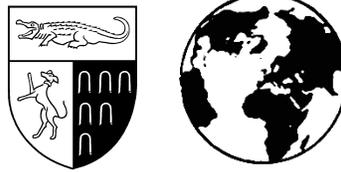


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RICO AND INTERNATIONAL LEGAL ETHICS

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INTRODUCTION

Despite the proliferation of international and transnational litigation in recent years, normative rules governing the conduct of international lawyers remain practically non-existent.¹ Given the varied nature of international law—and the many settings in which it is interpreted and applied—it is perhaps unsurprising that international law has not been successful in regulating those appearing before international courts and tribunals.² Yet international lawyers are not immune to ethical lapse and have not infrequently engaged in fraudulent and unprofessional behavior.³

The problem is both normative and institutional. Inasmuch as there is a lack of clear ethical rules for international lawyers, international courts and tribunals are reluctant to remark upon or sanction misconduct when it occurs before them.⁴

This Article discusses how national legal systems can fill these ethical gaps.⁵

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1. An exception may be in the field of international arbitration, where the International Bar Association (“IBA”) has recently issued ethical rules regarding party representation. See INT’L BAR ASS’N, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION (2013) [hereinafter “IBA GUIDELINES”].
2. See generally Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT’L L. J. 53, 55 (1992) (noting the lack of guidance in this area). But see IBA GUIDELINES, *supra* note 1 (providing a recent effort to remedy the lack of guidance in the international arbitral world).
3. See W. MICHAEL REISMAN & CHRISTINA SKINNER, FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS: THE DIRTY STORIES OF INTERNATIONAL LAW (2014).
4. See *id.* at 131, 195.
5. *Id.* at 200 (suggesting that at least a partial solution to fraudulent evidence in public international litigation lies with domestic political or judicial systems).

To illustrate the point, this Article considers a recent case of transnational fraud allegedly perpetrated by a U.S. lawyer in a case involving Ecuadorian plaintiffs and a U.S. defendant. In *Chevron v. Donziger*, a U.S. federal district court applied a federal law—the Racketeer Influenced and Corrupt Organizations Act (“RICO”)—to an American lawyer’s misconduct in connection with an Ecuadorian suit.⁶

Chevron may set a precedent for greater domestic regulation of international lawyers by paving a path for domestic law, especially RICO, to sanction American lawyers who behave fraudulently or corruptly abroad. At the same time, the district court’s *Chevron* opinion serves as a cautionary tale—in scrutinizing international lawyers’ conduct under RICO, the district courts must be careful not to inadvertently assume the role of appellate reviewer of a foreign court’s judgments. The Article thus concludes that U.S. courts should assume a greater responsibility for regulating American lawyers’ conduct abroad, but that this role should be subject to important limitations.

The Article proceeds in three parts. Part I considers the problem of fraud and unethical behavior in foreign and international tribunals, Part II argues that the RICO statute should apply to such behavior, and Part III discusses how to avoid foreign relations problems relating to extraterritoriality and comity.

I. ETHICAL REGULATION OF INTERNATIONAL LAWYERS

History has seen several significant cases of fraudulent or unprofessional conduct in the international legal arena.⁷ This Part first discusses the problem and the need for a national rather than international solution. It then considers a recent case of fraudulent conduct in which U.S. federal law was invoked by one of the parties for relief from what it argued was an illegitimate judgment.

A. *The Problem*

Under international law, the ethical obligations of international lawyers are notoriously difficult to identify and harder still to enforce.⁸ There are several reasons for this difficulty. For one, agreed-upon standards may be hard to come by.⁹ Litigants in an international case often come from different legal

6. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

7. See REISMAN & SKINNER, *supra* note 3 (discussing the fraudulent or unprofessional conduct perpetrated in different international tribunals, dating as early as the Mexican-American Claims Commission of the nineteenth century); see also *M/V Louisa* (St. Vincent and the Grenadines v. Kingdom of Spain), Case No. 18, Order of May 28, 2013, <http://www.itlos.org> (separate opinion of Judge Cot) (discussing a possible withholding of evidence in the case).

8. See, e.g., Catherine A. Rogers, *International Arbitration Needs Enforceable Conduct Rules*, 21 ALTERNATIVES TO THE HIGH COST OF LITIG. 97, 97 (2003) (noting that the “extraterritorial effect of national ethical codes is usually murky”). This gap has been partially filled by recent guidelines from the IBA. See IBA GUIDELINES, *supra* note 1. However, these guidelines are only a start, and many other areas of international and transnational litigation remain unaddressed by the IBA or elsewhere. See also *M/V Louisa*, Case No. 18, <http://www.itlos.org>, at ¶ 33 (separate opinion of Judge Cot) (noting that recently established international tribunals have adopted codes of conduct for counsel).

