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Reclaiming justice: A guide to recognizing and combatting Instrumentalization

Position paper from the Special Rapporteur on the independence of judges and lawyers*

Summary

In this position paper, the Special Rapporteur on the independence of judges and lawyers adopts the term "instrumentalization" to encompass the myriad ways justice systems are being misused to punish and inflict harm, rather than deliver justice. **It is the Special Rapporteur's position that the instrumentalization of the justice system is a human rights violation.** The Special Rapporteur puts forward a working definition of instrumentalization of the justice system designed to assist States, civil society, and the international community to identify and address this problem. This position paper is meant to be a tool that can be adapted to all legal system, and as such it sets out the main elements that together comprise instrumentalization, outlines the applicable human rights standards, and presents a set of recommendations to all relevant actors to tackle and prevent instrumentalization within their judicial systems.

* The Special Rapporteur on the independence of judges and lawyers gratefully recognizes the work of OHCHR in organising the expert consultations of 11 and 12 November 2024, held to discuss the subject of instrumentalization and build on the international standards applicable in the field. She is also grateful to all those who attended the two-day consultation and shared their expertise; as well as for OHCHR's support in drafting this guide.

Reclaiming justice: A guide to recognizing and combatting Instrumentalization

Position paper from the Special Rapporteur on the independence of judges and lawyers

I. Introduction

1. People expect judicial systems to deliver justice. This expectation is well grounded in human rights law, which guarantees everyone equal access to the protection of the law. As a result, many will be surprised to find that, in States around the world, these systems are being turned to more nefarious ends. Civil lawsuits and criminal prosecutions have become tools wielded to serve powerful economic or political interests. Journalists reporting on illegal business practices are subject to lawsuits for defamation; environmental defenders uncovering improper activities on their ancestral lands are accused of criminal trespass; and prosecutors pursuing corrupt public officials face charges that they are abusing their public office. This phenomenon can be described in various ways, including as "weaponization" of the justice system, or as "judicial harassment" or "legal harassment". This paper adopts the term "instrumentalization" to encompass the myriad ways justice systems are being misused to punish and inflict harm.

2. **It is the Special Rapporteur's position that the instrumentalization of the justice system is a human rights violation**.

3. The aim of this paper is to set out the main elements that together comprise instrumentalization, outline the applicable human rights standards, and present a set of recommendations to all actors to tackle and prevent instrumentalization within their judicial systems. With that objective, the Special Rapporteur on the independence of judges and lawyers (the Special Rapporteur) puts forward a working definition of instrumentalization of the justice system designed to assist States, civil society, and the international community to identify and address this problem.

4. The use of Strategic Lawsuits Against Public Participation (SLAPPs), often through defamation claims targeting journalists or human rights defenders uncovering illegal or harmful business practices or cases of corruption, is perhaps the most widely recognized form of instrumentalization of the justice system. However, over the last several years, such instrumentalization has widened and is increasingly used not only to silence journalists, but to stifle dissent and frustrate the course of justice more generally. As the nature and scope of such abuses have changed, the discussion has evolved to a broader concern about the systematic instrumentalization of the justice system.

5. In the last several years, the Special Rapporteur has received an increasing number of allegations of instrumentalization of justice systems. These allegations often concern legal proceedings that are aimed at limiting freedom of expression and speech, the right to public participation, and/or the right of people to claim their human rights and demand justice when those rights have been violated.

6. Other special procedures mandate holders, including the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, the Special Rapporteur on the situation of human rights defenders, and the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group on Business and Human Rights) have also expressed concern over the so-called "judicial harassment" of individuals seeking to claim their rights contrary to the interests of political or economic elites.

7. Iinstrumentalization is not particular to any part of the world or legal culture: it occurs across regions and in countries adhering to common law and civil law traditions alike. It is an instrument of suppression and control that may be exercised by politicians, public officials, wealthy businesspeople and corporations. It seeks to punish, silence or intimidate journalists,

lawyers, prosecutors, judges, human rights defenders, community activists, and individual rights-holders. It may also be used against political rivals.

8. Such instrumentalization can be criminal or civil in nature. The aim of instrumentalized proceedings is not necessarily to obtain a favourable court decision, but rather to pervert the course of justice and inflict harms on those targeted, for example, by tying defendants up in costly judicial processes, or by depriving the targeted individuals of their liberty. The targets of such proceedings may lack the means and capacity to defend themselves, suffer reputational damage, spend long periods in pre-trial detention, and be subjected to other, insidious forms of harassment and intimidation from which they may be unable to obtain a remedy. These actions have a chilling effect on civil society and freedom of speech and may deter people seeking to uphold accountability for rights violations involving governments, public institutions, large businesses and other powerful actors.[1] Instrumentalization also undermines the specific protections granted to the activities of human rights defenders.

