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The Legal Obstacles to the Work and Life of Human Rights Defenders: Alternative Approaches and Recommendations for Reform

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Aikaterini - Christina Koula

A Thesis Submitted for the Degree

of

Doctor of Philosophy

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Durham University

December 2019

Abstract

The thesis is concerned with the legal obstacles to the life of individuals who fight for the realisation of human rights and are known as Human Rights Defenders (HRDs). It argues that as a consequence of their struggle for human rights and justice, HRDs face numerous obstacles in their work, which affect their human rights activity and may entail serious consequences for human rights in general. In particular, the thesis identifies three main legal obstacles; the lack of a clear definition, the criminalisation of HRDs and impunity for crimes committed against defenders, placing particular emphasis on the failure of international human rights law to provide efficient protection to HRDs. On this basis, it also considers whether international refugee law can act as an alternative way of protection, as a HRD may meet the requirements of the term 'refugee'. It, however, rejects the idea, emphasising the need of a protection system for HRDs within the state of origin, given the desire of HRDs to remain in their home countries, as well as the crisis of refugee and asylum law. It therefore makes recommendations that could respond to each of the identified obstacles, while drawing upon recommendations for strengthening the implementation of human rights in general, also proposes alternatives, not strictly related to international human rights law as such, that could contribute to the protection of HRDs and the implementation of human rights in general.

The methodological approach of the thesis is considered 'socio-legal', as it looks at a numbers of factors relevant to the activity of HRDs which influence and are influenced by law and supplement the doctrinal analysis. Most importantly, it employs empirical research with the purpose of enabling the reader to understand the matter by putting themselves in the actors' shoes and to investigate the impact of the obstacles on participants' lives. Given the lack of empirical research in terms of HRDs, this approach fills a significant gap in academic scholarship.

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List of Abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
AESEAN	Association of Southeast Asian Nations
AICHR	ASEAN Intergovernmental Commission on Human Rights
CAT	Committee against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
ECOSOC	Economic and Social Council
ECHR	European Convention on Human Rights
EU	European Union
ECtHR	European Court of Human Rights
HRDs	Human Rights Defenders
HRE	Human Rights Education
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the all Forms of Racial Discrimination
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
INTV	Interview
ISIS	Islamic State of Iraq and Syria
LGBTQ	Lesbian Gay Bisexual Transgender and Queer
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions

NSAs	Non-State Actors
OHCHR	Office of United Nations High Commissioner for Human Rights
SLAPPs	Strategic Lawsuits against Public Participation
UDHR	Universal Declaration on Human Rights
UNCAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
UNGPs	Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
UK	United Kingdom
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

Declaration

Material contained in this thesis has previously been published in 5 (1) Queen Mary Human Rights Law Review, 2019.

Statement of Copyright

"The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged."

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Dedication

This doctoral thesis is dedicated to loving memory of my mother, Lefkothea Chatzikaloudi – Koula (1967-2019). I am glad to know that she saw most of this process, offering the support to make this work possible. I miss her every day and love her always and forever.

‘When the rights of human rights defenders are violated, all of our rights are put in jeopardy and all of us are made less safe’

Kofi Annan, Former UN Secretary-General

Chapter 1

Introduction

1.1. 'Human Rights Defenders'

Human Rights Defenders[1] (hereinafter HRDs) play a crucial role in protecting and promoting the realisation of human rights. More accurately, they work to turn the promise of the Universal Declaration of Human Rights (UDHR) into reality. In particular, they stand up against violence, denounce abuses of human rights, demand actions and work to create a better world. They hold governments accountable for their human rights obligations under international human rights law or under national and regional laws. In essence, 'HRDs seek the promotion and protection of civil and political rights as well as the promotion, protection and realisation of economic, social and cultural rights'.[2] For these reasons, it is widely accepted that the work of HRDs is of great importance to the advancement of human rights, democracy and the rule of law.[3] The purpose of the Introduction is to identify the key concepts of the present research project and lay the basis for further detailed discussion.

With respect to the meaning of the term 'human rights defenders', the definition is so vague and broad that this thesis perceives it as one of the key obstacles to the activity of HRDs and therefore devotes an entire chapter to discussing the definition from all possible angles. However, for now, it suffices to highlight that the term itself implies what these people are doing in practice; they either speak out against human rights violations or act to promote human rights or both. HRDs can be

[1] The most commonly used term is 'human rights defenders', but the abbreviation 'HRDs' is also widely used. They are also referred to as human rights activists or just defenders.
[2] 'Who Is a Defender' (*Ohchr.org*, 2018) <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx> accessed 30 October 2019.
[3] 'Human Rights Defenders - Commissioner for Human Rights' (*Council of Europe, Commissioner for Human Rights*, 2018) <https://www.coe.int/en/web/commissioner/human-rights-defenders> accessed 30 October 2019.

persons or organisations that promote human rights. For instance, Amnesty International can be considered the best-known example of an organisation-defender, as it is the biggest non-governmental organisation (NGOs) fighting for human rights and against injustice and abuses. In essence, by their nature, human rights NGOs are human rights watchdogs promoting the realisation of human rights[4] and as a result can be characterised as HRDs.[5]

With regard to individuals fighting for their own rights, members of the Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) community campaign for a better world for LGBTQ people. Similarly, trade unionists promote and protect the rights and interests of their members. In short, these categories of HRDs are committed to the protection of their own rights. However, it cannot be excluded that these persons may also fight for the rights and freedoms of other individuals. Moreover, lawyers, journalists and people promoting human rights and speaking out against abuses of fundamental rights defend other people's rights. As a result, people can fight either for their rights or for other people's rights or both. In any case, there is no question that they contribute to the realisation of human rights. Each time that this thesis refers to HRDs, it means that they can be any of those different categories of people or organisations defending human rights.

Defenders are usually named after the type of human rights they fight for. For instance, defenders working in the defence of women's rights and on any other gender issue are known as Women Human Rights Defenders.[6] Similarly, defenders campaigning for a clean, safe and sustainable environment, access to unspoiled natural resources and land rights are known as Environmental Human Rights Defenders. No matter their expertise, HRDs promoting fundamental freedoms and rights become target of hate and attacks by state and non-state actors (NSAs), as they challenge the interests of governments and other powerful stakeholders. Restrictive laws that undermine freedom of association, expression, and peaceful assembly, prosecution on false charges, surveillance, abuses, death threats, arbitrary

[4] Thomas L McPhail, 'The Roles of Non-Governmental Organizations (NGOs) in Thomas L McPhail (ed), *Development Communication: Reframing the Role of the Media* (Wiley-Blackwell 2009) 67-83.

[5] As will be explored later, members of human rights NGOs have been targeted by states and non-state actors because of their commitment to human rights.

[6] Women Human Rights Defenders are also female activists fighting for any right and freedom.

arrests, and detention, forced disappearances, torture, and assassination are commonly used methods against all defenders with ultimate aim of frustrating the defence of human rights. This thesis does not focus on the obstacles to a particular category of defenders on the basis that the problems and risks are the same for all defenders and can affect their activity anyway, regardless of their specialisation. In essence, the purpose of this thesis is to identify the key legal obstacles to the activity and life of all HRDs and make recommendations that could improve the situation of all defenders.

1.2. Violators of Defenders' Rights

In most cases, state authorities are responsible for abuses against HRDs in an attempt to stop them from challenging government's policy and interests. As states are the traditional duty-bearers of human rights, with regards to the abuses against HRDs, undoubtedly 'states are the same time the violators and guarantors of human rights'.[7] State authorities may be directly or indirectly responsible for violations committed against HRDs. In particular, police, security forces and national intelligence agencies are usually found responsible for arbitrary arrests, torture, illegal search and illegal surveillances.[8] Moreover, government officials propose and introduce restrictive legislation to control the activity of defenders, while the judiciary imposes pre-trial detention and severe sentences on defenders to deprive them of their liberty and their rights at a crucial moment for the protection of human rights.

Besides these direct acts, for each human right violation committed against individuals, state authorities have the obligation to investigate on the alleged violation, prosecute those responsible and also ensure that those whose rights have been violated are provided with an effective remedy.[9] However, in cases involving HRDs, no proper investigation is carried out, as it has been reported that the police refuse to register complaints made by HRDs. Also, in several cases, national courts and prosecutors refuse to initiate proceedings against the presumed perpetrator of such abuses.[10]

NSAs may also commit human rights violations. The term 'NSA' includes people, corporations, groups and organisations not being state agents and mechanisms.[11] That means a range of people may be responsible for abuses against defenders.

[7] Kate Nash, *The Political Sociology of Human Rights* (CUP 2015) 41.
[8] 'Who Are the Perpetrators of the Human Rights Violations Against Defenders?' (*United Nations Special Rapporteur on the Situation of Human Rights Defenders*, 2018) <https://www.protecting-defenders.org/en/content/who-are-perpetrators-human-rights-violations-against-defenders#1-anchor> accessed 30 October 2019.
[9] The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Res. 53/144, 8 March 1999, UN Doc A/RES/53/144 (hereinafter the Declaration on HRDs), art 9; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 2(3).
[10] McPhail (n 4) 85.
[11] Andrew Clapham, 'Non-State Actors in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017).

However, according to the UN Special Rapporteur on the situation of HRDs, there are NSAs who are most regularly accused of abusing HRDs, such as armed groups in time of peace, individuals, private corporations and the news media.[12] Despite the fact that the notion 'NSAs' encompasses, rebels, paramilitaries, militias in the context of an international or local armed conflict,[13] the thesis does not look at HRDs working in conflict zones and states of emergency, so emphasis is placed on the activity of NSAs during peaceful times.

In several cases, armed groups that support the interests of private corporations attack HRDs to intimidate them.[14] For example, in the context of empirical research, a participant referred to groups of locals along with security guards employed by logging companies that tried to stop them by using violent methods from protesting against the perceived negative impact of the companies on their land and forests.[15]

A significant number of violations against HRDs are also committed by isolated individuals who do not agree with defenders' beliefs and activities.[16] More specifically, community leaders and faith-based groups attack defenders who promote rights and ideas, which run counter to the ideals of the community and threaten them with ostracism. For instance, another participant said that her family and other members of the conservative community within which she used to live, attacked and isolated her because she promoted LGBTQ rights.[17]

Private corporations[18] are also responsible for serious abuses against defenders. Companies exploiting natural resources are in conflict with local populations, as the latter see their properties and nature be destroyed, having a little control over how development can proceed within their territory. In fact, several violations against defenders fighting for environmental and land rights have been reported to the UN Special Rapporteur on the situation of HRDs.[19]

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[12] UN General Assembly, Report of the UN Special Rapporteur on the Situation of Human Rights Defenders), 4 August 2010, UN Doc A/65/226 (hereinafter Report on Violations Committed against Defenders by Non-State Actors) para 5, 10.
[13] Katherine Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017) Chapter 3.
[14] Report on Violations Committed against Defenders by Non-State Actors (n 12), para 5, 10.
[15] Interview (INTV) 16, 8.2.2018.
[16] Report on Violations Committed against Defenders by Non-State Actors (n 12), para 13.
[17] INTV 7, 12.2.2018.
[18] The term 'private corporations' and 'companies' are used interchangeably.
[19] Report on Violations Committed against Defenders by Non-State Actors (n 12), para 10-11.

The best-known example of a defender targeted by a corporation was Berta Isabel Cáceres Flores. She was the general coordinator of the Civic Council of Popular and Indigenous Organisations of Honduras (COPINH) and winner of the 2015 Goldman Environmental Prize for South and Central America. She had led the protest against big mining, dam-building and logging projects and was murdered in March 2016.[20] Eight men were charged with the murder of Cáceres and two of the accused used to work for the dam-building company leading the construction.[21] In addition, after the refusal of the Inter-American Commission on Human Rights (IACHR) to investigate the murder of Cáceres, an independent group of experts was set up to investigate the murder. It found that 'the murder of Berta Isabel Cáceres Flores, executed on March 2, 2016, was a plan conceived by, at a minimum, senior executives of Desarrollos Energéticos SA, at least since November 2015, and delegated to one of the defendants the task of executing the operation'.[22]

The media are also involved in violations committed against HRDs.[23] In several cases, defenders have been subjected to smear campaigns in press and have been portrayed as 'troublemakers'. Undoubtedly, this label leads to stigmatisation of defenders and legitimises attacks against them.[24] As a result, HRDs need to go into hiding to protect themselves and their family.

In Chapter 5, the thesis considers many testimonies regarding violations committed against defenders by both states and NSAs. Even though the focus of the thesis falls on states, as the primary responsibility-bearers, it would be remiss of the thesis if it did not refer to the responsibility of NSAs at all. On this basis, in Chapter 5, the

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[20] 'Human Rights Defenders and Civic Space In The Context Of Business Activities' (*Human Rights Watch*, 2017) <https://www.hrw.org/news/2017/09/08/human-rights-watch-submission-re-human-rights-defenders-and-civic-space-context> accessed 30 October 2019.

[21] Liz Ford, 'We Lost a Great Leader': Berta Cáceres Still Inspires as Murder Case Takes Fresh Twist' (*the Guardian*, 2017) <https://www.theguardian.com/global-development/2017/nov/17/berta-caceres-murder-case-honduras-land-rights> accessed 30 October 2019.

[22] International Advisory Group of Experts, 'Report on Assassination of Berta Cáceres:The Plant that Killed Berta Cáceres' (2017) 46 para 6 < http://bertacaceres.org/international-group-experts-report-assassination-berta-caceres/> accessed 30 October 2019.

[23] Report on Violations Committed against Defenders by Non-State Actors (n 12), para 17-18.

[24] Sarah M. Brooks, '"Troublemakers" and "Foreign Agents": The Situation of Corporate Human Rights Defenders- Submission to the African Commission on Human and Peoples' Rights Working Group on Extractive Industries, Environment and Human Rights Violations' (2015) International Service for Human Rights <https://www.ishr.ch/sites/default/files/article/files/submission_to_the_african_commission_v2.pdf> accessed 30 October 2019.

thesis underlines the fact that NSAs are not the primary duty-bearers and can be held to account only through domestic law.

1.3. The UN Declaration on HRDs

In response to all the abuses committed against HRDs, the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, known as the Declaration on Human Rights Defenders (hereinafter Declaration on HRDs) was adopted on the protection on HRDs in 1998. Although the thesis discusses the drafting process and the difficulties in adopting the Declaration elsewhere, this Part explores the rationale behind the adoption of the Declaration.

The adoption of the Declaration does not mean that defenders are more vulnerable[25] than other groups, such as minorities, women, indigenous people or refugees. In fact, the nature of their work may make them vulnerable, so the adoption of the Declaration sought to address this vulnerability. Unlike other declarations and human rights treaties, which focus on rights for specific groups, such as children, indigenous people and women, the Declaration on HRDs serves two purposes. First, it emphasises that defenders have equal rights and opportunities, as is the case for all vulnerable categories of people;[26] and second, it acknowledges their commitment to human rights[27] and in this way it raises awareness of their role within the civil society and distinguishes them from common criminals. A key argument supporting this view is that the Declaration does not create new human rights, but articulates existing rights and freedoms that could apply to defenders' activities,[28] while it emphasises the importance of their work to the promotion of

[25] Martha Albertson Finemann argues that the concept of vulnerability captures the potential for each of us to be exposed to harm, injure and misfortunes either intentionally or accidentally. For that reason, no one is left unprotected and everyone falls under the provisions of international and regional conventions, such as right to life [Article 6, ICCPR and Article 2, European Convention on Human Rights (ECHR) respectively] and national laws. However, the thesis means 'vulnerable groups' as individuals who need a more robust guarantee of their freedoms and rights due to their sensitive and defenceless position, for instance children. In this thesis it is argued that HRDs are in a defenceless position in the sense that they are in the public eye and as a result are exposed to a range of dangers. See, Martha Albertson-Finemann, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) Yale Journal of Law & Feminism 1, 8.
[26] Yvonne Donders, 'Defending the Human Rights Defenders' (2016) 34 (4) Netherlands Quarterly of Human Rights 282, 284.
[27] M Robinson and K Boyle, *A Voice for Human Rights* (University of Pennsylvania Press 2005).
[28] 'Declaration on Human Rights Defenders, Legal Character' (*ohchr.org)* (<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx≥ accessed 30 October 2019.

human rights.[29] In essence, HRDs enjoy the same human rights as all individuals and vulnerable groups on the basis of international and regional human rights treaties, while the Declaration places special emphasis on certain rights, such as the freedom of expression and association, which are relevant to the defence of human rights.[30]

The reason why the work of human rights defenders should be promoted and respected through the Declaration and other mechanisms, as will be seen later, is because HRDs give meaning to the realisation of human rights and contribute to developing stability and securing democracy.[31] Additionally, they often find themselves at serious risk and fall victims to abuses on account of their activities. Their role is especially significant in states on a path towards authoritarianism, as through insisting on human rights standards, they prevent more severe human rights violations from occurring.

In sum, human rights activists do not deserve greater protection than other vulnerable groups. However, the aim of the Declaration is to confer on defenders the recognition they deserve as well as status within international human rights law, as they act as defenders and guarantors of human rights and fundamental freedoms. As a result, the recognition of defenders' commitment to human rights can make them more influential in fighting for the realisation of human rights on international, regional and national level. Furthermore, since HRDs may also fall under the umbrella of other human rights treaties, special recognition of their role brings to the fore abuses against them, highlighting the ways in which they are vulnerable. This will lead to a better implementation of their rights and greater protection at treaty level.

[29] Institute for Human Rights and Development in Africa (IHRDA)/ International Service for Human Rights (ISHR), 'A Human Rights Defenders' Guide to the African Commission on Human and Peoples Rights' (2012) 16 <http://www.ihrda.org/wp-content/uploads/2012/10/ishr-ihrda_hrds_guide_2012-1.pdf> accessed 30 October 2019.
[30] ibid 16, 17.
[31] Robinson (n 27), 108.

1.4. The Higher Protection Regime

In order to facilitate the implementation of the UN Declaration on HRDs, the Commission on Human Rights asked the UN Secretary- General to establish a special mechanism on HRDs. Special Procedures (SPs) or Special Mechanisms are international experts authorised by the UN Human Rights Council to tackle human rights situations.[32] On this basis, in August 2000, Hina Jilani was appointed by the UN Secretary – General as the first UN Special Rapporteur on the situation of HRDs (hereinafter the UN Special Rapporteur on HRDs).[33]

The UN Special Rapporteur on HRDs, as all the other UN Special Rapporteurs, is an independent and professional volunteer rather than an (United Nations) UN employee,[34] who is mandated to monitor and report on the situation of human rights through receiving comments, travelling to countries and making recommendations to governments.[35] He or she has also the authority to receive and respond to individual complaints on human rights abuses prior to the exhaustion of the domestic remedies and apply treaty law as well as customary international law when he or she is called upon to handle an individual complaint. In essence, the mandate establishes two functions; the fact-finding activity and the reporting function. It is said that 'the reporting function gives sense and meaning to the fact-finding'.[36] Despite the independent nature of their work, Special Rapporteurs have strong affiliation to the UN instruments and as a result travel and write their reports under the auspices of the UN.[37] In practice, Special Rapporteurs also carry out another important activity; they contribute to the development of international human rights law. In short, they monitor the implementation of soft law instruments and through

[32] Today, the Human Rights Council oversees 43 thematic mandates for which it has established SPs. See also, Marc Bossuyt, 'The Development of Special Procedures of the United Nations Commission on Human Rights' (1985) 6 Human Rights Law Journal 179, 183-206.
[33]'UN Office of the High Commissioner for Human Rights "Mandate"' (*ohchr.org)* <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Mandate.aspx> accessed 30 October 2019.
[34] Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 Human Rights Quarterly 201, 216.
[35] UN Commission on Human Rights, Human Rights Defenders Res 61, 27 April 2000, UN Doc E/CN.4/RES/2000/61; UN Human Rights Council, Institution-Building of the United Nations Human Rights Council Res 5/1, 18 June 2007, UN Doc A/HRC/RES/5/1.
[36] Ingrid Nifosi 'The UN Special Procedures in the Field of Human Rights. Institutional History, Practice and Conceptual Framework' (2017) 2 Deusto Journal of Human Rights 131, 146, 148.
[37] Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on Their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15 (2) The International Journal of Human Rights 232, 234.

their reports that sometimes are reaffirmed by the General Assembly enlarge the scope of human rights rules.[38]

Special Mechanisms such as the Special Rapporteur on HRDs and the Human Rights Unit[39] have been established by the Organisation of African Unity (African Union) and the Inter-American Commission on Human Rights respectively,[40] with functions similar to those of the UN Special Rapporteur. It is also of significance that the Declaration establishes a prime responsibility on states to ensure, through legislative and administrative initiatives, that the rights of HRDs are guaranteed at national level.[41] Undoubtedly, National Human Rights Institutions (NHRIs) play a vital role in the protection of activists.[42] They have at their disposal protective tools, such as complaints procedures, visits and recommendations, with which they contribute to the development and the implementation of targeted measures.[43] Moreover, there are several NGOs, such as Front Line Defenders and Protection International that are committed to protecting and supporting HRDs by providing international advocacy and ensuring the practical security needs of defenders.[44] Within the context of the Higher Protection Regime, the establishment of national coalitions of HRDs is another way to ensure and acknowledge the rights of HRDs at national level as well as to co-ordinate protection mechanisms.[45] In essence, national coalitions constitute a sort of network across a region through which defenders can claim their rights and seek protection at national level. Examples of

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[38] ibid.
[39] Organisation of African Unity (African Union), Resolution on the Protection of Human Rights Defenders in Africa, 1 June 2004, African Commission on Human and People's Rights Res 69.
[40] Organisation of American States, Human Rights Defenders in the Americas, Support for the Individuals, Groups, and Organisation of Civil Society Working to Promote and Protect Human Rights in the Americas**,** 7 June 1999**,** AG/RES. 1671 (XXIX-O/99).
[41] Declaration on HRDs (n 9), art 2.
[42] Gillian Triggs, 'National Human Rights Institution as Human Rights Defenders' (2016) 25 (1) Human Rights Defender 9, 9; Asmara Nababan, 'To Protect the Defenders Doing the Most Possible, Continuing to What Has to Be Done' (2008) 26 (1) Netherlands Quarterly of Human Rights 139, 143.
[43] UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, 16 January 2013, UN Doc A/HRC/22/47; UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, 23 December 2013, UN Doc A/HRC/25/55; UN Human Rights Council, Protection of Human Rights Defenders Res 13/13, 15 April 2010, UN Doc A/HRC/RES/13/13 para 3.
[44] M Lawlor and A Anderson, 'Role of International Organizations should be to support Local Defenders' (2014) 11 (20) SUR-International Journal of Human Rights 365, 368.
[45] Ulisses Terto Neto, *Protecting Human Rights Defenders in Latin America* (Palgrave Mcmillan, 2018) 122-128; N Blazevic, 'Networks for the Protection of Human Rights Defenders: Notes from the Field' (2013) 5 (3) Journal of Human Rights Practice 522, 526.

national coalitions are the National Coalition of Human Rights Defenders - Kenya (NCHRD-K), the East and Horn of Africa Human Rights Defenders Network (EHAHRD-Net), known as DefendDefenders, supporting defenders in Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, South Sudan, Sudan, Tanzania and Uganda. In South America, the Brazilian Program for the Protection of Human Rights Defenders (PPDDH) is one of the most-known national coalitions with branches in many states aiming to reach defenders working in remotes areas and are usually most vulnerable. In other words, these mechanisms are mechanisms devoted to the protection of defenders.

The argument put forward here is that all these special mechanisms for the protection of HRDs constitute a Higher Protection Regime, providing extra protection to HRDs. As stated above, defenders do not deserve greater protection than other vulnerable individuals, but, whilst they are not entitled to greater protection, in practice, most of defenders may need particular forms of protection that other vulnerable individuals who are not active in fighting for human rights do not require. This Higher Protection Regime is not a human rights enforcement mechanism. Rather, it constitutes a mechanism that brings the violations committed against HRDs to the fore and follows a 'name and shame' policy to increase state compliance.[46] Bennett et al described the Higher Protection Regime as a multi-level regime consisting of several stakeholders at national, regional and international level who work hard to ensure the protection of HRDs.[47] For instance, NGOs may make an urgent appeal to the Special Rapporteur on behalf of a defender or NHRIs may exert pressure on the Government to take all necessary measures to protect defenders or seek support from international governmental organisations, such as the European Union. Both terms refer to the work of various organisations to promote the protection of HRDs and ensure their rights. The main difference between these terms is that the 'multi-level regime' emphasises the involvement of several stakeholders in the protection of HRDs, while the Higher Protection Regime focuses on the extra-protection offered to HRDs.

[46] Mitchell (n 37), 237.
[47] K Bennett et al., 'Critical Perspectives on the Security and Protection of Human Rights Defenders' (2015) 19 (7) The International Journal of Human Rights 883, 885.

The logic behind this extra protection for HRDs is to provide a more efficient and faster protection for people who risk their lives to promote human rights. In particular, falling under the same protection regime as other individuals, defenders cannot enjoy an effective and immediate protection. Given the excessive volume of cases brought before treaty bodies and the equal importance of each case,[48] abuses against defenders are unlikely to be prioritised. For that reason, the Mechanisms devoted to the protection of HRDs offer trainings to defenders, provide material and psychological support to them, raise public awareness of their status and situations and most importantly, exert pressure on governments to comply with their international human rights obligations and the Declaration on HRDs. Furthermore, treaties' mechanisms are not as familiar with the trends in the violations committed against defenders as those Mechanisms established for this purpose were. In this sense, the reports of these Mechanisms can offer valuable guidance to human rights enforcement mechanisms at the international and regional level when they deal with cases involving HRDs.

Despite the existence of global and regional human rights treaties, state delegations taking part in the deliberations on the Declaration agreed to create and adopt a Declaration that would reiterate rights set out in other human rights treaties.[49] As pointed out above, the reason behind this was to highlight the relevance of some human rights with the activities of HRDs.

By the same token, the Higher Protection Regime for HRDs bestows on defenders the recognition they deserve and most importantly, it provides prompt, efficient and special protection based on their needs and the common methods of abusing their rights. If this were not the case, they would be inefficient, unable to continue their work, and as a consequence unlawfulness and corruption would increase.

[48] Nigel S Rodley, *The Role and Impact of Treaty Bodies* (OUP 2013).
[49] As will be explored further in Chapter 3 discussing the definition on HRDs, the Declaration on HRDs was passed by consensus.

1.5. The Focus of the Thesis

The thesis refers to the legal obstacles to the work and life of HRDs, no matter where they live and work. On this basis, the arguments raised concern all defenders operating either in the so-called 'human rights-friendly' countries or in conflict areas and countries skimming the edges of democracy.

The activity of HRDs in democratic states is limited, as Western states seem to respect the fundamental principles of democracy and ensure the rights that are significant to the defence of human rights. It is also remarkable that many states and regional systems tend to support defenders. For example, the European Union (EU) has adopted the 'EU Guidelines on Human Rights Defenders' to enhance the promotion of the work of defenders and promote their protection, while the United Kingdom (UK) expressed its support to defenders through a 2019 research report highlighting the work of HRDs and the challenges they face.

Taking these factors into account in conjunction with the fact that none of the participants taking part in the empirical research comes from a Western democratic country, as will be seen below, one could argue that there is no point in looking at examples of defenders living in western states. However, in practice, even states who profess the paramount importance of human rights violate fundamental rights and freedoms under the pretext of the combat against terrorism and national security; while in several cases keep distances from their human rights obligations.[50] In this sense, HRDs speaking out against government policies or human rights abuses can be found operating in democratic states.

HRDs live and work mainly in countries skimming the edges of democracy, putting pressure on governments to comply with their international human rights obligations. According to academic literature, the notions 'fragile democracies' as well as 'borderline democracies'[51] are used to describe the compliance with the

[50] For example, the Terrorist Asset – Freezing Act 2010 provides that '[t]he Treasury has the power to freeze the assets of individuals and groups thought to be involved in terrorism, whether in the UK or abroad, and to deprive them of access to financial resources.' In addition, Teresa May introduced the idea of extraterritorial derogation from the European Convention on Human Rights (ECHR) for future conflict, which would be a serious blow to human rights.

[51] The terms 'fragile democracies' and 'borderline democracies' are used interchangeably.

principles of electoral democracy.[52] However, in this thesis, these terms refer to states that do not comply with the fundamental principles of democracy under international law.[53] Notably, defenders in conflict zones fight hard to expose atrocities and abuses, so that justice can be served, while the UN Special Rapport has repeatedly highlight that the rights of defenders are particularly important during times of emergency and threat.[54]

On the basis that the legal obstacles to the work and life of HRDs may be, more or less the same and the protection of the rights of all HRDs should be ensured in any case, the thesis has drawn examples from democratic states, such as Western and Central Europe, 'fragile democracies', such as Russia and Turkey and conflict zones, such as Palestine.

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[52] Andreas Schedler, *The Politics of Uncertainty* (OUP 2013) 79-80; Samuel Issacharoff, 'Fragile Democracies' (2007) 120 (6) Harvard Law Review 1405, 1407.

[53] The UN Charter does not include the word 'democracy', but the opening words '[w]e the People" reflect the concept of democracy. On the other hand, the Universal Declaration of Human Rights (UDHR) clearly introduced the fundamental principle of democracy by stating that 'the will of people shall be the basis of the authority of government', while the ICCPR clearly lays the legal foundation for the principles of democracy under international law. In particular, freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association with others (Article 22); the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25); the right to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors (Article 25) . Consequently, if a State fails to comply with one of the aforementioned principles, is considered fragile or borderline democracy.

[54] UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights Defenders, 4 March 2020, UN Doc HRC 43/51; UN Special Rapporteur on the Situation of Human Rights Defenders, 'Human Rights Defenders in Conflict and Post-Conflict Situations' <https://www.youtube.com/watch?v=-ZNnYCfMSbM&fbclid=IwAR0dWhKggIPFLJIHN7ACr8d5O5Ihigx-Vw097LURylmhTCUL4_isHoo-L5Y> accessed 4 March 2020.

1.6. Thesis Overview

Following the Introduction, Chapter 2 discusses the methodological choices of the thesis and explains the reason why it has adopted a more socio-legal view. As qualitative research has been chosen to supplement the socio-legal approach of the thesis, Chapter 2 also provides a description of the empirical research implemented, allowing the reader to evaluate the reliability and validity of the qualitative part.

The primary objective of the thesis is to present and discuss the main legal obstacles to the activity and life of HRDs, as they come out of the reports of the UN Special Rapporteur on HRDs and other NGOs working with defenders. More specifically, the obstacles this thesis focuses on are: the definition of the term 'human rights defender', the criminalisation of HRDs, and impunity for crimes committed against HRDs. Chapters 3, 4, 5 each address an obstacle.

In particular, on the basis that a clear definition is essential to the effective protection of HRDs, Chapter 3 examines the definition of the term 'human rights defender' and particularly the predominant definition deriving from Article 1 of the Declaration interpreted in light of Fact Sheet 29. Considering a number of problematic aspects in the application of the definition, the Chapter argues that the existing definition is vague. Despite the importance of a clear definition, Chapter 3 does not propose a new definition, as that would cause further confusion. Instead, it suggests alternative interpretative approaches that could respond to the identified problematic aspects of the existing definition and facilitate the interpretation of the term.

Chapter 4 addresses another challenging obstacle, which seems to become a common method of targeting defenders: the criminalisation of HRDs. The Chapter looks at the two types of abuses through legal actions, namely the creation and implementation of criminal justice and the employment of punitive mechanisms and discusses the extent to which practices within this context can be justified under international human rights law. In the context of the analysis, it explores the nature of the rights of HRDs, emphasising the obligation of states to ensure their rights and examines whether and under which conditions limitations on their rights can be permitted. Chapter 4 also uses indicative examples, such as the Russian Foreign

Agent Law, that facilitate the analysis and show how practice occurs, contributing to a better understanding of each category.

Chapter 5 demonstrates how impunity for the crimes committed against defenders is a major obstacle to their life and activity in the sense that crimes that remain unpunished encourage further violations against HRDs. In order to discuss impunity, Chapter 5 needs to identify first who is responsible for the abuses. It therefore categorises the violators into two groups: state actors and NSAs. On this basis, it builds on arguments about state responsibility for human rights violations under international human rights law, placing particular emphasis on the nature of human rights obligations. It also develops arguments about the responsibility of NSAs, acknowledging, on the one hand, the absence of an international instrument imposing obligations on NSAs and emphasising, on the other, the United Nations Guiding Principles on Business and Human Rights (UNGPs), as they are considered the first steps towards regulating the legal responsibility of NSAs. Chapter 5 could not ignore the binary: the right of the victim to an effective and the obligation of the State to prosecute those deemed responsible for human rights violations. Chapter 5 concludes with the reasons why, at the end of the day, impunity prevails.

Chapters 4 and 5 are distinct from each other in the sense that the former focuses on the measures taken to target defenders directly and prevent them from carrying out their human rights activities. On the other hand, Chapter 5 looks at measures that deny accountability for the actions of those responsible for the violations committed against defenders and thus perpetuate the cycle of violence against them. There is no doubt that both obstacles affect the activity and efficiency of HRDs and have a chilling impact on the rule of law and human rights.

It will appear through the analysis that international human rights law has failed to provide efficient protection to HRDs, so the purpose of Chapter 6 is to consider the international refugee regime as an alternative to the protection of HRDs. In this sense, Chapter 6 first discusses the intersection between the term ‘refugee’ and ‘HRD’ in order to establish that HRDs fall under the protection of the Refugee Convention, and then considers the extent to which this alternative is suitable for HRDs. The Chapter may be regarded as a pre-recommendation chapter, as it acts as a transition between the obstacles and the recommendations for possible reforms.

Chapter 7 makes two types of recommendations. The first type responds to the identified legal obstacles within the context of international human rights law, while the second type of recommendations, which is not strongly related to international human rights law, may contribute not only to the protection of HRDs, but also to the implementation of human rights in general.

This thesis considers the state of the law and practice as at 21 May 2020.

1.7. Original Contribution

The area of HRDs is under-researched, as there is a limited number of journal articles and books addressing the situation of HRDs. The lack of academic sources related to HRDs is even greater in legal scholarship. In this sense, the purpose of the present thesis is to provide a coherent analysis of the abuses against defenders from a legal perspective and propose recommendations for reform under the umbrella of law, filling a significant gap in literature. In order to identify the legal obstacles to the activities of defenders and develop relevant arguments, the thesis adopts a strict doctrinal approach, relying on a number of sources that are not always strictly related to HRDs. Due to the lack of sources, it also considers socio-legal sources, such as research reports and policy papers, while interviews with HRDs further inform and supplement the doctrinal and socio-legal findings. The arguments raised in the present research project are the outcome of an innovative combination of research methods and seek to identify and discuss the obstacles to the life and work of HRDs in legal terms. The consideration of possible recommendations within the context of human rights law responds to the needs of HRDs and aims to contribute to enhancing the protection of HRDs.

Chapter 2

Methodology

2.1. Introduction

This thesis focuses on the legal obstacles to the work and life of HRDs, as any impediment to their activity may entail serious consequences for the realisation of human rights. Especially, it looks at how these obstacles arise and exist, emphasising their catastrophic impact on the life and activity of HRDs. In order to address all the aspects of the issue and provide a comprehensive analysis, it is not sufficient for the thesis to consider and develop only the legal rules and concepts that are relevant to the protection of defenders. On this basis, it also considers a number of other factors which influence and are influenced by law, adopting a more socio-legal approach. In essence, what makes this thesis original is that it combines pure doctrinal approach with strong socio-legal analysis, providing a holistic approach to the situation of defenders and developing a system of ideas based on law, filling a significant gap in literature. This Chapter sets out the methodological approach of the thesis and seeks to justify the methods and legal sources used in undertaking this project. In order to do so, it discusses how it understands and uses general international law to assess the situation of HRDs, while it emphasises the role of the socio-legal approach employed as well as its intersection with the doctrinal approach.

2.2. Doctrinal Approach

A simple definition of doctrinal approach is that it refers to research into theories, principles and rules. More precisely, the Australian Pearce Committee described it as a type of research that 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'[1] In other words, doctrinal approach identifies and analyses the current state of the law on a particular point.[2]

At many points throughout the thesis, pure doctrinal method is used to explore and discuss rules, principles and academic scholarship relevant to the matter under investigation within the context of international human rights law.[3] In essence, the use of strict doctrinal approach seeks to establish a conceptual analysis of all those rules and legal principles under international human rights law relevant to the situation of HRDs.

In order to explain the interpretative value of the sources used in this thesis, this Section discusses how this research understands international law and most specifically, how it has been used to assess the position of HRDs. On this basis, it looks first at the sources of public international law and considers the extent to which a traditional understanding of the sources of public international law can account for the development of international human rights law norms.

2.2.1. Sources of Public International Law

Article 38 (1) of the Statute of the International Court of Justice (ICJ) is always the classic starting point for any study of the sources of international law, as it enumerates the formal sources of international law that the Court relies upon when it is asked to decide disputes before it. In particular, Article 38 provides that international law derives its authority from international custom, international

[1] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service 1987) 2, 312.
[2] Glanville Williams, *Learning the Law* (12th edn, Sweet and Maxwell 2002) 206-207.
[3] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 (3) Erasmus Law Review paras 130-131.

conventions, general principles of law and judicial decisions and the teaching of the most highly qualified scholars of the various nations.[4]

Despite the fact that, for some scholars, such as Peters and Cassimatis, international human rights law is a self-contained subfield within general international law, this thesis accepts that international human rights law is an aspect of public international law and works within the broader framework of general international law.[5] On this basis, the sources of international human rights law are solidly grounded on international law and as a result have their basis in custom, human rights treaties and general principles of law. This Section seeks to explore and understand the sources of public international law and discuss to what extent each source has applied to this research project.

2.2.1.1. Treaty and Rules of Treaty Interpretation

While none of the sources listed in Article 38 (1) should be ignored, it is widely accepted that customs and treaties are the most fundamental sources of international law; this is why the analysis focuses mainly on these two sources. With regard to the international treaties,[6] according to Article 2 (1) of the 1969 Vienna Convention of the Law of Treaties (VCLT), a 'treaty is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[7] Treaties may vary significantly in substance and may regulate a wide range of issues. More specifically, there are bilateral treaties negotiated and concluded between two states, that also usually deal with narrow and specific issues (also known as bilateral agreements) and impose binding obligations on those two states. At the other end of the spectrum, there are

[4] Charter of the United Nations and the Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Art 38 (1).
[5] See Articles on theories of 'Fragmentation' and 'Reconciliation' of international law: Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 (3) International Journal of Constitutional Law 671, 673; Marjan Ajevski, *Fragmentation in International Human Rights Law: Beyond Conflict of Laws* (1st edn, Routledge 2015) 85; Antony Cassimatis, 'International Humanitarian Law, International Human Rights Law and Fragmentation of International Law' (2007) 56 (3) The International Comparative Law Quarterly 623.

[6] Treaties are also called as conventions, protocols, covenants and international agreements.
[7] Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UN TS 331 (1969), art 2 (1).

multilateral treaties with several parties (both sovereign states and international organisations) which create a set of rules governing a particular area, such as the UN Convention on the Law of the Sea.[8] 'Every treaty is binding upon the parties to it and must be performed by them in good faith',[9] which means that a treaty does not impose obligations and create rights for third states unless Articles 35 and 36 apply.

A treaty is the most explicit way to create legally binding obligations as it provides a solid and compelling legal ground. Much of international human rights law is now codified, but before the adoption of the ICCPR and ICESCR, it would sound impossible to believe that a human rights treaty would operate in the same way as other state-centred international conventions because treaties used to regulate interstate obligations and duties rather than individual human rights and freedoms.[10] In international human rights law, international treaties play the most decisive role in governing the area of human rights, as they are uncontroversial and do not cause jurisprudential difficulties. This in combination with the lack of consensus on whether the UDHR is customary international law, as will be seen below, and the difficulties in proving State practice and *opinio juris* in the area of human rights, renders treaty law a better choice for law-making than custom.

As the Declaration on HRDs reiterates human rights contained in other treaties, the discussion of the legal status of 'treaties' under public international law and the rules of treaty interpretation contributes to a better understanding of the nature of human rights in general as well as of those rights and freedoms articulated in the text of the Declaration in particular.

When it comes to treaty interpretation, Article 31 (1) of the VCLT provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose.' The underlying principle is that the text represents a real expression of

[8] A Roberts and S Sivakuramanim, 'The Theory and Reality of the Sources of International Law', in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018) 91.
[9] Vienna Convention on the Law of the Treaties (n 7), art 26.
[10] B Simma and P Alson, 'The Sources of Human Rights Law; Custom, Jus Cogens, and General Principles', (1988-1989) 12 Australian YearBook of International Law 82, 83; Malgosia Fitzmaurice, 'The Identification and Characters of Treaties and Treaty Obligations between States in International Law' (2002) 73 (1) British Yearbook of International Law 141, 143.

what parties intended at the time of the treaty was concluded and is also strongly connected with another principle embodied in the Vienna Convention, namely *pacta sunt servanda*. The ICJ has affirmed that this provision codifies a rule of customary international law and has highlighted the importance of textual interpretation as a method of giving effect to parties' intention.[11]

Words may change meaning over time in ways that no longer represent parties' intention upon conclusion of the treaty. However, a departure from the actual wording of the treaty would not respect the parties' intent, so it has been suggested that the new meaning of term should be explored and taken into account on each case on which the treaty is to be applied.[12]

Article 31 of the VCLT also requires that a treaty be interpreted 'in light of the object and purpose of a treaty' which seems to be a rather vague criterion. Therefore, in order to identify the object and purpose of a treaty, it is important to read this provision along with all interpretative declarations made by states. Even though interpretative declarations are not addressed by the Vienna Convention, the International Law Commission (ILC) defined the term 'interpretative declaration as 'a unilateral statement, […] made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.'[13] In other words, they are explanatory statements at the time of signature, ratification and accession explaining how a State understands those treaty obligations to which it has agreed to be bound.[14] Interpretative declarations should not be confused with reservations with which a State purports to exclude or modify certain provisions of the treaty.[15] As reflected in Article 32 (1) of the VCLT, the preparatory work of the treaty, known as travaux préparatoires, can be used as a supplementary tool of

[11] *Territorial Dispute* (*Libya Arab Jamahariya v. Chad*), Judgment, (Judgement), [1994] ICJ Rep 6 para 41; *Oil Platforms* (*Islamic Republic of Iran v, United States of America*) (Judgment) [2003] ICJ Rep 161 para 23; *Kasikili/Sedudu Island* (*Botswana v. Namibia*) (Merits) [1999] ICJ Rep 1045 para 18.

[12] *Dispute Regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*) (Judgment) [2009) ICJ Rep 133, para 64.

[13] International Law Commission, 'Guide to Practice on Reservations to Treaties' (2011) 2 vol II Yearbook of the International Law Commission (hereinafter Guide to Practice on Reservations to Treaties) 26.

[14] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Swedish Institute of International Law 1988) 213-222.

[15] Guide to Practice on Reservations to Treaties (n 13), 26.

interpretation either to confirm the meaning of the text or to contribute to exploring and understanding the object and purpose of the treaty.[16]

It has been argued that the special nature of human rights treaties requires the use of special interpretative rules because the methods of treaty interpretation under the VCLT, which is not a human rights-minded treaty, fail to consider the *raison d' être* of the convention and as result to give effect to human rights. However, the ILC Committee on International Human Rights Law and Practice held that human treaty body findings and regional court case law constitute 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation',[17] which falls clearly within the scope of Article 31 (3) b of the VCLT.

Within the context of treaty law, it would be remiss of this Section if it did not consider reservations provided in Article 19 of the Vienna Convention. The rationale of this provision is to accommodate the interests of those states not wanting to be bounded by specific provisions and thereby promoting universal participation on the one hand and preserve the integrity of the treaty on the other.[18] According to Article 19 (c), the reservation should not be 'incompatible with the object and purpose of the treaty'. In *North Sea Continental Shelf*, the ICJ accepted that reservations to treaty provisions that crystallise a rule of customary international law are possible,[19] but reservations excluding provisions reflecting *jus cogens* rules are not. The question that arises here is whether the rule of Article 19 (c) can apply to human rights treaties in the sense that human rights treaties differ from other treaties, as they create rights, impose obligations on State parties and regulate the relationship between the individual and the State. It has generally been accepted that the rule enshrined in Article 19 is applicable to reservations to human rights treaties but should be applied in 'an appropriate and suitably adopted

[16] Malgosia Fitzmaurice, 'The Practical Working of the Law of the Treaties', in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018) 154.
[17] International Law Association - Committee on International Human Rights Law and Practice, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Report of the 71st Conference of the International Law Association' (2004) 621, 628-629.
[18] Fitzmaurice (n 16), 161.
[19] *North Sea Continental Shelf* (*Germany v. Denmark*) (Merits) (1969) ICJ Rep 3 paras 29 and 72.

manner'.[20] Special emphasis should be placed on the leading role of treaty bodies in testing the validity and compatibility of reservations with the object and purpose of the treaty as well as their ability to engage in a 'reservation dialogue' with the reserving states in order to examine and understand the nature of reservations and political situations. As the so-called 'reservation dialogue' is not addressed by the Vienna Convention, the ILC has provided a non-binding guidance on reservations to facilitate the dialogue process.[21]

Even though this research project has heavily relied on the Declaration of HRDs, which is a non-binding instrument, the rights of HRDs are contained in human rights treaties, such as the ICCPR. In this sense, as stated above, it is really important to rely on the traditional reading of 'treaties' and the relevant rules of interpretation under public international law in order to define and understand the rights of defenders. In addition, as much of international human rights law is contained in treaties and at times the thesis looks at the provisions of international and regional treaties in order to establish and discuss the legal framework of certain rules and principles, the rules of treaty interpretation and particularly Articles 31 and 32 needed to be discussed in this Section so that the reasoning of the researcher could be followed throughout the analysis.

2.2.1.2. Custom

The second source of international law is custom, and it is composed of two elements: namely state practice and *opinio juris sive necessitatis* or simply *opinio juris*, which refers to a state's belief that it is obliged to act according to a norm. State practice refers to a pattern of behaviour and practice by state organs and officials, such as the executive, the legislature, the judiciary and the military.[22] State practice should be accompanied by a belief that the action is carried out as a legal obligation. In particular, the ICJ explained customary law and *opinio juris* for the first time in *North Sea Continental Shelf* judgment, while the Court reiterated the approach in *Nicaragua case*:

[20] Fitzmaurice (n 16), 161; Alain Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur' (2013) 24 (4) The European Journal of International Law 1061, 1061.
[21] Guide to Practice on Reservations to Treaties (n 13), 37.
[22] Roberts and Sivakuramanim (n 8), 93.

> [F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by opinio juris sive neccessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief..the subjective element, is implicit in the very notion of opinio juris sive neccessitatis.[23]

The question that arises here is which evidence counts as State practice and which as *opinio juris*. D'Amato, distinguishes between actions (State practice) and statements (*opinio juris*) arguing, for example, that actions respecting or violating human rights amount to State practice, while statements declaring the existence of a particular right or condemning human rights abuses could amount to *opinio juris*.[24] On the other hand, scholars, like Akehurst, argue that actions and statements are evidence of State practice.[25] This opinion is not quite convincing in the sense that it may result in double counting, as the explanation of vote on a UN General Assembly Resolution can be described as both State practice and *opinio juris*.[26]

As stated above, international human rights law is mostly treaty-based, however, there is some debate about whether human rights treaty law has emerged from customary law. At this point, one could argue that since there is extensive human rights treaty there is no point in considering whether there exists customary law beyond treaty rules. However, this position is quite problematic in the sense that there may be states that are still not parties to major human rights treaties, such as the ICCPR and ICESCR, or have made substantial reservations, opting out of some treaty obligations.[27] When it comes to domestic law implications, in some states, international treaties have the same status as that of domestic legislation. However,

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[23] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [1986] ICJ Rep 14 paras 183 and 207.
[24]Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 89-90, 160.
[25] Michael Akerhust, 'Custom as a Source of International Law' (1976) British Yearbook of International Law 1, 1-2, 35.
[26] Roberts and Sivakuramanim (n 8), 93.
[27] Michele Olivier, 'The Relevance of Soft Law as a Source of International Human Rights' (2002) 35 (3) Comparative and International Law Journal of Southern Africa 289, 300.

if they conflict with a domestic rule, provisions deriving from customary law may be protected more effectively than treaty rules.[28]

There is a strong opinion in international human rights law that it is solidly grounded in customary law in the sense that the UDHR has now acquired customary law status. The UDHR introduces the basic rights and freedoms all human beings are entitled to. In particular, it includes civil and political rights, like the right to life, liberty, free speech and privacy. It also includes economic, social and cultural rights, such as the right to social security, health and education.[29] The status of the UDHR is described by the United Nations as that of 'a manifesto with primarily moral authority',[30] while many UDHR's provisions were incorporated into human rights treaties. The existence of such human rights conventions by no means renders the Universal Declaration useless. On the contrary, many scholars share the opinion that the UDHR constitutes customary international law, as it was the first source of international legal obligations at the international level.[31]

A relatively modest argument supporting the origin of human rights customary law from the UDHR is found in Oscar Schlachter's book '*International Law in Theory and Practice: General Course in Public International Law*'. Having taken into consideration different evidence of *opinio juris* and practice in the field of human rights, he concluded that some rights, such as freedom of expression and assembly and equality between men and women cannot fall under the umbrella of custom. Despite the fact that there is *opinio juris*, these rights are commonly violated in many ways in different states, so the requirement of State practice is not satisfied. However, he found that provisions, such as slavery, genocide and torture can be considered customs as, even though torture happens in many instances, it is almost always against the domestic law. More accurately, Schlacher states that: '[w]hen violations of these strongly held basic rights of the person take place, they are to be

[28] Simma and Alson (n 10), 86.
[29] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)
[30] The International Bill of Human Rights is comprised of the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the ICCPR and its two optional protocols.
[31] Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2010) 5-10; Melissa Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement,' (2005) 35 (2) California Western International Law Journal 275, 279-281; Theodor Meron, *Human Rights And Humanitarian Norms As Customary Law* (Clarendon Press 1991) 108.

regarded as violations, not as "State practice" that nullifies the legal force of the right'.[32]

The thesis does not rely on custom to a great extent for two main reasons: first, because much of international human rights law is treaty based, and second, because it has become clear from the analysis that principles claimed as customs are difficult to be proved as such.

2.2.1.3. General Principles of International Law

The third source of international law set out in Article 38 (1) of the ICJ Statute is general principles of law recognised by civilised nations. General principles are considered 'gap fillers' in disputes where treaties and customs do not provide a rule.[33] Today, there are understood as principles derived from domestic law and can be principles of justice, such as *res judicata* and the impartiality of judges, criminal and comparative law and natural rule.[34] Simma and Alston believe that the UDHR cannot fall within the meaning of custom because even if the authority of the UDHR is undeniable, lying in its acceptance by UN Member states, the rights enshrined in the Declaration are hugely violated.[35] On this basis, they argue the UDHR is binding because it falls within the third type of source, constituting a general principle of law.

The *Nicaragua* case, however, lowered the threshold for the development of customary law from resolutions, as it played down the significance of State practice as one of the elements necessary for the transformation of resolutions into customary law,[36] which leaves room to argue that the UDHR is customary law. In this sense, even if the views of Schlachter, Simma and Alston are described as radical, the point here is that all views accept that most of the rights set out in the UDHR are legally binding.

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[32] Oscar Schlachter, International Law in Theory and Practice: General Course in Public International Law (Martinus Nijhoff 1982) 336.
[33] Emmanuel Voyiakis, 'Do General Principles Fill "Gaps" in International Law' (2014) 14 Austrian Review of International and European Law 239, 239-240.
[34] Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 (4) The European Journal of International Law 949, 950-951; Mahmood Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law" ' (1990) 11 (3) Michigan Journal of International Law 768, 775.
[35] Simma and Alson (n 10), 102.
[36] *Nicaragua v. United States of America* (n 23), paras 99-100; Theodor Meron, *Human Rights and Humanitarian Law as Customary Law* (Clarendon Press 1989) 107.

Despite the significance of the third source articulated in Article 38 (1), the thesis has not used general principles of international as they were not found to be relevant to the analysis. However, the discussion of the source at this point was needed because, as elaborated above, there are views supporting that the UDHR, which is the foundation stone of international human rights law, may fall within the classification of 'general principles of international law'.

2.2.1.4. Judicial Decisions and the Teaching of Scholars

In academic literature, there is a lot of debate as to whether judicial decisions and the teaching of highly qualified scholars can really be qualified as sources of international human rights. Considering literature on this field would exceed the limits of this series, the thesis accepts that there is a clear distinction between the sources in paragraphs (a), (b) and (c), namely treaty, custom and the principles of international law, and judicial decisions and the teaching of publicists, which are characterised as 'subsidiary means' for determination of rules of law. This research project also accepts that Article 38 (1) (d) is not meant to denote 'lesser importance' to these sources, but the point is that these sources cannot generate rules. In fact, judicial decisions and the work of scholars are of great significance because they reiterate rules deriving either from treaty, custom or general principles.

The reference in Article 38 (1) (d) to judicial decisions includes not only the decisions of the ICJ, but also the decisions of international and regional courts and tribunals as well as domestic jurisprudence. The thesis has relied on ICJ jurisprudence to discuss treaty and customary international law, while it has considered soft law emerging from international mechanisms, such as the Human Rights Committee. At this point it has to be said that the ICJ has relied on the reasoning of international and regional human rights specialist mechanisms and borrowed findings and concepts from their jurisprudence.[37] Similarly, in several circumstances, the thesis has showed significant reliance on regional and domestic jurisprudence not only because it appears to be more well developed with regards

[37] *Ahmadou Sadio Diallo* (*Guinea v. Democratic Republic of the Congo*) (Judgment) [2010] ICJ Rep 428 paras 66-68.

to HRDs, but also because it contributes to the formulation and implementation of international human rights law in general.

When it comes to domestic jurisprudence, in literature, there are views that domestic judicial decisions constitute evidence of treaty practice or *opinio juris*,[38] but this is clearly out of the scope of this research project. This thesis understands domestic jurisprudence as 'non-binding, but legally relevant considerations'.[39] More specifically, according to Besson, domestic judicial decisions have not only 'decisional authorities' for the parties, but also 'interpretative authority'. In essence, the court's reasoning on matters related to international law may be taken into account by judges, decision-makers and researchers and as a result guide future interpretations of international law, informing both domestic and international law. The domestic context of the judicial decision, such as the jurisdiction, the composition and the court hierarchy should also be taken into account with regards to the importance of the decision.[40] For instance, several US Supreme Court and Court of Appeals' judgements identified and discussed rules of customary international law, contributing to the development of international law more generally.[41]

In international human rights law, there is a whole area of law considering the role of regional and domestic human rights jurisprudence in international human rights law and the extent to which regional systems can threaten the universality of human rights,[42] however, this clearly goes beyond the limits of this research project. In

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[38]Andrei Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY'in G Boas and W A Schabas (eds.) *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 280; Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 113; UN International Law Commission, Draft Conclusions on Identification of Customary International Law, With Commentaries, 10 August 2018, UN Doc A/73/10.

[39] Grant Lamond, 'Persuasive Authority in the Law' (2010) 17 Harvard Review of Philosophy 16, 16.

[40] Odile Ammann, *The Legal Effect of Domestic Rulings in International Law* (Brill Nijhoff 2018) Ch 4.

[41] Indicatively see, F*ilártiga v. Peña-Irala* US Appeal Judgment 191 (1980); The *Paquete Habana* 175 US 677 (1990); *Sosa* v. Alvarez-Machain 542 U.S. 692 (2004).

[42] See, Michael K Addo, 'Practice of United Nations Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (2010) 32(3) Human Rights Quarterly 601; C. Heyns and M Killander, 'Towards Minimum standards for regional human rights instruments', in Cogan *et al* (eds), *Looking to the future: Essays on International Law in Honor of*

essence, the thesis has considered and used regional and judicial jurisprudence because it accepts that regional and domestic jurisprudence localise international human rights rules and standards, reflecting the cultural elements of each state and region and as a result act as a bridge between universality and cultural relativism. In other words, regional human rights systems and domestic courts interact with international jurisprudence and all together shape the content of international human rights law.

In respect of the academic literature, the few monographs on HRDs, such as Terto Neto's monograph entitled 'Protecting Human Rights Defenders in Latin America' and special issues and research articles on HRDs, books and journal articles regarding fundamental legal concepts and doctrines enable the researcher to establish a conceptual framework, applying the relevant legal rules to the situation of HRDs. In addition, these sources contribute to understanding the decisions concerning the rights and violations against HRDs and as a result enable the researcher to predict future decisions which will logically be based on the established ideas and criticise those that do not adhere to rule.[43]

2.2.2. Soft Law

The area of HRDs is primarily governed by the Declaration on HRDs, resolutions, annual reports and other research reports, which fall within the meaning of the concept of the 'so-called' soft law. As this thesis focuses on the work and life of HRDs, it has inevitably considered and relied on several soft law sources, placing particular emphasis on the Declaration on HRDs and UN resolutions and reports as well as NGO research reports.

Soft law does not satisfy the traditional criteria for the establishment of binding rules of international law and as a result is not among the principal sources of international law. However, the main advantage of adopting rules in soft law is that states agree to take on commitments that otherwise they would not be willing to,

W Michael Reisman (Martinus Nijhoff Publishers 2010) 527-558; Tamara Relis, 'Human Rights and Southern Realities' (2011) 33 (2) Human Rights Quarterly 509, 509-551.

[43] Graham Virgo, 'Doctrinal Legal Research' in P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008).

and compose a text in a more accurate and precise form than they would do in a treaty.[44] Also, soft law instruments are easier to amend, supplement or replace than hard law in the sense that all that is needed is the adoption of a new resolution or another report.[45] The literature on soft law has identified a number of reasons why soft law is a remarkable alternative to hard law, but any further discussion would go beyond the scope of this thesis. The point here is to highlight that there may be a lot of soft law instruments out there, which, in fact, constitute valuable sources of law.

Notwithstanding the non-legally binding nature of soft law, it would be wrong to characterise it as legally irrelevant or non-law.[46] In fact, soft law contributes not only to the development of international law, but also to a better understanding of hard law, as it seeks to handle and explain those legal phenomena that are currently in the process of articulation and effectuation and the sources of general international law cannot accommodate.[47] In essence, soft law plays a major role in formulating hard law and there is no room for doubt that hard and soft law develop the content of international human rights law.

It is worth noting that judges and policy-makes take soft law instruments very seriously, interpreting and relying on non-binding provisions in the same way as treaties. More specifically, the UK House of Lords considered and referred to a number of soft law sources, such as a UN High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, the Declaration on Territorial Asylum 1967, resolutions of the Committee of Ministers of the Council of Europe, the Human Rights Committee General Comment 31 and reports by the Inter-American Commission for Human Rights and UN Committee on the Elimination of Racial Discrimination.[48]

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[44] Alan Boyle, 'Soft Law in International Law-Making' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2014) 122-123; Alan Boyle, 'The Choice of a Treaty: Hard Law versus Soft Law in S Chesterman, D M Malone and S Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (OUP 2019) 102.

[45] Anthony Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 (4) The International and Comparative Law Quarterly 787, 791.

[46] G H J van Hoof, *Rethinking the Sources of International Law* (Deventer 1986) 181.

[47] Ibid, 189.

[48] *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre and Others* [2005] 2 WLR 1, paras 6, 12, 21, 24.

Even though there is no generally accepted definition of soft law, Dinah Shelton has categorised sources of soft law into two main categories, which accurately reflected the significance of each type of source. According to Shelton, 'those normative texts, not adopted in treaty form that are addressed to the international community as whole or to the entire membership of the adopting institution or organisation'[49] can be classified as 'primary' soft law. More specifically, this category includes UN Declarations, Resolutions of the GA and other Committees. 'Secondary' soft law is a broader category, including a wide range of sources. It covers the general comments and recommendations of human rights treaty bodies, annual reports and recommendations of Special Rapporteurs and other *ad hoc* bodies, the jurisprudence of treaty bodies and research reports of international organisations.[50]

The degree of softness may vary and have a strong impact on compliance. Indicatively, whether a resolution was adopted by consensus, or articulates rules and human rights enshrined in treaties or represents the recognition of customary law may be one of the factors that could lead to greater compliance. The body that issues a report or makes recommendations, its composition and especially whether it derives its jurisdiction and authority from a treaty is also a decisive factor. The credibility of each source can be evaluated on a case by case basis, but the main reason behind the decision to rely heavily on soft law in this thesis is because it facilitates the understanding of hard law and together with the binding rules of international law formulates international human rights law.

This research project has used the Declaration on HRDs as the main source of information in order to discuss the definition of the term 'human rights defenders' as well as the rights of HRDs in general. As said many times in the thesis, the Declaration on HRDs does not create new human rights, but reiterates existing human rights enshrined in human rights treaties. This in conjunction with the fact that the Declaration on HRDs was adopted by consensus, despite the difficulties

[49] Dinah Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 Studies in Transnational Legal Policy 119, 120.
[50] ibid, 122.

and compromises, as will be discussed later in detail, is crucial in determining the degree of softness and value of the source.