9. See Richard Mosk, *Attorney Ethics in International Arbitration*, 5 PUBLICIST 32, 33 (2010)

backgrounds that may promote varying perceptions of what is ethical and professional.¹⁰ Moreover, even when the litigants' professional mores are relatively similar, certain political forces inherent in international litigation—especially in public international tribunals—may drive the lawyers to depart from them. Specifically, as Michael Reisman and I have argued elsewhere, loyalty to the lawyer's sovereign state and feelings of nationalism may seem to trump the obligation to an international court or tribunal and a foreign adversary; this ethical tension may be particularly acute for government lawyers.¹¹ Finally, some international lawyers may behave as though domestic rules that would ordinarily bind them are relaxed abroad because it is unclear whether and how these rules apply outside the domestic system.¹² For these reasons, the international legal community may be mistaken to expect (or desire) that international law is adequate to define the ethical duties of international lawyers.

Even if there were a coherent international “code of conduct,” there is no supranational regulatory body to credibly enforce it.¹³ In theory, a foreign court or international tribunal could assume responsibility for enforcing an international ethical code, or otherwise penalize a party who acts unethically. Yet reliance on these courts to sanction misconduct may be unwise for several reasons. For one, at least in cases of arbitration, the misconduct may come to light after the end of proceedings, and re-constituting a panel to deal with the problem may be impracticable or undesirable.¹⁴ Moreover, in past cases of unethical behavior, international tribunals have been reluctant to denounce unethical conduct and parties responsible for it, preferring instead to find a way to adjudicate the case without mention of the misconduct.¹⁵ International tribunals usually have a

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- (noting that “[d]ifferent regimes have a variety of rules or laws applicable to [ethical] issues”).
10. *See id.* (noting that imposing different states' varying disciplinary rules to counsel in the same proceeding may lead to unfair results).
 11. REISMAN & SKINNER, *supra* note 3, at 8-9 (discussing competing loyalty systems that may account for unprofessional conduct in international tribunals).
 12. Catherine Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing An Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 30 (2003) [hereinafter Rogers, *Context*] (noting that “national bar associations . . . have essentially abdicated responsibility for regulating attorneys in the context of international arbitration” and conjecturing that “local bar associations [may] recognize that they would not be particularly effective at disciplining extraterritorial conduct of international advocates”); Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 342-43 (2002) (noting, at least with respect to international arbitration, that “[t]he extraterritorial effect of national ethical codes is usually murky, as is the application of national ethical rules in a nonjudicial forum such as arbitration. There is no supranational authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far”).
 13. *See* Rogers, *supra* note 12, at 342 n.3 (noting that “the [International Bar Association] cannot accurately be understood as a supranational regulatory authority. The IBA is a federation of national bar associations and law societies, not a licensing body that could impose any penalties for noncompliance”); *see also* Mosk, *supra* note 9, at 33-34 (arguing that an international code of ethics, at least for international arbitration, would not be effective).
 14. *See* Rogers, *Context*, *supra* note 12, at 57.
 15. In a prior work, Michael Reisman and I discuss several cases before the Iran-United States Claims Tribunal where the Tribunal was presented with evidence that could not be

constitutive power to revise or annul an award that newly discovered evidence demonstrates was induced by fraud,¹⁶ yet even this “consequence” is almost never meted out in such cases.¹⁷

There are likely good reasons for courts’ and tribunals’ cautious approach. As to international tribunals, most lack the power to credibly threaten a party with a meaningful punishment for committing fraud.¹⁸ A “soft” reprimand from an international court may cause a lawyer reputational harm, but unlike a domestic court, an international tribunal does not have the power to bar the attorney from practicing law in other foreign or international forums or in his home state jurisdiction.¹⁹ In a transnational dispute, the foreign court would likewise presumably lack authority to restrict or rescind an attorney’s ability to practice before other courts and tribunals.

National court systems, however, do not face these same constraints.²⁰ Domestic systems can concretely set standards of ethical behavior and, more importantly, enforce them with the weight of their civil and criminal laws.²¹ And in the absence of agreed upon and recognizable international ethical standards, it is arguably fairer to hold international lawyers accountable to the laws of their sovereign state, rather than to a shifting or unclear set of international standards, even while acting in an international arena. Part I.B. considers a current case, *Chevron v. Donziger*,²² in which a federal court relied on RICO’s civil provision, section 1964(c),²³ to enjoin a judgment allegedly obtained by the fraudulent acts

