



Criminalisation of Human Rights Defenders

CATEGORISATION OF THE PROBLEM AND MEASURES IN RESPONSE



Credits

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Preface

At **Protection International (PI)** we are very pleased to be publishing this research report on the criminalisation of human rights defenders (HRDs) and related aspects.

In recent years we have witnessed the limitation of the spaces available to civil society in many countries around the world, and a deterioration of the conditions under which organisations carry out their activities. Criminalisation and other related phenomena such as stigmatisation, defamation and delegitimation of the work of people who promote and defend human rights are representative of this worrying trend.

The report is the result of more than a year's research and discussion involving the author and **PI** staff in our offices in the field (Protection Desks) in Latin America, Sub-Saharan Africa and South East Asia, as well as in our main office in Brussels, Belgium. The author also interviewed HRDs based in the three continents mentioned and in Europe, from whom she also received written information.

The report categorises and presents a typology of the various forms of criminalisation and judicial and administrative harassment suffered by HRDs; it identifies the kinds of actors who contribute to the phenomenon and deals also with its consequences, that are felt not only by criminalised HRDs but also by their families and the organisational context in which they operate. Finally, the report makes a series of recommendations aimed at HRDs, the state institutions that are responsible for their protection and other key stakeholders, in the hope that they will adopt legal and political measures – and provide accompaniment to victims – in order to react and also prevent criminalisation from occurring.

This publication is of fundamental importance to **PI**, as it permits us to respond to a series of challenges that HRDs face as they seek to carry out their day-to-day work. It also enables us to strengthen the accompaniment we provide to HRDs, civil society organisations and rural communities across a range of aspects important to their ability to manage their security and protection. We hope that the report and the recommendations it contains will contribute to strengthening the movement for human rights across the globe.

Gorik Ooms

EXECUTIVE DIRECTOR

PROTECTION INTERNATIONAL

Introduction

In addition to the different forms of violence that have been suffered by people who have sought to bring about social change, human rights defenders (HRDs), social movements and civil society organisations (CSOs) have also faced attempts by the authorities to use the criminal justice system as a tool to limit their activities.

While criminalisation has for a long time been used as a strategy to limit the spaces available to civil society, recently a growing number of campaigns have been organised in different countries and internationally to denounce the illegitimate use of legal systems and other forms of legal harassment in order to attack and disrupt the work of HRDs. However, few studies have been carried out to analyse the phenomenon in depth.

In response to this situation, **PI** believes that the forms of criminalisation suffered by persons who defend human rights need to be investigated if the phenomenon is to be understood more clearly. This report focuses in particular on those countries where PI has a presence and enjoys access to first-hand information on the situation and circumstances in which HRDs carry out their activities.

It is hoped, furthermore, that the report will identify best practices that may be employed to combat criminalisation. Thus, the intention is to increase the capacity of HRDs and of CSOs to respond and to continue to promote and defend human rights. It is also hoped that the report will help to establish new lines of work that might in the future be deepened and transformed into more concrete action.



1. A conceptual approach to the criminalisation of human rights defenders

There are significant conceptual differences concerning the true nature of the criminalisation of HRDs, which were identified both during the literature review and in the conversations conducted with HRDs and representatives of different CSOs during the preparation of the report.

The definition used here is based on a brief analysis of the social control exercised by the criminal justice system, which serves to illustrate the high degree of selectivity observed in the processes of criminalisation to which HRDs are subjected.

1.1. The use of the criminal justice system against opponents of the status quo¹

Life in society implies the existence of conflicts between its members and the search for ways to resolve them; of these, violence appears to be the oldest and the least desirable. In order to avoid the generalised use of violence and to reduce adverse effects when it does occur, social groups have developed theoretical and practical tools to manage tensions: **political** tools, such as democracy, and **normative** ones, that include the law.

For the effects of the analysis advanced here, **democracy** may be defined as *“a technique of coexistence that seeks to achieve the non-violent resolution of conflicts.”*²

While the function of the **law** is *“to make [social] existence possible, ensuring each individual a field of existence [by offering] a coercive order that prevents civil war, that is: the war of all against all.”*³

In **democratic states under the rule of law**, therefore, the peaceful resolution of conflicts is pursued principally by way of a political negotiation that seeks to arrive at agreement and consensus with the participation of the parties. These agreements and consensus positions are rendered stable through their transformation into laws that govern everyone in society and which are applied by the competent authorities according to specific procedures.

In part, if these laws are to be effective violence must be present, and it is the state that monopolises its use by preventing or minimising violence between private citizens, on the condition that any legally employed violence shall not exceed *“what is strictly necessary for the control of other, evidently illegal, forms of violence that are more serious and prejudicial.”*⁴

However, this may lead to a somewhat paradoxical situation in which the law, *“[while intended] to reduce violence, instead legitimises it; but in the process of legitimisation it prevents its disappearance, multiplying it and contributing to its reproduction.”*⁵ Above all, in order to avoid disturbing the order that the law itself has contributed to establishing, it converts violence into an instrument with enormous repressive potential.

It should be noted that the kind of conflictivity referred to here - which is opposed to the status quo - may vary in its intensity and meaning but always has a clear political motivation. It is usually associated with actions such as attempts to achieve decent living standards, effective and legitimate policy interventions, or peaceful attempts to achieve harmony between different cultural groups.

It is, then, a variety of conflict that is associated with social change, inasmuch as it has the potential to alter social structures that permit some groups in society to enjoy privileges at the expense of others.

The process of criminalisation involves an initial level - linked to the legal framework - known as **primary criminalisation**,

1 Merriam Webster Dictionary: (Latin) the way things are now.

2 Luigi Ferrajoli. La legalidad violenta. Comisión Estatal de Derechos Humanos, Aguascalientes, June 2006. § 1.

3 Eugenio Zaffaroni. (1995). Tratado de Derecho Penal. Parte General. Ediar. Tomo I. p.44.

4 Ferrajoli (1). Op. cit. §1.

5 Efrén Rivera. (2003). “Derecho y violencia: Reflexiones bajo el influjo de una violencia extrema”. Seminario en Latinoamérica de Teoría Constitucional y Política (SELA). Paper 28. For his part, Kelsen considers the law to be a social technology that brings about socially desirable conduct by way of the threat of coercion that rationalises and legitimises the state’s use of punitive power. Hans Kelsen. (1947).

and a second – **secondary criminalisation** – which involves *“the organs of control - judges, the police, etc.- in selecting which illegal acts (violations of criminal laws) should be the subject of criminal prosecution and which individuals should be criminalised.”*⁶

Thus, beyond the framing of the law and the regulatory framework, what is most important are the political decisions advanced by privileged social groups by which the methods used in some forms of social protest, and the activities of certain HRDs, are diverted towards the sphere of action of the criminal justice system: the police, the courts, the investigating bodies and the prison system.⁷

Criminal justice policy, understood as a collection of *“instruments, rules, strategies and objectives that regulate criminal punishment contributes”*⁸ to sustaining a given social order by establishing parameters of social behaviour, defining prohibited conduct (crimes) or determining dangerous social states that shall be subject to punitive action.⁹ In societies in which the response to social conflicts is not confined to the application of the criminal justice system,¹⁰ the state may also intervene using force in order to frustrate the possibility of social change.

If this spiral of conflict and social violence is to be avoided there needs to be a commitment to resolving conflicts by means of negotiation instead of relying on private decisions to resort to force. It is therefore necessary to start from the democratic principle according to which it is important to *“protect every critic, even if they are alone, and above all when the persons in question criticise public power, who have no resources, and who face difficulties in expressing themselves.”*¹⁰

In an **inclusive democracy**, the law and the bodies that are responsible for ensuring its effective implementation should be based on the principle of providing the maximum degree of protection to the rights of minority groups and the most vulnerable in society.¹¹

1.2. What does the criminalisation of human rights defenders entail?

Criminalisation is characterised by its **selective nature** and may be defined as the **use** of **“legal frameworks, strategies and political and legal actions with the intention of treating [the defence, promotion and protection of human rights] as illegitimate and illegal.”**¹² Its ultimate aim is to attack HRDs and/or impede their work.

