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Independence of judges and lawyers

Note by the Secretary-General*

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, in accordance with Human Rights Council resolutions 53/12 and 17/2.

* The present report was submitted to the conference services for processing after the deadline so as to include the most recent information.

Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite

Justice is not for sale: the improper influence of economic actors on the judiciary

Summary

In a climate of increasing economic inequality, corporations and wealthy individuals in many places use their financial clout to infringe on the independence of the judiciary by attempting to intervene in processes to determine who becomes a judge, and to lobby sitting judges to make them more receptive to their aims. These actors also weaponize justice systems to achieve their goals, bringing strategic lawsuits against public participation that masquerade as a defence of private interests, but in fact seek to suppress legitimate criticism, oversight or resistance to their activities.

In the present report, the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, examines improper economic influence on judicial systems, recommending that ethics and integrity systems should be strengthened, loopholes closed, and judges, prosecutors and lawyers do their part to address these harms. If not, while some voices are privileged by justice systems, others will be shut out or silenced, with devastating impacts for human rights.

Introduction and context[1]

1. We live in an age of inequality. Since 2020, the fortunes of the five wealthiest men in the world have more than doubled. In the same period, almost 5 billion people became poorer.[2] No continent is immune from extreme inequality; its impacts are felt in all regions, and in countries in the global North as well as the global South.[3]

2. Economic inequality often translates into inequality of influence, including political influence.[4] Concentrated economic power can erode the parity between those who live in democracies; at its most extreme, this creates a plutocracy, in which government is dominated by the wealthy.[5]

3. The super-rich exercise outsized leverage through many channels, notably through their ownership of powerful multinational corporations.[6] The richest 1 per cent currently own 43 per cent of all global financial assets,[7] creating the kind of undiluted economic power that vastly increases the risk of plutocracy. Adding to this risk is a trend towards diminishing State wealth and increasing governmental dependence on private actors.[8] In rich countries in particular, the share of wealth held by public bodies is now close to zero or negative, leaving countries' assets in the hands of private actors.[9] As a result, economic actors increasingly rival conventional political actors in their potential for influence over State institutions, including the judiciary.

4. Income and wealth inequality has a strong impact on justice needs and outcomes. Poverty influences the prevalence of legal problems, as well as the likelihood of finding a justice solution. In 70 per cent of countries for which there is data, people living in poverty experience more legal problems.[10] These same communities encounter greater barriers to justice in 90 per cent of countries.[11] It is well-recognized that wealth is a major predictor of interactions with the criminal justice system. Poor individuals are more likely to face criminal prosecution and punishment, including imprisonment, for offences inextricably tied to poverty, such

[1] The Special Rapporteur is grateful for the research and analysis undertaken by her students at the New York University School of Law, the Clinique de l'École de droit de Sciences Po and the Stanford Law School Rule of Law Impact Lab. She thanks the American Bar Association, the New York City Bar Association, the Brazilian Bar Association, Focus on the Global South and the Cyrus R. Vance Center for International Justice for their support in organizing regional and thematic consultations.

[2] Rebecca Riddell and others, "Inequality Inc.: how corporate power divides our world and the need for a new era of public action", Oxfam 2024, p. 20.

[3] "3 ways to look at global income inequality in 2023 – insights from the World Inequality Database". Available at https://wid.world/news-article/3-ways-to-look-at-global-income-inequality-in-2023/.

[4] Larry Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age – Second Edition* (Princeton, New Jersey, Princeton University Press, 2016).

[5] Joseph Fishkin and William E. Forbath, "The anti-oligarchy constitution", *Boston University Law Review*, vol. 94, No. 671 (2014); and Maxwell Cameron, "The return of oligarchy? threats to representative democracy in Latin America", *Third World Quarterly*, vol. 42, No. 4 (2020).

[6] Riddell and others, pp. 20 and 26.

[7] Ibid., p. 20.

[8] Lucas Chancel and others, *World Inequality Report 2022* (World Inequality Lab, 2021), pp. 75–79.

[9] Ibid., p. 15.

[10] Daniela Barba and Alejandro Ponce, *Disparities, Vulnerability, and Harnessing Data for People-Centered Justice: WJP Justice Data Graphical Report II* (World Justice Project, 2023), p. 19. See also Sarah Chamness Long and Alejandro Ponce, "Measuring the justice gap: a people-centered assessment of unmet justice needs around the world", (World Justice Project, 2019), p. 7.

[11] Barba and Ponce, *Disparities, Vulnerability, and Harnessing Data for People-Centered Justice*, p. 19. See also Magdalena Sepúlveda Carmona and Kate Donald, "Access to justice for persons living in poverty: a human rights approach", Ministry of Foreign Affairs of Finland (2014).

as failure to pay a fine,[12] loitering, begging and sleeping in public places.[13] Impoverished individuals also encounter greater difficulty paying for legal representation and mounting an effective defense.[14] Poor people are more likely to face the most severe sanction: capital punishment.[15]

5. The correlation between poverty and negative justice experiences is not coincidental. Scholarship suggests that, in many ways, justice systems have been constructed to serve the wealthy while leaving the poor without effective legal protections.[16] This dynamic has worsened alongside increasing inequality, with legal codes strengthening the ability of those holding wealth to shield it from taxation and redistributive efforts.[17] Powerful economic actors use their clout to influence systems to favour their interests, while people living in poverty lack such capacity.[18] Often, wealthy private individuals and groups utilize political lobbying to achieve these goals, seeking to shape laws and government policies.[19]

6. Under international human rights law, judges and justice systems must be impartial, providing equal treatment to all.[20] However, every justice system is vulnerable to efforts by economically powerful actors to capture[21] and control those systems. In the present report, the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, examines efforts by powerful economic actors to exert improper influence in an attempt to transform formally public-serving institutions and processes into tools that work for private interests. She identifies the ways in which judges and justice systems are vulnerable to these forms of influence and encourages States to identify such entry points in their own systems and take necessary steps to increase their resilience.

7. The present report is not an exhaustive study of the issue; it is intended as a wake-up call. For too long, economic capture has flown below the radar of those working to protect justice systems from improper influence. Here, the Special Rapporteur provides a conceptual framework for a new discussion. First, she describes the contours of the problem. Second, she examines two manifestations of the issue in greater depth: orchestrated attempts to reshape justice systems to favour economic actors by targeting the judiciary, and the calculated exploitation of the outsized power of wealthy actors within justice systems through the use of strategic lawsuits against public participation (SLAPPs).

8. In preparation for the report, the Special Rapporteur issued a call for input and received numerous submissions. She also carried out interviews with experts and held

[12] Jean Galbraith and others, “Poverty penalties as human rights problems”, *American Journal of International Law*, vol. 117, No. 3 (2023).

[13] Anneke Meerkotter, “Litigating to protect the rights of poor and marginalized groups in urban spaces”, *University of Miami Law Review*, vol. 74, No. 1 (2019), pp. 7 and 8.

[14] Sepúlveda Carmona and Donald, “Access to justice for persons living in poverty: a human rights approach”, pp. 17–21.

[15] A/73/260, paras. 48–51.

[16] See, generally, Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, New Jersey, Princeton University Press, 2019), chap. 1.

[17] Ibid.

[18] Larry Bartels, *Unequal Democracy*, pp. 233–268; and Daniel Brinks and others, “Understanding institutional weakness: power and design in Latin American institutions”, *Cambridge Elements: Politics and Society in Latin America* (Cambridge University Press, 2019), pp. 35 and 36.

[19] See Riddell and others, pp. 34–36.

[20] Universal Declaration of Human Rights, art. 10; and International Covenant on Civil and Political Rights, art. 14.