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- authenticated. *See, e.g.*, *Golshani v. Iran*, 6 Iran-US Cl. Trib. Rep. 52 (1993). Yet rather than non-suiting the claimant, the Tribunal tended instead to disregard the putatively fabricated evidence as inauthentic. REISMAN & SKINNER, *supra* note 3, at 106, 108-09, 113-14. For other examples, see *id.*, wherein case studies identify this reluctance on the part of public international tribunals. *See also* Mosk, *supra* note 9, at 35 (noting that unethical behavior could result in the non-enforcement of an award, though it rarely does).
16. *See, e.g.*, Statute of the International Court of Justice art. 61, June 26, 1945, 591 Stat. 1055, T.S. 993; Int’l Ctr. For Settlement of Inv. Disputes [ICSID], Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, art. 52(1), *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.
 17. *See* Timothy G. Nelson, *The Explosion and the Testimony: The WWI Sabotage Claims and an International Arbitral Tribunal’s Power to Revise its Own Awards*, 23 AM. REV. INT’L ARB. 197, 198-99, 220-21 (2012).
 18. *See* Rogers, *Context*, *supra* note 12, at 4 n.13 (“[I]t is fairly rare that misconduct ‘abroad’ results in all too serious consequences ‘at home’”) (quoting IVO G. CAYTAS, TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY 3 (1992)).
 19. *See* REISMAN & SKINNER, *supra* note 3, at 5-6 (“National legal systems may police the boundary between zealous advocacy and fraud through codes of professional conduct. . . . The international system has nothing comparable to this arsenal of deterrent, preventative, and punitive weapons.”).
 20. *See id.*
 21. *Id.*
 22. *Donziger*, 974 F. Supp. 2d at 362.
 23. Section 1964(c) of the RICO statute provides for a civil cause of action by “[a]ny person injured in his business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). Section 1962 of RICO criminalizes a “pattern” (two or more) of certain “predicate” acts when committed by an “enterprise,” that is, an association of individuals. 18 U.S.C. § 1962(c).

of an American lawyer²⁴ in connection with a foreign case. The case suggests that the RICO statute and U.S. federal courts can play an important role in regulating the legal profession by deterring misconduct abroad and, in certain cases, preventing enforcement of a fraudulent award rendered by a foreign or international court.

B. *The Chevron Case: A Current Example*

In the early 1990s, Texaco (Chevron's predecessor) was sued in the Southern District of New York for environmental and health-related harms in the Amazon.²⁵ The Ecuadorian plaintiffs were represented by several United States-based lawyers.²⁶ Eventually, the case was dismissed on grounds of forum non conveniens and re-filed in the Supreme Court of Neuva Loja in Lago Agrio, Ecuador, where the case was litigated by both American and Ecuadorian lawyers.²⁷ The Ecuadorian Court ultimately held Chevron liable for approximately US\$18 billion in damages.²⁸

The litigation was fraught with claims of fraud and unethical conduct.²⁹ Chevron claimed, among other things, that the plaintiffs and their lawyers had colluded with the court-appointed damages expert³⁰ and ghostwrote the final judgment.³¹ Chevron then unsuccessfully sought to enjoin enforcement of the award anywhere in the world, claiming that the report and the processes used to produce it were fraudulent.³² It later filed another suit in the Southern District of New York, claiming that U.S. lawyer Steven Donziger (and other members of the litigation team)³³ had violated the RICO statute by committing extortion under state and federal law, mail and wire fraud, money laundering, obstruction of

24. There are technically other defendants in the suit. *See Donziger*, 974 F. Supp. 2d at 387 n.16.

25. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (JSR) (filed Nov. 3, 1993).

26. *Donziger*, 974 F. Supp. 2d at 387-390.

27. *Id.* at 389-402.

28. *See* Ex. 39 to Declaration of Juan Pablo Saenz M., Dkt. No. 157, *Donziger*, 974 F. Supp. 2d (filed Feb. 28, 2011) (opinion of the Ecuadorian trial court) [hereinafter Ecuadorian Trial Court Opinion]; *Donziger*, 974 F. Supp. 2d at 516.

29. *See* Ecuadorian Trial Court Opinion, at 49-55. Subsequent to the judgment, both parties appealed the claim. Although Chevron made claims of "fraud and corruption" on the part of the "plaintiffs, counsel and representatives," the intermediate appellate court did "not refer at all" to these claims "except to let it be emphasized that the same accusations are pending resolution before authorities of the United States of America due to a complaint that has been filed by [Chevron] under what is known as the RICO act" and stated that the court "has no competence to rule on the conduct of counsel, experts or other officials or administrators." Brief for Defendants-Appellants, *Chevron Corp. v. Naranjo et al.* No. 14-826, App. 452, 462 (2d Cir. filed July 2, 2014) (opinion of the Ecuadorian Intermediate Appellate Court, Jan. 3, 2012). *See Donziger*, 974 F. Supp. 2d at 544.

