendant in criminal contempt proceedings. This practice violates international human rights law and standards, which allow no exceptions to the requirement of fair trial rights.

Rule 42 of the *Federal Rules of Criminal Procedure* states:

> 2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt."[60]

SDNY Rules for the Division of Business Among District Judges (RDB) state: "If a judge is disqualified or if a judge has presided at a mistrial or former trial of the case, and requests reassignment, the assignment committee shall transfer the case by lot." The rule provides that it is intended for "internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys."[61] The rule contains no language affirming the obligation to ensure actual or perceived independence and impartiality of judicial assignments. However, this omission does not obviate the mandate for the court to ensure that any judges who are appointed are, and are seen to be, impartial and independent.

Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (without a vote, meaning by consensus of all members of the General Assembly).

[56] U.S. CONST. art. III, https://www.law.cornell.edu/constitution/articleiii [https://perma.cc/838M-4D8Q]; U.S. COURTS, 2 GUIDE TO JUDICIARY POLICY: ETHICS AND JUDICIAL CONDUCT ch. 2, pt. A (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[57] U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES (2019) [hereinafter CODE OF CONDUCT], https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[58] *Id.* at Canon 1.

[59] FED. R. CRIM. P. 42.

[60] *Id.* (emphasis added).

[61] Citing SDNY Loc. R. at 105 (emphasis added).

2.3 **Findings and analysis**

In the observations of the Panel, the trial was conducted without reference, formal acknowledgement, or deference to either the international human rights law or the US Constitutional guarantees of an independent and impartial tribunal. Based upon a full review of the record the Panel finds that a reasonable observer would apprehend judicial bias by the court against Mr. Donziger in violation of fundamental principles of the rule of law.

2.3.1. **Bias in Judge Kaplan's appointments of a special prosecutor and Judge Preska**

2.3.1.1. **Appointment of the special prosecutor**

On 31 July 2019, Judge Kaplan filed criminal contempt charges[62] against Mr. Donziger after New York federal prosecutors declined to do so, citing a lack of resources. In August 2019, Judge Kaplan appointed a special prosecutor, the law firm of Seward & Kissel LLP (Seward), pursuant to Rule 42 of the Federal Rules of Criminal Procedure.[63] Ms. Rita Glavin, a Seward partner, assumed the role of lead prosecutor.

Mr. Donziger's defence counsel complained that Seward did not meet the legal standard of a disinterested prosecutor and sought a dismissal of the charges. Included in the defence allegations were claims that Seward had failed to acknowledge its attorney-client relationship with Chevron for eight months after its appointment and had refused to disclose "non-privileged

[62] The six counts of criminal contempt are set out in United States v. Donziger, 19 Cr. 561 (LAP); [11 Civ. 691 (LAK)], Order to Show Cause Why Defendant Steven Donziger Should Not Be Held in Criminal Contempt ("Order to Show Cause"), dated July 30, 2019 [dkt. no. 1 in 19-CR-561; dkt. no. 2276 in 11-CV-691]:

> Count I. For the period of March 8, 2019 to May 28, 2019, Mr. Donziger willfully violated paragraph four of the Protocol, which directed him to provide, by March 8, 2019, a sworn list of all his electronic devices, communication and messaging accounts, and document management services accounts that he had used since March 4, 2012.
>
> Count II. For the period of March 18, 2019 to at least May 28, 2019, Mr. Donziger willfully violated paragraph five of the Protocol, which directed him to surrender, on March 18, 2019 at 12:00 p.m., to a neutral forensic expert all of his "Devices" and "Media" for imaging.
>
> Count III. Mr. Donziger willfully violated the Passport Order, which directed him to surrender, to the Clerk of Court by June 12, 2019 at 4:00 p.m., every passport issued to him.
>
> Count IV. For the period of March 4, 2014 to September 3, 2018, Mr. Donziger willfully violated paragraph one of the RICO Judgment by refusing to assign to Chevron his contractual rights to a contingent fee under the 2011 retainer.
>
> Count V. For the period November 1, 2017 to May 27, 2019, Mr. Donziger willfully violated paragraph one of the RICO Judgment by refusing to assign to Chevron his contractual rights under the 2017 Retainer.
>
> Count VI. On December 23, 2016, Mr. Donziger willfully violated paragraph five of the RICO Judgment by assigning and pledging a portion of his own personal interest in the Ecuadorian Judgment in exchange for personal services.

[63] FED. R. CRIM. P. 42.

details of the Seward-Chevron relationship so that the full extent of Seward's disinterestedness can be assessed."[64]

The special prosecutors argued that: (1) Seward's conflict of interest checks had found no current attorney-client relationship with Chevron, (2) that past work in 2016 and 2018 involved "preparation of corporate forms and issuance of related legal opinions for two Chevron foreign affiliates," (3) that "total fees and disbursements relating to that work was $30,403.73," (4) that "the Special Prosecutors were not involved in that work," and that (5) the fees generated from that work "were an immaterial portion of Seward's revenues." The special prosecutors did not disclose the identity of the foreign affiliates of Chevron or the nature of the legal opinions it provided.

Defence counsel asserted that Seward's responses had ignored "the inherent conflict between protecting Chevron's assertions of privilege in response to Mr. Donziger's request for information, while simultaneously acting as the sovereign in a case in which Chevron is adverse to Mr. Donziger."

The Panel notes that the special prosecutors' submissions did not refute the defence counsel's legal arguments that the nature of information sought about the Chevron affiliates was not privileged.[65]

Judge Preska rejected the defence counsel's submissions, concluding in her 26 July 2021 Opinion that:

> Mr. Donziger has already asserted, at least twice before, that the Special Prosecutors are not disinterested. The Court rejected that contention both times, finding that (1) Seward's former relationship with Chevron did not merit disqualification under [the] Young [case] because (a) Chevron was no longer Seward's client, (b) Seward's work for Chevron, which involved the preparation of corporate forms, was entirely unrelated to this case, and (c) Seward's work for Chevron was de minimis, amounting to only two matters billed at a total of about $30,000 (i.e., less than 0.1% of Seward's annual revenue); and (2) "the theory that Seward has a financial conflict based on its clients' ties to Chevron" and other energy companies was "wholly unconvincing" and "far too attenuated to justify relief." Because Mr. Donziger identifies no material facts or legal authority that the Court overlooked, the Court adheres to its prior rulings.[66]

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[64] Memorandum in Support of Dismissal of this Case with Prejudice and in Reply to the Prosecution's Opposition to Pretrial Motions, United States v. Donziger, 19-CR-561 (LAP) (S.D.N.Y. Jul. 26, 2021); Memorandum of Law of the United States of America in Opposition to the Defendant's Pre-Trial Motions, Rita M. Glavin, Brian P. Maloney, and Sareen K. Armani, Document 62, Filed March 24, 2020; ORDER as to Steven Donziger: Mr. Frisch's motion to vacate (dkt. no. 157), 3 September 2020, *infra* note 135.

[65] *Id.*

[66] United States v. Donziger, 19-CR-561 (LAP) (S.D.N.Y. July 26, 2021) (footnotes omitted), https://casetext.com/case/united-statesn-v-donziger-2.

Judge Preska's ruling did not address defence counsel's concerns about the identity of Chevron affiliates for whom it had provided legal opinions. It is also not known whether Judge Kaplan was aware of or inquired about the potential conflicts of interest prior to the appointment.[67]

The Panel is concerned that these unaddressed questions about conflict of interest reasonably called into question the appearance that the special prosecutors are disinterested. Further, Judge Preska's incomplete justifications regarding the disinterestedness of the special prosecutors raises legitimate concerns about her legally required independence and impartiality as a judge.

The conduct of the special prosecutors is addressed in Chapters 3 and 4.

2.3.1.2. **Appointment of Judge Preska**

Judge Kaplan decided not to try the criminal contempt charges himself. The SDNY Rules for the Division of Business Among District Judges (RDB) state that "[i]f a judge is disqualified or if a judge has presided at a mistrial or former trial of the case, and requests reassignment, the assignment committee shall transfer the case by lot."

However, Judge Kaplan chose to bypass this procedure and appointed Judge Preska to hear the case at trial. His reasons for doing so, and his criteria for choosing Judge Preska, remain unknown.

Judge Kaplan's decision to appoint a particular judge has given rise to vociferous defence allegations of an appearance of bias throughout the criminal contempt proceedings.

On 7 May 2020 Judge Preska made a pretrial ruling denying a defence application to disqualify all judges of the 2nd Circuit associated with Judge Kaplan.[68] Further, Judge Preska denied the request that she recuse herself pursuant to 28 US Code, paragraph 455, which states:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .[69]

Judge Preska ruled that "[o]n an objective view of the facts, there is no basis for disqualifying the entire SDNY bench," nor were there any grounds for her own recusal.[70]

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[67] *Id.*

[68] United States v. Donziger, 19-CR-561 (LAP) (S.D.N.Y. May 7, 2020) (quoting United States v. Cutler, 796 F. Supp. 710 (E.D.N.Y. 1992)), https://casetext.com/case/united-states-v-donziger.

[69] 28 U.S.C. § 455 (emphasis added), https://www.law.cornell.edu/uscode/text/28/455.

The Panel notes that Judge Preska's ruling on the legitimacy of her own judicial appointment and on her own judicial conduct raises concern about the lack of natural justice; there were no procedural safeguards in place to ensure both impartiality and the appearance of impartiality.

When assessing whether a defendant's right to an impartial tribunal has been violated, international human rights bodies have considered the judge's "prior involvement in a case or related cases, their personal biases or affiliations, their relationship to the parties to the case, and any arbitrary rulings at trial or statements that call their neutrality into question."[71] International human rights bodies have held that a court "must . . . appear to a reasonable observer to be impartial."[72] The test is objective.

Jurisprudence of the Inter-American Court and the European Court of Human Rights has held that "the objective . . . test consists in determining whether the judge in question offered sufficient elements of conviction to exclude any legitimate misgivings of well-grounded suspicion of partiality regarding his or her person."[73] The Panel is concerned that in the Donziger case, a senior judge with prior involvement in related cases both handpicked and appointed another senior judge to manage and hear a criminal case without permitting the system of randomized judicial appointments to mitigate the potential for bias and partiality. These factors are compounded by Judge Preska's peremptory dismissal of all challenges that expressed what the Panel finds to be reasonable misgivings about her impartiality springing either from her appointment or her rulings. After careful review of the record, the Panel is unable to find that Judge Preska offered sufficient grounds to exclude such misgivings. Furthermore, short of any available independent judicial review of the appointment of the judge, the defendant had no means of raising his objections to these irregularities except to a judge whose impartiality he had challenged. The Panel provides further observations on Judge Preska's conduct in Section 2.3.3 below.

2.3.2. **Conclusions about judicial independence and impartiality in the appointment of prosecutor and judge**

The obligation to take effective measures to ensure an independent and impartial judge is a fundamental principle of international human rights law, including customary and treaty law. International law does not distinguish between contempt and other criminal charges—the requirement of an independent and impartial tribunal stands regardless of the nature of the charge.

The Panel observes that Judge Kaplan has a decade of experience in several proceedings involving Mr. Donziger. He has consistently found in favour of Chevron against Mr. Donziger in all civil proceeding which came before him. Notably:

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[70] United States v. Donziger, 19-CR-561 (LAP) (S.D.N.Y. May 7, 2020) (quoting United States v. Cutler, 796 F. Supp. 710 (E.D.N.Y. 1992)), https://casetext.com/case/united-states-v-donziger.