[21] “Capture” expresses the idea of a private, financial interest gaining control and influence over a public good – in this case, justice systems – which should be operated for the benefit of all. See Caroline Devaux, “Towards a legal theory of capture”, *European Law Journal*, vol. 24, No. 6 (2018), p. 460.

consultations with judges concerning improper economic influence on the judiciary, as well as global and regional consultations with lawyers and civil society concerning SLAPPs.

II. Defining improper economic influence

9. Article 7 of the Universal Declaration of Human Rights and article 26 of the International Covenant on Civil and Political Rights provide that all people are equal before the law and are entitled without any discrimination to the equal protection of the law. To operationalize this principle, justice systems must be equally accessible to all, and judges should ensure the same legal rules are applied impartially and consistently, with no differentiation based on power, status, wealth, race, gender or any other axes of discrimination. To perform this task, judges must be independent. They must be able to decide matters "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[22]

10. The importance of insulating judges from political influence has been examined extensively by the mandate holder, including in the Special Rapporteur's thematic report on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy.[23] The mandate holder has also examined the problem of judicial corruption, exploring inappropriate incursions on the impartiality of judicial processes by both politicians and wealthy private actors,[24] including organized criminal gangs.[25]

11. In the present report, the Special Rapporteur conceptualizes a form of improper influence that has not been the subject of sufficient focus: improper economic influence over justice systems. The Special Rapporteur offers a working definition as follows:

12. Improper economic influence occurs when:

(a) Economic actors, including corporations, executives and extremely wealthy individuals;

(b) Conduct activities using powerful economic means;

(c) That have, or may be seen to have, an improper influence on the structure of justice systems or the carrying out of judicial functions, with the apparent purpose of exploiting the justice system to further their specific aims;

(d) With the impact that processes designed to operate fairly and transparently to ensure judicial independence and equality before the law are systematically distorted to favour improper aims.

13. The United Nations High Commissioner for Human Rights has recently identified "State capture" of the judiciary by "powerful economic" actors as "an abuse of power, with serious consequences for human rights".[26] The specific aims private actors seek to advance may be tied to protecting or enhancing their wealth or furthering their business interests. They may also concern wider political or social goals. The activities used to further these aims may be lawful – or masquerade as

[22] Basic Principles on the Independence of the Judiciary, principle 2.
[23] A/HRC/56/62.
[24] A/67/305, paras. 25 and 45.
[25] See A/72/140.
[26] Volker Türk, "Human Rights are our mainstay against unbridled power," 9 September 2024. Available at https://www.ohchr.org/en/statements-and-speeches/2024/09/human-rights-are-our-mainstay-against-unbridled-power.

being lawful – but are nevertheless destructive of human rights, including judicial independence and equality before the law.

14. Other human rights mechanisms have noted that States must protect courts from "economic pressure" by "business actors" [27] and should ensure "complete independence" from actors including businesses.[28] The Working Group on the issue of human rights and transnational corporations and other business enterprises has stressed that, to be rights-respecting, responsible business interactions with the judiciary[29] should be "based on values of integrity, legitimacy, accountability and oversight, consistency and transparency".[30] Improper influence, and the undermining of human rights in the service of private aims, is particularly likely to arise when economic actors use covert, deceptive or misleading means to achieve impacts on justice systems.[31]

III. Systematic attempts to purchase influence over judges

A. Introduction

15. Across the world, there is compelling evidence that wealthy actors use murky and unaccountable methods to target justice systems. Through these strategies, economic actors attempt to alter the playing field to their own advantage. In submissions for the present report, and in scholarly literature and policy studies, a range of structural interventions by economic actors have been identified. These include the following, which will not be the focus of this report:

(a) Sponsoring academic research or think tanks to promote pro-business legal theories;[32]

(b) Lobbying political and justice bodies to alter court rules and procedures to benefit economic actors, for example by restricting the grounds for class action lawsuits;[33]

(c) Inserting arbitration clauses in consumer and employment contracts and removing certain classes of disputes from resolution in the ordinary courts to resolution processes that are less transparent, and where judicial independence is not required;[34]

(d) Creating new dispute resolution or remedy frameworks, for example operational-level grievance mechanisms for mega-projects, where they divert claims to privatized processes and preclude judicial resolution.[35]

[27] Guiding Principles on Business and Human Rights, principle 26, commentary.
[28] Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017).
[29] A/77/201, para. 9.
[30] Ibid., para. 6.
[31] Ibid.
[32] Dieter Zinnbauer, "Corporate judicial activity", working paper (2022), pp. 20–22. See also Sheldon Whitehouse and Jennifer Mueller, *The Scheme: How the Right Wing Used Dark Money to Capture the Supreme Court* (New York, The New Press, 2022), pp. 137–151.
[33] Joanne Doroshow, "Federal legislative attacks on class actions", *Loyola Consumer Law Review*, vol. 31, No. 1 (2018).
[34] Deepak Gupta and Lina M. Khan, "Arbitration as wealth transfer", *Yale Law & Policy Review*, vol. 35, No. 2 (2017); and Katherine Stone and Alexander Colvin, "The arbitration epidemic: mandatory arbitration deprives workers and consumers of their rights", briefing paper No. 414, Economic Policy Institute, 2015, p. 3.
[35] Submission of Colombia.

16. In the present section, the Special Rapporteur considers one particular strategy to remodel justice systems: seeking to influence who becomes a judge or influencing the receptiveness of sitting judges to economic actors' interests.

B. Judicial selection and appointment

17. When economic actors adopt improper strategies to attempt to shape who becomes a judge, this may create the perception that judges will be biased towards patrons seen to have helped them get appointed. More generally, there is a risk that the involvement of economic actors will – or will be seen to – orient judicial selection away from merit-based criteria and towards criteria based on judges' positions on issues of concern to the economically powerful.

18. Both the criteria and processes for judicial selection and appointment are essential to guaranteeing judicial independence.[36] Criteria for judicial appointment should be "objective",[37] and "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".[38] Legal standards require that "decisions concerning the selection and careers of judges should be based on merit, having regard to the qualifications, skills and capacities of the candidates, as well as to their integrity, independence and impartiality".[39] Mechanisms for choosing judges "shall safeguard against judicial appointments for improper motives".[40]

19. States utilize a variety of processes for the selection and appointment of judges,[41] including political appointment by the executive or legislative branches of power; appointment by direct, popular elections; corporative appointments by bodies composed of judges; appointment by judicial councils with plural representation; and mixed systems where the nominating body is one type, such as a judicial council, and the body in charge of appointments is of a different nature, such as a political body.[42] Appointment by a judicial council, or an equivalent body independent of the legislative and executive branches of power, is often seen as the best means of guaranteeing judicial independence and insulating judges from improper influences from political branches of government, as well as from private actors.[43] However, all methods of selection and appointment have access points through which political and economic actors may attempt to exert improper influence through clandestine means.