Bothe argues that besides the Resolutions of the Security Council that are legally binding under Article 25 of the United Nations Charter,[51] resolutions or declarations purporting existing rules and provisions of international or express the instant general consensus of the international community should be regarded as binding law.[52] Even though this view is rather extreme, in the sense that binding rules are only those set out in Article 38 (1) of the ICJ Statute, there is no doubt that soft law sources articulating existing principles of international law, like the Declaration on HRDs, are of great interpretative value. In any case, when interpreting a GA resolution or a Declaration, the thesis does accept that a state's position on a particular area creates expectations that it will adhere to the principle it declares and plan their actions on the ground of these commitments.[53]

The thesis has relied on a wide range of annual reports of the UN Special Rapporteur on HRDs and other UN treaty bodies and Special Procedures, general comments, resolutions of the GA and research reports as well as recommendations of international organisations. As discussed on many occasions in the thesis, the value of those non-binding instruments is significant, as they provide authoritative interpretations of the obligations deriving from human rights treaties.[54] This is an approach supported by the Inter-American Court of Human Rights (IACtHR) when it considered the legal status of the American Declaration of the Rights and Duties of Man. In particular, the Court stated:

> The Declaration is the text that defines the human rights referred to in the [OAS] Charter … with the result that … the American Declaration is for these States a source of international obligations related to the Charter of the

[51] Charter of the United Nations and the Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 25.
[52] Michael Bothe, 'Legal and non-Legal Norms: A Meaningful Distinction in International Relations' (1980) 11 Netherlands Yearbook of International Law 65, 68, 75-76.
[53] Gregory J Kerwin, 'The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts' (1983)1983 (876) D*uke* L*aw* J*ournal* 876, 892; Stephen M Schewbel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 Proceedings of the annual Meeting of American Society of International Law 301, 303.
[54] Christine Chinkin, 'Sources' in D Moeckli, S Shah, S Sivakumaran, and D Harris (eds), *International Human Rights Law* (3rd edn, OUP 2018) 81.

> Organization. … That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect.[55]

Based on these sources, the author firstly identified the main obstacles to the work of HRDs and then discussed their impact on their life and human rights activity. The socio-legal part of this research project and particularly the interviews with HRDs came to confirm the findings of the doctrinal approach and strengthen the analysis. In other words, the thesis used doctrinal approach to identify and discuss the obstacles, while the socio-legal part informed the doctrinal reading of the sources.

As the thesis has heavily relied on Fact Sheet 29 to discuss the requirements to be a defender, at this point it is worthy justifying this choice. One could question the credibility of the source in the sense that the Office of the UN High Commissioner for Human Rights (OHCHR) did not even take part in the negotiations on drafting the Declaration on HRDs. Even though the OHCHR did not participate in the negotiations, the role of the Office is to 'ensure universal enjoyment of all human rights, to remove obstacles to their effective implementation, and to enhance coordination and cooperation of human rights-related activities throughout the United Nations system.'[56] On this basis, it produces Fact Sheets to increase knowledge and provide interpretative guidelines in order to give effect to human rights.[57] In several circumstances, international organisations mandated to monitoring and developing certain human rights collaborate with the OHCHR to issue Fact Sheets. For example, the World Health Organisation together with the OHCHR produced Fact Sheet 31 to clarify the right to health and elaborate on states' obligations.[58] Fact Sheets are of great importance not only to those working for international organisations as they facilitate their work, but also to academics

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[55] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, OC-10/89 Series A No 10 (IACtHR 14 July 1989) paras 45-47.
[56] 'OHCHR | The Role of OHCHR'(*Ohchr.org*) <https://www.ohchr.org/EN/Issues/HIV/Pages/RoleOHCHR.aspx> accessed 26 February 2020.
[57] G Macnaughton and M McGill, 'The Office of the UN High Commissioner for Human Rights: Mapping the Evolution of the Right to Health' in B Mason Meier and L O Gostin (eds), *Human Rights in Global Health* (OUP 2018) 463.
[58] UN Office of the High Commissioner for Human Rights and World Health Organisation, Fact Sheet No 31 The Right to Health, June 2008 <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> accessed 26 February 2020.

and researchers who tend to use Fact Sheets to explore international human rights law.[59]

As stated above, the degree of the softness may vary, depending, for instance, on the institution that issued the reports and its composition. Although the Fact Sheet may be found on the softest side of the spectrum, it is greatly used in this research project as it is the only interpretative tool to approach and understand the definition.

Shelton also believes that human rights NGOs play the most important role in developing secondary soft law by producing research reports, condemning human rights abuses in particular countries, making complaints on behalf of the victims and submitting information to Special Procedures regarding human rights violations.[60] Even though, the thesis has used research reports of NGOs to measure the impact of international human rights law on society and to enhance the socio-legal analysis, from a doctrinal point of view the interpretive value of such sources has been significant to the identification of the legal phenomena affecting the life of HRDs.

However, this thesis sees the obstacles hindering the activity of HRDs as a social problem or as a situation involving political, cultural and social factors that need to be considered. Such type of research cannot be undertaken by relying merely on legal rules and principles, as the 'law neither possesses an internal metric nor a methodology for determining its effects'.[61] Doctrinal research cannot be used in isolation and therefore methodological tools and methods need to be drawn from other disciplines to ensure a comprehensive analysis of the topic area.

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[59] With regards to the right to health, indicatively see: FXB Center for Health and Human Rights/ Harvard School of Public Health, 'Health and Human Rights Resource Guide' (5th edn, 2013) 24-25 < https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2410/2014/06/HHRRG_Introduction.pdf> accessed 26 February 2020; C Castillo, V Garrafa, T Cunha, F Hellmann, 'Access to 'Health Care as a Human Right in International Policy: Critical Reflections and Contemporary Challenges' (2017) 22 (7) Ciênca Saúde Coletiva 2151, 2152.
[60] Shelton (n 49), 130.
[61] George L Priest, 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Ideas: A Reply to Judge Edwards' (1993) 91 (8) Michigan Law Review 1929, 1933.

2.3. Socio-Legal Research

In socio-legal studies, the aim of socio-legal research is to 'analyse the social, political, cultural and economic forces that shape the formulation of law and the design and function of legal institutions'.[62] On this basis, this thesis seeks to understand the background of the legal problem and explore the consequences of the obstacles for the activity and life of defenders in order to be in a position to make viable recommendations for possible reforms. More specifically, it intends to reveal and consider the social, political and cultural circumstances influencing the law and conceptualise a system of ideas concerning the situation of defenders always based on law.

Moreover, another reason why socio-legal approach is necessary to this research is because the area of HRDs is a significantly under researched area. In academic scholarship, there are quite a few journal articles addressing issues related to defenders and a limited number of books and monographs. The primary source of knowledge and information is policy papers, such as UN and regional mechanisms' documents as well as NGOs reports focusing on the abuses against HRDs and the online version of newspapers. Even though these sources were used from a doctrinal point of view to establish the theoretical framework of this research project, they were also used to unpack and understand the meaning, operation and practical impact of law on legal concepts, on the society and particularly on HRDs. On this basis, the research is also characterised as 'socio-legal'.

Socio-legal research relies on a wide range of theoretical approaches and assumptions, as there are no particular methodological tools as such. In this sense, the researcher can draw from different disciplines, collect 'data wherever appropriate to the problem' and adopt any method that can analyse and generate the data.[63] However, Salter and Mason have identified four categories of socio-legal research: empirical, theoretical, policy-orientated and comparative. The present research seems to include, more or less, aspects of each category.[64] In particular,

[62] Robert Kagan, 'What Socio-Legal Scholars Should Do When There Is Two Much Law to Study' (1995) 22 (1) Journal of Law and Society 140, 143.
[63] Alan Bradshaw, 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods', in Philip Thomas (ed), *Socio-Legal Studies* (Dartmouth Publishing 1997) 99.
[64] M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Harlow: London Pearson/Longman: New York 2007) 165-166.

the empirical research enriches the socio-legal approach of the thesis, while the theories of other disciplines come to inform the research and add a more holistic approach to the analysis. Similarly, policy-orientated information coming from NGOs reports and examples from different jurisdictions also inform the socio-legal approach and links the rule to practice.

Besides case law, textbooks and research articles, academic research from other disciplines has been drawn on. This is largely in the following chapter regarding the Definition, where the thesis refers to the theory of civil disobedience.

In addition, there is not a lot of empirical research in legal scholarship in terms of HRDs, so it became clear that the empirical research would further inform and supplement the analysis arising primarily from a socio-legal reading of legal doctrines and rules. As Richie and Lewis stated 'the aims of qualitative research are generally directed at providing an in-depth and interpreted understanding of the social world, by learning about people's social and material circumstances, their experiences, perspectives and histories.'[65] On this basis, this research project adopts a qualitative approach, using in-depth semi-structured interviews. This approach enables the researcher to understand the matter by putting herself in the actors' shoes, to examine the impact of the law within the society from a wider context and to investigate the impact of the obstacles on participants' lives.[66] Although interviews are not central to the method, participants' experiences and opinions are considered 'part of the reality' and used to enhance the socio-legal strategy of the thesis.[67]

It has recently become more common for researchers to adopt a more socio-legal approach in the context of legal research. For that reason, in order for the researcher to ensure the credibility of the present research, an entire section below is devoted to discussing the methods and methodology of the empirical research investigating the legal obstacles to the activity and everyday life of HRDs.

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[65] J Ritchie and J Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications 2003) 267.
[66] Demet Asli Caltekin, 'A Socio-Legal Analysis of the Right to Conscientious Objection in Turkey' (Doctoral Thesis, Durham University 2017) Chapter 1.
[67] ibid.

2.4. The Intersection Between Doctrinal and Socio-legal Research and the Value of Interviews

Even though the methodological strategy of this thesis is primarily doctrinal, the doctrinal approach and the socio-legal approach are strongly interrelated and inform each other. In fact, the discussion of the legal obstacles to the work and life of HRDs is the outcome of the combination of these two approaches. The doctrinal approach laid the foundation for the identification of the themes and trends in the field of HRDs, while the socio-legal approach confirmed and enhanced the doctrinal approach.

As elaborated in the following Section, the research questions as well as the interview questions emerged from the doctrinal reading of the sources. Once the main themes were identified, the conceptual framework of rules, principles and ideas was established and developed. However, it would be impossible not to consider the impact of the legal regime on the activities and life of defenders and all those factors that influence the implementation of the law. On this basis, the thesis relied on a series of research reports of the UN and NGOs, the profiles of several HRDs and the interview data to support and develop further the findings of the doctrinal approach.

On several occasions, the researcher has used real life examples of HRDs to show how practice occurs. She does not rely on the examples of defenders as authoritative, but uses them to add clarity to the points made and to explore the application of law within the society.[68] The examples have been selected from either the websites of leading NGOs in the area of HRDs or the interviews and do not focus on a particular jurisdiction. Although some examples, particularly the profiles of HRDs, seem to be single case examples, in fact, the range of the abuses committed against defenders is so extensive that in some cases, it is hard to gather similar examples of a particular abuse merely to argue that a particular situation/abuse is common. Therefore, on some points, the thesis relies on the most indicative example to link the rule to practice.

[68] David N Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 (3) Modern Law Review 241.

As stated above, it became clear that themes and trends emerged from the doctrinal reading. The Russian Foreign Agent Law was found to be a common way to target NGOs acting as watchdogs and bringing human rights violations to the fore. It was confirmed by all those participants coming from former Soviet Union countries that this type of legislation is becoming a trend. This was quite convincing for the researcher to use it as a case study in order to explore how legislation can be used to criminalise the activities of HRDs.

Besides the case study and the experiences and stories of HRDs deriving from websites, the thesis has used the interview data and particularly the experiences and opinions of the participants to enhance the analysis and support the doctrinal approach. When it comes to the value of the interviews, it should be made clear that the interview data do not generate knowledge, provide evidence on their own or contribute to the identification of the research questions. Instead, they come to confirm and supplement the findings of the doctrinal reading. In fact, the interviews supplied the research project with several examples that enrich the analysis and enable the researcher to discuss how practice occurs. Most importantly, interviews enabled the researcher to consider the issue from the victims' perspective, while the opinions of the participants constituted a true source of inspiration for suggesting recommendations for possible reforms.

2.5. Research Questions

After a careful consideration of the existing literature, the reports of the UN and regional mechanisms, NGOs' policy papers on the situation of HRDs and the gaps in knowledge identified, this research established three main Research Questions. In short, the research question emerged from the doctrinal reading of the literature on HRDs. A number of sub-questions have been come out of the main research questions. In particular,

Research Question 1: What are the legal obstacles to the activity and life of HRDs?

- What is the definition of HRDs?
- What are the rights of HRDs?
- Is the legislation a means of targeting HRDs?
- Are those responsible for the abuses against defenders held accountable?

Research Question 2: Can HRDs take advantage of the international refugee regime to escape from violations?

- Does a HRD fall within the meaning of the term 'refugee'?
- How could HRDs benefit from the international refugee regime?
- Is the international refugee regime an ideal alternative for defenders?

Research Question 3: Are there any measures that could improve the situation of HRDs?

- Do the measures aimed at contributing towards the implementation of general international human rights law apply to HRDs?
- Are there any measures only for HRDs?
- How long will it take for measures to be implemented?
- Are there any alternatives?

2.6. Qualitative Research

2.6.1. Research Design

This Part discusses the research design for the empirical research investigating the legal obstacles to the activity and life of defenders undertaken for this doctoral thesis. More specifically, this research used a qualitative approach based on in depth semi-structured interviews. Taking the research questions into consideration, the purpose of the empirical research was to initiate a dialogue with HRDs about their experiences and the most challenging aspects of their work (Research Question 1), about whether they would flee their country to escape from the abuses against them (Research Question 2) and about any suggestion for possible reforms (Research Question 3). The exploratory nature of these research questions leaves no option for any other type of research design, as an accurate and in-depth investigation would, by no means, be possible by using quantitative methods.[69]

Qualitative research can produce new knowledge and theoretical ideas,[70] while it can just test theories and opinions.[71] Denzin and Lincoln state that '[q]ualitative research involves an interpretative, naturalistic approach to the world […] attempting to make sense of, or to interpret, phenomena in terms of the meaning people bring to them'.[72] With regard to the present project, the purpose of qualitative research is not to produce new knowledge and generate new theoretical contributions to the area of HRDs. Rather, as stated above, it is more to enable the researcher to understand the impact of the obstacles on the defenders' life and enhance the socio-legal reading of the analysis of the principles of international human rights law.

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[69] Bernard Russel, *Social Research Methods: Qualitative and Quantitative Approaches* (2nd edn, Sage 2013).
[70] Jon Wagner, 'Observing Culture and Social Life: Documentary Photography, Fieldwork, and Social Research' in Gregory Stanczak *Visual Research Methods: Image, Society, and Representation* (Sage 2007) 23.
[71] Chris Argiris, 'Using Qualitative Data to Test Theories' (1979) 24 (4) Administrative Science Quarterly 672.
[72] N K Denzin and Y S Lincoln, 'Introduction: The Discipline and Practice of Qualitative Research' in N K Denzin and Y S Lincoln (eds), *Handbook of Qualitative Research* (Sage 2003) 4.

2.6.2. Interview Design

2.6.2.1. Semi- Structured Questions

In qualitative research, rigorous data collection procedures ensure the high quality and trustworthiness of the study and critically influence the empirical results of the project.[73] Interviews are the most widely-used method of data collection, while the semi-structured interview format is used most often in qualitative studies.

One of the main key advantages of semi-structured questions is the interaction between the interviewer and participant. Although it is very important to cover the same matters in all interviews, the story and understanding of each participant is unique and must be heard. This interview method enables the interviewer/researcher to improvise and ask follow up questions based on participant's responses.[74] However, semi-structured interviews require a significant amount of preparation prior to the interview, as the interview questions are based on previous established knowledge in the respective research area.[75]

The interview questions were formulated in accordance with the research questions and previous knowledge/literature in the research topic area of HRDs.

[73] S C Kitto, J Chesters and C Grbich, 'Quality in Qualitative Research' (2008) 188 (4) Medical Journal of Australia 243, 246.
[74] A Galletta, *Mastering the Semi-structured Interview and Beyond: From Research Design to Analysis and Publication* (New York University Press 2012); H Kallio, A Pietila, M Johnson and M Kangasniemi, 'Systematic Methodological Review: Developing a Framework for a Qualitative Semi-structured Interview Guide' (2016) 72 (12) Journal of Advanced Nursing 2954, 2955.
[75] Tom Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-structured Methods* (Sage 2001) Chapter 6.

Table 1

Questions 1, 2 and 3	
Q1: Would you identify yourself as a HRD? Q2: In your point of view, what makes someone a HRD? Q3: Do you think that the risk to life, livelihood and safety at which an individual may put himself or herself, makes the work of promoting human rights more challenging?	The formulation of questions Q1, Q2 and Q3 was based on literature on the definition of HRDs, such as Yvonne Donders, 'Defending the Human Rights Defenders' (2016) 34(4) Netherlands Quarterly of Human Rights, K Bennett, D Ingleton, AM Nah & J Savage, 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5(3) Journal of Human Rights Practice and a wide range of UN Special Rapporteur on HRDs and NGOs' annual reports and working papers such as the UN Economic and Social Council, Report Submitted by the Special Representative of the Secretary–General on human rights defenders, Hina Jinali, 15 January 2004) Un Doc E/CN.4/2004/94 and the International Service for Human Rights (ISHR), 'Model Law for the Recognition and Protection of Human Rights Defenders' (2016).

Table 2

Questions 4, 5 and 6	
Q4: Have you ever had negative experiences (such as discrimination, isolation, or violence) due to your human rights activity? If so, who was the perpetrator? Q5: Has the legislation, such as criminal law, antiterrorism law etc, ever been used against you in an attempt to stop you from carrying out your human rights work? Q6: Have you or anybody you know ever been described as a terrorist because of your human rights activity?	The formulation of questions Q4, Q5 and Q6 was developed on the basis of several UN and regional human rights mechanisms and NGOs reports regarding the criminalisation of HRDs. Indicatively, Inter-American Commission on Human Rights, Criminalization of the work of Human Rights Defenders, 31 December 2015, OEA/Ser.L/V/II. Doc. 49/15 60, Peace Brigades International (pbi) 'Criminalisation of Human Rights Defenders' (2010) and Front Line Defenders 'Annual Report on Human Rights Defenders at Risk in 2017' (2017).

Table 3

Question 7	
Q7: Were persons responsible for violations/ attacks against you prosecuted?	This question was built on the ground of academic literature, such as Joseph R. Crowley, 'Justice On Trial: State Security Courts, Police Impunity, And The Intimidation Of Human Rights Defenders In Turkey' (1999) 22 Fordham International Law Journal, reports of the UN and regional mechanisms, for instance UN General Assembly, Report of the Special Representative on the situation of human rights defenders, Hina Jilani, 10 September 2001, UN Doc A/56/341 and the Committee on Enforced Disappearances, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the Situation of Human Rights Defenders and the Special Rapporteur on Violence against Women, 'Mexico: UN rights experts strongly condemn killing of human rights defender and call for effective measures to tackle impunity' (2017) and NGOs policy papers, such as CIVICUS 'Advocacy to Challenge Impunity and Violence against Transgender

	Human Rights Defenders' in State of Civil Society Report (2016).

Table 4

Questions 9, 10 and 11	
Q9: Have you ever been forced to leave your country or to flee from persecutions/ attacks against you and your family? Q10: Have you ever applied for asylum? Q11: If not, would you consider leaving your country and applying for asylum if the risk was significantly high?	The formulation of these question was developed primarily on Martin Jones, 'Protecting Human Rights Defenders at Risk: Asylum and Temporary International Relocation' (2015) 19 (7) The International Journal of Human Rights and Katie McQuaid 'Defenders Across Borders: Congolese Human Rights Defenders in Uganda's Refugee Regime' (2018) Human Rights Defender Hub Working Paper Series 4 York: Centre for Applied Human Rights, University of York.

Table 5

Question 12	
Q12: As a HRD, what kind of legal protection would you suggest or like to see, so that all HRDs can remain efficient and concentrated on their human rights activities?	This question was formulated on the ground of recommendations that UN, regional mechanisms and NGOs make for enhancing the rights of HRDs and improving their situation. Indicatively, Inter-American Commission on Human Rights, Towards Effective Integral Protection Policies for Human Rights Defenders, 29 December 2017, OEA/Ser.L/V/II Doc 207 and Alice M. Nah, 'Countering the Stigmatisation of Human Rights Defenders' (2018) Human Rights Defender Hub Policy Paper 5 York: Centre for Applied Human Rights, University of York.

Table 6

Question 13	
Q3: Why did you agree to take part in my research?	This question was built with the purpose of helping the researcher understand the participants' motives for participation in the qualitative research.

2.6.3. Participants

2.6.3.1. Participant Recruitment

This Section considers the participant recruitment process for this thesis' empirical research, discussing among other things the way of approaching potential participants and ethics. First of all, it should be highlighted that the researcher did not interview experts but focused on HRDs. The reason behind this choice is because the thesis draws primarily from UN and NGOs' reports. In this sense, interviews with people whose life and human rights activity has affected by the legal regime the thesis is researching, inform the research from a different perspective and enable the researcher to investigate the obstacles through the lens of HRDs.

HRDs are people in danger due to their activities and might have received a lot of threats, which is likely to make them quite suspicious of taking part in the research of someone who do not know and trust and reluctant to share their experiences and information about their activities. The researcher was aware of the difficulties in reaching and convincing defenders to participate in the research from the beginning, so she was convinced that potential participants needed to be approached through NGOs working with HRDs (gatekeepers).[76]

The recruitment process became more challenging as several NGOs devoted to the protection of defenders never responded to any of the researcher's requests for interviews with HRDs. However, the Centre for Applied Human Rights of the University of York, Peace and Justice in the Hague, and Front Line Defenders were willing to contribute to the recruitment process. In particular, they contacted those defenders they are currently or have been working with on behalf of the researcher, explained the research's motives and the purpose of the study and encouraged them to participate. There is no question that this research employs convenience sampling, which is a non-probability/non-random sampling method, as the subjects/participants have been chosen because of their accessibility and availability to the researcher.[77] Although one could argue this method of sampling

[76] Stuart Hannabuss, 'Research interviews' (1996) 97 (5) New Library World 22, 24.
[77] I Etikan, S A Musa, R S Alkassim, 'Comparison of Convenience and Purposive Sampling' (2016) 5 (1) American Journal of Theoretical and Applied Statistics 1.

is weak, given the difficulties in approaching participants, this technique was the only way to make this qualitative research happen.

Without the assistance of the gatekeepers, the empirical part of the research would not be possible, as the researcher would be unable to know and get in touch with so many defenders on her own. Most importantly, the defenders admitted that they would not have accepted the researcher's invitation if they had not been reassured by the members of the NGOs they work with and trust that they would not be found at risk.[78] A very few participants were recruited by the researcher, and it is noteworthy that they met the researcher and got to know her in the context of university activities, which gave them reassurance.

The Table below shows the way of recruitment, the gatekeepers who contributed to the participants' recruitment, the method of initial contact between the researcher and the NGO, the method of distributing the call for participants and the number of participants recruited from each organisation.

Table 7

Way of Recruitment	**Gatekeeper/ NGO**	**Method of Contact with the Gatekeeper**	**Method of Distributing the Call for Participants**	**No of Participants**
Researcher	N/A	N/A	Email. The researcher contacted prospective participants who have met at	3

[78] INTV 2, 22.2.2018; INTV 5, 18.2.2018; INTV 7, 12.2.2018; INTV 10, 17.2.2018.

			university seminars, lectures and conferences.	
Through Gatekee pers	Centre for Applied Human Rights, University of York, York, UK.	Email	Email. Call for Participants distributed by the Centre's employees on behalf of the researcher. Prospective participants contacted the researcher by email.	6
Through Gatekee pers	Peace and Justice, Hague, Netherlands.	Email	Email. Call for Participants distributed by the organisation's employees on behalf of the researcher. Prospective participants contacted the researcher by email.	5

Through Gatekeepers	Frontline Defenders, Dublin, Ireland.	Email.	Email. Call for Participants distributed by one of the Centre's employees on behalf of the researcher. Prospective participants contacted the researcher by email.	1
Snowballing[79]	N/A	N/A	Email. Call for Participants distributed by one of the Participants to his/or her colleagues on behalf of the researcher. Prospective participants contacted the researcher by email.	1
				Total: 16

[79] Michelle Byrne, 'Sampling for Qualitative Research' (2001) 73 (2) ORN Journal.

2.6.3.2. Ethics

This Section outlines the ethical aspects of the empirical research implementation. In consideration of the Ethics Policy of the Law School, ethical approval was sought and obtained from the Director of Ethics and Data Protection of Durham Law School, Dr Anca Chirita, prior to commencing any contact with gatekeepers and potential participants in January 2017. All participants were informed of the purpose of the study both in the 'call for participants' invitation and at the beginning of the interview. Most importantly, all interviewees were given the approved consent form, which explained and made it clear that their participation was voluntarily, and they could withdraw from the research at any time. 14 participants scanned and returned the consent form via email, while one participant returned the consent form directly to the researcher and another one sent an email giving the researcher her permission to use her testimonies, as she was unable to get access to scanner appliances.

In the consent form, participants were given the option to remain anonymous. Although several defenders did not ask for anonymity in the sense that they are known HRDs and could raise awareness by making people hear their voice through this project, the majority wanted to remain anonymous for fear of further abuses. In order to avoid the difference, protect the anonymity and confidentiality of all participants and to ensure that none would be exposed to any risk as a consequence of their participation, the researcher decided not to display any name.[80] Instead, she refers to them as Participants 1, 2, 3 etc., when presenting the interview data and discussing the research project. One could raise the concern that anonymity may undermine trustworthiness and as a result influence. However, it is clear from literature in qualitative research that trustworthiness is a concept involving multiple dimensions, which include credibility, transferability, dependability and confirmability.[81] In other words, the lack of anonymity may not be a factor when it

[80] Raymond M Lee, *Doing Research on Sensitive Topics* (Sage 1993) Chapter 4.

[81] P Rule and V John, *Your Guide to Case Study Research* (Van Schaik Publishers 2011); Alan Bryman, *Social Research methods* (2nd edn, OUP 2004); Nomazulu Ngozwana, 'Ethical Dilemmas in Qualitative Research Methodology: Researcher's Reflections' (2018) International Journal of Educational Methodology 19, 25; Egon G Guba, 'Criteria for Assessing the Trustworthiness of Naturalistic Inquiries' (1981) 29 (2) Educational Communication and Technology Journal 75; Andrew K Shenton, 'Strategies for ensuring trustworthiness in qualitative research projects' (2004) 22 (2) Education for Information 63, 64.

comes to the trustworthiness of the subject. More specifically, the literature places special emphasis on the importance of anonymity and confidentiality, as a matter of ethics, in the sense that they protect the participant who voluntarily agree to participate in the project from any harm.[82] Given the vulnerability of the participants taking part in this research project and the desire of the majority to remain anonymous, there was no other option for the researcher, but to anonymise the interview data.

In order to safeguard their confidentiality, their personal and contact details, such as names, email addresses and social media names, are stored on a password-protected computer, in a locked file and on password-protected Excel file. Verbal consent to the recording of the meeting was given by the participants at the beginning of the interview. The interview recordings, once transcribed, were deleted, while the transcripts were anonymised, and any possible identifying element were carefully changed, replaced or omitted.

In line with academic literature on qualitative research, empirical research data, once analysed, should be kept for a reasonable period of time.[83] The data of this research will therefore be securely kept for a period of at least 5 years following the completion of the degree,[84] as they are of continuing value to the researcher.

2.6.4. Data Collection

Face-to-face interviews tend to be more useful in the sense that they allow the researcher to obtain detailed information about personal feelings and opinions, read the facial expressions, gestures and body language of the participant and deduce the quality of each response.[85] The vast majority of participants are based in different

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[82] Rose Wiles et al., 'The Management of Confidentiality and Anonymity in Social Research' (2008) 11 (5) International Journal of Social Research Methodology 417, 417; Helen M Richards and Lisa J Schwartz, 'Ethics of Qualitative Research: Are these Special Issues for Health Services Research' (2002) 19 Family Practice, 135, 136-137; Adrianna Surmiak, 'Confidentiality in Qualitative Research Involving Vulnerable Participants: Researchers' Perspectives' (2018) 19 (3) Forum: Qualitative Social Research 12.

[83] ibid, 98; John W Cresswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd edn, Sage 2003) 66.

[84] Joan Sieber, 'Planning Ethically Responsible Research' in L Bickman and D J Rod (eds), *Handbook of applied social research methods* (Sage 1998) 127-156.

[85] Roger W Shuy 'In-person versus Telephone Interviewing' in J F Gubrium and JA Holstein (eds), *Handbook of Interview Research: Context* (Sage 2001).

countries, and even more precisely, in different continents, so most of the interviews were conducted via Skype or Whatsapp video calls, which provide the face-to-face experience in real-time.[86] Despite the interesting literature on the use of Skype in the field of qualitative research,[87] this matter goes beyond the purpose of this section.

The interviews lasted 45 minutes approximately, were recorded (with the permission of the participants) and transcribed by the researcher at a later time.

It should be mentioned that some participants lacked sufficient internet speed for Skype or Whatsapp and requested the list of questions, so that they could provide written responses and return them to the researcher at their earliest convenience. Even if the written responses could not capture the participants' emotions and feelings and did not allow follow-up questions, they provided valuable information, contributing to the understanding of the opinions and needs of HRDs.

Table 8

Way of Interviewing	No of Participants
Skype and Whatsapp Video Calls	11
Face-to-Face	1
List of Questions and Written Responses	4

2.6.5. Data Analysis and Research Findings

This Section outlines the data analysis methods used to analyse the data gathered through the interviews with HRDs. First of all, the data analysed for enhancing the

[86] A face-to-face interview was conducted with a participant residing at that time in the UK in a place the participant suggested.
[87] See for example, V LoIacono, P Symonds and D H K Brown, 'Skype as a Tool for Qualitative Research Interviews' (2016) 21 (2) Sociological Research Online 1.

socio-legal perspective of this project was drawn from the interview transcripts and was analysed using the qualitative data analysis software Nvivo 12.

It is of great importance that qualitative research and data analysis must be conducted in a transparent and rigorous manner.[88] For that reason data analysis software, like Nvivo, 'ensures that the user is working more methodically, more thoroughly, more attentively.'[89] In practice, Nvivo reduces manual tasks and allows the researcher more time to code the data, recognise themes and draw conclusions.[90]

In relation to the present project, the data/interview transcripts were coded at 'nodes'. At an early stage of the data analysis, 'nodes' were created and used to code themes and ideas that have emerged out of the data, such as the definition of defenders, perpetrators and criminalisation. In the progress of the data analysis process, the researcher organised nodes into categories 'main nodes' that responded to the main research questions. Also, 'subcategory nodes' addressing sub-questions and other important matters were created. For example, 'impunity' was a parent node with 'non-identifiable perpetrators', 'legislation facilitating impunity', 'inability of the states to stop impunity' and 'the fear of being targeted' as children nodes.

Nvivo has several functions, but most of them were not applicable to the present research project, so it was used to facilitate the coding part of the analysis and enable the researcher to derive conclusions. As stated earlier, the empirical research supplements the socio-legal view of the thesis, so on this basis, the research findings are presented, where relevant, with the purpose of supplementing, testing or backing up the other socio-legal and doctrinal sources.

[88] Elaine Welsh, 'Dealing with Data: Using NVivo in the Qualitative Data Analysis Process' (2002) 3 (2) Qualitative Social Research (Online Journal) < http://www.qualitative-research.net/index.php/fqs/article/view/865/1880> accessed 30 October 2019.
[89] Patricia Bazeley, *Qualitative data analysis with NVivo* (Sage 2007) 6-15.
[90] A Hilal and S Alabri, 'Using Nvivo for Data Analysis in Qualitative Research' (2013) 2 (2) International Interdisciplinary Journal of Education 181, 182.

2.7. Reflections on the Research Process

While the empirical research process was fascinating and a truly immeasurable experience, it was also very challenging in a number of aspects. This Section is written in the first-person in an attempt to highlight the challenges and reflections in the way I personally experienced them.

There are particular difficulties and challenges which a researcher may face when undertaking qualitative research. As lawyers and legal scholars, we are primarily library-based researchers and as a result are not familiar with the empirical research methods and interview techniques, while the use of software for analysing the data appears to be complex. For these reasons, when my primary supervisor, Dr Anashri Pillay, recommended I should conduct empirical research to test, back up my arguments and explore the matter from the actors' perspective, I did not find it a good idea. To be more specific, I considered qualitative research something far different from the research methods I had used and was familiar with, so I did not feel confident enough to undertake this project. However, I realised that in order to provide a coherent socio-legal analysis, I needed to consider the views and needs of HRDs. With the guidance of my supervisor, the trainings on qualitative research provided by the Centre for Academic, Researcher and Organisation Development of Durham University and the support of my colleagues in the PGR Workroom who worked on similar projects, I managed to understand the concept of qualitative research and make it happen.

Another significant difficulty I encountered pertained to the recruitment of participants, as HRDs are people at risk and as a result are cautiously attentive to whom they speak and work with. As it would be really hard to find and convince these people to talk, it became clear that I should approach defenders through organisations they work with and trust. However, the majority of the organisations I contacted to request their assistance, for many reasons, never responded to my emails, which made the recruitment of participants even more difficult and slow. Again, with the support of my supervisor and her network, I managed to establish collaborations with the Centre for Applied Human Rights of the University of York, which provided great support in choosing and contacting defenders.

Despite the fact that I did not expect that the participants would be open to share their personal experiences with me, in fact, they trusted me from the very first moment and touched very sensitive and traumatic issues. As a consequence, at times, I was in a difficult position, as it was challenging to strike a balance between my sympathy for these people and my role as a researcher. The experience of conducting empirical research in such challenging and sensitive area enabled me to develop my interview skills and cultivate the ability to discuss sensitive issues. Most importantly, it was personally empowering, as despite initial reservations and difficulties, I managed to go beyond my limits and make my own contribution to the field of HRDs.

Besides the importance of the empirical part to my personal development, the interviews had a major impact on my research, thoughts, reasoning and arguments. Not only did the interviews contribute to testing and supporting the main arguments of the thesis, but they also inspired me to look at some issues and develop further some ideas I would not have thought of on my own. In fact, most of the recommendations made in the respective chapters are based on what the participants would want to see in the future.

2.8. Conclusion

This Chapter has set out the research methodology of the research project. In particular, it has been aimed to explain the combination of doctrinal and socio-legal methods with the intention of providing a holistic approach to the situation of HRDs. It has also described the qualitative research process, the data analysis and how the findings have been used. The following chapters discuss the three key obstacles to the activity of HRDs and the last two parts of the thesis seek to consider alternatives and propose recommendations for possible reforms.

Chapter 3

The Definition

3.1. Introduction

This Chapter perceives the lack of clarity over the definition of the term 'human rights defender' as one of the major obstacles to the work and life of HRDs, given the importance of the definition to defenders themselves, those organisations working with them as well as state authorities and several non-state actors. In particular, in order to gain the recognition and protection they deserve, individuals must know if they can be characterised as HRDs and as a result fall under the Declaration on HRDs. Also, NGOs, public authorities and NSAs, for their part, must be able to identify them, so that they can treat them accordingly. In addition, in order to address other problems concerning the reality of HRDs, such as the misapplication of legislation and the impunity for crimes committed against them, and to influence government policies, powerful stakeholders and civil society organisations working with defenders, it is extremely important to define who fall within the meaning of the term 'HRD'.

The definition of HRDs derives from Article 1 of the Declaration on HRDs,[1] and is interpreted in light of the UN High Commissioner for Human Rights Fact Sheet 29 (hereinafter Fact Sheet 29).[2] Article 1 establishes an activity-based definition, focusing on the activity of promoting human rights, while Fact Sheet 29 introduces three minimum requirements to be a defender.

This definition is considered predominant at the international and regional level. It has been adopted by the UN Special Rapporteur on the situation of HRDs and UN

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[1] UN General Assembly, Resolution 53/144 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc A/RES/53/144 (hereinafter Declaration on HRDs).

[2] UN Office of the High Commissioner for Human Rights, Fact Sheet No 29, Human Rights Defenders: Protecting the Right to Defend Human Rights, April 2004 (hereinafter Fact Sheet 29) < https://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> accessed 30 October 2019.

bodies as well as the Council of Europe, the European Union, the African Commission on Human's and People's Rights and the Organisation for the American States.[3] It is worth noting that major civil society organisations working with HRDs rely on the UN definition.[4] Despite the strong acceptance of the definition and the fact that it has been twenty years since the adoption of the Declaration, the definition is still of great interest, as it is still not clear who can be characterised as a defender.[5]

This Chapter discusses why the definition of HRDs deriving from the Declaration, and interpreted in the light of Fact Sheet 29, constitutes a problem and argues that it is related to the vague characteristics of the definition and the misinterpretation of its elements. On this basis, it seeks to provide a critical analysis of the definition, highlighting its flaws and through practical examples to show that a vague definition can impair the effectiveness of the Declaration and the protection of human rights defenders. The thesis and particularly Chapter 3 does not aim to introduce a new definition. On the contrary, it argues that greater clarity may be derived from a particular understanding of the terms and on this basis, it emphasises those elements of the definition that need work and suggests alternative approaches that could facilitate the interpretation of the definition.

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[3] UN Committee on Economic, Social and Cultural Rights, Human Rights Defenders and Economic, Social and Cultural Rights,7 October 2016, UN Doc E/C.12/2016/2; UN Economic and Social Council, Report Submitted by the Special Representative of the Secretary – General on Human Rights Defenders, Hina Jinali, 23 January 2006, UN Doc E/CN.4/2006/95; UN Special Rapporteur on the Situation of Human Rights Defenders, 'How Are Human Rights Defenders Defined?', <https://www.protecting-defenders.org/en/content/how-are-human-rights-defenders-defined> accessed 2 March 2019; Council of Europe Commissioner for Human Rights, Conclusions of Council of Europe Commissioner For Human Rights, Mr Thomas Hammarberg: Council of Europe Colloquy on Protecting and Supporting Human Rights Defenders, 14 November 2006, Doc. CommDH/Speech (2006) 26 and Doc. CommDH (2006)19; European Union, Ensuring Protection-EU Guidelines on Human Rights Defenders (2004) <https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf> accessed 30 October 2019; African Commission on Human and People's Rights Res 69, 4 June 2004, ACHPR/69 (XXXV); Organisation of American States, Human Rights Defenders: Support for Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas, San Pedro Sula 4 June 2004, Res AG/RES. 2517 (XXXIX-O/09).

[4] Front Line Defenders and International Federation for Human Rights (fidh) are organisations that have been founded and work with the specific aim of protecting human rights defenders and use the definition deriving from the Declaration and Fact Sheet 29. See, Front Line Defenders, 'The Front Line Defenders Story' <https://www.frontlinedefenders.org/en/who-we-are> accessed 30 October 2019.

[5] UN Human Rights Council, Report of Special Rapporteur on the Situation of Human Rights Defenders on his Mission to Mexico, 12 February 2018, UN Doc A/HRC/37/51//Add.2.

3.2. The Background of the UN Declaration on HRDs

In 1998, the UN General Assembly adopted by consensus the UN Declaration on HRDs. The Declaration does not create new rights but articulates existing human rights and fundamental freedoms. On that basis, the primary aim of the Declaration was to recognise the role of those people contributing to the realisation of human rights, bestow on them legitimacy and recognition within international human rights law, raise awareness and enhance their protection, so that they continue their valuable work.

Declarations and human rights treaties in general, make sense if their subjects can be identified. In regard to the Declaration on HRDs, the definition of the term derives from Article 1, which constitutes the key provision of the Declaration, states that 'Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.' Although the right to defend human rights is not a right itself, it could be characterised as a personal or group right in the sense that being a human rights defender is a status that ensures existing rights and establishes the states' responsibility for protection.

The definition deriving from the Declaration is wide, encompassing anyone who fights for human rights and promotes fundamental freedoms. This definition is not the only vague aspect of the Declaration: there are other provisions such as Article 13, which could also be regarded as unclear.[6] This lack of clarity can be attributed to the long and difficult negotiations that commenced in 1986 and ended with the adoption of the Declaration in 1998 as well as the subsequent compromises required for the adoption of the Declaration. Although the subject was first mentioned in the UN Commission of Human Rights' Resolution 1980/23 which urged all governments to 'encourage and support individuals and organs of society exercising their rights and responsibilities to promote the effective observance of human rights',[7] negotiations on drafting the Declaration on HRDs officially commenced in 1986 and were conducted by the Working Group on Human Rights Defenders,

[6] See for example, K. Bennett et al., 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5(3) Journal of Human Rights Practice 401,404; Yvonne Donders, 'Defending the Human Rights Defenders' (2016) 34 (4) Netherlands Quarterly of Human Rights 282, 282.
[7] UN Commission on Human Rights Resolution 23 (XXXV) of 14 March 1979.

which was created by the UN Commission on Human Rights.[8] The states' delegates tried to work by consensus in the Working Group because the draft had to be submitted to the Economic and Social Council (ECOSOC), before it was examined and adopted by the UN General Assembly.[9] On this basis, articles adopted by consensus were less likely to be challenged.[10] However, the negotiations proved considerably difficult for several reasons. The primary conflict line of the negotiations concerned the ideological confrontation between Western and Eastern states during the Cold War.[11] In addition, the countries of the Eastern bloc considered the promotion of the protection and recognition of HRDs to be an anti-Soviet move and therefore attempted to block it.[12] The climate changed significantly after the collapse of the Soviet Union in the late 1980s. Several states previously dependent on the Soviet Union, for instance Czechoslovakia, softened their position and contributed to a new balance within the Working Group.[13]

Moreover, at the beginning of the negotiations human rights issues were considered a governmental task at the international and national level.[14] Indicatively, in the first meeting of the Working Group, the German representative stated that: '[t]he question of the individual must be seen in the context of principles such as the sovereign equality of states and non-interference in their internal affairs.'[15] This stance was abandoned as the first draft of the Declaration placed emphasis on the protection of the rights of defenders rather than on the rights of states.[16]

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[8] UN Commission on Human Rights, Decision 18/116, 16 March 1984, UN Doc E/1984/14-E/CN.4/1984/77 para 108.
[9] H R Dossier, '*The United Nations Draft Declaration on Human Rights Defenders: Analysis and Prospects'* (International Service for Human Rights 1998) 8.
[10] ibid.
[11]Janika Spannagel, 'Declaration on Human Rights Defenders (1998)' Quellen zur Gerichte der Menschenrechte 3<https://www.geschichte-menschenrechte.de/en/hauptnavigation/schluesseltexte/declaration-on-human-rights-defenders-1998/> accessed 30 October 2019.
[12] ibid.
[13] ibid.
[14] ibid.
[15] UN Commission on Human Rights, Report of the Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 13 March 1986, UN Doc E/CN.4/1986/40.
[16] Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Report of the 2nd Session 26-30 January 1987, 6 March 1987, UN Doc E/CN.4/1987/38.

One of the main areas of conflict during the negotiations concerned the inadequacy of international human rights law to deal with the cultural and social specificities of states. In particular, Soviet states along with Cuba, China, Mexico and Syria emphasised the supremacy of domestic law over international law and insisted that the Declaration should not interfere with the internal affairs of states.[17] Questioning the 'universality' of human rights norms that underpins the wider context of international human rights law, the same states argued that human rights are 'imprisoned in universality' and as a result they may be at odds with the cultural identity of each state and region.[18] In this sense, the promotion of human rights should be exercised in full conformity with the domestic legislation which is better placed to consider religious, cultural, social and economic elements of the society. In other words, these states want to confine the activities of HRDs to what is consistent with national legislation and keep the identity of HRDs under their control. Despite the concerns of states and NGOs that 'there was a danger that some states might use culture and community as pretext for repressions of human rights defenders whose legitimate work called into question some of the policies or methods of the State rules',[19] the Declaration included several references to the domestic legislation.

Furthermore, a significant number of developing states, which had remained under colonial rule until the 1960s and 1970s and were marginalised in multilateral economic negotiations, found the opportunity to demonstrate their power in human rights fora. As these newly independent states were often governed by authoritarian regimes and as a result were against the development of additional international obligations,[20] they used their majority power to control the negotiations, slow down the process and impose their views.[21] In contrast, several developed countries, such

[17] Amie Lajoie, 'Challenging Assumptions of Vulnerability: The Significance of Gender in the Work, Lives and Identities of Women Human Rights Defenders' (PhD, National University of Ireland 2018) 19-58.
[18] ibid.
[19] UN Commission for Human Rights, 'Report of the Eighth Session of the Working Group on a Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 8 March 1993, UN Doc E/CN.4/1993/64 20-21.
[20] Henry F Carey, 'The Postcolonial State and the Protection of Human Rights' (2002) 22 (1&2) Comparative Studies of South Asia, Africa and Middle East 59, 61-62; Obiora Okafor, 'International Human Rights Fact-Finding Praxis: A TWAIL Perspective' in P Alston and S Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 49.
[21] ibid, 8, 13.

as Canada and Sweden, from the very beginning invested in the deliberations and facilitated the process, because their aim was to support and strengthen the position of HRDs.[22] However, it was unofficially agreed by delegations aiming to strengthen the position of HRDs that they would not pass a resolution at any price and, thus, were ready to renounce it, if the other delegations did not modify their attitude.[23] At the same time, the hard-line states (China, Syria and Cuba) did not want to adopt a draft body of principles on the rights and responsibilities of people promoting and protecting human rights due to their general hostility towards human rights.[24] As a result, they coordinated regular interventions, not only to avoid the adoption of the text of principles, but also to weaken it significantly.[25] For these reasons, it was difficult to arrive at a consensus and, as a result, the delegations had to make a number of compromises.[26]

After more than 12 years of difficult negotiations and considerable compromises, the Working Group adopted a body of principles on the rights and responsibilities of defenders. The fact that the negotiation leaders were eventually able to come to a consensus still remains surprising. The resolution included several general provisions so as to bring together different policies and protect defenders. Despite the vague nature of the provisions, the text was of great importance, since it officially recognised the role of defenders for the first time and articulated existing human rights that were being violated with respect to defenders.

There is no evidence that those taking part in the negotiations had a particular definition of the term in their mind when drafting the Declaration. The absence of a clear definition in the Declaration and the activity of promoting human rights as the only characteristic of a defender indicate that the drafters did not mean to set out a definition. It is difficult to identify the reasons why they chose not to define the term. Notably, the main reason is related to the disputes and tensions in the Working Group. In any case, it seems that the delegates took for granted that a

[22] Dossier (n 9), 8.
[23] ibid 26.
[24] Spannagel (n 11), 4.
[25] ibid 17.
[26] Martin A Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities' (1994) 16 (1) Michigan Journal of International Law 141.

defender was someone who promotes human rights, which was sufficient for them to proceed.

Although the Declaration was adopted by consensus, straight after the adoption by the General Assembly, 26 states led by Egypt issued an 'interpretative declaration' with the intention of clarifying their reservations regarding the provisions set out in their declaration and tempering the expectations in regard to their willingness to implement the Declaration in good faith. More specifically, the *note verbale* put emphasis on the 'respect for the sovereignty of states and their territorial integrity [and] non-interference in the internal affairs of states',[27] while it made it clear that 'any interpretation that creates rights and obligations not provided for by domestic laws does not correspond to our understanding'.[28] The objector states emphasised the importance of cultural identity with regards to the promotion and implementation of human rights, stating that 'in interpreting the provisions, various, cultural religious, economic and social backgrounds of societies must be taken into account.'[29]

Even after a lot of effort, the scope of Article 1 and the entire Declaration was so uncertain that the Office of the UN High Commissioner for Human Rights produced a research report with the aim of providing guidance on the interpretation and application of the Declaration on HRDs. Fact Sheets are not legally binding, and their purpose is to increase knowledge and provide guidance on human rights related issues.[30] In response to the definition of the term 'human rights defender', this Chapter argues that Fact Sheet 29 is the only interpretative tool to approach the definition and is therefore considered part of the definition. In particular, Fact Sheet 29 suggests that a defender should meet three requirements: firstly, a defender should accept the universality of human rights; secondly, his or her arguments should not necessarily be factually or legally correct; and, thirdly, the defender should promote human rights through 'peaceful actions'.[31] In other words, the

[27] UN General Assembly, Letter dated 18 November 1998 from the Permanent Representative of Egypt to the United Nations addressed to the President of the General Assembly,18 November 1998, UN Doc A/53/679. E/CN.4/2001/94 2-3.
[28] ibid.
[29] ibid.
[30] P Alston and R Goodman, *International Human Rights* (1st edn OUP 2013) 743; Fact Sheet 29 (n 2), 7.
[31] Fact Sheet 29 (n 2) 9, 10.

definition deriving from Article 1 was so vague and broad that Fact Sheet 29 was produced to establish three minimum standards, drawing a line on who can be a defender.

Based on the Declaration on HRDs, Fact Sheet 29 and a range of UN Special Rapporteur on HRDs reports, 'HRDs can be any person or group of persons who act at any moment for any human rights'[32] provided that they meet the three minimum requirements to be a defender. Furthermore, 'they can be of any gender, of varying ages, from any part of the world and from all sorts of professional or other backgrounds.'[33] Nevertheless, despite the UN Special Rapporteur reports and UN High Commissioner's for Human Rights attempt to provide guidance on the interpretation and application of the definition of defenders, certain characteristics of the proposed definition can be called into question, as will be discussed extensively below. Therefore, it is still unclear who is or who is not a defender.

The empirical result comes to confirm this conclusion. In particular, according to the research findings, several HRDs perceive the term 'human rights defender' as someone who promotes human rights, which is not far from the Declaration's definition. In particular, Participant 16 states:

'A HRD is someone who looks at human rights violation from higher perspective and takes action, whether paid or not.'[34]

Participants 2, 6, 8, 9, 11 and 15 seem to share the same views. However, only a few defenders, Participant 4 and 13 are aware of the UN definition. More specifically, Participant 4 states that:

'Anyone who strives to protect and promote human rights must be a HRD and the UN Declaration on HRDs also declares that anyone working for the protection and promotion of human rights is no matter if they are professional or volunteers.'[35]

It is worth noting that there are participants who are unaware of the UN definition of HRDs and therefore have adopted their own approach to the term, which is not

[32] Fact Sheet 29 (n 2), 6.
[33] ibid.
[34] INTV 16, 8.2.2018
[35] INTV 4, 4.6.2018.

even close to the predominant definition. For instance, Participant 14 is one such person who is of the opinion that:

> '*I think a HRD is someone that knows about law, either by learning it in school or learning it by need, like the mothers of forcefully disappeared persons. Also, they are people who have a cause and give their life and time to it, whether they get payment for it or not.*'[36]

In a similar vein, Participant 5 states that:

> '*In my opinion, HRDs are people who protect rights that are named in the European Convention on Human Rights and other international Conventions because those conventions provide not for political and social rights, but 10 or 13 basic human rights. And second is: those professionals and lawyers defending human rights the whole day or most of their time.*'[37]

Both Participants emphasised the knowledge of law a defender needs to demonstrate in the sense that if an individual understands the law, he or she is also in a better position to understand the nature of the abuses and therefore can be more efficient in combating human rights violations. An indicative example is lawyers who defend human rights in general, but according to Participant 14, individuals who have familiarised themselves with human rights law due to abuses against them or their families are not excluded. This perception narrows down the definition dangerously, as it encompasses only lawyers or those who happen to have some understanding of law.

Apart from Participant 5 who erroneously believes that HRDs can be only lawyers, the other Participants seem to focus on the activity of the individual and not on their motives and status. As pointed out below, this perception implies that a defender working on a contracted basis deserves the same recognition and protection as a volunteer.

In sum, it is clear from the interviews that the definition is not something they necessarily think about or think is that significant in doing their work. In particular, none of the Participants has showed familiarity with the three requirements to be a

[36] INTV 14, 24.2.2018.
[37] INTV 5, 18.2.2018

defender, while most of them are unaware of the definition deriving from the UN Declaration. Remarkably, they seem to have got either a general idea of who is a defender or a mistaken perception of who can be defined as such. Although the sample is limited to HRDs, by analogy, it can be argued that there may be confusion regarding the definition among NGOs and any other individual working or being interested in HRDs. In any case, the point here is that the misperception of the definition itself as well as its significance may prevent defenders from the recognition and the extra protection it entails.

3.3. Problematic Aspects of the Definition

3.3.1. The Broadness of the Definition

According to the Declaration's Article 1, anyone can serve as a defender of a right and fundamental freedom at any given time. As a result, individuals, groups of persons and organisations can fall within the classification of 'human rights defenders'. Notably, the Declaration makes the activity of promoting human rights the only characteristic of a defender. This activity-based approach allows for a wide definition, which accommodates all individuals carrying out human rights activities. The resolutions of the UN General Assembly and the Human Rights Council as well as the reports of the UN Special Rapporteur confirm this approach and understands the term as an individual who fights and promotes human rights.[38] However, this approach leaves two main issues open: the period of activity and the motives of HRDs.

In particular, this Section argues that the period of activity should not play any role in defining a defender and as a result an individual could be regarded as a defender in relation to a specific event, or because he or she promotes and protects human rights occasionally or throughout his or her whole life.[39]

The first part of the definition makes sense, provided one bears in mind that people who have occasional links with human rights activities can be characterised as HRDs. For instance, a poet may not generally be a defender. However, the poet could act as such, if he or she writes a poem that condemns the human rights violations conducted in his or her country. If that poet is threatened and subject to severe human rights violations because of his or her actions, then the poet could be referred to as a defender. Nevertheless, in order to justify this position, it is

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[38] Indicatively see, UN General Assembly, Human Rights Defenders in the Context of the Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 10 February 2016, UN Doc A/RES/70/161; UN General Assembly, Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. 10 April 2012, UN Doc A/RES/66/164; UN Human Rights Council, Protecting Human Rights Defenders, 12 April 2013, UN Doc A/HRC/RES/22/6

[39] UN Special Rapporteur on the Situation of Human Rights Defenders, 'How Are Human Rights Defenders Defined? <https://www.protecting-defenders.org/en/content/how-are-human-rights-defenders-defined> accessed 30 October 2019.

important to focus on the action, which is sufficient to cause problems and put the poet in danger, despite the fact that the danger stems from a single event or act.

On the other hand, one can argue that isolated activities are not sufficient to make a person a defender on the basis that a person should have a consistent human rights based approach over time in order to be regarded as a defender.[40] This position excludes from the definition individuals fighting for human rights occasionally or only once. For that reason, the argument here is that it is important to consider if the activity of an individual is able to lead to the violation of his or her fundamental human rights, regardless of the period of activity. This point is inevitably linked with the criterion of risk at which an individual puts her or his safety to promote human rights, which will be explored later in the Chapter. In other words, 'instantaneous' and 'occasional' defenders who could be exposed to abuse and other violations, as the poet exemplified above, should fall under the term 'human rights defender' and receive the protection of the Declaration.

With respect to the motives of the defender, one could also say that a person working for a human rights non-governmental organisation should not be considered to be a defender, since he or she is contracted to promote human rights. However, any individual who fights for the human rights of other people must be entitled to the status of HRDs. Thus, it is necessary to focus on the consequences to, rather than the motives of, individuals.[41] Regardless of the motives, these individuals are willing to put their safety on the line by protesting against violations of, and fighting for, human rights. Undoubtedly, their activities also make a difference in terms of moving human rights forward. Therefore, an individual who promotes human rights on a non-profit basis is no more of a defender than someone who is paid to undertake the role. Should anyone risk his or her freedom, livelihood and life to fight for human rights, then he or she meets one of the most fundamental characteristics of a HRD, as is analysed below.

[40] L Erugen Fernandez and C Patel, 'Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders' (2015) 16 (7) The International Journal of Human Rights 896, 900.
[41] Walter W Cook, 'Act, Intention and Motive in the Criminal Law' (1917) 26 (8) Yale Journal 645, 645; Whitley R P Kaufman, 'Motive, Intention and Morality in Criminal Law' (2003) 28 (2) Criminal Justice Review 317, 317.

For these reasons, the fact that the activity of promoting human rights renders someone a defender, regardless of the period and motives behind their activity, should have explicitly been included in the definition to add clarity.

The broadness of the definition in Article 1 is not a problem in itself, as it understandably recognises that anyone may act as a human rights activist. Nonetheless, the wide definition in conjunction with the vague guidance provided by Fact Sheet 29 leaves states a dangerous level of discretion in deciding who is considered a defender. Vague legislative provisions are open to different interpretations, which allow either the implementation of judicial mechanisms, or the filling of gaps by states and powerful stakeholders through their own interpretation, depending on their particular interests.[42] In particular, certain categories of activists, which oppose government policies or condemn human rights violations, can be seen as a threat to state practices. For that reason, states may rely on the vague definition in order to be able to exclude their opponents from being considered as HRDs. For example, the absence of a clear definition of HRDs and the failure to establish a definition of the term ‘terrorism’, allowed the American authorities to characterise animal activists who damaged property or caused a loss of profits to an animal enterprise as terrorists.[43] Similarly, there is a strong chance that a number of defenders may not be recognised under the umbrella of the Declaration on HRDs.

Importantly, the choice of a broad definition is not accidental, as a more detailed definition would leave activists fighting for human rights out of term ‘human rights defender’.[44] Also, in treaties creating ‘special rights’ for a particular group of individuals, such as the Refugee Convention, which will be explored in Chapter 6, the treaty itself set outs who is entitled to those special rights. Unlike the Refugee Convention, the Declaration on HRDs reiterates existing human rights and does not

[42] G Keil and R Poscher, *Vagueness in the Law* (1st edn, OUP 2016) 9.
[43] Animal Enterprise Terrorism Act (AETA) of 2006, Pub.L 109–374, 18 USC s 43 (United States); Emma Marris, ‘Animal Rights “Terror” Law Challenged’ (2010) 466 Nature 424, 424; Ed Pilkington, ‘Animal Rights “Terrorists”? Legality of Industry-Friendly Law to be Challenged’ (*the Guardian*, 2018) <https://www.theguardian.com/us-news/2015/feb/19/animal-rights-activists-challenge-federal-terrorism-charges> accessed 30 October 2019.
[44] International Service for Human Rights (ISHR), ‘Model Law for the Recognition and Protection of Human Rights Defenders’ (2016) 2 <https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf> accessed 30 October 2019.

establish a special group in the sense that a broad definition can accommodate everyone. In essence, the broadness of the definition ensures that every individual can be included, providing that they fight for human rights.[45] However, a broad definition itself may entail definitional restraints in the sense that it is open to different interpretations. When it comes to the definition of HRDs, the unclear requirements along with the absence of an official definition provoke misunderstandings concerning the implementation of the Declaration,[46] thus limiting its effectiveness. Even though there are very good reasons for supporting such a broad definition, to avoid confusion, the elements of the definition need to be clear.

3.3.2. The Need for a Clear and Specific Definition

The clarity of the definition is extremely important not only to governments and state authorities, but also to non-state actors such as NGOs, defenders and businesses. In particular, in order for HRDs to take advantage of the Higher Protection Regime, as described earlier in this thesis, all those special mechanisms must be able to identify them. On this basis, the definition is a necessary tool for dealing with the number of defenders' cases brought to their attention and for providing effective protection for defenders. At the same time, defenders themselves must know if they fall within the meaning of 'HRD', in order that they seek protection through those mechanisms.

Failure to have a clear definition has consequences for HRDs as well as for the Special Mechanisms that are called on to deal with cases involving defenders. More specifically, if defenders do not know whether they fall within the definition and are entitled to make use of special mechanisms, they may be reluctant to report abuses and seek protection. That could render their work more challenging and make some defenders cease their activities, which would constitute a serious blow to the realisation of human rights. In a similar vein, if competent NGOs and Special Mechanisms are unable to distinguish defenders at risk who need protection from

[45] Commonwealth Human Rights Initiative, 'Silencing the Defenders: Human Rights Defenders in the Commonwealth' (2009) 11.
[46] Emmanouil Athanasiou, 'The Human Rights Defenders at the Crossroads of the New Century: Fighting for Freedom and Security in the OSCE Area' (2005) 1 Helsinki Monitor 14, 16.

those who are not defenders, they may mistakenly get involved in cases that do not concern HRDs. As a consequence, that could delay the cases of real defenders in need of protection, which would also have an impact on the promotion of human rights. However, it is noteworthy that there are international and regional mechanisms, such as the Human Rights Committee, the Committee against Torture, and the Council of Europe Commissioner for Human Rights, that seem to be aware of the term 'human rights defender', as they use it in their official documents.[47] It is a promising sign that these mechanisms are able to identify defenders, but a clearer definition will ensure that those bodies understand the definition properly and do not exclude anyone falling within the term.

Furthermore, defenders often publicly challenge the policies and practices of international companies with potentially damaging consequences for the businesses and thus face significant risks.[48] The report of Human Rights Watch on Hydro Developments activities in India supported and funded by the World Bank proved that people protesting against powerful international institutions and companies find themselves in danger and are subject to severe abuses.[49] However, some are of the opinion that companies can act as HRDs in certain circumstances. For instance, companies investing in a country can use their influence to prevent human rights violations or to promote human rights.[50] More specifically, in states where

[47] See UN Human Rights Committee, Concluding Observations on the Gambia in the Absence of its Second Periodic Report, 30 August 2018, UN Doc CCPR/C/GMB/CO/2 paras 39 (c) and 40 (c); UN Human Rights Committee, Concluding Observations on the Second Periodic Report of Burundi, 21 November 2014, UN Doc CCPR/C/BDI/CO/2 para 20; UN Committee against Torture, Concluding Observations on the Second Periodic Report of Rwanda, 21 December 2017, UN Doc CAT/C/RWA/CO/2 para 53 (a) and (b); UN Committee against Torture, Concluding Observations of the Committee on the Special Report of Burundi Requested under Article 19 (1) in Fine of the Convention, 9 September 2016, UN Doc CAT/C/BDI/CO/2/Add.1 paras 3, 23,24 and 25; Council of Europe Commissioner for Human Rights, Third party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application *Ecodefence and others v. Russia* and 48 other applications no 9988/13, 5 July 2017, CommDH (2017) 22 paras 3, 4, 6, 19, 21, 24 and 35.