[71] *Id.*

[72] AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW 110–11 (2020).

[73] *Id.*

- In 2011, Judge Kaplan granted a preliminary injunction in favour of Chevron against enforcement of the Ecuadorian judgment;[74]
- In 2014, Judge Kaplan found for Chevron against Mr. Donziger in the civil RICO case;[75]
- From 2014 to 2018, Judge Kaplan made a number of civil contempt rulings attempting to enforce Chevron's applications concerning the RICO decision, particularly focused on discovery of documents in possession of Mr. Donziger that Mr. Donziger stated were privileged;
- In 2018, Judge Kaplan's RICO decision formed the grounds of the SDNY Grievance Committee to seek New York State Bar disciplinary proceedings against Mr. Donziger, which led to his being disbarred;
- In 2019, Judge Kaplan levied criminal contempt charges for non-compliance with his civil contempt rulings;
- Judge Kaplan chose the prosecutor for the criminal contempt charges, whose law firm was later discovered to have represented Chevron as a former client;
- Judge Kaplan chose the judge to hear the criminal contempt charges, bypassing the random selection procedures typically employed by the Court; and
- Judge Kaplan remains seized of the RICO proceedings for purposes of discovery and enforcement.

The Panel has examined Judge Kaplan's 2011 opinion in *Chevron v. Donziger,* in which he finds that there is "no objective reason to think that it [the Court, referring to himself] has been anything less than entirely impartial."[76]

The Panel concludes that Judge Kaplan's background, and in particular his decade-long involvement as a decision maker in every aspect of the case – including the laying of charges, selection of the special prosecutor, and selection of the trial judge – provide an appearance of bias which tainted the criminal contempt proceedings. The Panel concludes that this appearance of bias could have been avoided by utilizing a random judicial appointment and by taking effective measures to ensure that the appointed special prosecutors had no prior connections to Chevron whatsoever.

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[74] Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 602 (S.D.N.Y. 2011), https://casetext.com/case/chevron-corporation-v-donziger-2.

[75] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), https://casetext.com/case/chevron-corp-v-donziger-8.

[76] Memorandum Opinion, Lewis A. Kaplan (May 9, 2011), Chevron Corp. v. Donziger, 11 Civ. 0691 (LAK), https://www.courtlistener.com/docket/4348669/310/chevron-corporation-v-donziger/. *See id.* at nn.1 & 21 and accompanying text.

2.3.2.1. **Judge Preska's conduct of the case**

The appearance of bias resulting from Judge Kaplan's appointment of the judge might have been ameliorated or allayed by the exercise of strict judicial impartiality on Judge Preska's part from the outset of her involvement in the case. The Panel has reviewed transcripts of the proceedings, and (to the extent permitted and possible) has attended court proceedings in person or by telephone. After careful consideration, the Panel unanimously and unequivocally concludes that Mr. Donziger has not received a fair trial due to numerous instances where a reasonable person would apprehend judicial bias by Judge Preska in favour of the prosecutor and against Mr. Donziger.

From the outset of the proceedings and throughout the trial and sentencing proceedings, the Panel noted that Judge Preska was deferential and helpful to the prosecutor. Conversely, the Judge was frequently argumentative and appeared aggressive in her comportment towards the defendant and defence counsel.

From the beginning of the proceedings, Judge Preska denied almost all pretrial defence requests and granted almost all requests of the prosecutor and in some instances provided inadequate or no reasons for her rulings. The Panel was also troubled by a lack of judicial decorum, including disparaging or prejudicial remarks about the defendant and to defence counsel during hearings and in written rulings.

2.3.2.2. **Pre-trial detention**

The Panel's most concerning findings relate to Judge Preska's violation of the defendant's right to be presumed innocent and his right not to be arbitrarily deprived of his liberty, demonstrated particularly in the Judge's hearings and findings regarding pre-trial release. This issue is discussed in Chapter 4.

2.3.2.3. **Pretrial motions for jury trial**

The judicial treatment of the defendant's motion requesting a jury trial raises further concern. While there is no right to a jury trial at international law, in the US this right is considered fundamental for serious offences but not "petty" offences. The right to a trial by an impartial jury for serious offences is guaranteed by the Sixth Amendment of the US Constitution.[77] The line between "serious" and "petty" offences is determined by the maximum length of sentence or the nature of the offence. An offence carrying a maximum sentence of more than six months imprisonment or a fine of $5,000 is not a "petty" offence. An offence may also be defined as serious for other reasons, including the potential consequences to the defendant.[78]

It is beyond the scope of the Panel's mandate to interpret US domestic law on jury trials. However, after reviewing the record of submissions and Judge Preska's order of 3 September

[77] U.S. CONST. amend VI, https://www.law.cornell.edu/constitution/sixth_amendment.
[78] *Id.* (commentary and citations).

2020, the Panel is concerned that Judge Preska's exercise of discretion to deny a jury trial was not based on an unbiased, reasoned determination of the facts and law presented to her.

In US law, the charge of criminal contempt is considered serious, especially since there is no maximum sentence. US Sentencing Guidelines provide no guidance as to a typical sentence for criminal contempt, because "the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent."[79]

At the arraignment hearing on 6 August 2019 where pre-trial conditions were first set, the prosecutor repeatedly emphasized the severity of the charges, saying that Mr. Donziger was "facing, very likely, jail time in this case, and it is unlike anything he's gone through before" (appearing to refer to the underlying civil proceedings). Moments later, the prosecutor repeated that Mr. Donziger would be "facing . . . likely prison." She referred to the "severity of the allegations." Later in the hearing, she commented that the criminal contempt case was a "vastly different, more serious proceeding that involves the loss of his liberty."

Picking up on this theme, Judge Preska stated that Mr. Donziger was "in a brave new world now. He is facing jail time. The weight of the evidence seems very strong."[80] Judge Preska ordered pre-trial home confinement. The prosecutor's original prediction of a sentence of "jail time" proved accurate. The criminal contempt conviction reportedly precludes Mr. Donziger's prisoner classification as "minimum risk" that would apply to other misdemeanor offences, resulting in his incarceration with those convicted of felonies.

On 27 February 2020, Mr. Donziger made a motion for a jury trial, expressing concern about the impartiality of a trial by a judge alone if the judge was a member of the SDNY bench. On 7 May 2020, Judge Preska denied the motion saying that a jury trial was guaranteed only for an offence for which the maximum sentence was six months or a fine of more than $5,000. Judge Preska denied the order, "subject to renewal pending the Court's determination of the potential sentencing and fine range."[81] On 18 May 2020, Judge Preska again precluded a jury trial, saying that although the criminal contempt offence prescribes no maximum penalty, "a review of the cases, particularly United States v. Cutler, 796 F. Supp. 710 (E.D.N.Y. 1992), persuades the Court that, if convicted, defendant should be sentenced to no more than six months' imprisonment or a $5,000 fine."[82] On 3 September 2020, she denied another motion for a jury

[79] U.S. SENT'G GUIDELINES MANUAL § 2J1.1(1) (U.S. SENT'G COMM'N 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

[80] Minute Entry for proceedings held before Judge Loretta A. Preska, United States v. Donziger, 19-CR-561 (LAP) (Aug. 6, 2019), https://www.docketbird.com/court-cases/USA-v-Donziger-11cv691/nysd-1:2019-cr-00561-520592/page/6.

[81] As quoted in United States v. Donziger, 19-CR-561 (LAP), Order, Document 163 Filed September 3, 2020, https://www.docketbird.com/court-documents/USA-v-Donziger-11cv691/ORDER-as-to-Steven-Donziger-Mr-Donziger-s-renewed-motion-for-a-trial-by-jury-dkt-no-143-is-DENIED-Signed-by-Judge-Loretta-A-Preska-on-9-3-2020-See-ORDER-set-forth-Docketed-in-11cv691-ap-Modified-on-9-4-2020/nysd-1:2019-cr-00561-520592-00163.

[82] As quoted in *Id.*

trial, ruling that the severity of personal consequences of conviction to Mr. Donziger did not "convert his charges into 'serious' offenses requiring a jury trial."[83]

Judge Preska's decision to use her discretion to deny Mr. Donziger trial by jury meant that Mr. Donziger was denied independent, impartial fact-finding by his fellow citizens while leaving Judge Preska free to pronounce a penalty of six months.

The Panel notes that US Sentencing Guidelines (USSG) often provide for sentencing ranges of 0-6 months for first-time offenders convicted of nonviolent felonies all of which carry guarantees of a jury trial. While there is no sentencing guideline for criminal contempt, USSG § 2J1.2 encourages the imposition of contempt sentences by analogy to offences that carry a guideline. The most analogous to the conduct for which Mr. Donziger was convicted would be defiance by a criminal defendant of a court order to appear in violation 18 USC § 3146, which is conduct at least as serious as defiance of a court order to deliver papers. At trial, such a defendant would have the right to trial by jury, and on conviction would be subject to Base Level 6, and with no prior criminal record would face a USSG sentencing range of 0-6 months.[84] Judge Preska decided to sentence Mr. Donziger to a prison term at the top of the sentencing range compared to someone convicted of similar conduct for which a jury trial would have been guaranteed.

Accordingly, while on one hand, Judge Preska denied Mr. Donziger a trial by jury because his offence was "petty," on the other hand she denied him pre-trial release when she accepted the prosecutor's argument about the seriousness of the offense as an indicator of a possible motivation to flee, as she did at the 6 August 2019 arraignment. This followed a pattern of pre-trial rulings where Judge Preska consistently interpreted facts, laws, and rules in a fashion that disadvantaged the defendant, procedurally and substantively, allowing a reasonable observer to apprehend both judicial bias and partiality.

2.3.2.4. **Trial**

The trial proceeded on 10-13 May and the morning of 17 May 2021. At all times, at least one IMPETUS monitor was present at the trial in person, making handwritten notes of their observations. Monitors attended in relays as they were available. Other IMPETUS Panel members had wished to attend the trial remotely but were unable to do so because the Judge ordered that there would be no televised or audio attendance; as an alternative to remote access, these monitors obtained and read daily transcripts. See more about court access in Section 2.4.

IMPETUS monitors were present at the court as follows.

- *10 May 2021, morning*: One IMPETUS panel member and one attorney monitor were present in the overflow observation room which was linked to the courtroom by video. Seating for spectators in the main courtroom was observed to be limited to approximately 25 places due to COVID-19 restrictions. There were about 20-30 seats available to

[83] *Id.*
[84] *Supra* note 79, § 2J1.2.

spectators in each of the overflow rooms. Reporters were permitted to sit in the jury box, which is located adjacent to the prosecutors' table.

- *10 May 2021, afternoon*: One IMPETUS Panel member was able to obtain a seat in the main courtroom, but the attorney monitor had to remain in the overflow room and needed to leave the courtroom at 3:30 pm before proceedings concluded for the day
- *11 May 2021*: One IMPETUS Panel member and one attorney monitor were present in the main courtroom.
- *12 May 2021*: One IMPETUS monitor was present in the main courtroom.
- *13 May 2021*: One IMPETUS student monitor was present in the main courtroom.
- *17 May 2021*: One IMPETUS monitor was present in the main courtroom. On one occasion several lawyers representing Chevron were observed seated in the jury box adjacent to the prosecutors' table.

During the trial, Judge Preska consistently sustained prosecution objections and overruled defense objections. While such actions do not alone indicate bias or partiality, the Panel observed that these decisions were frequently rendered without seeking counterargument, and in some instances were rendered after interrupting and precluding defence counsel's attempts to provide counterarguments.