30. Ecuadorian Trial Court Opinion, at 50; *Donziger*, 974 F. Supp. 2d at 444-45.

31. *Donziger*, 974 F. Supp. 2d at 535-41; *see Chevron Corp. v. Naranjo*, 667 F.3d 232, 237 (2d Cir. 2012).

32. *Naranjo*, 667 F.3d at 234; *Donziger*, 974 F. Supp. 2d at 555.

33. The amended complaint in this action named claims against several defendants, but because they settled or defaulted the district court's opinion considered only the claim against Donziger. *Donziger*, 974 F. Supp. 2d at 567 n.1305.

justice, and witness tampering.³⁴ Chevron claimed that it was entitled to equitable relief from the judgment.³⁵

After extensive discovery, Judge Lewis A. Kaplan concluded that:

[Donziger] and the Ecuadorian lawyers he led corrupted the Lago Agrio case. They submitted fraudulent evidence. They coerced one judge, first to use a court-appointed, supposedly impartial, “global expert” to make an overall damages assessment and, then, to appoint to that important role a man whom Donziger hand-picked and paid to “totally play ball” with the [Ecuadorian plaintiffs]. . . . If ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it.³⁶

The use of RICO in the *Chevron* case may at first blush seem remarkable. It suggests that the statute, which was legislated with organized crime in mind,³⁷ may also be used by civil plaintiffs to block enforcement of a foreign award if induced by fraud or extortion. It also implies that these lawyers could be liable for treble damages for such misconduct. These points beg the question of whether *Chevron* has set a defensible precedent for using RICO to serve the ends of ethics and professional responsibility in the international lawyering context.³⁸

The balance of this Article argues that the structure and history of the RICO statute demonstrates that RICO is, indeed, both a ready-made and appropriate solution to that problem. The following Part begins that defense by discussing how the statute relies on predicate acts, such as bribery, extortion, and fraud, that proscribe conduct that any reasonable code of ethics should, and how its civil provision has long been applied to sanction or enjoin advocacy activities that cross these ethical lines.

II. RICO AS A CONSTRAINT ON INTERNATIONAL LAWYERS

Part I discussed the challenges of defining and enforcing ethical rules at the international level and argued that the profession cannot rely on international law to ensure the ethical comportment of international and transnational lawyers. It argued that national governments and court systems must therefore assume the responsibility. This Part explains how RICO can serve this end in the United States. Part II.A explains the mechanics of a civil RICO suit. Part II.B addresses the scope of a civil RICO suit, and demonstrates why the civil RICO statute naturally extends to curb unethical advocacy activities of international lawyers.

34. Amended Complaint, *id.*, dkt. no. 283, ¶¶ 7-17, 339-379.

35. *Id.* ¶ 433.

36. *Donziger*, 974 F. Supp. 2d at 384; see Paul M. Barrett, *Chevron RICO Fallout: What Happens to the Losing Lawyer*, BLOOMBERG BUS.WEEK, May 7, 2014, <http://www.businessweek.com/articles/2014-03-07/chevron-rico-fallout-what-happens-to-the-losing-lawyer> (quoting Professor Michael Krauss that “the evidence of corruption of the Ecuadorian judicial system was overwhelming”).

37. RICO, passed in October 1970, was initially intended to curb organized crime’s involvement or “infiltration” into legitimate business. See Gerard Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 669-70 (1987).

38. Judge Kaplan did “note that Donziger is a member of the New York Bar. His conduct, whether in the United States or in Ecuador, was subject in every respect to the New York rules governing the conduct of lawyers.” *Donziger*, 974 F. Supp. 2d at 394.

A. *RICO's Structure: Predicate Offenses*

RICO has long been known as the “darling” of prosecutors, as a relatively potent and flexible statutory tool.³⁹ Yet it has also been a favorite among civil plaintiffs for the access to federal courts that it provides. RICO is not a substantive offense itself, but rather a vehicle for prosecuting the commission of (at least two) predicate acts,⁴⁰ when committed by members of associations⁴¹ or groups (“enterprises”).⁴² These predicate acts include extortion and bribery, under both state and federal law, and fraud under federal law.⁴³ Notably, these offenses do not themselves have federal civil counterparts. And so for civil plaintiffs like Chevron, RICO is the only way to bring a case in federal court to hold such actors accountable.

This structure makes RICO an ideal tool for dealing with ethical problems in international cases. By relying on predicates such as extortion, bribery, and fraud, RICO liability extends to offenses that already are considered ethical violations under state regulatory schemes (such as a state’s model rules of professional conduct) and yet, at the same time, allows the federal government to speak with one voice on the question of how its citizen-lawyers are required to behave abroad.⁴⁴ From this perspective, RICO can be seen to set a federal floor of ethical behavior that is enforceable in federal court. This minimum standard mirrors, but does not preempt, the states’ existing ethical codes of conduct.