[48] Business and Human Rights Resource Centre and International for Human Rights (ISHR), 'Shared Space under Pressure: Business Support for Civic Freedoms and Human Rights Defenders' (2018) 32 < https://www.business-humanrights.org/sites/default/files/documents/Shared%20Space%20Under%20Pressure%20-%20Business%20Support%20for%20Civic%20Freedoms%20and%20Human%20Rights%20Defenders_0.pdf> accessed 30 October 2019.

[49] 'At Your Own Risk | Reprisals against Critics of World Bank Group Projects' (*Human Rights Watch*, 2015) <https://www.hrw.org/report/2015/06/22/your-own-risk/reprisals-against-critics-world-bank-group-projects> accessed 30 October 2019.

[50] D F Orentlicher and T A Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China Symposium: Doing Business in China' (1993) 14 (1) Northwestern Journal of International Law & Business 66, 67.

legislation undermines workers' rights, companies as powerful investors can negotiate the terms and conditions of employment with the government, imposing rules consistent with human rights law. The most indicative example is that of Adidas Group; Adidas Group has adopted a longstanding policy of non-harm and non-interference in connection with the activities of defenders, including those who actively speak out against Adidas businesses. In a 2016 report, Adidas highlighted the absence of an accurate definition of HRDs under the Declaration, stating that this made the protection of defenders and the promotion of their work difficult, as it is not clear who is a defender.[51] Thus, a clear definition will provide significant guidance on the interpretation of the term and will not allow states and non-state actors to interpret the definition according to their own interests.

Last but not least, the identification of the subjects of the definition also contributes to raising awareness of the crimes against defenders and addressing a number of issues that constitute serious obstacles to their activity, such as the impunity for crimes and abuses against them.

3.3.3. Criticisms of the Minimum Standards

The Declaration on HRDs implies that defenders have rights, as well as responsibilities, as set out in Articles 12 and 18. In particular, Article 12 states that: '[e]veryone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms', while Article 18 provides that '[e]veryone has duties towards and within the community, in which alone the free and full development of his or her personality is possible'. On this basis, it could be argued a defender should meet all the minimum standards that are stated in Fact Sheet 29 or at least act consistently with them at all times. At this point, it should be made clear that the requirements do not impose restrictions on the rights of defenders because, as will be discussed in the

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[51] Adidas Group, 'The Adidas Group and Human Rights Defenders' (June 2016) 1 <https://www.adidas-group.com/media/filer_public/f0/c5/f0c582a9-506d-4b12-85cf-bd4584f68574/adidas_group_and_human_rights_defenders_2016.pdf> accessed 30 October 2019 ; Michael Ineichen, 'Protecting Human Rights Defenders: A Critical Step Towards a More Holistic Implementation of the UNGPs' (2018) 3 (1) Business and Human Rights Journal 97, 100; UN General Assembly, Report of Special Rapporteur on the Situation of Human Rights Defenders, 19 July 2017, UN Doc A/72/170.

following Chapter, only states can impose limitations on the rights of individuals, including HRDs in order to promote and serve certain legitimate aims. In the same vein, when it comes to the requirement for peaceful activities, the element of pacifism is implied in that element,[52] however, the criterion is not superfluous as it seeks to add further clarity. On this basis, the purpose of the requirements is to emphasise the duty of HRDs to act compatibly with human rights and basic standards of international human rights law. It can be seen from the reports of the UN and other regional treaties that human rights mechanisms refer to defenders more generally and do not examine whether an individual meets the requirements to be a defender. In essence, human rights bodies appear to place emphasis on the activities rather than the belief of the defenders and the character of the activity. In fact, most of their reports address the situation of HRDs and the abuses against them, while there is no report devoted to the definition of HRDs. On the other hand, NGOs working HRDs tend to take the requirements into account because they work with defenders on a daily basis and therefore should be able to identify them. That being said, the point of this Section is to understand the duty of defenders to act consistently with human rights principles, to discuss borderline cases and develop clarity in understanding of who can be referred to as a defender, thereby not granting states a wide margin of appreciation in excluding individuals.

3.3.3.1. Accepting the Universality of Human Rights

The first requirement provides that defenders should accept the universality of human rights as defined in the UDHR, otherwise their activities would be contrary to the spirit of international human rights law as whole. In essence, it would be a paradox if an individual actively protesting against human rights abuses whilst at the same time denying others, was defined as a defender.

For this reason, the first standard is not useful in cases where individuals resist adopting particular human rights because of cultural and religious beliefs. In other words, the application of this criterion would leave individuals who act in particular way within a socio-political context outside the Declaration.[53] Therefore, it is

[52] Jan Naverson, 'Pacifism, ideology and the Human Right of Self-defence' (2002) 1 (1) Journal of Human Rights 55, 55.
[53] Bennett et al. (n 5), 404.

essential to see the 'universality' of human rights as an individual's consistent willingness to fight and react to any human rights violations. For example, in Saudi Arabia, where *Sharia* (Islamic Law) applies, men deny that women have equal rights because of religious beliefs, but the same men have no hesitation in protesting and putting their safety on the line because of their commitment against the government's corruption;[54] these men can be defined as defenders. The fact that they are willing to fight for particular human rights is crucial in determining them as defenders. However, individuals who protest against abuses, but resist the adoption of other human rights violently, cannot be referred to as defenders. This position is correct, as is analysed below, because defenders must be peaceful and not violate human rights. In essence, it is not the denying that is incompatible with the first standard but, rather, any violent action comes from that.

This approach deals with cultural, social and religious specificities, because it focuses on the general attitude of an individual towards human rights violations. In short, a person who does not recognise some human rights due to social, cultural and religious beliefs, could be defined as a defender, as long as he or she adopts a human rights-based approach and does not violate the human rights that he or she resists.

In the context of this criterion, it is interesting to consider whether an individual or a group of individuals that promotes the right of hate groups to free speech falls within the definition of HRDs. For instance, the American Civil Liberties Union (ACLU), which is a NGO whose mission is 'to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States',[55] has been accused of defending the rights of neo-Nazis, especially following their defence of a white nationalist rally organised by a small group of neo-Nazis, at Emancipation Park in Charlottesville in 2017,[56] where an

[54] Paschal Menoret, 'Repression and Protest in Saudi Arabia' (2016) Report No 101 Middle East Brief, Crown Center for Middle East Studies, Brandeis University 1, 4.
[55] 'Guardians of Freedom' (*American Civil Liberties Union*, 2019) <https://www.aclu.org/guardians-freedom> accessed 30 October 2019.
[56] Joseph Goldstein, 'After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles with its Role' (*Nytimes*, 17 August 2017) <https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html> accessed 30 October 2019.

individual was killed.[57] The national executive director of the ACLU, Anthony Romero cemented the Union's reputation, stating:

> We are the premier defenders of freedom of speech and racial justice and the rights of all people in the United States. For almost a hundred years, our mission has been to defend the rights of everyone, even people we hate. And ultimately, this is about making sure the government never has the authority or the ability to censor speech because it finds it loathsome or disgusting.[58]

Drawing from this example, the Section emphasises several relevant points with regard to the first minimum standard set out in the Fact Sheet. First of all, freedom of speech seems to be the most cherished American constitutional right to the extent that it is considered a cultural symbol.[59] The main reason behind the prominence of freedom of speech in the United States is a strong preference for liberty over equality.[60] In other words, free speech is perceived as a right belonging almost entirely to the individual against the state, which must be unlimited. However, it is worth noting that American theory and practice has not always been consistent. For example, despite the importance of freedom of political speech in a democratic society, for much of the twentieth century, laws adopted with the purpose of suppressing communist views were routinely upheld as constitutional.[61] The United States has a rich history of debate over hate speech, but the United States Supreme Court has repeatedly held that hate speech falls within the meaning of 'freedom of expression', unless it constitutes an incitement to immediate violence.[62]

The American approach to the freedom of speech and particularly to hate speech differs significantly from those of other Western democracies.[63] In particular, the

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[57] ibid.
[58] S Simon and A Romero, 'ACLU Leader on Defending Hate Groups' (*NPR*, 26 August 2017) < https://www.npr.org/2017/08/26/546323173/aclu-leader-on-defending-hate-groups> accessed 30 October 2019.
[59] Lee C Bollinger, *The Tolerant Society* (OUP 1986) 76-103.
[60] Michel Rosenfeld,'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis (2003) 24(4) Cardozo Law Review 1523,1529; Kevin Boyle, 'Hate Speech- The United States versus the Rest of the World?' (2001) 53 (2) Maine Law Review 488, 490.
[61] See e.g. *Dennis v. United States*, 341 US 494 (1951); *Gitlow v. New York*, 268 US 652 (1925); *Debs v United States*, 249 US 211 (1919).
[62] See e.g. *R.A.V.v. City of St Paul*, 505 US 377 (1992); *Snyder v. Phelps*, 562 U.S 443 (2011*);* *Matal v. Tam*, 582 US (2017).
[63] Freedom of expression is a right which strongly associated with western democracies because during the Cold War the Soviet bloc worked on establishing treaties that protected social rights.

ECtHR held that 'expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention'.[64] The Court has reiterated this position in several cases, establishing the principle that hate speech is not protected in the European Convention on Human Rights (ECHR) system.[65] In *Karaahmed v. Bulgaria*, the Court went a step further saying that the failure to punish and prosecute hate speech can amount to a breach of the ECHR,[66] but it is hard to argue that this standalone case imposes on states the duty to prosecute hate speech.

The ECtHR case law is aligned with the ICCPR.[67] More specifically, Article 19 of the ICCPR guarantees the right to freedom of expression in terms similar to the UDHR. It allows absolute protection of the right to hold opinions,[68] and protects the right to seek, receive and impart information and ideas. Article 19 permits limited restrictions on these rights only where these are a) provided by law; b) for the protection of one of the interests listed; and c) necessary to protect that interest.

The ICCPR also imposes an obligation on States parties to prohibit hate speech. In particular, Article 20(2) provides that 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' Article 20 has been characterised as being 'among the strongest condemnations of hate speech',[69] even though it does not refer to hate speech explicitly, but only to incitement. However, reference to 'incitement to discrimination, hostility or violence' as well as 'advocacy of national, racial or religious hatred' is indicative of the degree of hatred that the Article is concerned with.[70] The UN Human Rights Committee has held that full and effective

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On other hand, the West promoted civil and political rights. As a result, this right has mainly been developed in western jurisdictions.

[64]*Jersild v. Denmark* Application No 15890/89 (ECtHR 23 September 1994) para 35.

[65]*Gündüz v. Turkey* Application No 35071/97 (ECtHR 4 December 2003) para 51; *Féret v. Belgium* Application No 15615/07 (ECtHR 16 July 2009) para 64; *Jean- Marie Le Pen v. France* Application No 18788/09 (ECtHR 20 April 2010).

[66] *Karaahmed v. Bulgaria* Application No 30587/13 (ECtHR 24 February 2018).

[67] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

[68] UN Human Rights Committee, General Comment No. 34 'Article 19: Freedoms of Opinion and Expression', 12 September 2011, UN Doc CCPR/C/GC/34, para 9.

[69] Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 (4) Modern Law Review 543,544.

[70] Nazila Ghanea, 'The Concept of Racist Hate Speech and its Evolution over Time' Paper presented at the UN Committee on the Elimination of Racial Discrimination's day of Thematic

compliance with this obligation requires ‘a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation’.[71] This should also apply to both states and non-state actors who ‘should themselves refrain from any such propaganda or advocacy’.[72]

The Human Rights Committee has emphasised the close relationship between Article 19(3) and 20(2). Particularly, it has stated that any law seeking to implement the provision of Article 20(2) must also comply with the requirements of Article 19(3).[73] This position has also been found in the Committee’s case law. For example, in *Ross v Canada*, the Human Rights Committee held that a restriction on racist expression had to be justified on the ground of the test set out in Article 19(3) of the ICCPR.[74]

Despite the two contrasting approaches to hate speech adopted by the United States and by other Western states, freedom of expression is not absolute and can be restricted under certain conditions, depending on the human rights system, to limit hate speech. If hate speech, as a form of freedom of expression, is not recognised or cannot be justified in a jurisdiction, those defending this right, in practice, promote an illegitimate right. Defending an illegitimate right is in total contradiction with the first criterion of the Declaration on HRDs which requires that a defender should respect the rights enshrined in the UDHR. On this basis, the activity of the ACLU may be legitimate, and the organisation may be referred to as a defender, as America is more tolerant of hate speech. However, an organisation with similar activity in Europe could not be characterised as a defender in the sense that hate speech is prohibited.

Discussion on Racist Hate Speech, 81st Session, 28 August 2012 <https://www.ohchr.org/Documents/HRBodies/CERD/Discussions/Racisthatespeech/NazilaGhanea.pdf> accessed 30 October 2019.

[71] UN Human Rights Committee, General Comment No. 11 ‘Article 20: Prohibition of propaganda for War and Inciting National, Racial or Religious Hatred’, 29 July 1983, UN Doc CCPR/C/GC/11 para 2.

[72] ibid.

[73] ibid, para 1.

[74] *Ross v. Canada* Application No 736/1997 (26 October 2000) UN Doc CCPR /C/70/D/736/1997 para 11.1.

A second example relevant to the question of the first requirement and the conduct of HRDs is lawyers who defend those accused of terrorism and who become the target of criticism. Particularly, many believe that such lawyers ‘support terrorism and provide aid and comfort to the enemy’, while the defence of people accused of horrific crimes is perceived as an endorsement of those crimes.[75]As a consequence, lawyers who fight for the rights of those accused of terrorism have been refused entry to the United States even for holidays, while they have been characterised as the most-hated people in America.[76] In fact, those defending the rights of those accused of terrorism, either in the capacity of lawyer or activist, struggle to ensure the right of the accused to a fair trial and other fundamental rights.[77] In other words, they fight to uphold the rule of law against a powerful government and society which may overreach, violating the civil rights of suspects, in an attempt to convict them on the charges of terrorism. The point here is that these individuals do not question the universality of human rights; on the contrary, they fight to promote the human rights of those people who may be subject to civil rights violations due to the brutality of their actions. For that reason, there is no doubt that these individuals deserve the title of human rights defenders in relation to the first standard.

3.3.3.2. The Validity of the Arguments Being Presented

The second requirement to be a defender, under the Fact Sheet, concerns the validity of defenders’ arguments. It is not important for a defender to develop valid arguments in order to be a ‘genuine’ defender.[78] However, their arguments must generally fall within the scope of human rights law. In other words, the ultimate aim of a defender’s activity and argument should be the promotion and protection of human rights.

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[75] Nancy Hollander, ‘Opinion: A Terrorist Lawyer, and Proud of it’ (*Nytimes.com*, 26 March 2010) <https://www.nytimes.com/2010/03/24/opinion/24iht-edhollander.html> accessed 30 October 2019.
[76] Sarah Netter, ‘Lawyers Who Defend Terrorists, The Most Hated People in America’ (*ABC News*, 12 January 2010) <https://abcnews.go.com/WN/lawyers-defending-terrorists-stress-case-hated-people-america/story?id=9531235> accessed 30 October 2019; ‘Terrorist Suspects’ Lawyers Refused Entry to the US’ (*vrtnws.be*, 19 September 2018) <https://www.vrt.be/vrtnws/en/2018/09/19/terrorist-suspects-lawyers-refused-entry-to-the-us/> accessed 30 October 2019.
[77]Alissa Clare, ‘We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorist’ (2005)18 Georgetown Journal of Legal Ethics 651, 654.
[78] Fact Sheet (n 2) 29, 9.

Although it would appear to be an easy test to ascertain if a person is defending human rights, reality has been proven to be far more complicated. States have the power to set tight parameters on what activities may be considered 'right' and 'wrong'. As a result, defenders can easily be perceived as being in the wrong. Undoubtedly, the second requirement creates a dangerous margin of appreciation, which can undermine efforts to promote human rights within society and weaken defenders' actions. On this basis, this criterion should be disregarded, given that it can cause confusion in an already complicated definition.

Fact Sheet 29 used a very good example to explain the meaning of the validity of human rights. In particular, according to the Fact Sheet, 'a group of defenders may advocate for the right of a rural community to own the land they have lived on and farmed for several generations. They may conduct protests against private economic interests that claim to own all of the land in the area. They may or may not be correct about who owns the land.'[79] The example concludes that 'whether or not they are legally correct is not relevant in determining whether they are genuine human rights defenders'.[80]

Similarly, there are a significant number of organisations in Latin America, such as the Civic Council of Popular and Indigenous Organisation of Honduras (COPINH), which advocate environmental and land rights in order to protect rivers, forests, air and the land of the Indigenous people. The organisations perceive the environment as a gift of mother earth and therefore try to defend nature in all possible ways.[81] Based on these arguments, they fight for land rights. However, the state and companies whose interests are affected, find the arguments of Indigenous people to be frivolous and deem them wrong and unjust. Murders, threats and intimidation against members of the COPINH have been reported, with the motivation of stopping COPINH's protests.[82] The argument here is that regardless of whether

[79] ibid.
[80] ibid.
[81] 'Civic Council of Popular and Indigenous Organizations of Honduras (COPINH) | Grassroots International' (*Grassroots International*, 2010) <https://grassrootsonline.org/who-we-are/partner/civic-council-of-popular-and-indigenous-organizations-of-honduras-copinh> accessed 30 October 2019.
[82] International Service for Human Rights Defenders (ISHR), 'Human Rights Defender Profile: Francisco Javier from Honduras' (15 November 2016) <http://www.ishr.ch/news/human-rights-defender-profile-francisco-javier-honduras> accessed 30 October 2019.

COPINH's argument is right or wrong, the members of the COPINH deserve to fall within the scope of HRDs, since they fight for human rights.[83]

In addition, defenders campaigning on the rights of political prisoners and terrorists may be regarded by the State as supporters of those people and as individuals who share the same belief, and as a result states may argue that these individuals cannot be characterised as HRDs.[84]

Both examples show that the requirement of the validity of arguments does not add clarity; on the contrary, it causes confusion and grants states the discretion to exclude certain individuals from the definition of defender. Therefore, the key issue must be whether or not their intentions and actions fall within the scope of human rights.

3.3.3.3. Peaceful Activities

According to the third requirement, defenders should fight for human rights and protest against violations only through peaceful actions. This 'non-violence' criterion is clearly derived from the Declaration text which provides that defenders 'have the right to participate in peaceful activities against violations of human rights and fundamental freedoms'.[85] Moreover, Article 20 does not permit states 'to support and promote activities of individuals, groups of individuals, institutions or NGOs contrary to the provisions of the Charter of the United Nations'.[86] In other words, the activities of defenders must be conducted peacefully in order to comply with the provisions of the Declaration on HRDs.

As stated, the third criterion requires that defenders should not act in a violent manner, when promoting particular rights. For example, defenders protesting against sexual discrimination are not entitled to vandalise public and private properties during a demonstration merely to highlight the importance of their fight. However, it should be acknowledged that there is a likelihood that a peaceful protest could turn violent in response to violent and repressive policing.[87] Therefore, it is

[83] 'COPINH' (*Front Line Defenders*, 2018) <https://www.frontlinedefenders.org/en/profile/copinh> accessed 30 October 2019.
[84] Fact Sheet 29 (n 2) 9.
[85] Declaration on HRDs, art 12(3).
[86] ibid, art 19.
[87] Bennett et al. (n 5), 404.

interesting and important to discuss whether or not defenders participating in this kind of demonstration would be excluded from the definition of HRDs.

There should be a balance between the peaceful promotion of particular human rights and violent actions in response to aggressive and violent policing. Therefore, it should be taken as a condition that individuals protesting against human rights violations actually aim to promote human rights peacefully. Consequently, a violent action is only acceptable in certain circumstances such as a response to abusive and brutal policing and when not premeditated.[88]

Article 2 of the ICCPR establishes the obligation on states to 'respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant without distinction […]'. In essence, the exercise of violence displayed by state authorities means that the State fails to comply with the obligation of Article 2, as it violates fundamental rights under the Covenant.[89] That, in turn, allows people to react and defend their rights by themselves. On this basis, Ashworth articulated the opinion that 'where the attack or threat is sudden, the protection of society and its laws is no longer effective, and the individual alone may be left to protect his right to life and physical security'.[90]Although international human rights law does not establish a right of forcible resistance, forcible resistance may be justified against human rights abuses that threaten to cause a serious and irreparable harm. This limited right to resistance against human rights violations derives from the right to an effective remedy, which also part of Article 2, in the sense that if a human rights violation poses a serious and irreparable threat, resistance may be the only effective remedy available.[91] A more obvious origin of

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[88] Inter-American Commission on Human Rights, Second report on the Situation of Human Rights Defenders in the Americas, 31 December 2011, OEA/Ser.L/V/II. Doc. 66 para 129; Inter-American Commission on Human Rights, IACHR Expresses Concern for Violence against Student Protests in Chile, 6 August 2011, Press Release 87/11; Inter-American Commission on Human Rights, IACHR Condemns Excessive Use of Force in Repression in of Protests in Honduras, 22 September 2009, Press Release 65/09.

[89] Egon Schwelb, 'The Nature of the Obligations of the States Parties to the International Covenant on Civil and Political Rights' in René Cassin (ed), *Amicorum Discipulorum que Liber Vol 1, Problèmes de Protection Internationale des Droits de l'Homme* (Pedone 1969) 301, 304-305.

[90] Andrew J Ashworth, 'Self-Defence and the Right to Life' (1975) 34(2) Cambridge Law Journal 282, 283; W Paley and D L Le Mahieu, *Principles of Moral and Political Philosophy* (Liberty Fund, Incorporated 2014) Ch 1.

[91] D Kopel, J Eisen and P Gallant, 'The Human Right of Self-Defence' (2008) 22 Bringham Young University 22 (1) Journal of Public Law 43, 43.

the right to forcible resistance may also be the right to personal self-defence that is considered a general principle of law recognised by nations.[92]

In other words, this kind of violent action is considered a measure to counter an immediate threat of violence and thus may eliminate the illegal nature of the violative action.[93] It also becomes an issue of proportionality, which requires a balancing of competing interests: the interests of the defenders and the interests of the aggressor.[94] In short, self-defence as displayed by protestors in response to aggressive policing can be legally justified and therefore allow perpetrators to remain part of the definition.

In addition, there are practitioners who express their concerns regarding the difficulties of applying the criterion of 'non-violence' in occupied territories.[95] In those regions, demonstrations arise as protest against the occupation, or in response to violations conducted by the regime. They can be organised on the occasion of national days.[96] However, peaceful protests might be deemed illegal and violent by the ruling regime, in order that the regime can prove the illegal character of the protest and prevent similar actions in the future. In other words, even if someone wants to undertake a peaceful protest and promote human rights in the occupied territory, he or she could become part of a violent situation.[97] This would mean they do not meet the third standard and cannot be referred to as defenders.

For example, in Palestine, where people fight against human rights violations such as their right to self-determination, right to life and human dignity, demonstrations play a crucial role in the struggle against abuses. Demonstrations are a chance for confrontation between occupying military forces and Palestinian demonstrators

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[92] Jan Arno Hessbrueege, *Human Rights and Personal Self-Defence in International Law* (OUP 2017) 303.

[93] Ben Saul, 'Defending "Terrorism": Justifications and Excuses for Terrorism in International Criminal Law (2006) 25 Australian Year Book of International Law 107, 204-207.

[94] ibid, 204; Rachel E Schwartz, 'Chaos, Oppression and Rebellion: The Use of Self-Help to Secure Individuals' Rights under International Law' (1994) 12 (2) Boston University Journal of International Law 255, 307; Fiona Leverick, 'Defending Self-Defence' (2007) 27(3) Oxford Journal of Legal Studies 563, 563; J M Firth and J Quong 'Necessity, Moral Liability, and Defensive Harm' (2012) 31 (6) Law and Philosophy 673.

[95] R Jaraisy and T Feldman, 'Protesting for Human Rights in the Occupied Palestinian Territory: Assessing the Challenges and Revisiting the Human Rights Defender Framework' (2013) 5(3) Journal of Human Rights Practice 421, 422.

[96] Daoud Kuttah, 'A Profile of the Stonethrowers' (1988) 17(3) Journal of Palestine Studies 14,15.

[97] Jaraisy and Feldman (n 95), 429.

with the former using excessive force with the result that demonstrators turn violent.[98] However, there are dozens of Palestinians, such as Abdullah Abu Rahme,[99] who campaign using non-violent protests against the separation barrier, but who have been convicted on charges of participating in violent and illegal demonstrations and throwing stones at Israeli soldiers.[100] Regardless of whether or not the charges of which they were convicted are well-founded, it could be said that the demonstrators want to remain peaceful and only turn violent in response to excessive use of force. Despite the fact that the criterion of peaceful action could not apply to this case, these individuals can be referred to as defenders.

For these reasons, in cases where defenders adopt violent actions in response to aggression used by state authorities and within territories in which violence prevails, non-peaceful activities can be justified, and this criterion should be ignored. In any other case, there should be no derogation from a requirement derived from the Declaration.

It is also difficult to apply the third criterion in areas where movements are attempting to restore the rule of law. In the context of the fight for establishing a real democracy and promoting human rights, the actions of HRDs may cross the boundaries of peaceful action and act violently. For instance, although the African National Congress (ANC) under the leadership of Nelson Mandela attempted to fight against apartheid peacefully, after the massacre of 69 African protestors by South African police in 1961, Mandela set up an armed wing, known as 'Umkhonto we Sizwe', which was actively involved in the fight against the apartheid government.[101]

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[98] ibid, 423.
[99] European Union, Statement by the Spokesperson of High Representative of the Union for Foreign Affairs and Security Policy on Conviction of Human Rights Defender Abdullah Abu Rahme, 24 August 2010, A 167/10<https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/116232.pdf> accessed 30 October 2019.
[100] 'Human rights defender Abdullah Abu Rahma [sic] arrested and detained' (*International Solidarity Movement,* 15 May 2016) <https://palsolidarity.org/2016/05/press-release-human-rights-defender-abdullah-abu-rahma-arrested-and-detained/≥ accessed 30 October 2019; 'Israel: Activist Convicted after Unfair Trial' (*Human Rights Watch,*17 April 2015) <https://www.hrw.org/news/2010/09/08/israel-activist-convicted-after-unfair-trial> accessed 30 October 2019.
[101]A Kelk-Mager, B Nasson and R Ross, *The Cambridge History of South Africa* (1st edn, Cambridge University Press 2011) 340-350, 360-369; Nelson Mandela Foundation, 'Foundation Remembers Sharpeville Massacre Victims' (10 March 2010)

It is a long standing position in political philosophy that 'any individual citizen oppressed by the rulers of the state, has a right to disobey their commands, break their laws, even rebel and seek to replace the rules and change the laws.'[102] This position helps to understand the idea of revolution. In particular, the revolutionary does not accept the present government entirely and tries to establish the rule of law and promote individual and civil rights.[103] Non-acceptance of the present legal system allows any kind of violence in an attempt to restore democracy and human rights. It is said that international law accepts that a revolution may be a lawful exercise of a right to resistance provided that the right to self-determination is forcibly denied owing to colonial rule, unlawful alien occupation or racist regime.[104] In essence, an organised and violent resistance is justified as a measure of last resort.[105] It is worth noting that, according to Hessbruegge, this rule seems to apply to the struggle against Apartheid and Israel's occupation of Palestinian territories.[106] On this basis, individuals fighting for establishing the rule of law and human rights should be characterised as defenders, despite the violence and disobedience.[107] The violence they commit, as a reaction to abuses, must be the only means by which they manage to restore democracy and promote the realisation of human rights in a hostile environment.[108]

The argument put forward in this Part is that the use of violence by either states or defenders is by no means condoned in international human rights law, but the defender should not be stripped of all protection on the basis she or he took violent

<https://www.nelsonmandela.org/news/entry/foundation-remembers-sharpeville-massacre-victims> accessed 30 October 2019.

[102] Michael Walzer, 'The Obligation to Disobey' (1967) 77 (3) Ethics 163, 163; see also, Catherine Valgke, 'Civil Disobedience and the Rule of Law-Lockean Insight (1994) 36 Nomos 45, 46.

[103] Joseph Betz, 'Can Civil Disobedience Be Justified?' (1970) 1 (2) Social Theory and Practice 13,15.

[104] Bertil Dunér, 'Rebellion: The Ultimate Human Right?' (2005) 9 (2) The International Journal of Human Rights 247, 250; James Summares *People and International Law* (2nd edn, Brill Nijhoff 2014) 458; Thomas Keenan, 'The Libyan Uprising and the Right to Revolution in International Law' (2011) 11(1) International and Comparative Law Review 7, 17; Robert McCorquodale ,'Self-Determination: A Human Rights Approach' (1994) 43 (4) The International and Comparative Law Quarterly 859, 882.

[105] Summares, ibid.

[106] Hessbruegge (n 92), 317; Paul A. Beckett, 'Algeria vs. Fanon: The Theory of Revolutionary Decolonization and the Algerian Experience' (1973) 26 (1) The Western Political Quarterly 5.

[107] Beckett, ibid.

[108] Hessbruegge (n 92) 317; Summares (n 104) 458.

action to promote human rights. Therefore, people making a significant effort to promote and establish democracy should be, in principle, HRDs.

It should also be taken into consideration that there are individuals who fight for human rights through actions that are deemed to be against the law. The purpose here is to equate the requirement for peaceful actions with lawful actions in order to examine whether breaking the law can be compatible with the activity of HRDs. This Section draws from the literature on the theory of civil disobedience because both categories seem to have a lot of things in common. In particular, on the one hand, civil disobedient may break the law to correct injustices and on the other hand, HRDs may break the law to promote certain human rights. In other words, through the lens of civil disobedience, this Part looks at the similarities between a disobedient and defender and seeks to justify their unlawful actions. That would allow an individual who breaks the law to contribute to the realisation of human rights overcoming the requirement for peaceful and, by extension, lawful actions.

Although there is no undisputed definition of civil disobedience, the political philosopher John Rawls understands it to be 'a public, nonviolent, and conscientious act contrary to law usually done with the intent to bring about a change in the policies or law of the government.'[109] It should be highlighted from the very beginning that civil disobedience can only function within a democratic society and as will be discussed below, it promotes democracy and can make more law than it actually breaks. More specifically, in democratic states everyone accepts the principle of majority rule. However, this does not mean that the majority is infallible and the citizens are bound to follow unjust laws.[110] In essence, civil disobedience must be perceived as an attempt to protest unjust laws and make the majority correct injustices.

Given that civil disobedience is an act which breaks the law, a number of requirements must be fulfilled, in order that the unlawfulness character can be justified. For understanding whether an individual is a civil disobedient and as a

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[109]John Rawls, 'The Justification of Civil Disobedience', in A Kavanagh and J Oberdiek (eds), *Arguing about Law* (Routledge 2009) 247.
[110] ibid.

result he or she can be regarded as a HRD, it is better to analyse the requirements in combination with a real life example.

The ‘Den Plirono’ (I do not pay) movement was founded in 2009 in Greece and protested against increases in tolls’ charges and public transport tickets,[111] based on the right to an adequate standard of living.[112] The members of the movement encouraged their fellow citizens not to pay the tolls or buy tickets on public transport in order to exert pressure on the government. This example raises the question of whether or not the members of the movement can be characterised as defenders, despite their unlawful activities.

According to Betz, civil disobedience breaks specific laws which provoke injustices and creates inequalities within the society. The civil disobedient never violates basic laws guaranteeing life, the human integrity and property and most importantly, never repudiates the constitution, the entire system of laws and government.[113] In essence, the disobedient does not commit crimes such as murder, robbery and rape. His or her protest is a protest for the sake of better law. As a result, the fact that a civil disobedient would never violate fundamental laws as well as their motivation distinguishes them from common criminals.

In regard to the members of the movement, they fought against an economic injustice which affected the middle class and poor people. Actually, through breaking the law in question, they tried to bring the matter to the attention of the government and Parliament and make them review or recall the law and correct injustice. There is no doubt that their activity contributed significantly to the process of law making.

According to John Rawls, who was one of the most influential political philosopher, civil disobedience is best described as a non-violent law breaking protest over social injustice. This standard is quite similar to that of peaceful activities, as discussed earlier in the Chapter. The non-violent character of civil disobedience as well as the activities of HRDs refers to the fact that both are intended to address the sense of

[111] ‘Den Plirono movement’ <http://www.kinimadenplirono.gr/> accessed 30 October 2019.
[112] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11.
[113] Betz (n 103), 14.

injustice. As a consequence, engaging in violent actions is incompatible with the nature of civil disobedience and the promotion of human rights as a method of bringing injustices to the fore and fighting against them.[114] Yet, as seen in the case of defenders, this standard is not inconclusive, as some actions can be considered self-defence, which, in turn, could justify a violent action.[115]

Rawls believes that the reason for civil disobedience must be the elimination of inequalities created by legislation. It is extremely difficult to identify the kind of inequalities that must be corrected, as the choice depends upon a number of theoretical factors. Nevertheless, given that the economic and social policies are those which are able to damage equality within the society,[116] civil disobedience may also apply to these policies. As civil disobedience is aimed at correcting laws which affect the social equality, it cannot be grounded on self-interest and prejudice.[117] Obvious cases of civil disobedience is for instance when certain minorities are denied to hold political offices or have equality of opportunities in the economy because justice is not clearly being given.[118] It has also been argued that economic protest over austerity and equality cannot be regarded as actions of civil disobedience, as the economic interest of a specific group is placed first.[119] As a consequence, the members of the movement 'Den Plirono' could not be characterised as civil disobedient because they protested against the law on the grounds of the group interest.

On the other hand, Jessie Jackson is of the opinion that a great number of protests over economic issues are actually protests over injustices and inequalities within the society.[120] The 'Mouvement des gilets jaunes' or known as the 'Movement of yellow vests' seems to validate the Jackson's theory, as it is a political movement for economic injustice that began to protest against the disproportionate burden of Governments tax reforms that were falling on the middle and working class citizens

[114] Rawls (n 109), 248.
[115] Tony Milligan, *Civil Disobedience: Protest, Justification And The Law* (Bloomsbury Publishing 2013) 14.
[116] Rawls (n 109), 249.
[117]John Rawls, *A Theory of Justice* (Belknap Press 2005) 365
[118] Rawls (n 109), 249.
[119] Milligan (n 115), 8.
[120] Peter King, *Martin Luther King Jr* (Routledge 2002) 274-275.

in November 2018 in France.[121] Returning to the example of 'Den Plirono', in a country like Greece that has been going through financial crisis for far too long and austerity measures have affected mainly the middle and lower classes, increases in tolls charges and public transport tickets exacerbate social injustice. By disobeying the law in question, the movement 'I do not pay' protested and called upon the government to recall the law and correct this social inequality. Therefore, the action of the movement is, in principle, an action of civil disobedience.

Civil disobedience is a public action and hence non-secretive. That means civil disobedient expects and accepts the possibility of being arrested and punished as a consequence of breaking the law. In this way he or she manifests his or her respect for legal procedures. Civil disobedience is done within the limits of law and expresses fidelity to law.[122] In essence, civil disobedience publicly challenges a part of the legal system, but, at the same, it accepts the remainder. When it comes to the 'I do not pay' movement, the members alerted the police and news media in order to make their fight known and finally managed to convince the majority to change the law. In several cases, members of the movement were arrested and tried,[123] which allows the movement's activity to fall with the meaning of 'civil disobedience'.

This feature of civil disobedience distinguishes it from other crimes. Common lawbreakers would never alert the police before acting, and do not usually admit their crimes.[124] Thus, defenders who break the law within the framework of civil disobedience should be distinguished from common criminals in respect of their motivation, the kind of laws they break and the circumstances in which they do so.

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[121] H Clarke and G Mezzofiore, 'Who Are the 'Yellow Vest' Protesters Causing Chaos in France?' (*CNN*, 2018) <https://edition.cnn.com/2018/12/07/europe/who-are-gilet-jaunes-intl/index.html> accessed 30 October 2019; Alissa Rubin, 'France's Yellow Vest Protests: The Movement that Has Put Paris on Edge' (*Nytimes.com*, 2018) <https://www.nytimes.com/2018/12/03/world/europe/france-yellow-vest-protests.html> accessed 30 October 2019; Kim Willsher, 'Paris Protest: 'People Are in the Red. They Can't Afford to Eat'' (*the Guardian*, 2018) <https://www.theguardian.com/world/2018/nov/24/paris-fuel-tax-protest-macron-france-poverty> accessed 30 October 2019.
[122] Rawls (n 109), 249.
[123] Kinima Den Plirono, 'The Release of Dimitris Aggelis- Dimakis' (unofficial translation) (*Kinima Den Plirono, 24 October 2016)* <http://www.kinimadenplirono.gr/efxaristiria-epistoli-dimitris-aggelis-dimakis-athoosi/> accessed 30 October 2019.
[124] Betz (n 103), 17.

At this point, emphasis should be placed on the fact that a disobedient is not necessarily a HRD; he or she also needs to meet all the minimum standards to be characterised as such. In short, as long as he or she falls within the term 'human rights defender', through civil disobedience, a defender may contribute not only to the realisation of human rights, but also to good governance and democracy.

Being inextricably linked to democracy, civil disobedience loses its peculiar nature in less democratic states,[125] as, even though there is an active society which is keen to address any sense of inequality, it lacks independent institutions that could correct injustice and guarantee democracy. The question that arises is whether an individual who disobeys the law in order to promote and defend human rights in a fragile democracy can be referred to as a defender. Although the theory of civil disobedience is hard to apply, it should be highlighted that in this case too, individuals should not challenge the whole system and therefore must not break basic laws; otherwise they would not differ from common criminals. Hence, the question is whether an individual who breaks an unjust law or laws restricting freedoms and human rights can be characterised as defender.

In a fragile democracy, it would be more difficult to make the majority change an unjust law, as the government is the one who adopts unjust laws with the purpose of serving its authoritative policies. It is crucial that the courts may also be unable to restore, at least to some extent, the sense of justice, protecting civil liberties and rights. Despite the fact that civil disobedience does not apply, the action of disobeying the law can be justified on the basis that the law is unjust on purpose, does not violate fundamental rights and the system lacks independent institutions that could correct injustice and guarantee the rule of law and human rights. It seems that the individual or the group of individuals is the only guarantor of human rights within a fragile democracy and therefore should fall under the term 'HRD'.

[125] For countries that are less than fully democratic in relation to civil liberties and electoral procedures, besides the terms 'fragile democracy' and 'borderline democracy', Collier and Levitsky introduced the term 'democracy with adjectives', so various terms can be used such as'semi-democracy', 'illiberal democracy' and 'defective democracy'. See, D Collier and S Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49 (3) World Politics 430, 441.

3.4. The Criterion of Risk to Safety and Violations of Fundamental Human Rights as a Means of Ensuring Access to the Higher Protection Regime

Taking into consideration Article 1, the guidelines of Fact Sheet 29 and the analysis to date, one can argue that a defender can be any person or group of persons working to promote human rights. Furthermore, the individual must meet the three minimum standards required to be a defender. In addition to the apparent flaws in the minimum standards, the definition does not include the risk to the safety, livelihood or freedom at which defenders put themselves in order to protect and promote human rights and the abuses against them because of their work. Although the Special Rapporteur constantly reports serious human rights violations and abuses against defenders and sometimes against their families, and names them as 'human rights defenders at risk',[126] this threat, as well as any kind of abuse against them, is not part of the definition.

The use of the word 'strive' in Article 1 of the Declaration could imply that defenders try so hard to promote human rights that they could face difficulties because of their activities. However, neither the Declaration nor Fact Sheet 29 specifically includes the threat to safety and livelihood and other abuses to which defenders are often subject as part of the definition of being a HRD. In the context of interviews, several participants emphasised the role of risk in their activities and life.[127] Indicatively, they said:

'All these risks are part of your mission, when you protect human rights in a hostile environment, you have to be ready to be criticised and be targeted maybe.'[128]

[126] UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, 22 February 2016, UN Doc A/HRC/31/55/Add; UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, 1 February 2016, UN Doc A/HRC/31/55; UN General Assembly, Human Rights Defenders, 4 August 2010, UN Doc A/65/223; UN Economic and Social Council, Report Submitted by the Special Representative of the Secretary– General on Human Rights Defenders, Hina Jinali', 15 January 2004, Un Doc E/CN.4/2004/94.

[127] INTV 1, 18.2.2018; INTV 2, 22.2.2018; INTV 7, 12.2.2018; INTV 13, 19.6.2018; INTV 16, 8.2.2018.

[128] INTV 2, 22.2.2018.

'We all know that the environment in which we work includes many dangers and risks. We are aware of that and we have chosen this work. If you choose to be a defender, you know that the risk is there.'[129]

And

'There are so many risks in our work.'[130]

It is worth noting that despite the 'convenience sampling',[131] all the participants, regardless of whether or not they believe the risk at which someone puts his life must be part of the definition, are or have been subject to some type of abuses due to their work. That strongly suggests that the activities of HRDs go hand in hand with the danger in which they may find themselves.

The threat to safety, life and livelihood and violations of other fundamental human rights, as a consequence of defenders' activity, is the element which distinguishes a defender from an individual who just supports human rights. A defender risks his or her freedom, life, family and job to promote human rights and many times he or she is subject to major human rights abuses. Therefore, in order for defenders at risk to be able to continue their human rights activities, it is imperative to fall under the Higher Protection Regime mechanisms, which recognise not only their role, but also the sensitive and risky nature of their work and offer a suitable means of protection. Therefore, including any person supporting human rights in the protection provided by the special protection mechanisms may only cause confusion over who is actually in need of extra protection and most importantly, extends the special protection to everyone. For this reason, the criterion of risk and human rights violations should play a vital role in determining who is in danger and therefore needs immediate and special protection. In essence, this criterion is used to distinguish between an individual risking his life, livelihood and safety in order to promote human rights from another individual who merely supports human rights and hence sets up a limit on who is entitled to the extra protection.

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[129] INTV 1, 18.2.2018.

[130] INTV 7, 12.2.2018.

[131] Martin N Marshal, 'Sampling for Qualitative Research' (1996) 13 (6) Family Practice 522, 523.

One could say this approach places definitional constraints, and leaves those carrying out human rights activities but not putting their life on the line outside of the extra protection and as a result unprotected. For instance, Participant 15 supported by Participants 3 and 9, states that:

> *'This element [the criterion of risk] would narrow down the definition. A person fighting for good governance knows in advance that the government won't like their actions and may be in trouble. Thus, they must be characterised as HRDs because of their work and activities.'*[132]

The point here is that those not falling under the notion 'human rights defenders at risk' are not unprotected, as they fall under the protection of relevant international and regional human rights conventions. As already pointed out, the term 'human rights defender' raises awareness, recognises the role of those individuals risking their lives to protect human rights and enhances their protection, so that they can remain efficient. On this basis, those not being at risk do not need extra protection. In fact, the definition is still broad in general, but is narrowed in relation to the criterion of risk. In essence, this standard seeks to draw a line between those in need of protection and those not at risk. It is crucial that those excluded from the extra protection regime are not left unprotected.

The questions this approach raises are: how can a defender prove that he or she is at serious risk; and, does he or she bear the onus of proving this risk? The only thing that a defender must prove is that his or her human rights activities are sufficient to cause violations given the political, cultural and religious characteristics of the society where he or she lives, regardless of whether or not abuse has occurred. In addition, the state's record with regards to human rights and the level of rule of law can play a major role in predicting the situation of defenders in a particular state. More specifically, defenders fighting against human rights abuses in outlier states are most likely to be in danger and to meet the criteria of the definition. By the same logic, individuals promoting human rights in states of political turmoil, where violence prevails, like the example of Apartheid above, may be more vulnerable to violations and as a result fall under the umbrella of term 'HRD'.

[132] INTV 15, 17.6.2018.

From a pragmatic and legal perspective, the severity of the abuses and threats must not be the cardinal feature of this criterion. In Turkey, a significant number of academics lost their jobs at the universities due to their prominent standing in the academia and their constant condemnations of human rights violations.[133] In the context of academic freedom, which includes inter alia freedom of teaching and discussion, freedom to express freely their opinion and freedom from institutional censorship,[134] many academics were critical of the government and signed the Peace Declaration, a petition denouncing attacks on Kurds, in January 2016.[135] The state, being unable to control academics and the freedom of academic expression, expelled more than 4,000 academics from universities in response.[136] In contrast, in Pakistan, one of the most challenging countries for human rights defenders, Salman Haider is a defender who has been working on minority rights and protesting against forced disappearances. On 4 January 2017, he was reported missing in Islamabad and 24 days later he was released without commenting on his disappearance.[137] In essence, multiple violations, from losing a job to enforced disappearances and torture are all sufficient reprisals to meet the criterion of risk and characterise someone as a defender.

According to Fact Sheet 29, an architect who chooses to design her construction in a way that offers specific support to relevant human rights,[138] such as the right to a healthy environment and for this reason uses eco-friendly materials, could be referred to as a defender. The argument posited is different from the position presented in Fact Sheet 29 in the sense that she does not need recognition just because she is conducting her job in a way which supports human rights.

[133] 'Turkey: Government Targeting Academics' (*Human Rights Watch*, 14 May 2018) <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics> accessed 30 October 2019.
[134] R Quinn and J Levine, 'Intellectual-Human Rights Defenders and Claims for Academic Freedom under Human Rights Law' (2014) 18 (7-8) The International Journal of Human Rights 898, 901.
[135] Ibrahim Natil, 'Turkey's Foreign Policy Challenges in Syrian Crisis' (2016) 27 Irish Studies in International Affairs 75, 79.
[136] Sibel Hurtas, 'The Collapse of Turkish Academia' (*Al-Monitor*, 2017) <http://www.al-monitor.com/pulse/originals/2017/02/turkey-academics-purges-collapse-of-academia.html> accessed 30 October 2019.
[137] 'Pakistan - Disappearance of Human Rights Defenders Salman Haider, Ahmed Raza Naseer, Waqas Goraya And Asim Saeed' (*Front Line Defenders*, 2017) <https://www.frontlinedefenders.org/en/case/disappearance-salman-haider> accessed 30 October 2019.
[138] Fact Sheet 29 (n 2), 7.

Nevertheless, this architect could be characterised as defender, provided that her insistence on eco-friendly methods of construction put her in danger of being harmed or stigmatised within the society.

In short, anyone can choose to support and promote human rights in the way he or she wishes at any time. It is reasonable to expect that an individual supporting specific human rights does not deny others and overall has a human rights activity-based approach. However, this characteristic is not sufficient to make someone a defender and be able to access the protection regime. For these reasons, one must use the criterion of risk to an individual's human rights through being threatened, harassed or stigmatised because of their work, in order to be described as HRD and access the Higher Protection Regime protection mechanisms.

3.5. How Human Rights Defenders Identify Themselves?

Although it is not usual for the subjects of a Declaration or a treaty to identify themselves, as they are usually only subjects to the given definition, their approach, as individuals directly affected and involved, might contribute to a better understanding of who is a defender and most importantly, to measuring the implementation of the definition. Even though there is not a conventional and clear definition, important deductions concerning the characteristics of defenders could be drawn from the Declaration adopted by the Human Rights Defenders Summit in 1998.[139] The Summit was held in Paris on the occasion on the 50th anniversary of the UDHR and a number of prominent defenders, Nobel Laureates, including the Dalai Lama and Bishop Jose Ramon Horta from East Timor took part in the Summit and expressed their admiration of HRDs' work. Although it has been several years since the Summit took place, the three substantial documents that came out of it are a valuable source of information on defenders' plans and thoughts about their situation. In 2018, 20 years after the first gathering, HRDs from all over the world met in Paris again and adopted a plan of action for the protection and promotion of the work of HRDs. The Declaration adopted by the Human Rights Defenders Summit in 2018 make no mention at all of the definition, so the approach adopted in 1998 is the main source of discussion.

The Summit was the first time where defenders explained collectively how they actually contributed to the realisation of human rights and expressed their concerns about threats and abuses against them. According to the first clause of the Declaration, the defenders perceive themselves as people committed to fighting for the realisation of the human rights introduced and adopted in the UDHR. Even before any guidance on the UN Declaration on HRDs was provided by the High Commissioner through the Fact Sheet, HRDs made it clear that they recognise the universality of human rights and consider human rights 'indivisible' and

[139] *Amnesty International, 'Information on Human Rights Defenders Summit, Paris, December 1998: Summary' (1998) < https://www.amnesty.org/en/documents/act30/015/1998/en/> accessed 30 October 2019.*

'inalienable'.[140] Therefore, they stated they were keen to champion and defend all human rights by all possible means. They also insisted on the fact that they have been victims of violations to their dignity because of their legitimate commitment and as a result, were under constant threat of further violations.[141] In short, the defenders who took part in the Summit concluded that everyone can be a defender provided that he or she recognises the universality of human rights. Of great importance is that they laid stress on the violations to their dignity to which they are subject due to their human rights work.

The conclusion of the Summit offers a more systematic approach to the definition, as it emphasised the universality of human rights and the violation to defenders' dignity because of their commitment to human rights. On the other hand, the findings of the research regarding how the subjects of this research project perceive the term 'human rights defender', as discussed earlier in this Chapter, as well as the responses to the question 'Do you identify yourself as a HRD?' show that individual defenders are in line with the conclusions of the Summit, but seem to have a more basic idea of who falls within the meaning of the term 'defender'. Indicatively, Participant 10 states:

'I am a HRD because the government made it clear that I would be arrested and sentenced to several years of imprisonment because of my support to a political prisoner.'[142]

Similarly, Participant 8 says:

'I identify myself as HRD because my work involves highlighting human rights violations and providing the necessary defence, promotion and protection of human rights.'[143]

The conclusions of the Summit as well as the views of HRDs are not far from the UN definition as all have adopted a broad perception of the term. However, defenders seem to be unaware of some of the minimum standards a defender must meet, according to the UN. In any case, it can be argued that the perception that

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[140] The Paris Declaration: The Human Rights Defender Summit (10 December 1998) clause 3 < https://www.amnesty.org/download/Documents/148000/act300321998en.pdf> accessed 30 October 2019.
[141] ibid, clauses 14, 16 and 17.
[142] INTV 10, 17.2.2018.
[143] INTV 8, 13.3.2018.

defenders are victims of violations to their dignity may leave space for the criterion of risk to become part of the definition in the future.

3.6. Approaches and Definitions Developed by NGOs Working with HRDs

The role of NGOs in the UN human rights system is so integral that Brett argues that 'the entire UN human rights system would quite simply cease to function without NGOs'.[144] It is easy to agree with this idea if one considers that they play the leading role in lobbying of government delegations and experts, in drafting resolutions and have a consultative status with several UN committees.[145] Most importantly, not only are NGOs able to influence government and state delegations, but they also enjoy the confidence of the public. They are aware of the needs of the society and their main purpose is to secure rights for all their members, making them an effective weapon in supporting UN human rights instruments and in pressurising governments.[146]

In relation to the Declaration on HRDs, the international NGOs, which were part of the International Service for Human Rights initiative, played a decisive role in the adoption of the text, which would aim to protect the rights of defenders. The members of the NGOs actively participated in the negotiations and helped to persuade delegates in the Working Group to oppose a draft that would not meet certain basic protection standards.[147] Currently, several NGOs are working on the protection of HRDs; powerful NGOs, such as Amnesty International and Human Rights Watch, have extended their actions to protect defenders, while other NGOs, such as Front Line Defenders and the Observatory for Human Rights Defenders have been established with the specific aim of providing support to HRDs.

[144] Rachel Brett, 'The Role and Limits of Human Rights NGOs at the United Nations' (1995) 43 (1) Political Studies 96, 100.
[145] D Davis, A Murdie and C Garnett Steinmetz, '"Makers and Shapers": Human Rights INGOS and Public Opinion' (2012) 34 (2) Human Rights Quarterly 199, 200; Felice D Gaer, 'Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs' (2003) 2 (3) Journal of Human Rights 339, 343, 345.
[146] Telmo Rudi Frantz, 'The Role of NGOs in the Strengthening of Civil Society' (1987) 15 (1) World Development 121, 121-127. See also, Stephanie Grant, 'The NGO Role: Implementation, Expanding Protection and Monitoring the Monitors in AF Bayfsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer International Law Publishers 2000).
[147] Dossier (n 9), 6-7.

Many NGOs have adopted either their own definition or set out certain characteristics of who can be a defender that they rely upon to determine HRDs. Arguably, it is important to look at the NGOs' approaches in the sense that they are capable of influencing the UN mechanisms and governments regarding the interpretation of the current definition.[148] Most importantly, NGOs working closely with defenders are those who implement the definition and determine in practice who is a defender by providing trainings and support to those falling within the meaning of the term.

3.6.1. The Observatory for the Protection of Human Rights Defenders

One of the most representative examples of a powerful NGO fighting for the protection of defenders is the World Organisation against Torture (hereinafter OMCT), which in partnership with the International Federation for Human Rights (fidh), established the Observatory for the Protection of Human Rights Defenders (hereinafter the Observatory). This joint programme aims to protect HRDs and struggles to mitigate serious human rights violations, such as enforced disappearances and degrading treatment. The OMCT has the means to bring serious human rights violations to the attention of UN mechanisms through communications and reports and actively contributes to the protection of defenders. Enjoying a consultative status with a number of international organisations such as the UN ECOSOC, the International Labour Organisation (ILO) and the Council of Europe,[149] it has the power to influence the interpretation of the definition.

Recognising that the existing UN definition, as derived from the Declaration on HRDs and the Fact Sheet, is vague and has caused several difficulties in handling cases, the Observatory adopted its own 'operational definition' that intends to facilitate the analysis of the admissibility of the cases involving HRDs brought to its attention. According to the Observatory's definition, a HRD can be:

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[148] There are several NGOs working in the field of HRDs. The thesis considers the approaches of four organisations on the basis of whether they have developed their own definition or a definition can be drawn on their activities as well as the profiles of defenders they work with.

[149] Dominique Dembinski-Goumard, *International Geneva Yearbook 2008* (1st edn, United Nations Publications 2008) 377; 'The Observatory for the Protection of Human Rights Defenders / OMCT' (*Omct.org*) <http://www.omct.org/human-rights-defenders/observatory/> accessed 30 October 2019.

> Any person who risks or who is victim of reprisals, harassment or violations because of his or her commitment, be it individually or in association with others, in favour of the promotion and the implementation of the rights recognised in the Universal Declaration of Human Rights and guaranteed by various international instruments.[150]

In addition to the definition, the Observatory provides examples of categories of defenders for a better understanding and for facilitating the implementation of the definition. These categories include doctors, leaders of trade unions and journalists.[151]It seems that the Observatory's list is similar to the Fact Sheet. However, there are some vital differences in the definitions; first, the OMCT definition clearly states that a defender should be in danger or be a victim of serious violations. Second, the Observatory also includes all those people who engage with human rights and because of their human rights activity they are likely to find themselves in serious danger.[152] In other words, the Observatory's approach considers the likelihood of repression to be one of the characteristics of defenders.

As far as the other characteristics are concerned, even though the definition does not make any mention of peaceful activities, the Observatory requires that defenders should only work for human rights through peaceful means.[153] This requirement coincides with the UN's minimum standard for peaceful action. Thus, the concerns over the problematic application of this standard in several cases, as discussed previously, also apply to the OMCT.

The definition is not clear in terms of whether or not those individuals promoting human rights occasionally or just once fall within the title of 'HRD'. However, according to the Observatory, a journalist can be a defender. With few exceptions, journalists are not defenders, unless they report on human rights violations or protest against abuses, as this activity can put their career and life in danger. On this

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[150] ibid.
[151] ibid.
[152] After enumerating possible categories of individuals who engage with human rights promotion, the Observatory adds the sentence that '[t]hey can all be victims of repression".
[153] Dembinski-Goumard (n 149).

basis, it could be argued that those acting as defenders once or occasionally, they deserve to be referred to as such and therefore enjoy the protection regime.

To conclude, the Observatory's approach is quite satisfactory, but needed to be clearer by gathering all the requirements in one definition. It remains broad, while it sets some boundaries, including the likelihood of repression. However, the organisation needs to define further the requirements of peaceful activities and take a clear position on whether the activities of defenders must be also in compliance with international human rights law. In essence, the OMCT's approach does not contribute to a better understanding of the definition, as the concerns about the minimum requirements remain unaddressed.

3.6.2. The Commonwealth Human Rights Initiative

It is worth examining the definition of another powerful NGO, the Commonwealth Human Rights Initiative (CHRI), which actively supports HRDs. According to the Commonwealth Secretariat, HRDs are 'individuals, groups and organisations that promote and protect universally recognised human rights and fundamental freedoms'.[154] This is another quite broad definition, which does not include minimum standards and can accommodate all types of defenders. The breadth of the definition could be attributed to the Commonwealth's perception of who are HRDs. According to their view, every individual or group of persons promoting and protecting human rights can be defined as defenders and therefore fall under the protection of the Declaration on HRDs, regardless of profession, gender and social background.[155]

Although the criterion of risk and abuse is not a part of the definition, the Commonwealth does acknowledge that defenders are subject to grave violations because of their activities.[156] Moreover, the definition provides that defenders should promote and protect 'universally protected human rights'. This term might exclude from the definition defenders, either individually or in association, who

[154] Commonwealth Human Rights Initiative (n 45), 10.
[155] ibid, 11.
[156] 'Human Rights Defenders' (*Demo.humanrightsinitiative.org*) <http://demo.humanrightsinitiative.org/strategicinitiativeswhatwedo/human-rights-defenders> accessed 30 October 2019.

fight for specific issues not included and named within the existing international human rights law.[157] For instance, the right of access to energy, such as electricity, is not a universally recognised right, but it may be derived from the right to an adequate standard of living.[158] On this basis, according to the Commonwealth's definition individuals and NGOs campaigning for the right to electricity and water may not be referred to as defenders. Conversely, it should be held that defenders can fight for any right no matter of whether or not it is customarily or conventionally recognised and regulated.

In sum, the Commonwealth's approach seems to be on the same page as the UN definition and even wider, as it does not include any requirement similar to that of peaceful activities. This is particularly because of the perception that the definition must include as many individuals as possible. However, this considerably wide approach may end up with a definition including individuals that promote human rights violently or by foul means and in fact, do not deserve to be referred to as HRDs.

3.6.3. Amnesty International and Front Line Defenders

Powerful human rights NGOs, such as Amnesty International and Front Line Defenders, which actively engage with the protection of defenders and support their fight for the realisation of human rights, have not adopted a clear and specific definition of the term 'human rights defender'. More specifically, Amnesty's approach is not different from the other NGOs' basic perception of the role of defenders. Undoubtedly, defenders are people who fight to make the UDHR real. The activity of defending is precisely what characterises a defender in the first place and this fact appears to be indisputable.

[157] Institute for Human Rights and Development in Africa (IHRDA) and International Service for Human Rights (ISHR), 'A Human Rights Defenders' Guide to the African Commission on Human and Peoples Rights' (2012) 15 < https://www.ihrda.org/wp-content/uploads/2012/10/ishr-ihrda_hrds_guide_2012-1.pdf> accessed 30 October 2019.
[158] Aikaterini – Christina Koula 'The Right to Energy as an Individual Right' (unofficial Translation)' (Master, Democritus University of Thrace, Greece 2016) 9.

Although most of Amnesty's cases concern activists who fight for human rights systematically, Amnesty states that defenders can 'come from all walks of life'.[159] The defenders Amnesty works with are either men or women, regardless of origin and race. Consequently, it is commonplace that there is not only one type of HRD and, as already stated, anyone can be a defender.

Moreover, Amnesty International accepts that defenders are exposed to all kinds of abuse and risks due to their sensitive nature of their work.[160] Through its reports, Amnesty condemns the use of methods targeting defenders as a means of stopping them from carrying out human rights activities. Overall, it is of great importance that a powerful NGO, such as Amnesty International, recognises that even though anyone could become a defender, the distinguishing characteristic of a HRD is his or her exposure to human rights violations.