Further, the defence counsel's cross examination was hampered by the "collateral bar," which precluded questioning of any findings made during the RICO rulings, not even to allow the evidence so as to explain the motivations of the defendant. The Panel makes no findings concerning the general fairness of the US-based law on "collateral bar." The Panel notes that Judge Preska's strict and rapid-fire preclusion of any and all defence cross-examination and argumentation touching on matters precluded by the "collateral bar" was in marked contrast to the latitude she showed to the prosecutor.

The Panel also observed the prosecutor continually leading her witnesses during examination in chief. The prosecutor was allowed to read into the record lengthy passages of prejudicial evidence on matters not subject to the charges at bar, on the grounds that such evidence went to Mr. Donziger's "state of mind." In contrast, the defence was not permitted any cross examination involving the defendant's state of mind if those matters involved issues that the judge considered to be precluded by the collateral bar.

On the last day of the trial, 17 May 2021, after the defence had closed its case, The Panel observed a contentious exchange between Judge Preska and Mr. Garbus as Mr. Garbus attempted to make a constitutional argument.[85] Judge Preska repeatedly interrupted Mr. Garbus's submissions to the court such that the interruptions obstructed the Panel's ability to both hear and

[85] This issue is currently under appeal. *See* Oral Arguments, United States v. Donziger, No. 21-2486 (Nov. 30, 2021) [hereinafter Oral Arguments] (recording of hearing oral arguments), https://www.courtlistener.com/audio/78750/united-states-v-donziger/?type=oa&q=Donziger&type=oa&order_by=score%20desc.

decipher the purpose of Mr. Garbus's argument and the purpose of documents that Mr. Garbus had handed to the judge. At one point, Mr. Garbus asked Judge Preska, "May I present an argument at least somewhat coherently so that many of these things can be explained and you will take whatever exception you want to it? It's impossible to do it in this incoherent way." In the Panel's observation, Mr. Garbus was never able to finish his submission. It was pre-empted by Judge Preska's affirmation of an earlier order denying discovery, which in the Panel's view, was unresponsive to the new motion and arguments being attempted by Mr. Garbus. The Panel also found the Judge's argumentative and interruptive demeanour toward Mr. Garbus to be inconsistent with the requirements of judicial decorum. Issues of judicial decorum are discussed further in Section 2.3.3.4 below.

In summary, throughout the trial, the Panel observed a pattern of behavior exhibited by Judge Preska that appeared to give considerable latitude and deference to the prosecutor without equally ensuring full and respectful attention to defence counsel's submissions and cross-examination. The Panel is concerned that Judge Preska's aggressive and interruptive stance towards the defendant and defence counsel impeded the right of the accused to make full answer and defence to the charges against him.

See more on equality of arms, Chapter 3, and presumption of innocence, Chapter 4.

2.3.2.5. **Judicial decorum**

This trial was conducted in a tense atmosphere with dozens of protestors outside the court building appropriately exercising their right of peaceful assembly in support of Mr. Donziger. This atmosphere made the exercise of judicial decorum crucial to ensure public respect for the court proceedings. Judicial decorum is particularly significant in criminal contempt proceedings, since the purpose of criminal contempt charges is to ensure that the lawful authority and functioning of the court is protected from illegitimate interference.

Decorum of the court is necessary for the proper administration of justice, according to the international standards set out in the 2002 *Bangalore Principles of Judicial Conduct*:[86]

> "A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control."[87]

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[86] The Bangalore Draft Code of Judicial Conduct 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25–26, 2002, https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf [hereinafter Bangalore Principles]. The Bangalore Principles elaborate on the international requirements of impartiality and independence of judges and are referred to below. While the Bangalore Principles are not binding at international law, they are internationally respected and cited.

[87] *Id.*

The *Code of Conduct for United States Judges* confirms that a judge "should maintain order and decorum in all judicial proceedings."[88] The US Code of Conduct also provides that "a judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.

In the Panel's view, Judge Preska failed to maintain judicial decorum in several respects. First, some spectators inside of the courtroom inappropriately wore "Free Donziger" insignia and displayed a photo of oil sludge in Ecuador that was not part of the evidence. The Judge did not intervene to prevent or halt these demonstrations.

In the view of the Panel, Judge Preska correctly intervened to prevent broadcasting and photography of the proceedings, including through the use of mobile phones. However, the Judge's refusal to allow audio access to the trial contributed to the inability of interested persons around the world, including international monitors, to listen to the trial. This issue is discussed in Section 2.4 below.

Second, the Judge's manner towards defence counsel, particularly Mr. Garbus (discussed in Section 2.3.3.3 above) indicate how judicial decorum is intertwined with fundamental fair trial standards.

Third, the Panel noted that throughout the trial, the Judge deployed a jocular tone that contradicted the significance of the proceedings. For example, Judge Preska referred to counsel as "children"[89] on several occasions while reprimanding their behaviour or expressing approval of counsel (e.g., "bless you, my children").[90]

2.3.2.6. **Sentencing**

At the sentencing hearing on 1 October 2021, Judge Preska gave adequate time and courteous attention to counsel for all parties. Widely available audio access to the hearing was permitted by the judge. The Panel monitored the hearing through telephone audio link, and one IMPETUS monitor was present in the courtroom.

The IMPETUS monitor in attendance in the courthouse noted that in trying to obtain access to the courtroom, court security personnel treated him with discourtesy on several occasions,[91] including attempting to steer him to an overflow room when there were open seats available in the main courtroom. Another security officer seated him behind a barrier in the main courtroom, which precluded an unobstructed view of the proceedings. The IMPETUS monitor sought assistance of a court clerk, who obtained an empty seat normally reserved for journalists. It was noted that approximately six journalists were present as well as three members of Mr. Donziger's

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[88] CODE OF CONDUCT, *supra* note 57, at Canon 3A(2).

[89] Transcript of Trial from May 11, 2021, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. May 11, 2021).

[90] Transcript of Trial from May 10, 12, & 13, 2021, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. May, 13 2021)

[91] Detailed notes on file with IMPETUS.

family, including his wife, teenage son, and another family member. There were several empty seats in the main courtroom. When the IMPETUS observer was able to gain access to the courtroom, he noted that several of the corporate lawyers representing Chevron were seated in the courtroom.

During the hearing, Judge Preska acknowledged that she had received "voluminous" written submissions and letters on behalf of Mr. Donziger, including an opinion by the UN Working Group on Arbitrary Detention (WGAD) dated 1 October 2021.[92] The WGAD comprises independent, international experts in international human rights law who are appointed by consensus of the 47 member States of the UN Human Rights Council.

The Panel reviewed the WGAD decision, which found that Mr. Donziger's detention was arbitrary. The WGAD transmitted the communication to the US government in February 2021. The US government provided no reply. The Panel noted that the WGAD had:

> ". . . requested that the [US] Government provide, by 6 April 2021, detailed information about the current situation of Mr. Donziger and clarify the legal provisions justifying his continued detention and its compatibility with the obligations of the United States under international human rights law, in particular with regard to the treaties ratified by the State. The Working Group called upon the Government of the United States to ensure Mr. Donziger's physical and mental integrity."[93]

The Working Group added that it "regrets that it has received no reply from the Government, and the Government did not request an extension in accordance with paragraph 16 of the Working Group's methods of work."[94]

The WGAD indicated it was "appalled by the uncontested allegations in the case."[95] The WGAD found it to be a "staggering display of lack of objectivity and impartiality" and claimed that "Judge K" (referring to Judge Kaplan) had "drafted the charges against Mr. Donziger."[96]

During the sentencing hearing, the prosecutor made various reference to the WGAD opinion, alleging that the WGAD "did not review any of the court record in this case" and that its opinion was "misleading, unreliable, and riddled with material omissions and errors." Counsel for Mr. Donziger reviewed the working methods of the WGAD for Judge Preska. Such methods include presenting the information received to the government of the State in question. In this case, the government did not respond.

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[92] U.N. Hum. Rts. Council, Opinions Adopted by the Working Group on Arbitrary Detention, *Opinion No. 24/2021 concerning Steven Donziger (United States of America)* at 1, 91st Sess., 6–10 September 2021, U.N. Doc. A/HRC/WGAD/2021/2 (Oct. 1, 2021), https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session91/A_HRC_WGAD_2021_24_AdvanceEditedVersion.pdf.

[93] *Id.* at para. 61.

[94] *Id.* at para. 62.

[95] *Id.* at para. 84.

[96] *Id.* at para. 81.

Judge Preska interrupted Mr. Donziger's counsel, saying "Mr. Kuby, Mr. Kuby, Mr. Kuby, I don't care if you go on and on. It's fine," adding that she would take the WGAD opinion "for what it's worth." To the Panel, it appeared that Judge Preska did not care to hear further from Mr. Kuby about the WGAD opinion, about its standing in international law, or about its substantive content.

The Panel notes that a few of the factual details set out in the WGAD's opinion may lack specificity. However, clarifications of facts could have been provided to the WGAD by US government if it had chosen to do so. It did not. The IMPETUS Panel has made every attempt to ensure fairness and accuracy by both reviewing and carefully considering the court record and by attending the hearings in person.

When sentencing submissions were complete, Judge Preska immediately read her prepared decision, finding that "Mr. Donziger's offenses are extremely serious. Given Mr. Donziger's repeated, willful refusal to obey court orders, it seems that only the proverbial 2-x-4 [2-by-4] between the eyes will instill in him any respect for the law."[97] She sentenced him to six months' imprisonment, the maximum sentence available.[98] Mr. Donziger was denied release pending appeal and the Appellate Court decided on 26 October 2021 not to stay the execution of the sentence pending appeal. This issue is discussed in Chapter 4.

On 27 October 2021, Mr. Donziger reported to the federal prison in Danbury, Connecticut. US law provides for no reduction of the sentence in consideration of time served in home confinement. Since Mr. Donziger has been convicted of a petty offence, there are no provisions for reduced jail time based on good behaviour. Since it is a criminal contempt charge, there is no maximum sentence. Despite Judge Preska's order capping the sentence to six months imprisonment, correctional guidelines preclude Mr. Donziger's classification as "minimum security." Accordingly, he has been classified as "low" security, which makes him ineligible for a minimum-security facility to serve his sentence.

While prison conditions are not reviewed as part of this report, the Panel notes that the ongoing public health concerns posed by the ongoing spreading of COVID-19 in prisons throughout the world has resulted in the development of international statements, including a joint statement of several UN bodies, urging the reduction of prison populations and the provision of adequate health care in prison to prevent the spread of COVID-19.[99] The Nelson Mandela Rules[100] provide that:

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[97] Transcript of sentencing hearing 1 October 2021, on file with IMPETUS. In North America, a "2x4" (2 by 4) refers to a board that measure two inches (38 mm) in thickness and 4 inches (89 mm.) in width.

[98] *See* Section 2.3.2.3 above; notes 79, 80 and surrounding text [On 18 May 2020…]

[99] UNODC, WHO, UNAIDS and OHCHR Joint Statement on COVID-19 in Prisons and Other Closed Settings, https://www.unodc.org/documents/Advocacy-Section/20200513_PS_covid-prisons_en.pdf [https://perma.cc/AF6H-V2VD].

[100] G.A. RES/70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Jan. 8, 2016), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf.

