

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

REFERENCE:

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Dear Mr. Allegra,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 25/2 and 32/32.

In this connection, we would like to bring to the attention of your Government information we have received concerning **a number of proposed Bills criminalizing peaceful protests in 16 states in the United States of America (USA), representing a worrying trend that could result in a detrimental impact on the rights to freedom of peaceful assembly and freedom of expression in the country.**

According to information received:

Between 26 May 2015 and 23 February 2017, draft legislation was presented in 16 US states that, if passed into law, would severely infringe upon the exercise of the rights to freedom of expression and freedom of peaceful assembly in ways that are incompatible with US obligations under international human rights law.

In this regard, we wish to submit the following comments on some of the aspects of the draft laws.

1. Presentation of the Bills

A. Pending Bills

Arkansas

Senate Bill 550 was introduced on 2 March 2017. The proposed Bill would create the offense of “unlawful mass picketing”. The Bill defines “mass picketing” as “the assembly of persons in the use of pickets or demonstrations at or near a business, school, or private facility. A person would be guilty of unlawful mass picketing if she or he: “knowingly engages in picketing obstructs access by the mass picketing to the pursuit of lawful work or employment; or obstructs the entrance to or egress from a place of free use of public roads, streets, highways, railways, airports, or other rights of way of travel or conveyance, or engages in mass picketing at a private residence that obstructs the entrance to or exit from the private residence; or includes a threat of violence or intimidation communicated near or contiguous to the private residence”.

The Bill expressly excludes any individual “who is validly exercising his or her rights as guaranteed by the United States Constitution or the Arkansas Constitution” from its ambit. The Commission of unlawful mass picketing would constitute a Class A misdemeanor, punishable by up to one year in prison, a fine not to exceed \$2,500, or both.

We are concerned that considering some picketing “unlawful” could result in hindering the right of individuals to assemble. If enacted, this Bill would further increase criminalization of picketing discretionally considered “unlawful”.

Colorado

Senate Bill No. 17-035 was introduced on 11 January 2017. According to the Bill, “Although there is a crime for tampering with equipment associated with oil or gas gathering operations, people continue to break into enclosed areas, break locks, and adjust valves on oil or gas gathering equipment”. The Bill would therefore propose that “obstructing or tampering with oil and gas equipment” entail a harsher penalty, being

reclassified from a misdemeanour to a “Class 6” felony (section 2), a category of crime that can be punished by up to 18 months in prison and a fine of up to \$100,000.

In addition, the Bill also provides that oil and gas firms (or “any other victim”) may pursue separate claims against a protester who is also being prosecuted by the State.

The definition of “tampering with equipment associated with oil or gas gathering operations” is explained as “Any person who in any manner knowingly destroys, breaks, removes, or otherwise tampers with or attempts to destroy, break, remove, or otherwise tamper with any equipment associated with oil or gas gathering operations”. This vague definition could be interpreted very broadly, therefore encompassing a wide range of situations, such as a peaceful protest near the concerned area, which could be construed as going in and tampering with equipment. The bill could consequently deter protestors from assembling freely, especially in contexts of environmental protests.

The bill was reportedly proposed to prevent activists from shutting off pipelines, as part of a national pattern of increased repression of this form of political dissent. We are concerned at the Bill’s imposition of much harsher penalty for environmental protesters, the possibility to pursue separate claims against a protester, as well as that the Bill’s broad language which includes anyone who “attempts to alter, obstruct, interrupt, or interfere with the action of any equipment used or associated with oil or gas gathering operations”. We are concerned that these elements of the Bill could severely restrict freedom of assembly in protests involving such equipment, generally focus on environmental rights.

We are finally concerned that this Bill is introduced in a context of strong controversies in the State of Colorado over the question of oil and gas extraction. In recent years, many demonstrations have taken place to support civil disobedience actions against drilling methods that reportedly are environmentally harmful.

Florida

Senate Bill No.1096 was introduced on 21 February 2017. The Bill provides that “A person may not obstruct or interfere with the regular flow of vehicular traffic on a public road, street, or highway during a protest or demonstration for which a public assembly permit or other applicable special event permit has not been issued by a county or municipality”. The penalty for obstructing traffic amounts to a second degree misdemeanour, punishable by up to 60 days in prison and a \$500 fine.