1. Where judges are selected or appointed by judicial councils or bodies with similar functions

20. In States with judicial nomination or appointment bodies, economic actors may covertly obtain membership on those bodies, or otherwise engage in organized

[36] Human Rights Committee, general comment No. 32 (2007), para. 19.
[37] Ibid.
[38] Basic Principles on the Independence of the Judiciary, principle 10.
[39] A/HRC/38/38, para. 49. These principles are reflected in other international legal norms. See Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities, para. 44; and African Commission on Human and Peoples Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), para. 4 (i). See also European Commission for Democracy through Law, "Compilation of Venice Commission opinions and reports concerning judges", 2023, p. 6.
[40] Basic Principles on the Independence of the Judiciary, principle 10.
[41] European Commission for Democracy through Law, "Compilation of Venice Commission opinions and reports concerning judges", p. 12.
[42] A/HRC/11/41, para. 24.
[43] A/HRC/38/38, para. 48. See also submission of Ukraine.

schemes to direct their activities. This phenomenon has been reported in Guatemala.[44] Competition for membership on judicial nomination commissions in Guatemala has been described as resembling an electoral contest, including the use of lobbying, parties,[45] advertising, rallies and promotional merchandise.[46] This politicized process has reportedly generated opportunities for economic actors to purchase influence by financing expensive campaign activities for candidates.[47] Investigations by the Guatemalan Special Prosecutor's Office against Impunity in 2014, 2017 and 2019 specifically targeted these influences, revealing the extent of economic actors' influence over the nomination commissions.[48] However, these investigations were halted when the mandate of the International Commission against Impunity in Guatemala ended. The Special Prosecutor's Office was further weakened by the dismissal of its head and attacks on prosecutors handling high-profile corruption cases. Nonetheless, the Special Prosecutor's Office against Impunity presented evidence in 2020 of continued economic influence on the 2019 selection of Supreme Court and Court of Appeals magistrates.[49]

21. Processes for the appointment of non-judicial committee members – including lawyers, academics and other representatives of civil society – can also become politicized.[50] Furthermore, these committee members may have pre-existing professional connections with private actors. The inclusion of non-judicial members on judicial selection bodies is not inherently improper, and in some cases it may be an important means of guarding against corporatism among judges.[51] Nevertheless, there is a risk that economic actors may purchase influence through these members.

22. In some States, the nomination of non-judicial members to selection committees is delegated to independent bodies, which economic actors may systematically target. Where bar associations have a role in nominations, economic interest groups may propose candidates for leadership within those associations, or for membership in the

[44] See communications GTM 1/2024 and GTM 1/2020. Available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments.

[45] International Commission against Impunity in Guatemala, "Comisiones de postulación: desafíos para asegurar la independencia judicial", 2019, p. 7 (in Spanish).

[46] Claudia Escobar, "How organized crime controls Guatemala's judiciary," in *Corruption in Latin America*, Robert Rotberg, ed. (Springer, 2019), p. 250.

[47] See, for example, A/HRC/23/43/Add.1. See also the Guatemalan "Parallel Commissions 2014" investigation into allegations that a businessman and lawyer invested in campaign events to promote the election of representatives from the Guatemalan Bar and Notary Association aligned with his interests. Available at www.cicig.org/wp-content/uploads/2018/02/COM_023_20180227_Comisiones_paralelas_l.pdf (in Spanish).

[48] International Commission against Impunity in Guatemala, "Comisiones de postulación", p. 20.

[49] Fiscalía Especial contra la Impunidad, "Comisiones paralelas 2020: informe al Congreso de la República en cumplimiento de sentencia de la Corte de Constitucionalidad" (2020). Available at https://independenciajudicial.org/wp-content/uploads/2020/05/Presentacio%CC%81n-informe-al-congreso.pdf (in Spanish).

[50] International Commission against Impunity in Guatemala, "Comisiones de postulación", pp. 7 and 8. See also Impunity Watch, "Procesos de elección de magistrados en Guatemala y Honduras", 2015, pp. 13–15 (in Spanish).

[51] A/HRC/38/38, paras. 73 and 107.

associations appointed to judicial selection committees.[52] Improper influence can even extend to creating "cardboard"[53] entities that nominally meet the criteria for involvement in selection but actually act as a shell for private actors' interests. For example, economic actors have reportedly created universities and hired law school faculty with the apparent aim of being included among the academic membership of judicial selection committees.[54] In some circumstances, these universities may not have been created as traditional institutions aimed at conferring legal degrees.[55]

23. Finally, economic actors may endeavour to influence decisions by lobbying sitting members of selection committees. Lobbying involving lavish gifts, meals or entertainment may amount to corruption if there is an expectation of repayment by selecting judges in accordance with the donor's preferences. Where meetings take place "off the books" there is a further issue: selection may be influenced by secretive private processes, removed from public scrutiny and accountability. In Guatemala, investigations document the existence of unofficial "parallel commissions" dominated by political and economic interests and designed to direct the work of the formal nomination process through sophisticated negotiation and influence trading.[56] It is reported that some economic actors have spent significant sums arranging meetings for commissioners at law firm offices and hotel event spaces outside the hours and facilities that were intended to carry out the nomination process publicly, as well as provided meals, accommodation, parties, favours and payments.[57]

24. Even lobbying that falls short of corruption may orient judicial selection away from merit-based criteria and towards criteria favoured by economic actors. In addition to increasing the possibility of bias, this risks the appointment of unqualified judges. In consultations for the present report, judges who participated expressed concern that some appointment systems lack objective criteria or evaluation systems to determine the competencies of judges,[58] opening the door to subjective, discretionary factors and intervention by economic actors.

[52] For example, in Guatemala, it is alleged that economic actors, including groups connected with organized crime, obtained control over the Bar and Notary Association, proposing their own candidates for the Board of Directors and for committees involved in judicial appointments. See Claudia Escobar, "How organized crime controls Guatemala's judiciary", p. 249. See also Bar and Notary Association of Guatemala, "Election of titular and alternate magistrate for the Constitutional Court 2021-2026", Movimiento Pro Justicia 2021, p. 3, available at www.movimientoprojusticia.org.gt/images/archivos%202021/Primera%20Vuelta%20elecci%C3%B3n%20CC-CANG%2026022021.pdf (in Spanish); Federación Centroamericana de Juezas y Jueces por la Democracia, "Guatemala: diagnosis of the judicial system in Central America and the Caribbean", 2024, p. 9, available at https://fecajud.org/wp-content/uploads/2024/07/Diagnostico-Guatemala-FECAJUD-y-Vance-Center.-Junio-2024.pdf (in Spanish); and Impunity Watch, "Anomalies in the Constitutional Court election process", May 2021, p. 3, available at https://independenciajudicial.org/wp-content/uploads/2021/05/IW-informe-anomalias-en-la-eleccion-de-la-CC-mayo-2021.pdf (in Spanish).

[53] International Commission against Impunity in Guatemala, "Comisiones de postulación", p. 8.

[54] See Fundación Myrna Mack and Advocacy for Human Rights in the Americas (WOLA), "Guatemala's justice system: evaluating capacity building and judicial independence" (2019), p. 38; Cyrus R. Vance Center for International Justice, "Contribution to the fourth cycle of the universal periodic review of the 42nd Session of the United Nations Human Rights Council on Guatemala" (2022), paras. 13 and 14; and Federación Centroamericana de Juezas y Jueces por la Democracia, "Guatemala", p. 5.

[55] International Commission against Impunity in Guatemala, "Comisiones de postulación", p. 13. Claudia Escobar, "How organized crime controls Guatemala's judiciary", p. 250. See also, Fundación Myrna Mack and WOLA, "Guatemala's justice system", p. 39.

[56] Fiscalía Especial contra la Impunidad, "Comisiones paralelas 2020".

[57] International Commission against Impunity in Guatemala, "Comisiones de postulación", pp. 9–13.

[58] Judges consultations.

2. Where judges are selected or appointed through voting

25. In States where judges are elected by the public, or where the political branches of government take an active role in appointment, economic actors can shape courts by clandestinely funding campaigns for judicial candidates.