9. Instrumentalization may also take place by proxy, when accusations and charges are brought against family members of the intended target. It may also have a compounding effect on the degradation of rule of law, with reports of instrumentalized proceedings against judges, prosecutors and lawyers in retaliation for their efforts to confront and shut down the very same instrumentalization of the justice system.

10. Moreover, the very concept of instrumentalization has begun to be contested, with some powerful actors co-opting the term to claim "weaponization" when they face justice measures designed to hold them accountable for well-established crimes or wrongdoing. But this distorts the nature of instrumentalization cases, which often exploit an imbalance of power to target individuals or communities with few avenues for resistance.

III. Toward a working definition

11. As yet, there is no universally accepted definition of instrumentalization of the justice system. However, numerous regional bodies, domestic lawmakers and experts have suggested a range of definitions for the specific form of instrumentalization known as Strategic Lawsuits Against Public Participation ("SLAPPs"). These are perhaps the best-recognized and most frequently described form of instrumentalization of the justice system.[2]

12. In a briefing note on SLAPPs, OHCHR defines this practice as

"Lawsuits or threats of legal action which use abusive litigation tactics with the aim or effect of suppressing public participation and critical reporting on public interest matters".[3]

13. Additionally, in 2024 the European Union and the Council of Europe put forward detailed definitions that capture many key features of these abusive practices. On 3 April

[1] *How are courts responding to SLAPPs? Analysis of selected court decision across the globe"*. Columbia Freedom of Expression, 2023, p. 6.

[2] See, for example, Inter-American Court of Human Rights, Case of Palacio Urrutia et al. v. Ecuador, Judgment, 24 November 2021, para. 95; Supreme Court of Canada, Ontario Ltd. v. Pointes Protection Association, Judgment, 10 September 2020; Australian Capital Territory, Protection of Public Participation Act (2008); Constitutional Court of South Africa, Mineral Sands Resources (Pty) Ltd and Others v. Reddell and Others, Judgment, 14 November 2022; California Code of Civil Procedure CCP § 425.16 – § 425.18 (United States); Anti-SLAPP Act of 2011 (Philippines); Special Rapporteur on the rights to freedom of peaceful assembly and association, "Info Note: SLAPPs and FoAA Rights", 2017; Business and Human Rights Resource Centre, "SLAPPed but not silenced: defending human rights in the face of legal risks", 15 June 2021; and George W. Pring, "SLAPPs: strategic lawsuits against public participation", Pace Environmental Law Review, vol. 7, No. 1 (September 1989).

[3] Office of the United Nations High Commissioner for Human Rights, *"The impact of SLAPPs on human rights & how to respond",* 29 April 2024. Available at www.ohchr.org/en/documents/brochures-and-leaflets/impact-slapps-human-rights-and-how-respond .

2024, the Committee of Ministers of the Council of Europe issued a Recommendation[4] that sets out a framework for deterring and remedying SLAPPs, which defines SLAPPs as

"Legal actions that are threatened, initiated or pursued as a means of harassing or intimidating their target, and which seek to prevent, inhibit, restrict or penalize free expression on matters of public interest and the exercise of rights associated with public participation."

14. On 11 April 2024, the European Parliament and Council of the European Union adopted a Directive on protecting people who engage in public participation from manifestly unfounded claims or abusive court proceedings.[5] In its Directive the European Union provides the following definition:

"'abusive court proceedings against public participation' mean court proceedings which are not brought to genuinely assert or exercise a right, but have as their main purpose the prevention, restriction or penalization of public participation, frequently exploiting an imbalance of power between the parties, and which pursue unfounded claims."

15. These SLAPP-specific definitions offer a good starting point for formulating a broader working definition of the instrumentalization of the justice system.

16. Justice systems—composed of institutions, processes and personnel—do not have one single purpose; they must be capable of being used by many different actors with many disparate goals. These range from State organs prosecuting violations of criminal law, corporate entities asserting rights over intellectual property, and families seeking resolution of child custody disputes. Notwithstanding this variety of uses, international human rights law requires justice systems to share several common features (addressed in greater detail in the following section). In summary: tribunals should be independent and impartial; justice personnel must uphold (and not violate) human rights norms; and all persons shall be equal before the law and entitled without discrimination to the equal protection of the law. Therefore, justice systems must provide a remedy for rights violations, ensure equality before the law, and resolve legal disputes using fair procedures. Importantly, they must ensure they do not become a tool to inflict human rights violations. Instrumentalization occurs when justice systems are used for abusive purposes fundamentally at odds with these essential requirements.