The United Nations Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People has observed an unequal application of justice, with a lack of due diligence in cases presented by HRDs while, by contrast, the crimes of which HRDs are accused are investigated and processed by the legal institutions with surprising efficiency.¹³

While this report is intended to cover extremely heterogeneous situations and processes involving a wide range actors and structures, in strict terms the **use of other areas of the law or of the justice system such as the administrative, civil or labour branches should not be considered to be a part of the phenomenon of criminalisation and will be treated separately** (see Section 1.3 below).

This report refers both to the criminalisation of HRDs and to the criminalisation of social protest. Although the defence of human rights and acts of social protest are not synonymous it should be borne in mind that both activities are frequently carried out by HRDs.

Social protest is expressed in different ways:¹⁴

- + Demonstrative actions. These involve legal actions that are intended to mobilise large groups of people, for example legally sanctioned strikes or demonstrations.

6 Massimo Pavarini. (2002). Control y dominación: teorías criminológicas burguesas y proyecto hegemónico. Siglo XXI Editores. Buenos Aires. p.147.

7 Cf. Sutherland in: Cohen, Lindesmith, Schuessler. (1956) The Sutherland Papers. Indiana University Press. Bloomington. p. 38. Quoted by Alessandro Baratta. (2004). Criminología crítica y crítica del derecho penal. Introducción a la sociología jurídico-penal. Siglo XXI Editores. Buenos Aires. pp.254 and 255.

8 Alberto Binder. (1999). Introducción al Derecho Procesal Penal. Editorial Ad-Hoc. Buenos Aires. Segunda Edición. p.45.

9 Luis R. Ramírez G. “Criminalización de los conflictos agrarios en Guatemala.” Revista KAS Análisis político. Seguridad y Justicia: Pilares de la Democracia. Vol. 5. p.138. Available at: <http://www.kas.de/wf/doc/1978-1442-4-30.pdf>

10 Roberto Gargarella. (2012). “El Derecho frente a la protesta social.” Temas n. 70: 22-29. p.28. Available at: <http://www.temas.cult.cu/revistas/70/022-029%20Gargarella.pdf>

10 Gargarella. Op. cit. p. 24.

11 ibid. 23.

12 Jennifer Echeverría. (2012). “Criminalización de la protesta social.” Comisión Internacional de Juristas (CIJ). p.3. Available at <http://www.refworld.org/pdfid/530ef99b4.pdf>

13 James Anaya, United Nations Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People. “Preliminary Observations on his visit to Guatemala, 14 a 18 June 2010”. Office of the High Commissioner for Human Rights. Available (in Spanish) at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10173&LangID=S>. Also see http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.8_en.pdf.

14 Diana Favela. (2006). Protesta y reforma en México. Interacción entre Estado y sociedad 1946 – 1997. Mexico, UNAM – CEIICH – Plaza y Valdés. pp.95-97.

+ Confrontational actions. These involve “illegal but non-violent” actions – including unauthorised strikes or demonstrations – civil disobedience and the obstruction of thoroughfares.

+ Violent actions.

Margaret Sekaggya, United Nations Special Rapporteur on the situation of human rights defenders, has argued that whenever **activities of peaceful protest** are carried out in defence of human rights, their participants should be considered to be HRDs.¹⁵

According to this perspective, demands for housing in the wake of a natural disaster might involve people who participate in movements and organisations that campaign for the right to adequate housing or to help disaster victims. Though these organisations do not habitually carry out work in defence of human rights, their involvement in these particular activities would convert them into HRDs.

Certain acts of social protest, however, such as mass public protests of a racist or xenophobic nature or demonstrations opposing the rights of the lesbian, gay, bisexual and trans and intersex (LGBTI) population may in fact be considered to run contrary to human rights. Participants in these activities cannot be considered HRDs even though they argue that they are acting to defend traditional rights or values.

On the potentially controversial topic of who may or may not be considered HRDs, the article “**Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders**” by Eguren and Patel is highly recommended. Employing a critical and ethically grounded approach the authors advance an argument that views HRDs as relational agents situated in human rights work. This focus was developed in order to improve practices and policies associated with the protection of HRDs.¹⁶

1.3. Other phenomena associated with criminalisation

Other repressive actions may occur within the context of criminalisation processes that, according to the approach taken in this report, should not be considered acts of criminalisation, though they are frequently treated as if they were. These actions are, however, intimately linked to criminalisation processes, feeding them or even forming a part of a single strategy of aggression.

It is a good idea to examine the different kinds of aggression committed against HRDs in some detail, in order to be able to identify the different responses each one requires.

¹⁵ Margaret Sekaggya, United Nations Special Rapporteur on the situation of human rights defenders. (21 December 2011). “Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya.” A/HRC/19/55. § 32. Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-55_en.pdf

¹⁶ Enrique Eguren and Champa Patel. (20 August 2015). “Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders.” International Journal of Human Rights. Vol. 7/9. pp. 896-907.

1.3.1. Stigmatisation, delegitimation and crimes against the honour and public reputation of HRDs

Many analysts argue that stigmatisation is part of the criminalisation process, going so far, even, as suggesting the existence of a phenomenon of “criminalisation by the media.”

The explanation of why **delegitimation, stigmatisation** and other forms of disparagement are sometimes equated with criminalisation may lie in the fact that they may precede, or occur in parallel to, criminalisation processes and that the aim in both cases appears to be to damage the public image of the HRDs so targeted. Another reason might be that the detentions and prosecutions to which HRDs are subject may cause stigmatisation

In other words, stigmatisation and delegitimation should be considered **causes and/or consequences of criminalisation**, whereas **for the purposes of this report** criminalisation is understood to involve the use of the criminal justice system to attack people who defend human rights.

Stigmatisation seeks to attack the image of the movements or organisational processes involved in the defence of human rights, or their activities. It may also be organised in such a way that it questions the personal or professional integrity of the HRDs it targets.¹⁷ In other cases stigmatisation involves statements that seek to portray HRDs, and the causes and protests they promote, as criminal, for example, or as being obstacles to development or opposing national unity. Thus, attempts are made to **delegitimise** the actions of persons who promote and defend human rights. Even more seriously, this approach ends up playing a vital role in the development of policies that are designed to criminalise social protest and HRDs alike.¹⁸

Examples of the stigmatisation and delegitimation of HRDs include the following:

- + Activists and CSOs that defend the right to truth, justice, reparation and the non-repetition of human rights violations during or after armed conflicts are accused of profiting from the pain of others, or of dividing society.
- + Environmental HRDs and defenders of community territories are, on the other hand, accused of representing an obstacle to progress and opposing development, of creating disturbance and conflicts, or of acting as “destabilising elements”. Thus, responding initially to destructive economic activities that have negative effects on entire population groups, activities that defend natural resources and the environment end up being characterised as subversive, or even terrorist, acts.²⁰
- + Organisations and HRDs that promote the rights of the LGBTI population are accused of undermining the family, morality or traditional values. Similar disqualifications are faced by defenders of the rights – especially the sexual and reproductive rights – of women.²¹
- + Women HRDs (WHRDs) operating in rural communities face stigmatisation in the form of rumours spread by their neighbours.²² Their sexual or emotional lives are questioned or they are slandered as they face accusations of engaging in affairs or becoming involved with married men who work in their organisations or are members of their communities.

17 United Nations Secretary General. (2001). “Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms.” Human Rights Defenders: Note by the Secretary General. A/56/341. §.36. Available at: <https://www.un.org/documents/ga/docs/56/a56341.pdf>. See also: PBI. (2013). “The ongoing criminalisation of social protest.”

Available at: http://www.peacebrigades.org/fileadmin/user_files/projects/guatemala/files/english/BOLETIN_ingles_PBI_final.pdf

18 Rina Bertaccini. “El contexto de la ‘lucha antiterrorista’ planteado por EEUU.” In Claudia Korol. (2009). Argentina, criminalización de la pobreza y de la protesta social. Editorial el Colectivo. Buenos Aires.