26. Few States use direct elections to select judges, particularly for apex courts. The Plurinational State of Bolivia uses direct election to choose between candidates preselected by the legislature.[59] In Mexico, where proposals are being considered for the popular election of many judges, concerns have been raised about the risk of improper influence by economic interests, including large businesses and organized crime.[60]

27. The phenomenon of improper economic influence over judicial elections is particularly pronounced in the United States of America, where 9 out of 10 state judges must win popular election to be appointed to, or remain in, judicial office.[61] These judges play a vital role within the United States legal system, handling 90 per cent of judicial business.[62] Individual state courts, particularly state Supreme Courts, determine many of the most impactful and controversial questions of the day. These include economic issues that affect the fortunes of very rich individuals and corporations, such as business regulation or tax rules, but also political issues[63] and social issues[64] of great importance for economic actors and interest groups.

28. As a result of a 2010 United States Supreme Court decision,[65] outside interest groups, covertly backed by donors,[66] can deploy unlimited spending to shape the political and ideological makeup of key courts.[67] During the period 2021–2022, outside interest groups spent $45.7 million on state Supreme Court elections.[68] This money can be used to finance digital, television, radio and mail advertising and text messages, including to targeted voters and their households.[69] Advertising campaigns often involve vicious attacks against judicial candidates. Such "attack ads" may include racially discriminatory messaging,[70] or portray candidates as "soft on

[59] See communications BOL 1/2023 and BOL 1/2024, available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments. See also Amanda Driscoll and Michael J Nelson, "Judicial selection and the democratization of justice: lessons from the Bolivian judicial elections", *Journal of Law and Courts*, vol. 3, No. 1 (2015), p. 122.

[60] See communication MEX 11/2024, available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments. See also Adriana Garcia, "A threat to judicial independence: constitutional reform proposals in Mexico", Stanford Law School Rule of Law Impact Lab and the Inter-American Dialogue 2024, p. 13; and Centro de Estudios Constitucionales, "Analysis of the reform initiative to the judicial power in Mexico", 2024, p. 36.

[61] Michael Kang and Joanna Shepherd, *Free to Judge: The Power of Campaign Money in Judicial Elections* (Stanford University Press, 2023), p. 4.

[62] Ibid, p. 6.

[63] Such as electoral redistricting.

[64] Such as restrictions on abortion.

[65] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[66] Tim Lau, "Citizens United explained", Brennan Center for Justice, 12 December 2019.

[67] Laila Robbins, "Conservative group behind Kavanaugh confirmation has spent years reshaping state and federal benches", Brennan Center for Justice, 12 September 2018; Andy Kroll and others, "We don't talk about Leonard: the man behind the right's Supreme Court supermajority", ProPublica, 11 October 2023.

[68] Outside groups can raise and spend unlimited sums without disclosing the sources of their donations, but there is evidence that wealthy individuals are at work behind the scenes.

[69] Evan Vorpahl and Lisa Graves, "Pulling back the curtain on who is targeting state Supreme Courts to limit our freedoms", True North Research, 2024, p. 14. Available at www.proteusfund.org/wp-content/uploads/true-north-conquering-the-courts-report.pdf.

[70] Andy Kroll and others, "We don't talk about Leonard".

crime",[71] in efforts to elect candidates expected to provide pro-business rulings on issues such as cuts to corporate taxes or the extent of government regulation.[72]

29. In addition to shaping the composition of courts by electing judges seen to favour particular ideologies or judicial philosophies, donors may hope specific judges will favour their patrons' interests to "pay them back" or secure their support for future bids at re-election. In a survey in the United States, almost half of elected judges themselves reported that campaign contributions had an impact on their decisions.[73] This is supported by analysis of judicial decision-making, which demonstrates that elected judges tend to favour their donors' preferences.[74] This study suggests that, as the amount of money a judge's campaign receives from business groups increases, so does the likelihood the judge will make pro-business decisions.[75] This connection is particularly stark in relation to judges seeking re-election, who need to maintain donor support to keep their jobs.[76]

30. Although United States federal judges are not elected by the public, they are still subject to political processes. Following nomination by the executive branch, federal judges must be confirmed by the Senate, and economic actors have deployed their financial might to influence senators' votes. It is alleged that a single outside interest group spent $10 million on advertisements supporting the confirmation of one Supreme Court justice, and millions opposing another nominee in separate confirmation proceedings. In this way, economic actors and interest groups attempt – and claim to have succeeded in some cases – to influence the composition of federal courts, including at the highest level.[77]

31. The Special Rapporteur observes that, for specific instances of bias or potential conflict of interest, the primary remedy is judicial recusal. However, recusal is undermined when the ultimate source of funding is hidden, giving rise to the potential for unobservable conflicts of interest when judges decide cases involving their campaign donors.[78] Furthermore, recusal would not provide a solution to the attempted systematic biasing of the justice system towards particular private interests through coordinated campaigns to influence court composition described in the present section.

C. In office and beyond

32. Opportunities for economic actors and groups to exercise systemic improper influence to reshape justice systems do not end following judicial appointment. Economic actors exploit their wealth and power to achieve special access to sitting judges. The aim is to cultivate relationships and improve judicial receptivity: to be

[71] Kate Berry, "How judicial elections impact criminal cases", Brennan Center for Justice, 2015.
[72] Alicia Bannon and Scott Greytak, "The big money propping up harsh sentences", *The Atlantic*, 14 November 2015.
[73] Michael Kang and Joanna Shepherd, *Free to Judge*, p. 11.
[74] Ibid.
[75] Ibid.
[76] Ibid., p. 104.
[77] Andy Kroll and others, "We don't talk about Leonard"; and the Ziklag Group, "Thursday's Ziklag Call: Supreme Court Mercies, Election Update, & REVIVAL" (provided by ProPublica).
[78] Patrick Berry and Janna Adelstein, "Court rules to regulate judicial elections", Brennan Center for Justice, 25 June 2024.

heard "more clearly, loudly and frequently than other interest groups",[79] or even to engender a sense of reciprocity or indebtedness.[80] Sometimes, this proximity is facilitated by power brokers, who seek to have a coordinated impact on the judiciary while enhancing their connections to private actors through "influence-peddling".[81]

33. Effective transparency and oversight over engagement with public officials ordinarily requires strong conflict-of-interest legislation, income and asset disclosure rules, comprehensive lobbying registration and disclosure frameworks, and regulations to ensure the meaningful participation of civil society and other non-business stakeholders in political consultations.[82] Human rights risks are more likely to arise where inadequate disclosure and transparency frameworks exist,[83] or where different stakeholders have a grossly unequal capacity to place their views before decision-makers.[84]

1. A sliding scale of conflict: paid engagements, resource dependence, training and socializing

34. Judges must act with integrity, ensuring their conduct is above reproach in the view of a reasonable observer.[85] Even when economic actors do not actually shape judicial decision-making, it is necessary to consider the perception that they do. Potential entry points for economic actors to exercise improper influence over sitting judges may be conceptualized on a "sliding scale" in terms of their probability of creating improper influence. However, economic actors may seek to exploit all of these avenues in concert, particularly in relation to the most powerful and influential judges. The cumulative impact of these efforts may be greater than their biasing effects when considered in isolation.

35. First, corporations, or those representing businesses or other economic actors, may offer judges income-generating opportunities, such as speaking engagements or appointments as expert consultants or arbitrators. Consultations with judges for the present report revealed a multiplicity of rules regarding the permissibility of earning additional income during judicial tenure. Several judges reported a complete prohibition on any additional fee-paying work.[86] However, in some States, it is commonplace for judges to "top up" their income in this way, and judges more than double their judicial salaries through such supplemental work.[87]

36. Judges are generally not barred from participating in extrajudicial activities, so long as these do not detract from the dignity of their office or interfere with judicial duties.[88] They should be positively encouraged to write, lecture and teach concerning the law, as such activities are likely to be in the public interest.[89] Judges may receive

[79] Dieter Zinnbauer, "Corporate judicial activity", p. 5, describing the "core strategy" in political lobbying. In the same paper, a study exploring worldwide corporate judicial lobbying, Mr. Zinnbauer also stressed that, as judges enjoy long-term tenure, cultivating proximity to them may be more beneficial than creating relationships with elected officials, who may be replaced following the next election (see p. 11).