17. Based on the consultations, and the work of the mandate, the Special Rapporteur proposes the following **working definition** of the instrumentalization of the justice system:

(i) The use of legal processes against **targeted individuals or groups** who appear to have been selected (a) to persecute them, (b) on the basis of reprisal, (c) on the basis of discrimination, (d) to silence them personally or in their functions, or (e) to achieve an exemplary chilling effect aimed at others who engage in similar activities.

(ii) Some indicia of this phenomenon include the following, when used against a **targeted individual or group**, as defined in (1):

- People from targeted groups are **disproportionately chosen, in an observable pattern**, for legal processes such as criminal prosecution, civil proceedings and administrative proceedings (such as audits or tax charges, professional license withdrawal or disciplinary proceedings).
- **Violations of due process guarantees or reduced fair trial guarantees** are observable in cases brought against targeted individuals or groups. In particular, this may involve the use or abuse of pre-trial detention, undue delays, obstacles

[4] Recommendation CM/Rec (2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs), Adopted by the Committee of Ministers on 5 April 2024 at the 1494th meeting of the Ministers' Deputies, Council of Europe

[5] Directive (EU) 2024/1069 of the European Parliament and the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation')

to adequate facilities to mount a defense, lack of access to adequate legal representation and a lack of transparency in proceedings.

- **Changing burdens and standards of proof or over-use of presumptions and imputations** to the detriment of the targeted individual or group.

18. This definition encompasses the following **key elements** that often characterize the instrumentalization of the justice system. These indicia are not always all present; in some cases, one or more may be absent**:**

- **Imbalance of power**. There is an imbalance in financial, political or societal power between the powerful claimant or initiator and the less powerful defendant or target of the abusive lawsuit.
- **Questions on legal merit**. Upon examination, the case frequently lacks legal merit, the arguments put forward are partially or fully unfounded, or the causes of action selected do not seem well-connected to the facts at issue (for example, because a harm to the public interest or a criminal offence is alleged when the true thrust of the complaint is damage to personal reputation). Instrumentalization may rely on the creation of laws with overbroad definitions of criminal conduct, allowing Criminal proceedings to be initiated for crimes that have been vaguely and imprecisely typified, (such as criminal defamation, "fake news", sedition, collusion, "abuse of authority", or national security crimes). Alternatively, charges may be filed based on spurious accusation for a seemingly well-defined crime. Abusive lawsuits brought by powerful economic or political actors aimed at stifling criticism or obstructing challenges to unlawful business activities often allege damage to a company's property or attacks on a company's employees.
- **Abuse of procedure**. Whether the charges are civil or criminal, claimants utilize legal tactics that are unreasonable, improper or abusive, at times amounting to harassment or intimidation.

19. Claimants may also maximize pressure by making unreasonable demands for punishment, including sentences of imprisonment. Civil claims often pursue inflated financial awards that have devastating consequences for the targets. Sometimes, cases seek punitive measures through administrative proceedings, often without the possibility of judicial review or appeal, for example through sanctions or measures such as removal of passports, travel bans, freezing of assets, etc., during or after the proceedings.

20. In cases where lawsuits target organizations, powerful private actors often bring claims against individual employees or members, rather than the organization itself, exerting maximum pressure on the individuals concerned. Instrumentalized cases also abuse legal tactics by issuing multiple legal cases and opportunistically pursuing the same case in several domestic or foreign jurisdictions. Such forum shopping, i.e. selecting a court or jurisdiction the claimant believes will be favorable to its position or that has fewer protections against abusive lawsuits, is a commonly used tactic – especially in cases involving transnational corporations, which are often in a position to demonstrate a connection to multiple jurisdictions.[6] Forum shopping can also increase stress and costs for defendants, as they may be required to face proceedings in foreign and unfamiliar jurisdictions. In some cases, claimants may be able to resubmit cases that have already been dismissed in one jurisdiction, or submit new ones against the same defendant, exposing targets to potentially unlimited litigation.

- **Violations of due process guarantees and other human rights protection**. Ordinary fair trial protections and rights for people in detention which are guaranteed by international human rights law are frequently absent or limited. For example, the judicial process may be compromised by a declaration of secrecy surrounding proceedings or the case file, and targets may be denied access to counsel of their choosing, face restrictions on the facilities required to mount a defense, delays in hearings, isolation in custody, denial of access to medical services, etc., impacting

[6] A/79/362, paras. 50-51.

equality of arms. A particularly concerning practice is "rotation", in which human rights defenders subject to a sentence of imprisonment whose sentences are about to expire, are charged again under similar accusations on or close to the date of their release in order to extend their detention.