Moreover, when used to sue lawyers for ethical breaches, civil RICO suits can enhance the profession’s ability to self-regulate by incentivizing parties and counsel to act as “private attorneys-general” in the ethical arena, by providing a highly public forum and hefty financial “rewards.”⁴⁵ Although local, state codes of professional conduct already provide a basis for redress for ethical grievances with local disciplinary committees and possibly, with torts suits, in state courts, the stakes of a RICO case—with a federal forum and the specter of treble damages and attorneys’ fees—are significantly greater.⁴⁶ Civil RICO suits may thus be quite effective at punishing and deterring unethical behavior when brought by aggrieved members of the profession, like opposing counsel or clients. As the next section shows, an extension of RICO to international legal advocacy

39. See Barry Tarlow, *RICO: The New Darling of the Prosecutor’s Nursery*, 49 *FORDHAM L. REV.* 165, 169-71 (1980).

40. 18 U.S.C. § 1962(c) (2012).

41. *United States v. Turkette*, 452 U.S. 576 (1981) (holding that a criminal association qualifies as an enterprise).

42. Under civil RICO, relief is available where “[t]he predicate acts [are] both the factual and the proximate cause of the injury” alleged. *Donziger*, 974 F. Supp. 2d at 601 (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120 (2d Cir. 2003)).

43. 18 U.S.C. § 1961.

44. See, e.g., *NEW YORK RULES OF PROF’L CONDUCT* 3.4 (2009) (amended 2014) (dealing with fraud, bribery, and extortive conduct).

45. Section 1964(c) of the RICO statute provides for a civil cause of action by “[a]ny person injured in his business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c) (2012).

46. 18 U.S.C. § 1964(c) (2012). The district courts are also afforded the power of injunctive relief to restrain further violations of the statute. 18 U.S.C. § 1964(a).

is also contextually sound.

B. RICO's Application: Advocacy Activity

For several decades now, plaintiffs have used civil RICO suits as a type of self-help measure against various types of advocates.⁴⁷ Specifically, RICO suits have been filed against protestors motivated by some political, social, or economic issue. Suits in the labor arena are particularly well known. There, employers have sued unions in connection with comprehensive campaigns that are designed to exert intense pressure on employers by mobilizing social or community groups and applying other forms of financial pain or high-pressure lobbying initiatives.⁴⁸ Similarly, civil RICO suits have been brought against social or political protestors,⁴⁹ like pro-life groups that have attempted to prevent access to abortion clinics.⁵⁰ Plaintiffs in these suits often allege that the advocacy activities constitute extortion under state or federal law.⁵¹ Though many of these cases have a “mixed track record” of ultimate success, a fair number do, at least, survive through the motion to dismiss stage,⁵² suggesting that it is factually possible to state a claim under RICO for advocacy-related activity (and has become increasingly popular to do so).⁵³

Yet the extent to which RICO can expand in the advocacy arena is limited by the constitutional concerns attendant to the First Amendment—and pushing too far in this direction may give the courts concern.⁵⁴ But speech-related constitutional concerns are largely absent in cases like *Chevron*. Cases of lawyers defrauding or extorting tribunals or opposing counsel would likely not qualify as protected speech as most courts understand the interplay between RICO and the

47. See, e.g., James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 746 (2010) (noting that “[t]he upshot of [RICO’s] textual approach is to encompass conduct wholly unconnected to organized crime”).

48. *Id.* at 738, 754-57.

49. Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 838-39 (1996).

50. See, e.g., Nat’l Org. for Women v. Scheidler, 510 U.S. 249, 259 (1994). There have also been some RICO cases filed against “political protestors,” involving offenses against foreign leaders and threats to certain corporate interests. Parker, *supra* note 54 at 839 & n.121.

51. See, e.g., Scheidler v. Nat’l Org. for Women, 537 U.S. 393 (2003) (holding that petitioners’ actions to shut down abortion clinics did not constitute Hobbs Act extortion and reversing the judgment below that RICO had been violated); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2619 & n.4, 2623 (2012).

52. Garden, *supra* note 57, at 2631.

53. For an examination of the use of RICO in the labor context, see *id.* at 2619 n.4 and Brudney, *supra* note 52, at 754-55,

54. See Brudney, *supra* note 52, at 782-88; Parker, *supra* note 54, at 819, 821 (criticizing the extension of RICO to protest activities as inappropriately suppressing First Amendment rights); see also *Scheidler*, 510 U.S. at 264 (noting that “[c]onduct alleged to amount to Hobbs Act extortion, for example, or one of the other somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis”) (Souter, J., concurring).