> The provision of health care for prisoners is a state responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.[101]
>
> [. . .]
>
> "All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care."[102]

It was reported by the press that Mr. Donziger was released from prison into home confinement on 10 December 2021, after having served 45 days (25 percent) of his six-month sentence at Danbury Federal Prison.[103] This relief was ordered not by judges but by prison officials as permitted by the CARES Act,[104] and would not normally have been permitted until he had served 90 percent of the term in prison.[105] Under the policy of Federal Bureau of Prisons, this home confinement may be accompanied by electronic monitoring[106] and, in any case, represents a continuing deprivation of his liberty.

The total period of Mr. Donziger's confinement will, if fully served as expected, amount to more than 26 months during the pre-sentence period, plus six months on his criminal sentence, which is more than five times the maximum term for the petty offence with which he was charged.

This outcome leads the Panel to conclude that Mr. Donziger has been subjected to prolonged arbitrary detention in violation of international human rights laws, norms, and standards that are binding on the US. More is said about the issue of pre-trial detention in Chapter 4.

2.3.3. **Appeal proceedings**

Apart from the Appellate Court decision on release pending appeal, at the time of drafting, the appeal proceedings have not concluded. The Panel notes, however, that the Appellate Court

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[101] *Id.* r. 24.

[102] *Id.* r. 27.

[103] Sebastien Malo, *Chevron Foe Donziger Released from Prison under COVID Waiver*, REUTERS (Dec. 10, 2021), https://www.reuters.com/legal/litigation/chevron-foe-donziger-released-prison-under-covid-waiver-2021-12-10/.

[104] CARES Act, *supra* note 47.

[105] Jennifer L. Masscott, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, *Home Confinement of Federal Prisoners after the COVID-19 Emergency* (Jan. 15, 2021), https://www.justice.gov/olc/file/1355886/download.

[106] U.S. DEP'T JUST., RSD/RSB, CN-1, HOME CONFINEMENT (Aug. 1, 2016), https://www.bop.gov/policy/progstat/7320_001_CN-1.pdf.

dismissed Mr. Donziger's application for release pending appeal with no justification. See more in Chapter 4 about international standards for release pending appeal.

2.4 **Right to a public hearing**

Public transparency of criminal proceedings is an essential safeguard to protect the rights of the defendant and the public interest in the fair administration of justice. At international law, access to criminal proceedings may be precluded only when necessary in narrow circumstances set out in the ICCPR, Article 14.[107] All domestic laws and rules should be interpreted so as to be consistent with the State's international legal obligations.

The COVID-19 pandemic limited physical public access to pre-trial hearings, the trial, and the sentencing hearing. Access to docketed "paper" applications and supporting materials was hampered by online paywalls. Audio access to pre-trial hearings was available.

Public access to the trial was severely limited by space and COVID-19-related limitations. Advocates for Mr. Donziger raised concerns that the trial court room was not sufficiently large to accommodate all members of the public wishing to attend. While international fair trial standards require trials to be public, the Panel is aware of no international law or standards that require courtroom space to be made available to accommodate all supporters of one party or another.

Concern about the lack of public access to the trial proceedings could have been mitigated by provision of audio access to the trial. However, Judge Preska ruled against this measure, stating that while audio access to pre-trial hearings was possible, audio access to the trial was not authorized[108] by *Federal Rules of Criminal Procedure* 53 ("Federal Rule 53"), which prohibits courtroom photographing and broadcasting.[109] She also cited the CARES Act,[110] which provides that during the COVID-19 emergency certain criminal hearings may be conducted by teleconference or telephone conferencing, but not trials.

The Panel contends that neither Federal Rule 53 nor the CARES Act preclude judicial discretion to authorize audio access to trials. Therefore, on 30 April 2021, IMPETUS chairs, Stephen Rapp

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[107] Under international law exceptions to a public trial are limited to: reasons of moral, public order, or national security; private lives of the parties; the interests of justice (e.g., hearing covert evidence, protecting a witness); and trials involving juveniles. *See* CLOONEY & WEBB, *supra* note 72, at ch. 2 ("Right to a Public Trial").

[108] *See* Judicial Order of April 6, 2021, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. Apr. 6, 2021), https://www.docketbird.com/court-documents/USA-v-Donziger-11cv691/ORDER-as-to-Steven-Donziger-The-Court-is-in-receipt-of-Defendant-Steven-Donziger-s-letter-regarding-various-access-measures-for-his-trial-beginning-on-May-10-2021-See-dkt-no-251-In-response-to-Mr-Donziger-s-requests-As-further-set-forth-herein-Signed/nysd-1:2019-cr-00561-520592-00254. *See* Judicial Order of April 30, 2021, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. Apr. 6, 2021), https://www.docketbird.com/court-documents/USA-v-Donziger-11cv691/ORDER-as-to-Steven-Donziger-The-Court-is-in-receipt-of-the-letter-dated-April-13-2021-from-the-Danziger-Case-Monitoring-Committee-the-Committee-regarding-the-public-access-measures-for-Defendant-Steven-Donziger-s-upcoming-trial-See-dkt-no-270-That-le/nysd-1:2019-cr-00561-520592-00275.

[109] U.S. CODE tit. 18, r. 53 (Supp. 5 2006), https://www.govinfo.gov/content/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-app-federalru-dup1-rule53.pdf.

[110] CARES Act, *supra* note 47.

and Catherine Morris, applied for audio access to the trial to initiate monitoring of the proceedings for individuals who could not attend in person due to the COVID-19 pandemic. The application put the following arguments to Judge Preska:

> On 6 April 2021, Judge Preska cited Fed. R. Crim. P. 53 in support of a prohibition of audio access to the trial. The title of Rule 53 is "Courtroom Photographing and Broadcasting Prohibited." The plain language of Rule 53 indicates that its purpose is to limit the public broadcasting of proceedings through public media, such as radio, so as to prevent members of the media from undertaking activities that would detract from the rights of the parties to a fair trial, unduly distract participants during proceedings, or otherwise interfere with the administration of justice. Rule 53 is not intended for the purpose of constraining public access and scrutiny of judicial proceedings or for the purpose of limiting the defendant's right to a fair and public hearing by an independent and impartial tribunal in accordance with the *International Covenant on Civil and Political Rights*, which at international law is binding at all levels in the United States.
>
> We also note that the Order of 6 April 2021 references the CARES Act, which stipulates that certain proceedings may be conducted by video or teleconferencing (rather than in person) during the pandemic. These provisions for online conduct of proceedings ensure the right to a fair and public hearing and the right to counsel in the context of the necessary public health restrictions posed by the COVID-19 pandemic. However, the CARES Act is silent regarding the issue of public broadcasting. Accordingly, it is our submission that the CARES Act provisions are not relevant to the issue of audio access to the trial of Mr. Donziger.
>
> We wish to assure the court that our monitoring group has no intention to publicly broadcast the proceedings; we intend to listen to the proceedings for the sole purpose of assessing compliance with international human rights law and standards applicable to the United States. . .
>
> We are unable to discern any valid public policy reason to allow audio access for pre-trial proceedings but not for the trial itself. Therefore, we make this respectful application for audio access to the trial by all members of our monitoring group, and indeed the public around the world [footnote citations omitted].

Thus, the Panel sought the exercise of judicial discretion to allow audio access, given that some members of the Panel were hampered by COVID-19 travel restrictions. Judge Preska docketed the application but denied it by way of an endorsement order handwritten on the application letter and dated 4 May 2021, stating: "The court adheres to its order of April 6, 2021 (dkt. no. 254) and April 30, 2021 (dkt. no. 275)." Judge Preska did not provide reasons for this order, so it is unknown whether she considered the legal arguments made in the IMPETUS application, which distinguished audio access for specific applicants from "broadcasting."

Judge Preska reiterated her opinion during the trial when, on 10 May 2021, she stated in response to the defendant's request for Zoom access for Mr. Donziger's clients in Ecuador, "I am not permitted to broadcast a trial . . . the rules are the rules. I adhere to my prior rulings."[111] She provided no further reasons.

The Panel notes that there is no right at international law to live public broadcasting of criminal proceedings. However, we provide the following observations regarding inequality of access to the court room for observers. In the Panel's opinion, Judge Preska adopted an overly narrow interpretation of the scope of her discretion, disregarding the plain meaning and overarching purposes of both Federal Rule 53 and the CARES Act, which are both intended to ensure independent, impartial, and public proceedings.

The Panel regrets Judge Preska's decisions regarding audio access to the trial. However, the trial was physically open to the public, and some IMPETUS monitors were able to attend the trial. Unfortunately, such attendance was sometimes met with restricted visibility of witnesses because monitors were unable to access the main courtroom and were seated in the overflow room, which provided limited video access. The video did not provide full views of the courtroom and precluded unimpeded observation of the comportment of the trial judge, prosecutors, defence attorneys, courtroom security, and clerks. Other IMPETUS monitors relied on transcripts and daily communications and notes from monitors present in the court room.

Moreover, regarding court access, it must be noted that despite the "collateral bar" applied to the proceedings, the criminal contempt charges against Mr. Donziger are inextricably intertwined with the underlying litigation between Chevron and Indigenous communities in Ecuador. This insight includes Mr. Donziger's resistance to post-judgment discovery proceedings that he argues violate his clients' rights to attorney-client privilege. In this regard, the Panel notes that lawyers for Chevron, the beneficiary corporate entity in the underlying RICO litigation, and New York-based supporters of Mr. Donziger, were able to access the trial in person. On at least one occasion, several Chevron lawyers were observed sitting in the jury box adjacent to the prosecutors' table. As previously noted, news reporters were also permitted to sit in the jury box.

However, the Panel noted a stark contrast between the seemingly guaranteed and preferred access to the courtroom for legal representatives of Chevron, and denial of all forms of access to the courtroom for Mr. Donziger's clients. Mr. Donziger's clients largely comprise Indigenous communities in Ecuador who are adversely affected by the outcome of the proceedings against Mr. Donziger. They were unable to access the trial in person due to travel restrictions. They were also denied electronic access to the trial.

See Section 2.3.3.4 for comments on access to the sentencing hearing on 1 October 2021.

[111] Transcript of Trial from May 10, 2021 at 39-40, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. May 10, 2021).

2.5 Conclusions on the fulfilment of the right to an independent, impartial and public tribunal

The Panel finds a reasonable appearance of bias due to the confluence of multiple roles taken by Judge Kaplan. He presided over all the underlying litigation, laid the charges, appointed the prosecutor, and appointed the judge. There has been no appearance of independence and impartiality in the appointment process, in clear violation of international law and related standards.

The fact that Judge Kaplan was purportedly not in violation of any laws or rules in appointing the special prosecutor and judge does not justify his marked lack of regard for ensuring independence and impartiality required by international and domestic law. The Panel emphasises that at international law, those charged with criminal contempt are entitled to the same standards of independence and impartiality as those accused of any other crimes.

An appearance of bias was demonstrated by Judge Preska, including overt displays of disregard for Mr. Donziger's right to equal and impartial justice. On these grounds alone, the Panel concurs with the WGAD's opinion that Mr. Donziger's fair trial rights have been violated and that his detention is arbitrary.

3 Equality before the law: Equality of arms and right to counsel of choice

This chapter addresses two topics related to equality before the law: equality of arms and the right to legal representation of one's own choosing.

3.1 International standards

Equality before the law is a fundamental principle of international human rights law found in the UDHR and the ICCPR.

The UDHR, Article 10, states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of . . . [their] rights and obligations and of any criminal charge against . . . [them]."[112]

UDHR Article 11 guarantees that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[113]

The ICCPR, Article 14.3 guarantees equality before the courts as follows:

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> [. . .]
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> [. . .]

