



ELAW Environmental Law Alliance Worldwide

Submission to:

Professor Margaret Satterthwait
UN Special Rapporteur on the independence of judges & lawyers

*Regarding a forthcoming thematic report to the UN General Assembly on
the Undue Influence of Economic Actors on Judicial Systems*

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Strategic Lawsuits Against Public Participation (SLAPPs) & Undue Influence on the Judiciary

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Strategic Lawsuits Against Public Participation (SLAPP) & Undue Influence on the Judiciary

1. Context of the Submission

Professor Mary Satterthwait, the UN Special Rapporteur on the independence of judges and lawyers, has adopted the term “economic capture” to refer to circumstances where private financial interests gain influence over a public good like the justice system.¹ In this context, Professor Satterthwait recognizes that “SLAPPs constitute one method by which economic actors can exert disproportionate and improper influence over the judicial system, instrumentalizing that system to further private interests at the expense of the public good.”² This submission will respond to the following questions posed by the Special Rapporteur:

- *Are you aware of SLAPPs being used by private actors to stifle advocacy on issues of public interest?*
- *What steps can be taken to deter SLAPPs, or limit their detrimental impact?*

2. Outline of the Submission

This submission begins by briefly describing the work and expertise of its authors on the topic of SLAPPs in relation to human and environmental rights defenders. Next, it organizes and summarizes relevant statements from international law-making bodies within the following framework: definition of SLAPP, harms of SLAPPs, and State obligations with respect to SLAPPs. Referring to these sources of law and commentary, we argue that there is emerging international consensus that SLAPPs constitute a standalone human rights violation, which accordingly gives rise to specific State obligations. Finally, this submission articulates ways the Special Rapporteur might use her thematic report to strengthen and develop this framework.

3. ELAW Defending Defenders Program

Founded in the early 1990s, the Environmental Law Alliance Worldwide (ELAW) is a network of nearly 500 environmental lawyers in more than 80 countries who represent communities and civil society groups advocating for conservation, environmental justice and respect for human rights. ELAW is also a charitable organization based in the state of Oregon in the United States with a staff of scientists and environmental lawyers dedicated to supporting and strengthening the work of the lawyers in the network. Complementing this work, ELAW’s Defending Defenders (DD) team supports members of the network when they face threats and attacks because of their public interest environmental work. Significantly, this includes supporting lawyers around the world to mitigate the risk of SLAPP, or to respond strategically and effectively when a SLAPP occurs. Over the years, lawyers in ELAW’s network have faced dozens of criminal, administrative and civil SLAPPs, as well as SLAPP threats, that have limited their ability to work safely and effectively.

¹ UN Special Rapporteur on the independence of judges and lawyers, Concept Note (Draft), for a Report on the Undue Influence of Economic Actors on Judicial Systems, 79th session of the UNGA, p 2.

² *Ibid*, p 5.

4. International Human Rights Law & SLAPPs

a. Definition of SLAPP

A SLAPP is any use of law by a more powerful actor, or threat thereof, against a less powerful individual or group, that has the effect of sanctioning, silencing and/or deterring public participation. SLAPPs are baseless, or at best, their legal basis is tenuous.³ They can take the form of civil law actions and subpoenas, administrative measures, and criminal charges,⁴ and can be instigated by a private actor or by the State. Notably, SLAPPs suits initiated by States are sometimes at the behest of private actors. Given the various legal forms that a SLAPP can take, for ease of reference, the entity who initiates the SLAPP is often called the “SLAPPer”. SLAPP targets commonly include human and environmental rights defenders, journalists, and others who participate in public debate on public interest matters.⁵ Some forms of legitimate public participation that may attract a SLAPP are: amplifying important information to the public, sharing facts or analysis about the acts and omissions of powerful actors, and monitoring compliance with international law, as well as domestic law and regulations. Anyone who publicly criticizes a powerful actor is at risk of a SLAPP.

b. Public & Private Harm Caused by SLAPPs

This section summarizes the harms that SLAPPs cause to three related constituencies: (1) the direct targets of the SLAPP, (2) civil society groups associated with the target(s); and (3) the public more generally, including the court system. The authors of this submission have directly observed many of these harms in their work with SLAPP targets and their lawyers.

