



Protect the Protest Task Force

Submission to the UN Human Rights Committee on US Compliance with the ICCPR

1. Issue

The use of Strategic Lawsuits Against Public Participations (SLAPPs) by corporations and wealthy individuals to limit and chill the exercise of free speech, peaceful assembly, and association.

2. Reporting Organization

[Protect the Protest](#), launched in September 2018, is a task force of over 20 organizations that combines its members' organizational expertise and collective power to protect free speech in a new public campaign to stop SLAPPs.¹ An attack on one is now an attack on all. Our task force includes experienced lawyers, journalists, communications professionals, and activists. We stand together as one to expose courtroom bullying and to protect the right to boldly speak the truth. We provide expert support to the targets of SLAPPs, emboldening public watchdogs to continue their efforts with confidence.

Our approach is threefold:

- Building Resilience to SLAPPs - We provide resources and training for civil society organizations, community leaders, journalists, and the broader public on how to best protect themselves from SLAPPs and what to do if they're targeted. This includes a network of attorneys to defend those facing SLAPPs, especially individuals and small organizations with extremely limited resources.
- Exposing SLAPPs and Those Who File Them - We draw on our own organizations' campaigning, communications, and legal expertise to support public interest advocates and watchdogs targeted by SLAPPs. This includes campaigning against the biggest SLAPP offenders, as well as legal defense where resources allow.
- Campaigning on Strategic Issues - When a specific SLAPP poses a broader threat to civil society or to democracy, we mobilize our collective resources to protect the rights to free speech and peaceful protest. Likewise, when opportunities arise to advance anti-SLAPP policies or laws, we engage in close collaboration with other stakeholders.

¹ See Appendix A for full membership list.

3. Issue Summary

In recent years there has been a discernible growth in Strategic Lawsuits Against Public Participation (SLAPPs)² - civil lawsuits designed to manipulate the litigation process to shut down critical speech by intimidating, harassing and draining the resources of those targeted. While corporations and rich individuals can easily absorb the cost of such lawsuits, to those with little financial resources the prospect of a long drawn out civil lawsuit can be overwhelming. Hence often the mere *threat* of a heavy-handed lawsuit can be enough to force a campaigner or journalist to retract criticism and issue an apology. As David Ardia, a professor at the University of North Carolina Law School has said, “what’s filed is just the tip of the iceberg.”³

While global in nature, the SLAPP trend is particularly pronounced in countries that lack procedural safeguards, legal aid or otherwise affordable legal services, and measures to sanction abusive legal practices. The United States suffers to various degrees from all of these deficiencies and is therefore particularly fertile ground for SLAPPs. Strict rules on costs apportionment limits judicial discretion to penalize abusive plaintiffs,⁴ for example, while a lack of access to legal aid and high legal fees make it prohibitively expensive for SLAPP victims to defend themselves.⁵

Since most SLAPPs are settled out of court, the SLAPP trend is by its very nature difficult to quantify. Nonetheless, since 1990 academics studying SLAPPs have identified a clear trend in the use of the tactic. George Pring and Penelope Canan, who wrote the book that coined the term “SLAPP”, first began their research after noting that an increasing number of environmentalists were being named as defendants in large civil damage cases.⁶ The growth of anti-SLAPP statutes across the US is itself largely attributable to a growing recognition of this trend. Section 5 of the Illinois Citizen Participation Act, for example, notes “*there has been a disturbing increase in lawsuits termed ‘Strategic Lawsuits Against Public Participation.’*”⁷ A similar recognition can be found in California’s anti-SLAPP law: “*The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievance.*”⁸

The threat of SLAPPs also becomes more acute in relation to loosely worded laws targeting speech. In recent years, the Racketeer Influenced and Corrupt Organizations Act (RICO), originally passed to tackle mafia activity, has been popularized as a weapon against critical advocacy groups. The law allows private

² See the Info Note of the UN Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association, Annalisa Ciampi, ‘SLAPPs and FoAA rights’: ‘SLAPPs have seen a significant increase worldwide’ <<https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>> accessed 14 Jan 2019.