First Amendment.⁵⁵ In short, courts can embrace the use of civil RICO suits to punish unethical international lawyers without also accepting that such suits are appropriate to other forms of socio-political advocacy-related activity.⁵⁶

III. RICO AND FOREIGN RELATIONS

Applying any U.S. law to foreign conduct is a delicate endeavor. It requires special attention to issues of extraterritoriality, comity, and personal jurisdiction. This Part explains how these problems may be avoided in civil RICO suits against unethical international lawyers.

A. *RICO and Extraterritoriality*

The presumption against extraterritoriality is a “longstanding principle of American law”⁵⁷ by which it is assumed that U.S. laws do not apply to conduct outside the United States, unless Congress clearly expresses a contrary intent.⁵⁸ This canon of construction, though regularly invoked by the courts since the early nineteenth century,⁵⁹ has gained increased attention in recent years with the Supreme Court’s decision in *Morrison v. National Australia Bank*, which held that certain civil provisions of the Securities and Exchange Act of 1934 did not apply to securities traded on foreign exchanges.⁶⁰ The Court applied the presumption against extraterritoriality to that statute.

Since then, federal courts have heightened their attention to issues of extraterritoriality.⁶¹ Several federal courts have concluded that, like the 1934 Act, RICO does not apply extraterritorially.⁶² But the question of whether an

55. *See Donziger*, 974 F. Supp. 2d at 581 (noting that “corruption of an adjudicative process removes any shield that the First Amendment otherwise would provide”); *see also* *Smithfield Foods, Inc. v. United Food & Comm. Workers Int’l Union*, 585 F. Supp. 2d 789, 804-06 (citing cases that demonstrate the First Amendment does not protect extortion “and the like”).

56. Extending civil RICO suits to international and transnational lawyers is also consistent with legislative views on the degree to which the government should regulate American professional morality abroad. In the business context, specifically, Congress has enacted the Foreign Corrupt Practices Act (“FCPA”), which criminalizes the making of bribes (construed broadly) to foreign officials for the purposes of securing a business advantage. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -3, 78ff (2012); DEP’T OF JUSTICE, SEC. & EXCHANGE COMM’N, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 14-16 (2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

57. *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

58. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKLEY J. INT’L L. 85, 85-86 (1998).

59. *Id.* at 86.

60. *Morrison v. Nat’l Australia Bank*, 561 U.S. 247 (2010).

61. *See, e.g.*, *United States v. Vilar et al.*, 729 F.3d 62 (2d Cir. 2013) (extending *Morrison*’s holding to the Exchange Act’s criminal provisions).

62. *See, e.g.*, *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 28 (D.D.C. 2011); *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (*per curiam*).

application of civil RICO is, in fact, extraterritorial remains somewhat unclear.⁶³ The following Subsections offer theories of why the presumption is not triggered when civil RICO is applied to U.S. lawyers' unethical activities in international and transnational cases.

1. *The Domestic Nature of the Predicate Acts*

In assessing whether an application of RICO qualifies as extraterritorial, several courts focus on the predicate acts alleged and whether those predicates are intended to have extraterritorial reach themselves.⁶⁴ Yet even for these courts, RICO may nonetheless apply to conduct involving predicates without extraterritorial reach provided that conduct has "sufficient domestic nexus"⁶⁵ or is substantially domestic in nature.⁶⁶ That standard is met if there is sufficient domestic conduct to satisfy the elements of the predicate acts, even "if some further conduct contributing to the violation occurred outside the United States."⁶⁷

This standard can likely be satisfied in most international or transnational cases involving unethical American lawyers. Consider the two most likely predicate offenses alleged in cases of unethical lawyering in a foreign or international tribunal. Extortion, for one, would be common, on the theory that a lawyer has used high-pressure tactics that amount to "actual or threatened force, violence, or fear" to obtain a favorable judgment, which could be characterized as a form of "property."⁶⁸ The second predicate likely to be alleged is mail or wire fraud (under federal law), where a lawyer has used the U.S. interstate or international wires or mails to transmit fraudulent or misleading evidence to a tribunal or an adversary.⁶⁹

Even if these predicates do not have extraterritorial reach (which is an open question in many courts of appeals), one could argue that the elements of these crimes all inherently have a domestic basis (and the court has personal jurisdiction) when (1) the lawyer is licensed by a domestic jurisdiction and (2) at least some of the extortive or fraudulent planning or activity occurred within the United States.⁷⁰ Therefore, suits alleging unethical conduct of a U.S.-barred lawyer who has acted at least in part while in the United States *or* as a member of

63. As Judge Kaplan points out, "these cases yield no clear, authoritative principle for determining whether a given application of RICO is or is not extraterritorial." *Donziger*, 974 F.Supp. 2d at 574.