SLAPPs cause grave harms to the *individuals targeted*, including material (financial) harms connected to their legal defense, as well as non-material harms, including psychological, reputational, and career harms.⁶ When a SLAPP is criminal in nature, it exacerbates these harms because it includes the risk of a prison sentence, as well as further stigmatization associated with being accused of a crime. The SLAPP will often scare its direct target into silence and cause them to withdraw their public participation on public interest matters. It also diverts their time and energy from their public interest work toward defending the SLAPP. In this sense, even if a

³ Ton van den Brandt, Principal Advisor to the OSCE Representative on Freedom of Media, “Legal Harassment and Abuse of the Judicial System Against the Media” (2021) Organization for Security and Co-operation in Europe, Office of the Representative on Freedom of the Media, p 9, online: <https://www.osce.org/representative-on-freedom-of-media/505075> [OSCE Advisor, 2021].

⁴ Michel Forst, “Statement on the Committee of Ministers’ Recommendation on Countering Strategic Lawsuits against Public Participation (SLAPPs)” (2023), UN Economic Commission for Europe (UNECE), p 4, online: https://unece.org/sites/default/files/2023-08/SR_Statement_COE_CM_Recommendation_SLAPPs_02.08.2023.pdf [Forst, 2023].

⁵ Special Rapporteur on Economic, Social, Cultural and Environmental Rights, IACHR, “Business and Human Rights: Inter-American Standards” (2019), OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19 at paras 317, 324, online: https://oasmailmanager.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf [Special Rapporteur, IACHR, 2019].

⁶ Forst, 2023, *supra*, p 5.

SLAPP is ultimately shown to have no legal basis, it nonetheless will have succeeded in its goal of silencing and punishing the target.

Civil society actors associated with those targeted and their cause are also harmed. They may similarly reduce or abandon their public participation due to fear of further SLAPPs. This impact is commonly referred to as a “chilling effect” that reaches beyond the target of the SLAPP. This is especially the case where the SLAPP includes many unnamed defendants or respondents. They may also face additional burdens related to supporting the SLAPP target through fundraising, campaigning, or by taking up the substantive work of the target while the target is saddled with the burdens of SLAPP defense.

SLAPPs also harm the *public* more generally because they curtail discussion and monitoring of important matters of wide public concern.⁷ The public has a right to access diverse expressions and opinions. The free circulation of ideas and expressions is a fundamental feature of a healthy democracy and the rule of law. As such, SLAPPs directly impact the exercise of free expression, association, assembly and public participation of the direct target(s), civil society organizations and movements associated with the target(s), as well as the public at large.⁸ They also indirectly impact the social and environmental rights that SLAPP targets might be working to defend.⁹ We submit that a SLAPPER’s improper use of *judicial resources*¹⁰ must be understood together with these public and private harms. In sum, the SLAPPER wastes judicial resources while generating a wide range of harm to society, including harms to democracy, the rule of law, and the full exercise of human rights.

c. State International Obligations regarding SLAPPs

International human rights bodies are increasingly recognizing that SLAPPs constitute a standalone human rights violation that gives rise to both negative and positive State obligations.¹¹ This in turn means, as with other human rights matters, that States have obligations to: prevent or deter SLAPPs, to fully investigate alleged SLAPPs, to sanction or penalize the SLAPPER, and to provide remedy to the SLAPP victim(s).¹²

⁷ European Parliament and Council Directive, *On protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings* (‘Strategic lawsuits against public participation’) OJ L106/9 (2024) at para 16, online: <https://eur-lex.europa.eu/eli/dir/2024/1069/oj>, [EU SLAPP Directive].

⁸ UN Working Group on the issue of human rights and transnational corporations and other business enterprises, “The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders”, Human Rights Council, 47th session, A/HRC/47/39/Add.2 (2021) at para 83, online: <https://media.business-humanrights.org/media/documents/G2116149.pdf>, [UNWG, 2021].

⁹ In this way, SLAPPs also affect access to remedy: UN Working Group on Business and Human Rights, “Guidance on National Action Plans on Business and Human Rights” (2016), online: https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf [UNWG, 2016].

¹⁰ EU SLAPP Directive, *supra* at para 17.

¹¹ Committee of Ministers, Council of Europe, Recommendation, *Countering the use of strategic lawsuits against public participation*, CM/Rec (2024) 2, p 1, online: <https://rm.coe.int/0900001680af2805> [Committee of Ministers, 2024].