Similarly, Front Line Defenders has not adopted a definition of defenders, while its approach and mission is along the same lines as those of Amnesty. In particular, they support and act for individuals who are subject to serious human rights violations, such as enforced disappearances, unfair trials, and threats to life because of their commitment.[161]

According to the definitions/ approaches of those four NGOs, anyone can be a defender regardless of race, sex and educational background. Notably, their approaches seem to be in line with the broad UN definition, while accept some of the minimum standards. However, they fail to interpret the muddy aspects of the minimum standards, thereby failing to add the much needed clarity on the UN definition. One of the arguments put forward here is that the current definition could have been clearer and more precise if those NGOs working with HRDs had provided a systematic analysis of the current minimum requirements through the profiles of the defenders they are working with and their research reports. On this basis, the purpose of this Chapter is to facilitate the interpretation of the definition

[159] 'Human Rights Defenders – Some of The Bravest People in the World' (*Amnesty.org.uk*, 2017) <https://www.amnesty.org.uk/human-rights-defenders-what-are-hrds> accessed 30 October 2019.
[160] 'In their own words: Nabeel Rajab' (*Amnesty.org.uk*, 2016) <https://www.amnesty.org.uk/podcast-in-their-own-words-nabeel-rajab-bahrain> accessed 30 October 2019; 'China: Hundreds of human rights lawyers targeted in China' (*Amnesty.org.uk*, 2015) <https://www.amnesty.org.uk/china-hundreds-human-rights-lawyers-targeted> accessed 30 October 2019.
[161] Front Line Defenders (n 4); Front Line Defenders (n 137).

in the sense that it can encourage the UN and regional mechanisms and civil society organisations to consider those problematic elements that remain unaddressed, when they interpret and implement the Declaration on HRDs. In addition, it is of great significance that NGOs emphasise the danger or the possibility of exposure to various risks. Although this approach may narrow down the definition, as discussed in detail earlier, the focus of NGOs on defenders at risk confirms that, in practice, HRDs are at risk. In essence, it comes to support the position of the thesis that the risk should be part of the definition, while it leaves space for the risk to become part of the definition in the future.

3.7. Conclusion

The definition of the term 'human rights defender' constitutes a significant obstacle because it is vague and open to different interpretations. It has also become clear from the findings that several defenders are not aware of the UN definition and when the researcher asked questions on the meaning of the term, they appeared to adopt their own approaches, most of which are not even close to the predominant definition. The vagueness of the definition and unfamiliarity with its characteristics can be attributed to the fact that it implicitly derives from an unclear provision of the Declaration on HRDs interpreted in light of a research report.

The human rights activity of an individual, as one of the characteristics of a defender, is an absolutely sensible approach. Nevertheless, it needed to make it clear whether the motive and period are decisive elements of the activity. In essence, these characteristics would make the definition far clearer and broader, as there would be no room for excluding individuals who promote human rights occasionally or once or on a contracted basis.

Two of the criteria intended to add clarity, namely the requirement for accepting the universality of human rights and peaceful activities, are also fair on the basis that the activities of HRDs must be in consistency with the standards of international human rights law. However, both requirements are so broad that in several circumstances it is hard to draw a line between human rights defence and taking up arms. Therefore, this Chapter tried to identify those cases where individuals cannot be referred to as defenders, even though they are in practice, and suggested alternative interpretations on these minimum standards that could facilitate the application of the requirements.

Emphasis was also placed on the criterion of risk which distinguishes an individual who breaks out of his or her comfort zone to fight for human rights from another individual who promotes human rights without taking any risk. The point of this distinction is to clarify who should have access to the Higher Protection Regime. Although this requirement does put a definitional limit, in fact, no one is left unprotected, as everyone is entitled to the protection of international human rights law and enhances the protection of those at risk. The profiles of defenders NGOs

work with, in practice, as well as their approaches to the term shows that this element must be connected to the definition.

Undoubtedly, the existence of a broad definition can accommodate all profiles of HRDs, but it has become clear a number of issues are still undefined and unclear. As a result, defenders cannot take advantage of the definition and more importantly, of the protection and recognition the entire regime entails. Even if a new definition is adopted in the future, some elements, such as the peaceful character of defenders' activities, will remain broad in the sense that a borderline cannot be drawn. Therefore, those UN and regional mechanisms as well as NGOs working with HRDs should interpret systematically the minimum standards and the definition itself to prevent misunderstandings and inconsistencies. Coherent and clear requirements will supplement the predominant definition and create a comprehensive approach to who is a HRD.

Chapter 4

Violations of Defenders' Rights through Legal and Extra-Legal Actions

4.1. Introduction

It has been said so far that due to the sensitivity of their work, defenders are exposed to serious human rights violations, such as attacks, torture and murders. In addition to these types of human rights violations, it is clear from the reports of NGOs working with HRDs and the UN Special Rapporteur on HRDs as well as the empirical result that defenders are also targeted through legislative measures. Additionally, they are deprived of their liberty on the ground of criminal law and are subject to long judicial proceedings. In essence, this Chapter looks at the measures taken to prevent defenders from doing their human rights work and goes a step further and argues that in practice, there are two main methods of abusing HRDs' rights: violations through extra-legal actions; and violations through legislative measures (or legal actions). The latter comes as a result of the adoption and implementation of criminal justice policy as well as the abuse of administrative power, which constitute the central focus of this Chapter. In essence, this Chapter seeks to address a practical obstacle to the life and work of HRDs, which tends to become a common method of targeting defenders. The reason why abuses through legal actions constitute an obstacle is because it prevents defenders from concentrating on their activities, which may also have an impact on the realisation of human rights and democracy.

In particular, this Chapter explores the nature of the rights of HRDs and examines whether and under which conditions limitations on their rights can be permitted. It also emphasises the obligation of the states to ensure the rights of defenders under the concept of due diligence. Through the distinction between violations through legal actions and extra-legal actions, this Chapter seeks to show that in practice, there are states that do not comply with their human rights obligations. The Part devoted to violations through extra-legal actions focuses on the status of the violated rights with regard to HRDs, while the Part dedicated to violations through legislative measures is considerably longer, as it considers the two different types

of measures that directly target HRDs,as have been previously reported in the literature. The Chapter looks at each category and discusses the extent to which these practices can be justified under international human rights law. Given that there may be numerous ways of violating the rights of defenders both through legal and extra-legal actions, the Chapter relies on indicative examples coming from the empirical research as well as websites of NGOs working with HRDs that facilitate the analysis, contributing to a better understanding of each category and show how practice occurs. At this point, it should be made it clear that the Chapter uses the term 'criminalisation of HRDs' to describe the result of the adoption and the misuse of criminal justice system against HRDs.

More specifically, in relation to the empirical result, it should be clarified that there are many ways of violating the rights of defenders; however, the participants referred to different incidents of criminalisation, depending on their personal experiences. For that reason, it cannot be argued that the empirical result confirms that only a particular type of criminalisation occurs, but it is better to say that it is seen from the empirical research that criminalisation occurs widely in the field of HRDs. However, examples of the participants' experiences are used where relevant to enhance the analysis.

Finally, given that NSAs are among the main violators of defenders, it would be remiss of the thesis if it did not look at how NSAs misuse legislation to target HRDs, contributing to the criminalisation and stigmatisation of HRDs. The last section of the Chapter focuses on the use of frivolous lawsuits as a tool to stifle the work of HRDs.

4.2. The Rights of HRDs

As stated earlier, the Declaration on HRDs is not a legally binding instrument. However, it contains a number of fundamental freedoms and human rights enshrined in other legally binding human rights treaties, such as the ICCPR. That means HRDs, as with all individuals, are entitled to the same human rights. Nonetheless, defenders are targeted and impacted more than others, including those whose rights are being defended, owing to the nature of their work. Therefore, for its part, the Declaration reiterates that human rights are instrumental to the defence of human rights. In particular, it reaffirms, *inter alia,* freedom of association, freedom of peaceful assembly, freedom of expression and the right to an effective remedy.[1] In addition, the Declaration provides for the right to access funding. Although this right is nominally protected by international and regional treaties under provisions regarding the freedom of association, the Declaration clearly recognises the right to access funding as a self-standing right.[2]

While Article 4 (1) lays down special conditions under which rights within the Covenant can be limited, Article 4 (2) of the ICCPR classifies certain fundamental human rights, to which everyone is entitled, as non-derogable rights. It should be highlighted that these rights are *ipso facto* incapable of suspension, therefore they must be protected by all means at all times, no matter what happens in the country. In short, when a provision is a non-derogable right no restrictions can be imposed, even in a state of emergency. The rights of HRDs are routinely violated and as will be seen below, it is important to recognise that often the violation is not of just ordinary rights but of rights having a special status, so the violation of non-derogable rights is even more serious. For that reason, the intention of this Part is to explore the idea of non-derogability and show that in many cases the rights that have been violated do not allow of any derogation.

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[1] UN Office of the High Commissioner for Human Rights, Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognizes Human Rights and Fundamental Freedoms (2011) 5 (hereinafter Commentary on the Declaration on HRDs) < https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf> accessed 30 October 2019.

[2] The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Res. 53/144, 8 March 1999, UN Doc A/RES/53/144 (hereinafter Declaration on HRDs), art 13.

The concept of non-derogable rights was established during the early stages of the formulation of human rights treaties. In the preparatory work for several human rights treaties the members of delegations highlighted the importance of certain human rights, which they regarded as 'fundamental' rights.[3] These rights are known as 'core rights' and 'the most basic human rights'. Koji states that 'the more important human rights deserve more protection'.[4] However, Meron believes that 'the characterisation of some rights as fundamentals results significantly from our own subjective perception of their importance'[5] and that can lead to an arbitrary distinction. Nevertheless, the 'superior' nature of non- derogable rights can be supported on the basis of the Basic Human Needs Approach. This approach says that 'the realisation of all human rights relies on the fulfilment of basic human rights [...] if those are infringed, all other are automatically infringed as well'.[6] For example, the right to marriage is useless, if an individual is subjected to torture or deprived of his or her liberty. It is worth noting that Article 4 (2) applies to HRDs, as it applies to all individuals. By the same token, limitations under Article 4 (1) can, of course, be imposed in the case of HRDs.

Article 4 (2) of the ICCPR identifies as non-derogable: the right to life (Article 6); the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article 7); the prohibition against slavery, slave trade and servitude (Article 8); freedom from imprisonment merely for failure to fulfil a contract (Article 11); the prohibition of retroactive penalties (Article 15); and the right to freedom of thought, conscience and religion (Article 18).This list of rights is more detailed than that in Article 15 (2) of the ECHR,[7] which identifies only four non-derogable rights, but less comprehensive than those listed in Article 27 (2) of the American Convention

[3] Council of Europe, *Collected Edition of the Travaux Preparatoires Vol VI* (Martinus Nijhoff 1985) 78-81, 126-129; UN General Assembly, Third Committee 1261st meeting, 12 November 1963, UN Doc. A/C.3/SR.1261 para 31; UN General Assembly, Third Committee 1262nd meeting, 13 November 1963, UN Doc. A/C.3/SR.1262 para 16.
[4] Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' (2001) 12 (5) European Journal of International Law 917, 922.
[5] Theodore Meron, 'On a Hierarchy of International Human Rights' (1986) 80 (1) The American Journal of International Law 1, 8.
[6] Koji (n 4), 926.
[7] For example Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols 11 and 14) (entered into force 3 September 1953), art 15 (2): non-derogable rights are: the rights to life (Article 2); the prohibition of torture (Article 3); the prohibition of slavery and forced labour (Article 4); and the right of *nulla poena sine lege* (Article 7).

on Human Rights (ACHR).[8] However, this research considers the rights listed in Article 4 (2) of the ICCPR because this is the international treaty upon which the Declaration on HRDs is based and is also one of the most widely ratified treaties in international human rights law.[9]

Pursuant to General Comment 29 of the Human Rights Committee (or the Committee), the list in Article 4 (2) contributes to understanding the customary international law in relation to non-derogable rights. General Comment 29 is an attempt to interpret article 4 (1) and (2). Interpretative guidance given by the Human Rights Committee, as the treaty's monitoring body, is of paramount normative importance, since it has the authority to clarify the provisions of the Covenant.[10] Nowak recognises the value of general comments, describing them as evidence of 'the most authoritative interpretations' of the ICCPR's provisions.[11]

The Human Rights Committee provided a solid explanation as to why certain rights provided in the ICCPR, are designated as non-derogable rights, acknowledging the need to maintain the principles of legality and rule of law at crucial times.[12] Further to the list of non-derogable rights in the ICCPR, the Committee also identified rights and freedoms under customary international law that cannot be derogated even if they are not listed in Article 4 (2) on the ground that certain rights are strongly linked to the international public order. In particular, the Committee identified the following rights with non-derogable rights as customary international law: i) the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; ii) the prohibitions against the

[8] American Convention on Human Rights (ACHR) (entered into force 18 July 1978) art 27 (2), the new rights that have been designated as non-derogable rights are: the right of family (Article 17); the right to a name (Article 18); the right of the child (Article 19); and the right to participate in government (Article 23).
[9] The ICCPR has had 172 parties so far. Six states have signed it but not ratified it yet, while 19 states are neither signatories nor parties.
[10] Yutaka Arai-Takahashi, *The Law of Occupation* (Martinus Nijhoff Publishers 2009) 468.
[11] UN Human Rights Committee, Summary Record of the 2674th Meeting, 23 October 2009, UN Doc CCPR/ C/SR.2674 para 2; Martin Scheinin, International Mechanisms and Procedures for Implementation, in R Hanski and M Suksi (eds) *An Introduction to the International Protection of Human Rights* (Åbo Akademi University 1999) 444; Philip Alston, 'The Historical Origins of 'General Comments' in Human Rights Law', in Vera Gowlland- Debbas (ed), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff, 2001) 764; Manfred Nowak, *UN Covenant on the Civil and Political Rights- CCPR Commentary* (2nd edn, Engel 2005) 746-748.
[12] UN Human Rights Committee, General Comment No. 29 'Article 4: Derogations during State of Emergency', 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add 13 (hereinafter General Comment 29) para 2.

taking of hostages, abductions or unacknowledged detention; iii) the international protection of the rights of persons belonging to minorities; iv) the deportation or forcible transfer of population without grounds permitted under international law; and v) the prohibition against propaganda for war or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[13] It is noteworthy that Hartman criticises the inclusion of rights such as the right of all persons deprived of their liberty to be treated humanely in the sense that the suspension of which can be considered unnecessary, even in time of emergency.[14] In any case, States parties to the ICCPR are obliged not to derogate from the rights above, even not listed in Article 4 (2).

Moreover, the Declaration on HRDs was adopted by consensus, therefore it represents a strong political commitment by states to its implementation, albeit it is non-legally binding. However, based on Article 2 of the ICCPR, which establishes the obligation of states to 'respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant without distinction',[15] states bear the primary responsibility for guaranteeing the rights of individuals within their jurisdiction, including those of HRDs.

The ICCPR requires states that have ratified the Covenant to adopt such legislation that may be necessary to give effect to the rights of the Covenant.[16] However, the legal obligation under Article 2 has an immediate effect, and hence is both positive and negative in nature.[17] Thus, on the one hand, State parties must refrain from interference in the exercise of the Covenant's rights, but, on the other hand, they must take legislative initiatives and adopt judicial, administrative and other measures in order to fulfil the legal obligations of the Covenant in general and Article 2 in particular. Possible restrictions on the rights, as is discussed below, can be imposed should states justify their necessity and prove that the measures taken

[13] ibid, paras 13-14.
[14] Joan F Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' (1985) 7 Human Rights Quarterly 89.
[15] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2.
[16] Egon Schwelb, 'The Nature of the Obligations of the States Parties to the International Covenant on Civil and Political Rights' in Rene Cassin (ed), amicorum discipulorumque liber (Pedone 1969) 304-305.
[17] General Comment No. 29 (n 12), para 11.

are proportionate to the pursuance of legitimate aims, while ensuring continuous and effective enjoyment of the ICCPR rights.[18]

Furthermore, states should act with due diligence in order to facilitate the work of HRDs within their territory. The concept of due diligence was expressed coherently in the *Corfu Channel* case and is being discussed in detail in the following chapter. For now, it suffices to say the concept of due diligence refers to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[19] However, international human rights law is different from other areas of international law as it focuses on the internal affairs of states.[20] On this basis, the concept of due diligence has its own meaning in the context of international human rights law. Although the negative obligation does not pivot on the concept of due diligence,[21] the positive obligation for states to take measures in order to fulfil their human rights obligations can be described as due diligence.[22]

It is argued that this obligation is an obligation of conduct, which means that it does not guarantee certain outcomes. In other words, the state cannot be responsible for the violation itself, but only for its failure to act and to take effective measures.[23] The key point in due diligence is that states must not leave an individual exposed to the risk of violation because they have failed to take effective measures. In essence, law enforcement agencies, such as police, prosecutors and judges should operate *diligently,*[24] in order that victims of violations can be vindicated.

In short, states must refrain from violations of defenders' rights enshrined in the Declaration as well as prevent abuses against HRDs by taking legislative, administrative and judicial measures to ensure their effective protection.[25] In the context of Article 2 of the ICCPR, states must also exercise due diligence to prevent

[18] ibid.
[19] *Corfu Channel Case* (*UK v. Albania*) (Merits) [1949] Rep 4.
[20] International Law Association, 'ILA Study Group on Due Diligence in International Law First Report' (2014) (hereinafter ILA First Report) 14.
[21] ibid, 15.
[22] International Law Association, 'ILA Study Group on Due Diligence in International Law Second Report' (2016) (hereinafter ILA Second Report) 8.
[23] ILA First Report (n 20), 16.
[24] ILA Second Report (n 22), 32.
[25] Commentary to the Declaration on HRDs (n 1), 10.

violations committed by private persons, entities and businesses.[26] For instance, it is implicit in Article 7 that no one shall be subjected to torture conducted either by state authorities or private persons. In essence, states must guarantee the rights of individuals, including HRDs as well as protect them either from public authorities or from private persons. It is worth noting that the IACtHR held that a state may be liable for human rights abuses caused by a third party if the State failed to exercise due diligence and to prevent the violation.[27]

In addition, the Declaration on HRDs addresses not only states, but all individuals and organisations. Articles 11, 12 (3), 19 and the preambulatory clauses reaffirm the responsibility of all, including non-state actors and private persons, to respect the rights of HRDs.[28] Hence, the protection of HRDs is an overall responsibility: on the one hand, states have both the negative and positive obligation to guarantee the rights and freedoms of HRDs; on the other hand, all individuals and organisations must respect defenders and refrain from violating their rights.

As stated above, states are responsible not only for guaranteeing the rights of their nationals, but also for ensuring the rights of individuals who may be within their territory or subject to their jurisdiction, regardless of nationality or statelessness, such as asylum seekers and irregular migrants.[29] As is explored later in this thesis, there are HRDs who have fled their state of origin in order to escape from prosecution and seek asylum. The asylum states, therefore, must ensure and respect their rights under the ICCPR and Declaration on HRDs.

Despite the 'overall obligation' to respect the rights of defenders, the latter fall victims to human rights violations, as they challenge their governments and the interests of powerful actors. In particular, they are subject to intimidation, threats, killings, disappearances, torture, ill-treatment, abduction, sexual harassment,

[26] In 2011 the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs). These principles create a framework of three 'pillars'; the second pillar concerns the responsibility of a corporate to respect human rights. See, L UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy', 21 March 2011, UN Doc. A/HRC/17/31.
[27] *Velasquez Rodriguez v. Honduras,* (IACtHR 29 July 1988) para 172. Similar approaches of other universal and regional systems to third parties are covered in detail in the following chapter.
[28] Commentary to the Declaration on HRDs (n 1), 11.
[29] General Comment No. 29 (n 12), para 31; UN International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies Vol. II, 27 May 2008, UN Doc HRI/GEN/1/Rev.9 (Vol II).

arbitrary detention, surveillance, administrative and judicial harassment and convictions accompanied by often disproportionately harsh sentences.[30] In certain countries, there has been an increasing misuse of laws to improperly impede actions of defenders.[31] In 2017, Front Line Defenders received reports on the murders of 312 defenders. It is noteworthy that in 84% of the killings, the defenders had been subjected to threats and other human rights violations before the murder.[32] The next Section discusses five typical examples of violations of defenders' rights; there are a number of ways of violating defenders' rights, but the examples here represent only five of the different methods of abuses.[33] The purpose of using specific examples is to demonstrate how practice occurs and to facilitate the analysis, placing particular emphasis on the two predominant types of violations against defenders.

The Chapter establishes two categories of abuses against defenders: those conducted through extra-legal actions and those based on the application of the legislation. It should be made clear from the outset that extra-legal actions are actions that are outside the scope of law. As will be seen, such violations include abductions, torture and intimidation. In contrast, violations through legislative measures are those abuses made on the grounds of law that either are aimed at HRDs or are misused in an attempt to silence them.

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[30] UN General Assembly, Report of the Special Rapporteur on the Situation of Human rights Defenders, 30 July 2015, UN Doc A/70/217 (hereinafter Report on Global Trends in Risks and Threats Facing Human Rights Defenders) para 7; UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights Defenders, 28 July 2011, UN Doc A/66/203 para 17.

[31] Report on Global Trends in Risks and Threats Facing Human Rights Defenders (n 30), paras 7, 48.

[32] Front Line Defenders, 'Annual Report on Human Rights Defenders at Risk in 2017' (2017) 6 < https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf> accessed 30 October 2019.

[33] The author does not use the participants' testimonies, so that they are by no means identifiable on the ground of the state of origin, activities and abuses against them. Instead, she relies on examples of defenders published online by
NGOs working with HRDs. The types of violations presented through the examples have not been chosen accidentally but derive from the violations which the Participants have been subjected or referred to.

4.3. Violations through Extra-legal Actions

4.3.1. Examples of Violations through Extra-legal Actions

4.3.1.1. Torture, Ebtisam Al-Saegh, Bahrain

Ebtisam Al-Saegah is a Bahraini HRD working fora human rights NGO, SALAM for Democracy and Human Rights that focuses on the promotion of democracy and exposing human rights violations in Bahrain. After she received a summons, she presented herself to the National Security Agency (NSA) at Muharraq police station. According to her testimony, she had to stand for seven hours and was kept blindfolded the whole time. During a seven-hour long interrogation, she was subjected to verbal and sexual abuse by the interrogators who threatened to rape her if she did not cease her human rights activities within SALAM. They also threatened to harm her husband and children if she did not announce on social media that she would put an end to her human rights work. Once she was released, she was in shock and taken to hospital. It is worth mentioning that Al-Saegh was detained in May 2017, following her return from the 34th UN Human Rights Council in Geneva, where she condemned the violations of human rights in Bahrain.[34]

4.3.3.2. Murder, Gauri Lankesh, India

Gauri Lankesh was a prominent HRD who was the editor of the local magazine *Lankesh Patrike* and fought for freedom of expression in India. She wrote hundred articles criticising corruption and conservatism regarding the women's rights and women's safety in India. She had received numerous death threats, mainly from members of Hindu nationalist organisations, before she was fatally shot by unidentified assailants in front of her home, after returning from work.[35]

[34] 'Ebtisam Al-Saegh Tortured and Sexually Assaulted' (*Front Line Defenders*, 2017) <https://www.frontlinedefenders.org/en/case/ebtisam-al-saegh-tortured-and-sexually-assaulted> accessed 30 October 2019.
[35] 'India: Murder of Ms. Gauri Lankesh' (*International Federation for Human Rights*, 2017) <https://www.fidh.org/en/issues/human-rights-defenders/india-murder-of-ms-gauri-lankesh> accessed 30 October 2019; 'Gauri Lankesh' (*Front Line Defenders*, 2017) <https://www.frontlinedefenders.org/en/profile/gauri-lankesh> accessed 30 October 2019.

4.3.3.3. Violent Attacks, Marina Dubrovina and Elena Milashina, Russia

Marina Dubrovina is a famous lawyer and defender who worked on many human rights cases, such as the cases of the head of the Human Rights Centre ‘Memorial’ in Gronzy, Oyub Titiev, and the Ukrainian prisoners in Russia Stanislav Klykh and Pavel Grib.[36] She was in Chechnya on 5th February 2020 for the court hearing of Islam Nukhanov, a blogger who was brutally tortured and detained on the charges of weapon possession because he had posted a video in which he criticised the luxurious lifestyle of Ramzan Kadyrov, the head of Chechnya, and his associates. Elena Milashina covered the case for *Novaya Gazeta.* Once they arrived in their hotel, they were surrounded by a group of 15 men and women who said that ‘we came here to defend Islamic radicals’. The group threw them to the floor and started beating them, punching them and heating their heads against the wall and marble floor.[37]

4.3.3.4. Enforced Disappearances, Punhal Sario, Pakistan

Punhal Sario is a defender and the founder of Voice for Missing Persons of Sindh, a human rights group advocating against enforced disappearances in Sindh province, an area in which several writers and activists have been abducted. He was subjected to enforced disappearance on 3rd August 2017. Some friends, who were with Sario at that time, said that he was taken from his car by individuals in civilian clothing and police uniforms as he was coming out of Khanabadosh Writer’s Café. His fate remains unknown since that night.[38]

4.3.3.5. Intimidation and Threats, Christina ‘Tinay’ Palabay, Philippines

Ms Christina ‘Tinay’ Palabay is the Secretary-General of the human rights NGO ‘Karapatan’ which works on the promotion and protection of fundamental rights in Philippines. In April 2017, Ms. Palabay and three other Filipino activists undertook a speaking tour in the USA on the human rights situation in the Philippines. She

[36] ‘Lawyer Marina Dubrovina and Journalist Marina Milashina Violently Attacked’ (*Front Line Defenders,2020*) <https://www.frontlinedefenders.org/en/case/lawyer-marina-dubrovina-and-journalist-elena-milashina-violently-attacked > accessed 13 February 2020.
[37] Tanya Lokshina, ‘Thugs Attack Lawyer, Journalist In Chechnya’ (*Human Rights Watch*, 2020) <https://www.hrw.org/news/2020/02/07/thugs-attack-lawyer-journalist-chechnya> accessed 13 February 2020.
[38] ‘Pakistan: Pakistani Defender Forcibly Disappeared:Punhal Sario’ (*Amnesty.org*, 2017) <https://www.amnesty.org/en/documents/asa33/6911/2017/en/> accessed 30 October 2019.

also took part, as a guest speaker, in the May 2017 Carter Centre Human Rights Defenders Forum in Atlanta, organised by the former American President Jimmy Carter. She has received a significant number of anonymous death threats and has been subjected to intimidation because of her 'courageous' activity.[39]

From these examples, one can conclude that perpetrators of abuse against HRDs are either state agents or non-state actors and individuals. The empirical result presented in the following chapter will come to confirm this conclusion. In fact, through violent extra-legal actions, they attempt to stop defenders from carrying out their valuable, and as it appears, legitimate job, and on occasions silence them permanently. Non-derogable rights, such the right to life and the right not to be subjected to torture, are also violated. At this point, one could argue that even though the right to life is non-derogable, in fact, it is subject to limitations, such as the death penalty. However, according to the Human Rights Committee, states that have not abolished the death penalty are obliged to apply it in a non-arbitrary way, with reference to serious crimes and in accordance with strict rules.[40] On this basis, the particular circumstances in which a state can continue to apply the death penalty are not related to the activities of HRDs, so any violation of the right to life in the case of defenders is unjustifiable. In relation to other rights, namely derogable rights, violations can be justified if they comply with Article 4 (1). The breach of non-derogable rights not only entails violations of treaty law, but if one considers that some of those rights are *jus cogens*, the State can also be held accountable for a breach of a peremptory norm in accordance with the rules of responsibility of states for internationally wrongful acts.[41]

In particular, *jus cogens* is of fundamental significance in international law, as it constitutes the foundation of the international community without which the entire

[39] 'Philippines: Threats and Acts of Intimidation Against Ms. Cristina "Tinay" Palabay, Secretary General of Karapatan / August 17, 2017 / Urgent Interventions / Human Rights Defenders / OMCT' (*omct.org*, 2017) <http://www.omct.org/human-rights-defenders/urgent-interventions/philippines/2017/08/d24490/> accessed 30 October 2019.
[40] UN Human Rights Committee, General Comment No. 36 'General Comment No 36 (2018) on the Right to Life', 30 October 2018, UN Doc CCPR/C/GC/36 para 10.
[41] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, 10 ILC Supplement No 10 (A/56/10) (hereinafter Draft Articles), art 41.

edifice would collapse.[42] In other words, the norm '*jus cogens'* refers to overriding principles of international law from which no derogation is permitted. Although *jus cogens* is constantly evolving, traditional *jus cogens* norms include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[43]

Special emphasis should be placed on the fact that *jus cogens* rules are hierarchically superior to ordinary rules of international law on the basis of their underlying values.[44] However, they should not be confused with *erga omnes* obligations, which are obligations of states to the international community as a whole,[45] even though both promote the same values. It is said that *jus cogens* are substantive rules 'arising *vis*-à-*vis another state in the field of diplomatic protection;*[46] on the other hand *erga omnes* obligations are 'the concern of all States', as 'all States may have a legal interest in their protection'.[47] More precisely, the International Law Commission stated that '[a]ll peremptory norms of general international law (*jus cogens*) have an *erga omnes* character, but that not all erga omnes norms were also peremptory norms of general international law (*jus cogens*)'.[48] Examples of *erga omnes* obligations are the protection from slavery and racial discrimination and the outlawing of torture and of genocide.[49]

The 1969 Vienna Convention of the Law of Treaties is the clearest operation of *jus cogens* in international law, as it stipulates that treaties should be consistent with peremptory norms.[50] Despite the fact that there is no reference to human rights, as

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[42] Erik Sue, 'The Concept of "Jus Cogens" in Public International Law, *Lagonissi Conference on International Law* (The Graduate Institute 1967) 17 - 77.
[43] International Law Commission, Report of the International Law Commission 66th Session, 6 May 2014, ILC Report A/69/10 para 10.
[44] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 (3) European Journal of International Law 491, 495.
[45] *Barcelona Traction, Light and Power Company Limited*, Judgment [1970] ICJ Rep 3, 32, para. 33.
[46] ibid.
[47] ibid, 33-34.
[48] International Law Commission, Peremptory Rules of General International Law (*Jus Cogens*) 71st Session, 29 April – 7 June and 8 July – 9 August 2019 10 <http://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_jc.pdf> accessed 30 October 2019.
[49] Malcolm Nathan Shaw, *International Law* (7th edn, CUP 2014) 88.
[50] Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UN TS 331 (1969), art 53.

international human rights law was at an embryonic stage in 1969,[51] a *jus cogens* norm can simultaneously be a human right. In his dissenting opinion to the 1966 *South West Africa* case, Judge Tanaka held that 'the law concerning the protection of human rights belonged to *jus cogens*.' [52] However, according to Article 53 of the VCLT not all human rights can obtain the status of *jus cogens.* In particular, *jus cogens* refers to peremptory norms of general international law defined as '(1) norms (2) accepted and recognised by the international community of states as a whole (3) from which no derogation is permitted'.[53] Given that several human rights remain controversial due to cultural and political diversity,[54] it is argued that only certain rights demonstrating minimum consent of states can be characterised as *jus cogens.*[55]

The reason why the concept of *jus cogens* is being discussed in this Section is because some of the peremptory rules, such as torture, are relevant to defenders. Most importantly, because the violation of *jus cogens* extends the compelling character of the norm to states that are not parties to a particular universal or regional human rights treaty.[56] In essence, the concept of *jus cogens* covers those abuses against defenders committed by states which are not parties to a certain human rights treaty. According to Article 41 on state responsibility, states have a duty to 'co-operate to bring to an end, through lawful action any serious breach of peremptory rules of international law'.[57] In essence, all states have a legal interest to raise infringements of fundamental rights by another State. Nevertheless, allusions to *jus cogens* norms and particularly to peremptory rules related to human rights are rare in the ICJ jurisprudence,[58] which focuses on state cases.

[51] Erica de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary International Law' (2004) 15 (1) European Journal of International Law 97, 99.
[52] *South West Africa* (*Ethiopia v. South Africa*), Dissenting Opinion Judge of Tanaka (1966), Rep 6, 298.
[53] Vienna Convention of the Law of the Treaties (n 49), art 53.
[54] Although the right of family has been classified as non-derogable by the ACHR, it cannot be considered *jus cogens,* as it is not recognised by the international community as such.
[55] Koji (n 4), 928-930.
[56] Brian D Lepard, *Customary International Law* (CUP 2011) 331-345.
[57] Draft Articles (n 40).
[58] S E Nahlik and L Hannikainen, 'Peremptory Norms (Jus Cogens) In International Law: Historical Development, Criteria, Present Status.' (1990) 84 (3) The American Journal of International Law 779.

Complaints about violations of human rights made through human rights treaties are a widely used practice to bring human rights abuses to the fore. The purpose of this discussion is not to compare the UN treaty bodies and regional human rights systems, such as the Council of Europe and the Inter-American systems, but to highlight the basic concept of the complaint mechanism under human rights conventions. In essence, a complaint against a state brings a potential infringement of treaty rights to the attention of the competent body committed to supervising and guaranteeing the rights enshrined in the relevant international and regional convention.[59]

Despite the fact that states as well as individuals should respect the obligations established by human rights conventions, the latter have legal implications only for states. Regardless of whether the perpetrator is an individual or a state, the victim can bring the complaint before the treaty mechanism if the State fails to provide an effective protection and remedy.

Common requirements to all human rights treaties and subsequent protocols are: first, the State against which the complaint has been brought must be a Party (through ratification or accession) to the treaty that provides for the rights that have allegedly been violated; second, the State must have recognised the competence of the institution to receive and consider complaints;[60] and third, the applicant must have brought the claim first to the attention of the highest available instance of the relevant national authorities.[61] The requirement of the exhaustion of domestic remedies is based on the logic that the protection of human rights should be carried

[59] Complaints are usually submitted from an individual against a State, but inter-state complaints are also possible, for example *Ireland v. UK* before the ECtHR; Olivier de Schutter, 'The Status of Human Rights in International Law' in C Krause and M Scheinin *International Protection of Human Rights: A Textbook* (Institute for Human Rights, Åbo Akademi University 2009) 39-41

[60] ECHR, art 19; Individuals can submit complaints alleging violations of human rights to the Inter-American Commission on Human Rights, ACHR art 44. Only states and the Commission on behalf of an individual can bring a case before the IACHR, ACHR, art 61 (1); According to the Rules of Procedures, an individual can submit a communication alleging violations of rights provided by the African Charter to the African Commission on Human and People's Rights. See, African Commission Human and People's Rights: The Guidelines for the Submission of Communications, 1987, Information Sheet No.2 art 55; Only states, the Commission and African Intergovernmental Organisations on behalf of an individual can bring a case before the African Court on Human and People Rights. See, Protocol to the African Charter on Human and People's Rights, Organisation of African States, 10 June 1998, art 5 (d) and 34; UN Office of the High Commissioner for Human Rights, Fact Sheet no. 7/ Rev.2 , Individual Complain Procedures under the United Nations Human Rights Treaty, November 2013, 3 < https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> accessed 30 October 2019.

[61] ECHR, art 35; ACHR, art 46; Fact Sheet 7 (n 59), 5.

out by national authorities, as access to local remedies is generally easier and faster. More importantly, 'the State must be given the opportunity to redress an alleged violation within the framework of its own domestic legal system before its international responsibility call be called into question'.[62] In essence, access to an international institution is the last resort if states have failed to carry out justice.[63]

At this point, it should be said that the human rights bodies receive communications rather than claims and petitions and produce views rather than judgments or verdicts. Furthermore, the decisions do not constitute precedents, but generate a body of jurisprudence that interprets and discusses the nature of the obligations under the Convention. Furthermore, there are elements within treaties, including the Optional Protocol to the ICCPR,[64] which provide that the monitoring body cannot examine a case if the same matter is already being examined by another international body. However, according to the Committee, the Human Rights Council's complaint procedure and Special Rapporteurs are not such subject to such procedures.[65] Hence, with regard to the example of Ebtisam Al- Saegah, above, it can be argued she could submit a communication to the Special Rapporteur on HRDs in order to complain about the alleged violation of her rights as a defender. Providing that the Bahraini state authorities failed to provide remedy and after exhausting the local remedies, she could also bring her case to the Human Rights Committee alleging a violation of Article 7.

[62] Antônio Augusto Cançado Trindade, *The Application of The Rule of Exhaustion of Local Remedies in International Law* (CUP 1983) 1.
[63] J G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1995) 45.
[64] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, in accordance with Article 9), art 15 (2) (a).
[65] The Human Rights Committee should not be confused with the Human Rights Council. The latter is an inter-governmental body within the United Nations structure, which is a forum for intergovernmental cooperation and dialogue among states on human rights violations, their compliance with human rights obligations and the development of international law in the field of human rights. In contrast, the role of the Special Rapporteur of HRDs is to give support to the implementation of the Declaration on HRDs through communications, visits and recommendations to states.

4.4. Violations through Legal Actions

States have the power to use legislation[66] to criminalise defenders' activities, rendering HRDs ineffective. In criminology, the term 'criminalisation' refers to 'the process by which behaviours and individuals are transformed into crimes and criminals'.[67] In relation to HRDs, criminalisation is used to impede the activities of defenders though the misuse of the legal system.[68] There are various ways in which HRDs become victims of criminalisation. Based on the literature in the field of the criminalisation of HRDs, this Section establishes two different categories of abuses through legal actions in order to explore and understand this method of targeting defenders.[69] In particular, the first type of abuses through legal actions is known as criminalisation and refers to the phase that begins with the creation of criminal justice policy, which includes more specifically the creation of laws that either define acts that should be prohibited or impose restrictions on activities and also covers the implementation of these criminal regulations. The second category concerns the abuse of administrative power, which is known as the 'effective employment of punitive mechanisms', and occurs 'with the implementation of concrete actions by the institutions and when punishment is carried out.'[70] Within these contexts, it considers different tactics of abuses and discusses the extent to which those tactics are consistent with international human rights law. Undoubtedly, there are numerous ways in which defenders can be made of victims of criminalisation and abuse of administrative power, but this Section considers only some indicative examples of these tactics in order to test their legality.

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[66] The Sections perceives legislation as primary and secondary (delegated) legislation made by different governmental and public bodies and can affect the public.
[67] Raymond J Michaelowski, *Order, Law and Crime: An Introduction to Criminology* (18th edn, Random House 1985) 6.
[68] Peace Brigades International (pbi), 'Criminalisation of Human Rights Defenders' (2010) 6 < https://peacebrigades.org.uk/fileadmin/user_files/groups/uk/files/Publications/Crim_Report.pdf> accessed 30 October 2019.
[69] ibid; Protection International, 'Criminalisation of Human Rights Defenders – Categorisation of the Problem and Measures in Response' (2015) <https://www.protectioninternational.org/wp-content/uploads/2012/02/ProtectionInternational_English_Update.pdf> accessed 13 February 2020; UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, 16 January 2013, UN Doc A/HRC/22/47; Inter-American Commission on Human Rights, Criminalization of the Work of Human Rights Defenders, 31 December 2015, OEA/Ser.L/V/II. Doc. 49/15 60 (hereinafter Criminalization of the Work of Human Rights Defenders).
[70] Protection International (n 69), 24.

4.4.1. Examples of Violations through Legal Actions

In China HRDs and NGOs which receive foreign funding, being unable to or prohibited from raising funds at domestic level, are usually accused of posing risks under the new law on foreign funding. The Chinese law, which was passed on 1st January 2017, outlaws any financial or other support to Chinese HRDs or NGOs from international organisations which are not registered in the mainland. Meanwhile, in Israel, legislation requires HRDs and NGOs to declare if over 50% of their funding comes from abroad.[71] The best-known example is the Foreign Agent Law in Russia, which is discussed below, and has made the existence and activity of human rights NGOs impossible. Another example of enactment of legislation in an attempt to criminalise their human rights activities is the adoption of legislation targeting the nature of defenders' work. For instance, according to Participant 1, at the time of the interview, Indonesia was about to adopt a legislation that would punish homosexuality. In particular, Participant 1 stated that:

> *'If the law passes, all organisations working for LGBT rights will turn into criminal organisations, and as a result all LGBT HRDs will be considered criminals.'*[72]

Moreover, in some countries in South America criminal offences are misused to criminalise HRDs exercising the right of freedom of assembly under the pretext of protecting the safety of transportation.[73] In particular, in Colombia Article 353 A[74] of the Law on the Obstruction of Roads is so ambiguous that NGOs have reported that this provision has been used by state authorities to prevent, hinder, suppress, or dissolve peaceful protests.[75]

[71] Front Line Defenders, 'Annual Report on Human Rights Defenders at Risk in 2016' (2016) 7< https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2016> accessed 30 October 2019.
[72] INTV 13, 19.6.2018.
[73] Criminalization of the Work of Human Rights Defenders (n 69), para 117.
[74] 'Who by illegal means incites, directs, constrains, or provides the means to hinder temporarily or permanently, selectively or generally, roads or transportation infrastructure so that it infringes human life, public health, food security, the environment, or the right to work, will be liable to imprisonment of twenty four (24) to forty-eight months (48) and a fine of thirteen (13) to seventy-five (75) monthly legal minimum wages and loss of inability of rights and public office for the same term of imprisonment.' See, ibid, para 64.
[75] ibid, para 64-65.

Some participants referred to planting evidence as a method of targeting defenders and initiating judicial proceedings on the ground of criminal law. More specifically, Participant 13 said that:

'In my country, they try to criminalise HRDs, so they put drugs on their cars, so that they can arrest them and charge them with drug dealing.'[76]

Similarly, Participant 5 shared another experience:

'A colleague for Chechnya was detained because marihuana was found in his car but I am sure that someone else put the drug in his car. He's Muslim, he doesn't sit even at the table if there is alcohol, he prays five times a day. He is also fit, despite his age, he's 60 years old, and runs every day, so it's impossible to smoke marihuana. I would never believe that he would have carried drugs'.[77]

The ultimate aim of this method is to arrest defenders and initiate judicial proceedings against them, distracting them from their human rights activities for a long time. This strategy may also constitute a warning or threat to human rights activists to stop speaking out against the State and other stakeholders; otherwise, they end up being accused of serious crimes.

Furthermore, since 9/11 and due to terrorist attacks by Islamic State of Iraq and Syria (ISIS) the majority of states have adopted or reconsidered their counter-terrorism legislation introducing restrictive measures. The absence of an accepted legal definition of terrorism has given states broad discretionary powers to interpret the term 'acts of terrorism' and has resulted in the enactment of ambiguous legislation.[78] In an attempt to stop defenders' activities, it is common for states to use counter-terrorism legislation to deprive them of their freedom and rights in relation to the causes they defend.

Furthermore, HRDs are subject to lengthy judicial proceedings, which are slow, or are accelerated on purpose with the intention of impeding the work of defenders at

[76] INTV 13, 19.6.2018.
[77] INTV 5, 18.2.2018.
[78] B Golden and G Williams, 'What is Terrorism? Problems of Legal Definition 2004 27 (2) UNSW Law Journal 270, 273.

a crucial moment. For instance, human rights organisations in Honduras have reported a significant contrast between the speed of arrest warrants and other similar measures and the pace of judicial proceedings; especially, for cases investigating harassment and abuses against defenders.[79] It is also noteworthy that one participant said that he did not even have the right to a fair trial. Particularly, Participant 9 said:

> *'In my case, I didn't have a trial or a defence lawyer. They put me in an interrogation centre for 14 days and the trial wasn't trial. We randomly sat at a table, the judges came over and sat there and military intelligence came over and just told me you said this is what you did, and I said no. If you don't want more sentence, from now on don't say no. It's ok to say no, but if you say yes you get a lower sentence. So I said yes, and I was sentenced to 8 years with no evidence. They didn't need to prove anything and no appeal of course was possible.'*[80]

To conclude, the rights of HRDs can be violated through extra-legal as well as legislative actions. Depending on the nature of the violations, a defender can be a victim of abuses of both categories simultaneously. For instance, Participant 1 is one such person:

> *'I was investigated by the Sudanese National Intelligence Security […] I have to say that I was investigated in a harsh way, I was beaten by the security men and prosecutors, arrested and tortured.'*[81]

The remainder of the Chapter seeks to understand each phase of criminalisation and relies on indicative legislative examples and methods of each category that facilitate the discussion. As stated above in relation to the violations through extra legal actions, the aim of this Section is to show how practice occurs and examine whether this kind of strategies can be justified under international human rights law. On this basis, the reasoning of this Section may apply to other forms of criminalisation that are not being addressed in the thesis.

[79] Criminalization of the Work of Human Rights Defenders (n 69), para 174, 89.
[80] INTV 9, 13.2.2018.
[81] INTV 1, 18.2.2018.

4.4.2. The Criminalisation of HRDs: The Creation and Implementation of Criminal Justice Policy

4.4.2.1. Enactment of Legislation Imposing Restrictions on Defenders' Activities

4.4.2.1.1. Limitations on Human Rights

The nature of human rights is such that, other than a very few absolute rights, limitations on them are unavoidable. These limitations are necessary for society to achieve its goals and preserve its democratic nature. In particular, states may impose restrictions on human rights in order to ensure the existence of the State, maintain national stability and public order.[82] It can be argued that ensuring the promotion of human rights, while preserving national stability, can be a dilemma for states. However, international human rights law supplies states with the flexibility to achieve these conflicting goals by providing requirements that must be met.[83] The freedom of peaceful assembly, the freedom of association and freedom of expression are amongst the human rights that are most commonly sacrificed in the name of national interest and public order. As already discussed, these human rights are important element in the fight of HRDs against abuse and for the realisation of human rights in general. In this context, this Section examines the conditions under which limitations on fundamental rights of HRDs, in the form of legislation adopted to protect national security, can be justified. It should be noted that a discussion of the theoretical framework for justifiable interference lies outside the scope of this research project.

There is no definitive justification for restrictions on human rights, as what constitutes a justifiable interference may vary across countries, depending on the local challenges and the self-perception of the society.[84] For that reason, the European ECtHR has developed the doctrine of 'the margin of appreciation', which is based on the idea that states are better placed to decide the extent to which the

[82] Gerhard Van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (Wolf Legal Publishers 2005) 151.
[83] A Conte and R Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2edn, Routledge 2009) 39.
[84]Agnieszka Cybulska, 'The 2012 Russian Foreign Agent Law' (Master Thesis, University of Oslo 2013) 32.

national interest should be promoted at the expense of human rights.[85] However, the Human Rights Committee does not apply the margin of appreciation doctrine, even though some academics hold the opinion that there are incipient elements of the doctrine in the Committee's decisions.[86] Instead, the Committee examines restrictions on a case-by-case basis, and appears to excuse justifiable, reasonable and proportionate limitation. This approach is not the same as the fully-developed and widely-used margin of appreciation doctrine in the Council of Europe system.[87]

However, a comparison of Article 22 of the ICCPR with Article 11 of the ECHR shows that to be justified, the interference must fulfil three requirements. This three-part test is well-known as 'the proportionality test', which, in practice, is a methodological doctrine that measures the legality of a restriction. Although it is not meant to provide a solution to the appropriate relationship between human rights and restrictions upon them, it should be seen as a means to understanding the scope of a right and the purpose of the restrictions imposed on it that prevents its full realisation.[88]

Common to all mechanisms granting limitations on human rights is that any measure taken to restrict a right or freedom must: i) be prescribed by law; ii) be in pursuit of a legitimate aim; and iii) meet the test of necessity and proportionality.[89]

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[85] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31(4) International Law and Politics 843, 843; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 1-16.

[86] P R Ghandhi, *The Human Rights Committee and the Right of Individual Communication* (Ashgate Dartmouth 2002) 14; Marcus Schmidt, 'The Complementary of the Covenant and the European Convention on Human Rights', *The International Covenant on Civil and Political Rights and the United Kingdom Law* (Clarendon Press 1995) 629.

[87] Conte and Burchill (n 83), 44.

[88]Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 (1) Law & Ethics of Human Rights 1, 5.

[89] ICCPR, Art 22 (2): 'No restrictions may be placed on the exercise of this right other than those which are prescribed by 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'; ECHR, art 11 (2) 'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'; ACHR, art 16 (2) 'The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others'; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), art 10 'Every individual shall have the right to free association provided that he abides by the law'

These requirements have been interpreted by the ECtHR and Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter Siracusa Principles) adopted by the UN ECOSOC in 1984.[90] The Siracusa Principles were introduced by a group of 31 distinguished experts in international law with the support of the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences. Although the text of the Siracusa Principles is not legally binding, it is worthy of consideration, as it is the outcome of elaborate doctrinal discourse of the leading experts in international human rights law.

i) Prescribed by Law

The expression 'must be prescribed by law' has been explored by the ECtHR and the Siracusa Principles. In particular, the Court considered the meaning of the term and concluded that it is comprised of two further requirements: i) the law must be adequately accessible, so that an individual has an adequate indication of how the law limits their rights; and ii) the law must be formulated with sufficient precision, in order that citizens can regulate their conduct.[91] The aim of these requirements is to ensure the principles of legal certainty and foreseeability. In essence, the provision imposing a restriction must be accessible, and with sufficient precision, so that individuals can foresee the consequences of their conduct and know beforehand the extent to which their rights are limited.[92]

As far as the element of accessibility is concerned, the concept of law covers the Constitution, laws adopted by Parliament and acts created by the Executive in accordance with particular Acts of Parliament.[93] However, states do not have to codify every piece of law; thus, the first requirement includes common law.[94] It is imperative that the law should be at the disposal of the individuals even with guidance from legal experts.[95]

[90] UN Economic and Social Council 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, UN/ Doc 3/CN.4/1985/4 (hereinafter Siracusa Principles).
[91] *Sunday Times v. United Kingdom Application No 6538/74* (ECtHR 26 April 1979) para. 49.
[92] *Gorzelik and others v. Poland* Application No 44158/98 (ECtHR 17 February 2004) para. 66-71.
[93] *Association Ekin v. France* Application No 39288/98 (ECtHR 17 July 2001) para 46.
[94] *Sunday Times v. United Kingdom* (n 91), para 49.
[95] Takahashi (n 85), 10.

On the other hand, the test of foreseeability needs further analysis in terms of the level of precision. According to the ECtHR, the level of precision is delineated by three factors: 'the context of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed'.[96] Thus, the Court attempts to introduce sufficient protection against possible abuse within the legal instrument. As will be seen, this aspect is covered better by the Siracusa Principles.

In particular, the Siracusa Principles provide that laws limiting human rights must not be arbitrary or unreasonable.[97] That means, even if there are laws restricting human rights and freedoms, the execution of limitations involves the conferral of discretionary powers. For that reason, the Siracusa Principles provide that any law imposing restrictions on human rights must not grant unrestrained discretion to those in charge of its execution and, if conferred, it must not be applied arbitrarily or unreasonably.[98]

The point here is that the first criterion ensures that restrictions on human rights and freedoms are well-thought through and responsible decisions on the part of the government or its agents, and they can therefore only be imposed by law. The fact that the ordinary legislative procedure should be followed highlights the importance and necessity of the restriction. The execution of the limitation must also be subject to prudence, ensuring that those in charge must work only to achieve the legitimate aim pursued. Notably, the first requirement has not proven to be challenging to overcome, but the majority of interferences have significant difficulties in passing the next two criteria.[99]

ii) In the pursuance of a legitimate aim

The permissible legitimate purposes for a restriction can vary according to the human rights treaty. However, the ICCPR as well as the ECHR, whose provisions on limitation clauses are identical, define these as national security, public safety, public order (*ordre public*), public health, morals and the protection of human rights

[96]*Chorherr v. Austria* Application No 13308/89 (ECtHR 25 August1993) para. 25; *Kalac v. Turkey* Application No 20704/92 (Commission's Report of 27 February 1996) para. 42.
[97] Siracusa Principles (n 90), para 16.
[98] Conte and Burchill (n 83), 47.
[99] Takahashi (n 85), 10.

and freedom of others.[100] In the context of the ECHR, the enumeration is exhaustive, and each notion should not be broadened beyond its meaning.[101] Similarly, the Siracusa Principles interpret each notion very strictly. For instance, measures that have been taken to protect the mere existence of the nation, the territorial integrity or political independence against force or threat of force can be justified by 'national security'. No restriction can be imposed that only prevents isolated threats to law and order.[102] In general, the Siracusa Principles provide that 'all limitation clauses shall be interpreted strictly and in favour of the rights at issue'.[103] However, this standard is linked to the third part in which the 'heart of debate' on the necessity and proportionality takes place. Therefore, the ECtHR has rarely found a violation by reference to the second requirement.[104]

iii) Necessity and Proportionality

Both necessity and proportionality are additional safeguards with which states must comply. This aspect is subjective involving concepts that can be interpreted broadly by states in an attempt to place restrictions on human rights. The Human Rights Committee stated in *de Morais v Angola* that the notions 'necessary' and 'proportionate' are interrelated, as the requirement of necessity implies an element of proportionality.[105] In particular, the criterion of necessity permits states to derogate from a particular human right in order to deal with a pressing social need, which must be related to one of the above-mentioned legitimate aims.[106] In essence, the State should demonstrate that the limiting measure is in pursuit of an objective which is permitted by the Covenant. However, the assessment of what constitutes a pressing social need is clearly left to state authorities that are in a better position to know the social and ethical standards of the society. The most important component of necessity involves the need for limiting measures to be included within a democratic society,[107] so as not to impair the democratic functioning of society and its hallmarks, such as pluralism, tolerance, freedom and

[100] ICCPR art 22 (2); ECHR art 1 (2).
[101] William A Schabas, *European Convention on Human Rights* (OUP 2017) 512.
[102] Siracusa Principles (n 90), para 29 and 30.
[103] ibid, para 3.
[104] Schabas (n 101), 513.
[105] *De Morais v. Angola* Communication No 1128/20 (1 April 2005) UN Doc CCPR/C/83/D/1128/2002 para. 6.8.
[106] Siracusa Principles (n 90), para. 10 (b) and (c).
[107] ibid, para 19.

broadmindedness.[108] For example, the Committee made it clear in *Lee v Republic of Korea* that the existence and functioning of a plurality of civil society organisations, even if they peacefully promote ideas that are not favourably received by the government or by the majority of the population, constitutes one of the cornerstones of a democratic society.[109] In essence, the only necessity capable of justifying an interference with any right is one that serves democratic purposes.

Importantly, the notion 'democracy' refers to the political model upon which all human rights treaties and constitutions are based. Nevertheless, what constitutes a justifiable limitation can vary across societies, depending on the social importance of a right. The importance of each right, which also carries a great weight in relation to conflicting principles, is closely connected to the underlying foundations of each society.[110] For example, rights related to dignity, freedom and liberty are all of vital importance to decolonialised states when compared to western countries in which the constitutions generally promotes equal importance to all rights.[111]

The final feature of necessity is that there should be a rational connection between the limiting measure and the objective being pursued, based on objective considerations.[112] In short, this feature is by its nature simple in practice, as it requires that restricting measures should logically contribute to the goal being pursued, so that one can argue that they are indeed necessary to fulfilling a pressing social need.

This aspect also includes the principle of proportionality in a strict sense (*stricto sensu proportionality)* which entails a balancing test between the positive and negative impacts of the limiting measure upon the enjoyment of the right; in other words, the social harm done by the restriction and the ameliorating effects of the limiting measure.[113]

[108] Schabas (n 101), 406.
[109] *Lee v. Republic of Korea* Application No 1119/2002 (20 July 2005) UN Doc CCPR/C/84/D/1119/2002 para 7.2.
[110] Barak (n 84), 9.
[111] S Woolman and H Botha, 'Limitations', in S Woolman and M Bishop (eds), *Constitutional Law of South Africa* (Juta 2006) 94; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 (2) University of Toronto Law Journal 383, 396.
[112] Siracusa Principles (n 90), para 10 (d)
[113] Conte and Burchill (n 83), 49.

The negative impact of the restriction upon the enjoyment of the right is the most important point in determining whether a measure taken is proportional. At this point, it is important to consider the social importance of the right and the value that entails. As mentioned above, the Human Rights Committee has already considered some rights and freedoms to be 'foundations of a democratic society', which means that due to their importance, they can be restricted only in exceptional circumstances and by the least intrusive measures. Hence, any limitations placed on them are carefully examined by the Committee. Generally, in evaluating the negative impact of a limitation, it is important to establish that the limiting measure cannot destroy the essence of the right concerned.[114]

At this stage, it is important to emphasise that the scope of the restriction placed on a right or freedom must be proportional to the value that the limiting measure serves to protect.[115] In essence, one should draw links between the importance of the goal being pursued and the extent to which the limitation radically furthers the objective, which is actually its ameliorating effect. This part also involves determining if effective and less restrictive measures that could fulfil the same objective were in existence. For instance, let us assume that the police banned a demonstration because it considered the slogans on the banners to be illegal. Even if this example would pass the first two stages of the test, one could argue that less intrusive measures existed; for example, the police could have seized the banners concerned, instead of banning the demonstration and thus limiting the right of freedom of assembly significantly.

4.4.2.1.2. Examples of Legislation Restricting HRDs' Activity

Having discussed the requirements allowing restrictions on human rights and freedoms, this Section discusses laws which impose limitations on HRD activity. In particular, it considers the extent to which these laws are consistent with international human rights law and as a result the restrictions imposed are justifiable. The analysis focuses on the right to access funding, as it is recognised as a substantive right by the Declaration on HRDs.[116]Although this right is not

[114] Siracusa Principles (n 90), para 2.
[115]*De Morais v. Angola* (n 105), para. 6.8.
[116] Declaration on HRDs (n 2), art 13.

legally binding, it constitutes an inherent element of the right of association[117] as well as the right of expression. Even if individuals can exercise the right of association, the right becomes invalid if they are not allowed access to sufficient resources to carry out their work and operate the organisation.[118] Placing restrictions on the freedom of association, the State is also likely to interfere with the freedom of expression, as an integral part of the former is the freedom to express ideas, make criticism and conduct research. Hence, the ability to seek, receive and use funding is of vital importance to organisations acting as HRDs. The Special Rapporteur on HRDs stressed that 'in order for organisation to carry out their activities, it is indispensable that they are able to discharge their functions without impediments, including funding restrictions.'[119]

However, a number of restrictions have been imposed on the access to funding with the intention of silencing HRD organisations expressing opposing ideas to the State. Using the Russian foreign agent law,[120] as a case study, in the sense that it is the most common violation of the right of NGOs to funding, this Section attempts to prove that this kind of legislation is inconsistent with international human rights law and aims at stopping the activities of defenders.

The foreign agent law requires all NGOs and media that receive funds from abroad and conduct 'political activity' to register with a government agency and identify themselves as foreign agents. The logic behind this legislative measure is to generate suspicion towards NGOs and media as well as to question their credibility within society, making their work more difficult. One could claim that this is not an apt example in the sense that Russia is an 'outlier' skimming the edges of democracy. However, it should not be forgotten that HRDs work mainly in countries like Russia and Turkey, which are marginally democratic, despite being

[117] UN General Assembly, Report of the UN Special Rapporteur on the Situation of Human Rights Defenders, 4 August 2010, UN Doc A/65/226 (hereinafter Report on Violations Committed against Defenders by Non-State Actors).
[118] Commentary to the Declaration on HRDs (n 1), 95.
[119] Report on Violations Committed against Defenders by Non-State Actors (n 109).
[120] Legislation on Making Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Functions of Foreign Agents, Federal Law 121-FZ, 20 July 2012, Unofficial Translation (hereinafter Russian Foreign Agent Law) <http://www.citwatch.org/upload/wysiwyg/files/ICNL%20Unofficial%20Translation%20Russian%20Enacted%20Law.pdf accessed 30 October 2019.

parties to human rights treaties and regional mechanisms. In fact, this kind of law is a widespread policy and tends to become a trend.

In particular, many states, even members of the EU, have adopted or are now proposing similar laws. In Bangladesh, NGOs receiving foreign funds must deposit their funds in a bank designated by the authorities. NGOs are not allowed to receive funding without authorisation by the NGO Affairs Bureau, and banks cannot release such funds without prior government approval.[121] Meanwhile, in Hungary, in October 2016 the vice president of the governing party and the vice chairperson of the Parliamentary Committee on national security, announced that they had proposed to the Committee to examine all those NGOs working closely with George Soros network.[122] Finally, in July 2017, the State adopted its own Law on Foreign funded NGOs. Participants from former Soviet Union states also confirmed that similar laws exist in their counties with the intent to thwart the activity of human rights NGOs.[123] Common justification for these restrictions is the protection of national security and transparency, but as will be seen below, the doctrine of proportionality undermines the basis of this argument.

i) The Russian Foreign Agent Law

State funding for Russian human rights NGOs is negligible. In 2013, the amount allocated was 3.5bn roubles (UK £70m),[124] but the global financial crisis has affected funding possibilities within the country.[125] The amount of funding is diminutive, when compared to the amount given by the Irish government, a significantly smaller country. More specifically, in 2015, Ireland allocated €647m (UK £750m), representing 0.37% of Gross National Product (GNP).[126]

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[121] The Observatory for the Protection of Human Rights Defenders (OMCT/ fidh), 'Violations of the Right of NGOs to Funding: from Harassment to Criminalisation Foreword by Maia Kiai: mo 2013' (2013) 51< http://www.omct.org/files/2013/02/22162/obs_annual_report_2013_uk_web.pdf> accessed 30 October 2019; Bangladeshi Foreign Donations (Voluntary Activities) Regulation Act 2016, Act No 43, 5 October 2016.

[122] Front Line Defenders (n 32), 10.

[123] INTV 2, 22.2.2018; INTV 10 17.2.2018.

[124] 'Russian NGOs: The Funding Realities' (*Open Democracy*, 2018) <https://www.opendemocracy.net/en/odr/russian-ngos-funding-realities/> accessed 30 October 2019.

[125] OMCT/fidh (n 117), 7.

[126] 'Where the Money Goes - Irish Aid' (*Department of Foreign Affairs and Trade*) <https://www.irishaid.ie/what-we-do/how-our-aid-works/where-the-money-goes/> accessed 30 October 2019.

Furthermore, in Russia the allocation of the limited funding has proven to be flawed, as pro-governmental organisations receive the bulk of the grants.[127] Moreover, national authorities refuse to fund organisations that challenge their interests and criticise government decisions and policy. In addition, private individuals and businesses are reluctant to donate money to NGOs for fear of being targeted by the State.[128] As a result, Russian NGOs are dependent on foreign sponsors in order to operate and survive.

