

Chapter 3: Analysis of national laws and authorities protecting human rights defenders

There are two types of legislation governing the protection of human rights defenders:

1. Laws leading to transposition of the declaration into national law, and which define human rights defenders and the state's obligations towards them.
2. Laws which lead to national protection mechanisms and stipulate their tasks and roles.

Ideally states should have both types and use the transposition of the declaration to develop mechanisms to meet its obligations. Unfortunately this usually does not happen, although the laws have in general at least accommodated the declaration with an express recognition of its binding nature.

We shall now examine the legislation.

Human rights defenders as protected subjects

One of the most important aspects of this study of legislation is without a doubt the people it is designed to protect. We will use the instruments adopted by the United Nations as a reference and more specifically the declaration on human rights defenders.

Definition of human rights defenders

From 1998 onwards, terms such as human rights 'activist, professional, observer or agent' fell out of usage because with the express recognition of the "right and duty to promote the respect and knowledge of human rights and fundamental freedoms at national and international levels" the term human rights defenders became increasingly common.¹

Fifty years after the Universal Declaration on Human Rights and twenty years after negotiations began on the draft "Declaration on Human Rights Defenders", the United Nations finally recognized the reality of the thousands of persons promoting and protecting human rights in the world. February 1998 saw the birth of the "Declaration on the Right and Responsibility of Individuals, Groups and Institutions to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms".

As already mentioned, article 12.1 of this Declaration recognizes the right of all persons to participate, individually and collectively, in peaceful activities against violations of human rights and fundamental freedoms.² This statement led to a sufficiently broad definition of the term defender for the needs of the situation and recognized the range of persons involved in human rights promotion and protection.

Before taking an in-depth look at the definition of the term 'human rights defender', for the purposes of illustration we will give a brief definition of human rights.

¹ See Fact sheet N° 29. Human Rights defenders: Protecting the right to defend human rights. The United Nations Secretary General's Special Representative for human rights defenders. Footnote on page 2.

² Art 12.1. "Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms".

International human rights law recognizes the individual's rights and freedoms before states. States are obliged to refrain from violating these rights and to guarantee the law is upheld.³

Thus human rights “can be defined as the privileges which all individuals have, in accordance with international law, before the authorities to preserve their dignity as human beings. Their function is to exclude state interference in specific areas of the individual's life or to guarantee the provision of certain services by the state to meet basic needs and which reflect the fundamental demands a human being can make on the society they live in.”⁴

So the work of human rights defenders is to take action when the state violates human rights or fails to guarantee them. They also intervene when the state fails in its obligations to transpose international law into national legislation.⁵



Essential requirements for human rights defenders

- Defend, promote, protect human rights
- Act in a non-violent manner
- Accept the universal nature of human rights

The United Nations document entitled “**Human rights defenders: protecting the right to defend human rights**”⁶⁶¹ defines the term ‘human rights defenders’ as applicable to persons who individually or with others promote and protect human rights through non-violent acts. So a human rights defender can be anyone irrespective of gender, age or origin. There are no requirements for professional qualifications nor must defending rights be part of their job. A defender can work alone or within an NGO, international institutions, the state machinery,

the government or the private sector. However, the human rights defender must meet three essential requirements: defend, promote or protect human rights, do so in a non-violent manner and accept the universal nature of human rights (that is, no human right may be rejected).

Before ending this section, it must be pointed out that in spite of the above and the many efforts to spread this concept within society and even among defenders, traditional positions which consider human rights defenders as people working in the civil and political rights sector or as individuals paid to defend them are still commonplace. Some people only consider defenders to be those working for social organizations, and some further restrict the definition by applying it solely to lawyers involved in human rights cases. Nevertheless, as we have already explained, both the United Nations and regional legislation adopt a broad definition of term ‘defender’ as has been described above.

3 Cf. Art.30 Universal Declaration on Human Rights; Art 1 (Obligation to respect human rights) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – part 1: duties and obligations, Chapter I Article 1 (Human and Peoples’ Rights) of the African Charter on Human and Peoples’ Rights (BANJUL CHARTER) art 1, para.1 of the American Convention on Human Rights.

4 Inter-American Institute for Human Rights. The inter-American system for the protection of human rights: institutional and procedural aspects, Héctor Ledesma Faúndez. 4th ed., 2004 pp. 5 and 6.