¹² UNWG, 2021, *supra* at para 41; UNWG, 2016, *supra*; African Commission on Human and Peoples’ Rights, “Resolution on the Situation of Human Rights Defenders in Africa”, ACHPR/Res.376(LX) 2017, online:

International bodies have recognized some of the necessary ways in which States might discharge these obligations:

- Enact and enforce ethical standards for the legal profession that prohibit conduct that supports or enables SLAPPs and sanctions legal professionals accordingly.¹³
- Publicly and unequivocally recognize the fundamental role played by human rights defenders and the importance of public participation in protecting democracy and the rule of law in society. This public commitment should be reflected at all levels of the state, whether municipal, state, or national, and across all branches of power.¹⁴
- Revoke criminal defamation laws and amend ambiguous or vague criminal laws that inappropriately limit free expression and democratic debate on matters of public interest. The protection of the privacy, honor, and reputation of public officials or persons who have voluntarily engaged in matters of public interest should be guaranteed exclusively through civil law.¹⁵
- Take positive steps to deter SLAPPs and to ensure effective legal protection or safeguards against SLAPPs.¹⁶
- Establish programs for legal and psychological assistance for SLAPP targets.¹⁷
- Train judges and lawyers to recognize SLAPPs.¹⁸

<<https://achpr.au.int/en/adopted-resolutions/376-resolution-situation-human-rights-defenders-africa-achprres376>>; Special Rapporteur, IACHR, 2019, *supra* at para 327; Committee of Ministers, 2024, *supra*.

¹³ Forst, 2023, *supra*, p 6.

¹⁴ Inter-American Commission on Human Rights, Criminalization of the work of Human Rights (2015) OEA/Ser.L/V/II. Doc. 49/15, p 155, online: <http://www.oas.org/en/iachr/reports/pdfs/criminalization2016.pdf> [IACHR, 2015].

¹⁵ OSCE Advisor, 2021, *supra*, p 8. UNWG, 2021, *supra* at para 84; UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 102nd Session (2011), para 47, online <https://www.ohchr.org/sites/default/files/english/bodies/hrc/docs/GC34.pdf>; *Palacio Urrutia et al v Ecuador* (2021), Inter-Am Ct HR (Ser C) No. 446, OEA/Ser.L/V/II.151, Doc 8, online: https://www.corteidh.or.cr/docs/casos/articulos/seriec_446_ing.pdf, para 117; African Commission on Human and Peoples' Rights, *Resolution on Repealing Criminal Defamation*, ACHPR/Res.169 (XLVIII)10 (60) (2010), online: <https://achpr.au.int/en/adopted-resolutions/169-resolution-repealing-criminal-defamation-laws-africa-achprres169xlvi>; *Kimel v Argentina* (2008), Inter-Am Ct HR (Ser C) No 177 at para 76, online: https://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf; *Konaté v Burkina Faso* (2014), App. No. 004/2013, Judgment (AfCHPR) at paras 163, 176, online: <https://www.african-court.org/cpmt/storage/app/uploads/public/633/40b/e27/63340be2743c3757080189.pdf>; Irene Khan, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" (2022), UN Human Rights Council at paras 57, 58, online: <https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F50%2F29&Language=E&DeviceType=Desktop&LangRequested=False>; IACHR, 2015, *supra*, p 157.

¹⁶ OSCE Advisor, 2021, *supra*, pp 10, 12; UNWG, 2021, *supra* at para 83; Office of the High Commissioner for Human Rights, "The Impact of SLAPPs on Human Rights and How to Respond" (2023) OHCHR, p 3, online: <https://www.ohchr.org/sites/default/files/documents/publications/briefer-the-impact-slapps-hr-how-resond.pdf> [OHCHR Brief]. The InterAmerican Court has also recognized the need for special protections of speech in the public interest in: *Palacio Urrutia et al v Ecuador*, *supra*.

¹⁷ OSCE Advisor, 2021, *supra*, p 11; OHCHR Brief, *supra*, p 5.

¹⁸ UNWG, 2021, *supra* at para 84; European Parliament, Legislative Observatory, Resolution, *Strengthening Democracy and Media Freedom and Pluralism in the EU: the undue use of actions under civil and criminal law to*

In addition to these concrete steps, international bodies are increasingly calling on States to specifically modify their legal frameworks to mitigate the risk and harms of SLAPPs.¹⁹ These legislative measures can also be understood as a form of deterrence. This list reflects some key features of anti-SLAPP laws described by international bodies. Effective anti-SLAPP laws will:

- Place the burden on the SLAPPER to show that the claim is not unfounded.²⁰
- Allow judges to consider, upon receiving a complaint, whether the respondent is a human rights defender, as well as the context of the events, in order to identify if the complaint is being used as a mechanism to obstruct the defender's work.²¹
- Create pathways for early and efficient dismissal of unfounded cases.²²
- Empower judges to publicly name a SLAPP and the SLAPPER.²³
- Require SLAPPers to post sufficient security funds early in the proceedings to cover full costs should they fail to substantiate their claim.²⁴
- Limit the damages available to the SLAPPER.²⁵
- Impose mandatory obligations on the SLAPPER to pay all of the legal costs generated by the process.²⁶
- Sanction the SLAPPER for abusing court resources.²⁷
- Ensure full compensation for SLAPP victims including pecuniary and nonpecuniary damages, such as loss of income and emotional distress.²⁸