19 APRODEV, CIDSE, Front Line Defenders, (et al). (10 March 2010). “<http://www.omct.org/human-rights-defenders/urgent-interventions/palestinian-territory/2010/03/d20588/>.” Note to Minister Miguel A. Moratinos and High Representative Catherine Ashton. Brussels, Belgium.

Available at: <http://www.omct.org/human-rights-defenders/urgent-interventions/palestinian-territory/2010/03/d20588/>

20 Cecilia Chérrez, César Padilla, (et al). (November 2011). “Cuando tiemblan los derechos: Extractivismo y criminalización en Latin America.” Observatorio de Conflictos Mineros de Latin America (OCMAL). Quito, Ecuador.

21 Margaret Sekaggya. Report of the Special Rapporteur on the situation of human rights. A/HRC/25/55. (2013). §.65. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/190/95/PDF/G1319095.pdf?OpenElement>

22 Iniciativa Mesoamericana de Defensoras de Derechos Humanos (IM-Defensoras). (2013). “Violencia en contra de defensoras de derechos humanos. Diagnóstico 2012.” p. 53 ff.

Conservative groups in **El Salvador** initiated a media campaign against the *Colectiva Feminista por el Desarrollo Local* [Feminist Collective for Local Development] and the *Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico*. (Citizens' Association for the Decriminalisation of Therapeutic Ethical and Eugenic Abortion). In 2014 the groups initiated actions seeking pardons for 17 women who had been sentenced to up to 40 years' imprisonment for having undergone abortions; they also campaigned to legalise therapeutic abortion.

A national newspaper published an article with the headline "Thousands of Dollars to Finance Campaign to Decriminalise Abortion in El Salvador." The article included tendentious information on the monies received by organisations that supported a woman's right to choose. A range of defamatory editorials made direct and indirect calls for the WHRDs to be criminalised.²³

+ In general terms there is a growing tendency among certain states to "consider activities related to the defence of human rights as contrary to the national interest and a threat to national security."²⁴ This allows for the development of a political discourse that characterises HRDs as criminals, subversives, terrorists or as "traitors to their nation."

+ The salary demands of unionised and non-union labour may be characterised as "economic subversion," public demonstrations that interrupt the flow of traffic may be classified as violations of the right to freedom of movement, claims against the authorities may be interpreted as "coercion," or the occupation of buildings belonging to companies as crimes against private property.²⁵

On several occasions the President of **Ecuador**, Rafael Correa, has stigmatised HRDs and urged their criminalisation. In 2007 he indicated that no tolerance would be shown to individuals who engaged in strike activity and caused "chaos." In addition to calling them "unpatriotic" he ordered that those implicated should be tried on charges of sabotage. He indicated, furthermore, that these "anarchists who under other governments have become accustomed to paralysing the country's development whenever they feel like it" ²⁶ would feel the full force of the law.

The inhabitants of the region of Loie Jindapoo (in northern **Thailand**) attempted to prevent mining activities in the region in order to protect the environment, the natural resources of their town, and to preserve their community's agricultural practices. When they blockaded the mine entrance they were forcibly removed and processes of criminalisation were initiated.

The Director General of the Department of Primary Industries and Mines stated publicly that the conflict between the population and the mining company that was attempting to initiate operations there was due the excessive demands and unruliness of the inhabitants.²⁷

Equally, journalists and independent media outlets that publish information on the questionable behaviour of government or state bodies may also be victims of stigmatisation.

23 CIMAC Noticias. (21 August 2014). "Demandan fin de difamación contra activistas Salvadoreñas." Available at: <http://www.cimacnoticias.com.mx/node/67414>.

24 Echeverría. Op. cit.

25 Bertaccini. Op. cit.

26 Daniela Salazar M. "El derecho a la protesta social en Ecuador. La criminalización de los manifestantes persiste pese a las amnistías." En: Eduardo A. Bertoni (compilador). (2010). ¿Es legítima la criminalización de la protesta social?: Derecho penal y libertad de expresión en Latin America. Universidad de Palermo - UP. Buenos Aires.

27 Protection International (PI). (27 May 2014). "Briefing note on the situation of community based human right defenders and on recent political developments in Thailand". Available at: <http://protectioninternational.org/wp-content/uploads/2014/05/Briefing-paper-for-EU-PD-Thailand.pdf>

The **Russian Federation's** so-called "Foreign Agent Law" (2012) permitted the Ministry of Justice to register the NGO Soldiers' Mothers of St Petersburg as a "foreign agent." The decision was taken after the organisation announced that Russian soldiers had been killed in the Ukrainian conflict.

Although the Kremlin denies having sent troops to Ukraine, the decision provides evidence of attempts to suppress information concerning its military activities in the neighbouring country. For its part the NGO states that it has received no foreign funding, even though evidence of this is necessary if an organisation is to be classified as a foreign agent.²⁸

- + In countries or regions where armed groups that are considered by the authorities to be terrorist organisations (Kenya or Ethiopia for example) or in places with an internal armed conflict (such as Colombia), HRDs are frequently accused of serving the ends of revolutionary groups, of maintaining links with them or even of being members or forming a part of their criminal structures.

In contexts such as these accusations of this kind are particularly serious, especially if they are made by the highest authorities of the state. In addition to discrediting HRDs or their work they have a dissuasive effect on people who are seeking to claim their rights, because they might be understood as a threat to use criminal sanctions.²⁹

Similarly, accusations made by the highest authorities in the land may be translated into incentives to permit attacks on HRDs to go unpunished. They can also lead to cases against HRDs being investigated particularly zealously, even when they are unfounded.

2013 and 2014 saw an increase in the levels of judicial harassment of HRDs and journalists who report on anti-terrorist operations in **Kenya**. The Mombasa County Commissioner Nelson Marwa announced that state security services should investigate the organisations Muslims for Human Rights (MUHURI) and Haki Africa, as well as some of their members, for allegedly inciting young people to terrorism.³⁰

In April 2015, both NGOs were included in a government list of organisations associated with the terrorist organisation Al Shabaab and their bank accounts were frozen, paralysing their activities. In June a Mombasa court ordered both organisations to be removed from the list on the grounds that no evidence had been provided linking either organisation with terrorist activities. Nevertheless, their bank accounts remained frozen at the time this report was being prepared.³¹

In **Ethiopia**, HRDs – and especially national and international bloggers – are frequently accused of terrorism. Some cases involve only public accusations (stigmatisation), while others involve the formulation of criminal charges.³²

28 Amnesty International (AI). (2014). "Russian NGO branded as 'foreign agent' after reporting on Russian military action in Ukraine" Available at <https://www.amnesty.org/en/latest/news/2014/08/russian-ngo-branded-foreign-agent-after-reporting-russian-military-action-ukraine/>

29 United Nations Secretary General. Human Rights Defenders: Note by the Secretary General A/56/341. Op. cit. § 36. See also, APRODEV, CIDSE, CIFCA (et al.). Op. cit. Human Rights First. (February 2009). "Baseless Prosecutions of Human Rights Defenders in Colombia." Available at: <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090211-HRD-colombia-eng.pdf>. Special Rapporteur for Freedom of Expression (IACHR). (December 2013). "La agenda de la Relatoría Especial para la Libertad de Expresión: problemas persistentes y desafíos emergentes." OEA/Ser.L/V/II.IACHR/RELE/INF. 12/13. § 35.

30 HRW. (29 May 2014). "Joint Letter to UN High Commissioner for Human Rights Navanethem Pillay Regarding Violations in the Context of Kenyan Counterterrorism Operations." Available at: <http://www.hrw.org/news/2014/05/29/joint-letter-un-high-commissioner-human-rights-navanethem-pillay-regarding-violation>.

31 The Star. (12 June 2015). "Court orders Haki Africa, Muhuri removed from 'terror list'." Ver <http://www.the-star.co.ke/news/court-orders-haki-africa-muhuri-removed-terror-list#sthash.lfsbsGMH.dpuf>

32 Referring to the Ethiopian anti-terrorism law Human Rights Watch indicates that: "can be used to criminalise peaceful public protest and expression under an overbroad definition of promoting terrorism." Kenneth Roth. (n.d.). "The Abusers' Reaction: Intensifying Attacks on Human Rights Defenders, Organizations, and Institutions." HRW. Available at: https://www.hrw.org/sites/default/files/related_material/introduction.pdf. On bloggers and journalists, see El País. (27 August 2014). "¿Bloguear (no) es un crimen en Etiopía?." Available at: http://elpais.com/elpais/2014/08/08/planeta_futuro/1407495450_884452.html.