[80] Dieter Zinnbauer, "Corporate judicial activity", pp. 28–30.

[81] Andy Kroll and others, "We don't talk about Leonard".

[82] A/77/201, para. 31; see also submissions of Honduras, Armenia and Mexico

[83] A/77/201, para. 29.

[84] Ibid., para. 30.

[85] Bangalore Principles of Judicial Conduct, value 3.

[86] Judges consultation. See, for example, Judges Act of Canada, sects. 55 and 57 (1); and Guide to Judicial Conduct of the United Kingdom of Great Britain and Northern Ireland, p. 19.

[87] Dieter Zinnbauer, "Corporate judicial activity", p. 30.

[88] United Nations Office on Drugs and Crime (UNODC), "Commentary on the Bangalore Principles of Judicial Conduct", 2007, para. 166; and European Commission for Democracy through Law, "Compilation of Venice Commission opinions and reports concerning judges", pp. 10 and 11.

[89] UNODC, "Commentary on the Bangalore Principles of Judicial Conduct", para. 157.

reasonable compensation for permitted extrajudicial activities,[90] so long as this does not exceed the amount an equivalent non-judge would receive, [91] the payment does not create conflicts of interest and the source does not raise questions of improper influence or partiality.[92] The Special Rapporteur considers that improper influence is more likely to arise if the judge receives significant compensation from supplemental work in comparison to their regular income. The risk is also greater if extrajudicial activities are funded or arranged by actors who are repeat players in proceedings before the court, or who have a clear long-term interest in shaping jurisprudence, including law firms or economic interest groups.[93]

37. Second, economic actors may cultivate relationships with the judiciary by organizing and funding judicial training seminars. Judicial education programmes have been sponsored by multinational corporations, including oil and pharmaceutical companies, and by foundations linked to billionaire donors.[94] It is reported that corporations or businesses may also pay judges' expenses for attending training conferences that they do not sponsor. It is permissible for judges to receive reimbursement of expenses for attendance at a function or activity devoted to the improvement of the law, the legal system or the administration of justice.[95] However, a risk of improper influence arises when the funding provided is outsized to the purpose of the event – for example, when donors continue to pay for a judge's accommodation at a lavish resort for several days after the conclusion of a training programme. While many States permit judges to receive token gifts, awards or benefits,[96] gifts of excessive value raise questions about a judge's impartiality and integrity.[97]

38. In relation to sitting judges, the risk of improper influence is managed by prohibiting judges from undertaking certain activities;[98] by requiring judges to disclose such activities, as well as their income and assets;[99] and by mandating that judges disqualify or recuse themselves from participating in proceedings in which the judge is unable to decide the matter impartially.[100] Circumstances meriting recusal include those where a judge or a member of her or his family has a financial interest in the outcome of proceedings.[101]

39. However, many of the activities described in the present section exploit loopholes in the processes for guarding against improper influence. Scholars focusing on corporate lobbying have highlighted that asset, income and interest disclosure rules for judges often lag behind the rules for other branches of government; for example, only 6 of the 41 Organisation for Economic Co-operation and Development

[90] Ibid, para. 179; see also submission of the Republic of Korea.
[91] UNODC, "Commentary on the Bangalore Principles of Judicial Conduct", para. 157.
[92] Ibid., para. 182.
[93] Some judges and prosecutors reportedly deliver lectures for which they are compensated by private sector entities that sometimes have cases pending before them. See Maria Trombini and others, eds., *The Fight against Systemic Corruption: Lessons from Brazil (2013–2022)* (Springer, 2024), pp. 288 and 289; and Luis Vassallo, "Magistrados vão a evento em Portugal pago por empresas com ações pendentes", *UOL*, 28 May 2022 (in Portuguese).
[94] Chris Young and others, "Corporations, pro-business nonprofits foot bill for judicial seminars", Center for Public Integrity, 28 March 2013.
[95] UNODC, "Commentary on the Bangalore Principles of Judicial Conduct", para. 179.
[96] Bangalore Principles of Judicial Conduct, principle 4.16.
[97] UNODC, "Commentary on the Bangalore Principles of Judicial Conduct", para. 181.
[98] See also Bangalore Principles of Judicial Conduct, value 4; and submission of the Dominican Republic.
[99] See also European Commission for Democracy through Law, "Compilation of Venice Commission opinions and reports concerning judges", p. 57; and submission of Slovakia.
[100] Bangalore Principles of Judicial Conduct, principle 2.5; see also submissions of Cyprus and Poland.
[101] Bangalore Principles of Judicial Conduct, principle 2.5.

countries that have lobbying disclosure requirements include the judicial branch.[102] In addition, economic actors may funnel paid extrajudicial work or sponsor training events through separate entities, such as universities or non-profit organizations, obscuring their role in providing benefits to judges – sometimes even to the judges themselves. This limits the capacity for parties to ensure judicial impartiality by seeking judges' recusal or disqualification, and judges' own ability to assess potential conflicts.

40. When economic actors sponsor judicial training seminars, including determining their subject matter and speakers, this suggests another potential purpose: socializing judges to be more receptive to particular legal interpretations or theories that favour corporate aims.[103] If such judicial training programmes become sufficiently widespread and regular, this may create the perception of a privatized system of judicial education, funded and dictated by economic interests.[104]

2. The "revolving door"

41. Strategic attempts to exercise improper influence over judges extend to their career plans after they leave office. In this context, improper influence may arise from corporate actors, or those representing businesses or other economic actors – including private law firms – offering post-retirement job opportunities to judges while they are still serving.[105] As a result, judges may be improperly motivated, or seen to be motivated, by incentives related to their career prospects after their exit from the judiciary.[106]

42. The concept of the "revolving door" is a helpful description of this dynamic, referring to the phenomenon of individuals moving between employment in the public and the private sector, in the areas they previously regulated.[107] If judges are focused on maximizing their future payoff in the private sector, they cannot serve as impartial arbiters in disputes where economic actors (i.e. businesses and the law firms that represent them) are themselves parties. This problem may be particularly acute when judges have inadequate remuneration or security of tenure, and therefore have a more powerful incentive to seek private sector employment.[108]

43. Consultations with judges for the present report demonstrated that judicial systems take different approaches to regulating this problem. Ethical rules may place the onus on judges to avoid discussions about post-judicial careers before their term comes to an end; to refrain from appearing in court for a period, or at all, following retirement; and to be attentive to whether their post-judicial activities could

[102] Dieter Zinnbauer, "Corporate judicial activity", p. 33.

[103] Bruce Green, "May judges attend privately funded educational programs? Should judicial education be privatized?: questions of judicial ethics and policy", *Fordham Urban Law Journal*, vol. 29, No. 3 (2002), p. 1003; David Dayen, "Corporate- funded judicial boot camp made sitting federal judges more conservative", *The Intercept*, 23 October 2018; and Elliott Ash and others, "Ideas have consequences: the impact of law and economics on American justice", working paper for the National Bureau of Economic Research, February 2022.

[104] Bruce Green, "May judges attend privately funded educational programs?", pp. 1002 and 1003.