The Bill further provides that “a motor vehicle operator who unintentionally causes injury or death” to a protestor interfering with traffic during an unpermitted protest “is not liable for such injury or death”.

We are concerned that this Bill would disproportionately criminalize protestors for non-authorized protests, deterring individuals to hold peaceful protests.

We are seriously concerned at the provision lifting the liability of individuals who cause death or injuries to protestors in situations of non-authorized protests. If adopted, this Bill would have a chilling effect on protestors, leading to restrictions of the rights to peaceful assembly and expression.

Georgia

Senate Bill No. 160 was introduced on 10 February 2017 and approved by the Senate on 24 February 2017. The Bill was transferred to the other chamber and is now at the stage of the second reading (since 28 February 2017). The Bill would increase the penalties for intentionally or recklessly blocking “any highway, street, sidewalk, or other passage.” Accordingly, protesters and demonstrators obstructing a public sidewalk could be charged with a misdemeanour of a “high and aggravated nature”, subject to a fine of up to \$5,000 or up to one year in prison.

We are concerned about the fact that a sanction could be imposed for intentionally blocking the traffic as well as the severity of the sanction that is largely disproportionate to the aim to be attained.

Indiana

Senate Bill No. 285 was introduced on 9 January 2017. The Bill defines as “mass traffic obstruction” “an incident in which, as part of or as a result of a protest, riot or other assembly, at least ten persons obstruct vehicular traffic (...)”.

The Bill provides that public officials (mayor, town board or sheriff) must, within 15 minutes of learning of a mass traffic obstruction, dispatch all available law enforcement with directions to “use any means necessary to clear the roads of the persons unlawfully obstructing vehicular traffic”.

We are concerned that the Bill poses a very narrow definition of what is a “mass traffic obstruction” by considering that an obstruction of traffic by only ten persons could be considered as such.

Furthermore, “use any means necessary” would further allow law enforcement officials broad discretion in the means used to break up public assemblies. This would entail that almost any assembly that is interpreted as “obstructing vehicular traffic” would be forbidden or repressed with, potentially, excessive use of force.

Iowa

Bill Senate File No. 111 was introduced on 19 January 2017. It provides that a person who “intentionally block the traffic on certain highways” “commits a class “D” felony, which is punishable by “no more than five years in prison and a fine of at least \$750 but not to exceed \$7,500”.

We are concerned that a sanction could be imposed for “intentionally blocking the traffic” as well as the severity of the sanction that is largely disproportionate to the aim to be attained.

We are additionally concerned over the fact that the Bill was reportedly introduced as a response to the protests taking place in Iowa City, following the 2016 General Elections, as an expression of disagreement with the methods used by protestors, mainly disrupting traffic.

Michigan

House Bill No. 4643 was introduced on 26 May 2015, approved by the House on 7 December 2016, and is yet to be considered by the Senate.

The Bill provides that “a person shall not obstruct or interfere with entrance to or egress from any place of employment by mass picketing”, “obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports or other ways to travel or conveyance by mass picketing”. These prohibitions nevertheless don’t apply to picketing that is authorized under the constitution of the United States (...).”

The Bill further provides that individuals who return to a disruptive demonstration already blocked by a court would face fines of up to \$1,000 per day, with unions or other groups liable to up to \$10,000 per day. The Bill allows employers or others affected by mass picketing to bring an action against the demonstrators in local circuit court. It also lowers the threshold required for a court to order picketers and protesters to stop demonstrating. Under the Bill, in certain cases, employers can obtain injunctive relief.

We are concerned the Bill would dramatically increase penalties for protestors, especially for trade unions protestors, excising their legitimate right to assemble peacefully and facilitate the procedure for a court to order a demonstration to cease.

Minnesota

1. House File No. 55 and Senate File No. 148

The Bill was introduced on 5 January 2017 in the House and on 17 January in the Senate. The Bills would increase penalties for protestors who intentionally obstruct highway traffic by a gross misdemeanour rather than a misdemeanour, with penalties up to a year in prison and \$3,000 fine.

We are concerned this Bill would greatly increase penalties for nonviolent cases involving protestors during peaceful assemblies and therefore deter individuals to take part in peaceful protests.