- **Protection of human rights and freedoms**. The underlying facts of the case concern conduct by the targets that include public participation or the exercise of protected human rights. This may include the exercise of the right of free speech or assembly on matters of public interest, the demand for remedies for human rights violations, attempts to expose corruption, illegal or unethical action by state actors or corporations, or to resist environmental damage and climate change.
- **Chilling effect on civic space or human rights defenders.** Instrumentalized lawsuits or criminal charges often have the aim, and effect, of silencing or deterring debate, criticism or accountability measures that would impact the claimants. The legal action is thus often accompanied by a public relations campaign designed to discredit or intimidate the targets, particularly when those are groups that already experience discrimination, such as women or Indigenous peoples, and divert attention from the actual issue at stake.

21. Targets may include journalists, human rights defenders, lawyers, prosecutors and judges. Indigenous Peoples, for example, are often targeted when they seek recourse for human rights violations or demand meaningful participation in matters affecting their communities, including effective consultations and free, prior and informed consent.

- **Harassment by proxy** may occur when any of the practices described above are pursued against the defendant's family, allies, including their own lawyers or community defenders, or means of livelihood.

IV. International human rights law and instrumentalization of the justice system

22. Instrumentalization of the justice system entails numerous human rights concerns and is itself a human rights violation. It perverts the course of justice and damages public trust in the judiciary and the judicial system. In particular, where justice systems are used to affect a systematic pattern of intentional and severe deprivation of fundamental rights, targeted at specific groups, instrumentalization may rise to the level of persecution. At stake is not only the right of individuals to exercise their fundamental freedoms and participate in public affairs, but more broadly their rights to defend themselves against the abuse of the law by powerful and often overlapping economic and political interests.[7]

23. This abusive practice also violates key international standards and safeguards pertaining to the independence of the judiciary and the right of everyone to a fair trial and equality before the law. Ultimately, this is matter of subverting the justice system and undermining the rule of law as a fundamental principle of democratic governance.

V. Rule of law, the right to a fair trial and judicial independence

24. The Universal Declaration of Human Rights in article 10 affirms that*, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* Article 14 (1) of the ICCPR provides that all people have the right to be heard by a competent, independent and impartial tribunal established by law, in the determination of any criminal charge against them, or of their rights and obligations in a suit at law. The Human Rights Committee has clarified that a "tribunal" designates a body that is established by law, is independent of the executive and legislative branches of government or which enjoys in

[7] Adam Bodnar and Aleksandra Gliszczyńska-Grabias: "Strategic Lawsuits against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive", 19 *European Constitutional Law Review* (2024) 642, 645.

specific cases judicial independence in proceedings that are judicial in nature.[8] The ICCPR, in article 26, also requires respect for equality before the law, stating that *"[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law".*

25. Judicial independence and impartiality are key to defending the judicial system from instrumentalization. Judges play a vital role in countering abusive lawsuits and prosecutions at the earliest phase and ensuring that targets receive a fair hearing if such cases cannot be dismissed.

26. Instrumentalization of the justice system risks violating various elements of the right to a fair trial, in particular:

- The right to the presumption of innocence, as the misuse of the criminal justice system often opens the door to arbitrary or excessive pretrial detention. Additionally, judicial proceedings are often accompanied by public relations campaigns, particularly through social media, aimed at portraying the defendant as guilty before any judicial determination.
- The right to adequate time and facilities to prepare a defense, as the claimant will often seek to withhold information, obscure facts and surround the casefile with secrecy.
- The right to be tried without undue delay, as the claimant will frequently use abusive tactics to keep the target trapped in a continuous loop of lengthy but ill-founded proceedings.

27. Furthermore, the Special Rapporteur has underlined the essential role judges, lawyers and courts play in protecting these and other rights and freedoms.[9] Judges, prosecutors and lawyers have a duty to uphold human rights norms recognized in national and international law.[10] Judicial independence is also a fundamental prerequisite for securing the protection and realization of human rights. If judges are not independent, they may struggle to apply the law equally to powerful political or economic actors or to uphold fundamental democratic rights in the face of government pressure.[11]

28. Victims of human rights violations have a right to effective remedy as guaranteed under article 2(3) of the ICCPR:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

(c) To ensure that the competent authorities shall enforce such remedies when granted.