5 Some instruments have made the need to transpose these obligations into national law one of the obligations to guarantee human rights, repealing or amending such legislation as may be in violation of them or legislating to ensure they are complied with. Cf. art. 1 African Charter for human and peoples’ rights and art. 2 of the American Convention on Human Rights.

6 **Fact sheet N° 29. Human rights defenders: Protecting the right to defend human rights. The United Nations Secretary General's Special Representative for human rights defenders.**

⁶¹ <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf>

The actions of the human rights defenders

An important factor in the definition of the term human rights defender is the type of action they are involved in. The difficulty in arriving at a clear and precise definition led the above mentioned United Nations document⁷ to note that human rights defenders are above all identified by what they do and it is through a description of their actions and of some of the contexts in which they operate that the term can be best understood. To specify further who qualifies to be a human rights defender, the same document describes the nature of defence and lists some typical actions (see box).

Features of defence work

- Must promote or defend any human right (civil, political, economic, social and cultural rights) or fundamental freedoms
- May be carried out individually or collectively
- May use any platform (including state institutions, government or private firms)
- Should be non-violent or peaceful
- May focus on the rights of specific sections of the population
- May be paid or unpaid (through employment or voluntary work)
- May be carried out on a permanent or occasional basis
- May be carried out in any part of the world
- May be carried out at local, national, regional and international levels

Action may include:

- Investigation of human rights violations or gathering and disseminating the information
- Victim support
- Ensuring accountability and ending impunity
- Supporting more effective public management and governance
- Contributing to the implementation of human rights treaties
- Education and training in human rights

⁷ Fact sheet N° 29. Human rights defenders: Protecting the right to defend human rights. The United Nations Secretary General's Special Representative for human rights defenders.



Art. 3 of the Declaration on human rights defenders

“Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted”.

To many, requiring action to be legal is a debatable issue. Although international instruments stipulate non-violence on the part of the human rights defenders, they do not actually say their action must be legal. Some of the experts we interviewed for this survey felt action by defenders should not constitute a criminal offence; however, restricting the actions of human rights defenders to legal acts alone, especially in a context of conflict, repression or states of emergency⁸ can lead to unjust exclusion. A response to this question is found in article 3 of the declaration on human rights defenders,

which affirms that domestic law is the framework within which the defence of human rights should be exercised and enjoyed, but only as long as this does not contravene the aforementioned instruments. As such, if a human rights defender were to carry out action deemed *illegal* under domestic law, the same action can be construed to be legitimate if the infringing legislation proved to be contrary to international human rights instruments.

However, one can go further and point out that states which often “criminalise” the actions of human rights defenders do so in two ways. First, the states in question define as criminal all resistance or defence of human rights, for example restrictions on the right of assembly and demonstration, excessive application of the offences of conspiracy and terrorism etc.⁹ Secondly ambiguous laws may be applied in an arbitrary way to accuse a defender, i.e. when laws are

8 States of emergency, alert and siege are situations in which the states have the authority to restrict or limit guarantees. Authoritarian governments have traditionally made use of these methods to curb the activities of their opponents.

- This is an important point to emphasize as both the European and American Conventions include provisions that empower states to abolish some of the guarantees established by these instruments in exceptional cases. The European Convention stipulates that, “*in times of war or other public emergencies threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required the situation, provided that such measures are not inconsistent with its other obligations under international law*”. However, this provision does permit any derogation from the right to life nor from that prohibiting torture and slavery.
- In a wider sense but with more precision article 27 of the American Convention authorizes states in exceptional cases like war, public danger or any other emergency threatening state security or its independence to adopt measures that would limit certain guarantees, but solely for “*the period of time strictly required by the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, gender, language, religion, or social origin*”. Like the European Convention, the American Convention excludes from possible suspension the guarantees that protect the right to life, personal integrity as well as those that prohibit slavery but adds other rights not mentioned in the European Convention (10) where the obligation stipulated under article 15 must be deduced from the words “*such measures are not inconsistent with its other obligations under international law*”.
- So clearly in exceptional situations the legality of the actions of the defenders may not be curtailed by the states in the case of the defence of rights or guarantees which cannot be suspended under international law and conventions. Furthermore regarding actions to defend rights in states of emergency, both the European and American Conventions require that states inform the respective secretaries general on the reasons underlying the suspension of rights and guarantees and the date of expiry of these measures.