2. House File No. 322

House File No. 322 was introduced on 19 January 2017. The Bill provides that “a person is civilly liable for public safety response costs if the person is convicted of participating in an unlawful assembly under section 609.705, being present at an unlawful assembly under section 609.715, or committing a public nuisance under section 609.74”.

It furthers states that “Civilly liable for public safety response costs” means that the person is liable to a state agency or political subdivision for costs incurred for the purpose of responding to the unlawful assembly or public nuisance.

The Bill would allow state authorities to bring civil lawsuits against protestors convicted of unlawful assembly or public nuisance. Moreover, the individual would be liable for the total public cost comprising the equipment used, the state agents’ time or any other administrative expense to put an end to the “unlawful assembly”.

We are concerned that the Bill would impose excessive penalties on the participants for exercising their right to peaceful assembly.

We are also concerned that this Bill, introduced following a series of protests led by the Black Lives Matter movement blocking busy interstates in the Twin Cities, during which a man was shot and killed by a St. Anthony police officer in July 2016, could be adopted as a way to crack down on protests in Minnesota. A State representative justified the Bill as a good measure to the cost entailed by protests for the taxpayers.

3. House File No. 390

House File No. 390 was introduced on 23 January 2017. According to the draft: “Whoever intentionally commits an act that interferes with or obstructs, or tends to interfere with or obstruct, the operation of a transit vehicle is guilty of a crime and may be sentenced” to “imprisonment for not more than three years or to payment of a fine of not more than \$5,000, or both, if the violation was accompanied by force or violence or a communication of a threat of force or violence; or (2) to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or

both, if the violation was not accompanied by force or violence or a communication of a threat of force or violence”.

The Bill would increase fines for protestors that obstruct highway and airport traffic. It would additionally allow prosecutors to seek jail sentences for up to one year if no violence was involved and up to three years if acts of violence were committed.

We are concerned that the Bill would dramatically stiffen penalties for protestors excising their legitimate right to assemble peacefully and therefore have a chilling effect on individuals to exercise their right to peaceful assembly.

Missouri

1. House Bill No. 179

House Bill 179, introduced on 4 January 2017, provides that a person who intentionally conceals “his or her identity by the means of a robe, mask, or other disguise” while engaged in an “unlawful assembly” would constitute a Class A misdemeanor, entailing a penalty of up to one-year imprisonment.

The Bill exempts identity-concealing coverings for the purposes of religion, safety, or medical needs. The Missouri legislature’s website indicates that wearing a “hood” would also be included in criminalized coverings.

The broad and vague term of “other disguise” could comprehend a wide variety of situations and therefore overly criminalize protestors. We are concerned that this Bill, if adopted, would similarly impose excessive penalties on protestors.

2. House Bill No. 826

House Bill 826 was introduced on 2 February 2017. According to the Bill, an “unlawful assembly” consists of “two or more persons who meet for the purpose of violating any of the criminal laws of this state or of the United States”.

It creates a new crime of “unlawful traffic interference”, if the person has an intention to “impede vehicular traffic” and if “he or she walks, stands, sits, lies, or places an object in such a manner as to block passage by a vehicle on any public street or highway or interstate highway”.

The commission of “unlawful traffic interference” while participating in an “unlawful assembly” is subject to up to seven years in prison.

We are concerned that the Bill provides too wide of a definition of what is an “unlawful assembly” and imposes excessive penalties for what is considered “unlawful traffic interference”. If adopted, the Bill would highly curtail the right to peaceful assembly.

North Carolina

House Bill No. 249 was introduced on 2 March 2017. The Bill would criminalize protests obstructing traffic through “economic terrorism” defined as an individual who “wilfully and maliciously or with reckless disregard” disrupts the regular course of business and results in damages of over \$1,000. This criminal offense could be punishable of up to 25 months in prison and make a protestor liable for the costs incurred by the state response, as well as charging him/her in a civil action.

The Bill further provides that, if a person wilfully stands, sits, or lies upon the highway or street in such a manner as to impede the regular flow of traffic, or if she remains at the scene after being warned to disperse, criminal penalties would be increased.

We are concerned that the Bill broadly defines “economic terrorism”, encompassing a wide range of situations, including peaceful protests and leading to their potential disproportionate criminalization.