29. Solid justice systems promote and protect the fundamental principle of rule of law that provides the foundations for participatory governance and the protection of human rights. Under this principle all people, including State actors, are subject to the same laws, applied fairly and consistently. At its core, the rule of law requires dividing State power into distinct

[8] Human Rights Committee, general comment No. 32 (2007), CCPR/C/GC/32, para. 18.

[9] See also Human Rights Committee, general comment No. 25 (1996), CCPR/C/21/Rev.1/Add.7, para. 20.

[10] See, for example, Ibero-American Code of Judicial Ethics, art. 31; Basic Principles on the Role of Lawyers, principle 14; and Guidelines on the Role of Prosecutors, guideline 12.

[11] A/HRC/56/62, para. 11

branches, where the judiciary acts to ensure that executive and legislative actions do not exceed the limits of the constitution and law.[12]

30. The fundamental interdependence of participatory governance, the rule of law and judicial independence has been recognized on multiple occasions by the United Nations. The General Assembly, in its resolution 62/7, reaffirmed that *"... human rights, the rule of law and democracy are interlinked and mutually reinforcing"; they "belong to the universal and indivisible core values and principles of the United Nations"*. Similarly, the Special Rapporteur has in previous reports emphasized that *"respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy"*.[13]

31. Those linkages have also been acknowledged in the Sustainable Development Goals and the 2030 Agenda for Sustainable Development, which defines targets for promoting the rule of law at the national and international levels, ensuring equal access to justice for all, and ensuring responsive, inclusive, participatory and representative decision-making at all levels, as a key component and requirement for sustainable development.

VI. The right to participate in public life

32. Instrumentalization of the justice system also impacts on a broad swathe of human rights, in particular those rights that are key to participatory governance and democratic institutions.

33. Individuals and groups have a right to access information and participate in decisions that affect their lives and wellbeing. The right to participate and be consulted is particularly important in matters concerning groups that have been marginalized and made vulnerable to be effective and meaningful, participation requires that people are aware of their rights and empowered to challenge injustice and exclusion in the face of powerful economic and political actors. Genuine participation also demands that the people concerned can fully exercise their rights to freedom of expression, assembly and association. With regard to issues affecting the rights of persons belonging to groups that have been marginalized and disadvantaged, especially Indigenous Peoples, it is of particular importance that decision-making is based on free, prior and informed consent.

34. Under International Human Rights Law, participation in political life is an essential human right, as well as a vital tool for protecting and advancing other fundamental human rights. Article 21 (1) of the Universal Declaration of Human Rights provides that *"[e]veryone has the right to take part in the government of [their] country, directly or through freely chosen representatives"*. Article 25 (a) of the International Covenant on Civil and Political Rights (ICCPR) affirms that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. The ICCPR also requires, in articles 19 and 22, that States parties ensure the civil and political rights necessary for meaningful participation, including freedom of opinion, expression, information and association. Other international human rights treaties affirm the right of every person to participate equally in public life, free from discrimination on the basis of race, color, national or ethnic origin[14], gender[15], disability[16] and other prohibited grounds.

35. The rights to freedom of expression, assembly and association can only be restricted if such limitations are prescribed by law; necessary for the respect of the rights or reputation of others, or for the protection of national security, public safety, public order, public health or morals; and proportionate to the aim pursued and non-discriminatory.[17] Importantly,

[12] A/HRC/56/62, para. 3.
[13] Ibid.
[14] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (c).
[15] Convention on the Elimination of All Forms of Discrimination against Women, art. 7.
[16] Convention on the Rights of Persons with Disabilities, art. 29.
[17] International Covenant on Civil and Political Rights, art. 19 (3)

restrictions on these fundamental freedoms must not be aimed at discouraging their exercise.[18]

VII. Response by the international human rights system

36. While there is no specific international legal instrument that deals with the problem of instrumentalization of the justice system, the phenomenon is being increasingly recognized as a serious human rights concern by international and regional human rights mechanisms.

A. UN Human Rights Council

37. The misuse of the judicial system to stifle public participation has been highlighted in a number of recent resolutions adopted by the UN Human Rights Council. In October 2022 in resolution 51/9 on "The Safety of journalists",[19] the Council expressed its deep concern about all attempts to silence journalists and media workers, including by legislation that can be used to criminalize journalism and by the misuse of overbroad or vague laws to repress legitimate expression, including defamation and libel laws, laws on misinformation and disinformation, and counter-terrorism and counter extremism legislation, when not in conformity with international human rights standards. The Council further expressed serious concern at the increasing use of strategic lawsuits against public participation, including by business entities, to stop the media from performing their work by imposing pressure and intimidation or exhausting the resources and morale of journalists.

