**SLAPPs and FoAA rights**

**BY THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION**

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1. **Premise**

The term SLAPP - Strategic Lawsuit Against Public Participation - was first coined by Professors George W. Pring and Penelope Canan in their 1996 book ‘[SLAPPs: Getting Sued for Speaking Out](https://books.google.it/books?id=SEaAjENdpJkC&dq=Slapps-Getting-Sued-Speaking-Out/dp/1566393698&source=gbs_navlinks_s)’. It generally refers to a civil lawsuit filed by a corporation against non-government individuals or organizations (NGOs) on a substantive issue of some political interest or social significance. SLAPPs aim to shut down critical speech by intimidating critics into silence and draining their resources. In the process, they distract and deflect discussions on corporate social responsibility, and – by masquerading as ordinary civil lawsuits - convert matters of public interest into technical private law disputes.

Often based upon ambiguous and elastic provisions of law, SLAPPs use a range of tactics to exhaust resources, campaign capacity and morale:

* They resort to motions, injunctions and other procedurally onerous processes (particularly the expensive and resource-intensive discovery/disclosure process) to impose heavy burdens on activists and civil society organizations;
* They often target individual campaigners, as well as the organizations they work for, to maximize the SLAPP’s capacity to intimidate;

They generally include exorbitant claims for damages and allegations designed to smear, harass and overwhelm the campaigners.

SLAPPs threaten advocacy activities and therefore undermine the ability of civil society actors to effectively exercise their rights to freedom of expression, of assembly and of association.

1. **International SLAPP trend**

SLAPPs have seen a significant increase worldwide, with certain legal frameworks proving to be particularly fertile ground for the proliferation of this phenomenon.

How fertile the environment is for SLAPPs depends on a number of factors: e.g. how expensive legal costs are (including any caps on damages and availability of legal aid), the elasticity of laws targeting speech (especially defamation), and the absence of any safeguards (e.g. anti-SLAPP statutes or discretionary cost awards against abuse of process).

While the problem of SLAPPs varies widely from country to country, a growing trend has been recognized by international organizations around the world. For example:

In **Canada,** [Ecojustice](https://www.ecojustice.ca/wp-content/uploads/2014/11/Breaking-the-Silence_the-need-for-anti-SLAPP-legislation.pdf) pointed to the ‘worrisome trend of SLAPP suits’ in a report detailing the ‘urgent need for anti-SLAPP legislation in Ontario’. This trend was also recognized by the [Environment Commissioner of Ontario,](https://eco.on.ca/reports/200809-annual-report-building-resilience/) an expert advisory panel of the Ontario government, and by various non-governmental organizations and municipalities across the province.

In **Ecuador**, [Earth Rights](https://www.earthrights.org/blog/corporate-rights-or-human-rights) has described the SLAPP tactics used by Chevron against the organizations, lawyers, journalists and activists who have campaigned about the company’s destructive operations, as being ‘the most extreme’ example of a ‘rise in SLAPP … suits by corporate defendants against the human rights attorneys and NGOs that have advocated against them’.

In **India**, [[Amnesty International](https://www.amnesty.org.in/images/uploads/articles/Amnesty_International_India_submission_on_media_laws_%28with_summary%29.pdf)](https://www.amnesty.org.in/images/uploads/articles/Amnesty_International_India_submission_on_media_laws_%28with_summary%29.pdf) recognized an ‘increasing 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. In a report on how India's laws were used to suppress free speech, [Pen International](http://www.pen-international.org/wp-content/uploads/2015/05/Imposing-Silence-4-WEB.pdf) noted SLAPPs had ‘devastating impacts’ on the rights of marginalized people and that ‘socio-economic status is usually a decisive factor in their success’.

In the **Philippines,** [Amnesty International](https://www.amnestyusa.org/reports/annual-report-philippines-2010/3/) has also recognized a growing use of SLAPPs against NGOs and activists.