[105] Shubhankar Dam, "Second innings: how post-retirement ambitions imperil judges' integrity", *The Caravan*, 9 February 2021, pp. 62 and 67; and Les Amis de la Terre France and l'Observatoire des multinationales, "Les Sages sous influence? Le lobbying auprès du Conseil constitutionnel et du Conseil d'État", 25 June 2018, pp. 17 and 18 (in French).

[106] Submission of Hungarian Helsinki Committee; and judges consultations.

[107] Harvard Law Review Association, "Developments in the law: conflicts of interest in the legal profession", *Harvard Law Review*, vol. 94, No. 6 (1981), p. 1428.

[108] Siri Gloppen, "Courts, corruption and judicial independence", in *Corruption, Grabbing and Development: Real World Challenges*, Tina Søreide and Aled Williams, eds. (Cheltenham and Northampton, Mass., Edward Elgar Publishing, 2014), p. 71.

undermine public confidence in the judiciary.[109] But former judges often cannot be the subject of a complaint to a judges' regulator for their conduct after they leave office, making enforcement of these standards challenging.[110] Finally, States may mandate that public servants, including judges, require prior approval of post-retirement job prospects to manage potential conflicts of interest,[111] or impose a "cooling off" period in which judges cannot carry out certain forms of work that carry particular risks of conflict. However, in some States, there are no formal rules concerning judges' post-retirement work.[112]

IV. Misuse and abuse of justice systems: advancing private interests at the expense of human rights through strategic lawsuits against public participation

A. Introduction

44. As explored above, powerful economic actors may seek to exploit loopholes in ethics and integrity rules in organized efforts to reshape justice systems to serve their long-term aims. Submissions for the present report emphasized that such actors also make strategic use of existing justice systems to achieve more immediate goals. In this section, the Special Rapporteur focuses on one form of strategic use of the justice system to further the interests of economic actors: strategic lawsuits against public participation (SLAPPs). An examination of such lawsuits brought by powerful economic actors offers a stark illustration of the weaponization of justice systems to serve private interests at the expense of legitimate human rights objectives.

45. Companies and wealthy individuals use SLAPPs in an effort to shield their business interests or protect their reputations in the face of legitimate investigation, criticism or protest. In doing so, SLAPPs convert public concerns into private legal disputes, creating a climate in which activists may be punished, intimidated or deterred from engaging in human rights-promoting activities in the future. Most importantly for the mandate holder, SLAPPs claimants seek to enlist judges inappropriately in this effort.

[109] See, for example, Canadian Judicial Council, "Ethical principles for judges" (2021), pp. 57 and 58; and Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct, Third Edition* (2023), chap. 7.

[110] Judges consultations.

[111] Order No. 58-1270 of 22 December 1958 enacting the Organic Law on the Status of the Judiciary (France), art. 9-2; see also submission of the Republic of Korea.

[112] See Patrick O'Brien and Ben Yong, "Work in judicial retirement: a policy report" (2023). Available at https://sites.google.com/brookes.ac.uk/the-judicial-afterlife.

B. Defining and spotting strategic lawsuits against public participation

46. Regional bodies, domestic lawmakers and experts have developed various definitions of SLAPPs.[113] Defining SLAPPs is important, since the rapid identification of abusive actions gives judges and lawyers more options for combating them. After careful consideration, the Special Rapporteur adopts the definition used by the Office of the United Nations High Commissioner for Human Rights, as the Special Rapporteur considers that this definition includes all the key elements required to identify a SLAPP. SLAPPs are "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".[114]

47. There are three key elements that characterize a SLAPP:

(a) 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 SLAPP;

(b) The action abuses legal tactics, including bringing disproportionate or excessive claims, issuing multiple legal cases and "forum shopping";

(c) The subject of the action concerns public participation, such as the exercise of the right of free speech or assembly, on matters of public interest, such as human rights violations, illegal or unethical action by corporations, or environmental damage and climate change.

1. Strategic lawsuits against public participation exploit power imbalances

48. SLAPP targets are often individual activists, local groups, Indigenous Peoples, non-governmental organizations or journalists. SLAPP claimants may be wealthy, high-profile individuals, local businesses or transnational corporations. SLAPPs may be brought by State agencies as well as private actors, although the latter are the focus of the present report.

2. Strategic lawsuits against public participation abuse legal tactics

49. SLAPPs may use either civil or criminal procedures. A submission for the present report tracked 474 SLAPPs initiated by private actors around the world since 2015.[115] At least 68 per cent of those cases involved criminal charges, with 9 of 10

[113] See, for example, Directive (EU) 2024/1069 of the European Parliament and of 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") (*Official Journal of the European Union*, L 2024/1069, 16 April 2024); 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).

[114] 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.

[115] Submission of the Business and Human Rights Resource Centre.

occurring in the global South.[116] Most cases involving civil legal claims occurred in the global North.[117]

50. Whatever proceeding, civil or criminal, is selected, SLAPPs utilize legal tactics that are unreasonable, improper or abusive. Civil claims often seek inflated and devastating financial awards. Where SLAPPs target action by an organization, powerful private actors may bring claims against individual employees or members, rather than the organization itself, to ramp up the pressure.

51. Forum shopping – selecting a court or jurisdiction the claimant believes will favour its position – is a major issue in SLAPP cases. This is particularly true for claims involving transnational corporations, which may be able to demonstrate a connection to multiple jurisdictions. Economic actors may select jurisdictions with fewer protections against SLAPPs, creating a further disadvantage for the targets of their suits.[118] Forum shopping can also increase stress and costs for defendants, as they may be required to face proceedings in far-flung, unfamiliar jurisdictions.[119] Especially severe problems arise when claimants are able to refile SLAPPs dismissed in another jurisdiction, exposing SLAPP targets to potentially unlimited litigation.

3. Strategic lawsuits against public participation target public participation on matters of public interest

52. Many SLAPPs brought by economic actors allege some form of damage against a company or private interest. But this represents a disingenuous concealment of the private actor's true aims: to stifle legitimate criticism, oversight or resistance to their activities. SLAPP claims for defamation often relate to campaigns led by human rights defenders or critical reporting by journalists.[120] They may also be aimed at Indigenous Peoples who speak up about violations of their rights, including to self-determination, consultation and free, prior and informed consent.[121] Criminal cases may involve allegations of damage to a company's property or accusations that a company's employees have been attacked; such accusations may arise in the context of peaceful resistance to land-grabbing or extractive activities.[122]

53. It has been reported that activists face accusations of trespassing or physical obstruction when exercising their right to free assembly. Such claims may target environmental defenders engaging in protected acts of protest[123] or on-site monitoring of activities of public concern, such as environmental contamination caused by extractive industries. The Special Rapporteur also heard of peasant communities that occupied territory to resist illegal land-grabbing by companies being subjected to private criminal complaints of trespassing.[124]

54. In States where prosecutions can be initiated by private actors, SLAPPs may also involve more serious criminal accusations. Reports describe cases where private companies involved in major extractive projects filed private criminal complaints in response to protests from local communities. Charges encompassed kidnapping, home invasion, aggravated robbery, riots, obstruction of the operation of public services and aggravated damages – crimes that could carry lengthy prison sentences.

[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] A/HRC/50/29, para. 67.
[121] E/C.19/2024/6, paras. 13 and 14.
[122] Submission of the Business and Human Rights Resource Centre.
[123] Ibid.
[124] Asian regional SLAPP consultation.