In **Guatemala**, defamation campaigns against the human rights movement have been observed since the 1980s. At one point the then de facto head of state Oscar Mejía accused the *Grupo de Apoyo Mutuo* (GAM) – which pioneered the search for people who had been disappeared during the internal armed conflict in the country – of being a terrorist organisation. Shortly afterwards several of its members were brutally murdered.³³

In **Colombia**, during the first decade of the 21st Century, the principal source of stigmatisation of HRDs was high ranking government officials, headed by then President Álvaro Uribe and certain of his close advisors. These accusations favoured the creation of a polarised climate of hostility against HRDs, several of whom were detained and accused, using falsified evidence.³⁴

While it is true that **stigmatisation** and **delegitimation** are **social** and a **political phenomena**, it is important also to distinguish them from other practices such as **defamation**, which is **legal by nature**. HRDs may also be accused of engaging in such actions, which attack the public image and honour of persons and might constitute crimes.

1.3.2. Administrative and civil sanctions

United Nations Special Rapporteur Sekaggya has also indicated that states frequently use a range of different legal measures to infringe the rights of HRDs.³⁵

- + In addition to the central role played by the **criminal justice system** in impeding the defence of human rights, other branches of the law may also be used to attack, paralyse or obstruct such activities.
- + Both **civil law** and **labour law** may play a role in this connection, the latter being used particularly in relation to HRDs who work in the area of trade unionism.
- + However, **administrative law** (the branch of the law governing the relation between government and the general public) plays a role of some importance here as it has been used to impose (administrative) sanctions and to develop other measures that impede the exercise of activities to defend human rights or engage in social protest.

It should be borne in mind that, as these sanctions and penalties imposed on HRDs are not criminal but administrative they cannot, strictly speaking, be considered to constitute criminalisation.

In **Thailand**, some mining companies have not only initiated criminal proceedings against HRDs based in remote rural communities but civil procedures too. In the case of villagers with few economic resources the latter can lead to the imposition of large fines and administrative penalties.³⁶

As with stigmatisation, administrative and civil proceedings can occur prior to or in parallel with processes involving the criminalisation of HRDs, with the same effect of impeding their work. This may occur in the case of public servants who perform the function of human rights defence in the course of their work when attempts are made to inhibit their activities by applying administrative sanctions.

33 Marc Drouin. (2012). "La guerre contre-insurrectionnelle guatémaltèque. Sa généalogie, le déni des responsables et les sources historiques." Ph.D. Thesis in History. University of Montreal. Canada. pp. 287-293.

34 Statements by Luis J. Ramírez, Executive Director, Comité Permanente de Derechos Humanos, quoted in: Human Rights First. (February 2009). "Defensores de derechos humanos acusados sin fundamento". Available at: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090211-HRD-colombia-esp.pdf>.

35 Margaret Sekaggya. (30 December 2009). "Report of the Special Rapporteur on the situation of human rights defenders." A/HRC/13/22/Add.3. § 31.

36 human right defenders and on recent political developments in Thailand." Available at: <http://protectioninternational.org/wp-content/uploads/2014/05/Briefing-paper-for-EU-PD-Thailand.pdf>. Protection International (PI). (17 June 2014). "Second briefing note. On the situation of community based human right defenders. The Khong Rak Ban Koed group, challenges in the Loei province."

Cases of administrative sanctions employed against officials who seek to prevent the criminal prosecution of HRDs:

- + In **Argentina** an administrative enquiry was ordered against a prosecutor who ordered the release of a group of people who had been imprisoned as a result of their involvement in social protests.³⁷
- + In **Guatemala**, within a process that was plagued by irregularities, the judge Yassmin Barrios, was suspended from service for a year after finding former General Efraín Ríos Montt guilty of ordering the crime of genocide against one of Guatemala's indigenous peoples.³⁸

Cases also occur in which administrative sanctions are imposed by the immigration authorities on HRDs working in countries of which they are not nationals. Thus, expulsion from a country may be used as a method to punish the defence of human rights without, strictly speaking, any criminal proceedings having been initiated.

In **Guatemala**, in 2014, two companions from Peace Brigades International (PBI) were issued with an expulsion order as a response of the government to their participation as observers in an act organised in opposition to the La Puya mining project. Although the order was revoked without their having been detained or or any criminal proceedings initiated, the Ministry of Government publicly accused one of the companions of allegedly having taken part in acts of violence against some police officers.³⁹

1.3.3. The reduction and limitation of spaces available for the defence of human rights, in particular activities associated with the rights to freedom of expression, assembly and association

It should be reminded that regulations limiting the rights to freedom of expression, assembly and association should not be considered to constitute criminalisation if the criminal justice system is not involved. When it does come to play a role because of a failure to comply with administrative requirements, the resulting squeezing of the space in which to act may constitute criminalisation.

This is an important distinction, as administrative actions are political in nature and may be highly susceptible to other actions that are also political.

In 2010 the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, said that, in spite of the terms of the Optional Protocol to the International Pact on Civil and Political Rights, states frequently use criminal legislation to silence critical voices and arbitrarily restrict freedom of expression.⁴⁰

Different United Nations special rapporteurs have warned of the existence of a growing tendency on the part of governments to seek to exercise increased control over independent NGOs and CSOs, using different laws for the purpose, including the so-called "NGO laws."⁴¹ This approach allows the authorities to limit activities in favour of human rights unnecessarily, and in violation of international human rights standards.

One of the clearest examples of these limitations may be found in the **requirements for the creation of new NGOs or other kinds of CSO**.

³⁷ Gerardo Etcheverry. "Algunas consideraciones sobre el rol de la Policía Federal Argentina frente a las diversas formas de protesta social." In Korol. Op. cit. p.284.

³⁸ "La suspensión acordada por el Tribunal de Honor del Colegio de Abogados y Notarios de Guatemala (CANG) en contra de la jueza Yassmin Barrios constituye una injerencia indebida en el ejercicio de la judicatura y amenaza el principio de independencia judicial en este país." Centro por la Justicia y el Derecho Internacional (CEJIL). (2014). "Colegio de abogados y notarios de Guatemala pone en peligro la independencia judicial." Comunicado de prensa. Available at: <http://cejil.org/comunicados/colegio-de-abogados-y-notarios-de-guatemala-pone-en-peligro-la-independencia-judicial>.

³⁹ Office of the High Commissioner for Human Rights in Guatemala. (July 2014). "ONU Human rights valora decisión del Ministro de Gobernación de revocar la cancelación de residencia temporal a dos defensores de derechos humanos." Available at: [http://www.ohchr.org.gt/documentos/comunicados/082014_ONUDH_valora_decision_MINGOB_casoPBI\(1_0jul14\).pdf](http://www.ohchr.org.gt/documentos/comunicados/082014_ONUDH_valora_decision_MINGOB_casoPBI(1_0jul14).pdf).

⁴⁰ Frank La Rue. (2010). United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue. A/HRC/14/23. § 75 and 83.

⁴¹ Office of the High Commissioner for Human Rights. "Kenya: Statute Law Bill poses grave threat to civil society and must be rejected – UN rights experts –". 3 December 2013. Available at: [http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14055&Accessed 22 October 2014](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14055&Accessed%2022%20October%202014).