9 Manual to address, monitor and verify cases of violations against human rights defenders. Claudia Samayoá. Protection unit for human rights defenders in Guatemala. (UDEFEUGUA).

applied without the proper guarantees (recognized by international instruments). Under these ambiguous laws the assumptions are so broad as to be imprecise, lending themselves to various interpretations and the prosecution of a broad range of actions. So a precise classification of offences is needed, especially those which human right defenders could be accused of in the course of their work. The draft Nepali decree contains a good example of preventive measures under which human rights defenders cannot be detained or prosecuted in the course of their duties (unless they commit a crime), neither can they be forced to testify or to make statements based on information they have acquired as a result of their work as defenders. Both measures are important to avoid the criminalisation of defenders.¹⁰

Furthermore in some countries the right to resistance is recognized by law¹¹ and this would imply that many of the actions referred to here are not even deemed illegal.

Is the definition of human rights defenders in national legislation the same as in international instruments?

National legislation on the protection of human rights defenders should clearly determine the target group. Almost all laws include the term *human rights defenders* but some actually lack a definition of defender (perhaps largely due to the fact the laws adopt the definition in the Declaration).

In Guatemala the proposed Public Protection Policy for Human Rights Defenders and Other Vulnerable Groups includes some of the elements of Fact Sheet N° 29, However it does so in a section entitled “Background” and when referring to the target group states that protection policy “should be directed at certain categories or sectors in society such as:

- a) Leaders and activists in political groups, especially opposition groups
- b) Leaders and activists in social, civic, community, trade union, farmers and ethnic groups
- c) Leaders and activists from human rights organisations
- d) Victims of crime, abuse of power and/or witnesses in cases of human rights violations and offences against international humanitarian law, whether or not criminal, disciplinary and administrative proceedings have been initiated
- e) Journalists and media personnel dealing with the dissemination, defence, safeguard and restoration of human rights and the application of International Humanitarian Law or who exercise freedom of speech
- f) Mayors, councillors and trade unionists whose duties place them at risk”.

Although this Public Policy includes important elements for the definition of human rights defenders, it simply lists various groups without mentioning them specifically. Although the list is not exhaustive, it could be misleading and exclude certain people, which is not advisable given the matter’s importance.

10 Human Rights Defenders Bill 2066, First Draft (this document along with other relevant one can be found in Focus (<http://focus.protectionline.org/-Focus->).

11 For example, article 45 of the Political Constitution of the Republic of Guatemala stipulates that “action to prosecute human rights offenders is public and can be exercised through a simple complaint without bail or any formality. The people shall legitimately exercise resistance in order to protect and defend the human rights and guarantees enshrined in the Constitution”.

For its part, the **General Protection Programme of the Directorate of Human Rights in the Colombian Ministry of Home Affairs and Justice**¹² covers several target groups, although the members of the groups are not always defined as defenders under law.¹² The programme¹³ is intended for:

1. Leaders or activists of political or opposition groups, social, civic and community organisations, trade unions, farmers and ethnic groups, human rights NGOs and members of Mision Medica
2. Witnesses in cases of violation of human rights and international humanitarian law
3. Leaders and members of the Unión Patriótica (Patriotic Union-UP)¹⁴ and the Colombian Communist party
4. Journalists and media personnel
5. Mayors, councillors, members of parliament and proxies¹⁵
6. Leaders of organisations representing displaced populations
7. Civil servants and former civil servants responsible for designing, coordinating and implementing the government's human rights and peace policy.

The draft bill under discussion in Brazil and the draft decree in Nepal accept and include the definition in the declaration. But there are other important contributions to the definition of the term human rights defender such as the bill in the Democratic Republic of Congo, which in article 6 includes a list of action typically taken by defenders:

"[...] human rights defenders shall:

- *provide proof of acts of violence*
- *provide legal, medical, psychological or any other form of assistance, such that victims may assert their rights before the law*
- *combat the culture of impunity that has been used to hide systematic and repeated violations of human rights and fundamental freedoms"*

The civil servants attached to protection programmes are familiar with this concept and usually endorse the definition in the international instruments.¹⁶ However, the laws governing these programmes are sometimes confused and although the objective is to

¹² <http://www.derechoshumanos.gov.co/>

¹² According to Jorge Cubides, Interinstitutional Coordinator of the Government Programme for Human Rights and International Humanitarian Law in Colombia, this was in order to avoid excluding anyone.