In **South Africa,** Otto Saki from the [Ford Foundation](https://www.fordfoundation.org/ideas/equals-change-blog/posts/how-companies-are-using-law-suits-to-silence-environmental-activists-and-how-philanthropy-can-help/) recently noted that ‘the use of SLAPP suits in South Africa is becoming a trend’, pointing to a recent SLAPP targeting individual lawyers and activists from the Centre for Environmental Rights (CER).

The SLAPP trend has been particularly pronounced in the **US**, fueled and aided by exorbitant legal fees, the “American rule” of costs apportionment (whereby each party to a lawsuit is responsible for its own attorney fees), and an absence of caps on damages. In a recent report, the free speech group [Index on Censorship](https://www.indexoncensorship.org/wp-content/uploads/2017/04/US-Report-Web-Final-27-April-2017-1.pdf) identified civil litigation as one of a number of growing threats to US press freedom. The growth of anti-SLAPP statutes (now enacted in twenty-eight US states, along with the District of Columbia and Guam) is largely attributable to a growing recognition of this trend[[1]](#footnote-2). 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 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.

1. **International legal standards**

The rights to freedom of expression, of peaceful assembly and of association are fundamental human rights, enshrined in Articles 19 and 20 of the Universal Declaration of Human Rights and guaranteed under Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR). These rights can be subjected only to restrictions which are prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Resolution 24/5 of the Human Rights Council stresses that:

 “(…) respect for the rights to freedom of peaceful assembly and of association, in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as the environment, sustainable development, crime prevention, human trafficking, empowering women, social justice, consumer protection and the realization of all human rights”[[2]](#footnote-3).

It also reminds States of:

“**their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely** […], **and** **to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law**”.

The imperative of the obligations to respect and protect FoAA rights is underscored by the “destruction of rights” provisions contained, *inter alia*, in Articles 30 of the Universal Declaration of Human Rights and 5 of the ICCPR. According to the latter:

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

1. **States’ obligations**

States’ positive obligation to facilitate the exercise of the rights of freedom of expression, peaceful assembly and association includes, among others, the duty to establish and maintain an enabling environment for civil society to operate freely.[[3]](#footnote-4) Regarding the right to freedom of association in particular, it is crucial that individuals exercising this right are able to operate freely, without fear that they may be subjected to any threats, acts of intimidation or violence[[4]](#footnote-5).

The Committee on Economic, Social and Cultural Rights has elaborated States’ obligation to protect individuals under their jurisdiction from interference by third parties in its [General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en) (2017):

“The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners” (para. 16).

The General Comment further indicates that:

“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” (para. 44).

The UN Guiding Principles on Business and Human Rights[[5]](#footnote-6) stress that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. Furthermore, in meeting their duty to protect:

 “States should enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps”.

Thematic reports of special procedures mandate holders have further specified elements of States obligations concerning the rights to freedom of expression, peaceful assembly and association.

In a 2013 report, the Special Rapporteur on the situation of human rights defenders notes:

“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”[[6]](#footnote-7).

The State duty to protect and facilitate the exercise of the rights to freedom of peaceful assembly and of association in the context of natural resource exploitation is also highlighted in a 2015 report by the former Special Rapporteur on the rights to freedom of peaceful assembly and association[[7]](#footnote-8). The report insists on the duty for States to, not exhaustively, enact robust national laws that stipulate the rights and responsibilities of all, create independent and effective enforcement, oversight and adjudicatory mechanisms, ensure effective remedies for violations of rights and promote awareness of, and access to information about, relevant policies and practices related to natural resource exploitation.

According to a joint report of 2016 by the former Special Rapporteur on the rights to freedom of peaceful assembly and of association and the former Special Rapporteur on extrajudicial, summary or arbitrary executions:

“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**”[[8]](#footnote-9).

Finally and more specifically, the Working Group on Business and Human Rights in its Guidance on National Action Plans on Business and Human Rights recommended that States enact anti-SLAPP legislation to ensure that human rights defenders are not subjected to civil liability for their activities[[9]](#footnote-10).