In **Russia** there have been complaints about the systems of control that make it difficult to attain registration, with the result that in turn it is not possible to obtain funds from international cooperation agencies.⁴²

In February 2009, the **Ethiopian** government adopted the Proclamation to Provide for the Registration and Regulation of Charities and Societies. This law regulates the registration of and activities of NGOs and CSOs in general. However, the proclamation violates international standards on freedom of association. Among other things, the register grants excessive discretionary powers to the government regarding the obligatory registration of CSOs, limits on the participation in activities including the promotion human and democratic rights, prohibition of NGOs receiving more than 10% of their funding from foreign sources, and vague provisions concerning the potential criminal sanctions for the supposed violation of the law.⁴³

Following the example set by Ethiopia, in January 2013 **Kenya** adopted the Public Benefits Organisations Act (the PBO Act). At the time this report was being prepared the government was still awaiting the conclusion of the regulation process required for implementation and to decide a start date. However, several attempts have been made to modify the law in order to grant the government sweeping powers. Currently, a project exists to make miscellaneous amendments to the Act. Stakeholders have not been informed of the contents of this project. Up until now some of the obstacles placed in the way of civil society include: the reasons for denying registration are not clearly specified, the timescale for reviewing documentation is not set out, and the government is able arbitrarily to refuse registration of CSOs and to decide whether they may operate or not.⁴⁴

In its 2013 annual report, Observatory for the Protection of Human Rights Defenders (OBS) carried out an exhaustive analysis of the multiple and abusive restrictions that many states place on the right of NGOs to accede to funding sources, an integral part of the right to freedom of association. The report also analyses the devastating impact of these measures on the creation and management of NGOs. In particular, restrictive legal frameworks are being instrumentalised in order to encourage smear campaigns that equate the funding of NGOs with violations of national sovereignty and portray HRDs as criminals.⁴⁵

⁴² HRW. "Russia: Revise NGO Law to Protect Rights." (2009). Available at: <https://www.hrw.org/news/2009/05/13/russia-revise-ngo-law-protect-rights>

⁴³ See the webpage of the International Center for Not-for-Profit Law (ICNL) on Ethiopia. Available at <http://www.icnl.org/research/monitor/ethiopia.html>.

⁴⁴ See the ICNL webpage ICNL on Kenya. Available at <http://www.icnl.org/research/monitor/kenya.html>.

⁴⁵ OBS. (2013). "Violations of the right of NGOs to funding: from harassment to criminalización." Informe annual. Available at: http://www.omct.org/files/2013/02/22162/obs_annual_report_2013_uk_web.pdf

Similarly, the violations of human rights of which HRDs are victim include the unjustified restriction of meetings and public acts. Furthermore, **travel restrictions are imposed on HRDs who participate in international meetings and forums for the promotion and protection of human rights**.⁴⁶ These restrictions may be applied by the authorities of the affected HRDs' home country or, in other cases, by third states who act in support of the abusive or illegal restrictions imposed by the country of origin.⁴⁷

A clear example of this may be seen in restrictions imposed by **Israel**. There, HRDs from Israel and the Occupied Palestinian Territories have not only faced laws that seek to restrict the activities they are able to carry out if they want to benefit from tax exemptions, but also face severe limitations on their ability to leave the country.⁴⁸

On two occasions in 2012 the **Mexican** HRD Alejandro Cerezo encountered difficulties when he sought to travel to Europe in order to attend a series of work-related meetings. On the first occasion the airline refused him permission to board their aeroplane because he did not have permission from the **United States of America** to overfly US territory. Although this problem was resolved and he was allowed to fly after his luggage was searched by federal police officers, on a second occasion, in December of the same year, he was refused permission to fly to Europe.⁴⁹

In 2003 the **US** authorities refused a visa to the **Colombian** HRD Jahel Quiroga (at the time Director of the NGO *Corporación Reiniciar*), making it impossible for her to attend sessions of the Inter-American Commission of Human rights (IACHR) in Washington. This decision responded to the fact that the Colombian authorities had informed their US counterparts that Quiroga allegedly supported guerrilla groups.⁵⁰

In a more recent case, from early 2015, the **Colombian** HRD Yessika Hoyos, from the *Colectivo de Abogados José Alvear Restrepo* (CAJAR), member organisation of the Worldwide Movement for Human Rights (FIDH) in the country, was excluded as a panellist in a forum organised by EuroLat's Committee on Political Affairs, Security and Human Rights. EuroLat is a bi-regional strategic association that brings together European and Latin American parliamentarians. Two members of the European Parliament argued for Hoyos's exclusion at the start of the event, arguing that they could not accept her presence on the grounds that members of CAJAR were allegedly "recognised defenders of the FARC."⁵¹

The IACHR has indicated that journalists and other persons who document human rights violations face serious limitations to operating in contexts of social protest, because of the actions of the security forces to a large extent.⁵²

46 United Nations Secretary General. (5 September 2006). "Human Rights Defenders. Note by the Secretary General." A/61/312.

Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/488/07/PDF/N0648807.pdf?OpenElement>

47 Report of the Special Rapporteur on the situation of human rights defenders. (2009). "Addition. Mission to Colombia." A/HRC/13/22/Add.3

Available at: http://www.acnur.org/t3/uploads/media/A_HRC_13_22_Add.3.pdf?view=1

48 APRODEV, CIDSE, CIFCA, (et al.). Op. cit.

49 PBI Mexico. (7 October 2012). "Paquete informativo October 2012." Available (only in Spanish) at: <http://acuddeh.mayfirst.org/spip.php?article2800>. See also Alejandro Cerezo. (5 December 2012). "Impiden a Alejandro Cerezo viajar a Europa a un evento de derechos humanos." Rebelión.org.

Available at: <http://www.rebelion.org/noticia.php?id=160295>

50 Margaret Sekaggya. (7 to 18 September 2009). "Report of the Special Rapporteur on the situation of human rights defenders. Misión a Colombia." § 61.

51 FIDH. "COLOMBIA: Ataque a la libertad de expresión de defensora colombiana de derechos humanos en EuroLat." 4 June 2015.

Available at <https://www.fidh.org/es/americas/colombia/colombia-ataque-a-la-libertad-de-expresion-de-defensora-colombiana-de>

52 Special Rapporteur for Freedom of Expression (IACHR). (2013). *Violencia contra periodistas y trabajadores de medios. Estándares internacionales y prácticas nacionales sobre prevención, protección y procuración de la justicia*. OEA/Ser.L/V/II. §227. Available at: http://www.oas.org/es/IACHR/expresion/docs/informes/2014_04_22_Violencia_ESP_WEB.pdf.

In the case of demonstrations in **Spain**, for example, the security forces are authorised to search equipment used by journalists and reporters (still and video cameras for example), which are necessary tools if they are to be able to document and denounce abuses carried out by the police.⁵³

In **Mexico**, the Human Rights Commission of the Federal District (Spanish initials CDHDF) documented the cases of eight people who had received warnings, and then been detained and imprisoned in 2013 and 2014 for exercising their right to freedom of expression and access to information in reporting violent acts committed by members of the security forces. These cases included those of a journalist who photographed members of the police carrying out apparently illegal detentions and who made a complaint to the authorities about what she had seen. Officials at the Public Prosecutor's office ordered her to hand over the photographs and when she insisted that the request be made in writing an investigation was initiated and she was charged with having committed an "outrage against authority." She appeared before a judge the following day but was released four days later because of "lack of sufficient evidence to justify a trial".⁵⁴

In **Ecuador** administrative law procedures require public demonstrations to have been approved by the relevant authority (i.e., it is not enough for them simply to have been informed). This might constitute a limitation on the right to defend human rights and freedom of expression.

Furthermore, participation in political and religious or other meetings or demonstrations that have been prohibited by the authorities or that lack written approval from the police might lead to criminalisation, as the criminal code provides for prison sentences in such cases.⁵⁵

1.3.4. Violent or illegal actions committed by the police during mass demonstrations

Interference and other actions by state security forces against HRDs, including cases where undue force is used, may or may not, then, be characterised as processes of criminalisation. The same applies in cases of police responses to marches and demonstrations. Whether or not criminalisation occurs depends entirely on whether their actions result in arrests or criminal investigations of the HRDs so affected.

1.3.5. Information gathering and intelligence

At times during mass actions involving HRDs and in social protests the security forces do not use physical violence, but instead carry out actions to identify individual participants: by taking photographs, videos, or by stopping them and requesting identification documents.