[112] UDHR, *supra* note 18.
[113] *Id.*

(g) Not to be compelled to testify against himself or to confess guilt."[114]

Equality before the law includes the principle of "equality of arms,"[115] which according to the UN Human Rights Committee,

> means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[116]

Equality before the law also requires that

> similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction.[117]

According to the *UN Guidelines on the Role of Prosecutors* (Guidelines on Prosecutors), the prosecutor plays a crucial role in the administration of justice, including "equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal."[118] The Guidelines on Prosecutors provide as follows:

> 12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
>
> 13. In the performance of their duties, prosecutors shall:
>
> (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
>
> (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
>
> [. . .]

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[114] ICCPR, *supra* note 4, at art. 14.3(g) (emphasis added).
[115] General Comment 32, *supra* note 53, at para. 13.
[116] U.N. Hum. Rts. Comm., Communication No. 1347/2005, *Dudko v. Australia*, at para. 7.4.
[117] *Id.* at para. 14 (emphasis added).
[118] U.N. Guidelines on the Role of Prosecutors, adopted by consensus by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders on 7 September 1990, https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx.

> 44. The right to legal assistance should be available at all stages of the proceedings, including during the pretrial stage. All persons who are arrested, detained or imprisoned should be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Prosecutors must make every effort to safeguard these rights. The United Nations Guidelines stress the importance of cooperation between prosecutors, the legal profession and public defenders.[119]

The UN Special Rapporteur on the independence of judges and lawyers, in her 2012 report to the UN Human Rights Council, emphasised that prosecutors should

> ensure that the rights to a fair trial and to adequate access to legal defence are safeguarded. States should ensure respect for the principle of equality of arms between prosecutors and lawyers, which requires, inter alia, procedural equality between the prosecution and the defence.[120]

The UN Human Rights Committee has ruled that the requirement for equality of arms is not fulfilled when "the accused is denied the opportunity to . . . properly instruct his legal representative."[121]

3.2 **National legislation**

Equality before the law is enshrined in the US Constitution and law.[122] The right to effective assistance of counsel is provided in the Sixth Amendment to the Constitution and case law.[123]

The US Department of Justice *Principles of Federal Prosecution*[124] guides the conduct of US federal prosecutors in the Southern District of New York (SDNY) for the overall purpose of promoting "the reasoned exercise of prosecutorial authority and contribute to the fair, even handed administration of the federal criminal laws."[125] There appear to be no US laws or rules that establish requirements for public prosecutors or special prosecutors to adhere to the above-noted UN Guidelines.

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[119] *Id.* at para. 44 (emphasis added), https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx.

[120] Gabriela Knaul, Report of the Special Rapporteur on the Independence of Judges and Lawyers), Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, Including the Right to Development, U.N. Doc. A/HRC/20/19 (June 7, 2012), https://www.refworld.org/docid/501651c62.html.

[121] U.N. Hum. Rts. Comm., Communication No. 289/1988, *Dieter Wolf v. Panama*, at para. 6.6.

[122] For explanation and citations, see *Equal Protection*, LEGAL INFO. INST. (LII), https://www.law.cornell.edu/wex/equal_protection [https://perma.cc/D9LC-VD4D].

[123] For explanation and references, see *Right to Counsel*, LEGAL INFO. INST. (LII), https://www.law.cornell.edu/wex/right_to_counsel [https://perma.cc/7SEU-XUPV].

[124] U.S. Dep't Just., *Principles of Federal Prosecution*, *in* JUSTICE MANUAL tit. 9 (2018), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

[125] *Id.* at 9-27.001.

The Supreme Court of the US has held that it is a "fundamental premise of our [US] society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters.[126] Case law provides that prosecutors are not permitted to comment on the fact that a defendant has chosen not to testify."[127]

The American Bar Association has published *Criminal Justice Standards for the Prosecution Function*[128] which require prosecutors to avoid improper bias and conflicts of interest and to "preserve the defendant's right to effective assistance."[129] The ABA Standards do not discuss the UN Guidelines on Prosecutors or other international law or standards.

It is not clear how a court-appointed special prosecutor is held accountable to uphold these standards. It is equally unclear whether there is any oversight body with authority to hold special prosecutors accountable for their conduct, other than judicial oversight during the proceedings of the particular cases they are prosecuting.[130] Lack of impartial judicial vigilance to ensure equality of arms creates significant risks of violations of fair trial rights.

3.3 Findings and analysis

3.3.1. Equality of arms

The Panel is profoundly concerned that the criminal contempt proceedings against Mr. Donziger have been marked by significant violations of the principle of equality of arms. Since 2019, Mr. Donziger has relied on a series of pro bono lawyers, stating that his resources have been exhausted by Chevron's civil litigation to resist the Ecuador court ruling. At sentencing in the criminal contempt matter, defence counsel noted Chevron's "endless resources and abilities to dispatch endless lawyers, fueled by endless dollars" to resist the underlying civil action against them, and quoted from a 1993 email in which Chevron promised "to fight them [the Ecuadorian plaintiffs] until hell freezes over and then fight them on the ice."[131]

There was an extraordinarily high level of resources available for the prosecution of the criminal contempt charges against Mr. Donziger. Filings on the docket indicate that the special prosecutor has billed hundreds of thousands of dollars to prosecute the case.[132] The special prosecutor spent hundreds of hours of time preparing for the trial with Chevron lawyers.

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[126] Young v. United States *ex rel.* Vuitton et Fils, 481 U.S. 787 (1987).

[127] United States v. Robinson, 485 U.S. 25 (1988) (emphasis added). *See also* United States v. Whitten, 610 F.3d 168 (2010).

[128] CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (4th ed., AM. BAR ASS'N 2017).

[129] *Id.* at Standard 3-8.4.

[130] Oral Arguments, *supra* note 85.

[131] Transcript of Sentencing Hearing, October 1, 2021, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. Oct. 1, 2021).

[132] Letter motion addressed to Judge Loretta A. Preska from Ronald L. Kuby dated 19 January 2022 re: 108 Order, re: Modification of Order. Document filed by Steven Donziger, https://www.docketbird.com/court-cases/USA-v-Donziger-11cv691/nysd-1:2019-cr-00561-520592

At the trial there was strong presence of members of the law firm of Gibson, Dunn & Crutcher, which represent Chevron. Several members of the law firm were present throughout the trial as legal counsel to Chevron witnesses. The behaviour of the special prosecutors during the proceedings has been more in keeping with the zealousness partisan counsel against Mr. Donziger than that of an impartial, disinterested prosecutor.

In the view of the Panel, Judge Preska allowed an inequality of arms to persist, accusing Mr. Donziger of engaging in "machinations" and "manipulations" when seeking to adjourn the trial. Mr. Donziger's stated rationale for seeking adjournments was to ensure the presence of pro bono legal representation and an adequate opportunity to prepare a defence. This issue is further discussed in Section 3.3.2.

During a pre-trial scheduling hearing on 5 October 2020, the prosecutor spent significant time commenting on the nature and merits of Mr. Donziger's prospective witnesses. Defence counsel made allegations of prosecutorial discrimination in the special prosecutor's singling out of one prospective Ecuadorian witness as a "defaulted defendant" and another as being "of concern" given the possible difficulty of extradition from Ecuador in the event of perjury. The Panel found the pre-trial behaviours of the special prosecutor to be unduly prejudicial, adversarial, and not in keeping with the role of an impartial and disinterested prosecutor faced with a defendant who did not have counsel easily available with him in the courtroom. Mr. Donziger's pro bono counsel was available at the hearing only by telephone.

During the trial, the Judge allowed the special prosecutor to provide in her opening statement information about matters that were not the subject of the charges, which to the Panel appeared to be prejudicial rather than probative. When counsel for the defendant objected, the Judge stated, "I'll bear it in mind,"[133] but did nothing to restrain the special prosecutor.

Judge Preska also gave unusual latitude to the special prosecutor to lead Chevron witnesses in giving evidence of matters not the subject of the charges. When the defence objected, the special prosecutor stated that the evidence was adduced to prove the defendant's "state of mind." Judge Preska ruled to permit the testimony "in order to submit evidence of the intent consciously to disregard a court order."[134] A similar lack of specificity regarding "court orders" is discussed further in Chapter 4 in the section on pre-trial release.

By contrast, as the Panel observed, the Judge was impatient with defence counsel throughout the proceedings. During the trial, the Judge repeatedly interrupted arguments and abruptly curtailed cross-examination, disallowing any cross-examination that attempted to adduce exculpatory information about Mr. Donziger's motivations if they touched at all on the collateral bar. This report has already commented on the judicial inattentiveness to the defence during cross-examination. See Section 2.3.3.4 above.

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[133] Trial Transcript, May 10, 2021 at 49, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. May 10, 2021).

[134] Trial Transcript May 10, 2021, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. May 10, 2021) (emphasis added).

3.3.2. **Legal representation of one's own choosing**

During a 3 September 2020 hearing of an application for an adjournment of the trial and recusal of the judge, Judge Preska stated:

> . . . Mr. Donziger and his counsel have employed virtually every conceivable tactic to stop trial from starting as long-scheduled on September 9 [2020] . . . Because Mr. Donziger refused to waive the potential conflict [of interest], the Court disqualified Mr. Friedman and Ms. Littlepage as counsel, which left Mr. Donziger with one lawyer, Martin Garbus, who refuses to attend trial in person, and another lawyer, Lauren Regan, who is purportedly not prepared to serve as lead counsel . . ."
>
> That we find ourselves in this situation [of postponing the trial date] is deeply disturbing, especially given the Court's view that it is largely the result of the machinations of Mr. Donziger and his legal team (not including Mr. Frisch). Regrettable as it is, the Court concludes that it must grant Mr. Frisch's motion and postpone the upcoming trial.[135]

In a 16 September 2020 ruling, Judge Preska adjourned the hearing to 4 November 2020 but denied a defence application for a date of 7 December 2020 to allow the defendant his chosen pro bono criminal defence lawyer, Mr. Ronald Kuby, who had advised that he was not available until that date. At the same hearing, Judge Preska ruled against a defence motion that she recuse herself on the grounds of bias. She referred to the defendant's motion in what the Panel considered to be a disrespectful and disparaging manner as "yet another attempt to derail his trial" on the basis of a "grab bag of complaints." She further stated:

> Mr. Donziger also argues that recusal is required because the Court has "mistreat[ed]" him and showed "[f]avoritism" to the Government, including by using the word "machinations" to describe aspects of Mr. Donziger's litigation strategy, imposing conditions on his pretrial release, and postponing trial to November 3, which is election day and earlier than Ronald Kuby [Mr. Donziger's counsel of choice] . . . would prefer.[136]

The characterization of Mr. Kuby's stated date of availability as a preference (without evidence), failed to respect and recognize Mr. Donziger's right to counsel of his own choosing.

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[135] Order as to Steven Donzinger, 3 September 2020, United States v. Donziger, No. 1:19-CR-00561 (LAP), 11-CV-691 (LAP) (S.D.N.Y. Sep. 3, 2021), https://www.docketbird.com/court-documents/USA-v-Donziger-11cv691/ORDER-as-to-Steven-Donziger-Mr-Frisch-s-motion-to-vacate-dkt-no-157-is-GRANTED-and-trial-is-adjourned-to-November-3-2020-at-10-00-a-m-in-Courtroom-12A-or-such-other-courtroom-as-is-designated-Counsel-shall-confer-and-inform-the-Court-whether-they-wis/nysd-1:2019-cr-00561-520592-00168.