³ Bloomberg Law, ‘Green Groups: Suits to Silence Them on the Rise’, April 14, 2017: <<https://www.bna.com/green-groups-suits-n57982086728/>> accessed 14 Jan 2019.

⁴ See, as an example, Clara Jeffrey and Monika Bauerlein, Why We’re Stuck With \$650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us, Huffington Post (Oct. 23, 2015), available at <<http://www.motherjones.com/politics/2015/10/why-wont-we-get-our-legal-fees-back/>> accessed 14 Jan 2019.

⁵ See for example Leaders, America’s Lawyers: Guilty as Charged, The Economist (Feb. 2, 2013), which describes how “during the decade before the economic crisis, spending on legal services in America grew twice as fast as inflation”, available at <<https://www.economist.com/news/leaders/21571141-cheaper-legal-education-and-moreliberal-rules-would-benefit-americas-lawyersand-their>> accessed 14 Jan 2019.

⁶ See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989), and Pring and Canan, *SLAPPs: Getting Sued for Speaking Out* (1996).

⁷ Illinois’ Citizen Participation Act, 735 ILCS 110/1, Section 5.

⁸ California Code of Civil Procedure, Section 425.16(a).

parties to pursue punitive civil remedies for criminal racketeering activities that implicate speech (e.g. fraudulence and extortion). Since the law is directed against criminal acts, it is punitive in nature and allows civil parties to recover triple the damages for the harm they claim to have suffered. As a federal law, it is also generally able to bypass any anti-SLAPP laws in force in the state. As such, it has proven a powerful means of intimidating and harassing activists.

Over the past five years, there have been a number of high-profile efforts to use RICO to criminalize advocacy activity. The lawsuits filed against advocacy groups by the logging company Resolute Forest Products⁹ and the pipeline company Energy Transfer Partners¹⁰ treat everyday advocacy activity as being criminal in nature: efforts to communicate with corporate customers are framed as extortion, for example, while fundraising efforts are presented as examples of fraud. By stretching the concept of a “criminal association”, both lawsuits smear a wide range of groups and raise the possibility of including further groups as complicit co-conspirators. Such lawsuits seek to set a precedent that would be devastating to the operation of advocacy groups across the USA.

4. Relating SLAPPs to the ICCPR Legal Framework

Article 19 of the ICCPR lays down the right to hold opinions without interference and the right to freedom of expression. SLAPPs seek to silence opposition through the abuse of the judicial process and are by definition intended to restrict freedom of speech. The rights guaranteed under this provision can be restricted for the respect of rights or reputations of others - i.e. to prevent defamation. SLAPPs, however, are not intended to vindicate the rights of the plaintiff, but to undermine the rights of the defendant. They are legal intimidation tactics that *masquerade* as ordinary civil lawsuits, most frequently using defamation law as “camouflage.”¹¹

Article 21 of the Covenant provides for the right of peaceful assembly, subject to certain reasonable restrictions. **Article 22** lays down the right of freedom of association with others, also subject to such restrictions which are prescribed by law and are necessary in a democratic society. In the context of civil society action on environment, the two rights are closely connected. SLAPPs are designed to threaten freedom of association by intimidating groups/individuals from working together for fear that they may become the next victim of such a suit, or in the case of RICO, part of the alleged “criminal enterprise.” Bad faith litigation not only restricts access to civic space, but also conflicts with the state responsibility to create a safe and enabling environment.¹² By not regulating retaliatory litigation, the state does not meet its obligation to protect minority and dissenting views and to promote a culture of tolerance.