North Dakota

In North Dakota, House Bill No. 1304 - introduced on 12 January 2017 - was signed by the Governor on 2 March 2017. It provides that “An individual may not wear a mask, hood, or other device that covers, hides, or conceals any portion of that individual's face with the intent to intimidate,

threaten, abuse, or harass any other individual, for the purpose of evading or escaping discovery, recognition, or identification during the commission of a criminal offense; or for the purpose of concealment, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense”.

House Bill No. 1426 was introduced on 16 January 2017 and was signed by the Governor on 2 March 2017.

The Bill increases protests penalties from Class C to Class B felony if a riot involves more than 100 people and from Class A misdemeanour to Class C felony otherwise.

We are highly concerned over the Bills proposed by legislators in both chambers. In particular, House Bill No. 1426 will highly increase penalties for participating in protests and therefore is likely to have a chilling effect on protestors in North Dakota.

We recall that the Special Rapporteurs have, on several occasions, condemned the violent repression of protests held in North Dakota in opposition to the construction of the pipeline that threatens to contaminate waters and disrupt sacred sites of the Standing Rock Sioux Tribe. We are finally highly concerned at the fact that, despite the reiterated calls of the Special Rapporteurs to hold the construction of the Dakota Access Pipeline, an executive order issued on 24 January 2017 seeks to advance the stalled project.

Oklahoma

House Bill No. 1123 was introduced on 17 January 2017 and approved by the House on 28 February 2017. According to the Bill: “any person who shall wilfully trespass or enter property containing a critical infrastructure facility without permission by the owner of the property or lawful occupant thereof shall, upon conviction, be guilty of a misdemeanour punishable by a fine of not less than one thousand dollars (\$1,000), or by imprisonment in the county jail for a term of six months, or by both such fine and imprisonment”.

Additionally, if an intent of “wilfully damage, destroy, vandalize, deface, tamper with equipment, or impede or inhibit operations of the facility”, the person could be guilty of a fine of no less than \$10,000, a one-year imprisonment or both.

The Bill provides a long list of “critical infrastructure” facilities, including petroleum or alumina refinery, a liquid natural gas terminal or storage facility or a transmission facility used by a federally licensed radio or television station.

We are concerned this Bill would target peaceful protests in certain contexts, such as protests which focus on environmental rights, imposing disproportionate penalties on protestors. We are even more concerned that the Bill reportedly was prompted by the Dakota Access Pipeline protests in North Dakota.

Oregon

Senate Bill No. 540, introduced on 9 January 2017, would oblige public universities and community colleges to expel students who are convicted of participating in a riot “under ORS 166.015” defined as “a person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm”.

We are concerned this provision could have a chilling effect, deterring students to participate in peaceful protests by fear of being expelled.

South Dakota

Senate Bill No. 176, introduced on 3 February 2017, was signed by the Governor on 13 March 2017.

The Bill provides that:

“Upon the request of the Governor and the sheriff of the county where the public land is situated, the commissioner of school and public lands may prohibit any group larger than twenty persons from congregating upon any

tract of land under the supervision of the commissioner of school and public lands, if the prohibition is necessary to preserve the undisturbed use of the land by the lessee or if the land may be damaged by the activity”.

“The Department of Transportation with respect to highways under its jurisdiction may promulgate rules pursuant to chapter 1-26 to prohibit or restrict the stopping, standing, or parking of vehicles or the presence of any person standing outside of a motor vehicle, on any highway or highway right-of-way if such stopping, standing, or parking, or presence of any person standing is dangerous to those using the highway or if the stopping, standing, or parking of vehicles or the presence of persons outside of a motor vehicle would unduly interfere with the free movement of traffic thereon on the highway. A violation of this section is a Class 1 misdemeanor”.

Finally, “Unless otherwise directed by law enforcement or other emergency personnel or to seek assistance for an emergency or inoperable vehicle, no person may stand upon the paved or improved or main-travelled portion of any highway with intent to impede or stop the flow of traffic”.

We are concerned that the broad language used to justify the prohibition of gatherings could grant the Governor and the Sheriff wide power to discretionally justify the prohibition of peaceful assemblies.

Moreover, including new penalties for obstructing traffic would curtail the right to peaceful assembly and freedom of expression, impeding citizens to use public spaces to express their opinion.

Tennessee

House Bill No. 0668 and Senate Bill No. 0944 were both introduced in the House and the Senate on 9 February 2017.