64. *See, e.g.*, *European Community v. RJR Nabisco, Inc.*, 764 F. 3d 129, 138 (2d Cir. 2014) (noting that "RICO [does not] contain any other language that would suggest its extraterritorial application differs from that specified in its various predicates").

65. *United States v. Botsvyniuk*, Cr-10-159-1, 2012 WL 2885928, at *10-11 (E.D. Pa. July 16, 2012) *aff'd*, 552 F. App'x 178 (3d Cir. 2014) (quoting *United States v. Inigo*, 925 F.2d 641, 648-49 (3d Cir.1991)).

66. *RJR Nabisco*, 764 F. 3d at 149.

67. *Id.*

68. 18 U.S.C. § 1951.

69. 18 U.S.C. §§ 1341, 1342.

70. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (holding that the presumption against extraterritoriality applies to the Alien Tort and therefore foreign plaintiffs could not sue a foreign corporation for human rights abuses that occurred abroad).

a U.S. law firm would meet these criteria.⁷¹

2. *The Domestic Nature of the Enterprise*

Some courts (although a minority) consider whether the enterprise is domestic or foreign to determine whether an application of RICO is extraterritorial.⁷² A RICO “enterprise” is the “vehicle through which the unlawful pattern of racketeering activity is committed.”⁷³ For these courts, an argument can easily be made that a suit against U.S. lawyers’ unethical activities in connection with a foreign or international suit is not an extraterritorial application of the statute.

Legal work is almost always performed by a group or “association.” Even if not members of a formal law firm, lawyers’ work requires coordination and support from at least some combination of assistants, partners, associates, consultants or co-counsel, or other support staff. And this litigation team for an American lawyer is presumptively a domestic one if the attorney is licensed by a state bar authority. On this view, courts could thus readily conclude that the citizenship and domicile of the lawyer’s enterprise is the state in which the attorney is barred.

3. *The Presumption is Irrelevant to International Tribunals*

Lastly, in cases where the misconduct occurs before an international tribunal, the presumption may be inapposite. The presumption against extraterritoriality is premised in part on a sovereignty/comity ideal: unless otherwise stated, Congress does not intend for U.S. laws to interfere with a foreign state’s affairs.⁷⁴ And so the United States avoids interjecting its laws abroad “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁷⁵

However, an application of U.S. law to conduct occurring before an *international tribunal* would arguably not implicate these comity or sovereignty concerns.⁷⁶ International tribunals, whether standing or ad hoc, may be consented

71. In *Chevron*, for example, the district court concluded that many of the predicates were domestic because “[a]lthough certain of defendants’ actions took place abroad, this is a case in which the conduct of the [affairs of the] enterprise within the United States was key to its success,” noting that the enterprise participants “live and work in the United States” and that “Donziger, the head of the enterprise” “resides and mostly operates within the United States.” *Donziger*, 974 F.Supp. 2d at 600 (internal quotation marks omitted).

72. *See, e.g.*, *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1350-51 (S.D. Fla. 2012); *In re Le-Nature’s, Inc. v. Kronos, Inc.*, No. 9-1445, 2011 WL 2112533, at *3 (W.D. Pa. May 26, 2011).

73. *See Scheidler*, 510 U.S. at 259.

74. *See* Wade Estey, Note, *Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT’L & COMP. L. REV. 177, 178 (1997) (noting that pursuant to the presumption “Congress does not intend for legislation to contravene the basic legal principles of other nations”).

75. Curtis Bradley, *Territorial Intellectual Property Rights in An Age of Globalization*, 37 VA. J. INT’L L. 505, 513, 515 (1997) (quoting *Aramco*, 499 U.S. 244).

76. Curtis Bradley, *Enforcing the Avena Decision in U.S. Courts*, 30 HARV. J.L. & PUB. POL’Y, 119, 122 (2006-2007).

to by a foreign sovereign but are not created “for a national purpose” or generally “supervised” by a foreign nation.⁷⁷ These tribunals cannot, therefore, be properly considered foreign “organs” themselves.⁷⁸ There is thus no intrusion of U.S. law into a foreign government’s legal space in applying civil RICO to lawyerly misconduct in an international tribunal. Moreover, given these tribunals’ reluctance (or inability) to confront instances of fraud and misconduct themselves,⁷⁹ U.S. domestic efforts to curb unethical misconduct would more likely be welcomed than rebuffed as meddling. For these reasons, the rationale for applying the presumption is muted where the U.S. law in question applies in an international forum.

B. RICO and Comity

Civil RICO suits against unethical lawyers implicate not only a potential sanction against the lawyer but also a possible injunction against enforcement of the judgment that was induced by fraud or extortion (or other RICO predicate). When the judgment is a foreign or international one, an injunction implicates certain comity concerns to the extent the injunction functions like appellate review.

