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From: National Lawyers Guild  
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February 21, 2020

To: United Nations Human Rights Committee  
Delivered via email: [ccpr@ohchr.org](mailto:ccpr@ohchr.org)

Re: General Comment No. 37 on Article 21

Dear Rapporteur Heyns and Members of the Human Rights Committee:

We write in response to your invitation to submit comments on the draft General Comment No. 37 on Article 21: right to peaceful assembly. We represent two groups active with protest in the United States. Greenpeace USA<sup>1</sup> is a global independent campaigning organization that uses peaceful protest and creative communication to expose global environmental problems and promote solutions that are essential to a green and peaceful future. The National Lawyers Guild<sup>2</sup> is a progressive bar association that provides legal support to social justice movements. Both of our organizations regularly attend and organize protests, and have deep experience organizing around political activities.

We have reviewed the draft comment and while we agree with most of what appears in the document, we want to call your attention to two recent trends in the United States we find troubling that are leading to a crackdown on protesters and protest movements—trends we think are not adequately addressed by the draft comment. We also have a few additional comments on the draft itself.

### ***1) Anti-protest legislation***

Since the election of President Donald Trump, we have seen a rash of anti-protest legislation introduced at the state-level that seeks to increase existing criminal penalties for already illegal conduct. The bills restrict the rights of activists, chilling their speech and making it increasingly difficult to peacefully assemble. The bills often come from legislation drafted by the American Legislative Exchange Council (ALEC), a secretive group of corporate lobbyists who work to

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<sup>1</sup> <https://www.greenpeace.org/usa/about/>

<sup>2</sup> <https://www.nlg.org/about/>



rewrite state laws to benefit corporations over people.<sup>3</sup> The mere introduction of these bills chill speech, even when not enacted. To date, over 100 bills have been filed matching this description, in 36 states and on the federal level.<sup>4</sup>

The bills are not seeking to target protest generally, but instead to deter the most impactful tactics of today's prominent social justice movements. There are several broad categories of bills, including anti-boycott legislation, bills to limit collective bargaining, bills that increase criminal penalties for protests against fossil fuel pipelines, bills that enhance penalties for highway protest shutdowns, bills that restrict the rights of students to oppose hate speech on college campuses, and more. Each of these categories of bills attempts to criminalize a particular movement tactic, often the most successful tactic of that movement.

The trend first emerged in 2015 and was used to target the boycott, divestment, and sanctions movement in support of Palestinian rights. Anti-boycott legislation<sup>5</sup> has been introduced, and in some cases enacted, on the federal level and in all but nine states. Another example: after large wildcat strikes occurred in several states, legislatures introduced bills to limit the collective bargaining rights of public sector teachers unions—at least one of which has been ruled unconstitutional.<sup>6</sup> Bills targeting campus speech have been filed in response to student protests against white supremacists.<sup>7</sup> And anti-mask wearing laws, which historically were designed to target the Klu Klux Klan, are now used to target anti-fascists.<sup>8</sup>

By far the largest category of bills is designed to impact Black Lives Matter, which has used highway protests as one of its most successful tactics.<sup>9</sup> Lawmakers introduced legislation that would increase penalties for these protests, and even bills that would remove liability for drivers who hit such protesters with their car. Thus far no anti-liability bills have actually been enacted, but this is hardly a victory, as introducing these bills discourages people from getting involved in the fight for racial justice.

## **2) Critical infrastructure bills**

Climate and anti-pipeline activists are also at risk. Critical infrastructure bills are a direct response to pipeline protests by Water Protectors seeking to stop the building of pipelines across native land, protests like Standing Rock. Indeed, the first state to enact this legislation was Oklahoma—the state with the second-largest Indigenous population in the country—even

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<sup>3</sup> <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>

<sup>4</sup> <https://www.icnl.org/usprotestlawtracker/>

<sup>5</sup> <https://palestinelegal.org/righttoboycott/>

<sup>6</sup> <https://molawyersmedia.com/2020/02/03/missouri-supreme-court-strikes-down-public-sector-union-bill/>

<sup>7</sup> <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html>

<sup>8</sup> <https://www.businessinsider.com/countries-states-where-protesters-cant-wear-masks-2019-10>

<sup>9</sup> <https://theintercept.com/2017/04/05/minnesota-is-trying-to-crush-black-lives-movement-highway-protests-a-tactic-activists-have-used-for-decades/>



though no similar protests had taken place in the state. This was made clear by the author of the bill, who said his goal was to ensure no protests took place in the oil-rich state.<sup>10</sup>

Since that time, these critical infrastructure bills have been introduced on the federal level and in nearly two dozen states; thus far the bills have been enacted in ten states, though we do expect both numbers to grow this legislative session.

Generally, critical infrastructure bills share several common elements.

- (1) They create new criminal penalties for already illegal conduct—for example, turning misdemeanor trespass (a common charge for civil disobedience) into a felony.
- (2) They broadly redefine the term “critical infrastructure” to include everything from cell phone towers to trucking terminals; far greater than the fossil fuel pipelines the bills purport to protect.
- (3) The bills also seek to create liability for organizations that support protesters by treating such support as a criminal conspiracy.
- (4) The bills are lobbied for by fossil fuel companies and introduced by lawmakers who have received substantial campaign contributions from those same interests.

Dozens of activists have been arrested under these new critical infrastructure protection laws, including Greenpeace activists, and are facing felony charges. Many of the activists facing such charges are Indignous, Black, queer, trans, and are otherwise members of marginalized communities. The fossil fuel projects these activists are protesting are disproportionately built in low-income communities and communities of color.