[136] Order as to Steven Donzinger, 16 September 2020, United States v. Donziger, No. 1:19-CR-00561 (LAP), 11-CV-691 (LAP) (S.D.N.Y. Sept. 16, 2021).

At the outset of the 5 October 2020 hearing, Judge Preska made an opening statement that she would not allow any further adjournment. This statement pre-emptively prejudged a defence motion of submissions regarding adjournment. Also, in her opening remarks, Judge Preska stated directly to Mr. Donziger (despite the fact that his counsel was present by telephone):

> . . . you have the right to represent yourself if you want to, particularly because you are a trained lawyer . . . I'm informing you again, Mr. Donziger, that the trial will not be further adjourned. You will not be permitted to manipulate the proceedings by your choice or non choice of counsel. So the November 4 trial date is a firm date.[137]

Mr. Donziger had indicated from the date of the arraignment that he required adequate legal representation and had never provided any indication that he wished to waive that right. Judge Preska appeared to regard Mr. Donziger's right to counsel as an option, rather than a right. This statement of Judge Preska implied that because Mr. Donziger had training and experience as a lawyer, he did not require legal representation, and that he did not need an adjournment to ensure counsel of choice.

Judge Preska denied the application to change the date to accommodate Mr. Donziger's chosen counsel. In the Panel's view, Judge Preska failed to ensure equality of arms and demonstrated bias by treating the defendant's exercise of his legal rights, including his right to choice of counsel, as "manipulations" and "machinations."

In an interim report on 27 October 2020, the Panel expressed concern about the potential denial of effective legal counsel available to represent him during the trial. It was also of concern that Judge Preska attributed blame to Mr. Donziger and his lawyers for the delays, invariably adopting the special prosecutors' arguments.

After examining the record, the Panel has concluded that the trial was delayed by a combination of COVID-19 restrictions on the in-person presence of counsel in New York, together with Mr. Donziger's challenges in ensuring the availability of pro bono counsel of choice.

The Panel acknowledges the duty of judges to ensure that trials are not delayed by the inappropriate means or whims of the accused. However, the right to a trial without undue delay is a right of the accused, not a right of the judge or prosecutor. The right to a trial without undue delay does not displace the right to the presence of effective counsel of choice or any of the other legal rights of the accused. No one is to be deprived of the right to mount full answer and defence to criminal proceedings, which requires effective legal representation.

Ultimately, after further motions by the defence, the trial was adjourned to 10 May 2021 to ensure Mr. Kuby's availability in court.

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[137] Transcript of Status Conference as to Steven Donzinger, 5 October 2020 at 3, United States v. Donziger, No. 1:19-CR-00561 (LAP), 11-CV-691 (LAP) (S.D.N.Y. Oct. 5, 2021) (emphasis added).

3.3.3. **Accused's right not to testify**

It is well established in international law that an accused is not required to testify against himself.[138] US law also upholds this right. Yet, during the sentencing phase of the proceedings, the special prosecutor stated in her written submissions:

> The Special Prosecutors elicited testimony from seven witnesses and more than 160 exhibits were received into evidence. See Dkt. 326 at 7-8. Mr. Donziger did not call a single witness and elected not to testify in his own defense, waiving his right to do so in open court.[139]

This statement by the special prosecutor disregarded the prohibition in *Young*[140] against making prejudicial comments about the defendant's exercise of his right not to testify.

3.3.4. **Oversight of the special prosecutors**

It is the responsibility of States to ensure fair trial rights, including fair prosecutions. In the Donziger case, the Panel was unable to discern with certainty whether there was any transparent or effective oversight of the prosecution by the Department of Justice or judicial authorities after the special prosecutors were appointed.[141] The Panel is concerned by an appearance that no transparent procedural safeguards were implemented to ensure a fair prosecution as required by international or domestic standards cited in section 3.1 and 3.2 above.

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[138] ICCPR, *supra* note 4, at art. 14.3(g).

[139] Sentencing Submission by USA as to Steven Donzinger, 23 August 23 2021 at 8-9, United States v. Donziger No. 1:19-CR-00561 (LAP) (S.D.N.Y. July 26, 2021).

[140] Young v. United States *ex rel.* Vuitton et Fils, 481 U.S. 787 (1987).

[141] United States v. Donziger 19-CR-561 (LAP) (S.D.N.Y. Jul. 26, 2021) (see text surrounding notes 473-487), https://casetext.com/case/united-statesn-v-donziger-2. *See also* Brief for Appellant at 38, United States v. Donziger, No. 21-2486, Document 88, (2d Cir. Nov. 5, 2021); Amicus Brief for the United States Department of Justice as Amicus Curiae in Support of Appellee On Issue I, United States v. Donzinger, No. 21-2486 (2d Cir. 2021). Please note that the Panel's concern is distinct from the Appellant's US Constitutional arguments. Rather, the Panel is concerned with the question of whether there is effective oversight of the prosecutorial function.

4 The right to liberty, the presumption of innocence, and pretrial release

This chapter discusses the right to liberty, which at international law is the foundation of the presumption of innocence of all persons accused of criminal offences. The presumption in favour of pre-trial release of accused persons prior to their trial is grounded in these intertwined rights.

The Panel finds that Steven Donziger has been subjected to prolonged arbitrary detention in violation of fundamental norms of international human rights law. Violations set out in the previous chapters of this report have compounded into violations of the presumption of innocence, which is most notably evident in multiple orders issued by Judge Preska that violate fundamental norms and standards relevant to pre-trial release.

4.1 International standards

The right to liberty, with the corollary right not to be arbitrarily detained, is a principle of customary international law. The prohibition against prolonged arbitrary detention is a jus cogens norm.[142]

The UDHR[143] stipulates that:

> 3. Everyone has the right to life, liberty and security of person.
>
> [. . .]
>
> 11. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

The ICCPR sets out the following guarantees:

> Article 9
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release

[142] Jus cogens (Latin: compelling law; English: peremptory norm) refers to "certain fundamental, overriding principles of international law, from which no derogation is ever permitted." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998). *See* Dire Tladi (Special Rapporteur), Int'l Law Comm'n, *Fourth Report on Peremptory Norms of General International Law* (Jus Cogens), at 42, U.N. Doc. A/CN.4/727 (Jan. 2019), https://undocs.org/en/A/CN.4/727.

[143] UDHR, *supra* note 18.

> may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
>
> [. . .]
>
> Article 14
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[144]

The UN Human Rights Committee, General Comment No. 32: states:

> 30. According to [ICCPR] article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.[145]

In interpreting ICCPR Article 9.3, the UN Human Rights Committee has ruled that detention pending trial "must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime."[146]

The UN Human Rights Committee pointed out in its General Comment No. 35 that "detention" includes house arrest[147] and that:

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[144] CCPR, *supra* note 4, at arts. 9, 14 (emphasis added).

[145] General Comment 32, *supra* note 53 (emphasis added).

[146] U.N. Hum. Rts. Comm., Communication No. 66/1980, *David Alberto Cámpora Schweizer v. Uruguay*, U.N. Doc. CCPR/C/OP/2, at 90 (1990) (emphasis added), https://www.ohchr.org/Documents/Publications/SelDec_2_en.pdf. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

[147] U.N. Hum. Rts. Comm., *General Comment No. 35, Article 9 (Liberty and Security of Person)* para. 40, 112th Sess., adopted Oct. 31, 2014, U.N. No. CCPR/C/GC/35, https://tbinternet.ohchr.org/_layouts/15/treaty

> States parties also need to show that detention does not last longer than absolutely necessary.[148]
>
> After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives. If the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.[149]

The Tokyo Rules, adopted by the UN General Assembly in 1990, also confirm that pretrial detention is to be used only if the circumstances make it necessary as a last resort.[150]

The ICCPR, Article 2, provides that individuals have the right to a remedy for rights violations, including an enforceable right to compensation.

Persons arrested or detained are entitled to challenge the lawfulness of their detention. The legality of the detention must be determined promptly and release ordered, if detention is found to be unlawful. "Lawfulness" includes compliance not only with domestic law but also with the ICCPR. A person detained on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of detention. In the case of a petty offence with a maximum penalty of six months imprisonment, a reasonable interval between reviews would be short, particularly when the trial is delayed.[151]

It must also be emphasized that presumption of innocence places the burden on the State, notably the prosecution, to provide evidence as to why the defendant cannot be released. The standard of evidence and burden of proof are discussed by the Inter-American Commission on Human Rights (IACHR)[152] in its 2013 report on pre-trial release.[153] Elaborating on international law and

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bodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en [hereinafter General Comment No. 35].

[148] *Id.* at para. 15 (emphasis added).

[149] *Id.* at para. 38 (emphasis added).

[150] G.A. 45/110, U.N. Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules"), (Dec. 14, 1990), https://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf.

[151] For discussion, see LOIS LESLIE, PRE-TRIAL RELEASE AND THE RIGHT TO BE PRESUMED INNOCENT: A HANDBOOK ON PRE-TRIAL RELEASE AT INTERNATIONAL LAW 50 (Lawyers' Rights Watch Canada (LRWC), Mar. 2013), https://www.lrwc.org/wp-content/uploads/2013/04/Pre-trial-release-and-the-right-to-be-presumed-innocent.pdf.

[152] The United States is a State Party to the Charter of the Organization of American States (OAS), which is founded on "fundamental rights of the individual." The OAS adopted the American Declaration on the Rights and Duties in 1948 and created the Inter-American Commission on Human Rights in 1959, The Commission members are elected in their personal capacity by the OAS General Assembly for four year terms. *See* Inter-Am. Comm'n on Hum. Rts., American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948), https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm.

standards of the UN, European, and Inter-American human rights systems, the IACHR report summarizes the standards established by the bodies of the Inter-American system as follows:

> (i) pretrial detention should be the exception, not the rule; . . .; (iv) . . . pretrial detention must be absolutely necessary and proportional, meaning that there should not be any other less restrictive means available to achieve the procedural purpose that is being pursued and that personal liberty should not be disproportionately affected; (v) all of the aforementioned aspects must be grounded in particular facts and not be supported by presumption; (vi) pretrial detention must be issued for the length of time strictly necessary to fulfill the procedural purpose and, therefore, requires periodic review of the elements that supported its application; (vii) holding a defendant in pretrial detention for an unreasonable length of time is tantamount to an anticipated prison sentence. . .[154]

The IACHR notes that persons subjected to pre-trial restrictions on liberty "suffer direct harm in terms of the quality of their family relations and their ability to earn an income, and they are also at a procedural disadvantage compared to individuals who face criminal prosecution from a position of liberty. . ."[155]

For these reasons, the IACHR emphasises that pre-trial restrictions on liberty must not exceed a reasonable time, pointing out that,

> the right to the presumption of innocence and the exceptional nature of pretrial detention give rise to the State's duty to periodically review that the circumstances on which its initial imposition was based still exist. . . The State's explanations of the need to keep a person in pretrial detention should be more convincing and better grounded as time progresses.[156]

In reviewing pre-trial detention,

> The judge must specify the concrete circumstances in the proceedings that lead to the reasonable conclusion that there is still a real risk of flight, or identify the evidence that still needs to be gathered and explain why it would be impossible to do so with the accused at large. This obligation is based on the need for current circumstances to determine the State's interest in maintaining the pretrial detention. This requirement is not met when the judicial authorities systematically reject review requests by, for example, merely invoking legal assumptions related to flight risk or any other provisions that, in one way or another, require that the measure be maintained. If the State fails to show that the pretrial detention is still

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[153] INTER-AM. COMM'N ON HUM. RTS., OEA/Ser.L/V/II. Doc. 46/13, REPORT ON THE USE OF PRETRIAL DETENTION IN THE AMERICAS 8 para. 21 (Dec. 30, 2013), https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf.