38. More recently, in July 2024 in resolution 56/7 on "Freedom of opinion and expression"[20], the Council reiterated its concern about the increasing use of legislation to silence journalists, media workers and human rights defenders, including through the use of SLAPPs.

B. Special procedures

39. In recent years, several special procedures mandates have analysed and provided guidance on the phenomenon of SLAPPs and other abuses of the justice system. While the focus has primarily been on SLAPPs targeting journalists, increasing attention has also been given to the misuse of the justice system to harass, intimidate and silence other actors, including lawyers, judges, prosecutors, human rights defenders, community activists and trade unionists. What these targets often have in common is their action to investigate, expose, challenge or prosecute human rights abuses, corruption or environmental crimes attributed to powerful private or state actors.

40. The Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has presented extensive analysis of SLAPPs, particularly those targeting journalists. In her report to the Human Rights Council in 2022[21], the Special Rapporteur noted that while laws on sedition or censorship have long been used to punish the media and supress freedom of expression, the digital age has provided new legal weapons including criminal cyber-libel, anti-terrorism, cybersecurity and "fake news" laws.

41. In a 2021 report to the Human Rights Council,[22] the Working Group on Business and Human Rights drew attention to the increasing threats that human rights defenders face as a

[18] Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, para. 21; General Comment No. 37, CCPR/C/GC/37, para. 37.

[19] Resolution of the United Nations Human Rights Council, A/HRC/RES/51/9*, "The safety of journalists"* adopted on 12 October 2022.

[20] Resolution of the United Nations Human Rights Council, A/HRC/RES/56/7, *"Freedom of opinion and expression"*, adopted on 11 July 2024

[21] A/HRC/50/29

[22] *"The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders"*

result of their work to disclose and demand action on abuses by private or state actors related to business activities. The Working Group expressed concern that the space for civil society actors to draw attention to human rights impacts is shrinking, as human rights defenders face reprisals including criminalization of their engagement in public protest or civil dissent. The Working Group recommended that States revise any existing legislation that directly or indirectly restricts the lawful activities of human rights defenders in their interaction with business, for example laws focused on strategic lawsuits against public participation or laws on defamation which may be used to silence defenders.

VIII. Recommendations

42. States must acknowledge and recognize instrumentalization of the justice system as a human rights violation and take active steps to address this abusive practice if and when it happens.

43. States have an obligation to protect the independence of the judiciary and ensure the right to a fair trial. States must also refrain from interfering with the right to public participation and the exercise of other rights protected by international human rights law, including the freedom of expression, association and assembly. At the same time States have a positive duty to create a favorable and safe environment that is conducive to the free exercise by everyone of the right to public participation and public debate, as well as the right to challenge and seek remedy for human rights violations.

44. As part of these obligations, States have a responsibility to ensure that national laws do not enable abusive lawsuits that stifle freedom of expression or block individuals and communities from claiming their rights and challenging injustices. At a general level, the aim of measures should be to extricate the instrumentalized case from the judicial system as rapidly as possible, mitigate its impact on the target, and restore the dispute to the public sphere where it can be the subject of debate.

45. The Special Rapporteur recommends the following measures to address the challenges posed by instrumentalization:

IX. Legislative measures

46. States should take urgent steps to decriminalize defamation, sedition, blasphemy and other offences that may impose disproportionate penalties on persons exercising their rights to freedom of opinion and expression, as well as peaceful assembly and association. Such laws should be replaced by appropriate civil legislation, in line with international human rights standards.

47. States should abolish, or review in accordance with international standards, other laws that criminalize free speech and participation under the pretext of cybersecurity, terrorism, hate speech, public health, national security and “fake news”.

48. States should take appropriate legislative measures to put a stop to lawsuits that are initiated to prevent, restrict or penalize the exercise of rights and fundamental freedoms, including the right of victims to seek redress for human rights violations.

49. To this end, States should consider adopting effective legislation aimed at countering such practices. Such laws should meet the following minimum requirements. They should:

- Be broadly formulated to capture all claims relating to the exercise of fundamental rights and freedoms in matters of public interest.
- Enable courts to dismiss abusive court proceedings on their own initiative or through the application of the target of abusive lawsuits.
- Provide for accelerated procedures for hearing an application to dismiss. The main proceedings should be halted while the application to dismiss is being considered by the court.
- Ensure that a decision for early dismissal is appealable.