The proliferation of SLAPPs also undermines the Declaration on Human Rights Defenders which provides that for human rights organisations to carry out their activities, it is essential for them to be able to discharge their functions without any impediment:

“Access to funding, the ability of human rights organizations to solicit, receive and use funding, is an

⁹ Resolute Forest Product et al. v. Greenpeace International et al, Case 1:16-tc-05000 (S.D. Ga., 31 May 2016).

¹⁰ Energy Transfer Equity L.P and Energy Transfer Partners L.P v Greenpeace International et al., Case 1:17-cv00173-CSM (D.N.D. 22 Aug. 2017).

¹¹ George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989).

¹² United Nations Human Rights Council, *The rights to freedom of peaceful assembly and of association*, 8 October 2013, UN Doc A/HRC/RES/24/5.

*inherent element of the right to freedom of association.*¹³ *In order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions.*¹⁴ Without access to resources or the ability to raise additional funds, such organisation can neither perform their core activities nor be able to engage counsel.

5. Current U.S. Government Policy

There have been no laws passed on a federal level to tackle the SLAPP problem. While some form of anti-SLAPP legislation exists in 28 states (along with the District of Columbia and Guam), these laws vary in strength. SLAPP plaintiffs are also often able to circumvent such free speech protections by filing lawsuits in jurisdictions without anti-SLAPP laws, or by filing a claim under federal law. The SPEAK FREE Act of 2015 (H.R.2304) was introduced in the US House of Representatives in May 2015 with bipartisan support, but has not advanced since.¹⁵ The Uniform Law Commission is currently drafting model anti-SLAPP legislation for the state level.

6. Human Rights Committee General Comments Related to SLAPPs

General Comment No. 24 of the UN Committee on Economic, Social and Cultural Rights: The General Comment makes a reference to such suits: “The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation’s reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies.”¹⁶ It also highlights the need for sanctions where business activities undermine the rights guaranteed under the International Covenant on Economic, Social, and Cultural Rights (ICESCR): “States parties should consider imposing criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of Covenant rights or where a failure to act with due diligence to mitigate risks allows such infringements to occur.”¹⁷

7. UN Body Recommendations Related to SLAPPs

Info Note of the UN Special Rapporteur on the Rights to Freedom Assembly and of Association, Annalisa Ciampi: The Special Rapporteur expressed concern at the rise of SLAPPs and noted in particular that “a worrying new approach has been the use of the Racketeering Influenced and Corrupt Organizations Act (RICO) to intimidate advocacy groups and activists by enabling corporations to smear

¹³ United Nations General Assembly, Resolution 53/144. *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999, UN Doc A/RES/53/144

<<https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>> accessed 14 Jan 2019.

¹⁴ United Nations General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders*, 4 August 2009, UN Doc A/64/226, at 91

<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/441/98/PDF/N0944198.pdf>> accessed 14 Jan 2019.

¹⁵ SPEAK FREE Act of 2015, H.R.2304, 114th Cong. (2015)

<<https://www.congress.gov/bill/114th-congress/house-bill/2304>> accessed 14 Jan 2019.

¹⁶ United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, UN Doc E/C.12/GC/24, at 44

<https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F24&Lang=en> accessed 14 Jan 2019.

¹⁷ *Ibid.*, at 15.

these groups as ‘criminal enterprises’, while claiming exorbitant damages (RICO entitles plaintiffs to claim treble damages as a punitive measure) for the “harm” they claim to have suffered.”¹⁸

Report to the 25th Session of the UN Human Rights Council of UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya: “[the Special Rapporteur has observed] the consolidation of more sophisticated forms of silencing their voices and impeding their work, including the application of legal and administrative provisions or the misuse of the judicial system to criminalize and stigmatise their activities. These patterns not only endanger the physical integrity and undermine the work of human rights defenders, but also impose a climate of fear and send an intimidating message to society at large.”¹⁹