The Bills provide that:

“(a) A person driving an automobile who is exercising due care and injures another person who is participating in a protestor demonstration and is blocking traffic in a public right-of- way is immune from civil liability for such injury.

(b) A person shall not be immune from civil liability if the actions leading to the injury were willful or wanton”.

The Bills would have the effect of exempting drivers from liability if they accidentally hit a pedestrian. If adopted, the Bills would enable general impunity of individuals aiming at protestors, create a climate of fear and highly increase insecurity of protests.

Washington

Senate Bill No. 5009 was introduced on 15 December 2016. If adopted, the Bill would allow a prosecuting attorney to file a special allegation that an accused committed an offense in order “to cause an economic disruption”. If the court were to find that a participant intended to create such a disruption, sentences can be extended 60 days for a misdemeanour, 6 months for a gross misdemeanour, and 12 months for a felony.

The proposed Bill defines “attempting to or causing an economic disruption” as a crime intended to:

- (a) “Influence the policy of a government by intimidation or coercion; and
- (b) Obstruct, hinder, or delay the passage of any train, truck, car, ship, boat, aircraft, or other vehicle or vessel engaged in the carriage, hauling, transport, shipment, or delivery of goods, cargo, freight, or other item, in commerce; or
- (c) Interferes with, tampers with, damages, or obstructs any pipeline facility, bulk oil terminal, marine terminal, tank car, waterborne vessel or barge, or power plant.”

We are concerned about the criminalization of protestors for causing economic disruption. We are all the more worried that the sponsoring State Senator reportedly proposed the Bill in response to protests aimed at disrupting activities that he referred to as “economic activities”. This Bill would therefore attempt to deter protestors that would have an effect on the corporate sector.

B. Defeated Bills

In other States, similar bills restricting the rights to freedom of assembly and association were also introduced but were not passed in Arizona, Mississippi, North Dakota and Virginia.

On 19 January 2017, Senate Bill No. 1142 was introduced in Arizona. It was transmitted to the House for review on 22 February 2017 after being passed by the previous chamber. The Bill foresees to add “rioting” to the list of offenses covered by the state's Racketeer Influenced and Corrupt Organization laws. Protests turning violent could lead to criminal racketeering charges and the Bill further allows the prosecutor to seize a person’s assets not only for participating in a “riot” but also to have planned such a riot.

In Mississippi, Senate Bill 2730 was introduced on 16 January 2017 and was defeated on 31 January 2017. The Bill would have created a crime of “maliciously impeding traffic on a public road”. The obstruction of public traffic was defined as “a person sitting, standing or lying in a public road or highway that would impede or hinder the passage of emergency vehicles, the violation shall be a felony punishable by a fine not to exceed Ten Thousand Dollars (\$10,000,00) or imprisonment not to exceed five (5) years, or both”. In North Dakota, several introduced bills were defeated. The Bills, although defeated, show a worrying pattern of the will of legislators to discourage protests, especially protests aiming at defending environmental issues.

House Bill No. 1203 was introduced on 9 January 2017 and failed to pass on 13 February 2017 (41 in favour and 51 against). According to the Bill, such a motorist would therefore not be liable or found guilty of an offense, even when leading to death, as long as it would be by negligence or “unintentional”. House Bill No. 1332 was introduced on 16 January 2017 and failed to pass on 30 January 2017. The Bill provided that anyone convicted of criminal trespass, a Class A misdemeanour, would have had to pay a new additional \$1,000 fine to support the county sheriff. House Bill No. 1383, introduced on 16 January 2017, failed to pass on 6 February 2017. It made it illegal for an individual to be in a place, “at a time, or in any

unusual manner, that warrants justifiable and reasonable alarm or immediate concern for the safety of other individuals or property in the vicinity”. Senate Bill No. 2246 was introduced on 16 January 2017. It was defeated on 21 February 2017. The Bill entailed a fine of \$5,000 for refusing to vacate:

In Virginia, Senate Bill 1055 was introduced on 6 January 2017 and defeated on 23 January 2017. If adopted, the Bill would likewise have dramatically increased penalties for protestors engaged in assemblies considered “unlawful”. Any law that would chill protesting also threatens the right to freedom of expression.

C. Others

North Carolina

On 23 January 2017, a Senator pledged to introduce legislation making it a crime to “threaten, intimidate, or retaliate against a present or former North Carolina official in the course of, or on account of, the performance of his or her duties.”

