

IMPETUS

INTERNATIONAL MONITORING PANELS TO EVALUATE
TRIALS IN THE UNITED STATES

Donziger Criminal Contempt Proceedings Violated US International Human Rights Obligations

Statement issued by IMPETUS

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An international group of legal scholars and practitioners, International Monitoring Panels to Evaluate Trials in the United States (IMPETUS), has released a 55-page report of their findings of US Federal Court criminal contempt proceedings against New York lawyer Steven Donziger in the Southern Division of New York (SDNY).

The IMPETUS panel found that Mr. Donziger was denied a fair trial, resulting in more than two years of confinement – several times longer than the available prison sentence in the case. Mr. Donziger was released by prison authorities on 10 December 2021 due to COVID-19 concerns, but he remains in home confinement to serve the rest of a six month sentence handed down on 2 October 2021.

The IMPETUS panel monitored pre-trial and trial proceedings against Donziger for more than 18 months, comparing the process and results with United States (US) international law obligations.

Background

The case arose from Donziger's representation of Ecuadorian clients in a case against Chevron that has spanned decades. In 2013, Ecuador's Supreme Court upheld a 2011 lower court judgement against Chevron awarding US\$9.5 billion for clean-up costs related to pollution of the environment and communities in the Ecuadorian Amazon by Chevron's predecessor company, Texaco.

In 2014, Judge Lewis A. Kaplan of the US Federal Court's Southern Division of New York (SDNY) found in favour of Chevron that the Ecuadorian judgement violated the *Racketeer Influenced and Corrupt Organizations Act* (RICO). The criminal contempt case against Donziger arose out of the enforcement phase of the civil RICO case, over which Judge Kaplan still presides.

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 that Donziger provide documents that Mr. Donziger argued were subject to lawyer-client privilege.

After New York federal prosecutors declined to prosecute Mr. Donziger, citing lack of resources, Judge Kaplan appointed the private law firm of Seward & Kissel LLP to prosecute the charges and appointed Judge Loretta A. Preska to preside over the criminal contempt case.

The IMPETUS 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.”

Major findings

Appearance of judicial bias

The IMPETUS panel found that an appearance of bias in the appointment of the judge and prosecutor by Federal Court Judge Lewis A. Kaplan resulted from a “confluence of multiple roles taken by Judge Kaplan.” The IMPETUS report notes that Judge Kaplan “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 has been 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,” said the report.

The Panel found that the appearance of bias resulting from Judge Kaplan’s 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.” The IMPETUS monitors found that “Judge Preska, too, demonstrated an appearance of bias” giving “latitude and deference to the prosecutor without equally ensuring full and respectful attention to defence counsel’s submissions and cross-examination.”

Inequality

The panel also found a marked level of inequality in the case. Since the charges were laid in 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 contrast, the IMPETUS monitors noted “an extraordinarily high level of resources available to the special prosecutors” including hundreds of thousands of dollars in fees and hundreds of hours of time preparing for the trial with Chevron lawyers.

According to IMPETUS, the behaviour of the special prosecutors during the criminal contempt proceedings has been “more in keeping with the zealotry of partisan counsel against Mr. Donziger than that of an impartial, disinterested prosecutor as required by international and national standards.” The Panel expressed concern about “an appearance that no transparent procedural safeguards were implemented to ensure a fair prosecution...”

Denial of the presumption of innocence leading to prolonged arbitrary detention

The Panel also concluded that the pre-trial home confinement of Mr. Donziger was based on “on unfounded speculation about possible flight risk” that had “little or no basis in evidence.”

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,” said the report.

“Mr. Donziger’s pre-trial home confinement for 25 months on charges attracting a maximum six-month sentence was unreasonable,” says the report, adding 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 IMPETUS group’s recommendations include the immediate and unconditional release of Donziger and a review of laws that can be applied arbitrarily to “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.”

Full findings and further information

Full findings and recommendations are available in the report. While the report speaks for itself, IMPETUS co-chairs, Stephen Rapp or Catherine Morris can be reached at impetusmonitors@gmail.com to schedule a call for further information or comment.