[154] *Id.*

[155] *Id.* at para. 128 (emphasis added).

[156] *Id.* at para. 202 (emphasis added).

> reasonable and necessary for achieving legitimate aims, that detention, even when ordered in accordance with the law, becomes arbitrary.[157]

The UN Human Rights Committee, in *CCPR General Comment No. 32*, notes that: "The necessity for detention and the imposition of non-custodial measures must be kept under judicial review.[158]

4.2 **National Law**

The US Constitution guarantees that accused persons shall not be subjected to excessive bail.[159] Pre-trial detention and release are governed by the *Bail Reform Act of 1984*.[160]

The Federal Rules of Court require pre-trial release "on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court" unless "the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[161] The prosecution "bears the ultimate burden of establishing that no series of conditions is sufficient to negate the risk of the accused's flight or dangerousness—by a preponderance of the evidence in the case of flight and by clear and convincing evidence in the case of dangerousness."[162]

The Federal Rules further provide that the:

> judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community . . . in a case, that involves—
>
> (A) a serious risk that such person will flee; or
>
> (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.[163]

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[157] *Id.* at para. 206 (emphasis added; footnotes omitted).

[158] U.N. Hum. Rts. Comm., *General Comment No. 34, Article 19: Freedoms of Opinion and Expression* para. 30, 102nd Sess., adopted July 20, 2007, https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

[159] CHARLES DOYLE, CONG. RSCH. SERV., R40221, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 2 n.15 (July 31, 2017), https://sgp.fas.org/crs/misc/R40221.pdf (citing U.S. CONST. amend. VIII ("Excessive bail shall not be required.")); VA. CONST., BILL OF RIGHTS § 9 (no excessive bail) (1776)).

[160] Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3156 (1990).

[161] Federal Rules of Court, 18 U.S.C. § 3142, https://www.law.cornell.edu/uscode/text/18/3142.

[162] DOYLE, *supra* note 159, at 10 n.90 (citing United States v. English, 929 F.3d 311, 319 (2d Cir. 2011) (emphasis added); United States v. Stone, 608 F.3d 939, 946 (2010); United States v. Bell, 209 F. Supp. 3d 275, 277 (D.D.C. 2016); United States v. Rodriguez, 147 F. Supp. 3d 1278, 1286 (D.N. Mex. 2015); United States v. Guerra-Hernandez, 88 F. Supp. 3d 25, 26 (D.P.R. 2015)).

[163] (emphasis added).

Thus, the prosecutor has the burden of proof to establish risk of flight by a preponderance of evidence.[164] While strict rules of evidence are not required, at the hearing the defendant "has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise."[165]

When a defendant seeks a review of a detention order, the district court must review the matter de novo, and undertake a complete review of the matter.[166]

4.3 **Findings and analysis**

At an arraignment hearing on 6 August 2019, Judge Preska denied pre-trial release, finding that Mr. Donziger posed a flight risk. Three special prosecutors were present at the hearing, including Rita Glavin.

Mr. Donziger represented himself at the hearing with assistance of pro bono "advisory counsel" after making several importunate pleas that he be permitted to talk to a Criminal Justice Act (CJA) Attorney informally for that hearing alone. Prior to being permitted to speak to the CJA attorney, Mr. Donziger was interviewed by a Pre-Trial Services Officer (PTS Officer) without the presence of counsel. The PTS officer recommended, the special prosecutor supported, and Judge Preska ordered several pre-trial conditions, including pre-trial home confinement with a GPS ankle monitor, along with a Personal Recognizance Bond of $800,000.

The PTS Officer did not disclose the evidence or reasons that grounded her recommendation of home confinement and an ankle monitor. Mr. Donziger was also ordered to surrender all travel documents and was confined to the South and Eastern districts of New York.[167] The trial date was set for 28 August 2019.

The prosecutor stated an opinion that in cases where flight risk was found these conditions were "standard . . . not unreasonable, and they are not unduly burdensome." She did not indicate how home confinement and an ankle monitor were "necessary."[168]

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[164] United States v. Tedder, 903 F. Supp. 344, 345 (N.D.N.Y. 1995) (citing United States v. Martir, 782 F.2d 1141, 1146 (2d Cir. 1986)); 18 U.S.C. § 3142(c); CLOONEY & WEBB, *supra* note 72, at 232.

[165] Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3156 (1990).

[166] United States v. Duncan, 897 F. Supp. 688, 689–90 (N.D.N.Y. 1995) (citing United States v. Leon, 766 F.2d 77, 80 (2d Cir. 1985)); *see also* United States v. King, 849 F.2d 485, 489–91 (11th Cir. 1988); United States v. Williams, 753 F.2d 329, 331 (4th Cir. 1985); 18 U.S.C. § 3145(a)-(c); U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL (updated Jan. 23, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual. https://www.justice.gov/archives/jm/criminal-resource-manual.

[167] Minute Entry for Proceedings before Judge Loretta A. Preska, August 6, 2019, United States v. Donziger, No. 1:19-CR-00561 (LAP), 11-CV-691 (LAP) (S.D.N.Y. Aug. 6, 2019), https://www.docketbird.com/court-cases/USA-v-Donziger-11cv691/nysd-1:2019-cr-00561-520592/page/6.

[168] *Id.* (emphasis added).

The grounds on which the prosecutor argued, and Judge Preska determined, that Mr. Donziger was deemed a flight risk included:

- past refusal to comply with orders of the court (in the underlying civil litigation);
- great emphasis that he was "facing, very likely, jail time," giving him an incentive to flee;
- he traveled frequently to Ecuador "where he had been at least seven times in the last two years" and which has "less than a reliable system for extradition";
- "If a defendant casts a case in political terms, there is no assurance that that defendant's coming back." The prosecutor stated that Mr. Donziger's Twitter messages "casts the matter in political terms" rather than as a criminal matter; and
- He had a lot of ties with people in Ecuador, people who are "politically active."

The only concrete evidence that the prosecutor presented was the fact that Mr. Donziger had breached civil discovery orders resulting in civil contempt orders and ultimately criminal contempt charges, that he travelled frequently to Ecuador and had ties with politically active people there, and that Ecuador's extradition system was not reliable.

The remaining allegations, including that Mr. Donziger had no incentive to remain in the US, either ignored or devalued evidence presented by Mr. Donziger that he had no criminal record; that he returned voluntarily from Canada to face the charges; that he has a family in the US; that he maintains ties to relatives and business in the US; that he has no incentive to abandon his wife, son, and life in the US; and that by leaving the US, he would forfeit his ability to continue with litigation he has been pursuing for decades.

The special prosecutor's submissions appear to be based on speculation and supposition rather than evidence. The special prosecutor provided no evidence to show that Mr. Donziger's resistance to civil discovery orders and civil contempt orders, in all the circumstances, was transferrable to a risk of flight. The special prosecutor's generalization that "if a defendant casts a case in political terms, there is no assurance that that defendant's coming back," based on unspecified comments on Twitter, appears to place the burden of proof on the defendant.

The Panel is of the view that the Court failed to recognize that the prosecutor had the onus to prove flight risk on the preponderance of evidence and that restrictions on liberty must be the least restrictive means possible to assure attendance at trial.

On 25 November 2019, Mr. Donziger applied for elimination of pre-trial home confinement and monitoring conditions. The same grounds were cited against the application, adding that Mr. Donziger's contacts in Ecuador included "very high ranking officials" such as a former president of Ecuador.

At a hearing on 18 May 2020, at which the trial was then adjourned by Judge Preska until 9 September 2020, Mr. Donziger was again denied pre-trial release on the same grounds as found on 2 August 2019, namely that he:

> (1) still had significant "ties to Ecuador," including to "high-ranking government officials," and had traveled there extensively in the past, (2) still had "failed to

> comply with numerous court orders in the past," and (3) still was "facing a criminal trial and facing the real prospects of incarceration."[169]

At review of pre-trial conditions on 4 December 2019, Mr. Donziger's defence counsel introduced evidence that:

> [Ecuador's] former President Correa, he's not in Ecuador anymore. He's essentially – he's . . . in exile in Belgium, and he and his people are out of favor with the current regime led by President Moreno who has starkly changed politics in Ecuador . . . the current political climate makes it impossible – If it were even plausible – to get there without a passport.

Counsel for Mr. Donziger noted that the PTS officer was now recommending a monitored curfew and pointed out that the case had become classified as a misdemeanor, reducing the maximum sentence to six months. The Judge responded by saying:

> "I don't understand . . . why [the Ecuadorian plaintiffs] wouldn't be delighted to take in the person who worked for them for so many years. . . . I am not sure I wouldn't presume that the individuals whom Mr. Donziger represented all these years and fought for all these years would not be inclined to take care of him."

The Panel finds this statement to consist of presumptions not based on any evidence, and it places the burden on the defendant to provide increased proof that he had no incentive to flee. Judge Preska subsequently denied the application and Mr. Donziger remained under the previously ordered conditions, including home confinement with an ankle bracelet.

In June 2020, Mr. Donziger requested a variation of the terms of his home confinement. Judge Preska denied the request, characterizing it in her order as a:

> . . . request for blanket permission to depart his residence, despite being on home confinement, every day to roam his neighborhood for several hours for any of a number of activities. . . Mr. Donziger proffered no specific reason for his request, other than the desire to be outside shared by every other defendant who is on home confinement, and, indeed, by the many people in New York City who have sheltered in place over the last several months. There is no reason why Mr. Donziger should be treated any differently from any other pretrial defendant.
>
> As the Prosecutors point out in their letter, Mr. Donziger has not been fully compliant with the conditions of his release. Specifically, in March 2020, [Pretrial Services] approved Mr. Donziger's attendance at a specific event at Madison Square Garden with his son. Without informing [Pretrial Services], Mr. Donziger

[169] Telephone Conference Proceedings, May 18, 2020, United States v. Donziger, No. 1:19-CR-00561 (LAP) (S.D.N.Y. May 18, 2020); Order on December 31, 2020, United States v. Steven Donziger, 1:19-CR-561 (LAP) (S.D.N.Y. Dec. 31, 2020).

> did not go to the event and went someplace in Brooklyn instead." (Id. at 1-2.) This was hardly an unauthorized stop for ice cream on the way home but was a material breach of the terms and conditions of home confinement. Combined with the Court's multiple previous findings that Mr. Donziger constitutes a flight risk, this incident justifies the Court's concern expressed at the May 18 conference that freedom to roam for several hours a day would create an opportunity to get to an airport and depart the country.[170]

The underlined statements are, in the Panel's opinion, prejudicial, and the suggestion that Mr. Donziger might be able to get to an airport is not evidence of an intention to flee in the absence of any other evidence. Furthermore, given that Mr. Donziger was also required to surrender his US passport, it would not be possible for him to legally travel out of the country, especially across international checkpoints with documentary and bio-data controls.

On 29 March 2021, the Court of Appeals denied Mr. Donziger' appeals from the 29 May 2020 and 3 June 2020 orders of Judge Preska denying his requests to eliminate or modify the conditions of his pretrial release, stating that it could find "no clear error in the District Court's determination that Donziger posed a risk of flight and that his pretrial release conditions were the least restrictive conditions necessary to reasonably ensure his attendance at trial."[171] The Court of Appeals hearing was not a de novo review, but rather an examination of the District Court record to determine whether there were "clear errors." This means that the appellate courts defer to the lower courts on findings of fact, not asking whether the findings were correct, but only whether they were clearly an error.