The Bill, if introduced and adopted, could consider a protestor a criminal for taking part in a protest aiming at criticizing a State official.

The proposition was reportedly aiming at countering protestors and journalists who criticized the former state Governor for signing a law making North Carolina the first state to require transgender people to use the bathroom that matched the gender listed on their birth certificates, rather than the gender with which they identify.

We are concerned that, if enacted, this proposition would highly curtail the rights to freedom of expression and peaceful assembly, as a way to crack down on any dissent view against legislators or any other state official in the performance of his duties.

2. Legal standards

We are concerned that the above-mentioned Bills are incompatible with international human rights law and would unduly restrict the possibility for individuals to freely exercise their rights to freedom of opinion and

expression, and peaceful assembly. If adopted, the pending Bills could have a domino effect on other states, leading to a general crackdown on protests in the United States.

As for the other Bills, although defeated, they show a worrying pattern of legislators, at the state level, to try to enact legislation aiming at criminalizing and potentially discouraging protests.

1. General Legal standards

The right to freedom of peaceful assembly is guaranteed in article 21 of the Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992, “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others”.

It is also reflected in article 8 of the International Covenant on Economic, Social and Cultural Rights, signed by the United States in 1977. It is a key human right in international human rights law, enshrined in article 20 of the Universal Declaration of Human Rights (UDHR).

The right to freedom of opinion and expression is enshrined in article 19 of the ICCPR and 19 of the UDHR. It can also be subject to certain restrictions but these shall only be “provided by law” and “necessary” for “respect of the rights or reputations of others” and the protection of national security or of public order (*ordre public*), or of public health or morals”.

Resolution 24/5 of the Human Rights Council “reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law”.

2. Positive obligations

The Special Rapporteur on the rights to freedom of peaceful assembly and association stressed, in his first thematic report, that the enjoyment of the right to hold and participate in peaceful assemblies entails the fulfilment by the State of its positive obligation to facilitate the exercise of this right (A/HRC/20/27, para 27).

- About the growing criminalization of protests

We are concerned that the growing criminalization of peaceful protests, as proposed by all aforementioned Bills, could deter individuals from organizing or participating in peaceful protests and have the effect of curtailing the rights to freedom of peaceful assembly and freedom of expression.

The Special Rapporteur on the rights to freedom of peaceful assembly and association highlighted, that assemblies are also an instrument through which other social, economic, political, civil and cultural rights can be expressed, meaning they play a critical role in protecting and promoting a broad range of human rights. They can be instrumental in amplifying the voices of people who are marginalized or who present an alternative narrative to established political and economic interests. Assemblies present ways to engage not only with the State, but also with others who wield power in society, including corporations, religious, educational and cultural institutions, and with public opinion in general (A/HRC/31/66, para 6).

The Special Rapporteur on the rights to freedom of peaceful assembly and association as well as the Special Rapporteur on extrajudicial, summary or arbitrary executions stressed, in a joint report on the proper management of assemblies, that the ability to assemble and act collectively is vital to democratic, economic, social and personal development, to the expression of ideas and to fostering engagement in citizenry. Assemblies can make a positive contribution to the development of democratic systems and, alongside elections, play a fundamental role in public participation, holding governments accountable and expressing the will of the people as part of the democratic processes (A/HRC/31/66, para 5).

- About the duty to protect peaceful protests and protestors

We are highly concerned about Florida Senate Bill No.1096, North Dakota House Bill No. 1203 (even if defeated) as well as Tennessee House Bill No. 0668 and Senate Bill No. 0944 which would have the effect of exempting drivers from liability if they accidentally hit a pedestrian. Allowing individuals to “hit” protestors blocking traffic during protests (whether they are authorized or not), possibly resulting in deaths and further exempting them from any liability, would lead to a general impunity of individuals aiming at protestors, create a climate of fear and highly increase insecurity of protests.

The right to life (article3 of the UDHR and article 6 of the ICCPR) should be overarching principles governing the policing of public assemblies. Not only should the State protect this non-derogable right at all cost, but it should certainly not allow individuals exemption from attempting to protect a protestor’s life for the reason that she/he is blocking traffic as a consequence of his participation in a peaceful assembly.