- Provide compensation for victims of abusive lawsuits; and
- Enable courts to deter and remedy the use of multiple and coordinated cross-border suits aimed at instrumentalizing the justice system.

50. States should adopt effective, dissuasive and proportionate penalties to deter abusive lawsuits and other instrumentalization of the justice system. To be an effective deterrent, such penalties should be proportionate to the resources available to the claimant.

51. States should, as an additional dissuasive measure, consider disseminating information on decided cases deemed to be abusive of the justice system, including the names of the people or organizations that filed the abusive claim, in compliance with relevant human rights and data protection standards.

52. Laws should ensure effective access to non-judicial remedies and alternative dispute resolution mechanisms.

53. States should ensure by law that public officials are not afforded special protection in relation to defamation. State agencies and public bodies should not be allowed to submit defamation claims.

54. States should, in cooperation with NHRIs, Bar Associations, human rights organizations, trade unions, academic institutions and other relevant actors, ensure adequate access to free legal assistance and representation to targets of abusive litigation aimed at restricting public participation or the exercise of human rights and fundamental freedoms.

55. As and when necessary, States should put in place adequate measures to ensure that targets and victims of abusive lawsuits are protected from potential threats and physical harm, as well as online persecution.

56. States should put in place effective laws and regulations to prevent forum-shopping.

X. Judicial measures

57. Courts should develop procedures and sets of criteria to identify abusive lawsuits.

58. Judges should be empowered to dismiss instrumentalized actions through abuse of process provisions.

59. Prosecutors have a key role in screening cases and ordering non-prosecution in manifestly unfounded cases and when prosecution would not be in the public interest. Prosecutors who engage in a pattern of instrumentalized prosecution should be subject to disciplinary measures. In cases where abusive charges filed by prosecutors are dismissed, this should be regarded as a failure of the State. In such instances, it is the duty of the State to provide redress to the target, by granting compensation.

60. With a view to protecting targets from lengthy proceedings in cases of suspected instrumentalization, case management mechanisms should be reviewed to ensure a speedy and efficacious resolution of cases from the beginning of the process.

61. Justice systems should explore the use of technology to monitor abusive lawsuits and avoid duplication.

62. Courts should ensure that targets are provided with integral reparations (by filers or by the State) in line with international and regional standards, if the lawsuits against them are ultimately found to be abusive and dismissed. Such reparations may include financial compensation, as well as measures to remedy non-pecuniary harm.

63. In cases of instrumentalization, courts should order claimants to indemnify targets for total litigation costs, as well as damages incurred from the litigation, without requiring targets to file a separate lawsuit.

64. Courts should allow strategic litigation related to abusive lawsuits. Such cases can have significant impact, by leading to decisions and interpretations aligned with international standards that can result in concrete legal and policy change, as well as setting positive precedents for future cases.

65. Courts should admit *amicus curiae* briefs in cases of suspected instrumentalization, as these can serve to inform court decisions, in favor of the exercise of human rights and fundamental freedoms associated with public participation.

66. Judicial measures against forum-shopping practices should be strengthened.

XI. Bar Associations and Law Societies

67. Lawyers and Bar Associations have a crucial role in ensuring that targets of abusive lawsuits have access to legal aid and effective legal representation. Bar Associations should encourage lawyers to take on more *pro bono* cases in the public interest, including cases relating to abusive lawsuits.

68. Bar Associations, in cooperation with Law Faculties, should develop incentives to encourage lawyers to counter abuse of the justice system that stifles freedom of expression, obstructs participation in public affairs and the exercise of human rights, and covers up corruption, human rights violations and other crimes.

69. Bar Associations and Law Societies should organize specific human rights education and training for lawyers regarding abusive lawsuits and litigation in order to raise awareness of the risk of instrumentalizing the justice system. This could include peer learning with lawyers from other countries.

70. Bar Associations should strongly discourage lawyers and law firms from engaging in cases involving abuse and instrumentalization of the justice system. Where possible and appropriate, Bar Associations may consider disciplinary action against lawyers and firms that persist in knowingly pursuing actions that abuse the justice system to further their clients' ends at the expense of human rights and fundamental freedoms.

Annex

Response at international level

UNESCO

1. In its 2022 World Trends Report on Freedom of Expression and Media Development, UNESCO expressed concern that a number of countries had strengthened or reintroduced provisions on libel and defamation. This included the introduction of new laws on cybersecurity, "fake news", and hate speech. The report further noted that there had been an increase in the use of civil defamation, which frequently resulted in disproportionate damages and a chilling effect on freedom of expression and the work of journalists.