5. Recommendations for the Special Rapporteur

We welcome the Special Rapporteur's inquiry into how SLAPPs constitute a form of undue influence by powerful economic actors on the legal system. In a socially unequal society where legal services are available primarily to those who can afford them, it is inevitable that wealthy actors will use their relative economic strength to disproportionately avail themselves of judicial resources. However, where the proceedings constitute a SLAPP, they do not serve to vindicate an alleged legal wrong, but rather to perpetuate a variety of private and public harms. SLAPPers use the judicial system to chill and sanction the legitimate exercise of civil and political rights and the defense of social and environmental rights, thereby undermining democracy and the rule of law.

silence journalists, NGOs and civil society, 2021/2036(INI) (2021) at para 25, online: <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1682257&t=d&l=en> [European Parliament Resolution, 2021].

¹⁹ UNWG, 2021, *supra* at paras 42, 83; UNWG, 2021, *supra*; *Palacio Urrutia et al v Ecuador*, *supra*. For a detailed description of the features of effective anti-SLAPP legislation, see: Committee of Ministers, 2024, *supra*, p 8.

²⁰ Forst, 2023, *supra*, p 4.

²¹ IACHR, 2015, *supra*, p 157.

²² Forst, 2023, *supra*, p 4.

²³ Forst, 2023, *supra*, p 6.

²⁴ EU SLAPP Directive, *supra* at para 31.

²⁵ OSCE Advisor, 2021, *supra*, p 8.

²⁶ OSCE Advisor, 2021, *supra*, p 11.

²⁷ UNWG, 2021, *supra* at para 84.

²⁸ Committee of Ministers, 2024, *supra*, p 8; EU SLAPP Directive, *supra* at para 31; Parliament Resolution, 2021, *supra* at para 25.

*For this reason, in our **first recommendation**, we encourage the Special Rapporteur to strongly endorse the SLAPP-related State obligations listed above that human rights bodies have already recognized.*

However, the Special Rapporteur has recognized that, in addition to attempting to convert the judicial system into an instrument of injustice and economic power, SLAPPers also generate unnecessary burdens and influence on the legal system.²⁹ We see the Special Rapporteur's observation as an important opportunity to expand the concept of harm and State obligations in this area. *Recognizing that SLAPPs cause unique harms to the judicial system, we submit our **second recommendation**, that these harms should be fully reflected in appropriate sanctions and remedies that take the true impact of SLAPPs into account. This could be achieved if SLAPPers are made to compensate not only their direct targets but also the public, including the court system.* For instance, judges could be empowered to order SLAPPers to pay into a public interest fund used for SLAPP education, legal aid, law reform research, and judicial training.

This points toward an important overarching principle: the true scope of SLAPPs' public and private harms must be fully reflected in the recognition of State international obligations in this area, including obligation to ensure the right to remedy and reparation, and to take protective legal and judicial measures to guarantee the rights enshrined in international law.³⁰ *As our **third and final recommendation**, we urge the Special Rapporteur to explicitly endorse this principle in her approach to conceptualizing State obligations and the right to remedy in her report.*

In closing, we would be happy to respond to any questions the Rapporteur might have with regard to our submission, and we look forward to reading her final report.

²⁹ EU SLAPP Directive, *supra* at para 17; Special Rapporteur, IACHR, 2019, *supra* at para 325.

³⁰ General Comment No. 3 of the UN Committee on Economic, Social and Cultural Rights concretely explains the general nature of obligations of States parties to the treaty. States parties who want to implement in good faith the ICESCR must: "Take all appropriate measures (including, but not limited to legislative measures) toward the realization of ESC rights; Foresee remedies in legislative texts introducing policies relevant for the realization of ESC rights; Adopt targeted, effective and low-cost programmes to protect the most at risk, even in instances of limited resources": International Commission of Jurists, *State Obligations Stemming from International Law*, online: <https://www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-judicial-and-quasi-judicial-bodies-2/2-3-identifying-breaches-of-international-obligations-of-states-pertaining-to-esc-rights/2-3-1-state-obligations-stemming-from-international-law/>. General Comment No. 31 on the ICCPR provides that article 2 "requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large" (para 7). General Comment No. 31 also provides that "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations." (para 16). See: UN Human Rights Committee, General Comment No. 3, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), online: <https://www.refworld.org/legal/general/hrc/2004/en/52451>.