The Special Rapporteur on the rights to freedom of assembly and association stresses that States have a positive obligation to actively protect peaceful assemblies. Such obligation includes the protection of participants of peaceful assemblies from individuals or groups of individuals, including *agents provocateurs* and counter-demonstrators, who aim at disrupting or dispersing such assemblies. Such individuals include those belonging to the State apparatus or working on its behalf (A/HRC/20/27, para 33).

- About protests turning violent

We are concerned several Bills aim at criminalizing protestors for protests turning violent, as it is established by Arizona Senate Bill No. 1142 and Minnesota Bill HF No. 390. These Bills could have the effect of criminalizing protestors for protests turning violent as a consequence of the unlawful conduct of others.

The protection of rights also requires that positive measures be taken to prevent actions by non-State actors that could interfere with their exercise

(A/HRC/31/66, para 14). According to the Special Rapporteur on the rights to freedom of peaceful assembly and association, “assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others... [and, together with] assembly stewards, should not be made responsible for the maintenance of public order” (A/HRC/20/27, para 31).

The Special Rapporteur on the rights to peaceful assembly and association has repeatedly stated that there is no such thing as a violent protest but there are violent protestors, which should be dealt with individually and appropriately by law enforcement. One person’s decision to resort to violence does not strip other protesters of their right to freedom of peaceful assembly. This right is not a collective right; it is held by each person individually.

- About costs incurred during protests

We are concerned at several Bills providing that an individual could be liable for the total public cost to put an end to an “unlawful assembly” as foreseen by Minnesota Bill HF No. 322 and North Carolina House Bill No. 249.

With regard to the responsibilities of organizers, the Special Rapporteur on the rights to peaceful assembly and association is of the opinion that “organizers should not incur any financial charges for the provision of public services during an assembly (such as policing, medical services and other health and safety measures)” (A/HRC/20/27, para 31).

3. Other obligations

States also have obligations not to unduly interfere with the right to peaceful assembly.

- Not to use excessive force during assemblies

We are highly concerned about Indiana Senate Bill No. 285 providing public official must, within 15 minutes of learning of a mass traffic obstruction, dispatch all available law enforcement with directions to “use

any means necessary to clear the roads of the persons unlawfully obstructing vehicular traffic”. The broad language of the Bill could result in excessive use of force during protests when these could be discretionally considered by law enforcement officials as “unlawfully obstructing vehicular traffic”.

As mentioned earlier, any restrictions imposed must be necessary and proportionate to the aim pursued. The Special Rapporteur on the rights to peaceful assembly and association stated that the use of force should be used on an exceptional basis, if it is strictly unavoidable and if applied, it must be in accordance with international human rights law, following principles of legality, precaution, necessity, proportionality and accountability (A/HRC/31/66, para 50).

- Authorization to hold peaceful assemblies

Various Bills refer to what they consider “unlawful assemblies”: Arkansas Senate Bill No. 550 “unlawful mass picketing”, Florida Senate Bill No.1096 “a protest or demonstration for which a public assembly permit or other applicable special event permit has not been issued by a county or municipality”; Indiana Senate Bill No. 285 “persons unlawfully obstructing vehicular traffic”; Minnesota HF 55, SF 148 and HF 390; Missouri HB 179 and HB 826 “unlawful assembly”; North Dakota, House Bill 1383 “to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public or private place without a lawful reason”.

We are concerned that, by considering unauthorized assemblies to be “unlawful” and criminalizing them, States could have a discretionary power to authorize or not assemblies. Consequently, the Bills would have a deterring effect on protestors who want to hold peaceful assemblies not previously authorized by the state.

The Special Rapporteur on the rights to peaceful assembly and association has identified as best practice “laws governing freedom of assembly [that] both avoid blanket time and location prohibitions, and provide for the possibility of other less intrusive restrictions... Prohibition should be a measure of last resort and the authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities” (A/HRC/20/27, para 39).

The Special Rapporteur on the rights to peaceful assembly and association further believes that the exercise of fundamental freedoms should not be subject to previous authorization by the authorities but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others. Such a notification should be subject to a proportionality assessment, not unduly bureaucratic and be required a maximum of, for example, hours prior to the day the assembly is planned to take place. Should the organizers fail to notify the authorities, the assembly should not be dissolved automatically and the organizers should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment. This is all the more relevant in the case of spontaneous assemblies where the organizers are unable to comply with the requisite notification requirements, or where there is no existing or identifiable organizer. In this context, the Special Rapporteur holds as best practice legislation allowing the holding of spontaneous assemblies, which should be exempted from prior notification (A/HRC/20/27, para 28).