Under the pretext of openness and transparency, the Russian government adopted in 2012 the Foreign Agent law, which was amended in 2017 to designate media as foreign agents.[129] As already mentioned, under the law all organisations engaging in political activity must register with the Justice Ministry as 'foreign agents' if they receive even small amounts of funding from any foreign sources, governmental or private. Political activity is defined by the law as 'participation in the organization and conduct of political actions aimed at influence over the decision-making by state bodies intended for the change of state policy pursued by them, as well as in the shaping of public opinion for the aforementioned purposes'.[130] If an NGO conducts political activity it must also note on its publications and materials, such as books, brochures and official statements that 'such materials are published and/or distributed by a non-commercial organization performing the functions of a foreign agent.'[131] In addition, for those NGOs receiving foreign funds, the law requires tighter control: annual audits, separate accounts on the use of foreign funds, half-yearly activity reports and quarterly financial reports.[132] Indeed, Participant 5 confirmed how complicated the process is for 'foreign agents' compared to other commercial organisations or NGOs. She said:

> *'Foreign agent law means: twice more checks from Ministry of Justice, there are also some special forms, three different forms, NGOs have to complete every month, every*

[127] Open Democracy (n 124).
[128] Cybulska (n 84), 21.
[129] Marilia Brocchetto, 'In Retaliatory Move, Putin Signs Media 'Foreign Agents' Law' (*CNN*, 2018) <http://edition.cnn.com/2017/11/25/world/russia-foreign-agents-law-media/index.html> accessed 30 October 2019.
[130] Russian Foreign Agent Law (n 120), art 2 para 1.
[131] ibid, art 2 para 3.
[132] ibid, art 2 para 4 (b) and (f).

three months and once a year. It's a chaos. And you know, it's really difficult to communicate with government bodies if you have a problem with your documents.'[133]

Non-compliance or failure of an NGO receiving foreign grants to register with the government body entails administrative and criminal sanctions.[134] Valentina Cherevatenko was the first head of a human rights organisation prosecuted under the Foreign Agent Law. She was accused of malicious evasion of duties imposed by the 2012 Foreign Agent Law, but the case against her was eventually closed 'due to lack of evidence of crime'.[135] It is worth mentioning that 88 human rights NGOs have been registered with the government agency so far.[136]

ii) Analysis of the Legitimacy of the Foreign Agent Law

The focus now turns to assessing whether the Foreign Agent Law meets the criteria justifying interference with freedom of association, freedom of expression and the right to access funding as *lex specialis.* The term '*lex specialis'* refers to a situation of incompatibility between two norms as well as situations where applicable norms concur. In the literature two different approaches on the nature of *lex specialis* are proposed. For some scholars, the concept of '*lex specialis derogate legi generalis*' is more appropriate and convincing. That means if a particular matter is being addressed and regulated by both a general norm and a more specific one, priority should be given to the special norm, which means that the general norm is not applicable.[137]Another opinion is that the special norm can also be considered a specification of a general norm, meaning that the special norm is applicable, while the general one remains important as a broader framework.[138] In essence, *lex specialis* is understood as a collision rule and interpretative tool respectively.[139] In

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[133] INTV 5, 18.2.2018.
[134] Russian Foreign Agent Law (n 120), art 3-5.
[135] 'Russia: Rights Activist Interrogated' (*Human Rights Watch*, 2016) <https://www.hrw.org/news/2016/05/19/russia-rights-activist-interrogated> accessed 30 October 2019.
[136] 'Russia: Government vs. Rights Groups' (*Human Rights Watch*, 2018) <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle> accessed 30 October 2019.
[137] Marko Milanovic, 'Norm Conflicts, IHL and IHRL' in Orna Ben-Naftali (ed*), International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 98.
[138] Dorota Marianna Banaszewska, 'Lex Specialis' in Rudiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2015) para 8.
[139]ibid, paras 4, 7; Nancie Prud' homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 (2) Israel Law Review 355, 355.

regard to the right of access funding, it is an elaboration of the freedoms of association and expression, as it cannot exist without the establishment and the proper functioning of an organisation. In other words, both freedom of association and expression are prerequisites of the right to access funding.

As far as the 'prescribed by law' requirement is concerned, it is difficult to say that it is fulfilled, since the interference must adequately and clearly be prescribed by law in such a way as to make the possible consequences of a given action reasonably foreseeable. The requirement of 'political activity' is broad and is not defined by the law adequately. Despite the attempt of the Constitutional Court of Russia to interpret the meaning of 'political activity' by stating that 'a basic criterion for the assessment of whether an act of an NGO can be considered as political was whether this act aims to influence state policies (directly or via forming public opinion), and besides that whether this act aims to create a public response and attract the attention of state bodies and civil society',[140] the term remains broad and vague.

In 2013, the human rights organisation 'Shield and Sword' voluntarily applied to be included in the register as a part of an experiment, even though they did not consider themselves as foreign agents.[141] In reality, the ultimate aim of the organisation was to understand how the law works and to force the Ministry of Justice to interpret the law. The latter refused to include Shield and Sword on the list of foreign agents due to a lack of legal grounds. More specifically, it explained that NGOs are considered to conduct political activity as long as they organise political protests against the government policy and seek to change it.[142] Shield and Sword contributed to eradicating instances of human rights violations within the Chuvash Republic, so the aims of the NGO do not contradict the government's policy and are not directed to alter it.[143] This example proves that the definition of

[140] Decision of the Russian Constitutional Court No 10-P ,8 April 2014, para 3.3; It is also worth mentioning that the Constitutional Court stated that culture, ecology, health protection, scientific activity, etc are not considered political activities even where such activity is aimed at influencing state police and public opinion on one of those areas. See also, para 3.2.
[141] 'Ministry of Justice Refuses to Consider Shield and Sword a Foreign Agent - Rights in Russia' (*Rights in Russia.info*, 2013) <http://www.rightsinrussia.info/archive/russian-media/forbes/shield-sword> accessed 30 October 2019.
[142] ibid.
[143] 'Enforcement of Russia's NGO Law Wavering as Justice Ministry Rejects Those Who Wish to Register as Foreign Agents - Bellona.Org' (*Bellona.org*, 2013) <http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2013-01-enforcement-of-russias-ngo-law-wavering-as-justice-ministry-rejects-those-who-wish-to-register-as-foreign-agents> accessed 30 October 2019.

political activity is so vague that it does not allow the members of an NGO to foresee the consequences of the law. Consequently, the law does not ensure the legal certainty and foreseeability and therefore does not meet the first requirement.

Moreover, by their nature, human rights NGOs act as human rights watchdogs by monitoring the actions of governments and pressuring them to comply with human rights principles as well as by challenging government policy. In essence, the way that the Russian national authorities and the Constitutional Court define the term 'political activity' contradicts the most-commonly practiced methods that NGOs use in order to perform their work effectively. For that reason, it can be argued that the requirement of 'political activity' is intended to target human rights organisations with the intention of silencing them.

Concerning the legitimate aims, the purposes put forward by the Court are greater openness and the protection of state sovereignty.[144] At first glance, neither of them is included in the exhaustive list of Articles 19 and 22 of the ICCPR and Articles 10 (2) and 11 (2) of the ECHR. Therefore, the identification of those aims as justification for the interference cannot be consistent with the international human rights law requirement.[145] However, the justification of state sovereignty can be reasonable and fall within the notion of 'national security' if one considers that the receipt of foreign funding can be used to influence governments to serve the interests of foreign bodies, governments or private institutions. Moreover, one can also argue that some restrictions on the right to access to foreign funding could be legitimate in the context of the fight against terrorism and money-laundering.[146] However, even if state sovereignty and financial transparency is a valid justification, this should never be used as justification to undermine the right and impede the legitimate work of organisations.[147]

[144] Siracusa Principles (n 90), para 3.2.
[145] International Commission of Jurists (ICJ), 'Russian Federation: Report on the Constitutional Court Proceedings and Judgement on the "Foreign Agent "Amendments to the NGO law' September (2014) 12 < https://www.icj.org/wp-content/uploads/2014/09/RUSSIA-FOREIGN-AGENTS-elec-version.pdf> accessed 30 October 2019.
[146] OMCT/fidh (n 121), 24.
[147] UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, 21 May 2012, UN Doc A/HRC/20/27, para 94.

Even if the aim is legitimate, it must fulfil a pressing social need, but must not impair the essence of the freedom of association. The State must show that there is a real, not a hypothetical, danger to the legitimate aim and that less intrusive measures would be insufficient enough to achieve the purpose.[148]

It should be noted that the majority of foreign organisations supporting Russian NGOs are small trusts, foundations and charities that raise their money through donations from ordinary citizens in Western countries.[149] The huge and ambitious foundations, such as the European Commission, the Council of Europe and the McArthur Fund that also distribute funds to Russian human rights organisations are all highly respected and trusted organisations, which follow open and transparent funding process.[150] Moreover, there is no evidence that the NGOs act as agents of their sponsors and try to influence the government in the interests of the donor organisations. Consequently, the logic behind the law is based on an assumption and not a real threat to state sovereignty.

Furthermore, under the principle of proportionality, it is imperative that the measure applied be proportionate to the purpose pursued and also be the least intrusive possible. As argued above, the label 'non-commercial organisation performing the function of a foreign agent' must appear on any material published or distributed by the NGO listed as a 'foreign agent'. The term 'foreign agent' has a strong negative connotation, as this term is closely associated with the term 'spy' or 'traitor' and widely used by Russian newspapers and authorities. This has been proved by surveys conducted by the Levada Centre, a Russian non-governmental institute for sociological research. The surveys show that 62% and 57% of participants, in September 2012 and in December 2016 respectively, perceived the term 'foreign agent' negatively. While the majority usually associate the phrase with words like spy, foreign intelligence agent, infiltrator, it is remarkable that 7%

[148] *Lee v. Republic of Korea* (n 109), para 7.2.
[149] 'Funding Russian NGOs Opportunity in a Crisis?' (*open Democracy*, 2013) <https://www.opendemocracy.net/od-russia/almut-rochowanski/funding-russian-ngos-opportunity-in-crisis> accessed 30 October 2019.
[150] *Ecodefence and others v. Russia* Application No 9988/13 (Application Submitted to the ECtHR to 6 February 2013) 25 < https://www.yumpu.com/en/document/view/9448663/2013-02-04-application-foreign20agents-pl-ft-pl-ft-final/5> accessed 30 October 2019.

of respondents stated the term evokes notions, such as enemy, enemy of Russia, traitor, and fifth column.[151]

Undoubtedly, the wording has not been chosen by accident. The real goal is to discredit the activity of NGOs receiving foreign grants and to make the general public question the motives and work of human rights NGOs. As a result of the wording, it becomes more difficult for these groups to operate effectively within society. Participant 5 described the impact of the term on their activities and noted that people do not want to be associated with the activities of his or her organisation. In particular, his organisation sought to organise a talk and invited a judge to talk about torture and other human rights abuses. The judge refused because the organisation had been identified as 'foreign agent'. Precisely, Participant 5 stated:

> *'We tried to organise a conference and so invited a judge, but he said "I know guys you are cool, but it would be very bad for my career if I joined a conference with foreign agents." And he didn't take part.'* [152]

The point here is that this measure stigmatises NGOs, substantially affects their functioning, and impairs the freedoms of association and expression, which both constitute foundations of democracy.

Despite the fact that the Russian Court is of the opinion that there is no interference with the rights of NGOs, as the registration with the Ministry of Justice does not impede the activity of NGOs, a number of organisations have been forced to self-dissolve.[153] Following the imposition of huge fines, several NGOs which were not able to cope with extra-operational expenses, suspended their activities. For instance, in January 2016, the Committee against Torture, an important human rights NGO and partner of the Council of Europe's Committee for the Prevention of Torture, announced that it had no available funds to pay fines imposed under the Foreign Agent Law and declared bankruptcy.[154] For that reason, the dissolution of

[151] 'The Results of the Survey on Foreign Agent Law' (*Levada.ru*, 2017) <https://www.levada.ru/en/2017/03/20/foreign-agent/> accessed 30 October 2019.
[152] INTV 5, 18.2.2018.
[153] Council of Europe Commissioner for Human Rights, Third party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application *Ecodefence and others v. Russia* and 48 other applications no 9988/13, 5 July 2017, CommDH (2017) (hereinafter Third Party Intervention) 22 para 10.
[154] ibid.

human rights NGOs as a consequence of the Law on Foreign Agent is undoubtedly a blatant violation of fundamental principles of democracy.

At this point, it should be said that a registration system in itself is not necessarily a violation of the freedom of association. For instance, a notification system, which does not target NGOs, enables state authorities to note the creation of a new association and the new body to obtain legal status.[155] Of course, the registration must not be prerequisite for the establishment of the organisation.[156] Nonetheless, in the case of Russia, the government took the most intrusive measures, violating the essence of the right and democracy.

Having analysed the three-part stage test, there is no question that the Foreign Agent Law is not consistent with the international human rights standards in every aspect. It is regrettable that organisations actively promoting human rights and acting with great difficulty as human rights watchdogs within authoritarian regimes are forced to stop their activities. It is not surprising that some NGOs decline foreign funding and stop any contact with international organisations and foreign donors in order to remain within the boundaries of the law.[157] In essence, those NGOs resort to a kind of self-censorship to survive. Yet, given the lack of resources they put the existence and activity of the organisation at risk. Other human rights NGOs conduct some commercial activities, so that they cannot be characterised as NGOs and can continue their activities. That, of course, entails higher taxes and operating costs, which places a significant burden on the organisation.[158] In any case, the Law on Foreign Agent is a blow to some of the fundamental principles of democracy and the promotion of human rights.

The great number of cases against NGOs receiving foreign funding has resulted in a new community of legal practitioners and organisations who are committed to defending NGOs. As a result, despite the attack on Russian human rights NGOs as well as the attempts to disarm them, civil society has created a new category of

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[155] The granting of legal status to an NGO enables it to increase its ability to act. For instance, a registered NGO may open a bank account in the name of the organisation, seize the courts, rent offices etc.
[156] OMCT/fidh (n 121), 29.
[157] 'Five Years of Russia's Foreign Agent Law' (*Open Democracy*, 2017) <https://www.opendemocracy.net/od-russia/daria-skibo/five-years-of-russia-s-foreign-agent-law> accessed 30 October 2019.
[158] INTV 10, 17.2.2018.

HRDs fighting for the rights of NGOs. Even in authoritarian states, the tendency of some individuals towards promoting and fighting for human rights is a strong counterbalance to authoritative policies.

Several countries have laws similar to the Foreign Agent law, since it is more convenient for states to restrict foreign funding on the pretext of transparency and state sovereignty rather than to limit a fundamental freedom, such as the freedom of association. In practice, they infringe both rights. It is therefore imperative that states realise that the right of NGOs to access funding is as significant as the right of an individual to benefit from the presumption of innocence until proven guilty.[159] Likewise, all NGOs should enjoy the right to seek, receive and use funding, unless suspected malpractice is confirmed and proved.

4.4.2.2. The Misapplication of Ambiguous Legislation and Criminal Law

4.4.2.2.1. Counter-terrorism Legislation and HRDs

This Section focuses on the misuse of counter-terrorism legislation in an attempt to discredit HRDs, as this is the most common method of targeting defenders. More specifically, in the wake of terrorist attacks in the United States, London and Madrid, states considered terrorism to be a grave threat to international peace and national security. In the same vein, the UN Security Council unanimously passed Resolution 1373 which called on all Member States to 'prevent and suppress the financing of terrorist acts' and 'take the necessary states to prevent the commission of terrorist acts'.[160] It also provided that all states 'should also ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences served'.[161] While the Security Council required states to take action, it did not define the meaning of 'terrorist acts', leaving this issue to be defined by the Member states.

States have both a right and a duty to protect individuals subject to their jurisdiction from terrorists, based on the general duty established by Article 2 of the ICCPR. In particular, this duty is regarded as part of the State's obligation to guarantee the right to life and the right to security. For that reason, all states including those who

[159] OMCT/fidh (n 121), 8.
[160] UN Security Council Resolution 1373, 28 September 2001, UN Doc S/RES/1373.
[161] ibid.

before 9/11 had no national laws on this subject have adopted counter-terrorism legislation.[162]

When it comes to HRDs, the counter-terrorism legislation has widely been used to stigmatise defenders and stop or curtail their activities, as a number of HRDs have been characterised as terrorists.[163] In particular, in Turkey 10 prominent HRDs were charged with 'aiding armed terrorist organisation' under 314 (2) and (3), 220 (6), 53 (1) and 58 (9) of the Turkish Penal Code as well as Articles 3 and 4 of the Anti-Terror Law 3713 and detained, while the Director of Amnesty International Turkey, Taner Kılıç, was charged with 'membership of an armed terrorist organisation'.[164] Nine of them were released following more than 100 days in prison. Due to a lack of a legal basis, the case against them was dismissed. However, Taner Kılıç remained in prison until September 2018.[165] The empirical result comes to confirm this practice, as several participants were arrested and jailed on the ground of counter terrorism legislation. Undoubtedly, terrorism charges were a pretext to silence defenders, at least, for a while.[166] Indicatively, Participant 1 stated that:

> *'I was arrested on charges of directing a terrorist organisation. They kept me in custody for more than a month without charges, according to Anti terrorism law of Sudan.'*[167]

This could be attributed to the lack of legal definition of the terms 'terrorism' and 'terrorist acts'. 109 academic and official definitions of terrorism have been identified;[168] however, despite the attempts of the Sixth Committee of the UN and academics,[169] there is still no universally accepted definition. Although the purpose of the thesis is not to look at different definitions, a brief analysis of the international

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[162] Golden and Williams (n 78), 271.
[163] UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, 10 August 2012, UN Doc A/67/292 para 81.
[164] 'Turkey: Amnesty Turkey's Chair Released After More Than a Year Behind Bars' (*Amnesty.org*, 2018) <https://www.amnesty.org/en/latest/news/2018/08/turkey-amnesty-turkeys-chair-released-after-more-than-a-year-behind-bars/> accessed 30 October 2019.
[165] 'Turkey: Second Hearing of the Istanbul 10 and Taner Kılıç Concludes' (*Front Line Defenders*, 2018) <https://www.frontlinedefenders.org/en/case/istanbul-10-released-turkey> accessed 30 October 2019.
[166] INTV 1, 18.2.2018; INTV 8, 13.2.2018; INTV 11, 17.6.2018; INTV 16, 8.2.2018.
[167] INTV 1, 18.2.2018.
[168] Ben Saul, *Defining Terrorism in International Law* (OUP 2010) 59.
[169] The UN Sixth Committee has been working on the draft comprehensive convention on international terrorism in attempt to eliminate terrorism since 2000. While Member States have agreed on many provisions of the draft comprehensive convention, diverging views on whether or not national liberation movements should be excluded from the application have impeded consensus on the adoption of the convention.

anti-terror framework would contribute to a better understanding of how counter-terrorism legislation is used to target defenders.

In 2001, the UN General Assembly authorised the Sixth Committee to prepare a comprehensive convention on international terrorism, which, in turn, established a Working Group to produce a draft convention. The latter came up with a draft text, but the definition of terrorism in draft Article 2 has caused fierce controversy ever since it was introduced.[170] In particular, the delegations of Islamic states wanted to exclude activities carried out by those fighting for self-determination from the definition. On the other hand, several states opposed this idea on the ground that under international law limitations can be imposed on the right to self-determination as well. As a consequence, the Convention has yet to be concluded and there is no official definition in international law. The point here is that, despite the lack of a widely-accepted definition, the Security Council established a general; clear though, definition of terrorism through Resolution 1566 in 2004 that could definitely be used as a basis for further development.[171] However, the legal conceptions of terrorism still vary across states and sometimes there is a range of formulations of terrorism even within the domestic legal order of one State.[172]

[170] 'Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause: Death or serious bodily injury to any person; or Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss; when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act. Any person also commits an offence if that person attempts to commit an offence or participates as an accomplice in an offence as set forth in paragraph 1. Any person also commits an offence if that person: Organizes, directs or instigates others to commit an offence as set forth in paragraph 1 or 2; or Aids, abets, facilitates or counsels the commission of such an offence; or In any other way contributes to the commission of one or more offences referred to in paragraphs 1, 2 or 3 (a) by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned'. For more information see Draft Comprehensive Convention against International Terrorism, 12 August 2015, UN Doc A/59/894 App. II.

[171] 'The Council recalled that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror, or compel a government or international organization to do or to abstain from doing any act which contravened terrorism-related conventions and protocols, were not justifiable for any reason –- whether of a political, philosophical ideological, racial, ethnic or religious nature.' See, UN Security Council Resolution 1566, 8 October 2004, UN Doc S/RES/1566.

[172] P Alston and R Goodman, *International Human Rights* (OUP 2013) 387.

The lack of a definition combined with the Security's Council strong push for states to take measures to combat terrorism[173] has led to two trends.[174] On the one hand, the Resolutions of the Security Council encouraged repressive states to take advantage of the counter-terrorism struggle at the international level and gave them the international legitimacy to de-legitimise political opponents. For instance, Israel has identified Palestinians with strong associations to Al-Qaeda as terrorists.[175] On the other hand, many states adopted counter-terrorism legislation in only a few weeks in response to the international threat. Therefore, some anti-terror laws are draconian and inconsistent with international law, partly as a result of having been drafted in a very short time. Notably, through counter-terrorism legislation some governments tried to show that they are doing something against terrorism.[176]

It is also remarkable that a number of states wanted to introduce stricter legislation before the attacks but did not receive parliamentary consent.[177] As a result, the attacks were a perfect excuse for the adoption of draconian measures against terrorism. As is also seen below, counter-terrorism provisions often do not meet the international requirements for permissible limitations; thus, constituting non-justifiable interferences with human rights. On this basis, there is no doubt that counter-terrorism legislation may have a significant impact on human rights, violating the fundamental rights of people.

It is noteworthy that common elements to definitions of terrorism are: the intention to inflict fear; serious acts of violence; and, in some cases, compelling governments to undertake a particular act or abstain from something.[178] Importantly, one could argue that, since the key element to terrorism is violence, defenders cannot act as terrorists. As argued in Chapter 3 (Definition Chapter), peaceful activities are one of the requirements to be a defender, so in the first place an individual or a group of individuals using violence for any reason cannot be a defender. In other words, a HRD cannot be, by definition, a terrorist and vice versa. However, different

[173] ibid. The Security Council was significantly late in reminding states that any measures taken to combat terrorism should be consistent with their obligations under international law.
[174] Alston and Goodman (n 172), 390.
[175] Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985–2004' (2005) 4 (1) Chinese Journal of International Law 141.
[176]Anna Oehmichen, *Terrorism and Anti-Terror Legislation* (Intersentia 2009) 348.
[177] ibid.
[178] I Bantekas and L Oette, *International Human Rights Law and Practice* (CUP 2013) 616.

interpretations of 'peaceful activities' could provoke serious misunderstandings. For that reason, a universally accepted definition of terrorism would contribute not only to less restrictive counter-terrorism laws, but also to a more effective protection of HRDs.

This position can be supported by the example of the Animal Enterprise Terrorism Act, known as AETA, a federal law passed in 2006 in the United States. According to this law, any animal activist who damages property or causes a loss of profits to an animal enterprise can face prosecution, despite the fact that no violence is involved.[179] It is worth noting that this law was introduced after heavy lobbying from the pharmaceutical, fur, and farming industries, which saw defenders challenging their work and interests.[180] That being said, this law was passed with the intention of silencing activists. Moreover, not only does the AETA apply the term 'terrorism' to a non-violent activist, but it also constitutes an interference with the freedom of expression as it restricts their actions. In August 2013, Johnson and Lang were accused of interfering with the operations of a mink farm because they released 2,000 mink from cages and used the slogan 'liberation is love'.[181]

In the context of taking preventative counter-terrorism measures, states infringe a number of fundamental rights, mainly the freedom of expression and the freedom of movement. They adopt laws prohibiting 'encouragement', 'glorification' and 'justification' of terrorism and travel bans.[182] For instance, the Terrorism Act 2006 in the UK introduced a number of new offences, including 'the direct or indirect encouragement or other inducement'.[183] In essence, the terms 'encouragement' and 'other inducements' are very broad and vague, so the law can easily target people promoting human rights. Therefore, any restriction should first meet the

[179] Animal Enterprise Terrorism Act (AETA) of 2006, Pub.L 109–374, 18 USC s 43 (United States).
[180] Emma Marris, 'Animal Rights 'Terror' Law Challenged: Targeted Researchers Support the Legislation, Despite Free-Speech Concerns' (2010) 466 Nature 424, 424.
[181] Ed Pilkington, 'Animal Rights 'Terrorists'? Legality of Industry-Friendly Law to be Challenged' (*the Guardian*, 2015) <https://www.theguardian.com/us-news/2015/feb/19/animal-rights-activists-challenge-federal-terrorism-charges> accessed 30 October 2019.
[182] XIX Article 19 Global Campaign for Free Expression 'The Impact of UK Anti- Terror Laws on Freedom of Expression. Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights' (2006) 7 < https://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf> accessed 30 October 2019.
[183] Terrorism Act 2006, s 1 and 2.

international standards discussed in detail above. Besides, given that those provisions link an individual to terrorism and limit his or her right to free speech, the pressing social need that should be fulfilled must be related to statements of people made in public and with the intent that the message will incite violence, and most importantly be spoken in a context where the audience could, in reality, be led to violence.[184]

In the name of terrorism and public order, states use vague laws to target individuals who may challenge their policy and relations with other states, violating fundamental principles of democracy. For instance, in *Ekin v France,* a book about the Basque cause was banned from circulation, distribution and sales in France by an order of the French Ministry of Interior under Section 14 of the 1881 Law on the basis that 'the circulation in France of this book, which promote separatism and vindicates resource to violence, is likely to constitute a threat to public order'.[185] The applicant claimed that the provision of 1881 Law was unclear and it was impossible to foresee its effects.[186] When the Court conducted the 'prescribed assessment', it made clear that 'the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that should be compatible with the rule of law.'[187] To avoid similar situations, states should increase certainty by clarifying how an act is linked to violent acts and terrorism related offences.

Travel bans are also measures used to counter terrorism, allowing the authorities to seize a person's passport or to just ban him or her from leaving the country if there are well-founded suspicions that the individual intends to leave with reference to terrorism-related activity.[188] However, states use this measure to cut defenders' networks and most importantly, to prevent them from interacting with international fora.[189]Apparently, this method constitutes a breach of the right of free

[184] UN General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 16 August 2006, UN Doc A/61/26, para 19.
[185] *Association Ekin v.* France (n 93), para 13.
[186] ibid, para 39.
[187] bid, para 44.
[188] Daniel Alati, *Domestic Counter-Terrorism in a Global World: Post 9/11 Institutional Structures and Cultures in Canada and the United Kingdom* (Routledge 2017) 72.
[189] Front Line Defenders (n 32).

movement.[190] Therefore, to be justified, this restriction should be consistent with the three-part test of proportionality. In other words, the State must prove that the person does have links with terrorism groups and has been involved in terrorist activities in the past.

Travel bans are commonly used to impede defender's activity, regardless of any terrorism accusation. In the context of the right to leave a country, the State has also the duty to issue travel documents, in order that an individual can exercise it. Any refusal to issue travel documents or the withdrawal of passports constitutes a breach of the freedom of movement.[191] Jestina Mukoko, a prominent HRD from Zimbabwe, said in a workshop for human rights that she was refused to renew her passport without adequate justification. Of course, the reason behind the state's refusal was related to her active fight against the Mugabe regime.[192] Participant 1 also noted that she could not travel abroad, as state authorities confiscated her passport.[193] In short, exceptions to the right to leave a country imposed either by law or by administrative authorities can be established,[194] but they should be consistent with the proportionality test.[195]

4.4.2.2.2. Defamation, Slander and Blasphemy Laws

In addition to counter-terrorism laws, states use criminal offences, such as defamation and slander laws, as tools to prosecute and punish those defenders expressing critical dissenting ideas and opinions concerning public officials or public figures as well as challenging their performance. As a result, defenders

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[190] This right is also known as right to leave a country and is provided by Article 12.2 of the ICCPR, Article 2.2 of the Protocol No. 4 to the European Convention on Human Rights, Article 22 of the ACHR and Article 12. 2 of the African Charter.

[191] Council of Europe Commissioner for Human Rights, 'The right to leave a country' (2013) 18, https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510> accessed 30 October 2019.

[192] 'Workshop on Human Rights in Zimbabwe' (Durham Global Security Institute – Conflict Lecture Series, Durham University, 30 January 2018).

[193] INTV 1, 18.2.2018.

[194] For instance, tax disputes may be a legitimate basis for restricting the right to leave a country (*Sissanis v. Romania* Application No 71525/01 [ECtHR26 April 2007]), criminal activity and prosecution may also be considered to be a possible restriction (*Stamose v. Bulgaria* Application No 29713/05 [ECtHR 27 November 2012]), while the UN Human Rights Committee held that withholding travel documents from individuals who have not completed their military service is not consistent with Article 12.2 of the ICCPR. (*Peltonen v. Finland* Application No 492/1992 [21 July 1994] UN Doc CCPR/C/51/D/*492/1992*).

[195] *Miguel Gonzalez del Rio v. Peru* Communication No 261/1987 (28 October 1992) UN Doc CCPR/C/46/D/263/1987; UN Human Rights Committee, General Comment No. 27 'Article :12 Freedom of Movement, 2 November 1999, UN Doc CCPR/C/21/Rev.1/Add 9.

questioning and protesting against the decisions of public figures can easily be characterised as criminals. For instance, Mrs Gladys Lanza, the Director of Honduran Women's Movement for Peace (Visitación Padilla) working on cases of violence against women, was sentenced to 18 months in prison for the crime of defamation. Following a complaint submitted by Juan Carlos Reyes, the former coordinator of the Foundation for the Development of Social Urban and Rural Housing, criminal proceedings against Lanza were initiated for statements she made during a protest outside the offices of the Foundation in support of an employee of the aforementioned foundation who reported to have experienced sexual and labour harassment at the hands of Reyes.[196] In essence, Lanza Glady exercised her right to freedom of expression based on real facts. Lanza passed away in September 2016 due to serious health issues. Until her death, she was fighting against her imprisonment for the act of protesting and defending the rights of other people.[197]

In addition to the consistency of a restriction on freedom of expression with the proportionality test, in *Canese* and *Herrera Ulloa*, the IACtHR concluded that the use of criminal law is incompatible with the freedom of expression and thought.[198] It is also noteworthy that in obiter remarks, in the *Kimel* case, the Court articulated that the application of criminal law against certain kinds of expressions may not be contrary to the freedom of expression.[199] However, this can be interpreted by saying that criminal law may be used only against hate speech and the incitement of violence.[200]

In the legal systems of states, blasphemy laws are determined to punish individuals for spoken or written statements that can be regarded as insults against religious symbols, doctrines and figures with the purpose of protecting public order and

[196] Criminalization of the Work of Human Rights Defenders (n 69), para 108, 57; 'Gladys Lanza – "Las Chonas" | PBI United Kingdom' (*Peacebrigades.org.uk*, 2018) <https://peacebrigades.org.uk/who-we-protect/pbis-field-projects/honduras/gladys-lanza-las-chonas> accessed 30 October 2019.
[197] 'Case History: Gladys Lanza Ochoa' (*Front Line Defenders*, 2017) <https://www.frontlinedefenders.org/en/case/case-history-gladys-lanza-ochoa> accessed 30 October 2019.
[198] *Canese v. Paraguay* (IACtHR 31 August 2004) para 129; *Herrera Ulloa v Costa Rica* (IACtHR 2 July 2004) para 18.
[199] *Kimel v. Argentina* (IACtHR 2 May 2008) para 78.
[200] Eduardo Andres Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue of Freedom of Expression Standards (2009) 3 European Human Rights Law Review 283, 344.

morality.[201] However, some states misinterpret these laws to target dissidents and silence critical voices. In particular, in states, where *Sharia* applies, HRDs fighting for fundamental rights are often accused of blasphemy, as they promote values against the principles of Islam.[202] For example, Dr Shaikha Binjasim is a prominent defender and Professor of Philosophy at Kuwait University who promotes freedom of conscience and freedom of speech in Kuwait. The Public Prosecutor dropped blasphemy charges brought against her following her statement that the Constitution is above the *Quran* and *Sharia*.[203]

In relation to religion and belief, the right to freedom of expression can be exercised in two ways: a) when an individual articulates their religious beliefs; and b) when an individual articulates their views about the religion of others.[204] In *Handyside v. UK*, the ECtHR noted that 'the freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.'[205] As mentioned previously, the functioning of a democratic society is impossible without freedom of expression, so in respect of religion and beliefs limitations may be imposed in exceptional circumstances, such as hate speech and improper proselytism.[206]

For these reasons, any restriction on the freedom of expression and particularly the use of criminal law against those defenders expressing their opinion on their

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[201] Human Rights First, 'Compendium of Blasphemy Laws' (2014) < http://www.humanrightsfirst.org/sites/default/files/Compendium-Blasphemy-Laws.pdf > accessed 30 October 2019.

[202] Moataz El Fegiery, *Islamic Law and Human Rights: The Muslim Brotherhood in Egypt* (Cambridge Scholars Publishers 2016) 118; Rebecca J Dobras, 'Is the United Nations Endorsing Human Rights Violations: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws' (2009) 37 (2) Journal of International and Comparative Law 339.

[203] 'Case History: Shaikha Binjasim'(*Front Line Defenders*, 2016) <https://www.frontlinedefenders.org/en/case/case-history-shaikha-binjasim> accessed 30 October 2019.

[204]A Donald and E Howard, 'The Right to Freedom of Religion or Belief and its Intersection with other Rights' (2015) International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) <https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf> accessed 30 October 2019.

[205] *Handyside v. UK* Application No 5493/72(ECtHR 7 December 1976) para 49.

[206] *Erbakan v. Turkey* Application No 59405/00 (ECtHR 6 July 2006) para. 56; *Kokkinakis v. Greece* Application No 14307/88 (ECtHR 25 May 1993); *Larissis and Others v. Greece* Application Nos 23372/94, 26377/94 and 26378/94 (ECtHR 25 February 1998).

religion or the religion of others clearly violates the right to freedom of expression. Even if blasphemy laws are used to tackle hate speech,[207] in the case of Binjasim, her statement did not incite hatred. Thus, the application of blasphemy legislation was an attempt to target the defender, thereby violating her right to freedom of expression.

The energetic misapplication of legislation as well as the restrictions on defenders' activities not only constitutes considerable interference with the free exercise of their rights, but also has ruinous consequences for HRDs. As a result of those measures, many human rights NGOs and defenders have been labelled as criminals or enemies of the public interest. This title fosters hatred, and as a result several defenders and personnel of organisations have been subjected to isolation, harassment, and even physical attacks by other members of the society within which they live.[208]

4.4.3. Abuse of Administrative Power: The Effective Employment of Punitive Mechanisms

Arbitrary arrests and detentions, false charges against HRDs, failure to inform defenders of charges brought against them and to admit key evidence are few of the flaws in the judicial systems of states that are used to criminalise HRDs.[209] However, the lengthy judicial proceedings to which defenders are subjected is the most commonly used strategy to keep defenders busy with their defence, distracting them from their human rights activities and to exhaust HRDs' financial resources. Some of the participants who have been subjected to long and unfair judicial proceedings also confirmed that this method is used to make them cease their activities.[210] In particular, Participant 16 stated:

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[207]Agnes Callamard, 'Freedom of Speech and Offence: Why Blasphemy Laws are not the Appropriate Response' (2006) European Monitoring Centre on Racism and Xenophobia *(EUMC)*<https://www.article19.org/data/files/pdfs/publications/blasphemy-hate-speech-article.pdf> accessed 30 October 2019.
[208] Third Party Intervention (n 145), para 41, 12; Protection International, 'New Protection Manual for Human Rights Defenders' (2009) 24 < https://www.protectioninternational.org/wp-content/uploads/2012/04/Protection-Manual-3rd-Edition.pdf> accessed 30 October 2019.
[209] Front Line Defenders (n 71), 5.
[210] INTV 1, 18.2.2018; INTV 16, 8.2.2018.

'Since 2015 January we've had this criminal matter [stopping the loggers from harvesting the trees] *that never proceeds. We have been stuck, we have not been able to continue our human rights activities because, you know, the criminal proceeding is expensive and members of the community are really poor. It actually takes too long because the intention was not really to take them into the Court; the intention was to stop our human rights work. We are weak financially, so we stopped. We don't have the money to continue with human rights work and at the same time we are in court, paying lawyers, people paying transport to go to court. It's really expensive.'*[211]

The Inter-American system has dealt with numerous cases of the misapplication of law from judges as a means of impeding the work of HRDs, thus this Section draws upon its reasoning.

The ICCPR, as well as the ECHR and the ACHR, have identical provisions regarding the right to a hearing, with due guarantees and within a reasonable time by an independent, competent and impartial tribunal established by law.[212] With reference to the reasonableness of the duration, the Inter-American Court held that it is necessary to take into account four elements to determine whether the period is reasonable: a) the complexity of the issue; b) the procedural activity of the interested party; c) the function of judicial authorities; and d) the impairment to the legal situation of the person involved in the proceedings.[213]

On the final element, the IACtHR has indicated that if the passage of time has a damaging impact on the legal situation of the individual involved, it will be then necessary that the process should be undertaken in a careful and detailed way, in order that the case can be resolved promptly. Defenders subjected to lengthy judicial proceedings must spend time and money on their defence and as a result they cannot concentrate on their activities and become less productive.[214] In other words, lengthy criminal proceeding exhaust defenders and those seeking to silence them in this manner achieve their goal.

Undoubtedly, the most severe precautionary measure that can apply to an individual accused of committing a crime is pre-trial detention. The latter should be considered

[211] INTV 16, 8.2.2018.
[212] ICCPR, art 9 (3); ECHR 6 (1); ACHR Article 8.
[213] *Kawas Fernandez v. Honduras* (IACtHR 3 April 2009)para 112.
[214] Criminalization of the Work of Human Rights Defenders (n 69), para 90.

an exception, as it limits the principle of proportionality and presumption of innocence.[215] Imprisonment constitutes a punishment before conviction and only a court is able to decide upon the innocence of a person.[216] In particular, an individual faces not only personal consequences, such as loss of physical liberty and separation from family, but also social consequences including stigma and ostracism from the society.[217]

On the other hand, one may argue that a person suspected of committing a crime could escape from the jurisdiction and commit the same or a new crime or threaten the safety of a witness. However, there are less severe alternatives to detention, such as bail, prohibition of leaving a temporary residence, obligation of reporting and performing unpaid community work,[218]which are more respectful to the fundamental rights of individuals. It seems, therefore, there is rather consensus amongst academics that protecting the innocent is better, even at the expense of letting the guilty escape.[219] Detention should be a last resort, where less intrusive measures had been tried and proved to be insufficient.

With regard to HRDs, the IACHR reported that there are defenders who have fallen victims of criminalisation, while prosecutors accentuate the accusations in order to bring more serious charges that allow pre-trial detention.[220] The ultimate aim is to deprive HRDs of their liberty from the beginning of the process and render them as ineffective as possible.[221] In essence, this measure has consequences for the individual not only as a human and social being, but also as a person fighting for rights and democracy.

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[215] One must be presumed to be innocent until proven guilty in a court of law.
[216] Jeff Thaler, 'Punishing the Innocent: The Need for Due Process and the Presumption of Innocence' (1978) 1978 (2) Wisconsin Law Review 441.
[217] François Quintard-Morénas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 (1) The American Journal of Comparative Law 109, 143.
[218]Andrei-Viorel Iugan, 'The Judicial individualization of the Punishment. Alternatives to Detention in the United Kingdom Criminal Law' (2016) Challenges of the Knowledge Society' 81, 82-83.

[219] John A Washington, 'Preventative Detention: Dangerous until Proven Innocent' (1988) 38 (1) Catholic Law Review 271, 272-273.
[220] Criminalization of the Work of Human Rights Defenders (n 69), para 99.
[221] ibid.

4.5. Strategic Lawsuits against Public Participation (SLAPPs)

It has been pointed out in this thesis that NSAs are one of the main violators of defenders' rights. Although the participants did not refer to the use of legislation by NSAs as a method of abuse because that they had not experienced such violations by NSAs, a series of recent studies has indicated that corporations tend to use litigation as a tool to target and silence HRDs that challenge their activities. This phenomenon is known as Strategic Litigation against Public Participation (SLAPPs) and differs significantly from other kinds of lawsuits because they seek to silence those who play a watchdog role in the society and it is therefore worth considering it in detail in the context of this Chapter.

One of the latest research projects of Business and Human Rights Resource Centre showed that between 2015 and 2018 24 SLAPPs were filed against 71 HRDs by giant corporations seeking more than $904 million (£693 million) in damages.[222] However, these types of lawsuits are not an entirely new phenomenon as it was conceptualised in the United States during the 1960s and 1970S. In particular, in the 1960s, for the first time, such lawsuits were brought against civil right activists who called for a boycott of white merchants in Clairborne County, in Mississippi to exert pressure on corporation leaders and governmental bodies to end racial discrimination.[223]

Even though such legal actions can take any form, in fact SLAPP suits are brought as claims based on defamation law used to create suspicion towards defenders and diffuse their attention from their human rights work.[224] More specifically, regardless of the outcome of the litigation, the logic behind this strategy is to exhaust financially the defenders by enforcing them to spend huge amounts of money on their legal defence

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[222] Elodie Aba and Ana Zbona, 'Investors Can Help Prevent Companies Using Frivolous Lawsuits to Silence Human Rights And Environmental Defenders | Business & Human Rights Resource Centre' (*Business-humanrights.org*, 2019) <https://www.business-humanrights.org/en/investors-can-help-prevent-companies-using-frivolous-lawsuits-to-silence-human-rights-and-environmental-defenders> accessed 13 February 2020.

[223] Robert Adams, 'Strategic Lawsuits against Public Participation (SLAPP)' (1989) 7 Pace Environmental Law Review 33, 39.

[224] Joshua R Furman, 'Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits against Online John Does as Strategic Lawsuits against Public Participation' 25 (1) (2001) Seattle University Law Review 213, 215; Carson Hilary Barylak, 'Reducing Uncertainty in Anti-SLAPP Protection' (2010) 71 (4) Ohio State Law Journal 845, 851; T Murombo and H Valentine, 'Slapp Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 (1) South African Journal on Human Rights 82, 84; Sean P Trende, 'Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem' (2006) 44 (4) Duquence Law Review 607, 615.

and most importantly, to distract them from their work.[225] It could be argued that the ultimate aim of taking such legal actions against HRDs is not different from that of states authorities that use legislation to target HRDs, as stated earlier in this Chapter.

There are various examples of such unjustified legal actions against HRDs. In particular, in Germany, Paypal initiate legal proceeding against the famous NGO SumOf US committed to putting a brake on the growing power of corporations for a peaceful protest outside the company's headquarters in Berlin. The NGO protested against the company's connections and business relationship with the neo-Nazi group Pro Chemnitz that used Paypal to raise funds to promote the group's activities based on hate speech.[226] Also, since 2016, the Thai-owned poultry farm, Thammakaset Company has filed more than 13 criminal and civil charges against at 14 HRDs who reported labour rights abuses to the Department of Protection and Labour Welfare.[227]

Private corporations' attempts to misuse laws to cease the human rights activities of HRDs not only violates fundamental rights protected under international human rights law, such as the right to freedom of expression and assembly, but also have a damaging impact on the promotion of human rights.

[225] Jeremie Gilbert, 'Silencing Human Rights and Environmental Defenders: The Overuse of Strategic Lawsuits Against Public Participation (SLAPP) by Corporations' (*Grain.org*, 2018) <https://www.grain.org/en/article/5971-silencing-human-rights-and-environmental-defenders-the-overuse-of-strategic-lawsuits-against-public-participation-slapp-by-corporations> accessed 15 February 2020.
[226] Patrick Beuth, 'Kein Geld Für Rechtsextreme: Paypal Stoppt Spenden An Pro Chemnitz - DER SPIEGEL – Netzwelt' (*Spiegel.de*, 2019) <https://www.spiegel.de/netzwelt/web/paypal-stoppt-spenden-an-pro-chemnitz-a-1298187.html> accessed 15 February 2020; 'URGENT: Paypal is Pressing Charges' (*SumOfUs*) <https://actions.sumofus.org/a/can-you-chip-in-to-help-defend-us-against-paypal> accessed 15 February 2020.
[227] Lawyers' Rights Watch Canada, 'Eight-nine Organizations Denounce SLAPP-suits against Human Rights Defenders by Thai Poultry Corporation (2019) 1 < https://www.lrwc.org/eighty-eight-organizations-denounce-slapp-suits-against-human-rights-defenders-by-thai-poultry-corporation-press-release/> accessed 15 February 2020.

4.6. Conclusion

The violations committed against HRDs through legal actions constitute a significant obstacle to the activity as well as life of HRDs in the sense that it distracts defenders from their human rights activities, which may have a detrimental effect on the exercise of democracy and rule of law. It can be seen from the examples deriving from the empirical research as well as from the reports of NGOs that besides the ordinary abuses against defenders, states use legal systems to impede the work of HRDs under the cloak of national security and public order. However, this Chapter showed that this method is not consistent with the applicable legal criteria; on the contrary, it is a clear violation of their international obligations.

Of great importance is the fact that criminalisation demonises the concept of promoting human rights by portraying those fighting for them as criminals or enemies of the State. HRDs are stigmatised and, as a consequence, several have been subjected to attacks by other members of society. The legitimacy of their work is heavily questioned and their reputation is damaged, making it difficult for them to carry out their human rights activities effectively. Even if the abuses through legal actions are not as cruel as, for instance, torture or other extra-legal actions, one should keep in mind that the end result is the same; both legal and extra-legal actions aim to target defenders, silence them and render them inefficient.

Chapter 5

Impunity for the Crimes Committed against Defenders

5.1. Introduction

Besides the misapplication of legislation, HRDs are subjected to serious human rights violations, such as torture, murders, enforced disappearances and intimidation. However, most of the abuses against HRDs remain unpunished, exacerbating the circle of violence against defenders and constituting a major obstacle to their human rights activities and thereby to the realisation of human rights.[1] The purpose of this Chapter is to present impunity as a legal obstacle to work and life of HRDs and to emphasise the state's failure to hold those behind violations against defenders accountable for their actions. On this basis, this Chapter seeks to show how international human rights law does not address - or more accurately - contributes to impunity. Notably, the Chapter does not discuss the psychological effect of impunity on the personality and work of HRDs, as it is beyond the scope of this project.

This Chapter is divided into four Sections: the first Section seeks to explore the states' obligations under international human rights law on the basis that states have the primary responsibility to uphold human rights and most importantly, to

[1] UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, Hina Jilani, 10 September 2001, UN Doc A/56/341 4 (hereinafter Report of the UN Special Rapporteur on Impunity, Legal Actions, Intelligence Activities and Smear Campaigns against Defenders) paras. 9-19; Committee on Enforced Disappearances, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the Situation of Human Rights Defenders and the Special Rapporteur on Violence against Women, Mexico: UN rights Experts Strongly Condemn Killing of Human Rights Defender and Call for Effective Measures to Tackle Impunity, 19 May 2017 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21640&LangID=E> accessed 30 October 2019; 'End Impunity For Attacks against Human Rights Defenders and Enact Laws For Their Protection' (*ISHR*, 2018) <https://www.ishr.ch/news/end-impunity-attacks-against-human-rights-defenders-and-enact-laws-their-protection> accessed 30 October 2019; 'Tackling Impunity: Expectations and Challenges Facing the Human Rights Council' (*fidh, Worldwide Movement for Human Rights*, 2018) <https://www.fidh.org/en/international-advocacy/united-nations/Tackling-impunity-expectations-and-12172> accessed 30 October 2019.

emphasise their failure to prevent and reduce violations committed against HRDs within their jurisdiction. More specifically, in order to define states' obligations, it relies on the nature of human rights obligations with the focus on treaty law, as much of international human rights law is regulated by treaties. Although the concept of due diligence within the context of international human rights law was briefly addressed earlier in this thesis, the first Section discusses the dichotomy of positive and negative obligations in more detail, elaborating on the obligation to 'respect and ensure'. Additionally, because the rights of HRDs are often violated by private parties as well as positive action on the part of the state is regularly required to ensure full protection of their rights, it also develops the tripartite typology of human rights obligations, providing a more holistic approach to the nature of human rights obligations.

The second Section addresses the responsibility of NSAs for abuses and emphasises the absence of an international instrument imposing obligations on NSAs. Emphasis is also placed on the UNGPs which have been considered the first steps towards regulating the legal responsibility of NSAs. It should be highlighted here that the purpose of the Section is not to discuss either the status of NSAs in the international legal system or the various conceptions of legal personality in international law, as both go beyond the scope of this study.

The third Section discusses the right to an effective remedy enshrined in major international and regional instruments as a right of the victim, in conjunction with the right of an individual to see the perpetrators prosecuted. It also considers the duty of the state to prosecute those deemed responsible for human rights violations.

Despite the state's obligations and the concept of due diligence, impunity does exist, so it seeks to explain why it prevails. In particular, it focuses on cases where defenders choose not to report the abuses and prosecute the violators, but most importantly, it emphasises the inability of states and lack of will to prosecute and punish those who abuse defenders' rights. The reason behind the decision of the government not to investigate and prosecute those responsible for abuses against defenders is rather obvious; state authorities and powerful stakeholders are behind

these attacks and therefore the attribution of accountability would entail a serious political cost.[2]

This Chapter draws upon the experiences of defenders to show that impunity does exist and constitutes a significant obstacle to their activities, even though it should not. Any tolerance of abuses encourages further violations, which aim at ceasing the activities of defenders. On that basis, increasing violence against defenders may eventually have an impact on their work, which could also be a terrible blow to the realisation of human rights. Therefore, it intends to highlight that states must comply with their human rights obligations, act diligently and finally break the vicious cycle of violence and abuses against defenders.

[2] Business and Human Rights Resource Centre, 'Latin American Briefing: Focus on Human Rights Defenders under threat and attack' (2017) 1-2 < https://www.business-humanrights.org/sites/default/files/Formated%20-%20Latin%20America%20and%20Caribbean%20Briefing-HRDs-2017-Final_0.pdf> accessed 30 October 2019.

5.2. States' Failure to Comply with their Obligations under International Human Rights Law and Prevent Human Rights Violations

5.2.1. State Authorities as Violators of Defenders' Rights[3]

As pointed out several times so far, HRDs are victims of murders, abductions, torture and are also targeted through legislation. Also, it has been highlighted from the very beginning that the violators of defenders' rights can be states authorities as well as NSAs. However, in most of the cases, states authorities are those directly responsible for the abuses committed against HRDs. Undoubtedly, states are at the same time the primary duty-bearers of human rights obligations and the main perpetrators of rights abuses, however paradoxical and illogical this sounds.

It is remarkable that the vast majority of the participants identified state authorities, such as police, security and intelligence services as well as government officials and Members of Parliament, as those behind the abuses against them.[4]

Indicatively, Participant 10 stated that:

'I was threatened to be arrested and sentenced to several years of imprisonment by the Security Services and by the Prosecutor's office if I continued to support a political prisoner.'[5]

In the same vein, Participant 14 said that:

'We were harassed by police and by agents of the local and state government.'[6]

[3] Under international law states may be responsible for the conducts of NSAs in certain circumstances. However, this Section of the thesis focuses on the violations committed by de jure agents, as it is more common for police, security forces to abuse HRDs. This by no means indicates that states cannot be responsible for the acts of NSAs.
[4] INTV 1, 18.2.2018; INTV 2, 22.2.2018; INTV 3, 26.2.2018; INTV 4, 4.6.2018; INTV 5, 18.2.2018; INTV 6, 27.6.2018; INTV 7, 12.2.2018; INTV 8, 13.3.2018; INTV 9, 13.2.2018; INTV 10, 17.2.2018; INTV 11, 17.6.2018; INTV 12, 9.2.2018; INTV 14, 24.2.2018; INTV 15, 17.6.2018.
[5] INTV 10, 17.2.2018
[6] INTV 14, 24.2.2018

A state is responsible for the conduct of all persons that have been elected or appointed as organs of the state by an act of domestic law as long as they act within their capacity.[7] They can be described as *de jure* agents and may be, for instance government officials, civil servants, police and security forces.[8] Acts of the legislative, executive and judicial are also attributable to the state.[9]

The Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) is clear and provides that: [c]ases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.'[10] That means if a police officer tortures a defender in the course of an interrogation, regardless of whether or not the conduct is legal, according to the state's domestic law, this conduct is attributed to the state and as a result the latter has breached the prohibition of torture. If the same police officer, when he or she is off duty, attacks his or her neighbour because he or she does not approve of his or her human rights activities, this conduct cannot be attributed to the State.

As mentioned at the beginning of the thesis, police, security forces and intelligence agents are responsible for numerous human rights abuses against defenders, such as arbitrary arrests, torture and murders. That being said, there is no question that states are ignoring their human rights obligations. On this basis, the intention of this Section is to explore the nature of human rights obligations, in order that it can discuss the responsibility of states for the violations against HRDs.

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[7] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, 10 ILC Supplement No 10 (A/56/10) (hereinafter Draft Articles), art 5.
[8] Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non- State Actors' (2005) 11 Buffalo Human Rights Law Review 21, 48-49.
[9] Draft Articles (n 7), art 4.
[10] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) 2 vol II Yearbook of the International Law Commission 46.

5.2.2. The Nature of Human Rights Obligations

There is a view that fundamental human rights, such as the right to life, pre-exist their legal recognition as they exist in nature.[11] In other words, human rights obligations have a meaning of their own that is formalised once states declare their commitment to the realisation of human rights.[12] Much of international human rights law is now codified, as states have manifested their commitment to recognising and respecting human rights and to be bound by a series of international and regional human rights treaties.[13] Hence, human rights obligations derive mainly from human rights treaties.

i) Positive/Negative Dichotomy

Article 2 (1) of the ICCPR establishes the most fundamental human rights obligation; the obligation to 'respect and ensure' all rights enshrined in the Covenant, while the corresponding provision of the sister Convention, namely Article 2 (1) of the ICESCR, provides that: '[e]ach State Party to the present Covenant undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.'[14] Even though the obligation deriving from the ICCPR is immediate and the other progressive, it is safe to say that both provisions entail positive and negative duties. This Section discusses the nature of human rights obligations on the basis of the ICCPR, as the civil rights of HRDs are those widely violated. It is worth noting that regional human rights treaties, also aimed at the

[11]R Cruft, S Matthew Liao and M Renzo, *Philosophical Foundations of Human Rights* (OUP 2015) Chapter 16; Jean Porter, 'From Natural Law to Human Rights: Or, Why Rights Talk Matters' (1999) 14 (1) Journal of Law and Religion 77, 84.
[12] Frédéric Mégret, 'Nature of Obligations' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 100.
[13] International human rights obligations differ significantly from traditional international law obligations, as they are agreements, typically between states, that address the obligation of states towards individuals. In essence, the beneficiaries of the agreement are third parties, namely the individuals within the State's jurisdiction. The State must respect and ensure the full enjoyment of human rights enshrined in the treaty concerned without expecting from the other State parties to do the same. Some of the core UN human rights treaties are the ICCPR, the ICESCR, the International Convention on the Elimination of Racial Discrimination (ICERD), Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (UNCAT) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Regional human rights treaties are the ECHR, the ACHR and the African Charter.
[14] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art2 (1).

protection of civil and political rights, such as the ACHR and the ECHR, contain similar provisions.[15]

In the case of *Velásquez Rodríguez v. Honduras,* the IACtHR interpreted the obligation to 'respect and ensure' the rights and freedoms of the Convention to all persons and laid the foundation for the concept of due diligence in international human rights law.[16] In particular, the Court held that Article 1 implies that the duty to 'respect' indicates an obligation to refrain from interfering with the exercise of a right (negative obligation),[17] while the duty to 'ensure' requires 'governmental conduct which effectively ensures the free and full exercise of human rights' (affirmative/positive obligation or the duty of performance).[18] In other words, states are obliged to give effect to the rights by taking the appropriate legal, judicial, administrative and all other necessary measures. As pointed out elsewhere, in international human rights law, the concept of due diligence focuses on the internal affairs of states, which means that states have the obligation to comply with their obligations diligently. On this basis, the 'positive/negative dichotomy' is part of the principle of 'due diligence' within the context of international human rights law. As will be seen later in this Chapter, redress for human rights abuses also constitutes an aspect of the principle. For that reason, when such measures have not proved to be sufficient to prevent human rights violations, states should carry out prompt and impartial investigation and provide an effective and adequate remedy.[19]

The Velásquez Rodríguez case is a leading case among cases applying the 'respect and ensure' duty for the first time, as it established the dichotomy of positive and negative obligations and laid the basis for state responsibility for abuses committed by private parties. The Human Rights Committee as well as the ECtHR endorsed

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[15]Article 1 of the ACHR uses the wording 'respect and ensure' to describe the human rights obligations deriving from the Convention, while the corresponding provision of the ECHR uses the wording 'secure'. However, the term 'secure' has been interpreted to include both 'ensure and respect'. See, Velli–Pekka Viljanen, 'Abstention or Involvement? The Nature of State Obligation Under Different Categories of Rights' in K Drzewicki, C Krause and A Rosas (eds), *Social Rights as Human Rights: A European Challenge* (Institute for Human Rights, Åbo Akademi University 1994) 52-60.

[16] American Convention on Human Rights (entered into force 18 July 1978), art 1.

[17] *Velasquez Rodriguez v Honduras* (IACtHR 29 July 1988) paras 165-166.

[18] ibid, 166-167.

[19] ibid, 160-167, 182.

this interpretation and relied on the IACtHR's reasoning,[20] but developed it a bit further, articulating that the 'respect and ensure' provision are of accessory character.[21] In essence, the accessory nature of a provision means that the provision concerned can be violated only in combination with other substantive rights enshrined in the Convention.[22]

In addition, with regard to the positive obligation, General Comment 31 states that:

> The positive obligation on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities [...]. [23]

The point here is that the affirmative duty entails the horizontal effects of certain human rights. In particular, human rights with horizontal effects are those rights that impose on the State the duty to intervene and provide protection against private interference. By nature, human rights with horizontal effects cannot be rights where the harm is caused by the action of the State, such as the right to an effective remedy under Article 2 of the ICCPR. In short, the concept of 'horizontal effects' means that certain human rights, such as the right to life under Article 6 (1) of the ICCPR and the right to personal security under Article 9 (1),[24] produce effects on the horizontal level between private parties and not on the vertical level, namely

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[20] UN Human Rights Committee, General Comment No 17 'Article 24 Rights of the Child', 7 April 1989, UN Doc HRI/GEN/1/Rev.9 (Vol. I) paras 10 and 18; UN Human Rights Committee, General Comment No. 28 'Article 3 The Equality of Rights Between Men and Women', 29 March 2000, UN Doc CCPR/C/21/Rev.1/Add.10 para. 3; *Rees v. United Kingdom* Application No 9532/81 (ECtHR, 17 October 1986) para.35; *Lopez Ostra v. Spain* Application No 16798/90 (ECtHR 9 December 1994) para. 51.

[21] *Ireland v UK* (ECtHR 18 January 1978) para 238; *Lubicon Lake Band v Canada* Communication No167/1984 (26 March 1990) UN Doc CCPR/C/38/D/167/1984 para 32 (1); *E.P et al v Colombia* Communication No 318/1988 (15 August 1990) UN Doc CCPR/C/39/D/318/1988 para 8 (2)

[22] Manfred Nowak, *UN Covenant on Civil and Political Rights* (Engel 1993) 34-35.

[23] UN Human Rights Committee, General Comment No. 31 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 29 November 2004, UN Doc CCPR/C/21/Rev.1/Add. 13 para 8.

[24] Human rights with horizontal effects are, for example, the right to privacy pursuant to Article 17 (2) of the ICCPR, the protection of the family and children under the principles laid down in Articles 23 and 24, the right to equal protection of the law and to protection against discrimination pursuant to Article 26 or the protection of minorities in Article 27. Similar provisions can also be found in regional human rights treaties.

between individuals and the State.[25] In other words, the duty to take measures to ensure the enjoyment of human rights also requires that the State should take measures to protect an individual from another individual or group of persons.

For example, Shaninda Ismail is a prominent human rights activist in Maldives advocating against religious fundamentalism and fighting for deradicalisation. Several articles accused Shaninda of promoting other religions rather than Islam in Maldives and portrayed her as an apostate. As a consequence of those articles, she has been threatened with disappearance, death, rape and severe physical abuses. The police have not investigated the threats she reported and have not provided adequate protection.[26] According to *Dalgado Paez v. Colombia*, Maldives[27] has to ensure the Shaninda's right to security under Article 9 (1) of the ICCPR and to provide efficient protection against the threats made by various NSAs.[28] The point here is that in the context of due diligence states have to take positive measures to ensure the full enjoyment of HRDs' rights. This duty encompasses the duty to take all necessary measures to protect a defender and his or her family from private interference.