55. In global SLAPPs cases tracked since 2015, the underlying issues of public interest at stake frequently relate to mining, agriculture and livestock.[125] More localized studies reveal a similar pattern. The United Nations Development Programme found that most SLAPPs initiated in Thailand between 1997 and 2022 were filed by mining companies, followed by the livestock industry.[126] The vast majority of such SLAPPs targeted local villagers.[127] However, SLAPPs may arise out of perceived threats to any economic activities, for example in response to reports of unlawful dismissals at a factory,[128] or protests at tax evasion by a technology company.[129]

C. Strategic lawsuits against public participation represent a manipulation by economic actors of the proper role of judges, prosecutors and lawyers

56. Judges, prosecutors and lawyers have a duty to uphold human rights norms recognized in national and international law.[130] These include the rights of freedom of expression, association and information,[131] and the special protections granted to the activities of human rights defenders[132] – all rights which are placed in jeopardy by SLAPPs. As businesses, private law firms have a separate duty to respect human rights.[133] They should refrain from and take steps to prevent the use of reprisals, such as SLAPPs – including by entities with which they have a business relationship – against any persons or groups who seek to investigate or raise concerns regarding actual or potential adverse business impacts.[134]

57. Around the world, anti-SLAPP laws are becoming increasingly widespread.[135] The most effective apply broadly to any activities that could constitute public participation on a matter of public interest. They make provision for early dismissal and expedited hearings, place the burden on the claimant to persuade the court that the case should proceed, suspend proceedings while the court determines whether the case is a SLAPP, insulate the defendant from paying legal costs and impose penalties on the claimant.[136] Effective anti-SLAPP regimes should also encompass procedures to enable prosecutors to dispose of criminal complaints, including a screening mechanism to identify potential SLAPPs and a truncated process of investigation and

[125] Submission of the Business and Human Rights Resource Centre.
[126] United Nations Development Programme (UNDP) Thailand, “Laws and measures addressing strategic lawsuits against public participation (SLAPPs) in the context of business and human rights”, 2023.
[127] Ibid.
[128] Business and Human Rights Resource Centre, “Lawsuit against labour union president (re: inciting social unrest, Cambodia)”, 2 December 2020.
[129] Ibid., “Apple lawsuit against Attac (re: tax avoidance protests)”, 24 September 2018.
[130] 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.
[131] Universal Declaration of Human Rights, arts. 19 and 20.
[132] See General Assembly resolution 53/144.
[133] Guiding Principles on Business and Human Rights, principle 1.
[134] Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Paris, 2023). The commentary on chap. II, para. 14, makes it clear that “reprisals” explicitly include SLAPPs.
[135] Business and Human Rights Resource Centre, “Corporate legal accountability resource sheet: anti-SLAPP legislation”, 10 September 2024.
[136] Evan Brander and James Turk, “Global anti-SLAPP ratings: assessing the strength of anti-SLAPP laws”, Centre for Free Expression, 22 March 2023; and Laura Lee Prather, “SLAPP suits: an encroachment on human rights of a global proportion and what can be done about it”, *Northwestern Journal of Human Rights*, vol. 22, No. 2 (December 2023).

dismissal, particularly in jurisdictions that mandate the investigation of any criminal complaint.

58. The Special Rapporteur heard encouraging examples of legal professionals working creatively to combat SLAPPs. Judicial independence and impartiality are key to shutting down SLAPPs at the earliest phase and ensuring SLAPP targets receive a fair hearing if such cases cannot be dismissed. Some judges have developed procedures for handling SLAPPs where these did not already exist in their national legislation.[137]

59. However, in many States, even when laws against SLAPPs exist, prosecutors and courts are not making effective use of them. Deficiencies in knowledge and understanding undermine the prompt and effective resolution of SLAPPs. Many States lack a clear definition of SLAPPs, and do not provide adequate training to judges and prosecutors regarding SLAPP cases. As a result, they may fail to recognize the human rights implications of these cases, treating them as ordinary civil or criminal cases.[138] Similarly, lawyers may not be aware of defences available to their clients if they are not well-trained in spotting SLAPP cases.[139]

60. When justice actors are aware of anti-SLAPP laws and procedures, this does not necessarily lead to decisive action.[140] There are several reasons why this may be the case. One is that some laws require a showing of "improper motive" on the part of the claimant for a suit to qualify as a SLAPP. Many prosecutors and judges are reluctant to dispose of cases at an early stage because of the high burden of proof required to make a determination about a SLAPP claimant's intent.[141]

61. In addition, judges who dismiss a case at the preliminary hearing stage may face questions from their judicial colleagues and demands to account for their actions from court presidents or others in the judicial hierarchy.[142] It may be easier to advance the case to a full trial, particularly if the case will be reassigned to another judge at that stage.[143]

62. Contrary to their duty to prevent reprisals, some law firms enable the exploitation of legal systems by powerful economic actors: advising SLAPP claimants and initiating and arguing SLAPP cases on their behalf. Meanwhile, the limited pool of specialist lawyers who represent SLAPP targets is overwhelmed and lacks resources. In some States, non-governmental organizations only have the resources to provide support to those facing criminal charges.[144] And since the targets of SLAPP cases are by definition less economically or politically powerful, they may face challenges identifying and paying for legal counsel. The Special Rapporteur heard that some communities lost their right to file a petition or an appeal when statutes of limitation or deadlines lapsed because there were no lawyers available to

[137] International Commission of Jurists submission, describing decisions of the Constitutional Court of South Africa. See also ARTICLE 19 and others, eds., "How are courts responding to SLAPPs? Analysis of selected court decisions from across the globe", Special Collection on the Case Law on Freedom of Expression series, Columbia Global Freedom of Expression, 2023.

[138] Global SLAPP consultation.

[139] Asian regional SLAPP consultation.

[140] A study conducted by UNDP of SLAPPs in Thailand found that, although prosecutors can order non-prosecution, and the court can dismiss cases filed by private individuals who act in bad faith or distort facts, these powers are not being used. See UNDP Thailand, "Laws and measures addressing strategic lawsuits against public participation", p. x.

[141] Global and Asian regional SLAPP consultations.

[142] Asian regional SLAPP consultation.

[143] Ibid.

[144] Ibid.

represent them.[145] Thus, the imbalance of power between SLAPP claimants and targets is reflected in their unequal access to legal help.

63. States should ensure that legal frameworks exist to identify and dispose of SLAPP cases, punish SLAPP claimants and provide reparation to victims. But if judges, prosecutors and lawyers adhere to their obligations in international law, SLAPPs will not flourish as they do presently. Legal professionals have a duty to recognize SLAPPs for what they are, and take all available steps, as a matter of urgency, to halt the use of justice systems to bully, silence and restrict human rights.