¹³ Decree 2816/06 of 22 August 2006: "Drafting and managing the Human Rights Protection Programme of the Ministry of Home Affairs and Justice and adopting other provisions".

¹⁴ Colombian political party.

¹⁵ These proxies are agents of the Solicitor-General of the Nation. In addition, article 277 of the Political Constitution of Colombia authorizes them to – *inter alia* - protect human rights and ensure they remain effective, to defend the interests of society as well as the collective interest, ensure administrative tasks are done efficiently and supervise the official conduct of those exercising public functions.

¹⁶ Interview with Hugo Enrique Martínez Juárez, director of the coordination committee for the protection of human rights defenders, administrators and officers of the law, journalists and media personnel of the COPREDHE, Guatemala.

protect human rights defenders, there is no clear reference to them and the term is even avoided. For example the Mexican ombudsman's programme is intended for 'civilian defenders' of human rights, which is an unclear, misleading term for such an important issue as the definition of a protected group.

In conclusion, it cannot be said that the different national laws are at variance with international instruments. In fact most of the protection programmes apply a broad definition of the term defender in their daily practice similar to that of international instruments. However, the lack of a written definition may lead to the exclusion of some defenders when certain institutions do not wish to include them or where civil servants do not have the right training.

National protection legislation should include a definition of defender based on international instruments.

Does national legislation only apply to the protection of human rights defenders or does it also provide protection to other sectors?

Protection legislation does not usually apply solely to human rights defenders, as the measures can also cover journalists, witnesses and other groups often at risk (and who in some cases can also be considered as human rights defenders).

In Mexico the rules of the ministry of state are intended to prevent human rights violations including those against human rights defenders, although they are not expressly mentioned. However the Programme of the Mexican National Human Rights Commission only deals with journalists and civilian defenders of human rights.

In Guatemala and Colombia the Proposal for Public Policy and the Protection Programme apply to a wide-ranging group of persons as we have seen. The fact that these provisions cover the protection of different, diverse groups may make it difficult to cater for each group individually. Ignoring this may affect how efficient these measures turn out to be.

In Brazil protection extends to family members who live with the defender as well as their assets should they also be threatened.

Laws governing protection measures should therefore take into account the different needs stipulated by each group (or else different laws should govern different groups).

The specific protection needs of defenders should be taken into account when legislation applies to several groups

Are witnesses included?

Although there is no indication that Colombia and Guatemala's protection programmes apply directly to witnesses, generally speaking both programmes include protecting witnesses as well as other groups from violations of human rights and international humanitarian law.¹⁷

In the case of Peru, where there is no government or state protection for defenders, an attempt was made to include defenders in a witness protection programme set up to protect those involved in court cases following the Truth Commission. To some, this was a good proposal as it endeavoured to guarantee the protection of human right defenders by making use of existing structures. However, for others this was not an appropriate alternative, as a witness programme does not necessarily reflect the specific nature of protection required for defenders and this could have a bearing on the effectiveness of the measures taken.

Where both programmes coexist, one for the protection of defenders under the ministry of state or home affairs for example and another for witness protection under the attorney-general's office or the ministry of justice, there are often problems of overlap when the witness is also a human rights defender. This conflict of interest is usually to the detriment of the defenders' protection because it can considerably delay the granting of measures.

*Where two programmes coexist
criteria on who is covered by each one
must be drawn up to avoid delays
owing to conflicts of responsibility*

In Colombia Decree 28/16 includes witnesses to human rights violations. The Protection Programme nonetheless coordinates with the Office of the Public Prosecutor.¹⁸ Cases are referred to this office if they meet the criteria for the witness protection programme since some of the measures in its remit, such as change of identity and isolation, are considered more effective for their circumstances. The same may apply to elected holders of public office in Colombia, such as mayors, who while not human rights defenders are still covered by the programmes (protection measures are only granted in these cases when the state security forces or the public bodies to which they belong do not have the resources to protect them).

It would therefore be advisable in such cases for legislation to lay down clear criteria allowing to rapidly determine which programme should cover the defender or the witness and by applying measures to each case in line with its specific protection needs.