We are concerned at the fact that most Bills criminalize peaceful protests for “obstructing traffic”: Florida Senate Bill No.1096, Georgia Senate Bill No. 160, Indiana Senate Bill No. 285, Iowa Bill SF 111, Michigan House Bill No. 4643, Minnesota Bill HF 390, Missouri House Bill No. 179 and House Bill No. 126. This legislation was reportedly proposed in response to an increasing number of highway and other roads closures by activists.

In this connection, we would like to highlight the recommendations made in the report of the joint report of the Special Rapporteur on freedom of peaceful assembly and association and of the Special Rapporteur on extrajudicial, summary or arbitrary executions: “Assemblies are an equally legitimate use of public space as commercial activity or the movement of vehicles and pedestrian traffic. Any use of public space requires some measure of coordination to protect different interests, but there are many legitimate ways in which individuals may use public spaces. A certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right is not to be deprived of substance” (A/HRC/31/66, para 32).

- Concealment

Missouri House Bill No. 179 and North Dakota House Bill No. 1304 (approved) both foresee penalties for concealing an individual's identity or a portion of his face.

We are concerned this measure could further increase penalties for peaceful protestors. In his 2014 report to the Human Rights Council, the Special Rapporteur on the rights to freedom of peaceful assembly and association stressed that numerous jurisdictions have in recent years banned peaceful protestors from covering their faces during demonstrations, motivated by fears that demonstrators who wear masks or hoods could engage in violence and escape punishment due to their concealed identities. The Special Rapporteur is concerned that bans on face coverings during assemblies are in some circumstances used to target particular groups and improperly curtail their right to freedom of peaceful assembly. He further stated that there may be legitimate and non-criminal reasons for wearing a mask or face covering during a demonstration, including fear of retribution (A/HRC/26/29, para 32 and 33).

4. *General observations*

The Bills were mainly proposed at the beginning of 2017 and exclusively by Republican legislators. Given the current context in the United States, where several protests have erupted in the past few years, starting with the general movement led by Black Lives Matter and the recent protests arising after the presidential elections, we are concerned that the proposed legislation, by increasingly criminalizing peaceful protests, is designed to discourage the development of that movement.

If enacted, the Bills would highly curtail the rights to freedom of opinion and peaceful assembly in ways that are incompatible with US obligations under international human rights law, in particular articles 19 and 21 of the ICCPR, as well as the First Amendment of the American Constitution.

The Bills would have a chilling effect on protestors, stripping the voice of the most marginalized, who often find in the right to assemble the only alternative to express their opinions. We are particularly concerned about the fact that several Bills directly target environmental activists. Senate Bill No. 17-035 in Colorado, House Bill No. 1383, Senate Bill No. 2246, as well as other proposed state Bills in North Dakota, and House Bill No. 1123 in Oklahoma would dramatically increase penalties over protests held in the vicinity of environmentally sensitive areas. As mentioned above, these Bills were reportedly proposed as a response to the protests organized by activists and opponents of the Dakota Access Pipeline in North Dakota.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide all information or additional comments in relation to these allegations.

2. Please explain how the aforementioned Bills are in accordance with the United States of America's obligations under international human rights law, particularly with regard to the rights of freedom of opinion and peaceful assembly as enshrined in articles 19 and 21 of the ICCPR, as well as articles 19 and 20 of the UDHR, respectively.

3. Please explain whether any analysis and/or consultation has been undertaken to assess the impact of the proposed legislation on the situation of human rights. Please share the outcome of any such analysis or consultation.

4. Please indicate whether the proposed Bills have been reviewed in light of United States of America's international human rights obligations to which the United States of America is a party. Please share the outcome of any such review.

5. Please indicate what measures your Government intends to take at the Federal level to ensure states adopt legislation in accordance to the American States' international obligations and generally protect the rights to freedom of expression and peaceful assembly in the country.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Government to clarify the issues in question.

Finally, we would like to inform your Government that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: (<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>).

Your Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council.

Please accept, Mr. Allegra, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom
of opinion and expression

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of
association