Report to the 29th Session of the UN Human Rights Council of UN Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai: “...[T]he increasing use of so-called ‘strategic litigation against public participation’ suits is of concern because of the chilling effect the proceedings may have on the legitimate expression of dissent or opposition, including through peaceful protest.” The Special Rapporteur also highlighted the State obligation to protect and facilitate the rights and freedoms under the ICCPR in the context of natural resource exploitation, and ensure that business interests don’t violate these rights.²⁰

Joint Report to the 31st Session of the UN Human Rights Council by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the Special Rapporteur on extrajudicial, summary, or arbitrary executions on the proper management of assemblies: “Business entities commonly seek injunctions and other civil remedies against assembly organizers and participants on the basis, for example, of anti-harassment, trespass or defamation laws, sometimes referred to as strategic lawsuits against public participation. States have an obligation to ensure due process and to protect people from civil actions that lack merit.”²¹ The Special Rapporteurs further make the recommendation that “States should introduce for assembly organizers and participants protections from civil lawsuits brought frivolously, or with the purpose of chilling public participation.” They also recommended that “states should protect individuals from interference with their rights in the context of assemblies by business enterprises, including by taking steps to comply with the responsibilities elucidated in the Guiding Principles on Business and Human Rights.”²²

¹⁸ Ciampi, *supra* note 1.

¹⁹ United Nations General Assembly, *Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya*, 23 December 2013, UN Doc A/HRC/25/55, at 59
<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-55_en.doc>
accessed 14 Jan 2019.

²⁰ United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, 28 April 2015, UN Doc A/HRC/29/25, at 14
<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_25_en.doc>
accessed 14 Jan 2019.

²¹ United Nations Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 4 February 2016, UN Doc A/HRC/31/66, at 86
<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx>
accessed 14 Jan 2019.

²² *Ibid.* at 88.

8. Recommended Questions to the US Government on SLAPPs

- What measures is the US Government taking to protect those who exercise their Constitutionally protected rights to free speech from being subjected to SLAPPs?
- What steps is the US Government taking to ensure that SLAPPs are quickly dismissed from federal courts, and to ensure that defendants do not bear the costs of these frivolous lawsuits?
- What has the U.S. Government done to engage in the process of passing federal anti-SLAPP legislation?
- What other steps has the U.S. Government taken to discourage the use of SLAPPs?

9. Suggested Recommendations

1. Adopt federal anti-SLAPP legislation with provisions to:
 - a. Ensure the rapid dismissal (with prejudice) of lawsuits targeting Constitutionally protected free speech that is made in the public interest.
 - b. Enable defendants to recover attorney fees and other costs from SLAPP plaintiffs.
 - c. Automatically stay discovery until the Court rules on the anti-SLAPP motion.
2. Set up an independent oversight mechanism to consider ways to amend RICO or otherwise prevent its abuse against advocacy groups.
 - a. The mechanism should assess the provisions of the RICO Act in light of its misuse by large corporations against civil society actors, and recommend amendment so that the implementation of the law is in line with its spirit.
3. Pass laws or guidance to protect advocacy groups and individuals speaking out in the public interest from abusive lawsuits, legal intimidation tactics, and criminalization of free speech and freedom of assembly.

APPENDIX A

Protect the Protest Member Organizations

1. 350.org
2. Amazon Watch
3. American Civil Liberties Union (ACLU)
4. Amnesty International
5. Center for Constitutional Rights (CCR)
6. Center for International Environmental Law (CIEL)
7. Civil Liberties Defense Center (CLDC)
8. Climate Defense Project
9. EarthRights International (ERI)
10. Electronic Frontier Foundation (EFF)
11. First Amendment Project
12. Freedom of the Press Foundation
13. Greenpeace International
14. Greenpeace USA
15. Human Rights Watch
16. International Corporate Accountability Roundtable (ICAR)
17. Mosquito Fleet
18. National Lawyers Guild (NLG)
19. National Resource Defense Council (NRDC)
20. PILNet
21. Public Citizen
22. Rainforest Action Network (RAN)
23. Stand.Earth