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

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The emergence of the Racketeer Influenced and Corrupt Organization Act (RICO) as a corporate weapon against critical advocacy represents an aggressive new phase in the evolution of Strategic Lawsuits Against Public Participation (SLAPPs) in the United States. RICO enables corporations to act as surrogates for federal prosecutors and smear critics with spurious criminal allegations. As such, it provides a vivid example of how corporations in the USA and beyond are increasingly able to operate in a way analog

use of strategic civil defamation lawsuits" – a practice referred to in the United States as SLAPPs – in its 2014 submission to the Law Commission of India,[2] while separately noting a similar trend in the Philippines.[3] Thai academics and human rights lawyers have called for legal reform to stop a rising tide of SLAPPs.[4]

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

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

II. THE FEDERAL ABUSE OF RICO

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

[9]*See* Clara Jeffrey & Monika Bauerleinoct, *Why We're Stuck With $650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us*, MOTHER JONES

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

RICO's elastic criminal provisions were always reliant on a disciplined exercise of prosecutorial discretion to prevent overreach. This was conceded by Justice Souter in *N.O.W. v. Schiedler*, where he noted that "conduct alleged to amount to Hobbs Act extortion, . . . or one of the other, somewhat elastic RICO predicate acts may turn ou0 0 1 17a72ICO predicate act/MCIDcate a0ETm.3 BDC(ay

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

It was Rudy Giuliani's crackdown on Wall Street white-collar crime in the 1980s that really marked RICO out as amenable to abuse.[38] Giuliani was accused in an op-ed penned by the New York Civil Liberties Union's Richard Emery of resorting to "an array of extreme measures that threaten the presumption of innocence and the right to an adequate defense in six criminal trials."[39] Giuliani "saw RICO's amorphous language as a potent weapon to rubber-hose and coerce guilty pleas and punish those who refused to cooperate."[40] In particular, Giuliani used RICO's sanctions to freeze the assets of the accused (thereby restricting their ability to pay for attorneys) and used "carefully orchestrated press conferences, news releases and luridly phrasLi " phras= & easures that ; i . i .

Given this abuse, it is perhaps surprising that RICO's civil remedies went "virtually unnoticed and unused" in the 1970s and early 1980s.

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

At the time, a number of advocacy groups warned about the precedent that *N.O.W.*

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

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

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

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VI. WEAPONIZING DEFAMATION – THE NEW RICO SLAPP SCRIPT

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

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

In many of the above cases, RICO's application was a stretch by the plaintiffs, but the required predicate acts were still generally substantiated. [91] This was the case even if, as in the *Chevron* case, the evidence used to substantiate these acts has since been discredited, with new evidence emerging that Chevron's "star witness"[92] in the RICO trial was fundamentally dishonest.[93] A pernicious new phase in the evolution of RICO SLAPPs therefore came the fol

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

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

RICO

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

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

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

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

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

victims intimidated – or alternatively, bound by confidentiality clauses in settlement agreements – into staying silent. The consequences of this silence only emerge when the abuse of power it permits reaches a tipping point: whether it's the legal threats issued by Harvey Weinstein (including a personal threat against Ronan Farrow, which prompted NBC to drop his exposé of Weinstein's sexual harassment and Farrow to take it to the *New Yorker*),[125] the lawsuits filed by Catholic priests against their child sexual abuse accusers (including against the advocacy group Survivors Network of those Abused by Priests[126]),[127]

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

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

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

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

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

work in a dune area. In that judgment, the Court described the NGO in question as a watchdog ("*chien de garde*") and observed that the participation

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

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

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

Establishing a system providing legal aid to certain SLAPP defendants, as required in light of the *Steel and Morris* ruling,[196] might to an extent discourage attempts to harass impecunious defendants. The McLibel litigation stands as a cautionary tale of how a SLAPP can turn into a PR disaster for the plaintiff if the defendants are able to carry on the fight.[197] The availability of legal aid might increase corporate apprehension of protracted "David v. Goliath" legal battles. Aeheehen0 gn92 reW* nQW/9ands s,

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

Overall, it is reasonable to say that these international safeguards – the heightened threshold for public figure plaintiffs, the requirement to ensure proportionate and predictable damages, and the duty to provide legal aid – act more as a hindrance than a barrier to plaintiffs bent on SLAPPing their critics, even if diligently implemented at the national level. Their thrust is to ensure plaintiffs in freedom of expression cases are denied inappropriate

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