53 El Diario. (2014). "Interior advierte de que la Policía podrá incautar cámaras en manifestaciones." Available at http://www.eldiario.es/politica/Interior-advierte-Policia-incautar-manifestaciones_0_290821071.html. See also Amina Nasser. Andaluces Diario. (2014). "Dos activistas del 15M serán encarcelados por participar en un piquete informativo." Available at: <http://www.andalucesdiario.es/ciudadanxs/15m/>.

54 Comisión de Derechos Humanos del Distrito Federal (CDHDF). (2014). Recomendación 11/2014. "Violaciones a los derechos humanos de personas y profesionales de los medios de comunicación que ejercen su derecho a la información mediante acciones de documentación ciudadana." Available at: http://cdhdfbeta.cdhdf.org.mx/wp-content/uploads/2014/10/reco_1411.pdf.

55 Salazar. Op. cit.

These kinds of action may be classified as instruments of control, or even of intimidation. Again, they cannot be classified as acts of criminalisation unless they lead to the initiation of criminal proceedings.

In **Colombia**, the government closed the state intelligence agency, the *Departamento Administrativo de Seguridad* (DAS), in 2011 in the wake of a series of scandals involving the participation of a significant number of high-ranking officials in illegal surveillance and espionage activities and, indeed, in criminal acts against opposition politicians and HRDs. The reports produced as a result of these activities were also used illegally in the criminalisation of several HRDs.⁵⁶

1.4. Conceptualising criminalisation in the international human rights protection mechanisms

1.4.1. The universal system for the protection of human rights

The fundamental resource on HRDs is 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** – Resolution 53/144, approved by the UN General Assembly on 9 December 1998. This document is generally known as the **UN Declaration on Human Rights Defenders**.

Though it is not a legally binding instrument the declaration “specifies how the rights contained in the principal human rights instruments apply to human rights defenders and their work.”⁵⁷

In article 12.2 it establishes that:

The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

This article deals with the criminalisation of HRDs by developing the universal system conceptually, principally by applying the results of different reports on the situation of HRDs produced by the current United Nations Special Rapporteur on the situation of human right defenders, Michel Forst, his predecessor Margaret Sekaggya, and Hina Jilani, who occupied the position of the UN Secretary General’s Special Representative on the situation of human right defenders before the rapporteurship was created. Other UN special rapporteurs have also referred to the matter in their reports.⁵⁸

In 2003 Hina Jilani expressed her concern at the growing levels of criminalisation affecting HRDs, when she referred to the effects that national security legislation in certain countries had on activities for the defence of human rights.⁵⁹

In 2011 the United Nations General Assembly expressed concern that “national security and counter-terrorism legislation and other measures have been misused to target human rights defenders or have hindered their work and safety in a manner contrary to international law.”⁶⁰

In 2012 Margaret Sekaggya referred to “the use of legislation to regulate the activities of human rights defenders, in the light of considerable concern about legislation being adopted and/or enforced in ways that restrict the activities of human rights defenders.”⁶¹ She also indicated that the laws and legal frameworks that most frequently affect the activities of HRDs are those associated with:

⁵⁶ FIDH. (28 May 2013). “Colombia: resolución sobre la situación de los defensores de derechos humanos, sobre la paz y sobre la situación carcelaria y presos políticos.” Available at: <http://www.fidh.org/es/americas/colombia/colombia-resolucion-sobre-la-situacion-de-los-defensores-de-derechos-13775>.

⁵⁷ Office of the High Commissioner for Human Rights, Colombia, Guatemala and Mexico. (2011). “Commentary on the Declaration on Human Rights Defenders.” p.13.

⁵⁸ The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism have also dealt with the criminalisation of HRDs.

⁵⁹ For the Special Representative the expression “security legislation” encompasses, laws, sentences and other binding legal measures that are intended to protect public security or the state, or against acts such as terrorism, along with security measures that are promulgated without discussion by the legislature but that the police or the legal system can implement. United Nations Secretary General. (18 September 2003). “Human Rights Defenders. Note by the Secretary General. A/58/380. § 12. Available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=5800A/58/380.

⁶⁰ Resolution of the United Nations General Assembly (2012). Resolution adopted by the General Assembly on 19 December 2011. 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. A/RES/66/164. §4. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/66/164&Lang=S

⁶¹ United Nations Secretary General. (2012). “Human Rights Defenders. Note by the Secretary General.” A/67/292. §2. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/67/292&Lang=S

- + Measures to combat terrorism and protect national security;
- + Public morality;
- + Registration, functioning and financing of associations;
- + Access to information, official secrets;
- + Defamation and blasphemy, and access to the Internet.

In 2013 the Human Rights Council recognised, in Resolution 22/6, that “domestic law and administrative provisions and their application should facilitate the work of human rights defenders, including by avoiding any criminalisation, stigmatization, impediments, obstructions or restrictions thereof contrary to international human rights law.”⁶² It also referred to the urgent need to “prevent and stop, the use of legislation to hinder or limit unduly the ability of human rights defenders to exercise their work.”⁶³ This resolution has served as a reference point for the subsequent work of different special rapporteurs.

In 2014, in his first report to the Human Rights Council, Michel Forst made a series of recommendations to member states, including that they should ensure the repeal of legislation criminalizing activities to defend human rights as a result of their cooperation with international mechanisms.⁶⁴

More recently, in his opening discourse at the sessions of the Human Rights Council in Geneva on 14 September 2015, the High Commissioner for Human Rights Zeid Ra’ad Al Hussein expressed his concern at the harassment meted out by certain member states against activists and HRDs in an attempt to prevent them from working with the UN’s human rights mechanisms, including the Council itself. This harassment includes impeding the registration of such organisations – employing arguments based on false accusations of criminal or terrorist activities – and reprisals against individuals who have participated in activities related to the Council. He said that these approaches undermine the legitimacy and credibility of international human rights institutions.

It is also important to refer to General Assembly Resolution No. 68/181 of 2013, which deals specifically with the protection of HRDs who work to defend the rights of women.⁶⁵

1.4.2. The African Union and the African system for the protection of human rights

The **African Charter on Human and Peoples’ Rights** (a legally binding instrument ratified by 53 countries). It makes no specific mention of the protection of HRDs. However, article 30 called for the creation of an **African Commission on Human and Peoples’ Rights (ACHPR)**, which has adopted specific resolutions for the protection of HRDs in Africa.

The Grand Bay Declaration and Plan of Action were approved in 1999, during the Organisation of African Unity’s first Ministerial Conference on Human Rights. Not legally binding, this instrument exhorts member states of the Organisation of African Unity “to take appropriate steps to implement the United Nations Declaration on Human Rights Defenders in Africa.”⁶⁶

Subsequently, the Kigali Declaration, approved in May 2003 by the African Union’s Ministerial Conference on Human Rights, recognised:

[...] the important role of civil society organisations [...] in general and human rights defenders in particular, in the promotion and protection of human rights in Africa⁶⁷ [and] calls upon Member States and regional institutions to protect them and encourage the participation of CSOs in decision-making processes [...]⁶⁸

In 2004 the ACHPR approved a resolution for the protection of human rights in Africa; the resolution recalled the important contribution made by HRDs in their respective countries.⁶⁹

⁶² United Nations Human Rights Council. (12 April 2013). “Resolution adopted by the Human Rights Council. Protecting human rights defenders.” A/HRC/RES/22/6. Available at: http://ap.ohchr.org/documents/dpage_s.aspx?si=A/HRC/RES/22/6

⁶³ *ibid.*

⁶⁴ Michel Forst. (2014). Report of the Special Rapporteur on the situation of human rights defenders. A/HRC/28/63. §124(k).

⁶⁵ Assembly Resolution de Naciones Unidas. (30 January 2014). “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: protecting women human rights defenders.” Resolution 68/181.

⁶⁶ Grand Bay (Mauritius) Declaration and Plan of Action, 1999. First OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999 in Grand Bay, Mauritius § 19. Available at: <http://www.achpr.org/instruments/grandbay/> Accessed 15 November 2014.

⁶⁷ UA. (2003). “Kigali Declaration. First OAU Ministerial Conference on Human Rights”. §28. Available at: <http://www.achpr.org/instruments/kigali/>.