Furthermore, Article 2 (3) of the ICCPR provides that 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy [...]', while in the Velásquez Rodríguez case, the IACtHR insisted that:

> The state is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with the duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[29]

Failure to refrain from human rights violations or to take the appropriate measures entails the duty to take the proper steps to investigate and provide remedy. The duty

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[25] Nowak (n 22), 38.
[26] 'Shahindha Ismail Targeted by News Article, Death Threats and Police Investigation' (*Front Line Defenders*, 2018) <https://www.frontlinedefenders.org/en/case/shahindha-ismail-targeted-news-article-death-threats-police-investigation> accessed 30 October 2019.
[27] Maldives ratified the ICCPR in 2006.
[28] *William Eduardo Delgado Páez v Colombia* Communication No 195/1985 (12 July 1990) Communication UN Doc CCPR/C/39/D/195/1985 para 5(6).
[29] *Velasquez Rodriguez v Honduras* (n 17) para 176.

to investigate and provide an effective remedy in an attempt to re-establish the right is part of the broader obligation to ensure the full exercise of human rights. In other words, the State must also take all necessary measures to be able to restore the full enjoyment of a right, if it fails to ensure it in the first place.

ii) The Obligations to Respect, Protect and Ensure

In 1960s and 1970s there was a significant gap between civil and political rights and economic, social and cultural rights. On the one hand, civil and political rights were considered to be 'immediately enforceable' rights, and on the other hand, economic, social and cultural were not well-defined and to be realised gradually.[30] In early 1980s, in order to highlight the importance of economic, social and cultural rights Asbjørn Eide introduced a threefold typology to explain how human rights obligations can be secured. According to Eide, an effective satisfaction of human rights requires that individuals should be protected from interference by the state in the exercise of their rights; that the state should protect the individual by other actors; that the state should provide all necessary means ensure the exercise of human rights.[31] State duty to protect people from the acts of NSAs was ensured, for the first time, through this approach.

The Committee on Economic, Social and Cultural Rights (CESCR), academic scholarship and bodies dealing with economic, social and cultural rights embraced the tripartite typology of states' duties corresponding to the rights of individuals.[32] More specifically, state responsibility for human rights violations can be analysed at three different levels: *respect, protect* and *fulfil*. According to that tripartite typology, a human right entails a 'spectrum of obligations': the one end represents the negative obligation – the obligation of non- interference- and the other one the

[30] Marc Bossuyt, 'La Distinction Juridique entre les Droits Civil et Politique et les Droits Economique, Sociaux et Cullutres' (1975) 8 Revue des Droits de l'Homme 783, 783.
[31]Asbjorn Eide, 'The International Human Rights System', in A Eide and W Barth-Eide (eds), *Food as a Human Right* (United Nations University Press 1984); V Dankwa, C Flinterman and S Leckie, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' in Olivier De Schutter (ed), *Economic, Social And Cultural Rights as Human Rights* (Edward Elgar 2013).
[32] UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 'The Right to Adequate Food', 12 May 1999, UN Doc. E/2000/22 102-110; Henry Shue, *Foundations for a Balanced U.S. Policy on Human Rights: The Significance of Subsistence Rights* (Center for Philosophy and Public Policy 1977).

positive obligation.[33] However, a specific duty can be found anywhere on the spectrum depending on the degree of state involvement and the resources required to ensure full enjoyment of the right.[34] In particular, the obligation to respect requires the same as discussed above, namely the duty to abstain from interfering with the exercise of the right. The obligation to protect describes the obligation of the State to protect an individual from other individuals and the obligation to take all necessary measures to ensure the full exercise of human rights and the satisfaction of people's needs.[35] The tripartite typology gradually gained acceptance, and the question arose was whether this threefold approach applies to civil and political rights, which are mostly violated in the case of HRDs.

The tripartite typology does not differ significantly from the positive/negative dichotomy. In essence, the obligation to abstain from interfering with the exercise of the right is the same in both typologies and the obligations to fulfil and ensure requires also the same.[36] The obligation to ensure seems to be broader, as it encompasses the horizontal effects as well as all possible measures to ensure the full exercise of human rights (from trainings and legislative and social measures to those measures providing redress for the victims). In addition, this trichotomy has more relevance to economic, social and cultural rights in the sense the implementation of these rights tends to require more of a range of measures and resources than civil and political rights. It is also worth noting that proponents of the tripartite typology are of the opinion that it applies to all human rights - economic, social, cultural, civil and political in the sense that some civil rights have resource implications and require state assistance at all levels.[37] For instance, in relation to the right to life, obligations not to interfere with the right, keep someone alive or protect him from being killed by third parties require that public official are

[33] Magdalena Sepúlveda Carmona, *The Nature of the Obligations Under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia 2003) 138.
[34] ibid.
[35] Ida Elizabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 (1) Human Rights Law Review 81, 85; Mégret (n 12), 102-104.
[36] Koch (n 35), 87.
[37] Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (2nd edn, Martinus Nijhoff Publishers 2001) 24-25.

given the necessary guidance on the content of the right and know how to react to ensure the right concerned.[38]

Despite the fact that the threefold approach has relevance to both sets of rights, the tripartite typology has not gained ground within those circles working on civil and political rights.[39] In any case, the tripartite typology is relevant in understanding the range of duties that apply to states in protecting HRDs' civil and political rights, even though the dichotomy of 'respect and ensure' obligations applies to these types of rights.

In sum, states must comply with their positive and negative obligations based on the concept of due diligence. If state authorities fail to comply with the negative obligation to refrain from violating human rights or the positive duty to create the necessary conditions for enjoyment human rights, then the State must provide an adequate and effective remedy. Failure to restore the full exercise of human rights means failure to comply with human rights obligations, which, in turn, means that a state may incur responsibility for violations of treaty provisions. As will be seen below, customary international law may apply if a state is not party to a human rights treaty.

[38] Carmona (n 33), 135- 139.
[39] Koch (n 35), 87.

5.3. Responsibility of NSAs for Human Rights Violations

The responsibility of NSAs for human rights violations is a quite controversial and challenging issue in international human rights law, as all human rights treaties concern states and constitute sets of obligations for states. As a result, the only bearer of international human rights obligations is the State and the responsibility for abuses committed by NSAs remains unregulated. The point of this Section is to explore the responsibility of NSAs for human rights violations, since, as already discussed earlier in the thesis, they are among the abusers of the defenders' rights.

It is worth noting that although the vast majority of the participants identified state actors as the main violators of their rights, Participants 3, 4 and 7 stated that they have been attacked not only by state actors, but also by NSAs. More specifically, they stated:

'I was perpetrated by men involved in child prostitution [that she denounced]*, the other aggressions were by police officers accused of torturing, raping and executing adolescents and youth in the "favelas".'*[40]

'The perpetrators were state, Talibans, Chinese investors, anyone else I cannot think of now.'[41]

And

'I have been attacked by different people. I've been attacked directly by my family, by public, and by parliamentary leaders.'[42]

Despite the considerable emphasis on the individual responsibility for war crimes, genocide and other crimes against humanity started with the Nuremberg tribunals in 1940s, and then the establishment of the International Criminal Court (ICC) as well as the recognition of direct responsibility of armed groups in international humanitarian law, international human rights law remains more state-centric than other areas of international law, excluding NSAs from direct responsibility for human rights violations. The main reason behind the state reluctance to allow state-like features, such as human rights obligations, to NSAs, is the fear of undermining

[40] INTV 3, 26.2.2018.
[41] INTV 4, 4.6.2018
[42] INTV 7, 12.2.2018.

the responsibilities of states.[43] Even though there are scholars who examine and place particular emphasis on the role of NSAs in domestic human rights implementation,[44] leading international lawyers, such as Richard Falk and Christian Tomuschat,[45] acknowledge the role of NSAs in the international legal system, but are not willing to depart from a system that has taken significant time, resources and human effort to achieve. They still believe that states are the predominant actors within the international context, and what needs to be regulated, should be done within the constraints of the existing system.[46] At the same time, it should not be neglected NSAs, for their part, are not keen to take on responsibilities that traditionally belong to states.[47]

Although NSAs do not have legal obligations under international human rights law, they have a duty to protect fundamental human rights. In particular, the UDHR provides that 'every individual and every organ of society [...] shall [...] promote respect for these rights and freedoms'[48] as well as 'everyone has duties to the community in which alone the free and full development of his personality is possible'.[49] In short, the UDHR does not impose direct obligations on NSAs to refrain from acts constituting violations of human rights. On the contrary, it calls all individuals and organs of society upon to respect human rights. In order to secure and respect the fundamental rights and freedoms enshrined in the UDHR, NSAs

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[43] Andrew Clapham, 'Non – State Actors' in D Moeckli, S Shah, S Sivakumaran, and D Harris (eds), *International Human Rights Law* (2nd edn, OUP 2014) 532.
[44] See for example, Andrew Clapham, 'The Use of International Human Rights Law by Civil Society Organisations' in S Sheeran and N Rodley (eds), *Handbook of International Human Rights Law* (Routledge, 2013); Rachel Brett, 'Non-Governmental Organizations and Human Rights' in C Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku/Abo, 2009); T Risse, S Ropp, and K Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP, 2013).
[45] Richard Falk, 'Democratizing, Internationalizing And Globalizing', in Y Sakamoto (ed), *Global Transformation: Challenges to the State System* (United Nations University 1994) 475, 488; Richard Falk, '*On Human Governance Towards a New Global Politics'* (Policy Press 1995) 212; C Tomuschat and J Thouvenin, *The Fundamental Rules of the International Legal Order* (Nijhoff 2006); Christian Tomuschat, *Obligations Arising For States without or against their Will* (The Hague Academy of International Law 1993); Christian Tomuschat, '*Human Rights: Between Idealism and Realism'* (OUP 2003) 90-93, 320.
[46] Phillip Alston, 'The "Not-a- Cat" Syndrome: Can the International Human Rights Regime Accommodate Non- State Actors?' in Philip Alston (ed), *Non-State Actors And Human Rights* (OUP 2011) 20-23, 36.
[47] ibid, 532.
[48] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) preamble para 8.
[49] ibid, art 29 (1).

should refrain from taking measures that would result in the violation of human rights.

By the same token, the Declaration on HRDs is more specific stating that 'no one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms'.[50] In other words, the Declaration is addressed not only to states and defenders, but also to NSAs who should refrain from impeding the enjoyment of human rights by HRDs.[51]

The responsibility of NSAs is limited to the duty of NSAs to respect the fundamental rights and freedoms, but they cannot be held responsible for human rights abuses. States are still the main bearers of human rights obligations and the only ones that could be held accountable for breaches of human rights under international human rights law. At this point, one could argue that only those who have had their rights violated by state actors can be considered 'lucky' enough[52] in the sense that the State is obliged to respect and ensure human rights and as a result to provide them with remedy, while there are no direct human rights obligations on NSAs. However, as stated earlier, according to the theories of both the tripartite typology and the dichotomy of human rights obligations, states have the obligation to protect individuals from other individuals by taking all necessary measures, including legislation, and imposing obligations on the members of society. In essence, states as the primary duty-bearers of human rights obligations have the obligation to regulate the individual responsibility of NSAs.

States have different constitutional systems that approach the relationship between international and national law, so in some states, once a state has ratified a treaty, then the treaty becomes automatically part of the domestic law. In most states,

[50] The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Res. 53/144, 8 March 1999, UN Doc A/RES/53/144 (hereinafter Declaration on HRDs), art 10.

[51] UN General Assembly, Report of the UN Special Rapporteur on the Situation of Human Rights Defenders, 4 August 2010, UN Doc A/65/226 (hereinafter Report on Violations Committed against Defenders by Non-State Actors) para 22.

[52] Nicolas Carrillo Santarelli, 'Non- State Actors Human Rights Obligations and Responsibility under International Law' (2008) 15 Revista Electronica de Estudios Internationales 1, 2.

however, treaties need to be incorporated into national law.[53] Regardless of the type of the constitutional system, once a state ratifies a treaty, it has the obligation to act diligently. For instance, once a state ratifies the Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment (UNCAT), it has the obligation to take all those measures to prohibit their citizens from torturing and inflicting inhuman treatment. In short, states have the obligation to adopt all the necessary legislation to regulate individual responsibility, so that NSAs can be held accountable for violations of human rights through criminal law or any other law within the domestic legal system.

Scholars, such as Clapham and Santarelli, are of the opinion that governments, especially those of developing countries, may be powerless to regulate giant corporations. In addition, violators may remain unpunished, as they can flee to another country with which the state has not concluded extradition agreements.[54] For these reasons, they suggest there should be a concept of international legal responsibility of NSAs for their acts. More specifically, claims against an NSA could be brought before non-judicial bodies such as Committees and Commissions and new alternative mechanisms and Courts that could be established with the task of addressing and judging violations committed by NSAs or before States themselves under universal jurisdiction. These mechanisms would be committed to determining whether NSAs have violated a human rights obligation for which they are responsible and the legal consequences that arise from their conducts.[55] Taking into consideration the reasons behind the non-existence of human rights obligations on NSAs mentioned earlier in this part, and the response of corporations and states to the Norms on the Responsibility of Transnational Corporations and Other Business Enterprise with Regard to Human Rights,[56] one can argue that both states

[53] Eileen Denza, 'The Relationship Between International and National Law' in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2014) 29-55; D Harris and S Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet & Maxwell 2015).
[54]Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 25; Santarelli (n 52), 2.
[55]Santarelli (n 52), 6.
[56] John G Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (2017) 67 Corporate Responsibility Initiative Working Paper – Harvard Kennedy School 8 <
https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pdf> accessed 30 October 2019; John G.Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York, Norton 2013) 45-47.

and certain NSAs, such as private corporations, would oppose to hard law imposing legal obligations and establishing monitoring mechanisms.

A counterargument to this concern would relate to the UNGPs,[57] which are the first official guidance of the Human Rights Council on private corporations' obligations in relation to business activity and human rights. In particular, the UNGPs can lay the foundation for drafting a human rights treaty on corporate responsibility. Despite the fact that they are not legally binding, as their status is similar to Declarations, guidelines and other UN resolutions, the Guidelines have established principles and standards of good practice, which more and more businesses comply with.[58] Additionally, they have led to international and national regulatory initiatives on business and human rights.[59] On this basis, one may argue that the UNGPs have made a start and paved the way for hard law that could impose obligations on NSAs and establish monitoring mechanisms, as those described right above.

However, John Ruggie, the initiator of UNGPs, made clear that the reason why the UNGPs gained acceptance is because they do not, by themselves, impose direct human rights obligations on private corporations. On the contrary, the UNGPs call on 'business to look to current internationally recognized rights for an authoritative enumeration, not of human rights *laws* that might apply to them, but of human *rights* they should respect.'[60] He also emphasised the existing legal obligations of states

[57] The UNGPs are the first instrument for preventing and addressing the risk of adverse impacts on human rights linked to business activity at international level. It includes three pillars outlining how states and business should act: i) the state duty to protect human rights; ii) the corporate responsibility to respect human rights, introducing the concept of human rights due diligence for businesses; and iii) access to remedy for victims of business- related abuses. The principles were unanimously endorsed by the Human Rights Council in 2011, but they are not legally binding. As a result, in practice, private corporations can be held accountable for human rights abuses through domestic law, unless multilateral and bilateral investment agreements have been concluded to oblige transnational companies to protect human rights.
[58] Maddalena Neglia, 'The UNGPs— Five Years on: From Consensus to Divergence in Public Regulation on Business and Human Rights' (2016) 34 (4) Netherlands Quarterly of Human Rights 289, 296-300.
[59] For instance, between 2011 and 2014, the European Union asked the Member States to issue a National Action Plan and define how they were going to implement UNGPs within their jurisdiction through national law and policies. In addition, the UK Modern Slavery Act, which was came into force in October 2015, has been designed to combat modern slavery and human trafficking in the global supply chain and applies to companies carrying out businesses in the UK.
[60] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (n 56), 14.

under international human rights law to protect against abuses by NSAs within their jurisdiction.[61] Ruggie concludes that the broad acceptance of UNGPs is due to their endorsement by states and support by key NSAs, including private corporations.[62]

In conclusion, it is not the purpose of this thesis to examine if the concept of international responsibility of NSAs is legally possible and how it can be implemented, but it should be said that history has shown that neither states nor third parties are willing to accept that businesses are duty bearers under international human rights law. Therefore, states should focus on their international human rights obligations and particularly, on their duty to protect against human rights violations by NSAs within their territory. That means what must be done to hold NSAs to account needs to be done within the existing regime, while any initiative, even non-binding, needs to enjoy the joint support of states and third parties.

[61] ibid, 12-13.
[62] ibid, 1-2.

5.4. The Right to an Effective Remedy

5.4.1. The Nature of the Right

The nature of a human right encompasses a duty to redress its violation. This is reflected in the Latin statement *ubi jus ibi remedium*, meaning that for every violation of a right, there must be a law providing a remedy.[63] No matter who is the violator if any of one's rights have been violated, the State has the duty to carry out prompt investigation and provide the victim with reparations. Failure to enact the necessary laws and provide the victim with an effective remedy contravenes with the principle of due diligence.

The right to a remedy requires the existence of an adjudicatory system to hear and decide on complaints (procedural dimension of the right), and the ability to redress if a violation of a right is found (substantive dimension).[64] In other words, the right to a remedy is of accessory character, meaning that it does not stand itself, but it requires the violation of other substantive right.[65] For that reason, a defender can obtain a remedy for torture because the right to life and the prohibition of torture, both substantive rights, have been violated.

The UDHR, the most important and accepted instrument of general human rights provides that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.[66] In addition, major international and regional human rights treaties, such as the ICCPR and the CAT,[67] provides for the right to an effective remedy. More importantly, the Declaration on HRDs also includes the right to an

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[63] 'Ubi Jus Ibi Remedium - Oxford Reference' (*Oxfordreference.com*) <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803110448446> accessed 30 October 2018.

[64] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 449, 479.

[65] Nowak (n 22), 34.

[66] UDHR, art 8.

[67] ICCPR, art 2 (3) and 9 (5), CAT art 13 and 14. The right to a remedy is also protected under several international and regional human rights treaties. In particular: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 6; ECHR, art 13; ACHR, art 7; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534, art 4 (g).

effective remedy,[68] which entails that states have the responsibility to provide those defenders whose rights have been breached with an effective remedy.

According to the wording of human rights treaties, remedies must be effective and adequate. Trindade exploring the meaning of an effective remedy in the context of the jurisprudence on exhaustion of remedies concluded that an effective remedy should give satisfaction to the claimant.[69] In parallel, Schachter is more specific, noting that 'undoing, repairing and compensating for violations' constitute rather effective reparation.[70] In any case, the logic behind an effective and adequate remedy is to restore the victim to his or her previous position, where possible. It is held that if restitution is not possible, monetary compensation creates the condition in which the claimant is no longer the victim.[71]

It is difficult and complicated to determine the extent to which a remedy is effective and adequate, as one should consider all relevant circumstances and the nature of the abuse and complaint.[72] The Human Rights Committee, through its case law, has developed extensively the meaning of an effective remedy, especially in relation to serious human rights violations as well as influenced other jurisdictions.[73]As mentioned above the Committee does not produce binding judgements, as regional human rights courts do. However, its case law constitutes authoritative interpretations of the ICCPR, in the sense that, since the ICCPR establishes legally binding obligations, any decision on the implementation of the ICCPR cannot go unnoticed.[74]

The Human Rights Committee seems to focus on the nature of the right involved and the features of the violations. More specifically, in cases of serious human rights violations, such as executions, enforced disappearances and human

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[68] Declaration on HRDs (n 50), art 9.
[69]Antonio A Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (CUP 1983) 11 -12.
[70] Oscar Schachter, 'The Obligation to Implement [ICCPR] in Domestic Law', in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 325.
[71] Dinah Shelton, *Remedies in International Human Rights Law. 3Rd Rev. Ed* (OUP 2015) 19.
[72] Nowak (n 22), 60 -61.
[73] David Valeska, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter – American Court' (2014) 3 (1) British Journal of American Legal Studies 259, 261.
[74]Anja Seibert-Fohr, 'The Fight Against Impunity under the International Covenant on Civil and Political Rights' (2002) 6 (1) Max Planck Yearbook of United Nations Law Online 301, 310.

trafficking; the Committee derives from the right to an effective remedy the obligation to conduct a prompt, impartial, and independent investigation in order to determine the factual circumstances of the abuse, and to identify those responsible. At this point, it should be made it clear that the obligation to investigate should focus on the means used rather than the results. In this sense, the State should initiate an investigation on its own initiative without delay and ensure that bodies responsible for the investigation is independent, impartial and free of bias.[75] Also, the State should ensure the centrality of the victims, facilitating victims' participation at all states of the investigation.[76] For instance, state authorities should ensure that victims can follow the process and provide them with efficient protection and security.[77]

In addition, an effective remedy may include a right of victims/or families of gross violations to know the truth.[78] However, among other remedies that are relevant to abuses against HRDs and have been required by the Human Rights Committee as effective remedies, are: compensation, which is the most common measure;[79] the adjustment of domestic legislation;[80] the release of detainees;[81] a public apology;[82] retrial under due guarantees;[83] protection of threats;[84] trial and punishment of those

[75] UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights Defenders, 15 July 2019, UN Doc A/74/159 para 41.
[76] ibid.
[77] ibid.
[78] *Almeida de Quinteros v. Uruguay* Communication No 107/1981 (21 July 1983) UN Doc CCCPR/C/19/D/107/1981 para. 14; *Aliboev v. Tajikistan* Communication No 985/2001 (18 October 2005) UN Doc CCPR/C/85/D/985/2001 para.6.7; *Staselovich v. Belarus* Communication No 887/1999 (3 April 2003) UN Doc CCPR/C/77/D/887/1999 para. 9.2.
[79]Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (1st edn, CUP 2011) 562.
[80]*Salgar de Montejo v. Colombia* Communication No 64/1979 (22 September 1982) Un Doc CCPR/C/15/D/64/1979, para 12; *Karakurt v. Austria* Communication No 965/2000 (24 March 2002) UN Doc CCPR/C/74/D/965/2000 para 10.
[81]*Polay Campos v. Peru* Communication No 577/1994 (6 November 1997) UN Doc CCPR/C/61/D/577/1994 para 10; *Koreba v. Belarus* Communication No 1390/2005 (25 October 2010) UN DOC CCPR/C/100/D/1390/2005 para 9.
[82]*William Lecraft v. Spain* Communication No 1493/2006 (27 July 2009) UN Doc CCPR/C/96/D/1493/2006 para 9.
[83]*Geniuval M. Cagas v. The Philippines* Communication No788/1997 (23 October 2001) UN Doc CCPR/C/73/D/788/1997 para. 9; *Kurbonov v. Tajikistan* Communication No 1208/2003 (16 March 2006) UN Doc CCPR/C/86/D/1208/2003 para 6.
[84]*Rajapakse v. Sri Lanka* Communication No 1250/2004 (14 July 2006) UN Doc CCPR/C/87/D/1250/2004 para 7.

responsible;[85] restitution of a victim's property;[86] (re) issuance of a passport;[87] and as can be seen practically in all communications, a guarantee that similar violations will not occur in the future.

5.4.1.1. The Right to See Violators of Defenders' Rights Prosecuted

Given the brutal violence against HRDs, the question that arises is whether a defender has the right to see his or her violator to be prosecuted based on the right to an effective and adequate remedy. At this point, it should be highlighted that the right to a fair trial does not apply, as it is the right of the accused and not of the victim in criminal proceedings. Furthermore, the Human Rights Committee has denied the right to see someone prosecuted within the right to a remedy on the basis that remedy basically means redress for a violation.

Notably, the prosecution and punishment of a violator proves that the right of the victim was violated and shows the attempt to re-establish the validity of the right retrospectively.[88]As already pointed out, the obligation of 'respect and ensure' requires that the State should conduct prompt investigation provided that it has failed to take all necessary measures to protect human rights or such measures have not proved sufficient. That means in order for the competent state authorities to recognise the violation and to grant a remedy, an investigation into the alleged breach of the human right concerned is necessary. Moreover, the Committee in *Blanco v. Nicaragua* concluded that the mere investigation into the victim's allegations 'could be seen as a remedy under Article 2 para 3 of the Covenant'.[89] Consequently, the investigation into an alleged violation and possible prosecution could constitute vindication for the victim.

[85]*Sarma v. Sri Lanka* Communication No 950/2000 (16 July 2003) UN Doc CCPR/C/78/D/950/2000 para.11; *Kimouche v. Algeria* Communication No 1328/2004 (10 July 2007) UN Doc CCPR/C/90/D/1328/2004 para 9.
[86]*Simunek et al. v. The Czech Republic* Communication No 516/1992, (31 July 1995) UN CCPR/C/54/D/516/1992 para 12.2; *Blaga v. Romania* Communication No1158/2003 (30 March 2006) UN Doc CCPR/C/86/D/1158/2003 para 12; *Victor Drda v. The Czech Republic* Communication No 1581/2007 (27 October 2010) UN Doc CCPR/C/100/D/1581/2007 para 9.
[87]*Vidal Martins v. Uruguay* Communication No 57/1979 (23 March 1982) UN Doc CCPR/C/15/D/57/1979 para.10; *El Ghar v. Libyan Arab Jamahiriya* Communication No 1107/2002 (15 November 2004) UN Doc CCPR/C/82/D/1107/2002 para 9.
[88] Seibert-Fohr (n 74), 316.
[89]*Blanco v. Nicaragua,* Communication No 328/1988 (20 October 1994) UN Doc CCPR/C/51/D/328/1998 para. 9.2.

In *Bautista v. Colombia* the Committee stressed that in cases of serious human rights violations purely disciplinary and administrative remedies cannot be considered effective and adequate under Article 2 para 3,[90] while in *Messaounda Grioua v. Algeria* it established the duty of state to prosecute violators of human rights by stating that:

> It nevertheless considers the state party duty bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and violations of the right to life, but also to prosecute, try and punish the culprits. Thus, the State party is also under an obligation to prosecute, try and punish those held responsible for such violations.[91]

In short, undoubtedly, there is no individual right to see someone to be prosecuted within the meaning of the right to an effective remedy. On the contrary, the State has the obligation to prosecute those held responsible for abuses committed against HRDs.

5.4.2. The Duty to Prosecute

Even though the concept of due diligence and the 'respect and ensure' provisions do not explicitly recognise that the punishment of human rights violators is necessary to ensure and pay respect to human rights,[92] it is the only measure to give effect to fundamental rights.

Let us put that on the other way; if the State does not bring perpetrators of serious human rights violations, such as torture and the deprivation of life, to justice, impunity prevails. It is argued that impunity encourages more human rights violations[93] and has a chilling impact on the rule of law. Therefore, the reason

[90]*Bautista v. Colombia,* Communication No 563/1993 (27 October 1995) UN Doc CCPR/C/55/D/563 para. 8.2; UN Human Rights Committee, Summary Record of the 1398th meeting: Police- Civil and Political Rights- Periodic Reports- Amnesty- Human Rights- Laws and Regulations, 27 March 1995, UN Doc CCPR/C/SR.1398 para. 18.
[91] *Messaouda Grioua v. Algeria*, Communication No1327/2004 (10 July 2007) UN Doc CCPR/C/90/D/1327/2004 para. 9.
[92]Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 (4) Law and Contemporary Problems 41,47.
[93]*Rodriguez v. Uruguay* Communication No 322/1988 (19 July 1994) UN Doc CCPR/C/51/D/322/1988 para 12.4.

behind the punishment of human rights violators is to prevent future human rights abuses and break the circle of impunity. Remarkably, not every human rights abuse requires criminal prosecution and penalties.[94] Human rights violations constituting crimes and thus punishable by a sentence (incarceration or fine) require criminal prosecution due to the nature of the offence, while violations, such as interference with the right to freedom of association and expression could be remedied by the finding of the violation, an admonition or a monetary compensation.[95] Consequently, all violations require punishment in a broad sense in the way that the State should ensure respect for human rights.

This Chapter has covered so far the obligation of states to respect and ensure human rights under the principle of due diligence. More specifically, it focused on the state responsibility for the abuses against defenders as well as on cases where the State can be held accountable for the conduct of NSAs. On the other hand, the responsibility of NSAs for human rights violations committed against defenders derives mainly from national law. In any case, it concluded that abuses against HRDs trigger the right of defenders to an effective and adequate remedy. As highlighted, there is no individual right to see one prosecuted, meaning that a defender cannot demand the prosecution of the violator and the punishment for the abuse. On the other hand, in order to sustain the rule of law, states have the duty to investigate and impose suitable punishments on the violators, depending on the nature of the violation.

However, many states are not willing to bring the perpetrators of human rights violations to justice, failing to comply with their human rights obligations. As a result, those committed serious violations may be left unpunished and victims without effective remedy or monetary compensation for their suffering. The issue of impunity with regard to HRDs is of great importance, as the UN Special Rapporteur on HRDs has noted that several states have failed or neglected to investigate complaints of human rights abuses against defenders and to impose punishments on the violators.[96] For instance, according to the Mexican National

[94] Seibert-Fohr (n 74), 324.
[95] ibid.
[96] Report of the UN Special Rapporteur on Impunity, Legal Actions, Intelligence Activities and Smear Campaigns against Defenders (n 1), 4 para 10.

Network of Human Rights Defenders (RNDDHM), in 2014, 98.5 percent of attacks against defenders remained unpunished in Mexico, while between 2009 and 2013, in Colombia, 95 percent of crimes against defenders went unpunished.[97] It is noteworthy, as will be addressed in the following Section, that almost all Participants referred to their own or their colleagues' cases of impunity.

[97] Oxfam, 'The Risk of Defending Human Rights: The Rising Tiding of Attacks against Human Rights Activists in Latin America' (2016) 8 <https://www.oxfam.org/sites/www.oxfam.org/files/bn-el-riesgo-de-defender-251016-en.pdf> accessed 30 October 2019.

5.5. Impunity for Crimes Committed against Defenders

This Section does not seek to measure the degree of impunity for crimes committed against HRDs, as, in order to do so, one has to consider the number of human rights violations complaints combined with the number of those cases remained unpunished or inadequately punished.[98] However, the empirical findings show that defenders are working within systems where their attackers are able to act without fear of punishment. It has become clear that impunity for attacks and abuses against HRDs is so widespread for two main reasons: first, states protect the violators from facing the consequences of their conduct; and second, defenders themselves do not bring their perpetrators to justice. On this basis, the point of this Section is to argue that impunity constitutes another legal obstacle to work and life of HRDs, as it encourages further violations and perpetuates the cycle of violation against HRDs, rendering their work even more difficult and challenging.

The UN Commissioner on Human Rights defines impunity as:

> The impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, stressed, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[99]

In other words, impunity requires an officially or not policy of ignoring or insufficiently implementing laws against human rights abuses by states authorities in an attempt to insulate human rights violators from the legal consequences of their conduct.

A fairly novel argument developed in this thesis is that impunity is a separate type of human rights violation, constituting a conceptually distinct phenomenon which is not covered by existing human rights violations, as it may exist independently of other human rights abuses.[100] However, one of the main positions of this thesis is

[98] Nick Jorgensen, 'Impunity and Oversight: When Do Governments Police Themselves?'(2009) 8 (4) Journal of Human Rights 385, 388.
[99] UN Economic and Social Council, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, 18 February 2005, UN Doc E/CN.4/2005/102/Add.1.
[100] Jorgensen (n 98), 389.

that impunity must not be considered a separate category of human rights abuse, as it is closely related to the violation of the right to an effective remedy. As the latter is of accessory nature and requires the violation of other substantive right, impunity requires the absence of a remedy for an abuse or an insufficient punishment. For this reason, one can say that impunity is not a human rights violation, but the outcome of the violation of the right to an effective remedy, plus the violation of a substantive human right.

5.5.1 State Reluctance to Hold the Perpetrators Accountable

Almost all participants referred to the high degree of impunity for the crimes committed against them, while the majority said that the violators have never been prosecuted because they are protected by the State.

In particular, Participants 11 and 15 summarised the experiences of most of the other participants. Participant 11 stated:

> *'When I came back to Kenya, I tried to name them all and gave out everything. I was interviewed by Kenyan and international organisations. I wrote articles about those people. In Kenya, the government does not respect human rights and you know if the president doesn't respect human rights, what can you expect from the others? So it's difficult to come after those attacked you. What I got from my experience is that impunity exists in Kenya, so those violating the rights of HRDs are not held accountable.'*[101]

In the same vein, Participant 15 said:

> *'Actually, it was difficult. I reported the issue to the police, but they would never prosecute or accuse of anything a government official or anyone who is closely affiliated with the government. So it's impossible for you to bring them before the Court. There is lots of impunity. Not only in my case, but in all cases.'*[102]

It is remarkable that according to Participant 13, states authorities lay the blame for the abuses on innocent people who are not associated with the violation so that the perpetrators can avoid prosecution. More specifically, Participant 13 stated that:

[101] INTV 11, 19.6.2018.
[102] INTV 15, 17.6.2018.

'X, a defender advocating against enforced disappearance was poisoned on his flight from Jakarta to Amsterdam and the Indonesian authorities accused the cabin crew of poisoning him. I know that sounds very weird, but the cabin are now in custody instead of those who did it.'[103]

Undoubtedly, impunity for abuses against HRDs exists because state authorities are reluctant to hold those responsible accountable, which means that the State also violates the concept of due diligence in the sense that it fails to ensure the rights of defenders and provide an effective remedy.

5.5.2. Defenders' Reluctance to Report the Abuses against Them

Impunity also exists because defenders themselves may decide not to report the violations committed against them and bring the violators before the Court and other similar mechanisms. The reasons behind this kind of decision may vary. The inability of the State and lack of will to ensure the right of HRDs and the right of victims to an effective remedy can act as a deterrent to reporting an abuse, as it has become clear that defenders do not trust the system. Additionally, based on the experiences of the participants and testimonies of other defenders, this Part identifies other reasons why a defender may decide not to take the violator to court. The reasons may be related to i) whether the perpetrators are identifiable; ii) whether the defenders will be comfortable with bringing their case to the fore; and iii) whether the legislation itself would prevent the prosecution of the violators. It should be noted that the list is not conclusive.

5.5.2.1. Perpetrators of Attacks are not Identifiable

In several cases defenders - or the family of HRDs - are unable to report an attack against them, since they cannot identify the violator. In particular, perpetrators use unmarked cars, put sacks over their heads, do not wear uniform and orders are usually given orally.[104] Victims are also kept blindfolded in private rather than

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[103] INTV 13, 19.6.2018

[104] Kurdish Human Rights Project and Bar Human Rights Committee of England and Wales. 'Relatives of Human Rights Defenders at Risk: The Extra-Judicial Killing off Siyar Perinçek' (2005) 6 [accessed 12 July 2018- webpage no longer exists]; 'Stand Up for Human Rights' (*Standup4humanrights.org*) <http://www.standup4humanrights.org/en/disappeared.html> accessed 30 October 2019.

public properties.[105] In addition, in some cases defenders do not know the perpetrators and therefore they cannot recognise them. For instance, Marcela, a transsexual HRD, said that '[o]ne night in October 2011 I was coming out of a bar when a car without plates stopped next to me. Four individuals got out and shot me four times in the head and body without saying a word.'[106] Similarly, Participant 16 stated that:

> *'Personally, I faced attacks three times. You can't know who has done the attack; you only put circumstances together. You can guess who could do it, but still don't know. Sometimes attacks are not planned, at that time you don't really care, or can't ask names, see ideas and take details. But generally, when you do human rights activities, they plan how to attack you. In this case, they do it secretively, so you don't know who he/she is. When you are followed up by strangers or they used to phone you to threat you, track you, they don't keep the line. Identification is a key to prosecute the perpetrators.'*[107]

Indeed, identification is essential to seek vindication. If a defender does not know who is behind the abuse, he or she will not know who to blame for the attack. As a result, the violators will remain unpunished, which will allow them to repeat their action, targeting another defender.

5.5.2.2. Lack of Ability and Willingness of States to Respond to Complaints and the Defenders' Fear of Being Targeted

In many states, the authorities do not make an effort to investigate promptly and adequately the complaints of HRDs and prosecute the perpetrators. As can been seen from the empirical findings above as well as according to Amnesty International, rarely state authorities respond properly to attacks on HRDs.[108] For that reason, HRDs/ victims of human rights abuses may decide that reporting the

[105] UN Economic and Social Council, Report of the Special Rapporteur on the Question of Torture, Theo van Boven, Submitted pursuant to Commission Resolution 2002/38, 27 February 2003, UN Doc E/CN.4/2003/68/Add.1 para 715-718.

[106] CIVICUS, 'Advocacy to Challenge Impunity and Violence against Transgender Human Rights Defenders' in State of Civil Society Report (2016) 165 < https://www.civicus.org/documents/reports-and-publications/SOCS/2016/Advocacy-to-challenge-impunity-and-violence-against-transgender-human-rights-defenders.pdf> accessed 30 October 2019.

[107] INTV 16, 8.2.2018.

[108] Amnesty International, 'Human Rights Defenders under Threat' (2017) 9 https://www.amnesty.nl/content/uploads/2017/05/HRD-briefing-26-April-2017-FINAL.pdf?x56589 accessed 30 October 2019.

crime to police and the competent authorities as well as seeking redress for the violation is not worth the effort, given the state failure to address defenders' cases.[109]

In addition, in the context of the empirical research one defender raised a very interesting point that could be the basis for another reason contributing to impunity. In particular, Participant 16 stated:

> *'I wouldn't* [report any abuse] *because when you do it, of course, you go to court, isn't it? And you have to keep yourself secure. Already you are a target as a result of your work, you don't want to set yourself as a target again and to be attacked again. And what is really important for me as a HRD is my safety. I need my life. I don't want to be a part of the statistics of HRDs who have been killed. You also have a family life you need to protect. When you are a HRD, you put your family at risk by the fact that you raise a voice for the voiceless. You do not want to victimise your family through prosecuting the perpetrators. It is very easy to be targeted when you go to court.'*[110]

The point here is that a defender who has already been a target because of his or her human rights activity may cause the anger of the violators if he or she comes after them. Given the state failure to investigate and punish those committed crimes against defenders, the only thing that the prosecution may achieve is to make himself or herself and his or her family a greater target. Defenders appear to prefer security over impunity given the state inability to prosecute those responsible for the attacks and protect the defender. For that reason, under the pressure from civil society and international mechanisms, the human rights system of those states failing to protect HRDs needs to be strengthened, so that defenders can feel more secure, trust and report abuses against them.

5.5.2.3. Legislation as a Means of Preventing Prosecution

Even when defenders know who is behind the attacks and are willing to report the abuse and bring him or her to justice, some states' legislation may protect people working for state authorities (civil servants) from being brought to justice.[111] The

[109] Jorgensen (n 98), 388.
[110] INTV 16, 18.2.2018.
[111] In the UK some offences and other matters (not related to human rights) cannot be instituted without the prior consent to prosecute the Director of Public Prosecutions (DPP). In Sweden,

most typical example is Turkish law; according to Article 129 of the Turkish Constitution, 'the prosecution of public servants and other public employees for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law.'[112] That means an administrative body consisting of other civil servants shall decide in the first place if civil servants accused of abuses shall be prosecuted. The logic behind a provision like that is to protect civil servants acting the official capacity from the harassment of unfounded prosecution.[113] However, the point here is that the administrative body, which is comprised of civil servants, is highly likely to protect the accused from prosecution on the ground of collegiality.[114]

Furthermore, some developing and conservative countries do not recognise universally accepted human rights, such as the rights of LGBTQ community. For instance, in Kenya homosexuality is illegal and homosexual relationships constitute a crime, while Indonesia has drafted a similar law.[115] On that basis, individuals promoting LGBTQ rights break the law and may be considered to be criminals.[116]At the same time, sexual minorities, activists and NGOs are abused, raped and tortured for their sexual orientation and activity.[117] More specifically, Participant 7 stated that:

'They have not been prosecuted because it is illegal to be homosexual in my country and you cannot take some in the Courts, because he would say that this is homosexual, so even if the cases are serious, they do nothing about it. They do nothing, the last time I reported a case, they turned the case against me because I was considered to be a criminal, and that has made me not report anything and just keep away from people.'[118]

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administrative authorities are able to initiate their own investigations into certain conduct that may become the subject of a criminal investigation.

[112] Amos Jenkins-Peaslee, *Constitutions of Nations* (Nijhoff 1985) 1627.

[113] Joseph Crowley, 'Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey' (1999) 22 (5) Fordham International Law Journal 2129, 2178.

[114] ibid, 2180.

[115] Patrick Grosse, 'Kenya's LGBT Community Fights for a Place in Society | DW | 06.04.2018' (*Deutsche Welle.com*, 2018) <https://www.dw.com/en/homosexuals-in-kenya-claim-a-place-in-society-court-legalize-homosexuality/a-43150313> accessed 30 October 2019.

[116] INTV 13, 19.6.2018.

[117] Nita Bhalla, 'Rare Win for Gay Rights as Kenya Court Rules Forced Anal Tests Illegal' (*Reuters*, 2018) <https://af.reuters.com/article/africaTech/idAFL3N1R45E4> accessed 30 October 2019.

[118] INTV 7, 12.2.2018.

For these reasons, defenders may be hesitant about reporting the abuses against them and bringing serious cases of human rights violations before the Court, as their activity is illegal and the case may turn against them. Hence, in these countries, serious human rights violations may be left unpunished and impunity prevails.

The point here is that failure to investigate human rights violations committed against HRDs and to hold those responsible to account has increased the vulnerability of defenders and strengthened the perception that violation of HRDs' rights is, if not licensed, at least tolerated.[119] In other words, impunity encourages more abuses and exacerbates the circle of violations against defenders, making their work even more challenging.

[119] Oxfam (n 106), 8; 'End Impunity for Attacks against Human Rights Defenders and Enact Laws for their Protection' (*ISHR*, 2015) <https://www.ishr.ch/news/end-impunity-attacks-against-human-rights-defenders-and-enact-laws-their-protection> accessed 30 October 2019.

5.6. Conclusion

Overall, the point of the Chapter was to show that impunity is part of the reality of HRDs, constituting a serious obstacle to work and life of defenders, as it gives the false perception that human rights violations against HRDs are tolerated, encouraging further abuses. The empirical result came to confirm that impunity for human rights violations committed against defenders is very common and constitutes a serious problem. The Chapter engaged with the states' human rights obligations and particularly the concept of due diligence in international human rights law in order to determine the scope of states' obligations, emphasise their duties and highlight their failure to comply with them and protect defenders. The thesis has acknowledged that states bear primary responsibility and that NSA responsibility is still evolving. At the same time, it is important to consider the ways in which NSAs can be held accountable because they are amongst the main violators. In this sense, emphasis was also put on the lack of legal obligations on NSAs in international human rights law and, consequently, the obligation of states as the primary duty-bearers to regulate individual responsibility in the domestic legal system. In any case, if one's right is violated, the State has the duty to conduct prompt and impartial investigation and to provide an effective remedy as a means of re-establishing the validity of the right retrospectively. Failure to do so, contravenes the principle of due diligence.

Although the duty to carry out prompt and impartial investigation may encompass the duty of the State to prosecute those deemed responsible, the victim does not have the individual right to see his or her violator prosecuted. Despite the provisions of international human rights law, the crimes committed against HRDs remain unpunished; impunity prevails, which also have a chilling impact on the realisation of human rights. The reasons why impunity exists are either because state authorities are unwilling to investigate and prosecute the perpetrators or because defenders themselves do not want to report the violations and bring the violators to justice. For these reasons, even though establishing new international mechanisms with the task of judging violations committed by NSAs would not be welcomed by NSAs, strengthening the international, regional and more importantly, the domestic

human rights system could contribute significantly to overcoming impunity and providing a better quality of work and life to HRDs.

Chapter 6

The International Refugee Regime as an Alternative for HRDs

6.1. Introduction

The thesis has so far addressed the most common obstacles to the work and life of HRDs; namely: the lack of a clear definition, the criminalisation of defenders and the impunity for crimes committed against them. It has become clear that international human rights law has failed to provide efficient protection to HRDs. On this basis, the question that arises is whether there are other legal regimes that would be more suitable or more effective in doing this. In this sense, it would be interesting to consider possible alternatives to international human rights law.

An obvious alternative would be international refugee law, which is a distinct area of law. Due to the dangerous nature of their work, several HRDs either may choose or are forced to leave their country of nationality and seek asylum in another state to escape the violations committed against them. Notably, most of the HRDs who took part in the empirical research for this research project referred to several of their colleagues who had left their country of origin and sought asylum,[1] while three participants had already been granted asylum.[2] In this sense, this alternative sounds ideal; it also seems suitable for HRDs in the first place. Most importantly, their status as refugees would entail a series of human rights to which they would not be entitled otherwise, and keep them safe in the asylum states, as the prohibition of forced removal applies.

The first Part of the Chapter discusses the intersection between the term 'refugee' and 'HRD' and concludes that a defender can fall within the term 'refugee' and consequently within the Refugee Convention. The central argument of this Chapter, however, is that the international refugee regime cannot be a suitable alternative

[1] INTV 2, 22.2.2018; INTV 5, 18.2.2018; INTV 10, 17.2.2018; INTV 17.6.2018; INTV 12, 9.2.2018.

[2] INTV 4, 4.6.2018; INTV 6, 27.6.2018; INTV 9, 13.2.2018.

and a reliable solution for the protection of HRDs for two main reasons. First, as it has become clear from the interviews, even though most HRDs consider the refugee regime to be a possibility, in practice, it is a measure of last resort due to the nature of their work. Second, the international refugee regime is facing a long-standing crisis, which affects its efficiency.

The second Part discusses the views of HRDs on the option of refugee status and explores their reluctance to take advantage of international refugee law. A significant Part of this Chapter looks at international refugee law and states' reluctance to take refugees under the pretext of preserving sovereignty and economic and social stability and considers some general critiques of international refugee law in an attempt to explore its suitability, even as a measure of last resort. Another Part of this Chapter is also devoted to Europe's collective failure to address the refugee crisis. The purpose of this case study is to highlight the inadequacy of the system and by analogy to question the efficiency of the entire refugee regime. In addition, it explores possible causes that could make a state more hostile, especially to defenders claiming asylum, thereby putting them at a greater risk. The last part of the Chapter looks at the UN Special Rapporteur's assessment of the situation of HRDs as refugees and concludes that the dreadful situation of refugee defenders provides further evidence that this alternative is not deal.

This Chapter relies on the findings of the empirical research and on the academic scholarship in the field of general international refugee law. It also draws on the considerably limited literature on the intersection between refugees and HRDs.

6.2. The Intersection between Refugees and Refugee Human Rights Defenders[3]

Refugees have existed as long as history, but the Convention Relating to the Status of Refugees, known either as the 1951 Convention or the Geneva Convention or the Refugee Convention, adopted on 28 July 1951, as well as the Protocol Relating to the States of Refugees of 1967, provides the most comprehensive codification of refugees' rights, constituting the cornerstone of the international refugee regime.[4] The definition of Article 1 (A) (2) is the passport to refugee status, which entails formal immigration, the expectation of naturalisation and an entitlement to a series of civil, political, economic, social and cultural rights.[5]

Martin Jones, a leading expert on HRDs, argues that HRDs, particularly those at risk,[6] may fall within the definition of 'refugees' if they decide to flee their country of origin. That means a defender under the title of 'refugee' can be entitled to various human rights.[7]

Pursuant to Article 1 (A) (2), a refugee must meet four requirements; in particular, they must: i) be outside the country of their nationality; ii) have a well-founded fear

[3] The thesis uses the term 'refugee defender' to refer to those individuals who used to act as defenders in their country of origin, regardless of whether or not they continue to work as HRDs in their country of residence or have decided to keep a low profile. The author consciously avoids using the term Human Rights Defenders in Exile or Exiled Human Rights Defenders (EHRDs) because it is quite broad. In particular, the term 'EHRDs' may encompass not only HRDs who have been granted refugee status, but also those living in self-imposed exile to safeguard their life and liberty. The latter may not have applied for asylum, but live legally within the territory of the state (e.g. by visa or dual citizenship). On the other hand, it is worth noting that McQuaid seems to use the term 'refugee defender' in the same way, but for her, it also includes those individuals who started fighting for refugees' rights, and human rights in general, once they arrived in their country of residence. See, Katie McQuaid, 'Defenders Across Borders: Congolese Human Rights Defenders in Uganda's Refugee Regime' (2018) Human Rights Defender Hub Working Paper Series 4: Centre for Applied Human Rights, University of York < https://static1.squarespace.com/static/58a1a2bb9f745664e6b41612/t/5ad0a19a70a6adbfd8917dbc/1523622302374/HRD+Hub+Working+Paper+No.+4+April+2018.pdf > accessed 30 October 2019.

[4] Jane McAdam, 'Interpretation of the 1951 Convention' in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to The Status of Refugees and its 1967 Protocol* (OUP 2011).

[5] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (hereinafter the 1951 Convention), art 3-43.

[6] There are authors, including Jones, who use the term 'HRDs at risk' to refer to defenders putting their life at risk to contribute to the realisation of human rights. However, in this thesis it has been argued that the term 'HRD' should also include the risk at which someone puts his or her life.

[7] Martin Jones, 'Protecting Human Rights Defenders at Risk: Asylum and Temporary International Relocation' (2015) 19 (7) The International Journal of Human Rights 935.

of persecution; iii) be at risk of persecution due to race, religion, nationality, membership of a particular social group or political opinion; and iv) must be unwilling to avail themselves of the protection of their country of origin.[8] In addition, the 1951 Convention allows certain individuals at risk to be excluded from the protection of the refugee regime if they have committed serious crimes against humanity and the purposes and principles of United Nations[9] or if they already benefit from other international or national protection.[10]

According to Jones, HRDs would meet the requirements of the 1951 Convention in most circumstances. More specifically, the first condition is fulfilled once a defender leaves his or her country of origin.[11] Despite the fact that many HRDs face difficulties in leaving their country of nationality as seen somewhere else, neither the way of departure nor the illegal entry or presence plays a role in characterising an individual as a refugee.[12]

As far as the element of the well-founded fear of persecution is concerned, the notion of 'persecution' is rather broad, but it is widely accepted that the concept of 'persecution' as well as 'fear of persecution' was intentionally left indeterminate so that it can be flexible enough to encompass all of the forms of mistreatment.[13] As highlighted from the beginning, defenders are subjected to enforced disappearances, torture, arbitrary arrest, unfair trial and other serious human rights violations. Consequently, these abuses fall within the notion of persecution and allow defenders to satisfy the second element.

However, according to the Handbook on the Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees produced in 1979 to guide the asylum determination process, individuals leaving their country to escape from prosecution

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[8] Article 1 (A) (2) states that '[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country […]'.
[9] The 1951 Convention (n 5), art 1 (F) (a-c).
[10] ibid, 1 (D).
[11] Jones (n 7), 940.
[12] The 1951 Convention (n 5), art 31.
[13] James C. Hathaway, 'Reconceiving Refugee Law as Human Rights Protection (1991) 4 (2) Journal of Refugee Studies 113, 122; Paul Weis, 'The Concept of the Refugee in International Law' (1966) 87 Journal Du Droit International 173, 193.

or punishment for a Penal Code or common law offence or crime cannot be considered refugees.[14] The logic behind this exclusion is that a refugee is a victim – or a potential victim – of injustice or other violations and not a fugitive of justice.[15] This proposition relies on Grotius, *De Iure Belli ac Pacis*, who argued that asylum is to be enjoyed by people 'who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men'.[16] Nevertheless, it is worth noting that this argument has been heavily criticised by the ECtHR, on the basis that it may expose individuals at risk to torture and other forms of inhuman or degrading treatment.[17] The approach of the ECtHR has paralleled that of the Human Rights Committee in relation to the interpretation of Article 7 of the ICCPR prohibiting torture, cruel or inhuman or degrading treatment or punishment. More specifically, in General Comment 20, the Human Rights Committee stated that: '[i]n the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[18]

In relation to HRDs, this proposition is of great interest, since it may result in excluding HRDs from the term 'refugees' because, as discussed earlier, states use the legislation against defenders to criminalise their activities. For that reason, it should be necessary for the state of asylum to carefully consider the nature of the offence and the crime presumed to have been committed. The State should establish whether the prosecution is only a pretext for persecution and as a result the applicant is not, in reality, a fugitive from justice or whether the prosecution is consistent with the standards of international human rights law, and his or her criminal behaviour does not outweigh his or her character as a *bona fide* refugee.[19]

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[14] UN High Commissioner for Refugees, Handbook on the Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, January 1992, UN Doc HCR/IP/4/Eng/REV.1 (hereinafter Handbook) para 56.
[15] ibid.
[16] Hugo Grotius, 'De Jure Belli ac Pacis II, para xvi' cited in Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet and Maxwell 2004), 12.
[17] *Chahal v. the United Kingdom* Application No 70/1995/576/662 (ECtHR 11 November 1996) paras 98, 102, 108; *Vilvarajah v. the United Kingdom* Application No 13163/87 (ECtHR 30 October 1991) para 108; *Soering v. the United Kingdom,* Application N 14038/88 (ECtHR 25 January 1989).
[18] UN Human Rights Committee, General Comment No 20 'Article 7 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 March 1992, UN Doc HRI/GEN/1/Rev.7.
[19] Handbook (n 14), para 156; Jones (n 7), 941.

On this basis, defenders subjected to prosecution due to the criminalisation of their activities can also meet the second condition. Since the second requirement includes the well-grounded *fear* of persecution, this fear can easily be proved on the ground of violations and persecution against similarly situated defenders.[20]

With regard to the third criterion, a link should be established between the individual's risk of persecution and one of the five reasons for persecution provided by Article 1 (A) (2). The element of membership of a particular social group and political opinion seems to apply to defenders in the first place. The Supreme Court of Canada in *Ward* established an alternative approach on the meaning of the ground of 'membership of a particular social group'.[21] In particular, the Court held that 'the meaning assigned to 'particular social group' should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative'.[22] On this basis, the Court articulated that it is not possible for every single group of persons to fall within the 1951 Convention refugee definition, as there are some groups where membership therein is not fundamental to the defence of human rights and the human dignity of the individuals.[23] The Court also made it clear that it is the membership in the groups that must be the cause of the risk or persecution and not the individual activities of the claimant.[24]

Although some HRDs may not identify their activities as 'political', in practice, they act as human rights watchdogs speaking out against human rights abuses and play a major role in monitoring the conduct of government officials and other state authorities. In addition, defenders are part of, or themselves run, organisations fighting for the rights of a particular group, satisfying the element of membership of a particular group. Notably, the vast majority of those defenders taking part in the empirical research have been members of NGOs promoting, for example, the

[20] ibid, 940.
[21] Legal Services Unit of the Immigration and Refugee Board of Canada, 'Interpretation of the Convention Refugee Definition in the Case Law' (2018) para 4.5 < https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDefPoints.aspx> accessed 30 October 2019.
[22] *Canada (Attorney General) v. Ward* [1993] 2 S.C.R 689, 103 D.LR (4th) 1, 20 Imm L.4 (2d) 85 para 739.
[23] ibid, 738, 745.
[24] ibid, 738-739, 745.

rights of LGBTQ people, abandoned children and the freedom of expression. This position has also been affirmed by the High Commissioner's Office for Refugees (UNHCR) who accepted that defenders 'may be in need of refugee protection on the ground of their [imputed] political opinion and/or their membership of a particular social group'.[25]

As will be discussed later in this Chapter, much of the academic scholarship has heavily criticised the Geneva Convention for several reasons. One reason was because the definition does not include all those persons at risk of persecution but accommodates only those at risk of being persecuted because of who they are and what they believe. In fact, the western countries' capacity to grant asylum was so insufficient that it forced the drafters to confine the class of refugees on the ground of the five most fundamental principles of non-discrimination in international law.[26] On this basis, the delimitation of the clause was considered a 'least bad option'.[27] However, the definition does not encompass those individuals fleeing conditions of serious danger and general harm, such as armed conflicts or climate change.[28] Undoubtedly, the definition of the term 'refugee' is in need of considerable reform, in order that it includes individuals at serious risk of persecution who are not currently part of the definition. In any case, with regard to HRDs, even the current narrow definition accommodates defenders wishing to apply for asylum in the sense that they are usually persecuted because of their activities as members of groups or for their beliefs.

Moreover, one of the most critical elements is the state of nationality's unwillingness to offer protection to individuals at risk. In relation to HRDs, they may find it harder to meet this criterion, as are those who have spoken out against the state's human rights record and challenged the government's policy. In essence, the activities of HRDs may be the cause of prosecution or risk. On this basis, it

[25] UN High Commissioner for Refugees, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala, January 2018, UN Doc HCR/EG/GTM/18/01 39.
[26] James Hathaway, 'Special Feature Seventh Colloquium on Challenges in International Refugee Law: Introduction' (2016) 37 (2) Michigan Journal of International Law 229.
[27] J C Hathaway and M Foster, *The Law of Refugee Status* (CUP 2015) 362-441.
[28] Stephen Meili, 'The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law' (2018) 41 Fordham International Law Journal 383, 389.

would be a paradox if a state that is behind abuses against defenders, or threatens HRDs to stop their activities, offered them protection.

Individuals at risk who have committed serious political crimes or crimes against humanity and the principles of the UN cannot benefit from refugee status and as a result are excluded from the definition. However, as discussed earlier in the thesis, individuals committing violent crimes cannot by definition be defenders, as violent activities are inconsistent with the requirement of peaceful activities. In this sense, HRDs easily meet this criterion. Consequently, a defender can be referred to as 'refugee' and make use of the international refugee regime.

Engagement with the international refugee regime entails a number of guarantees, economic, social and cultural rights and administrative assistance. In particular, Articles 3–43 offer various guarantees and rights such as: the prohibition of expulsion,[29] the right to engage in different forms of work,[30] the right to exercise his or her religion[31] and the freedom of movement.[32] In addition, a refugee defender enjoys international recognition and personality and has the right to travel documents,[33] as the principle of comity requires all states to recognise each other's legislative, executive and judicial acts,[34] such as the decision on refugee status. The point here is that the regime provides a more favourable treatment to those individuals applying for asylum and being classified as refugees. As a result, asylum seekers or refugee HRDs are entitled to all those rights provided by the 1951 Convention. On the other hand, EHRDs (Exiled Human Rights Defenders) fleeing their country and being granted Visa status are not entitled to the same rights as refugee defenders. For these reasons, Jones is correct in believing that HRDs through the refugee regime are entitled to privileges to which they would not be entitled otherwise.[35] However, he acknowledges that 'the protection of the refuge regime is not without difficulty', as states avoid their legal responsibilities towards refugees, imposing restrictive domestic legislations, and are not willing to extend

[29]The 1951 Convention (n 5), art 33.
[30] ibid, art 18, 24.
[31] ibid, art 4.
[32] ibid, art 26.
[33] ibid, art 28.
[34]Joel R Paul, 'Comity in International Law' (1991) 32 (1) Harvard International Law Journal 1, 5.
[35]Jones (n 7), 943.

the Convention's protection to other individuals at risk.[36] Despite his concerns, Jones is of the opinion that 'the refugee regime can offer a meaningful remedy to human rights defenders at risk'.[37] Using the interviews as a basis, the next sections analyse the validity of this position and conclude that the international refugee regime cannot be seen as an alternative way of protection for HRDs because it is highly flawed and because it does not suit the needs and desire of HRDs to continue their work in their home countries.

[36] ibid, 944, 949.
[37] ibid, 935.

6.3. International Refugee Regime as a Measure of Last Resort

HRDs champion and fight for human rights, challenge injustice and government activities, work to raise awareness of abuses against individuals and hold authorities accountable for their human rights obligations in their country of origin. In other words, the nature of their work is very much connected with the countries where they live, so leaving that country would have a disastrous impact on the realisation of human rights and rule of law. Despite the fact that only two defenders said they would apply for asylum if they were at risk,[38] the vast majority perceive that they would be abandoning the persons for whom they fight if they decided to leave their country to seek asylum. As Participants 13 and 1 state:

'We have discussed the possibility of leaving the country with my colleagues, because we know we will be the first who will be attacked by the authorities, but if we leave who will protect LGBT people, and particularly trans? It's not fair. We need to create a safe place for everyone, not only for us.'[39]

And

'No, I wouldn't. I have to work for people in Sudan.'[40]

The opinion of a participant that her activity is not illegal to force her to leave their country ashamed shows that, for them, their work is so important that there is no reason to stop doing it, provided that it is not illegal.

'I had not done anything that was illegal and as a citizen of Zimbabwe I was not going to accept being forced out of my country of origin.'[41]

One defender categorically excludes the possibility of asylum, stating that:

'I prefer dying doing what I love'.[42]

[38] INTV 2, 22.2.2018; INTV 14, 24.2.2018.
[39] INTV 13, 19.6.2018.
[40] INTV 1, 18.2.2018.
[41] INTV 8, 13.3.2018.
[42] INTV 16, 8.2.2018.

However, the other participants said that they would flee if the situation became very critical. For instance, Participant 7 says:

'If the situation got the worst, yes I would leave.'[43]

It seems that they want to exhaust all possible means available to them, such as changing strategy or moving to a safer place, before they flee. Participant 3, supported by Participants 11 and 16, states:

'*I did not do it* [seeking asylum] *until now because the strategies used, and the protection received, allowed me to return to my country to continue my activism.'*[44]

Taking into account that three participants have been granted refugee status, two would consider applying for asylum if they found themselves at serious risk, and the rest would flee in a critical situation, it can be safely said that international refugee regime is an alternative. However, it seems from the interviews that refugee status should be a measure of last resort for this group of people, because defenders want to remain in their country and continue doing their work. On this basis, contrary to Jones' opinion that the international refugee regime can provide a meaningful remedy, this option is not suitable for HRDs, and despite the failure of international human rights law to provide efficient protection to HRDs, an alternative form of protection within their countries of origin must be considered.