However, the Court of Appeals also indicated that by the time of trial, then only a few weeks away:

> Donziger will have spent approximately twenty-one months in home confinement, a period more than three times as long as the maximum jail sentence he faces if convicted on charges that the special prosecutors and the district court have decided can be treated as a petty offense. The length of his confinement has been attributable, in substantial part, to pandemic-related delays of his trial, and to his own requests for adjournments. Nevertheless, any further delay of his trial (other than a delay requested by Donziger himself) may well warrant a re-evaluation of whether continued home confinement will exceed the bounds of reasonableness.[172]

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[170] Donziger, docket, June 3, 2020 (emphasis added), https://www.docketbird.com/court-documents/USA-v-Donziger-11cv691/ORDER-as-to-Steven-Donziger-Before-the-Court-is-Defendant-Steven-Donziger-s-request-for-blanket-permission-to-depart-his-residence-despite-being-on-home-confinement-every-day-to-roam-his-neighborhood-for-several-hours-for-any-of-a-number-of-activitie/nysd-1:2019-cr-00561-520592-00090.

[171] United States of America v. Steven Robert Donziger, 11-cv-691, v. 20-1710-cr, Summary Order, 29 March 2021, https://www.courtlistener.com/docket/16019770/250/united-states-v-donziger-11cv691/.

[172] *Id.* (emphasis added).

The Court of Appeals accepted Judge Preska's finding that the delays in trial were due in part to Mr. Donziger's requests for adjournments. Judge Preska continued to deny repeated requests for review or relaxation of pre-trial home confinement.

The Judge responded with increasing impatience in ways that appeared not to recognize Mr. Donziger's right to seek regular reviews of pre-trial confinement or the standard and burden of proof required to justify the lengthy deprivation of his liberty. For example, on 7 July 2021, Judge Preska made an order stating that she had received a letter from Mr. Garbus, "apparently making yet another bail application on Mr. Donziger's behalf" and ordering Mr. Garbus to "inform the Court by letter which of the 18 U.S.C. § 3142 factors have changed since the Court's previous bail rulings, which have been twice affirmed by the Court of Appeals."[173]

The result is that Mr. Donziger was under pre-trial home confinement with an ankle bracelet for more than 21 months prior to trial, even though the maximum prison sentence for the petty offence with which he is charged is six months. After the trial, he spent another four months in home confinement after the trial and prior to sentencing on 1 October. He spent more than five times as long as the maximum jail sentence in home confinement before beginning his jail term.

4.4 Conclusions and recommendations

The Panel concludes, based on international law and standards, and also based on an examination of the record, that the pre-trial home confinement of Mr. Donziger was not grounded in evidence but in unfounded speculation. Pre-trial home confinement for 25 months on charges attracting a maximum six-month sentence was unreasonable. The lengthy period of home confinement did not serve the purpose of prevention of flight; rather it appears to have been punitive in nature and purpose. The Panel finds that Mr. Donziger's detention constitutes prolonged arbitrary detention in serious violation of the right to liberty and the presumption of innocence.

Mr. Donziger is entitled to an effective remedy for violation of his internationally protected rights pursuant to Article 2 of the ICCPR. The Panel recommends immediate and unconditional release from detention as well as compensation for all violations of his right to liberty.

[173] ORDER as to Steven Donziger dated 7 July 2021, United States District Court Southern District Of New York United States of America, No. 19-CR-561 (LAP) -against- No. 11-CV-691 (LAK) Steven Donziger, https://www.docketbird.com/court-documents/USA-v-Donziger-11cv691/ORDER-as-to-Steven-Donziger-The-Court-is-in-receipt-of-Mr-Garbus-s-letter-dated-July-6-2021-apparently-making-yet-another-bail-application-on-Mr-Donziger-s-behalf-See-dkt-no-336-Mr-Garbus-shall-inform-the-Court-by-letter-which-of-the-18-U-S-C-3142-fa/nysd-1:2019-cr-00561-520592-00337 (emphasis added).

5 Concluding observations and recommendations

After carefully reviewing the transcripts and relevant laws and standards, the Panel's unequivocal assessment of the criminal contempt proceedings against Steven Donziger is that he has been subject to multiple violations of his internationally protected human rights, including his right to a fair trial by an independent and impartial tribunal and his right to the presumption of innocence. These violations have resulted in prolonged arbitrary detention for Mr. Donziger.

The judge, prosecutor and defence counsel are all unquestionably highly skilled and knowledgeable of the domestic law, rules, and technical procedural requirements. The judge and prosecutor deployed a technocratic approach to laws and procedural rules, often in apparent concert with each another. To the outside disinterested Panel of observers, the proceedings and the result are dismaying.

SDNY Rules for the Division of Business Among District Judges (RDB) state: "If a judge is disqualified or if a judge has presided at a mistrial or former trial of the case, and requests reassignment, the assignment committee shall transfer the case by lot." The rule provides that it is intended for "internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys." (emphasis added).[174]

The RDB rule contains no language affirming the obligation to ensure actual or perceived independence and impartiality of judicial assignments. However, this omission does not obviate the requirement to ensure the appointment of judges who are, and are seen to be, impartial and independent.

In instance after instance, when a procedural rule could be deployed against the defendant, the prosecutor and judge did so. Judge Kaplan and Judge Preska consistently interpreted and deployed laws and rules in ways that gave a "rule by law" air of legitimacy to proceedings aimed toward a seemingly predetermined conclusions while disregarding fundamental principles of the rule of law. The result was multiple violations of international human rights law and standards.

5.1 Recommendations

The Panel recommends that all relevant US authorities and bodies:

- Review and amend laws, rules, decrees, and policies to prevent arbitrary applications that side-step or violate fundamental norms and principles of international human rights law and standards related to the administration of justice, including independence and impartiality of judges and prosecutors and fair trial principles.

[174] Local Rules of the United States District Courts for the Southern and Eastern Districts of New York 105, 116 r.16 (Oct. 29, 2018) ("Rules for the Division of Business Among District Judges: Southern District"), https://img.nyed.uscourts.gov/files/local_rules/localrules.pdf.

- Implement measures to guarantee that special prosecutors are accountable to uphold the same rules, guidelines, standards, oversight, and budgetary restraints applicable to public prosecutors in like cases.
- Conduct an independent and impartial investigation into the conduct of Judge Lewis A. Kaplan and Judge Loretta A. Preska related to all proceedings against Mr. Donziger.
- Ensure that in no case can convicted persons be sentenced to punishment that fails to take into account and give the convicted person credit for all forms of de jure and de facto pretrial confinement, regardless of the type of offence on which the person is convicted.
- Ensure that judges and lawyers in the US have education in international human rights law and standards binding on the US, in particular with regard to criminal proceedings.
- Accept the recommendations of the UN Working Group on Arbitrary Detention (WGAD) concerning Mr. Donziger and seek follow up technical assistance from the WGAD and other relevant Special Procedures of the UN Human Rights Council such as the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on human rights defenders. In this regard, the Panel welcomes the fact that on 21 October 2021, the US issued a standing invitation for country visits to the Special Procedures of the Human Rights Council. The Panel further notes that a proposed visit from the UN Special Rapporteur on the independence of judges and lawyers has been outstanding since 2014, and recommends that the visit be arranged on an urgent basis.

6 Annex: IMPETUS biographies

Stephen Rapp, BA (Harvard), JD (Drake), is a Distinguished Fellow at the United States Holocaust Memorial Museum's Center for Prevention of Genocide. He is also a Senior Fellow of Practice at the Center for Law, Ethics and Armed Conflict at Oxford University. During 2017-2018 he was Father Robert Drinan Visiting Professor for Human Rights at Georgetown University. He serves as Chair of the Commission for International Justice and Accountability (CIJA) and on the boards of Physicians for Human Rights, the IBA Human Rights Institute, the ABA Rule of Law Initiative, and the Siracusa International Institute for Criminal Justice and Human Rights. From 2009 to 2015, he was Ambassador-at-Large heading the Office of Global Criminal Justice in the US State Department. Rapp was the Prosecutor of the Special Court for Sierra Leone from 2007 to 2009 where he led the prosecution of former Liberian President Charles Taylor. From 2001 to 2007, he served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, where he headed the trial team that achieved the first convictions in history of leaders of the mass media for the crime of direct and public incitement to commit genocide. Before his international service, he was the United States Attorney for the N. District of Iowa from 1993 to 2001. Rapp organized processes for monitoring trials for compliance with international human rights law in Rwanda and Bangladesh, and led a team that monitored a 2019 trial in Turkey for Trial Watch (a Clooney Foundation for Justice Initiative).

Catherine Morris, BA (Alberta), JD (Alberta), LLM (UBC), is the UN Representative of Lawyers' Rights Watch Canada (LRWC). She has served as a transitional Executive Director of LRWC from June 2020 to January 2022. She has worked as an Adjunct Professor in the Faculty of Law at the University of Victoria (UVic) and is currently a Research Associate of UVic's Centre for Asia-Pacific Initiatives. She is also a director of Peacemakers Trust, a charitable organization for research and education in conflict transformation and peacebuilding. She has taught graduate level courses in international human rights, negotiation, and conflict studies at universities in Canada, Southeast Asia and Europe. She has more than two decades of experience in the field of international human rights with field visits in countries on five continents on issues related to conflict management, legal development, or international human rights. She is experienced in impartial fact finding, adjudication, and trial monitoring. Her publications include works on dispute resolution ethics and international human rights. She is a non-practicing member of the Law Society of British Columbia, Canada, and a member of the Canadian Bar Association.

Etienne C. Toussaint, S.B. (MIT), M.S.E. (Johns Hopkins), J.D.(Harvard), LL.M (GWU), is an Assistant Professor of Law at the University of South Carolina School of Law where he teaches contracts, secured transactions, business associations, and other courses related to business law, political economy, and critical theory. His scholarship on housing, community economic development, environmental justice, and human rights law has appeared or is forthcoming in the *California Law Review*, the *Columbia Human Rights Law Review*, the *Michigan Journal of Law Reform*, and the *Houston Law Review*, among other journals. Outside of the academy, Toussaint serves as a member of the American Bar Association Commission on Homelessness and Poverty. Professor Toussaint previously served as Board Member of the Washington Council of Lawyers in Washington D.C., an Assistant Professor of Law at the

University of the District of Columbia David A. Clarke School of Law, and a Visiting Associate Professor of Clinical Law and Friedman Fellow at The George Washington University Law School. Prior to entering legal academia, Toussaint worked as a Project Finance Associate with international law firm Norton Rose Fulbright, and subsequently as a Law & Policy Fellow with the Poverty & Race Research Action Council in Washington, D.C. Professor Toussaint's recent legal article, "Black Urban Ecologies and Structural Extermination," was published in the *Harvard Environmental Law Review* in July 2021.

Nykeeba Brown, JD (Barry), LLM (Pace), earned her advanced degree in Global Environment Law at Pace University's Haub School of Law. She serves as Co-Vice Chair of the Environmental Justice Committee of the Civil Rights and Social Justice Section of the ABA. Brown served as a diplomacy extern at the United Nations Headquarters in New York City. Prior to her studies for an LLM, Brown served as a summer associate at Akerman LLP in their labor and employment practice.