⁶⁸ *ibid.*

⁶⁹ ACHPR. (2004). “ACHPR /Res.69(XXXV)04: Resolution On The Protection Of Human Rights Defenders In Africa. African Commission on Human and Peoples’ Rights meeting at its 35th Ordinary Session, Banjul. Available at: <http://www1.umn.edu/humanrts/africa/resolutions/rec74.html>

Resolution 119 of the ACHPR, adopted in 2007 in Brazzaville, Republic of Congo, is the first document produced by the Commission on the situation of HRDs in Africa, and denounces the phenomenon of criminalisation: *“the situation of Human Rights Defenders in Africa [...], particularly those who, as a result of their activities, suffer multiple violations of their basic rights such as arbitrary arrests, illegal detentions, acts of torture, inhuman and degrading treatments, extra-judicial killings, lack of the right to counsel and the refusal of medical care and food during the period of their detention.”*⁷⁰ It also calls on member states to adopt *“all the necessary measures to ensure to all human rights defenders an environment conducive to carrying out their activities without fear of any acts of violence.”*⁷¹

The most recent pronouncement of the ACHPR, and the one that speaks most specifically of criminalisation in the sense used in this report, is Resolution 196 on Human Rights Defenders in Africa, approved during the 50th ordinary session held in October and November 2011 in Banjul, Gambia. The resolution expresses deep concern at the *“persistence of arbitrary arrests and detentions [...] including judicial harassment.”*⁷² It condemns all forms of violence and reprisals against HRDs, and calls on member states to *“release the human rights defenders who are arbitrarily detained and to put an end to the judicial harassment and other acts of intimidation against human rights defenders.”*⁷³

The special rapporteurs on freedom of expression (Faith Pansy Tlakula) and on access to information and on human rights defenders (Reine Alapini Gansou), expressed themselves in similar terms, when they criticised the 2014 arrests of HRDs in the Kingdom of **Swaziland** following the application of the Law of Sedition and Subversive Activities. Both had been accused of “uttering words with a subversive intention” and undermining a national court.

⁷⁴ In her 2014 **Djibouti** Statement on the Situation of HRDs the Rapporteur on HRDs qualified the systematic arrest of activists or their prolonged detention as “judicial repression.”⁷⁵

1.4.3. European Institutions and the European Human Rights System

The Organisation for Security and Cooperation in Europe (OSCE)

In 2014, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE) published its **Guidelines on the Protection of Human Rights Defenders (the OSCE/ODIHR Guidelines)**. The guidelines do *“do not set new standards or seek to create ‘special’ rights for human rights defenders,”*⁷⁶ but are intended to help participating States in the implementation of their human dimension commitments related to the protection of HRDs.

⁷⁰ ACHPR. (2007). “ACHPR/Res.119 (XXXII) 07: Resolution on the Situation of Human Rights Defenders in Africa. African Commission on Human and Peoples’ Rights meeting at its 42nd Ordinary Session, Brazzaville. Available at: http://old.achpr.org/english/resolutions/resolution119_en.htm.

⁷¹ *ibid.*

⁷² ACHPR. (2011). “Resolution on Human Rights Defenders in Africa”. ACHPR/Res.196 (L) 11. African Commission on Human and Peoples’ Rights meeting at its 50th Ordinary Session. Available at: <http://www.achpr.org/sessions/50th/resolutions/196/>.

⁷³ *ibid.*

⁷⁴ Pansy Tlakula and Reine Alapini Gansou. (27 March 2014). “Press Release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Special Rapporteur on Human Rights Defenders in Africa on the arrest of Mr Thulani Rudolf Maseko and Mr Bheki Makhubu”. Banjul. Available at: <http://www.achpr.org/press/2014/03/d197/> Accessed 3 October 2014.

⁷⁵ Reine Alapini Gansou. Statement on the Situation of Human Rights Defenders in Africa. (22 January 2014). “Statement on the Situation of Human Rights Defenders in Djibouti”. Available at: <http://www.achpr.org/press/2014/01/d186/>.

⁷⁶ OSCE Office for Democratic Institutions and Human Rights (ODIHR) (2014). “Guidelines on the Protection of Human Rights Defenders”. p. XI. Available at: <http://www.osce.org/odihr/119633?download=true>.

The OSCE/ODIHR Guidelines contain provisions on the criminalisation of HRDs, principally in the section entitled “Protection from judicial harassment, criminalisation and arbitrary arrest and detention”. The Guidelines start by differentiating between criminalisation and what are considered allied phenomena, arguing that HRDs:

[...] must not be subjected to judicial harassment by unwarranted legal and administrative proceedings or any other forms of misuse of administrative and judicial authority, or to criminalisation, arbitrary arrest and detention, as well as other sanctions for acts related to their human rights work [...].⁷⁷

In an attempt to deal with criminalisation in more concrete terms the Guidelines contain the heading “Criminalisation and arbitrary and abusive application of legislation”, which stresses that “[a]ny legal provisions that directly or indirectly lead to the criminalisation of activities that are protected by international standards should be immediately amended or repealed.”⁷⁸

A similar fate should befall “[l]egal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work.”⁷⁹ The Guidelines indicate, furthermore, that “[l]egal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work,”⁸⁰ and that politically motivated investigations and trials represent an abusive application of the law and of regulations.⁸¹

The OSCE/ODIHR Guidelines consider **criminalisation** and the **arbitrary and abusive implementation of the law** to be two distinct but closely related phenomena that are associated with arbitrary detentions, conditions of detention and the right to a fair trial.

The European Union (EU)

The EU has developed initiatives intended to champion the role of HRDs in the promotion and defence of democracy and to protect their rights. Thus, in 2004 the Council of Europe adopted the **EU Guidelines on Human Rights Defenders (EU Guidelines)**, which were revised in 2008.⁸²

The strongest aspect of the EU Guidelines is the operational section, which seeks to “identify ways and means of effectively working towards the promotion and protection of human rights defenders, within the context of the Common Foreign and Security Policy.”⁸³ The section deals with criminalisation in general terms, recalling the importance of “legislative, judicial, administrative or other appropriate measures, undertaken by States to protect persons against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of their legitimate exercise of any of the rights referred to the United Nations Declaration on Human Rights Defenders are all relevant in this regard.”⁸⁴ It also includes “attending and observing, where appropriate, trials of human rights defenders” as a specific measure that may be adopted by EU missions (delegations and embassies of member states).⁸⁵

⁷⁷ Ibid. § 23.

⁷⁸ Ibid. § 24.

⁷⁹ Ibid. § 25h.

⁸⁰ Ibid. § 26.

⁸¹ Ibid. § 27.

⁸² 82 Council of Europe. (2008). “European Union Guidelines on Human Rights Defenders.” Available at: <https://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesDefenders.pdf>

⁸³ Ibid. § 7.

⁸⁴ Ibid. §8.

⁸⁵ Ibid. §10.

In addition to the European Union, other countries such as Switzerland, Norway and the USA have adopted guidelines for the promotion of the work of HRDs from third countries and for their protection. These guidelines are among the set of tools available to diplomats to help them deal with their political relations with third countries. They contain specific recommendations concerning the provision of accompaniment in cases of criminalisation.

Swiss Guidelines:

https://www.eda.admin.ch/dam/eda/en/documents/topics/aussenpolitik/Menschenrechtsverteidigerinnen_Menschenrechtsverteidiger/2013-Leitlinien-Schutz-Menschenrechtsverteidiger_EN.pdf. ➡

Norwegian Guidelines:

<https://www.regjeringen.no/contentassets/b7384abb48db487885e216bf53d30a3c/veiledningmrforkjengelskfin.pdf>. ➡

U.S. Guidelines:

<http://www.humanrights.gov/wp-content/uploads/2013/03/support-for-human-rights-defenders.pdf>. ➡

The European Parliament

In its Resolution on European Union policies for the protection of HRDs, passing mention is made of criminalisation. It indicates the different ways in which their HRDs' rights are violated and the limitations they face because of their status as direct objectives of policies, laws, and procedures all of which are justified as "security" measures (and that are frequently combined with stigmatisation and accusations of terrorism).⁸⁶

The European Court of Human Rights (ECHR)

The ECHR pays particular attention to efforts to restrict freedom of expression. Its sentences tend to order the cessation of excessively broad definitions of crimes that result in criminal trials that are considered arbitrary and unjustified.