Recently some of these bills have sought to add “carve outs” for labor organizing, exempting picketing and other workers’ rights activities from facing the penalties imposed by the laws. This is a dangerous development aimed to secure Democratic support that in effect severs the solidarity between environmental activists and labor, harming the chances of an economic just transition away from fossil fuels and into a sustainable economy.

Further where enacted, critical infrastructure laws have led to legal challenges. A federal district judge in South Dakota struck down much of that state’s “riot boosting” law last September<sup>11</sup> and

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<sup>10</sup> <https://freespeechproject.georgetown.edu/tracker-entries/legislation-aims-to-protect-criticalinfrastructure-in-wake-of-environmental-protests/>

<sup>11</sup> <https://www.motherjones.com/politics/2019/09/a-judge-just-blocked-south-dakotas-riot-boosting-law-but-anti-protest-measures-keep-spreading/>



a Louisiana law continues to face litigation.<sup>12</sup> Despite the blatant unconstitutionality of these laws, legislators continue to pursue them, undermining resistance to the climate crisis.

### **3) SLAPPs**

While climate justice and civil liberties advocates have been using the courts to defeat critical infrastructure legislation, we are also seeing the judicial system weaponized against activists in another form: strategic lawsuits against public participation (SLAPPs). These lawsuits are a way corporations can harass and overwhelm activists who are bringing attention to their dangerous practices. They are designed to silence critics of a business by tying them up in costly and lengthy civil suits. SLAPP suits do not even need to win to achieve their goal of silencing public outcry. Too often, the time and cost of litigation can take a toll on defendants, ending in settlements where critics agree to no longer speak out.

SLAPP suits have regularly been deployed by private companies to silence environmental activism, using defamation, trespassing, and racketeering charges to punish individuals and organizations who bring attention to environmentally destructive practices. An example of a SLAPP suit would be the one brought by Energy Transfer—the company behind the Dakota Access Pipeline—against Greenpeace offices and others. The original lawsuit filed against Greenpeace sought 900 million dollars in treble (triple) damages under RICO, but a federal court recently dismissed the RICO claims with prejudice.

Under new critical infrastructure laws described above, the punitive fine organizations face can be as much as ten times the amount an individual might face. Energy Transfer is one of several companies that has been lobbying for these bills. The American Petroleum Institute—the lobbying arm of the industry—is also behind much of this.

### **4) Draft comment 37**

We would also like to draw your attention to a section in the draft comment as well. *Paragraph 17* describes and contrasts what is termed a “peaceful” assembly from one that is “violent.” The implication of this paragraph is that the protesters themselves are responsible for what description might apply to their protest. However, after years of supporting and documenting protest activity, we can state that capitalist law enforcement determines which description is best suited. Indeed, law enforcement is the entity that frequently shows up at peaceful protests with weapons—including chemical weapons—and engages in violent activity directed at protesters.

*Section Three* of the draft comment notes the obligations imposed on member states to respect the rights of protesters. We submit the United States regularly fails to uphold these rights and

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<sup>12</sup> <https://ccrjustice.org/home/press-center/press-releases/new-lawsuit-challenges-anti-protest-trespass-law>



we urge the international community to look for opportunities to support the efforts of activists on the ground to hold our government accountable for these violations of international law.

*Paragraph 60* of the draft comment recommends for the allowance of “flags, uniforms, signs and banners ... even if such symbols are reminders of a painful past. In exceptional cases, where such symbols are intrinsically and [exclusively / directly] associated with [incitement to discrimination, hostility or violence / acts of violence, or are aimed at intimidating members of the population], restrictions may be justified.” We urge you to approach this paragraph by keeping in mind that we are seeing the rise of neofascism in several places across the planet. At the protests that erupted in Charlottesville, Virginia, summer of 2017, we saw hate take the life of a fellow activist and injure dozens more. We suggest the Committee err against protecting hate speech and take steps to protect the most vulnerable.

Relatedly, on *Paragraph 70*, which provides that where no unlawful activity is taking place the use of face coverings shall not be prohibited, we continue to remember the events in Charlottesville and recall the pain caused by the simple wearing of a white hood worn by a Klu Klux Klan member. That said, we do support the rights of activists to wear face masks when they are not marked by a historical legacy of white supremacy, and we note that there continue to be laws here in the United States outlawing this practice, even where no other criminal activity is taking place.

While we recognize the spirit in *Paragraph 71* that seeks to prevent undue surveillance, we worry any encouragement or allowance of this sort of data collection is ripe for abuse and urge the Committee to adopt a position opposing this sort of collection in total.

And in *Paragraph 105* we note that while the use of body-worn cameras by law enforcement may, on occasion, support protesters, we believe this practice actually increases the power of police and is ripe for abuse. Such cameras can be turned on and off at the discretion of the officer, positioned in a way that benefits an officer’s narrative at the expense of an activist, and generally simply give the police more tools they can employ against assemblies.

We also strongly urge you to reconsider the use of *any* remotely controlled weapons systems, no matter the state of an assembly, as described in *Paragraph 106*. We submit there is never a scenario that justifies this sort of force.

## **5) Conclusion**

We appreciate your time in drafting this comment, in undergoing a process of feedback across the planet, and giving us the opportunity to share our thoughts here. The responsibility you bear and the difficult nature of your task is noticed and we are grateful for the chance to participate. The rights of activists are under attack, both in our country and abroad, and we are eager to

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support any effort at reducing the harm of these attacks and ensuring activists may speak as freely as possible.

Thank you,

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