[43] INTV 7, 12.2.2018.
[44] INTV 3, 26.2.2018.

6.4. Concerns with the International Refugee Regime

6.4.1. The International Refugee System and States' Refusal to Accept Refugees

The refugee regime does sound a promising alternative way to protect those defenders wishing to flee their country to escape from human rights abuses, even as a measure of last resort, given the failure of international human rights law to protect HRDs. However, this Part argues that the protection of HRDs through the international refugee regime cannot be a reliable and suitable solution for HRDs for one more main reason; it relies on a flawed and weak surrogate system that, as will be seen, is in crisis.

Although refugee protection is a human rights issue of great importance, ironically, its goal is not to meet the needs of individuals at risk and provide protection. On the contrary, the purpose of the establishment of the international refugee regime was to ensure the interests of powerful states and particularly to enable them to address issues of transnational character and to control enforced migration between states.[45]

In the 1960s and 1970s, the international refugee system appeared to be more generous, as many refugees were the products of anti-colonial movements and wars of national independence. Having shared the same experience, neighbouring states were driven by feelings of political sympathy and solidarity and embraced refugees.[46] Furthermore, for a couple of decades after World War II, refugees were seen as valuable resources that could contribute to development and boost the economy, and were therefore welcomed by powerful states.[47] Of course, the modest size of refugee influxes enabled the countries to take the brunt of refugees' movement without complaints.[48]

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[45] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 999; Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?' (1994) 47 (2) Journal of international Affairs 351, 351-353.
[46] Jeff Crisp, 'A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime' (2003) Head, Evaluation and Policy Analysis Unit UNHCR Working Paper No 100 5 <http://www.unhcr.org/3fe16d835.pdf > accessed 30 October 2019.
[47] James C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 Harvard International Law Journal 129, 177.
[48] Crisp (n 46), 5.

In the following years, the number of refugees grew dramatically due to the new forms of conflicts within the newly established democracies, the post-Cold War reformulations and socioeconomic problems in developing countries.[49] As a consequence, the hospitable policy of asylum that existed in the 1960s and 1970s faded. Asylum states became extremely worried about receiving massive refugee flows, while refugee migrations from the less developed world were seen as a threat to social stability and cultural identity and as an economic and political burden.[50] The perception that national sovereignty must be preserved as well as the idea of protecting prosperity and social coherence led states to focus on promoting the general well-being of their own populations.

Nowadays, this belief has not changed at all; several states are still tightening their refugee policies or closing their borders to refugees.[51] One can argue that the New York Declaration for Refugees and Migrants (New York Declaration), as well as the Global Compact on Refugees, proves evidence to the contrary.[52] More specifically, the New York Declaration was passed unanimously on 19 September 2016 and was considered to be a 'game changer', promoting the principles of refugee protection and enhancing the international refugee regime.[53] In addition, the Global Compact on Refugees was endorsed at the end of 2018 and was created with the purpose of providing a basis for predictable and equitable burden - and

[49] ibid.

[50] Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5 Washington University Journal of Law and Policy 129, 134.

[51] S Heavy and S Menchu, 'Trump Threatens to Send Military, Shut Border as Migrants Head For...' (*reuters*, 2018) <https://www.reuters.com/article/us-usa-immigration-caravan/trump-threatens-to-send-military-shut-border-as-migrants-head-for-mexico-idUSKCN1MS1TS> accessed 30 October 2019; J Hirschfeld-Davis and T Gibbons-Neff, 'Trump Considers Closing Southern Border to Migrants' (*Nytimes.com*, 2018) <https://www.nytimes.com/2018/10/25/us/politics/trump-army-border-mexico.html> accessed 30 October 2019; F Murphy and T Escritt, 'Germany, Austria Set Talks with Italy to Shut Southern Migrant...' (*uk reuters*, 2018) <https://uk.reuters.com/article/uk-europe-migrants/germany-austria-set-talks-with-italy-to-shut-southern-migrant-route-to-europe-idUKKBN1JV2F0> accessed 30 October 2019; Shaun Walker, 'No Entry: Hungary's Crackdown on Helping Refugees' (*the Guardian*, 2018) <https://www.theguardian.com/world/2018/jun/04/no-entry-hungarys-crackdown-on-helping-refugees> accessed 30 October 2019.

[52] UN General Assembly, New York Declaration for Refugees and Migrants, 3 October 2016, UN Doc A/RES/71/1; UN High Commissioner for Refugees, The Global Compact on Refugees. Draft 3, 4 June 2018, <http://www.unhcr.org/events/conferences/5b1579427/official-version-draft-3-global-compact-refugees-4-june-2018.html> accessed 30 October 2019.

[53] Jeff Crisp, 'New York Declaration on Refugees: A One-Year Report Card' (*Refugees*, 2017) <https://www.newsdeeply.com/refugees/community/2017/09/18/new-york-declaration-on-refugees-a-one-year-report-card> accessed 30 October 2019.

responsibility-sharing among all UN Member States.[54] What is really surprising is that the Global Compact on Refugees was adopted by the vast majority of the UN Member States,[55] while the Global Compact for Safe, Orderly and Regular Migration, known as the Global Compact for Migration, had provoked a lot of opposition. In particular, states, one after the other, were withdrawing from the Global Compact for Migration under the pretext of national sovereignty. The purpose of the Global Compact for Migration, which was also adopted in December 2018, was to boost international cooperation on migration.[56] However, Croatia, Hungary, Poland, the United States, Australia, Austria and other states withdrew from the agreement on the basis that it undermined their nation's sovereignty by forcing them to act against their interests. Indicatively, Heinz-Christan Strache, Vice-Chancellor of Austria, stated that 'Austria rejects the possibility that the Migration Compact could establish new customary international law which would be binding on Austria or could be interpreted as such'. [57]

Neither the Global Compact for Migration nor the Global Compact on Refugees is legally binding, but both represent the political will of the international community as a whole to improve cooperation on refugees and migration respectively.

[54] UN High Commissioner for Refugees, The Global Compact on Refugees. Final Draft, 26 June 2018 <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/Global-Compact-on-Refugees.pdf> accessed 30 October 2019.
[55] The Global Compact on Refugees was adopted by the General Assembly on Monday 17 December 2018 by a recorded vote of 181 in favour to two against (United States and Hungary), with three abstentions (Eritrea, Libya, Dominican Republic). Seven countries did not vote: Democratic People's Republic of Korea, Israel, Micronesia, Nauru, Poland, Tonga, and Turkmenistan.
[56] The migration compact was adopted by a recorded vote of 152 in favour to five against (Czech Republic, Hungary, Israel, Poland, and the United States), with 12 abstentions (Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, and Switzerland). 24 countries did not vote: Afghanistan, Antigua and Barbuda, Belize, Benin, Botswana, Brunei Darussalam, Democratic People's Republic of Korea, Dominican Republic, Guinea, Kiribati, Kyrgyzstan, Micronesia, Panama, Paraguay, Sao Tome and Principe, Seychelles, Slovenia, Somalia, Timor-Leste, Tonga, Trinidad and Tobago, Turkmenistan, Ukraine, and Vanuatu. That means 41 out of the 193 UN member states chose not to endorse this migration compact. See, UN High Commissioner for Refugees, The Global Compact for Safe, Orderly and Regular Migration. Final Draft, 11 July 2018 <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf> accessed 30 October 2019.

[57] Agence France-Presse, 'Austria Rejects UN Migration Pact to "Defend National Sovereignty"' (*The Telegraph*, 2018) <https://www.telegraph.co.uk/news/2018/10/31/austria-rejects-un-migration-pact-defend-national-sovereignty/> accessed 30 October 2019; Anna Gallengher, '3 Reasons All Countries Should Embrace the Global Compact for Migration' (*World Economic Forum*, 2018) <https://www.weforum.org/agenda/2018/08/3-reasons-all-countries-should-embrace-the-global-compact-for-migration/> accessed 30 October 2019; Faith Karimi, 'US Quits UN Global Compact On Migration' (*CNN*, 2018) <https://edition.cnn.com/2017/12/03/politics/us-global-compact-migration/index.html> accessed 30 October 2019.

Although states seem to approve the Global Compact on Refugees, in fact, the primary goal of several states is to defend their sovereignty and control the waves of migrants and refugees. Undoubtedly, the Global Compact on Refugees is in total contradiction with the migration policy of several states. Consequently, it is, in practice, impossible to have a different agenda on issues that are interrelated.[58] For that reason, it is doubtful whether states would implement the Global Compact on Refugees, strengthening the international refugee regime.

Apparently, in the context of the international refugee law, the intention of protecting the rights of those fleeing their countries of origin produces a negative tension between the protection of human rights and the preservation of national sovereignty. It is crucial that the international refugee regime concerns the relations between states and how they manage refugee inflows. Despite the humanitarian aspect of the problem, it does not see states as duty holders, as will be discussed in detail below.

Garvey argues that the *Trail Smelter Arbitration* rule provides that 'No State has the right to use or permit the use of its territory in such manner as to cause injury […] in or to the territory of another or to the properties of persons therein [...]' and as a result can apply to the refugee regime on the basis that the act of refusing to take refugees and ensure their rights may have a transnational impact that will become an issue of international concern. The point here is that the reluctance of states to accept refugees should incur the legal responsibility of the state in the sense that other states must bear the burden of receiving refugees instead. This approach would resolve the humanitarian aspect of the problem on the basis that if states had to accept and accommodate refugee inflows, they would also take care of refugee protection and ensure their rights. However, insisting on enlarging the human rights basis of international law and imposing obligations on states may be a mistake because the refugee problem is not a human rights issue but a problem of state-to-state relations.[59]

[58] Nayla Rush, 'U.S. Continues to Back UN Refugee Compact That Contradicts Administration Goals' (*Center for Immigration Studies*, 2018) <https://cis.org/Rush/US-Continues-Back-UN-Refugee-Compact-Contradicts-Administration-Goals> accessed 30 October 2019.
[59]Jack I Garvey, 'Toward a Reformulation of International Refugee Law' (1985) 26 (2) Harvard International Law Journal 483, 484, 495-496.

6.4.2. The Convention Relating to the Status of Refugees

The 1951 Convention is the only binding instrument that addresses the protection of refugees at the international level.[60] Even though it can be perceived as a 'Bill of Rights' for refugees,[61] it differs significantly from the traditional human rights treaties, as it is more about interstates' obligations than individuals' rights. On the other hand, Edwards is of the opinion that 'the United Nations Convention Relating to the Status of Refugees is a rights-based and rights-granting instrument'.[62] Its coverage in Articles 3 to 34 is of the same nature as some rights granted under various human rights instruments.[63] However, the wording of the vast majority of its provisions, starting with 'the Contracting States shall accord to refugees…', as well as the fact that the term 'rights' referring to refugees is rarely mentioned, leaves no doubt that the scheme of the Convention concerns obligations between states. Such normative digression can be justified if one considers the historical context within which the 1951 Convention was drafted. In particular, it was drafted and adopted several years before the ICCPR. In other words, in 1951, individuals were not entitled to conventionally binding human rights.[64]

The fact that the 1951 Convention is a duty-based instrument rather than a human rights-based treaty is decisive, as it allows states to keep a distance from their responsibilities. Leading scholars on international refugee law have attributed the failure of the refugee regime to its lack of minimum standards. In particular, James Hathaway underlines that fact that 'the pursuit by states of their own well-being has been the greatest factor shaping the international legal response to refugees since World War II',[65] while he argues that 'neither humanitarian nor human rights could

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[60] Based on the 1951 Convention, the regional systems in Latin America and Africa have established their own refugee protection instruments, which have been considered more generous and hospitable than the international one in terms of the notion 'refugee'.
[61] Brian Gorlick, 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law' (2000) 69 Nordic Journal of International Law 117, 122.
[62] Guy S Goodwin-Gill, 'Refugees and their Human Rights' (2004) Refugee Studies Centre Working Paper No.17, University of Oxford 7 <https://www.rsc.ox.ac.uk/files/files-1/wp17-refugees-and-their-human-rights-2004.pdf> accessed 30 October 2019; M G Wachenfeld and H Christensen, 'Note: An Introduction To Refugees And Human Rights' (1990) 59 Nordic Journal of International Law 178,180; Feller (n 49), 131.
[63] Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 (2) International Journal of Refugee Law 293, 306.
[64] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014).
[65] Hathaway (n 47), 133.

account for refugee law as codified in the United Nations Convention Relating to the Status of Refugees.'[66] Alice Edwards, for her part, is of the view that 'keeping international refugee law distinct from international human rights law has played into the hands of governments choosing to flout minimum standards.'[67] In fact, all duties imposed on states addressed particularly the question of the status of refugees, meaning that the State has a number of obligations once an individual has been recognised and labelled as a refugee.[68] In fact, it is at the discretion of the State to grant asylum to an individual, since there is no right of an individual to asylum enshrined in the 1951 Convention.

The 1951 Convention imposes on states the prohibition of *non-refoulement*, which is the most fundamental principle of international refugee law.[69] In particular, according to Article 33: 'No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' In essence, this principle prohibits any act of forcible removal or rejection that can put the individual in danger again. Emphasis should be placed on the consequences of the acts; namely, whether one's life will be threatened due to the State's failure to comply with this prohibition, rather than the nature of the act.[70] It must be highlighted that the principle of *non-refoulement* applies to both recognised refugees and asylum seekers as long as they are within the jurisdiction of a State party. The importance of this provision is further endorsed by Article 42, which does not allow states to place any reservation on this principle. It is now widely agreed that the principle against *refoulement* is a norm emerging from customary international law.[71]

[66] ibid, 130.
[67] Edwards (n 63), 294.
[68] Roger Zetter, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity' (1991) 4 (1) Journal of Refugee Studies, 39, 39.
[69] Hathaway (n 44), 278-369; McAdams (n 4), 1327; G S Goodwin Gill and J McAdams, *The Refugee In International Law* (3dn, OUP 2007) 201-284; E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in E Feller, V Türk and FNicholson (eds), *Refugee Protection in International Law, UNHRC's Global Consultations on International Protection* (CUP 2003) 87.
[70] E.g. deportation, expulsion, non- rejection at the border, extradition.
[71] Ministerial Meeting of States Parties, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 13 December 2001, UN Doc

From a conceptual perspective, the prohibition of *non-refoulement* entails a negative obligation: namely, the obligation to refrain from any act of forcible refusal or rejection. However, the 1951 Convention does not impose the positive aspect of the *non-refoulement* obligation, which would be the duty to grant asylum. That leaves no doubt that the right to grant asylum is a right of the State. Indeed, the silence on this issue is not accidental, as, in order to preserve national sovereignty, states should have control over who is entitled to be admitted to their territory. In particular, during the *travaux preparatoires*, one of the ambassadors highlighted that 'the right of asylum… was only a right, belonging to the State, to grant or refuse asylum, not a right belonging to the individual and entitling him to insisting on its being extended to him.'[72]

One could argue that even though there is not a *de jure* right to 'be granted' asylum, there may be an implied right to asylum.[73] More specifically, Chetail argues that 'the distinctive nature of *non-refoulement* and asylum appears highly artificial in practice. Although *non-refoulement* is primarily an obligation of result, asylum is generally the only practical means to respect and ensure respect for Article 33.'[74] In other words, in order to comply with the obligation of *non-refoulement*, states have the following options: granting asylum and allowing the individual at risk to enjoy all those rights enshrined in the 1951 Convention, granting temporary asylum until it examines whether the individual meets the requirements to be a refugee under the 1951 Convention, or sending them to another state where there is no risk of persecution.[75]

HRC/MMSP/2001/09 para 4. The Declaration was endorsed by the UN General Assembly the 19th December 2001 resolution A/RES/57/187, para. 4; Lauterpacht and Bethlehem (n 67), 87-177.

[72] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, UN Doc A/CONF.2/SR.19 13.

[73]Terje Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum' (1990) 2 (3) International Journal of Refugee Law 361; R Plender and N Mole,'Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments' in F Nicholson and P Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 364.

[74] Chetail (n 64), 31.

[75]The 1951 Convention (n 5), art 31 (B).

Article 14 of the UDHR provides for the right of an individual to seek asylum,[76] so, in fact, this right has implicitly been put into practice and reinforced by the inclusion of the prohibition of *non-refoulement*, including non-admission at the border.[77] On this basis, the French Ambassador concluded, once the Declaration was drafted, that 'the right to asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it.'[78]

In the absence of a clear positive obligation to grant asylum, the 1951 Convention does give states a considerable margin of appreciation in deciding on how to comply with their obligations. In practice, states have introduced restrictive domestic legislation, such as restrictive interpretation of the definition of refugee, limitations on the right to work, extended visa requirements and long procedures of identification to discourage people from seeking asylum.[79] As a consequence, a defender who became involved in the asylum system of a state as an asylum seeker would live in a perpetual state of uncertainty. Even if the defender will eventually be labelled as a refugee, it is questionable whether the refugee protection may be conceived as a human rights remedy.[80] This exceeds the limits of this study, though.

The Refugee Convention has also been criticised because it has no international supervision procedure. The absence of any independent supervisory mechanism for the Convention is a reflection of the human rights reality of that time. The 1951 Convention was designed to strengthen the protection of those individuals fleeing from Nazi, communist and other fascist regimes and built upon the standards of the time, namely the League of Nations.[81] On this basis, the General Assembly opted for a subsidiary mechanism that would have the responsibility to co-ordinate international action to protect refugees and resolve refugee problems worldwide. It

[76] Article 14 (1) of the UDHR provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'
[77] Edwards (n 63), 301.
[78] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting, 22 November 1951, UN Doc A/CONF.2/SR13 (France).
[79] Crisp (n 46), 8.
[80] James Hathaway, 'Why Refugee Law Still Matters' (2007) 8 (1) Melbourne Journal of International Law, 89, 101.
[81] Guy Goodwin-Gill, 'They Dynamics of International Refugee Law' (2014) 25(4) International Journal of Refugee Law 651, 655; Jaya Ramji-Nogales, 'Moving beyond the Refugee Law Paradigm' (2017) 111 American Journal of International Law 8, 10.

therefore established the UNHCR.[82] With the adoption of the Human Rights Covenants and the establishment of treaty bodies monitoring the implementation of the Conventions, states familiarised themselves with the idea of interstate supervision of human rights.

Hathaway, for his part, gives an alternative explanation for the continuing failure to establish an interstate supervisory mechanism. In particular, he underlines the role of the UNHCR to oversee the implementation of the Refugee Convention and places emphasis on the fact that the refugee regime is the only branch of international law that has its own institutional guardian in the face of the High Commissioner.[83] The UNHCR seems to be in a more favourable position compared to treaty monitoring mechanisms that rely on the under-resourced UN High Commissioner for Human Rights to support their work.[84] For these reasons, it concludes that the establishment of an additional supervisory mechanism for the Refugee Convention would be unnecessary.[85]

Despite the non-binding authority of the UNHCR, the High Commissioner seeks to safeguard the rights of refugees, provide guidance on the interpretation of the Convention and ensure that refugee law develops consistently with established principles and new challenges.[86] However, it seems that the UNHCR's role has changed significantly over the past decades, losing the character of the trustee of refugee rights. More specifically, the agency has now been transformed into a mechanism that is primarily committed to direct 'refugee protection service delivery', because states have become even more reluctant to resolve refugee crises and call on the agency to avert such crises on their behalf.[87] In practice, the UNHCR is the mechanism that ensures refugee rights on the ground; when it comes to exercise its traditional supervisory authority, it may be in the position of being

[82] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, UN Doc A/RES/428(V).
[83] James Hathaway, 'Epilogue: Challenges to the Viability of Refugee Rights' in James Hathaway (ed), *The Rights of Refugees under International Law* (CUP 2005) 995.
[84] Marcus Schmidt, 'Servicing and Financing Human Rights Supervisory Bodies' in P Alston and H Crawford *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 481.
[85] Hathaway (n 83), 995.
[86] See Handbook (n 14).
[87] James Hathaway, 'New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection' (1995) 8(3) Journal of Refugee Studies 288.

responsible to oversee itself.[88] What is really absent from the international refugee regime is states' accountability within the context of a monitoring body. In particular, the supervisory body seeks to ensure that all State parties comply with their obligations, while all states can hold a fellow state accountable for not complying with its treaty obligations. In essence, the dynamics of 'naming and shaming' and blandishing are those that ensure the protections of human rights within a human rights treaty system.[89] Consequently, the absence of a normal supervisory institution allows states to keep a distance from their obligations and take little, if any, responsibility for ensuring the rights of refugees.

Although the UNHCR has provided guidance on the interpretation of the 1951 Convention, national authorities and courts have emphasised that its views are of great importance, but are not legally binding.[90] One may argue that the decisions of treaty bodies are not binding either, so an additional monitoring body for the Refugee Convention with non-binding authority would be superfluous. However, as discussed earlier in this thesis, States parties, for instance, to the ICCPR, tend to comply with the decisions of the Human Rights Committee, even though they are non-legally binding.

Moreover, there is no provision of individual petition to a judicial body similar to those existing in regional treaties, so any case relating to asylum and refugee status is decided by national courts. In addition, since there is no relevant provision enshrined in regional treaties, regional courts, such as the ECtHR, may address cases involving asylum seekers and refugees on the basis of violation of human rights contained in the treaties concerned. Notably, regional as well as national courts have produced a large body of case law relating to refugee rights, but there are only disparate decisions and, more importantly, there is no uniformity of approach and reasoning.[91] In short, the continuing failure to establish a supervisory mechanism on the monitoring treaty bodies model encourages states to avoid taking responsibility for ensuring refugee rights, while also not creating a common

[88] Hathaway (n 83), 996.
[89] ibid.
[90] Goodwin-Gill (n 81), 655.
[91] Nuala Mole, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2003) 8.

approach and case law on the protection of refugees. It can be said that a supervisory body is unwelcome in the eyes of states, as it would challenge the parameters of their refugee policy and have a say in matters relating to state sovereignty.

As said earlier in this Chapter, an individual can obtain refugee status despite their illegal entry. However, as Nogales correctly noticed, the 1951 Convention does not include any provision regarding transit from the state of origin to the asylum state/ state of destination.[92] The irony is that asylum seekers must arrive at the borders of the state in order to fall within the 1951 Convention, while the Convention does not establish any effective transit mechanism. The absence of safe transit routes allows states to expand their border securitisation and externalise their borders, as will be seen later when the Chapter addresses the refugee crisis in Europe.

6.4.3. Europe's Failure to Deal with the Refugee Crisis

Europe faced the biggest influx of refugees in 2015, when more than 1.3 million people, mainly from Syria, Afghanistan and Iraq, sought asylum in the EU; [93] this was the largest inflow since World War II. Refugees will continue to come to Europe seeking asylum for as long as the civil war in Syria and with ISIS is raging, increasing the applications for asylum. The EU's asylum policy, which comprises a set of EU laws such as the Dublin Regulation[94] and the Asylum Procedure Directive, is known as the EU Common European Asylum System (CEAS). The CEAS aims to ensure that all EU Member States protect the rights of those seeking protection under the Geneva Convention and sets out minimum standards and

[92] Ramji-Nogales (n 81), 10.

[93] Eurostate, 1.2 Million First Time Asylum Seekers Registered in 2016, 16 March 2017, Doc 46/2017 <https://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1> accessed 30 October 2019; Eurostate, Statistics Explained: Countries of Origin of (non-EU) Asylum Seekers in the EU -28 Member States, 2015 and 2016, 15 March 2017 <https://ec.europa.eu/eurostat/statistics-explained/index.php/File:Countries_of_origin_of_(non-EU)_asylum_seekers_in_the_EU-28_Member_States,_2015_and_2016_(thousands_of_first_time_applicants)_YB17.png> accessed 30 October 2019.

[94] The Dublin Regulation sets out which country is responsible for the examination of the asylum claims presented by people who arrive in Europe. The Asylum Procedure Directive is intended to harmonise procedure guarantees and ensure the quality of asylum decision-making within the Union.
See Dublin Regulation [2013] OJ 2 180/31; Directive on Common Procedures for Granting and Withdrawing International Protection [2013] OJ 2 180/60.

procedures for processing and deciding asylum applications. However, this massive inflow uncovered the inability of European mechanisms to deal with the unprecedented refugee crisis. The purpose of this Section is to show how the inability of such a well-developed system as the EU to handle a huge refugee crisis raises questions on the efficiency and reliability of the entire refugee regime as an alternative.

One could argue that the case study of Europe is not indicative because most of HRDs would not seek sanctuary in Europe. In fact, the vast majority of refugees and asylum seekers defenders come primarily from the Middle East, North Africa and countries in Asia,[95] so it would be highly unlikely they would travel to Europe to seek asylum. However, it has become clear from the analysis and the empirical research that many HRDs come from Russia and other former Soviet Union countries as well as Turkey, so Europe is still an option for all those defenders wishing to flee Russia or Erdogan's Turkey. In any case, the point of this case study is to highlight Europe's inability to accommodate refugees, despite its advanced human rights mechanisms, and by analogy to question the readiness and efficiency of other State parties to the Refugee Convention.

In addition, of the 19 states in the Middle East and North Africa, only six states are parties to the Refugee Convention or the Refugee Protocol of 1967, while 20 states of 45 have signed and ratified the Convention in Asia.[96] That means those states are not bound by the Refugee Convention and have their own 'law of asylum', based on a wide variety of sources, such as international human rights law, domestic constitution, local legislation and any other local norms and customs.[97] In this sense, the ability and willingness of those states to accept refugees and more specifically refugee defenders is highly questionable.

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[95] Shannon Orcutt, 'Enhancing Support for Exiled Human Rights Defenders in Nairobi: Kenya Project' (2017) Peace Brigades International 3 <https://pbi-kenya.org/sites/peacebrigades.org.uk/files/Report%20PBI%20Kenya_WEB.pdf> accessed 26 March 2020.

[96] UN High Commissioner for Refugees, States Parties to the Status of Refugees and the 1967 Protocol, 2015, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> accessed 26 March 2020.

[97] Martin Jones, 'Expanding the Frontiers of Refugee Law: Developing a Broader Law of Asylum in the Middle East and Europe' (2017) 9 (2) Journal of Human Rights Practice 212, 214.

In 2015, several European countries, including Austria, Sweden and France, refused to accept refugees in the name of national sovereignty and imposed tighter internal border controls in order to avoid becoming a magnet for refugees.[98] Hungary also took the drastic measure of building fences along its borders with Serbia and Croatia to keep out refugees,[99] while EU Border states, namely Greece, Italy and Spain, bore the refugee crisis burden in parallel with financial crises. Conceiving that it would be impossible for Member States to arrive at a wider EU refugee agreement, the EU decided to assist 'frontline' states by offering financial and operational support. In other words, in exchange for bearing the burden of the refugee crisis, the EU Border States received additional financial support.[100] On this basis, the European Commission established and developed the hotspot approach in order to manage exceptional refugee flows.

The operational support given under the hotspot areas operates in certain ways: establishing functional hotspot/refugee camps, registration, identification, fingerprinting and debriefing of asylum seekers, as well as return operations.[101] The EU agencies Frontex, the European Asylum Support Office (EASO), Europol and Eurojust contribute significantly to fulfilling these tasks and providing further assistance in cooperation with local authorities.[102] Despite the dysfunctionalities of the system, the hotspot approach did improve the rates of registration and fingerprinting of incoming migrants, which is crucial in determining which follow-up procedures to apply.[103] However, the hotspot approach has received a lot of

[98] F Pastorea and G Henry, 'Explaining the Crisis of the European Migration and Asylum Regime' (2016) 51 (1) The International Spectator 44, 54.
[99] Marton Dunai, 'Hungary Builds New High-Tech Border Fence - With Few Migrants in Sight' (*U.S. reuters*, 2017) <https://www.reuters.com/article/us-europe-migrants-hungary-fence/hungary-builds-new-high-tech-border-fence-with-few-migrants-in-sight-idUSKBN1692MH> accessed 30 October 2019; Lizzie Dearden, 'Hungary Planning "Massive" New Border Fence to Keep out Refugees' (*The Independent*, 2016) <https://www.independent.co.uk/news/world/europe/hungary-massive-new-border-fence-to-keep-out-refugees-prime-minister-orban-turkey-eu-hold-them-back-a7212696.html> accessed 30 October 2019.
[100] It is estimated that Greece will have received over 1.3 billion euros by 2020 to manage its refugee crisis.
[101] European Commission/ Migration and Home Affairs, The Hotspot Approach to Managing Exceptional Migration Flows, 11 September 2015, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf> accessed 30 October 2019; A Niemann and N Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56 (1) Journal of Common Market Studies 3, 5-6.
[102] ibid.
[103] European Court of Auditors, 'Special Report: The *EU's Response to the Refugee Crisis: the "Hotspot" Approach: Pursuant to Article 287 (4) Second Subparagraph of TFEU'* (2017) 68-74

criticism with reference to the lack of a legal framework regulating the rights of refugees and the horrific living conditions and poor services as to food, water and medication.[104]

For instance, the Moria hotspot, a refugee hotspot on the Greek island of Lesvos, is so overcrowded that it is now two and a half times over its capacity.[105] Asylum seekers do not enjoy a standard of adequate living, personal security and wellbeing, while camps are harmful for the environment and public health.[106] Greece is no exception to the rule; it is rather an indicative example of what happens in other hotspots in Italy and in refugee camps such as the one in Calais, France, which is known as the 'Jungle'.[107]

In addition, asylum seekers are not allowed to leave refugee camps until they have been identified and fingerprinted. This process may take approximately two weeks; therefore, prohibition to leave hotspots over such a period amounts to *de facto* detention and breaches the right to liberty.[108]

<https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-ii/30125.htm> 30 October 2019; D Neville, S Sy and A Rigon, 'On the Frontline: the Hotspot Approach to Managing Migration' (2016) European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs < http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf > accessed 30 October 2019.

[104]Agustín José Menendez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 22 (4) European Law Journal 388, 408;

[105] 'Greece: Refugee Women Speak out Against Violence, Dangerous Conditions and Official Neglect' (*Amnesty.org 2018)* < https://www.amnesty.org/en/latest/news/2018/10/refugee-women-in-greece-speak-out-against-violence-dangerous-conditions-and-official-neglect/> accessed 30 October 2019.

[106] Rachel Banning-Lover, 'Greek Refugee Camps Remain Dangerous and Inadequate, Say Aid Workers' (the Guardian, 2017) < https://www.theguardian.com/global-development-professionals-network/2017/feb/10/greek-refugee-camps-dangerous-inadequate-aid-workers > accessed 30 October 2019; Emina Ćerimović, 'Asylum Seekers' Hell in a Greek "Hotspot"' (Human Rights Watch, 2017) <https://www.hrw.org/news/2017/11/30/asylum-seekers-hell-greek-hotspot> accessed 30 October 2019; Peter Stubley, 'Greece's Moria Refugee Camp Faces Closure Over "Uncontrollable Amounts of Waste"' (The Independent, 2018) <https://www.independent.co.uk/news/world/europe/moria-refugee-camp-closure-greece-lesbos-deadline-waste-dangerous-public-health-a8531746.html> accessed 30 October 2019.

[107] Ioanna Pervou, 'Refugees and Vulnerability: The Crisis and the Shift in Human Rights Protection' (2017) 4 (1) Queen Mary Human Rights Law Review 1, 11; H Lambert, P Tiedemann and F Messineo, 'Comparative Perspectives of Constitutional Asylum in France, Italy and Germany: Requiescat in Pace? (2008) 27 (3) Refugee Survey Quarterly 16, 25.

[108] Izabella Majcher, 'The EU Hotspot Approach: Blurred Lines Between Restriction on and Deprivation of Liberty (PART II)' (2018) Blog Border Criminologies <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/eu-hotspot-0> accessed 30 October 2019.

Despite the efforts of the EU, Member States turned their backs on refugees in the first place, violating refugees' rights. Photos capturing the devastation of the refugee crisis are seen all over the world, casting serious doubts on the leading role of the European Union's states as promoters of human rights globally.

In times of crisis, some small inconsistencies with human rights obligations may be tolerated on the basis of limited resources compared to large inflows. However, unfortunately, it tends to be accepted that the refugee regime entails a number of serious implications for the human rights of refugees.[109] In particular, with the case of *M.S.S. v. Greece and Belgium,* the ECtHR put limits on the tolerance of the predicament of refugees. In particular, the Court examined the legality of the Greek practices regarding the registration and identification of irregular migrants and concluded that they constituted a violation of Article 3 of ECHR. It also found that Belgium failed to comply with the Convention because state authorities requested the applicant's return to Greece, despite the fact that they were aware of the terrible conditions of the Greek sites and the unwillingness of the applicant to return to Greece.[110]

A point of particular concern is a shift in the Court's jurisprudence with regard to the protection of irregular migrants and refugees. The *Khlaifia et al v. Italy* and *J.R et al v. Greece* are the most recent illustrations of the current jurisprudence of the ECtHR. In particular, in the *Khlaifia* case, the court was called on to address several issues, such as the violation of the right to freedom of liberty (Article 5) and the conditions of detention in the refugee camps in Lampedusa and Palermo (Article 3).

More specifically, in *M.S.S.*, the court relied on the reasoning of *Budina* and found that refugees are vulnerable human beings by their nature and as a result special attention must be paid to their needs.[111] On the other hand, in the *Khlaifia*, it was held that the applicants were young and in good health and therefore did not fall

[109] J Milner and G Loescher, 'Responding to Protracted Refugee Situations: Lessons from a Decade of Discussion' (2011) Refugee Studies Centre Forced Migration Policy Briefing 6, Oxford Department of International Development, University of Oxford, 4 < https://www.rsc.ox.ac.uk/files/files-1/pb6-responding-protracted-refugee-situations-2011.pdf> accessed 23 March 2020.
[110] *M.S.S. v. Greece & Belgium* Application No 30696/09 (ECtHR 21 January 2011) para 424.
[111] ibid, para 233; *Budina v. Russia* Application No 45603/05 (ECtHR 12 February 2008) para 263.

within the notion of 'vulnerable group' and were not in need of special protection.[112] In short, the ECtHR changed its reasoning, considerably reducing the notion of vulnerability. Furthermore, the Court highlighted that the facts in question occurred at the time Italy had already been hit by a major migration crisis, so state authorities were under such pressure that there was no room for better conditions.[113]

In the same vein, in the case of *J.R. et al v. Greece,* the Court decided that the applicants' administrative detention, which lasted for a month, was not arbitrary and could not be considered unlawful under Article 5 (1) ECHR.[114] State authorities took drastic measures to prevent them from staying in Greece unlawfully, guaranteed their deportation, and identified and registered them as part of the implementation of the EU–Turkey Action Plan.[115] The Court reiterated the Grand Chamber's position in *Khlaifia* that the undeniable difficulties and inconveniences endured by the applicants stemmed from the situation of emergency confronting Greece at the time the EU–Turkey Statement was implemented.[116]

Several cases are currently pending before the ECtHR concerning the legitimacy of hotspots, the asylum policy and the violations of asylum seekers' rights, so the current position of the Court may change in the future. However, this position widens states' discretion in taking measures and imposing restrictions on asylum seekers' and refugees' rights, which could result in small deviations from established human rights obligations. On this basis, according to Pervou, this reasoning 'relativizes human rights protection during severe crises, exactly at the time when protection is needed the most.' [117] It must also be said that this change to the ECtHR approach shines a spotlight on the need for a supervisory mechanism for the 1951 Convention that would produce a body of case law, establishing a common approach to the interpretation of the Convention and prevent any deviation from its standards.

[112] *Khlaifia et al v .Italy* Application No 14483/12 (ECtHR 1 September 2015) para 194.
[113] ibid, para 185.
[114] *J.R. et al v. Greece* Application No 22696/16 (ECtHR 25 January 2018) para 116.
[115] ibid, para 112.
[116] ibid, para139, 143; *Khlaifia et al v. Italy* (n 105) para 194.
[117] Pervou (n 107), 14.

The crisis in Europe proved that criticisms of the absence of a supervisory institution, as well as the failure to establish effective transition mechanisms, were well-grounded. As seen earlier, the failure of the Convention to establish safe transition routes encourages states to externalise their borders and increase their securitisation. In this sense, some EU states set up physical barriers, such as fences, to stop individuals at risk from reaching their territory and seeking asylum. It is worth noting that the building of barriers is not illegal under EU law, as each Member State has the right to control who enters its territory.[118] In addition, physical barriers help states to address irregular migration. However, it seems that this measure is not appropriate because it stops not only irregular migrants, but also asylum seekers.[119]

Stopping asylum seekers from entering their territory may mean that they end up in non-safe countries or back in their country of origin, which, broadly speaking, would constitute a violation of the principle of *non-refoulement*. One may argue that there is no violation of the prohibition of *non-refoulement*, as the individual never entered the territory of the state and sought asylum, but it must be accepted that the individual failed to do so because he or she was prevented by the State. Additionally, even though the Convention does not include a right of entry to an asylum country, the scope of the principle of *non-refoulement* does not allow states to reject asylum seekers at their border without examination of their claims.[120]

Practices like that render refugees more vulnerable to human trafficking, as they are willing to put their life and the lives of their family at risk in an attempt to avoid returning back to the country of their nationality. To be more specific, there are human trafficking networks in Turkey, Greece, Libya and other countries in Europe that charge several thousand euros per person to facilitate the journey to Europe by providing documents, information and sea passage.[121] It is no exaggeration to say that states leaving asylum seekers with no other choice feed human trafficking.

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[118] Lyra Jakulevičienė, 'Migration Related Restrictions by the EU Member States in the Aftermath of the 2015 Refugee "Crisis" in Europe: What Did We Learn?' (2017) 3 (2) International Comparative Jurisprudence 222, 225.
[119] ibid.
[120] ibid.
[121] Patryk Kugiel, 'The Refugee Crisis in Europe: True Causes, False Solutions' (2016) 25 (4) Polish Quarterly of International Affairs 45, 50.

This Part has proven that the EU and state authorities have been unable and incompetent to deal with the largest inflow of refugees since World War II. The fact that such a well-developed system as the EU is unwilling to accept refugees and comply with the obligations of its system and the 1951 Convention in the name of sovereignty gives real cause for concern. As a consequence of the EU's and states' policies, a series of violations of refugees' and asylum seekers' rights have occurred, bringing the leading role of EU in the realisation of human rights into question. Most worryingly, the ECtHR, which can hold states accountable for the violation of refugees' rights within the Council of Europe system, seems to adopt a more tolerant approach on the violation of refugees' and asylum seekers' rights, widening states' margin of appreciation. From a moral perspective, the worst thing in this crisis is that in several European states there has been a strong demonstration of xenophobic tendencies against refugees,[122] which shows that the society of those states is not willing to embrace those individuals trying to escape from serious violations and dangers.

In essence, the refugee crisis in Europe uncovered the inadequacy of the refugee regime and the inhuman attitude of states towards individuals at risk, cultivating suspicion towards the efficiency of the entire refugee regime. For that reason, seeking protection within the refugee regime cannot constitute a reliable way of protection for those HRDs wishing to flee their country to escape from violations.

[122] Bedrudin Brljavac, 'Refugee Crisis in Europe: The Case Studies of Sweden and Slovakis' (2017) 3 (1) Journal of Liberty and International Affairs 91, 94.

6.5. States' Reluctance to Take Refugee Human Rights Defenders

As highlighted above, states perceive refugees as threats to economic and social stability and refuse to take them in order to preserve their sovereignty. Prejudice against refugees arises for several reasons, such as lack of knowledge of the background of refugees, fear of cultural change and loss of identity, and lack of respect for different religions and cultures.[123] For instance, Poland is one of the most homogenous countries in Europe, being strongly Polish and Roman Catholic. The reason behind Poland's antipathy towards refugees is the fear that Muslim refugees from Syria, Iraq and Afghanistan could destroy the homogeneity of Polish society.[124] In Greece, there is also a perception that refugees contribute to the spread of communicable disease, even though epidemiologists have made clear that there is very little risk of spreading life-threatening disease to the native population.[125] In addition, in the UK, people believe that refugees have strong links with terrorists, are prone to criminal activities and decrease property prices.[126]

With regard to HRDs, besides xenophobia, states may be more hostile to refugee HRDs. In this thesis it is accepted that refugee defenders used to be individuals fighting for human rights in their country of origin and found themselves to be at such a risk that they decided to flee. In this sense, they may want to keep a low profile to protect themselves and their family members in the asylum states.[127] However, it should not be forgotten that these individuals used to play an active role in the struggle against human rights abuses, so they may want to continue their human rights activities.

In particular, depending on their interests and passions, they may engage with the local community as well as the refugee population, promoting certain human rights or helping local civil society organisations and HRDs. For instance, Dieudonne, one

[123] K Van der Veer, O Yakushko, R Ommundsen and L Higler, 'Cross-National Measure of Fear-Based Xenophobia: Development of a Cumulative Scale' (2011) 109 (1) Psychological Reports 27.
[124] Jan Cienski, 'Why Poland Doesn't Want Refugees' (*POLITICO*, 2017) <https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/> 30 October 2019.
[125] A H Eiset and C Wejse, 'Review of Infectious Diseases in Refugees and Asylum Seekers – Current Status and Going Forward' (2017) 38 (22) Public Health Reviews 1,7.
[126] Crisp (n 46), 10.
[127] McQuaid (n 3), 18.

of the refugees HRDs with whom McQuaid talked in the context of several formal interviews and informal conversations between April and October 2012, and who talks about gender issues to the refugee population stated that:

> [p]eople are not reading CEDAW [Convention on the Elimination of all Forms of Discrimination Against Women], protocols and lots of documents. […]. Women could come with stories of change, one could say: "since I started with you and got information about rights I did not know beating a wife is violence, before I thought it was normal, but now I realise it is not normal. He must respect me as a partner.[128]

Moreover, in the context of the empirical research for this thesis, some defenders told the author that even if they were granted refugee status in a state, they would not abandon their fight and the people for whom they fought. Particularly, Participant 16 said:

'Of prime importance would be the ability to reduce the risks, and then get back to work again […] *Your ability to continue with the work in the asylum state is the most important thing.'*[129]

Participant 7 also stated:

'If I could move out with my son, in a safer place or in a safer country, it would be fine for me and still work for my people back at home. This is my main point of view.'[130]

In other words, refugee HRDs may want to stay efficient and continue their fight from a safer place.

States may be more hostile to defenders seeking asylum in the sense that they do not want individuals who may challenge their policies and powerful private corporations with strong relationships with the State and set the local as well as the

[128] ibid, 17.
[129] INTV 16, 8.2.2018
[130] INTV 7, 12.2.2018.

refugee population against state authorities. For instance, Uganda has been found to be one of those countries that has adopted legislation to target refugees who may challenge the state authorities. In particular, Uganda's Refugee Act 2006 provides that no refugee 'can engage in any kind of political activities within Uganda against any country including his own'.[131] The UNHCR has condemned those states refusing to accept refugees on the grounds that they could change or conceal the political identity of their citizens or requiring asylum seekers to cease any activity in order to be considered for refugee status.[132] The hostility of states towards refugee defenders is not surprising as states have proved to be hostile targeting all those defenders challenging their interests, as highlighted in previous chapters.

Granting asylum to a defender may also harm the relations between the asylum state and the state of origin on the basis that the former harboured an individual that challenged the state's human rights policy and embarrassed his or her state of origin by bringing to the fore human rights abuses and speaking out against its human rights record. For example, Vladimir Lukin, Russian Human Rights Commissioner, argues against Russia granting asylum to Edward Snowden, as 'there are state interests and Russia–US relations could be harmed if Russia grants asylum to Snowden.'[133] For that reason, Snowden should ask an international organisation to supply him with a temporary passport and ensure his rights, rather than Russia.[134] One can say that for two powerful states with conflicting interests and tense relations, such as Russia and the United States, these actions are rather provocative.[135] However, allied states or small developing countries may be reluctant to take in refugee defenders for fear of damaging the relations between

[131] Uganda's Refugees Act 2006, art 35 (d) and (e).
[132] UN High Commissioner for Refugees, Guidelines of International Protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, UN Doc HCR/GIP/12/01 paras 30-33; UN High Commissioner for Refugees, Guidelines of International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, December 2017, UN Doc HCR/GIP/17/13 para 28.
[133] Emily Englund, 'Snowden Says He Will Seek Asylum in Russia' (*Washington Post*, 2013) <https://www.washingtonpost.com/world/snowden-wants-meeting-with-human-rights-activists-lawyers/2013/07/12/237d5254-eac6-11e2-a301-ea5a8116d211_story.html?utm_term=.7032a3d04d0a> accessed 30 October 2019.
[134] ibid.
[135] Ashley Fantz, 'Phil Black and Michael Martinez, 'Snowden out of Airport, still in Moscow' (*CNN*, 2013) <https://edition.cnn.com/2013/08/01/us/nsa-snowden/index.html> accessed 30 October 2019.

them or with a powerful state respectively, constituting another obstacle to relying on the ‘refugee solution’.

6.6. The Situation of Human Rights Defenders as Refugees

The living and working conditions and the situation of those HRDs who managed to flee their country of origin in order to escape from abuses and seek asylum in other countries are so difficult that they provide further evidence that the international refugee regime is not a suitable alternative for defenders.

With the support of civil society organisations, some defenders have managed to remove themselves from immediate dangers, seek asylum in another country and safely relocate to a new place.[136] However, this is not the case for many HRDs who have not been so lucky and had to rely on smuggles to cross-borders or to obtain visas and other necessary documents.[137] The involvement of organised crime in the transportation of defenders as well as other irregular migrants and refugees may render defenders even more vulnerable because they may face the risk of exploitation and human trafficking.

In order to earn their livings and reconstruct their families, defenders often take on low-skill and paid jobs and are excluded from basic labour and social rights.[138] As a consequence of this, defenders may abandon their human rights activities, which will have a chilling impact on the human rights movement, in the sense that their experience, expertise and advocacy will be lost.[139]

Even more worryingly, UNHCR has not provided international guidance and training on how states authorities should respond to claims and requests for protection under the umbrella of the term ‘human rights defenders’ and as a result UNHCR local branches are unfamiliar with the basis of their claim as defenders.[140] This has the consequence that the registration process is delayed for years or indefinitely, perpetuating the circle of vulnerability, uncertainty and insufficiency.

In sum, the situation of HRDs as refugees along with the hostility of states towards refugees and defenders in particular, leaves no room for doubt that the alternative of

[136] UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, 1 February 2016, UN Doc A/HRC/31/55/ para 72.
[137] UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights Defenders, 16 January 2018, UN Doc A/HRC/37/51 para 59-60.
[138] McQuaid (n 3), 16.
[139] Report of the Special Rapporteur on the Situation of Human Rights Defenders (n 137), para 37.
[140] ibid, para 38.

the international refugee regime will put defenders at greater risk and affect the realisation of human rights.

6.7. Conclusion

This Chapter considered the extent to which HRDs fleeing their country to escape from human rights violations and other dangers can benefit from the international refugee regime, as they share the same characteristics as refugees. Although international refugee law is a safety net in a small set of circumstances, it is not an ideal alternative, for both practical and normative reasons.

The hostility of states to migrants and refugees, the inadequacy of the 1951 Convention and Europe's failure to deal with the refugee crisis as well as the situation of those defenders who left their country and sought asylum leave no room for trust in the refugee system. In fact, refugee law is so problematic that it needs to reform to ensure refugee rights and provide effective protection to those individuals at risk. For these reasons, using the refugee regime would mean uncertainty, greater risk and, possibly, further violations against defenders. It should not also be forgotten that it became clear from the empirical research that the top priority of HRDs is to remain in their home countries and continue their human rights work. On this basis, even though the failure of international human rights law to protect HRDs can be used as an argument to dismiss international human rights law as unhelpful, alternatives must be explored within this area of law so that defenders will not reach a point where fleeing the country is the only choice they have. The following chapter seeks to make recommendations for reforms within international human rights law that could create a favourable environment for HRDs within their state of origin.

Chapter 7

Recommendations for Possible Reforms

7.1. Introduction

Having discussed the main obstacles to the work and life of defenders, emphasised international human rights law's failure to protect them and concluded that the international refugee regime is not a suitable alternative; this Chapter considers recommendations for reforms that could improve the activities of defenders.

It would be imprudent to make and discuss recommendations without considering first how international and regional mechanisms have responded so far to the obstacles addressed in this research project. Therefore, the first Section discusses annual reports and country visits, as methods used by the UN Special Rapporteur on HRDs to examine major themes of concern and to encourage states to respect the rights of defenders. It also looks at the reports of other UN treaty bodies that are aware of the work of defenders and urge their State parties to comply with those rights related to the defence of human rights. Special emphasis is placed on the IACtHR, which is the only regional court that has developed case law focused on the violations committed against defenders.

Despite the efforts of international and regional mechanisms, the rights of defenders are brutally violated, while impunity still prevails. Before the thesis explores recommendations for dealing with the legal obstacles, the second Section considers whether a possible Convention on HRDs would provide more effective protection. However, the argument of this thesis is that trying to come up with a new human rights treaty devoted to HRDs would be a waste of time and energy on the basis that there are human treaties containing provisions relevant to the defence of human rights already in place. In addition to the existing legally binding provisions, the implementation of the Declaration on HRDs has proved to be quite problematic. Therefore, the argument put forward is that it is a much better idea to work with the existing treaty provisions rather than push for a new Convention.

The third Section of this Chapter is devoted to discussing recommendations for possible reforms. It is worth noting that a lot of those recommendations may apply to the implementation of human rights in general, but the relevant part discusses them, putting emphasis on the current situation of HRDs.

The recommendations' Part is divided into two main types of recommendations. The first type focuses on recommendations responding to each of the identified obstacles. In the context of making particular recommendations for dealing with criminalisation and impunity, it considers measures of decriminalisation, the establishment of a World Court of Human Rights and whether the pressure for compliance can sometimes come from outside. In terms of the definition of the term 'human rights defender', the Chapter does not propose a new one, but reiterates the importance of the interpretative approaches proposed in Chapter 3.

As pointed out many times in the thesis, defenders are also victims of enforced disappearances, murders and other extra-legal actions. On this basis, the second type of recommendations proposing reforms and measures could respond to any kind of abuse against defenders and not necessarily only to the legal obstacles discussed in this research project. It draws on recommendations for strengthening human rights in general but seeks to discuss these ideas in conjunction with the needs of defenders. In this sense, it considers the role of the Security Council in the implementation of human rights and the need for trainings for state officials and Human Rights Education in general. The recommendations' Section acknowledges that all these suggestions will take years to be implemented and therefore also suggests immediate measures that could respond to the immediate needs of defenders.

7.2. International Community's Response to the Obstacles

7.2.1. Definition

As stated earlier, it is commonly accepted that the definition of the term 'human rights defender' derives from Article 1 of the Declaration on HRDs. However, it soon became apparent that the definition of Article 1 was so uncertain that could provoke misunderstandings. For that reason, in 2004, 6 years after the adoption of the Declaration, the Office of the UN High Commissioner for Human Rights attempted to tighten up the interpretative loophole, producing Fact Sheet 29. Despite the fact that the Fact Sheet is not legally binding, in practice the three minimum requirements to be a defender introduced by Fact Sheet 29 are the only interpretative tools to approach the definition, as they are intended to provide clarity. Therefore, one of the main positions of this thesis is that Fact Sheet 29 should be considered to be part of the definition. In addition, the Special Rapporteur on HRDs, through his or her annual and country visit reports and the two Global Surveys (2006 and 2018), has determined to whom the definition refers. NGOs working with defenders, for their part, have adopted their own approaches contributing to the identification of HRDs.

Despite the efforts of the UN mechanisms and NGOs to provide a better understanding of who falls within the term, it has become clear from the Definition Chapter and the empirical findings that there is still confusion over the term. In his 2018 World Report, the UN Special Rapporteur on HRDs confirmed this finding, stating that 'many human rights defenders remain unaware of or are unwilling to use the term.'[1]

Framing a new definition is not feasible, as it would cause further confusion and render the identification of defenders even more challenging. The international community, NGOs and people working with HRDs are resistant to the idea of a clearer definition on the basis that they are worried that this would narrow the

[1] UN Special Rapporteur on the Situation of Human Rights Defenders/ Michel Forst, 'World Report on the Situation on Human Rights Defenders' (December 2018) (hereinafter World Report) <https://www.protecting-defenders.org/pdf.js/web/viewer.html?file=https%3A//www.protecting-defenders.org/sites/protecting-defenders.org/files/UNSR%20HRDs-%20World%20report%202018.pdf> accessed 30 October 2019.

definition. This thesis does agree with this argument in principle in the sense that the lack of clarity is counterproductive, provoking misunderstandings and encouraging different interpretations of the term, which may also result in excluding individuals from the definition. Therefore, the thesis attempts to point the flaws and inconsistencies with the definition. In particular, it attributes the confusion to the unclear minimum standards of Fact Sheet 29 and the absence of the 'risk' as a means of ensuring access to the Higher Protection Regime and prioritising those in need of immediate protection. On this basis, in the Chapter devoted to the definition, it suggested alternative interpretative approaches that could make the definition clearer. It also highlighted the importance of the risk, as an element that could distinguish an individual who put his or her life and livelihood on the line to fight for human rights from another individual who promotes human rights without taking any risk.

At the same time, there is a huge resistance to narrowing the definition in any way. The reason for that is the perception that a narrower definition would limit the protection of HRDs. The thesis responds to this concern with the argument that those excluded from the definition are not left unprotected, as they fall under the protection of other universal and regional human rights treaties. In other words, it is significant for the community of scholars, NGOs and activists to know what is distinctive about HRDs, so that they help defenders self-identify and understand that they are entitled to certain enhanced protection.

7.2.2. Criminalisation of Human Rights Defenders

As has been pointed out many times, HRDs are subject to cruel human rights violations, such as torture, enforced disappearances and murders, while criminalisation is the most common method of targeting defenders and ceasing their human rights activities. On this basis, the thesis has categorised the abuses against defenders into two different forms: violations trough extra-legal actions and violations through legal actions, also known as criminalisation. It must be said that the abuses against defenders, irrespective of the category, constitute breaches of treaty and, in some cases, customary law. Given that the focus of the thesis is to

point the legal obstacles to the work and life of defenders, it has put emphasis on criminalisation and abuse of administrative power.

The UN Special Rapporteur on HRDs conducts visits to states in order to assess the situation of defenders, identify problems and strategies used against them, and make recommendations for possible actions, thereby limiting as far as possible the violations committed against HRDs. After the visit, the Special Rapporteur issues a report indicating his or her concerns and calls for actions, providing specific recommendations.[2] For example, in January 2018, the Special Rapporteur visited Mexico to examine the situation of HRDs and had the opportunity to meet with 800 defenders and other members of civil society, such as lawyers and representatives of NGOS. In his report, he indicated, among other things, his main concerns and made recommendations for possible reforms.[3]Additionally, in the context of his mandate, the Special Rapporteur produces and submits annual reports to the Human Rights Council and the General Assembly, which describe the major trends and themes of concern, such as violations committed against defenders by NSAs and the situation of women defenders,[4] and also makes recommendations.

By publicising violations committed against defenders, the Special Rapporteur urges reforms. In essence, he relies upon the concept of 'naming and shaming' in the hope that spotlights are followed by improvements. This strategy may be proved to be counterproductive if one considers the example of Israel. In particular, Israel is one of the most common targets of naming and shaming, but widespread human rights abuses continue unabated.[5] Although this concept does not work every time, naming and shaming is a strategy designed to confront states with the legal obligations they have subscribed to by ratifying human rights treaties or other

[2]'OHCHR | Country Visits' (*ohchr.org, 2019*) <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CountryVisits.aspx> accessed 30 October 2019.

[3] UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights Defenders on his Mission to Mexico, 12 February 2018, UN Doc A/HRC/37/51/Add.2.

[4] See for example, UN General Assembly, Report of the UN Special Rapporteur on the Situation of Human Rights Defenders, 4 August 2010, UN Doc A/65/226; UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights, 10 January 2019, UN DOC A/HRC/40/60.

[5] Emily- Marie Hafner, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement' (2008) 62 (4) International Organization 689, 691.

standards.[6] On this basis, it puts public pressure on states to improve the situation of defenders.

Along the same lines, several treaty bodies also seem to be aware of the situation of defenders, as they have expressed through their reports their deep concern regarding various attacks and restrictions on HRDs. More specifically, according to one of the CEDAW's reports:

> The Committee is concerned about information on travel restrictions imposed on at least one woman human rights activist who intended to brief the Committee and to observe the constructive dialogue of the State party. The Committee is further concerned about information that the State party's legislation requires sponsorship to establish civil society organizations which results in undue restrictions in the registration of NGOs.[7]

The Committee on the Rights of the Child (CRC) also stated that those seeking to report on the violations of children's rights are subject to arbitrary arrest, police harassment and enforced disappearance.[8] The Committee on Economic, Social and Cultural Rights shared its concerns that Sudanese defenders of economic, social and cultural rights are victims of intimidation, harassment and criminalisation.[9] The Human Rights Committee, for its part, has expressed its concerns that Sudanese HRDs are subject to harassment, intimidation, arbitrary arrest and detention, torture and ill-treatment.[10] Furthermore, the Committee against Torture (CAT) stated that

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[6] Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 (4) Human Rights Quarterly 866, 869.

[7] UN Committee on the Elimination of Discrimination against Women, Concluding Observations of the Combined Seventh and Eighth Periodic Reports of China, 14 November 2014, UN Doc CEDAW/C/CHN/CO/7-8 para 32.

[8] UN Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Reports of China, 29 October 2014, UN Doc CRC/C/CHN/CO/3-4 para 21. See also, UN Committee on the Rights of the Child, Concluding Observations on the Third and Fourth Periodic Reports of Rwanda, 8 July 2013, UN Doc CRC/C/RWA/CO/3-4.

[9] UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Second Periodic Report of the Sudan, 27 October 2015, UN Doc E/C.12/SDN/CO/2 para 7.

[10] UN Human Rights Committee, Concluding Observations on the Fourth Periodic of the Sudan, 19 August 2014, UN Doc CCPR/ C/SDN/CO/4 para 22. See also, UN Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Cameroon, 30 November 2017, UN Doc CCPR/C/CMR/CO/5; UN Human Rights Committee, Concluding Observations on the Second Periodic Report of Chad, 15 April 2014, UN Doc CCPR/C/TCD/CO/2; UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the Philippines, 13 November 2012, UN Doc CCPR/C/PHL/CO/4.

HRDs and journalists have been charged with broadly defined offences for acts contrary to the positions of Rwandan authorities and ill-treated during their detention.[11]

The IACtHR is the only regional human rights system that has produced a well-developed jurisprudence on the protection of HRDs.[12] Due to the binding nature of regional courts' decisions, the IACtHR case law focusing on HRDs is of paramount importance, as it is the only legal binding guidance on the rights of defenders. The thesis has referred to IACtHR case law in the context of the criminalisation of HRDs and particularly of judicial harassment.

In addition to case law on criminalisation, *Luna Lopez v. Honduras* and *Human Rights Defender v. Guatemala* are the two leading cases dealing with the violations committed against defenders' rights. In particular, the Court emphasised the obligation to guarantee the rights of HRDs and the duty to prevent and investigate the abuses against them. It also highlighted the special protection needs of defenders, as they often find themselves in dangerous situations.[13] The Court reiterated these principles in the case of *Yarce et al v. Columbia*, where it placed emphasis on the situation of Women HRDs and the abuses against this particular group.[14] In March 2017, in the case of *Acosta y otros v. Nicaragua*, the IACtHR established its jurisprudence concerning investigation of possible acts of retaliation against HRDs.[15]

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[11] UN Committee against Torture, Concluding Observations on the Second Periodic Report of Rwanda, 21 December 2017, UN Doc CAT/C/RWA/CO/2 para 52. See also, UN Committee against Torture, Concluding Observations on the Third Periodic Report of Tunisia, 10 June 2016, UN Doc CAT/C/TUN/CO/3; UN Committee against Torture, 'Concluding Observations on the Fifth Periodic Report of Israel, 3 June 2016, UN Doc CAT/C/ISR/CO/5; UN Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Kazakhstan, 9 January 2014, UN Doc CAT/C/KAZ/3.

[12] There are several provisions of general international human rights law and regional human rights law that apply to HRDs. For instance, prohibition against torture, prohibition of arbitrary arrest, freedom of expression and assembly are all key rights of HRDs. On this basis, the jurisprudence of regional courts, like the ECtHR and African Court, would also be relevant to HRDs.

[13] *Luna Lopez v. Honduras* (IACtHR 10 October 2013); *Human Rights Defender v. Guatemala* (IACtHR 28 August 2014).

[14] *Yarce et al v. Columbia* (IACtHR 22 November 2016).

[15] *Acosta y otros v. Nicaragua* (IACtHR 29 April 2017).

Despite the efforts of the UN and regional mechanisms, the Chapter devoted to the criminalisation of HRDs showed that violations through legal as well as extra-legal actions still continue and as a result have a major impact on the activities of HRDs and on the realisation of human rights in general. Therefore, alternative methods of enhancing the rights of defenders should be explored to provide in conjunction with the existing mechanisms, more efficient protection.