2. The UNESCO report recommended that States should repeal criminal defamation laws and replace them with appropriate civil defamation legislation in line with international standards. They should also abolish, or review in accordance with international standards, other laws that criminalize expression through vague and overbroad definitions pertaining to "fake news", cybersecurity, terrorism, hate speech, public health and national security, among others, which lend themselves to abusive restrictions on freedom of speech.

European Union

3. Under a European Parliament and Council of the European Union Directive of April 2024, people targeted by SLAPPs, including journalists and human rights defenders, will benefit from a number of procedural safeguards and measures applicable to manifestly unfounded claims or abusive court proceedings in civil matters with cross-border implications. While the directive applies exclusively to civil lawsuits, it provides useful guidance to judicial authorities on how to address and process lawsuits that are potentially vexatious and abusive of the judicial system.

Council of Europe

4. In its Recommendation of 3 April 2024, the Committee of Ministers of the Council of Europe set out a framework for deterring and remedying SLAPPs. The Recommendation provides a set of guidelines for Member States encompassing the relevant legislative framework, procedural safeguards, remedies, support for targets and victims, education, training and awareness-raising. While the Recommendation is non-binding, it builds on European Court of Human Rights jurisprudence affirming that public interest discourse requires specific protections, and that early dismissal mechanisms should be available for all abusive court proceedings against public participation.

Response at the national level

5. The majority of national measures to counter instrumentalization of the justice system have been adopted in response to SLAPPs, and some countries (in particular the USA and Canada) have adopted specific anti-SLAPP legislation. As a rule, these laws enable courts to decide if a civil claim is aimed at activities in the public interest, assess whether there is evidence of abuse of process, and determine if the case has sufficient merit and a realistic prospect of success. These laws further empower courts to dismiss SLAPP cases at the early stages and, in some instances, award costs and damages to defendants.

In general, anti-SLAPP laws have three main objectives, to:

6. Protect the rights of individuals to speak out and associate, which are guaranteed under international human rights law in matters of public concern or public interest. At the same time, laws aim to protect the right of an aggrieved party to file a lawsuit in good faith to obtain a remedy based on actual damage or loss.

7. Discourage and prevent abuse of legal proceedings as a tactic designed to impede the right to public participation. Baseless cases should be processed speedily and dismissed promptly.

8. Provide SLAPP targets with a remedy for costs associated with legal proceedings.

9. In jurisdictions that have not enacted specific legislative protection against SLAPPs, the courts have a central role in ensuring that such lawsuits are not allowed to obstruct justice, prevent the exercise of fundamental rights or negatively affect the work of civil society. In the absence of specific anti-SLAPP laws, courts often have at their disposal other procedural remedies. The Supreme Court of the Philippines has incorporated an anti-SLAPP defense in its Rules of Procedure for Environmental Cases, promulgated in 2010, and Justices of the Court have opined that this defense should not be limited to environmental cases. Court rules may also allow for the dismissal of such lawsuits under "abuse of process" provisions or provisions prohibiting vexatious litigation. For example, the Constitutional Court of South Africa has held that SLAPP suits may be characterized as abusive litigation falls within the common law doctrine of abuse of process, and the courts have the power to prevent this type of abuse.

10. Abuse of process has been described as "misusing a 'criminal or civil process against another party for a purpose different than the proceeding's intended purposes' and thereby causing the party damages (e.g., arrest, seizure of property, or economic injury". In these situations, courts examine the motivation or conduct of the plaintiffs or complainant in bringing the case. The courts may also look beyond motivation and consider whether the case has a reasonable chance of succeeding.

11. Under U.S. common law, abuse of process is a tort that involves the misuse of legal process(es) for an ulterior purpose. Generally, abuse of process is characterized by three common elements: (1) an illegal or improper use of process; 2) an improper or ulterior motive; and (3) harm to a litigant. Courts can recognize abuse of process as one of several actionable offenses aimed at discouraging bad-faith litigation.

12. A global study by Columbia University analyzing SLAPPs cases found that courts are increasingly and explicitly recognizing the concept of SLAPPs and the damaging impact of abusive litigation. The fact that courts are defining and identifying cases as SLAPPs is an important step towards providing protection against them.

13. The study also found that in the vast majority of cases, when protection against SLAPPs was provided, it was granted at the level of the highest courts. This means that protection was granted only after the defendants had invested significant financial and other resources, usually after years of litigation. This serves to illustrate one of the claimants' strategic objectives of instrumentalization of the justice system: subjecting the defendants to years of legal proceedings at a very high financial and personal cost.