D. Impact of strategic lawsuits against public participation

64. SLAPPs have a significant negative impact, even when unsuccessful. Increasingly, it is arguable that that being subject to a SLAPP constitutes a human rights violation in and of itself.[146]

65. SLAPPs based on civil and criminal charges can each entail serious consequences if successful. The subjects of civil claims may be required to pay exorbitant damages and legal costs, and these sums can have a crushing impact on their capacity to pay for housing, food and health care. In States where companies can instigate criminal complaints, the subjects of SLAPPs face the possibility of lengthy prison sentences, which also have financial impacts. When breadwinners are detained, their families and dependants suffer the loss of their household contributions, and the existence of a criminal record affects prospects for education and employment. Furthermore, prior to conviction and sentencing, many States authorize pretrial detention, which may persist for years until a final verdict is reached. This often subjects accused persons to inhumane or degrading conditions[147] and poor individuals, who do not have money to pay for bail, are most likely to face restrictions on their liberty.[148]

66. Because SLAPPs represent the weaponization of litigation,[149] many of their negative impacts exploit wider justice problems. The subjects of SLAPPs often face significant defence costs, including paying for lawyers or expert witnesses. They may also lose income if they are required to miss work to attend court hearings and incur costs of transportation and childcare. Being the subject of a lawsuit may also be associated with stigma and restrictions on activities. The Special Rapporteur heard that the subjects of SLAPPs may be limited in their job prospects or opportunities for travel, and in some jurisdictions may face requirements to seek special permission for a passport.[150]

67. The stress and anxiety associated with being the subject of a lawsuit, coupled with the potential impacts of a successful SLAPP, have a powerful chilling effect.[151] Submissions for the present report observed that even the threat of a SLAPP may cause its targets to withdraw from their advocacy on matters of public interest.[152] When SLAPP targets are not deterred from their activism, they may still be distracted

[145] Ibid.
[146] Submission of the Environmental Law Alliance Worldwide; Recommendation CM/Rec(2024)2 of the Committee of Ministers of the Council of Europe to member States on countering the use of strategic lawsuits against public participation, p. 1; and A/HRC/47/39/Add.2, paras. 41 and 42.
[147] Submission of the Business and Human Rights Resource Centre.
[148] Global SLAPP consultation.
[149] A/HRC/53/25, para. 73.
[150] Global SLAPP consultation.
[151] Submission of the Business and Human Rights Resource Centre; A/72/170, para. 43; and A/HRC/53/25, para. 105.
[152] Submission of the Environmental Law Alliance Worldwide.

or diverted owing to the time, energy and resources required to defend themselves.[153] Using a SLAPP to label criticism or protest against private actors as unlawful helps delegitimize the concerns of human rights and environmental defenders, undermining this important work and harming human rights protections. Lastly, SLAPPs undermine legal systems themselves, wasting judicial resources in proceedings that subvert, rather than protect, human rights, increasing case backlogs and eroding public faith in the integrity of the legal system.[154]

V. Conclusion and recommendations

68. **Covert attempts by powerful economic actors to reshape the playing field, or to disingenuously abuse it to their advantage, must be tackled. In upholding the rule of law, justice systems must treat all equally and without discrimination. Efforts to use judicial systems for the financial gain of the few should be recognized as the threat to human rights that they are.**

69. **In the present report, the Special Rapporteur has shone a light on efforts by powerful economic actors to exert improper influence over justice systems and has set out an agenda for future investigation. She encourages all States to examine and analyse avenues for improper economic influence that have thus far been overlooked and calls on them to take action to close these access points. Judges, prosecutors and lawyers will be vital partners. In the paragraphs below, the Special Rapporteur offers recommendations to States and legal professionals.**

70. **To guard against improper economic influence over judicial appointment processes and protect sitting judges, States should work with judicial councils and judges' associations to:**

(a) **Establish objective, transparent, merit-based criteria for judicial selection. Consider instituting selection examinations. Publicize evaluation criteria and indicators to facilitate monitoring by civil society;**

(b) **Establish independent judicial councils or other bodies, charged with selecting judges;**[155]

(c) **Where independent judicial selection bodies exist:**

(i) **Review selection processes for non-judicial members**[156] **and the ratio of non-judicial to judicial members;**[157]

(ii) **Establish clear criteria for the selection of non-judicial members, ensuring the choice of members with a record of integrity, independence and appropriate knowledge and understanding of the judicial career;**

(iii) **Establish rules regarding the lobbying of judicial selection committees, including prohibitions and disclosure requirements;**

(d) **Establish clear standards for the types of gifts, services or financial gains that are:**

(i) **Prohibited;**

(ii) **Require disclosure;**

[153] Submissions of the Business and Human Rights Resource Centre and the Environmental Law Alliance Worldwide.
[154] Submission of the Business and Human Rights Resource Centre.
[155] A/HRC/38/38, paras. 91–93 and 97–99.
[156] Ibid., paras. 78, 79 and 109.
[157] Ibid., para. 68.

(iii) **Require judicial recusal or disqualification;**

(iv) **As part of this exercise, States should have regard to whether funding sources are likely to be sufficiently transparent to permit recusal when necessary;**

(e) **Eliminate fees or onerous deposits required for parties to file for judicial recusal or disqualification;**

(f) **Require mandatory lobbying registers and the disclosure of lobbying activities. Develop a robust and comprehensive definition of "lobbyist" that includes judicial lobbying;**[158]

(g) **Publish judges' financial disclosures;**

(h) **Ensure judges have competitive salaries and benefits to reduce the temptation to corruption;**[159]

(i) **Establish in law the type of remunerated work compatible with the position of a judge, and that which is prohibited;**[160]

(j) **Consider whether regulations should govern employment following exit from judicial office.**

71. **To maintain the integrity of justice systems in the face of attempted improper economic influence, judges' professional associations should consider establishing independent ethics bodies to advise judges on:**

(a) **Whether activities in the private sphere are compatible with their judicial responsibilities and duties;**

(b) **Whether certain gifts should be refused or disclosed;**

(c) **Whether specific judicial training activities or conferences carry unacceptable risks of improper influence by those sponsoring such activities.**[161]

72. **To stand up to the use of SLAPPs by economic actors:**

(a) **Prosecutors and judges should:**

(i) **Make proactive use of all tools available to identify and dispose swiftly of SLAPP cases;**

(ii) **Where inadequate procedures exist in national law, raise concerns, including through their professional associations;**

(b) **Lawyers' professional associations should:**

(i) **Develop ethical guidelines regarding SLAPPs that require lawyers to identify cases which restrict participation on a matter of public interest, clarify the advice to be provided to clients who seek to bring such lawsuits and enumerate the circumstances under which lawyers may refuse or withdraw from representation when asked to file or prosecute SLAPPs;**

(ii) **Consider defining SLAPPs as a sanctionable offence, stipulating that lawyers who use these abusive tactics will face sanctions and penalties;**

(c) **Lawyers should:**

[158] A/77/201, para. 99 (f).

[159] See also submissions of Poland and Azerbaijan.

[160] European Commission for Democracy through Law, "Compilation of Venice Commission opinions and reports concerning judges", p. 11.

[161] A/HRC/41/48, para. 97.

(i) **Within ethical limits, refrain from representing clients seeking to advance cases that constitute SLAPPs and advise clients not to pursue SLAPPs;**

(ii) **Provide pro bono support to lawyers and non-governmental organizations defending SLAPP targets;**

(d) **States should:**

(i) **Pass anti-SLAPP legislation, if such does not already exist;**

(ii) **Decriminalize defamation;**

(iii) **Review domestic law concerning private criminal prosecutions to introduce safeguards and protections against abuse;**

(iv) **Create a legal infrastructure to assist all justice actors, including judges and prosecutors, to identify and dismiss SLAPPs quickly and impose appropriate sanctions on SLAPP claimants, and consider including the following:**

a. **Clear guidance on defining and identifying SLAPPs;**

b. **Training on recognizing SLAPP cases and their impact;**

c. **Early case dismissal mechanisms;**

d. **Expedited case management procedures, including expedited appeals;**

e. **The shifting of the burden of proof to the claimant to persuade the court that the SLAPP should proceed;**

f. **The staying of proceedings while the court determines whether the case is a SLAPP;**

g. **Modified rules of evidence permitting SLAPP defendants to present evidence regarding other cases filed by the same claimants, including in other jurisdictions;**

h. **Deterrent sanctions and remedies against SLAPP claimants, including fines, costs and compensation;**

(v) **Provide free legal assistance, financial and psychological support to SLAPP targets;**

(vi) **Monitor and collect data on SLAPPs to ensure that anti-SLAPP laws are being applied effectively.**