With regards to SLAPPs against defenders, it seems that in the United States, anti-SLAPPs laws are a quite common way to prevent litigation aimed at silencing opposing views. Most of the American states have adopted such laws that allow individuals to initiate special proceedings to strike the complaint against them based on their right to freedom of speech under the United States or the particular State Constitution.[16] In Europe, Asia and Africa, as this policy is now becoming a trend, states have not dealt with the issue yet. It is worth noting that EU is currently working on a draft - legislation to deter SLAPPs.[17]

7.2.3. Impunity for Crimes Committed against Human Rights Defenders

Not only do the abuses against defenders continue, but also those responsible for the violations remain unpunished. The relevant chapter of the thesis emphasised state failure to investigate the violations committed against defenders and to provide redress. Even in cases where the defenders themselves do not want to report the violations and bring the violators to justice, the reason is that they do not believe in the state's ability to conduct prompt and impartial investigations and punish those responsible for the abuses against them. That being said, this situation contributes to an environment of impunity for those who attack HRDs, perpetuating the vicious circle of violence against defenders.

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[16] B Ashenmiller and C Norman, 'Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcment' (2011) 11 (1) The B.E. Journal of Economic Analysis and Policy 1, 11; Marc J Randazza, 'The Need for a Unified and Cohesive National Anti-SLAPP Law' (2012) 91 (2) Oregon Law Review 627, 627.

[17] 'EU Laws to Deter Slapps Should Cover Everyone' (*Scottish PEN*, 2020) <https://scottishpen.org/eu-laws-to-deter-slapps-should-cover-everyone/> accessed 15 February 2020.

The UN Special Rapporteur on HRDs has referred to widespread impunity for crimes against HRDs many times and repeatedly called on states to strengthen their efforts to combat impunity and ensure the prompt and transparent investigation of all violations against defenders.[18] Besides the UN Special Rapporteur on HRDs, it appears that the other UN mechanisms do not deal with impunity, especially against defenders, as they address the situation of HRDs merely on the occasion of a complaint, case or visit report.

However, it would be remiss of the thesis if it did not refer to the IACtHR position on impunity for abuses against defenders. As stated elsewhere, the IACtHR was the first human rights mechanism that established the dichotomy between the positive and negative obligations and laid the foundation for the concept of due diligence.[19] On this basis, the IACtHR, in the context of its case law focusing on HRDs, has elaborated on the obligation to prevent and investigate with due diligence the violations of HRDs' rights as a means of combating impunity. In particular, the Court stated:

> The Court established a broad scope for the obligation of prevention, encompassing all measures of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any potential violation of these rights is effectively considered and treated as an unlawful act which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences.'[20]

In sum, in regard to impunity for crimes against defenders, the UN Special Rapporteur aims to respond to the 'impunity obstacle' by reminding states of their obligation to investigate the violations of the rights of HRDs in the context of their obligation to ensure the full exercise of human rights. Most importantly, the IACtHR emphasises the principle of due diligence with reference to the protection

[18] See for example: UN General Assembly, Report of the Special Representative on the Situation of Human Rights Defenders, Hina Jilani, 10 September 2001, UN Doc A/56/341 paras 9-19; World Report (n 1).
[19] *Velasquez Rodriguez v Honduras* (IACtHR 29 July 1988). See Chapter 5.
[20] *Luna Lopez v. Honduras* (n 13), para 117-118; *Human Rights Defender v. Guatemala* (n 13) para 216.

of HRDs, leaving no space for states to turn a blind eye on the work of HRDs and the abuses against them.

7. 3. A Possible Convention on Human Rights Defenders

As pointed out earlier in this thesis, the Declaration on HRDs was the result of painful and long negotiations due to the ideological confrontation between Western and Eastern states during the Cold War as well as the general hostility of some states towards human rights. The concept of soft law is designed to reconcile the various economic, political and cultural interests of international society and to achieve agreement on new rules.[21] At that time, a soft law instrument, like the Declaration on HRDs, was the only means of protecting HRDs and conferring on them the recognition they deserved in international human rights law.

Twenty years after the adoption of the Declaration on HRDs and given that the rights of HRDs are still routinely violated, one can say that the time for a binding instrument has come. A number of objections to this position could be raised though.

Cole is of the opinion that 'states comply with international human rights treaties when it is beneficial - or at least - costless for them to do so.'[22] In other words, they decide as to whether they enter into conventional human rights obligations after a careful and rational consideration of costs and benefits. One of the main reasons behind the state decision to sign, ratify and comply with a human rights treaty is the fact that the State would have behaved the same way even if the treaty in question had not existed.[23] Put another way, if a state is not willing to comply with the rights set out in a potential Convention on HRDs, it will not respect and ensure the rights of HRDs, despite the existence of a relevant treaty. This conclusion is reinforced by the fact that the empirical findings confirmed that states ignore the rights enshrined in the Declaration, while the UN Special Rapporteur found that a great

[21] G F Handl, W M Reisman, B Simma, P M. Dupuy and C Chinkin, 'A Hard Look at Soft Law' (1988) 82 American Society of International Law 373.

[22] Wade Cole, 'Mind the Gap: State Capaciy and the Implementation of Human Rights Treaties' (2015) 69 (2) International Organization 405, 406; Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?' (1999) 36 (1) Journal of Peace Research, 95; E Hafner-Burton and K Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 (5) American Journal of Sociology 1373.

[23] ibid; Eric Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36 (2) The Journal of Legal Studies 397, 398.

number of states make great efforts not to ensure the full enjoyment of the rights of HRDs, but to frustrate them.[24]

Moreover, some states may be coerced into complying with a human rights treaty due to the economic sanctions for non-compliance, while marginally democratic states and repressive regimes may decide to sign and ratify human rights treaties to show ‘support’ to legitimising norms and avoid criticisms of domestic human rights violations.[25] However, treaty membership does not prevent State parties from violating treaty provisions. Unlike the violations of interstate agreements, where direct sanctions or reputational sanctions may be imposed by the other State parties against the violating state,[26] human rights treaties, which regulate the way in which states behave towards their citizens rather than other states, do not incur responsibilities for human rights violations. As stated earlier, inter-state complaints are possible under international treaties, but in practice are rare. The argument put forward here is that even if states decided to sign and ratify a potential Convention on HRDs, there would be no guarantee that they would ensure the full enjoyment of the rights of HRDs.

Today, there are ten international human rights supervisory treaty bodies that have been established with the purpose of monitoring and promoting the implementation of their respective treaties.[27] On this basis, one can argue that a possible Convention on HRDs could also entail the establishment of a supervisory treaty body, which would enhance the implementation of the rights of HRDs. The functions of treaty bodies are defined in the respective human rights treaties, but the main responsibility of monitoring treaty bodies is to examine the implementation of

[24] World Report (n 1), 7.
[25] Oona A Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 (8) Yale Law Journal 1937; E Hafner-Burton, K Tsutsui, and JW Meyer, ‘International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties’ (2008) 23 (1) International Sociology 115, 117.
[26] Andrew T. Guzman, ‘The Design of International Agreements’ (2005) 16 (4) The European Journal of International Law 579, 582.
[27] These are: the Committee Against Torture (CAT); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); the Committee on the Rights of the Child (CRC); the Human Rights Committee (HRC); the Subcommittee on the Prevention of Torture (SPT); the Committee on the Rights of Persons with Disabilities (CRPD); and the Committee of Enforced Disappearances (CED).

treaty obligations. Many human rights conventions provide for the possibility of submitting complaints of human rights violations committed by a State party to the relevant supervisory treaty body. In addition, some conventions, such as the CAT, have supplementary protocols establishing *ad hoc* state visits on the territory of State parties if they have reasons to believe that serious violations of treaty obligations are occurring.

The value of the role of monitoring bodies in enhancing human rights implementation is undeniable, but the effectiveness of the treaty body system can be called into question. Although the treaty monitoring systems' shortcomings go beyond this research project,[28] this Part points to those that could affect the implementation of the rights of HRDs. The main capacity deficit is that state reporting to monitoring is inadequate, as many states have never reported themselves at all. In particular, by the end of 2012, approximately 20% of State parties to the ICCPR, ICESR and CAT had never submitted an initial report.[29] At the same time, the most widely ratified treaties, namely the Convention on the Rights of the Child (CRC) and CEDAW, had managed to receive all initial reports from the then 193 and 187 their State parties respectively.[30]

The processing capacity of individual complaints is also shamefully inadequate, as the average time between registration and final decision on a case is three and a half years for the Human Rights Committee and two and a half years for the Committee against Torture.[31] The delay in deciding cases has an adverse impact on petitioners as well as states. On the one hand, petitioners should wait a lot of time until the relevant Committee decides upon their complaint; on the other hand, states may be requested by the respective Committee to implement interim measures over a long

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[28] M O'Flaherty and C O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 (1) Human Rights Law Review 141; C D Creamer and B Simmons, 'Ratification, Reporting, and Rights: Quality of Participation in the Convention against Torture' (2015) 37 (3) Human Rights Quarterly 580; G Ulfstein and H Keller, *UN Human Rights Treaty Bodies* (CUP 2012).

[29] United Nations: Office of the High Commissioner - Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System' (2012) 22 <https://www2.ohchr.org/English/bodies/HRTD/docs/HCreportTBStrengthening.pdf> accessed 30 October 2019.

[30] ibid.

[31] ibid.

period.[32] For these reasons, a potential Convention on HRDs that would create a human rights treaty body, which, in turn, would contribute to the compliance of the rights of HRDs seems to be rather questionable.

Treaty bodies and Special Procedures are two different concepts of the UN human rights protection system. Emphasis should be placed on the fact that all have a core function in common and therefore in academic scholarship there is a debate on potential overlap in the mandate of treaty bodies on the one hand and special procedures on the other.[33] For instance, both may be empowered to receive complaints, conduct country visits and make recommendations through reports. The purpose of this thesis is not to elaborate on the differences and similarities between these two systems though. The point here is that a potential monitoring body on HRDs would not enhance the protection of defenders' rights, as the Special Procedure devoted to HRDs has already had a lot of similar actions to a supervisory treaty body with the objective of monitoring the implementation of the Declaration.

In addition, despite the fact that human rights treaty bodies are not particularly effective, it would be a mistake to abandon treaty systems in general, as there are several treaties that include provisions relevant to the protection of HRDs and could contribute to the protection of HRDs. In 2012, the UN High Commissioner, Navi Pillay, made a series of recommendations for strengthening the UN human rights treaty body system. In particular, she considered a number of issues regarding the function of treaty bodies; from the reporting and consultative process to the follow up procedures and the impartiality of the members.[34] Although the discussion of recommendations for strengthening the function of treaty bodies is beyond the purpose of the study, it should be said that the enhancement of treaties bodies would be beneficial to HRDs too. Not only could defenders bring cases on the violation of treaty provisions before the respective treaty bodies promptly and feel efficient vindication, but also the reports of treaty bodies could bring the situation of defenders to the fore and urge states to ensure the rights of HRDs. On this basis,

[32] ibid, 23
[33]Nigel Rodley, 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission of Human Rights – Complimentarity or Competition?' (2003) 25 (4) Human Rights Quarterly 882.
[34] Pillay (n 29).

one of the recommendations of the thesis is that treaty bodies' reports should include a part devoted to the situation of HRDs, in which taking into account particular treaty provisions, the body would be able to examine the situation of HRDs and make relevant recommendations. Such a recommendation in conjunction with the work of the Special Rapporteur on HRDs would bring the violations committed against HRDs to the global light and make states take stronger actions to ensure those rights relevant to the promotion and defence of human rights.

To sum up, it is unlikely that those states that have taken actively steps to prevent defenders from enjoying their rights will agree on a legally binding text providing for the rights of defenders. However, it is of great importance that the Declaration on HRDs does not create new human rights, but articulates existing human rights set out in international and regional human rights treaties. That means HRDs defenders enjoy the same rights as all individuals, so states have the duty to respect and ensure their rights, regardless of the existence of a legally binding convention dedicated to HRDs.

The UN Special Rapporteur on HRDs articulated that 'twenty years is a relatively short period of time and over the last two decades there has been a productive discussion about the appropriate means of implementing the Declaration and about the needs of particular groups of human rights defenders.'[35] For these reasons, the argument put forward here is that since the Declaration on HRDs relies on a number of legally binding provisions, HRDs are not left unprotected, so more time should be given to states to understand the Declaration and develop different mechanisms and policies of implementation. The Special Rapporteur should also be given more time to understand state practice and in collaboration with civil society to develop new methods of implementing the Declaration.

In any other new human rights areas, such as Business and Human Rights or the rights of older persons, there is a strong lobby from academics starts arguing for a binding treaty,[36] so it is also quite interesting that this argument is not being made

[35] World Report (n 1), 7.
[36] See for instance, John G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 (4) American Journal of International Law 819; Olivier De Schutter,

in the case of defenders because, among other reasons, it is a sign of great resistance to binding norms in this area. It should not also be forgotten that notwithstanding the non-legally binding nature of the Declaration on HRDs, it was the result of long and painful negotiations and significant compromises among states. This makes the possibility of drafting a binding text even more challenging.

'Towards a New Treaty on Business and Human Rights' (2016) 1 (1) Business and Human Rights Journal 41; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 (2) Business and Human Rights Journal 203; I Doron and I Apter, 'The Debate Around the Need for an International Convention on the Rights of Older Persons' (2010) 50 (5) The Gerontologist 586; K Tang and J Lee, 'Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People' (2006) 36 (7) The British Journal of Social Work 1135.

7.4. Recommendations for Possible Reforms

Part of this Section proposes recommendations for the key legal obstacles identified in this thesis. It has also become clear from the empirical research that defenders suffer from violations committed through legal actions, so they would like to see these obstacles addressed most. In essence, the first Section seeks to propose measures that could ensure greater protection for HRDs in the context of international human rights law and overcome the legal obstacles to their work and life. However, the acceptance of those recommendations cannot happen immediately, while defenders are also subject to violations committed through extra-legal actions, such as death threats and abductions. Therefore, the second Section of this Part considers smaller steps that could happen, not strictly related to international human rights law as such, and contribute to the protection of HRDs and the implementation of human rights in general.

7.4.1. Obstacles-related Recommendations

One of the main positions of this thesis is that effective implementation should not rely only on retrospective complaint procedures, but also on forward-looking efforts to promote respect for human rights. As pointed out earlier, HRDs can rely on international refugee regime if they wish to escape from the abuses against them. However, this is not the first choice of defenders because they want to remain and fight for human rights in their home state. At the same time, the international refugee regime also faces a serious crisis, rendering it a non-ideal alternative. For these reasons, the purpose of this Part is to explore possible recommendations that could enhance the implementation of the rights of HRDs, so that defenders can feel secure enough to continue their human rights activity within the territory of their state of origin and work.

In regard to the definition, the main argument of the thesis is that the current definition is extremely broad and vague, provoking misunderstandings and constituting a serious obstacle to the work of defenders. However, it was stated from the beginning of this Chapter that it is not feasible to propose a new definition of HRDs. On the other hand, the Chapter devoted to the definition emphasises the

flaws in the minimum standards established by Fact Sheet 29 and suggests alternative interpretative approaches in the sense that in these still quite early days of HRD protection under international human rights law and given the resistance to narrowing the definition, it is better to work on interpretive standards. In essence, one of the purposes of the thesis is to make the UN and regional mechanisms dedicated to the protection of HRDs, state authorities and civil society organisations working with defenders aware of the problematic aspects of the definition and minimum standards and to encourage them to consider the proposed interpretative approaches. In essence, if all mechanisms take the proposed interpretative approaches into account and interpret it accordingly, a more precise definition will come out of practice, which will contribute to a more effective implementation of the Declaration on HRDs.

7.4.1.1. Measures on Criminalisation and Impunity: External Pressure

In terms of the criminalisation of HRDs and impunity for crimes against them, it is really difficult to handle these obstacles in the sense that the criminalisation is orchestrated by the State, which is also the one that fails to ensure their rights and provide redress for the violations against them. On this basis, it is unlikely that the State will act against itself. In states with judicial independence, courts are powerful instruments for the vindication of human rights, which have the power to ensure the compliance with international human rights obligations and uphold human rights and get the State back 'on track'. Given that HRDs live and work mainly in marginally democratic states where there have been serious attacks on the independence of justice, the compliance proves to be more complex. The only way to tackle these obstacles in a radical way is through the enhancement of human rights.

The defenders participating in the empirical research seem to give preference to this idea, as the majority suggested that states should comply with their human rights obligations more generally. This way will also ensure the enjoyment of human rights, such as the right to freedom of expression and assembly, which are relevant to the defence of human rights. Indicatively, Participant 10 summarising the views of Participants 1, 2, 4, 5, 9, 11, 13 and 16, stated that:

'I want the state to respect and implement the laws and international conventions, particularly on human rights issues.'[37]

In essence, more cases and complaints regarding abuses against HRDs should be brought before the regional human rights courts.[38] Regional human rights courts uphold human rights and provide redress, where states have failed to comply with their human rights obligations. Most importantly, decisions and sentences are binding on national authorities which have to take all necessary measures to comply with the court ruling. It should also be noted that almost all judgements of the ECtHR have been executed; even though the execution is not always speedy and easy.[39] However, the record of other regional courts is not as good as that of the ECtHR,[40] while the European mechanism of monitoring the execution of decisions is unusual, as not all regions have that.

In an ideal world, courts like the European Court would be great, however, regional human rights courts can have their own contribution to the implementation of human rights by developing important jurisprudence even if they do not have mechanisms supervising the execution of their judgements. In other words, these mechanisms place pressure on governments to comply with the human rights obligations enshrined in the respective human rights treaty. On this basis, decisions related to HRDs, like those developed by the IACtHR, would exert particular pressure on states to take all appropriate measures to ensure the full exercise of the rights of HRDs. In other words, in marginally democratic states where the rights of defenders are systematically flouted, external pressure through the binding

[37] INTV 10, 17.2.2018.
[38] The thesis does not consider the ICJ because, as stated elsewhere, cases on human rights are rarely brought before the ICJ.
[39] Déborah Forst, 'The Execution of Judgments of the European Court of Human Rights: Limits and Ways ahead' (Master, Katholieke Universiteit Leuven 2012).
[40] See indicatively, Daniel Abebe, 'Does International Human Rights Law in African Courts Make Difference?' (2017) 56 (3) Virginia Journal of International Law 527; Damian A Gonzalez-Salzberg, 'Do States Comply with the Compulsory Judgments of the Inter-American Court of Human Rights? An Empirical Study of the Compliance with 330 Measures of Reparation' (2014) 13 Revista do Instituto Brasileiro de Direitos Humanos 93; Cecilia M Bailliet, 'Measuring Compliance with the InterAmerican Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America' (2013) 31 (4) Nordic Journal of Human Rights 477; C Heyns, D Padilla and L Zwaak, ' A Schematic Comparison of Regional Human Rights System: An Update' (2006) 3 (4) SUR – International Journal of Human Rights 163.

decisions of regional courts is necessary and salutary to those HRDs whose rights are threatened.

Regional courts are of great importance because they can respond to particular specifities in the region as they are physically and culturally closer to the states. As a result, in regions where HRDs work and live, the respective regional courts may develop particular jurisprudence on the violations committed against defenders as well as on the types of reparations which would improve the situation of HRDs. In addition, states from the same region share the same standards and interests in the protection of human rights and as a result are in the position to influence each other's policy towards HRDs and human rights in general, ensuring compliance with regional common values and principles. [41]

Several defenders emphasised the need for external pressure as the violations of defenders' rights are so systematic and well-orchestrated by the State that without external assistance, state authorities are unlikely to respect their rights. Particularly, Participant 9 supported by Participants 1, 5, 7 and 16, said that:

'The UN and other similar mechanisms should force states to stop abuses and to protect HRDs somehow, but legally.'[42]

One could say that there are states that are not parties to regional human rights treaties that create human rights courts. Member parties to regional human rights treaties may criticise the human rights record of non-State parties through public official comments, putting pressure on them to sign and ratify the respective treaty. External criticism of internal human rights violation as a means of exerting pressure on states is by no means equated with intervention in state's business.[43] On the contrary, after the adoption of the UDHR, it is widely accepted that 'human rights in every country are the world's business.'[44]

[41] Heyns, Padilla and Zwaak (n 40), ibid.
[42] INTV 9, 13.2.2018.
[43] Gordon Brown, *The Universal Declaration of Human Rights in The 21St Century* (Open Book Publishers 2016) 101.
[44] ibid, 101.

In addition, the three most well-developed regional human rights courts exist in Europe, America and Africa, which means that there are states that do not belong to a human rights system. For instance, Asia does not have a regional human rights court. ASEAN (Association of Southeast Asian Nations) Intergovernmental Commission on Human Rights (AICHR) is the only regional human rights mechanism that has been established with the purpose of promoting and protecting the rights set out in the ASEAN Charter and has only consultative functions.[45] It is worth noting that the Charter has been heavily criticised by civil society as it fails to include adequate provisions for the protection of human rights,[46] while the organisation itself has only ten members.[47] For these reasons, it would be of the distinctive advantage of HRDs if courts similar to other regional courts were developed in Asia and Pacific. The fact that it has not happened to date indicates that there is resistance in those regions to the development of such a mechanism.[48] Aside from the fact that new human rights courts would contribute to the general enhancement of human rights in those regions, binding decisions and sentences on the abuses against defenders would enforce states to take all necessary measures to ensure the rights of HRDs and combat criminalisation and impunity.

[45] The Association of Southeast Asian Nations (ASEAN), 'ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)' (2009) 6 < https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf> accessed 30 October 2019.

[46] Catherine Drummond, 'ASEAN Intergovernmental Commission on Human Rights and the Responsibility to Protect: Development and Potential. Working Paper on ASEAN and R2P No. 1 Responsibility to Protect in Southeast Asia Program (2010) Asia-Pacific Centre for the Responsibility to Protect – University of Queenland 16 <https://r2pasiapacific.org/files/3111/2010_AICHR_and_r2p_workingpaper1.pdf> accessed 30 October 2019.

[47] These are Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), Philippines, Singapore, Thailand and Vietnam.

[48] Arguments for regional courts in these areas have been made for instance by Petersen and Burbach, Renshaw and Byrnes. However, Saul, Mowbray and Baghoomians are of the opinion that the reluctance of Asian and Pacific states to embrace a regional mechanism may be attributed to the fact that Asian principles are not compatible with the 'western' and international standards and as well as that Asia herself is too diverse to share common values and standards. See indicatively, Carole J Petersen, 'Bringing the Gap: The Role of Regional and National Human Rights Institutions in the Asia Pacific (2011) 13 (1) Asia- Pacific Law and Policy Journal 175; A Durbach, C Renshaw, A Byrnes, 'A Tongue but No Teeth: The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region' (2009) 31 (2) Sydney Law Review 211; B Saul, J Mowbray and I Baghoomians, 'The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia-Pacific' (2011) 18 Australian International Law Journal 23.

One could also suggest that the creation of a World Human Rights Court could enhance the maintenance of human rights and ensure the global implementation of human rights law,[49] which would also be beneficial to the protection of defenders' rights. Nevertheless, the thesis rejects this idea as there are a number of fundamental unknown factors that need to be considered. In particular, it is impossible to argue for a global human rights court if the status of the court is unknown. For instance, the Court could be established on the 'Pyramid Model',[50] and as a result would act as an ultimate court of appeals, or on the ICC or ICJ standard. Each model represents a different judicial regime, which goes beyond the purpose of the thesis. Moreover, it is not clear whether it would be an inter-state complaint system or individuals would be entitled to submit their own applications alleging human rights violations. The issue of the status and execution of judgements, which is also unclear, is of great importance, as it is one of the positions of this Chapter that binding decisions and sentences on national authorities are the most effective method of external pressure.

7.4.1.2. Measures on Criminalisation

With regard to the criminalisation of HRDs, as discussed in Chapter 3, broad terms like 'terrorism', are deliberately left broad and poorly-defined, so that states can take any measure they wish under the pretext of combating terrorism. Taking advantage of the absence of a widely accepted definition of the term 'terrorism', states name defenders as terrorists in order to target, deprive them of their fundamental rights and stop them from carrying out their human rights activities. Counter-terrorism legislation must meet those international standards that justify limitations on certain human rights. However, this is not sufficient to protect those defenders that could be characterised as terrorists.

One of the positions of this thesis is that a clear and careful definition of the term is needed not only to contribute to future planning of counter-terrorism legislation, but also to disengage the term 'terrorism' from the term 'human rights defender'. In essence, a clear and widely-accepted definition will be of significant benefit to

[49] Brown (n 43), 97.
[50] Stefan Trechsel, 'A World Court for Human Rights?' (2004) 1 (1) Northwestern Journal of International Human Rights paras 20-25.

defenders. For that reason, this thesis seeks to encourage civil society organisations and UN and regional mechanisms working to protect HRDs to put pressure on governments to adopt finally a clear definition that would emphasise the characteristics of terrorists.

Moreover, if states recognise through legislation the right to carry out human rights activities and break the link between the activity of promoting human rights and criminal, civil and administrative offences, defenders cannot be subject to criminalisation. For instance, in Indonesia, the Environmental Protection and Management Law clearly states that no one campaigning for the right to an adequate and healthy environment may be accused of criminal or civil offence.[51] In a similar vein, Mexico's Law for the Protection of Human Rights Defenders and Journalists requires states authorities not only refrain from violating the rights of defenders,[52] but also prevent any abuses against them. There is no doubt that this kind of legislation is a strong indication of the recognition of the right to conduct human rights activities. Despite these legislative measures, Mexico is still one of the worst countries in the world for people defending human rights,[53] while environmental HRDs in Indonesia face criminalisation and 80% of cases of abuses against HRD from 2014 to 2018 concerned environmental defenders.[54]

However, the recognition of rights associated with the activity of promoting human rights, such as the right to freedom of expression, and the right to defend human rights[55] more generally is a good place to start to decriminalise the work of HRDs. On this basis, the thesis suggests that states, as the main bearers of human rights obligations, should introduce and approve such legal frameworks for the protection

[51] Law No. 32/2009 on Environmental Protection and Management, 3 October 2009, art 66 <http://extwprlegs1.fao.org/docs/pdf/ins97643.pdf> accessed 30 October 2019.
[52] 'Law Protecting Journalists Goes into Effect in Mexico City | Reporteros Sin Fronteras' (*RSF*, 2014) <https://rsf.org/es/node/27660> accessed 30 October 2019.
[53] Peace Brigades International/ Advocacy for Human Rights in Americas, 'The Mechanism to Protect Human Rights Defenders and Journalists in Mexico: Challenges and Opportunities' (2015) < https://www.wola.org/wp-content/uploads/2016/05/WOLA-PBI-Mexicos-Mechanism-to-Protect-Human-Rights-Defenders-and-Journalists.pdf> accessed 30 October 2019.
[54] 'Environmentalists Face Greater Risks Amid Development Drive' (*The Jakarta Post*, 2008) <https://www.thejakartapost.com/news/2018/12/09/environmentalists-face-greater-risks-amid-development-drive.html> accessed 30 October 2019.
[55] The right to defend human rights refers to those rights associated with the defence of human rights, such as the right to freedom of expression and association.

of defenders to contribute to the decriminalisation of HRDs. The point here is that legislation recognising the defence of human rights makes the State's effort to criminalise defenders more difficult, while it justifies the activities of defenders in the eyes of society, thereby preventing HRDs from being stigmatised. Even if states do not to comply with the legislation created by themselves, such legislative measures help defenders resist and report the non-compliance of state authorities to global and regional treaty bodies.

The UNGPs recognise the corporate responsibility to respect human rights. On this basis, private corporations should refrain from human rights violations, so when it comes to SLAPPs, business should respect the rights even of those speaking out against their practices and refrain from attacking them or taking any legal action against them with the intent of ceasing their activities. In other words, business enterprise should follow the example of Adidas that, as stated elsewhere, has adopted a non-harm and non-interference policy in the activities of defenders, including those speaking out against its practices. At the same time, states, as the main bearers of human rights obligations, should decriminalise defamation and ensure that any measure that interferes with the freedom of expression and assembly should pursue a legitimate aim within a democratic society. Also, in the context of the UNGPs, states have the obligation to protect human rights and foster corporate respect for human rights. In this sense, they should take all those measures to protect individuals from the practice of private corporations and encourage the development of policy promoting labour rights and any other human right.

7.4.2. Recommendations for Dealing with any Kind of Abuse

The following recommendations are intended to improve the situation of defenders, regardless of whether they are victims of abuses committed through legal or extra-legal actions. Most of the recommendations are not short-time projects, but they may take many years to realise as they are meant to grow from the bottom up.

7.4.2.1. Trainings for State Authorities in the Context of the Obligation to Ensure Human Rights

States have the obligation to respect and ensure human rights. As discussed earlier, the obligation to respect human rights represents the duty to refrain from interfering with human rights and freedoms, while the obligation to ensure human rights requires states to ensure the full enjoyment of people's rights. Therefore, the thesis suggests that states provide trainings on the definition of HRDs, their work and the rights that are closely associated with the defence of human rights for civil servants, members of security forces and jurists.

For example, police officers should refrain from any action preventing defenders from demonstrating peacefully against the State or other powerful stakeholders, ensuring their right to assembly and expression. In some countries, defenders have been provided with panic buttons or satellite phones,[56] so state authorities in charge of receiving the signal must respond promptly once assistance is requested, ensuring the defenders' right to life. The point here is that state authorities should be familiar with the content of defenders' rights as well as the methods of harassing them, so that they know when to abstain from violating the rights of HRDs or how to guarantee their right to promote human rights.

7.4.2.2. Human Rights Education

One of the preambles of the UDHR states that 'every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms.'[57] Since the adoption of the UDHR, the principles enshrined in the Universal Declaration have gained greater recognition, acceptance and realisation. Alongside with the ideas of the UDHR, human rights education (HRE) has also gained increased attention.

From the very beginning, NGOs insisted on HRE in the form of legal trainings for UN and other formal proceedings employees,[58] while, in 1993 the International

[56] Inter-American Commission on Human Rights, Towards Effective Integral Protection Policies for Human Rights Defenders, 29 December 2017, OEA/Ser.L/V/II Doc 207 para 29.
[57] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) preamble para 8.
[58] Brown (n 43), 98.

Congress on Education for Human Rights and Democracy proposed a world plan for action on education for democracy, rule of law and human rights.[59] Over the years, HRE achieved greater acceptance, so in 2005 the UN General Assembly established a World Programme for HRE.[60] In 2012, it adopted the UN Declaration on Human Rights Education and Training[61] which provided the basis for states and other duty-bearers to promote and implement HRE. The Declaration on HRDs was ahead of its time recognising the obligation of states to promote the teaching of human rights. In particular, Article 15 states that:

> The State has the responsibility to promote and facilitate the teaching of human rights and fundamental freedoms at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teaching in their training programme.[62]

There are now many models of HRE that depend on the intended outcomes and contribute to a better understanding of the term 'HRE' as well as the obligation of Article 15. More specifically, models promoting the cognitive aspect of HRE aim at providing education about human rights norms and principles.[63] There are also models focusing on methods that can create skills for active citizenship.[64] Some other models are designed to foster learners' ability to speak out against human rights abuses and injustices.[65] The different types of models go beyond the limits of this thesis, but HRE, in general, could contribute to promoting universal respect for HRDs.

According to Article 2 of the UN Declaration on Human Rights Education and Training:

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[59] UN General Assembly, Human Rights Education Decade, 20 December 1993, UN Doc A/RES/48/125.

[60] 'World Programme for Human Rights Education (2005-ongoing' (*Ohchr.org)* <https://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx> accessed 30 October 2019.

[61] UN General Assembly, Resolution 66/137 United Nations Declaration on Human Rights Education and Training, 19 December 2011, UN Doc A/RES/66/137.

[62] The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Res. 53/144, 8 March 1999, UN Doc A/RES/53/144 (hereinafter the Declaration on HRDs), art 15.

[63] Monisha Bajaj, 'Human Rights Education: Ideology, Location and Approaches' (2011) Human Rights Quarterly 481, 483.

[64] ibid.

[65] ibid.

> human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing, inter alia, to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.

In essence, the aim is to prevent human rights violations by effectively teaching citizens the content of human rights, encouraging them to refrain from abuses and by promoting the realisation of human rights.

As pointed out earlier, stigmatisation of HRDs can occur in several ways, such as criminalisation, smear campaigns and the spreading of lies, and may result in more threats and attacks against defenders. Eliminating the stigmatisation is essential to their safety and security.[66] On this basis, education emphasising the work and status of HRDs would counter the stigmatisation, as it would promote the legitimacy of their human rights practice. In essence, education focusing on the practice of defenders would help people understand the nature and significance of their work and prevent them from believing any smear campaign and negative rumours.

Tibitts, one of the leading academics in the field of HRE, is of the opinion that 'a successful HRE experience was intended to influence learner's knowledge, attitude and actions, so that they would respect and promote human rights standards in their professional roles.'[67] In other words, individuals who have successfully absorbed the goals of a HRE programme on HRDs may find it relevant for their work and change their professional attitude accordingly. For instance, a law enforcement

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[66] Alice M Nah, 'Countering the Stigmatisation of Human Rights Defenders' (2018) Human Rights Defender Hub Policy Paper 5 York: Centre for Applied Human Rights, University of York <https://www.york.ac.uk/media/cahr/documents/Countering%20the%20Stigmatization%20of%20Human%20Rights%20Defenders,%20Human%20Rights%20Defender%20Policy%20Brief%205.pdf> accessed 30 October 2019.

[67] Felisa L Tibbitts, 'Revisitng Emerging Models of Human Rights Education' (2017) 1 (1) International Journal of Human Rights Education 1, 8.

officer may restrain himself or herself from using excessive violence against defenders. This would also contribute to the implementation of the Declaration and particularly, of Article 15. That being said, HRE focusing on the activities of HRDs may result in a significant reduction of human rights violations.

At a more advanced level, HRE encourages learners to think critically on the situation of human rights in their societies, recognise possible symptoms and take action against human rights violations. The point here is that HRE may raise the next generation of HRDs who through personal reflection and recognition of symptoms and sources will take action to counter injustices.

Sonia Cardenas believes that HRE may give rise to the demands for justice and human rights.[68] On this basis, states are likely to be resistant to the idea of incorporating HRE, as those educated about human rights may start challenging governments about their policies and condemning human rights violations committed by state organs. For that reason, NGOs and UN mechanisms should put pressure on states to incorporate human rights content into national systems, such as school textbooks or professional trainings, even if human rights are presented without their activist-oriented approach.

HRDs would also benefit from HRE. In fact, most HRDs are not lawyers or legal scholars and as a result are not able to understand legal concepts and provisions. Based on the findings of her empirical research, Irina Ichim concluded that HRDs are trained to face daily violence and risks but are not concerned about existing protection mechanisms for HRDs, such as the UN Special Rapporteur on HRDs or similar mechanisms at regional level.[69] It goes without saying that the trainings should respond to the needs of HRDs, however, they should also provide an overview of some basic principles of the international framework and the existing

[68] Sonia Cardenas, 'Constructing Human Rights? Human Rights Education and the State' (2005) 26 (4) International Political Science Review 363, 363-364.

[69] Irina Ichim, 'The Capacity Building of Human Rights Defenders and (Dis)Empowerment: An Analysis of Current Practice' (2019) Human Rights Defender Hub Working Paper Series 6: Centre for Applied Human Rights, University of York 14 < https://static1.squarespace.com/static/58a1a2bb9f745664e6b41612/t/5cb459a19140b72b6a820bf2/1555323304573/Working+Paper+6.pdf> accessed 30 March 2020.

protection mechanisms for defenders.[70] This approach would make HRDs aware of the Higher Protection Regime, enabling them to take advantage of its mechanisms and contribute to a better institutional protection for all HRDs.

7.4.2.3. Raising Concerns Regarding the Situation of Human Rights Defenders for Consideration by the UN Security Council

In March 1992, during the crisis in former Yugoslavia, the then Venezuelan president of the Council, Ambassador Diego Arria, was contacted by Fra Joko Zovko, a Croatian priest who came to New York to convey an eyewitness perspective of the atrocities in Bosnia and Herzegovina to the members of the Council.[71]At that time, only Ambassador Arria agreed to talk with him. Being so impressed with Zovko's testimonies, he felt that the Council Members should hear his stories too.[72] Given that it was impossible to find a formal way to organise a meeting and convince the other members to hear his testimonies, Arria invited Council Members to meet him over a coffee break in the Delegate's Lounge.[73] Many delegates attended and the meeting went unexpectedly well. The concept of institutionalising informal meetings that would allow the Security Council to be briefed about international peace and other security issues by non-Council members was conceived and became known as 'Arria Formula'.

'Arria Formula' meetings are now a recognised form of communication between UN human rights bodies, Special Procedures, experts and NGOs and the Security Council. For example, in December 2018, upon the invitation of the Permanent Mission of the Republic of Poland to the UN, an 'Arria Formula' meeting on the situation of persons with disabilities in armed conflicts was organised.[74] The UN Special Rapporteur on the Rights of Persons with Disabilities was one of the formal

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[70] ibid, 23.
[71] 'Arria-Formula Meetings : UN Security Council Working Methods : Security Council Report' (*Securitycouncilreport.org*) <https://www.securitycouncilreport.org/un-security-council-working-methods/arria-formula-meetings.php> accessed 30 October 2019.
[72] 'The Arria Formula' (*Globalpolicy.org*, 2003) <https://www.globalpolicy.org/component/content/article/185-general/40088-the-arria-formula.html> accessed 30 October 2019.
[73] ibid.
[74] 'Open Arria Formula Meeting: Situation of Persons with Disabilities in Armed Conflict' (*International Disability Alliance*, 2008) <http://www.internationaldisabilityalliance.org/arria-idpd2018> accessed 30 October 2019.

briefers who brought many of the challenges that persons with disabilities in armed conflict areas face to the attention of the Council.

One of the recommendation of the thesis is that any member of the Security Council should take the opportunity to organise an 'Arria formula' meeting on the situation of HRDs or on a particular group of defenders, such as journalists or women or on the situation of defenders living in certain regions.[75] A meeting on the situation of HRDs would give the opportunity to the UN Special Rapporteur on HRDs and NGOs to brief the Council Members about the abuses (through legal and extra-legal actions) against defenders. It is noteworthy that in 2015 the Security Council expressed its outrage over the violations of human rights in Burundi and condemned the abuses against HRDs.[76] An 'Arria Formula' could raise further awareness of the violations committed against HRDs and the legal obstacles to their work and life. It may also result in the Council taking further action for the promotion of the rights of HRDs, which could have a positive impact on the situation of defenders in the future.

According to Article 99 of the UN Charter, 'the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.'[77] It has been argued that the UN Secretary- General should exercise this power if he or she is advised to do so by the Office of the UN High Commissioner, the Special Rapporteurs or the Head of the rights components of UN peace missions to enhance the implementation of human rights.[78]

This recommendation is not realistic, particularly in terms of the protection of HRDs. First of all, the Secretaty-General has this power in order to be able to maintain peace and stability to the whole world.[79] Notably, Article 99 has been

[75] 'Arria Formula' Meetings can be organised at the initiative of any Member of the Security Council. See, 'Arria Formula' Meetings: Working Methods Handbook (*Securitycouncilreport.org*) <https://www.un.org/securitycouncil/content/arria-formula> accessed 30 October 2019.
[76] UN Security Council Resolution 2248, 12 November 2015, UN Doc S/RES/2248.
[77] Charter of the United Nations and the Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16
[78] Brown (n 43), 93.
[79] Charter of the United Nations (n 77), art 99.

invoked only three times in the history of the United Nations.[80] The circumstances under which the Secretary-General exercised his power indicate that it is highly unlikely that the Secretary-General would ever invoke Article 99 to bring the situation of HRDs to the attention of the Security Council.

In particular, he exercised the power of Article 99 to maintain stability in the Republic of Congo in response to emergency request made by the Congolese government to intervene in 1960.[81] In 1979, he also utilised his power to invoke Article 99 in order to ease the Iranian-American crisis,[82] and in 1989 he invoked the same Article to quell the ongoing crisis in Beirut.[83] The point of this Section is not to discuss the reasons behind the decisions of the Secretaries-General to exercise their power or the consequences of their decisions for international community. Actually, it would be unreasonable to argue that the Secretary-General would take advantage of Article 99 to escalate the matter of defenders.

In fact, his predecessors utilised this power only when international peace was really in jeopardy. The situation of HRDs does not have similar characteristics to those cases, and more importantly, does not threat international security and peace. This position is strengthened by the fact that the Secretary-General did not invoke Article 99 even in Middle Eastern war-torn countries, such as Syria and Iraq, where international peace was put in jeopardy.

To conclude, this Section argues that 'Arria Formula' meetings can be a feasible means of bringing the abuses committed against defenders to the attention of the Security Council in the hope that it could take further actions in the future. On the other hand, a possible invocation of Article 99 is rather unlikely in the sense that it has been made only three times and in circumstances in which international peace and stability was at serious risk.

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[80] Thomas G Weiss, *The United Nations and Changing World Politics* (8th edn, Routledge 2018); UN Office of Legal Affairs, Article 99: Repertory of Practice of United Nations Organs (1945-1959) Supplement 3 vol 4 para

[81] UN Office of Legal Affairs, Article 99: Repertory of Practice of United Nations Organs (1959-1966) Supplement 3 vol. 2 paras 3-8.

[82] UN Office of Legal Affairs, 'Article 99: Repertory of Practice of United Nations Organs (1979-1984) Supplement 6 vol. 4 paras 3-4.

[83] UN Office of Legal Affairs, 'Article 99: Repertory of Practice of United Nations Organs (1979-1984' Supplement 8 vol. 4 para 12.

7.4.2.4. High-level Dialogue on HRDs

High-level Dialogue meetings are state-led meetings under the auspice of the UN General Assembly, involving ministerial or any other high-level participations, with the aim of bringing Member states, the UN system, experts, academics and stakeholders together to review how states respond to pressing issues of international interest .[84] For instance, a resolution adopted by the UN General Assembly has decided that the General Assembly will hold regular high-level dialogue meetings on topics related to the 2030 Agenda for Sustainable Development adopted at the UN Sustainable Development Summit in 2015.[85] In this sense, in 2019, 47 states participated in the High-level Dialogue on Financing for Development.[86]

In 2013, several Member states took part in the High-level Dialogue on immigration and development[87] and at the end of the 68th session, the UN General Assembly adopted a Declaration of the High-level Dialogue on International Migration and Development.[88]

On this basis, a High-level Dialogue dedicated to HRDs would be an excellent opportunity for cooperation on the promotion of the work of HRDs, as it would enable states, several UN mechanisms, civil society organisations, experts and academic to explore ways that could enhance the protection of defenders and end impunity and violence against HRDs.

Although this recommendation is akin to the 'Arria Formula' meeting, in fact, this is another method of bringing the most pressing issues facing HRDs to the fore, forcing states to address them within the context of the UN General Assembly and seeks new ways of ending violence and impunity against HRDs.

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[84] 'High-level Political Forum 2019 (HLPF 2019): Sustainable Development Knowledge Platform' (*Sustainabledevelopment.un.org*) <https://sustainabledevelopment.un.org/hlpf/2019> accessed 30 March 2020.

[85] UN General Assembly, Follow-up and review of the 2030 Agenda for Sustainable Development at the global level, 18 August 2016, UN Doc A/RES/70/299.

[86] 'Financing for Sustainable Development' (*UN.org*, 2019) <https://www.un.org/esa/ffd/events/event/high-level-dialogue-on-financing-for-development.html> accessed 30 March 2020.

[87] 'High Commissioner's Dialogue on Protection Challenges, 2018' (*UNHCR*) <https://www.unhcr.org/uk/high-commissioners-dialogue-on-protection-challenges-2018.html> accessed 30 March 2020.

[88] UN General Assembly, Declaration of the High-level Dialogue on International Migration and Development, 21 January 2014, UN Doc A/RES/68/4.

7.4.2.5. Emergency Funds

Most of the measures proposed in this thesis will take decades to be implemented and improve the situation of HRDs across the globe. At the same time, defenders facing imminent danger need a rapid support when the situation escalates. For that reason, the existence of emergency funds is critical to the safety and security of HRDs, as these programmes ensure that defenders can access and implement urgent security measures to respond to an immediate life-threatening risk. Emergency funds are, for example, commonly used for emergency evacuation to shelters, for temporary relocation of HRDs and security improvements, such as security cameras and steel doors.[89]

NGOs devoted to the protection of HRDs provide assistance through emergency support grants to defenders facing imminent danger and threats. Indicatively, ProtectDefenders.eu provides fast response to HRDs by delivering the emergency support grants through its partners Front Line Defenders, Reporters without Borders, fidh, OMCT, Defend Defenders, Forum Asia and Urgent Action Fund for Women's Human Rights.[90] Civil Rights Defenders, for their part, helped 357 defenders in 2017 through its emergency fund programme which was used 49 times.[91]

Emergency funds can also be used to respond to other urgent needs of HRD; for instance, to provide medical or legal assistance. Besides emergency grants, this thesis suggests that NGOs should encourage donors to create funds that could be used by defenders when they are no longer able to earn their livings. As discussed earlier, several defenders are involved in long judicial proceedings or lose their jobs and as a result are not able to continue their conventional work as well as their human rights activities. For that reason, defenders who do not have an alternative source of income should have access to these programmes to cover any basic, psychological and medical need.

[89]'Emergency Fund - Civil Rights Defenders' (*Civil Rights Defenders*) <https://crd.org/emergency-fund/#> accessed 30 October 2019.
[90]'Emergency Support for Human Rights Defenders' (*Protectdefenders.eu*) <https://www.protectdefenders.eu/en/supporting-defenders.html#> accessed 30 October 2019.
[91]Emergency Fund - Civil Rights Defenders (n 81).

Moreover, many defenders are subject to false accusations, arbitrary arrests and pre-trial detention, as the criminalisation of HRDs is the most commonly-used method of targeting defenders. For these reasons, defenders need to have fast access to free legal assistance in order to respond to criminalisation. In particular, the thesis recommends that NGOs should establish an association of lawyers that would have branches in regions where criminalisation heavily occurs and would provide fast legal support and representation to defenders for free.

To sum up, emergency funds as well as funds for financially weak defenders and free legal assistance are the only means to respond rapidly to those challenges defenders face in their everyday life. On the other hand, the recommendations presented in this Chapter aim to improve the work and life of defenders substantially, but, as NGOs, UN and regional mechanisms need to put a lot of effort into creating better conditions for defenders, that may take a couple of decades to be developed.

7.5. Conclusion

Despite the UN Special Rapporteur's on HRDs good work and the efforts of other UN and regional mechanisms and NGOs, HRDs are still targeted and subject to serious human rights violations. Undoubtedly, any obstacle to their work and life has a chilling effect on the realisation of human rights, so one of the main positions of this Chapter is to make appropriate recommendations for removing the legal obstacles to their work and everyday life.

Although the absence of a clear definition of the term 'human rights defender' provokes misunderstandings, thereby limiting the effectiveness of the Declaration on HRDs, this Chapter did not propose a new definition. The rationale for this decision is that a new definition would cause further confusion and as a result would not contribute to improving the situation of defenders. By pointing to the flaws and proposing some alternative interpretative approaches, this Chapter aimed to bring to the attention of scholars, defenders and officials all those elements they need to take into consideration to interpret the definition properly and unambiguously. These may allow for a clearer definition in years to come.

In relation to criminalisation, states should decriminalise the activities of defenders by adopting laws that would decouple the work of HRDs from criminal and administrative offences. However, states are the main violators of the rights of HRDs, so in fact, they may not be willing to take any measure to combat criminalisation as well as impunity. On the other hand, something that may force states to respect the rights of defenders is external pressure, as states may choose to comply with their human rights obligations to shield from external criticism of domestic human rights abuses. It turns out that pressure coming from outside may prove to be the most effective means of enhancing the implementation of the rights of defenders at national level.

HRE focused on defenders may help individuals understand the nature of defenders' work, countering the stigmatisation. Most importantly, it may encourage individuals to take action and promote human rights on their own, raising the new generation of HRDs.

The measures proposed require a lot of time to become a reality, but once implemented, they will change the situation of defenders dramatically. In the meantime, financial, legal and psychological support is critical to their security, efficiency and wellbeing.

Chapter 8

Conclusion

8.1. Limitations of the Thesis and Future Research

The main strength of this research project is that it has put together and discussed the most significant obstacles to the work and life of defenders, combining doctrinal and socio-legal approaches. The research project has relied upon a number of doctrinal sources to identify the obstacles and establish a solid conceptual framework, while the socio-legal approach through interviews, real life examples and case studies has significantly enhanced the analysis and showed how HRDs rights are developed in practice.

However, it is inevitable for all research projects to have limitations. More specifically, even though NSAs are the sources of many abuses and difficulties faced by defenders, the thesis focused on states as the main bearers of human rights obligations and addressed the responsibility of NSAs within this framework. As the role and responsibility of NSAs in international law is a subject of much controversy and long-standing debate in academia, future research projects addressing the position of NSAs could also consider the responsibility of NSAs for violations against defenders in a greater detail.

It was stated from the very beginning that the focus of the thesis would be the obstacles to the work and life of all defenders, regardless of their area of activity and expertise, in the sense that all defenders face the same challenges and threats. However, particular categories of defenders, such as women human rights defenders, may face additional abuses and threats on the account of their gender and because they challenge established norms of behaviour. On this basis, researchers could also focus on particular categories in order to be able to identify those additional obstacles and make relevant recommendations. By the same token, the thesis made recommendations that could improve the situation of HRDs in general, however, measures that could facilitate the activity and improve the life of certain defenders should also be explored further.

Moreover, it has become clear that every doctrinal attempt should be combined with empirical research. In order for researchers to understand and discuss the situation of HRDs, it is extremely important to consider the views and experiences either of defenders themselves or organisations and experts working with them, depending, of course, on the nature of the research project.

This thesis has also left room for further research, enabling future researchers to explore some areas in more detail, filling gaps in this field. More specifically, it has become clear from the empirical research that most of HRDs are not aware of the definition of HRDs and the Declaration. Apparently, that affects the implementation of the Declaration and the promotion of human rights in general. On this basis, future researchers could build on this finding and identify the reasons of this unawareness. For example, one could look at whether states have used their powers to keep defenders in dark and under their control as well as the extent to which NGOs and other civil society organisations have failed to raise awareness of the status of 'human rights defenders', the rights and duties the Declaration entails and the protection devoted to defenders. Also, researchers could measure the impact of this lack of awareness on the human rights movement and make relevant recommendations.

With reference to recommendations, this research argued that the international refugee regime is not an ideal option and an alternative should be sought within the context of international human rights law. The thesis has made some modest recommendations on this point, but based on the dissertation's recommendations, future researchers could conduct in depth research on possible alternatives and propose measures that can provide immediate and effective protection to defenders.

8.2. Overall Conclusion

Challenging governments, state authorities as well as powerful stakeholders and organisations is a dangerous work. HRDs are therefore targeted and many have paid with their lives. However, the nature of their work does not render them more vulnerable than other categories of vulnerable people, such as children and disabled persons. That means they do not deserve greater and stronger protection. In fact, the Declaration aims to provide them with equal rights, conferring on them recognition and status, like for example the CRC and the Convention on the Rights of Persons with Disabilities do in terms of the rights of children and persons with disabilities respectively. Although the Declaration is not of a status of a treaty and as a result a treaty body could not be established to monitor its implementation, a special mechanism on HRDs was established to facilitate the implementation of the Declaration.

Following the example of the UN, regional systems established special mechanisms with similar functions to the UN Special Rapporteur, while NGOs that worked with HRDs at that time and contributed to the adoption of the Declaration became more active. New NGOs devoted to HRDs were also established and developed, creating a dynamic system for the protection of HRDs.

All these institutions and organisations through their reports, recommendations, annual visits and complaint procedures aim to enhance the protection of HRDs, focusing on the rights set out in the Declaration. The monitoring and reporting function of the international and regional mechanisms on HRDs along with the financial, psychological, legal and material support provided by NGOs establishes a Higher Protection Regime that provides extra protection tailored to the needs of HRDs. In essence, the specialised mechanisms of the Higher Protection Regime provide prompt and special protection to HRDs, keeping them more efficient and concentrated on the promotion of human rights.

In order to take advantage of the Higher Protection Regime's protection and recognition, HRDs should be able to identify themselves as such. The international and regional institutions as well as civil society organisations that are components

of the Higher Protection Regime should be able to know who is entitled to fall within the meaning of the term ‘human rights defender’, in order that they can protect HRDs effectively and develop further the entire system devoted to their protection. As discussed earlier, states have the obligation to respect, protect and ensure all human rights including those relevant to the defence of human rights. On this basis, state authorities should also be able to determine who is a defender in order to ensure that defenders are supported and protected from harm. At the same time, NSAs, such as media, businesses and even ordinary people, for their part, should be able to identify defenders in order to be able to raise awareness of their activities and create a safety net for them. Even the researchers should be in a position to define HRDS, so that they address and examine other factors hindering the activity of defenders, contributing to enhancing their protection and strengthening their status. However, the lack of a clear definition does not allow the aforementioned actors to understand the definition and identify HRDs.

The definition, as derived from Article 1 of the Declaration on HRDs and interpreted in light of Fact Sheet 29 is broad, but what make it problematic and as a result impair the effectiveness of the Declaration, are the unclear requirements to be a defender. Nevertheless, several international and regional mechanisms use the definition deriving from the Declaration, while NGOs rely on the UN definition to determine their vision, mission and purpose. Notably, several NGOs have developed the UN Definition further, adopting their own approach to the term. Even if several defenders are unaware of some of the minimum standards, a growing number of defenders refer to the UN definition. On this basis, this thesis has aimed to fix the ambiguity by suggesting alternative interpretative approaches to complex issues rather than proposing a new definition and causing further confusion.

Besides the requirement of the validity of the arguments being presented, which causes further confusion, the requirement for peaceful activities and the universality of human rights are reasonable in the sense that the defender should accept all human rights and act in consistency with international human rights law. However, a series of problems with the interpretation and application of the definition may arise in several situations, which may result in leaving defenders outside of the definition. Indicatively, with reference to the universality of human rights, the thesis has dealt with individuals who deny certain human rights due to religious and

cultural beliefs, but at the same time, campaign for other human rights as well as groups of individuals who promote human rights through hate speech. In regard to the criterion of risk, the application of the definition is far more challenging, as defenders may take a violent action in response to another brutal action or in order to promote human rights. The list of examples developed in the respective chapter is not conclusive and the purpose is to provide guidance on the interpretation of the definition in borderline cases, which would exclude individuals from the definition.

Emphasis has also been placed on the absence of the criterion of risk, which distinguishes an individual taking out of their comfort zone and putting their life on line to fight for human rights from someone promoting human rights without any risk of repression and provides clarity on who should have access to the Higher Protection Regime. All violations and abuses, from murders to stigmatisation, are sufficient reprisals to characterise someone defender. Even though the definition becomes narrower in relation to this criterion, the key issue is that those left outside are not exposed, as, in fact, are not in need of protection and recognition. Even if civil society organisations working with HRDs and defenders themselves do not acknowledge that risk is an integral part of defenders' activity, they tend to accept it, meaning that this element could become part of the definition in the future.

The thesis has also pointed to the different tactics of targeting HRDs and on this basis established two distinctive categories of methods of violating defenders' rights: violations through extra-legal actions and violations through legal actions. Given the emphasis of the entire research project on the legal obstacles to the activity and life of HRDs, the thesis has focused more on violations through legal actions, known as the criminalisation of HRDs. Most importantly, the use of legislation and other legal techniques is becoming a trend in silencing and ceasing the activities of HRDs, so the research project intended to examine the extent to which these tactics are permissible in international human rights law.

The three categories of criminalisation may serve as a basis for violating human rights that are relevant to the defence of human rights. In particular, it became clear from the analysis that the rights that are mostly violated through the three types of criminalisation are: the right to freedom of expression and association, the right to receive funding and the right to liberty and security, while the presumption of

innocence has been in question in several cases. This is a non-exhaustive enumeration, which means that the criminalisation of HRDs may entail further violations of civil and social and economic rights as well as stigma and social exclusion.

The main position of the thesis is that the aforementioned rights do not fall within the meaning of 'non-derogable' rights and as a result can be restricted under international human rights law. That means the activity of HRDs can also be limited under certain conditions. To be consistent with international human rights law, any measure restricting derogable rights, including defenders' rights, must be prescribed by law, be in pursuit of a legitimate aim, necessary in a democratic society and proportionate to the aim pursed. However, it became definite that in several cases, states act in a bad faith and impose restrictions that are nowhere near the international standards in an attempt to keep HRDs distracted from their human rights work and eventually stop their activities. Ambiguous terms and provisions are also interpreted broadly and extended to defenders merely to target them. In this sense, vague terms, such as terrorist acts, should be crystallised in a way consistent with the rule of law, so that there will be no room for any misunderstanding, which would involve HRDs.

When it comes to impunity for the crimes committed against defenders, despite being the primary duty-bearers of human rights obligations, it has become clear that states have failed to take measures to ensure the full exercise of human rights, including those relevant to the activity of HRDs. Besides, they have failed to comply with their negative obligation to refrain from human rights violations against defenders, as they are the most common perpetrators of abuses against them. However, the root cause of impunity is attributed to state reluctance to provide effective remedies to victims. Unlike the victims, the State has the obligation to hold accountable and, depending on the abuse, prosecute those responsible for violations committed against defenders to ensure respect for human rights and prevent future human rights violations, breaking the vicious circle of impunity. The thesis has emphasised that defenders are also reluctant to report abuses against them, as they do not trust that state authorities will hold those behind attacks into account either because they protect the violators or because their activity will be considered illegal and the case will turn against them. The point is that even if states

fail to comply with their obligation to 'respect and ensure' the rights of HRDs, they should be able and willing to correct the injustice and establish the validity of the right retrospectively. The meaning of the remedy may vary; from prosecution and punishment to the adjustment of the legislation and the (re) issuance of the passport are all sufficient remedies, depending on the nature of the offence.

NSAs are also implicated in the abuses against defenders. The relevant chapter of the thesis examined their responsibility and concluded that human rights obligations exist for NSAs, but they are contested and contained in soft law instruments. Thus, states bear the responsibility for protecting HRDs from violations by NSAs. Notably, states and NSAs would not agree on the latter having human rights obligations like the ones state-entities bear. Even though the obligation of the State to protect individuals from the acts of other individuals falls within the obligation to 'respect and ensure' human rights, in fact, it fills the gap in international human rights law in terms of the responsibility of NSAs for human rights violations.

Impunity encourages further abuses against defenders and hence makes the activity of defenders even more exacting, which has a catastrophic impact on the realisation of human rights in general. For that reason, states should develop favourable conditions for HRDs by abstaining from any violations and taking measures to ensure the full enjoyment of all human rights. If the State is unable, for some reason, to do so, offering an effective remedy is the best and most efficient response to impunity.

It has become clear from the analysis of the identified legal obstacles that international human rights law has failed to ensure the rights of defenders. Seeking alternatives to international human rights law, the thesis could not have ignored the most obvious one; the international refugee regime. The Chapter devoted to the intersection between refugees and defenders proved step by step that defenders are qualified to be protected under the protection of the refugee regime, as in most cases they are able to meet the requirements of the term 'refugee'. Moreover, several participants have already been granted asylum, which also provides strong evidence that the international refugee regime can be a suitable alternative for the protection of HRDs. However, the thesis has emphasised that throughout history states have been reluctant to take in and protect refugees. Although the obligation of *non-*

refoulement prohibits states from returning refugees to a country when there are substantial grounds for believing that they will face irreparable harm, the absence of a clear obligation to grant asylum creates gaps in refugee protection.

The recent refugee crisis in Europe as well as the inability of a developed system to deal with the biggest refugee influx leaves no room for doubt that the international refugee regime would not be a reliable solution for HRDs. Although it creates a safety net for HRDs, in practice it may be proved to be more complex, thereby causing further troubles for defenders. Even for HRDs, the international refugee regime is a measure of last resort in the sense that due to the nature of their work, they would not like to leave their country and activities. In essence, the inefficiency of the refugee regime along with the sentiment of abandoning those people they fight for requires seeking alternative methods that could improve the situation of HRDs and ensure more efficient protection within their state of origin and work. On this basis, the thesis has made two types of recommendations. The first type focuses on addressing the identified legal obstacles and aims to improve the work and life of HRDs within the context of international human rights law. On the other hand, the second type, which is not strictly linked to international human rights law, can respond to violations through legal actions as well as violations through extra-legal actions, contributing to the implementation of the rights of defenders more generally.

Although the thesis has chosen not to propose a new definition to avoid causing confusion over who falls within the meaning of the term, it has been argued that the suggested interpretative approaches can facilitate the implementation of the definition, which can also lead to a definition coming out of practice. External pressure from international and regional human rights mechanisms, which would call on states to comply with their human rights obligations, and the development of jurisprudence regarding the right of HRDs would contribute to addressing impunity. Also, clear definitions of terms and unambiguous legislation, which could not be associated with the term ‘human rights defender’ as well as placing emphasis on the right to defend human rights would respond to the problem of criminalisation. The promotion of HRE and the Security Council Engagement on the protection of HRDs, which are both recommendations that can contribute to the implementation of human rights in general, could prevent attacks on defenders and

ensure the promotion and protection of their work and status respectively. The proposed recommendations may need years to be implemented; for that reason, the thesis has suggested immediate financial, legal and psychological measures that could respond to the immediate needs of HRDs.

The list of identified obstacles as well as the type of recommendations is not conclusive. It became clear from the empirical research that defenders face a number of legal and extra-legal challenges. For that reason, more empirical research would contribute to identifying more obstacles and as a result enable researchers working either in academia or for UN mechanisms and NGOs to deal with them and make relevant recommendations, ensuring a better environment for HRDs and a more efficient system for the realisation of human rights in general.

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