In the *Chevron* case, for example, Chevron sought an injunction against enforcement of the Ecuadorian court’s judgment in U.S. courts. Judge Kaplan granted the injunction, concluding that the fact that fraud had occurred trumped the justness of the Ecuadorian plaintiffs’ cause.⁸⁰ The appeals court in Ecuador, however, had already reviewed the case, including Chevron’s allegations of fraud.⁸¹ That appellate court did “not find evidence of ‘fraud’ by the plaintiffs or their representatives.”⁸² Donziger thus argued in his briefs that the district court had no jurisdiction or authority to use RICO to review the Ecuadorian court’s decision.⁸³

Donziger’s argument may have merit, at least in part. Courts generally enforce foreign judgments as a matter of comity on the rationale that “the courts of one country will not sit in judgment on the acts of the government of another

77. In *Filler v. Hanvitt Bank*, 378 F.3d 213, 217 (2d Cir. 2004), the Second Circuit set out five factors for determining whether an entity is an “organ” for purposes of the Foreign Sovereign Immunities Act: “(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.”

78. *Id.*

79. *See supra* Part I.

80. *Donziger*, 974 F.Supp. 2d at 385.

81. *See* Ecuadorian Trial Court Opinion, at 49-55.

82. Brief for Defendants-Appellants, App. 492 (clarifying order of the Ecuadorian Intermediate Appellate Court, Jan 13, 2012); *see also* Brief for Defendants-Appellants, *Chevron v. Naranjo*, No. 14-832, at 94-99 (2d Cir. July 16, 2014) (arguing that RICO cannot be used to collaterally attack a judgment, least of all a foreign judgment).

83. Brief for Defendants-Appellants, *Chevron v. Naranjo*, at 69-99; Reply Brief for Defendants-Appellants, *Chevron v. Donziger*, No. 14-832, at 1-8 (2d Cir. Jan. 6, 2015).

done within its own territory.”⁸⁴ A U.S. federal court that enjoins a foreign or international judgment that has already been subject to the appellate or revision processes of a foreign tribunal must be mindful of these longstanding principles of deference among sovereigns.

Federal courts can avoid overstepping the bounds of comity by limiting their jurisdiction in certain types of cases. The appropriate limiting principles could be drawn from international law principles that differentiate between revision (which is generally not merits based) and appellate review (a merits-based, substantive review).⁸⁵ In some international tribunals, for example, revision is appropriate where certain facts are discovered after judgment (i.e., the perpetration of fraud or extortion) and are proven to have decisively affected the judgment.⁸⁶

Borrowing from such revision standards under international law, federal courts could limit their injunctive power over foreign or international judgments by considering two factors: (1) whether the fraud or extortion alleged is a “new fact,” insofar as it was unknown at the time the foreign or international court’s judgment was rendered; and (2) whether the new fact was “decisive,” insofar as it “caused the original award to be materially different, had it been known at the time.”⁸⁷ As an additional self-limiting principle, courts could consider the impact of an injunction on third parties by assessing whether the interests affected by the injunction would be mostly private or public. Where interests are mostly public, an injunction might be inappropriate because it would principally affect third parties, like communities, who were not responsible for the lawyer’s misconduct.

These factors applied in the *Chevron* case would cut against injunctive relief primarily because the alleged fraud was not a new fact—many of these allegations were known to the Ecuadorian tribunal during its consideration of the case and subsequent appeals. Moreover, the interests at stake—at least in the underlying dispute—are public ones, involving the environmental damage in the Amazon. This analysis would not necessarily preclude a damages award against the individual defendants; here, holding Donziger liable to Chevron for the costs of the Ecuadorian suit and the financial remedies ordered by the Ecuadorian court. But such an analysis would counsel caution where a federal court is asked to enjoin enforcement of a foreign award using the RICO statute.

CONCLUSION

This Article considered a possible new use of civil RICO to sanction unethical international lawyers and, possibly, enjoin enforcement of a foreign or international judgment induced by fraud or extortion. Though unethical international lawyering is a longstanding problem, the Article considered a current case pending in the federal courts, *Chevron v. Donziger*, to discuss the viability of using RICO in this way. It also suggested several limiting principles to

84. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2357 (1991) (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

85. See Nelson, *supra* note 17, at 199-200.

86. *Id.*, at 222-25, 230 (quoting *De Neufville Case (Fr. v. Ger.)*, 7 Trib. Arb. Mixtes 629, 632-33 (1927)).

87. *Id.* at 225 (discussing these factors).

avoid comity and foreign relations problems with applying RICO to American lawyers who litigate in foreign and international tribunals.