¹⁷ In Colombia, the target group of decree 2816/06 is "victims of crime, abuse of power, and/or witnesses in cases of human rights violations and infringement of international humanitarian law, irrespective of whether criminal, disciplinary or administrative proceedings have been initiated". In Guatemala, the Proposal for Public Policy includes both witnesses and accused persons in the protection scheme.

¹⁸ Interview with Jorge Cubides, Interinstitutional Coordinator of the Colombian Presidential Programme for Human Rights and International Humanitarian Law.

Are any defenders excluded?

Even the most exhaustive list of persons such as the one in the Colombian programme (see above) may leave certain defenders out of the programme, despite the fact the definitions in international instruments include them. For example, human rights defenders involved in teaching human rights in educational centres (or anywhere else other than social organizations) could fall outside the programme even though this is a sector that has traditionally been a victim of political violence. A further example is the Colombian programme which limits one of its target groups to affiliates of two political parties¹⁹ which could put other current or future political parties involved in human rights work in a vulnerable position and leave them without protection.

In the Peruvian bill even though reference is made to human rights defenders, this only applies to persons participating in trials and as such, human rights defenders whose activities do not involve court cases are not covered by the legislation.

The term “civil defender” used by the Mexican National Human Rights Commission apparently excludes all those who do not belong to human rights NGOs. This implies that non-organised human rights defenders or those working in national or international institutions will not be protected; furthermore the identity of the aggressor can also exclude people because the Commission does not protect human rights defenders who have not been attacked by state agents. This creates an additional problem since in many cases it is not possible to identify who is behind an attack.²⁰

Another example of possible restrictions is to be found in the Nepali draft bill which alludes to a code of conduct: depending on how this is defined, several groups of defenders might be excluded.

As previously explained, defenders involved in violent action are disqualified and therefore excluded from protective measures. However, some civil servants appear to confuse “non-violence” with the requirement that the action of a human rights defender should be legal. Mistakes like this can also exclude them from protection.

Obligations for states arising from legislation on human rights defenders

When national protection guidelines apply to wider groups and not solely to defenders, states base their legislation on the obligation to guarantee the security of persons on their territory, arising from their recognition of different rights and freedoms in the Universal Declaration of Human Rights²¹ and other universal and regional instruments. When legislation applies specifically to human rights defenders as a group, in addition to the general obligation to protect, it normally draws on the obligations under the declaration on

19 Members of the Unión Patriótica and the Communist Party of Colombia are included for historical reasons (systematic repression of members of both parties) and possibly because regional bodies such as the Inter-American Commission on Human Rights are aware of this.

20 The main objective of the National Human Rights Commission is to closely examine cases in which a media worker or member of any non-governmental organization dealing with the defence of human rights is wronged by any authority in the exercise of their respective duties.

21 Article 2 of the Universal Declaration of Human Rights: “Everyone is entitled to all the rights and freedoms set forth in this Declaration”.

human rights defenders. Protecting this group does not only mean protecting the right to life and to one's physical integrity but also the right to defend human rights.

When addressing violence against human rights defenders from this perspective a broader approach can be adopted so that the legislation and mechanisms created to meet these obligations can also fully meet the needs in question.

Therefore, when the declaration on human rights defenders acknowledges *"the important role of international cooperation and the valuable work of individuals, groups and institutions in contributing to the effective elimination of all violations of human rights and fundamental freedoms"* and recognizes in the same text the right to defend human rights, it places an obligation on states under article 12 to protect these rights in accordance with the terms above.

The content of national legislation on human rights defenders

In conclusion, we can say that substantive legislation on the protection of human rights defenders should at least cover the following points:

- Protected persons:
 - They should be precisely defined as human rights defenders and the text should include a broad and clear definition of human rights defenders in accordance with international instruments
 - Any list of persons should not be considered closed since the broad interpretation of the term 'human rights defender' makes it almost impossible to draw up detailed lists that do not lead to exclusions
 - Protection of human rights defenders should be addressed separately from other protected groups so that legislation can include their specific needs
 - Should other groups be included, it is important that the human rights defenders be dealt with in a separate paragraph which should cater for the specific nature of protection required by defenders. In this way their needs will not be glossed over in an attempt to legislate for the protection of several groups at once.
- State obligations:
 - Obligations arise from a recognition of the work done by human rights defenders. Recognition implies an obligation to protect
 - Obligations incumbent on the state should include a general obligation to guarantee human rights, but this should not be dealt with separately from the duty to protect the right to defend human rights.