1. **Corporations’ obligations**

The UN Guiding Principles on Business and Human Rights clearly outline that private actors and business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others, to address adverse human rights impacts with which they are involved but also carry out human rights due diligence. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate[[10]](#footnote-11). Internationally recognized human rights are ‘understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work”[[11]](#footnote-12).

Corporations’ responsibilities exist independently of States’ abilities and/or willingness to fulfil their human rights obligations, and do not diminish those obligations.

Moreover, under the horizontal dimension of human rights, all private parties, including corporations, have an international obligation not to abuse their rights for the purposes of constraining the rights of others (in accordance with the so-called “destruction of rights” provisions referred to above).

It is a well established principle of international law that the characterization of an act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[[12]](#footnote-13) The obligations of corporations under international law, therefore, prevail over all national laws and regulations, including those protecting human rights.

1. **Recommendations**
2. **States should protect and facilitate the rights to freedom of expression, assembly and association to ensure that these rights are enjoyed by everyone by, *inter alia*, enacting anti-SLAPPs legislation, allowing an early dismissal (with an award of costs) of such suits and the use of measures to penalize abuse.**
3. **All State actors - legislative, judiciary, executive, regulatory – at any level should work towards facilitating an environment where criticism is part of a healthy debate on any issues of public or societal relevance.**
4. **Private companies should refrain from the use of civil lawsuits as a means of shutting down public participation and critical advocacy.**

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In October 2010, the Human Rights Council adopted resolution 15/21 establishing the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association for an initial period of three years. The Council extended the mandate of the Special Rapporteur for an additional period of three years in September 2013 (resolution 24/5) and June 2016 (resolution 32/32).

1. 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”’(Illinois' Citizen Participation Act, 735 ILCS 110/1). 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 grievances’ (California Code of Civil Procedure, Section 425.16(a)). [↑](#footnote-ref-2)
2. [Human Rights Council, Resolution 24/5.](https://documents-dds-ny.un.org/doc/UNDOC/LTD/G13/171/79/PDF/G1317179.pdf?OpenElement) The rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/RES/24/5, 8 October 2013, para. 2. [↑](#footnote-ref-3)
3. [Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf), UN Doc. A/HRC/20/27, 21 May 2012. [↑](#footnote-ref-4)
4. [Ibid](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf), para. 63. [↑](#footnote-ref-5)
5. [Guiding Principles on Business and Human Rights,](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) UN Doc. A/HRC/7/31, 21 March 2011. The Guiding Principles have been established as the authoritative global standards for all States and businesses with regard to preventing and addressing the risk of business-related human rights impact. [↑](#footnote-ref-6)
6. [Report of the Special Rapporteur on the situation of human rights defenders,](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx) UN Doc. A/HRC/25/55, 23 December 2013, para 59. [↑](#footnote-ref-7)
7. [Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=24900), UN Doc. A/HRC/29/25, 28 April 2015, para 14. [↑](#footnote-ref-8)
8. [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](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/13/PDF/G1601813.pdf?OpenElement), UN Doc. A/HRC/31/66, 4 February 2016, para. 84. [↑](#footnote-ref-9)
9. [Guidance on National Action Plans on Business and Human Rights, United Nations Working Group on Business and Human Rights](https://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf), December 2014, p. 37, UNGP 25. [↑](#footnote-ref-10)
10. [Guiding Principles on Business and Human Rights](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), UN Doc. A/HRC/7/31, 21 March 2011, Pillar II. [↑](#footnote-ref-11)
11. [Guiding Principles on Business and Human Rights,](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) UN Doc. A/HRC/7/31, 21 March 2011, Guiding Principle 12. [↑](#footnote-ref-12)
12. Vienna Convention on the law of treaties, 1969 (Art. 27); Draft Articles on Responsibilities of Sates for Internationally Wrongful Acts, 2001 (Art. 3). [↑](#footnote-ref-13)