In *Altuğ Taner Akçam v. Turkey* the ECHR considered the drafting of article 301 of the Turkish Criminal Code to be too vague, arguing that it constituted a permanent threat to the exercise of freedom of expression.⁸⁷

Not only does the ECHR call on states to reform existing statute but also to fill the legal gaps that authorities exploit in order to limit the right to freedom of assembly:

In *Oleksiy Vyerentsov v. Ukraine*, the ECHR urged Ukraine to alter its laws and its administrative practice with urgency in order to clarify the requirements that needed to be met for planning and carrying out peaceful demonstrations as well as the reasons they may be restricted.⁸⁸

1.4.4. The Inter-American System for the protection of human rights

The Inter-American System for the protection of human rights is the regional protection mechanism that appears to have achieved the highest level of conceptual development concerning the criminalisation of HRDs. This is the result of the activities of its bodies: the **Inter-American Commission of Human Rights (IACHR)** and the **Inter-American Court of Human Rights (IACtHR)**.

⁸⁶ European Parliament. (2010). "Resolution of 17 June 2010 on EU policies in favour of human rights defenders (2009/2199(INI)) Consideration I. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010IP0226>

⁸⁷ ECHR. (25 October 2011). *Altuğ Taner Akçam v. Turkey*. Application no. 27520/07. Final 25 January 2012.

⁸⁸ ECHR. (11 April 2013). *Vyerentsov v. Ukraine*. Application no. 20372/110.

The IACHR

In its First Report on the Situation of Human Rights Defenders in the Americas, published in 2006, the IACHR recommended that member states and third persons should not manipulate the punitive power of the state and its organs of justice in order to harass those who are dedicated to legitimate activities, such as HRDs. It recalls also that states are obliged to ensure measures are taken to guarantee that state investigations are not used to initiate unjust and unfounded criminal proceedings against persons who legitimately call for the respect and protection of human rights.⁸⁹

In its second report, published in 2011, the IACHR included a specific section on criminalisation, which it considered to be *“a problem that merits urgent attention on the part of States, as it undermines the leading role defenders play in the process of pursuing the full attainment of the rule of law and the strengthening of democracy.”*⁹⁰ In the same section the IACHR presented a systematic examination of previous declarations by the IACHR, the IACtHR and other international bodies, highlighting:⁹¹

- + The manipulation of the coercive power of the state and legal institutions;
- + Submission to unfair or baseless trials; or
- + The initiation of criminal investigations or unfounded trials against HRDs.

Thus, for the IACHR the criminalisation of the HRDs constitutes a complex barrier to the defence of human rights, whose consequences go beyond the judicial, as they affect the individual psychosocial sphere – of HRDs – and the collective context of NGOs and CSOs as a whole.⁹²

Finally, the IACHR considers that criminalisation acts as a mechanism of collective stigmatisation and intimidation of everyone who has the intention of making a complaint or has already denounced human rights violations.⁹³

The IACtHR

In examining IACtHR jurisprudence on the criminalisation of HRDs, the 2014 decision of the IACtHR in the case *Norín Catrimán et al. (leaders, members and activist of the Mapuche indigenous People) vs. Chile* merits particular attention. During the first years of the 21st Century when the facts of the case occurred, a section of Chilean society and of the media qualified the multiple demands, demonstrations and protests advanced by members, leaders and organisations of the Mapuche indigenous people in the south of Chile as acts of violence. The Mapuche were engaged in a struggle over the use and enjoyment of their ancestral lands and the natural resources they contained.⁹⁴

Between 2000 and 2013 the prosecuting authorities used the Anti-terrorist Law (Law 18,314) in a total of 12 cases related to the land claims advanced by the Mapuche people, leading

⁸⁹ IACHR. (2006). “Report on the Situation of Human Rights Defenders In the Americas”, Recommendation 11.

Available at: <http://www.cidh.org/countryrep/Defenders/defenderstoc.htm>

⁹⁰ IACHR. (2011). “Second Report on the Situation of Human Rights Defenders In the Americas.” Doc. 66 OEA/Ser.L/V/II. §78.

Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf

⁹¹ Ibid.

⁹² Ibid. §80.

⁹³ Ibid. §79.

⁹⁴ 94 IACtHR. (2014). Case of *Norín Catrimán et al. Case of Norín Catrimán et al. (Leaders, Members and Activists of the Mapuche Indigenous People) V. Chile* (Merits, Reparations and Costs). §79-81. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf

to several convictions for terrorist acts.⁹⁵ This phenomenon was accompanied by allegations against the state security forces over the use of force during search operations and while effecting arrests.

Although in its decision the IACtHR established that it could not be concluded that the application of the law was selective or discriminatory, it did recognise that the principles of equality and non-discrimination and of equal protection before the law had been violated, as had the right to equal protection under the law because of the use of *“reasoning, which reveals stereotypes and biases, as grounds for the judgments.”*⁹⁶ Similarly, it concluded that the use of pretrial detention violated the rights to individual freedom and not to suffer arbitrary detention in conditions that do not comply with international standards and the presumption of innocence.⁹⁷

Furthermore, the IACtHR urged the Chilean state to *“guarantee adequate and effective attention to and resolution of these claims in order to protect and ensure the rights of both the indigenous people and the other members of society in those regions.”*⁹⁸ It reminded it also of *“the importance that the special criminal offense of terrorism [not be] used in the investigation, prosecution and punishment of criminal offenses when the wrongful act could be investigated and tried as an ordinary offense because it is a less serious conduct.”*⁹⁹

⁹⁵ Ibid. §83, 85 y 93.

⁹⁶ Ibid. § 228.

⁹⁷ Ibid. § 378, 386 y 410.

⁹⁸ Ibid. § 182.

⁹⁹ Ibid. § 180.



2. Categories of criminalisation

HRDs face different forms of violence and harassment, including the use against them of the criminal justice system. These actions of legal nature form a part of strategies that at times are combined with social and media campaigns.

Criminalisation can result from a **process** that begins with a police action or a complaint and ends with a conviction. It can also be seen as a **result** of an admonitory message that the judicial system uses to send a message to the victim (that is, the criminalised HRD), to social movements and to society as a whole.

This differentiation does not mean that criminalisation cannot occur as a result of a unique act or of diverse actions taken by the justice system

CRIMINALISATION RESULTING FROM A UNIQUE ACT

Examples include the creation of a criminal offence, an unsuccessful detention or a complaint that leads to no further action being taken by the justice system

CRIMINALISATION RESULTING FROM DIVERSE ACTIONS

Plaintes qui perdurent et donnent lieu à des
When detentions or complaints prosper and criminal investigations or trials result.

At the same time, the diversity or lack of diversity of the events should also not be confused with the possibility that they will produce different damaging results. Thus, an arrest might in itself be considered a damaging result that may in turn produce others, such as a prosecution or an eventual guilty verdict.

Although the practices of justice operators and the rules governing criminal law and procedures differ significantly from country to country, it is possible to identify different models of criminalisation. That is, patterns of action may be identified that are common to different regions and that might be categorised according to the stage in the judicial process in which the particular action takes place.

2.1. The creation of criminal offences

Primary criminalisation is the form of criminalisation that involves the classification of an action as a criminal offence.¹⁰⁰ The process begins at the point when criminal justice policy is established, process that implies the creation of laws and criminal regulations that define conducts that should be prohibited or increasing the sanctions to be applied to acts that have previously been defined as crimes.¹⁰¹ And while the violence that is implicit in the punitive power of the state may be expressed in very different ways, one such is the threat that it will be applied.¹⁰²

On occasion the norms used to criminalise HRDs contradict the human rights instruments intended to protect the civil and political rights associated with freedom of expression, assembly and peaceful demonstration, or even with political participation and the right to defend human rights. they may also enter into conflict with other national laws that do recognise these fundamental rights.

2.1.1. Provisions penalising the defence of certain rights

The threat of criminalisation emerges as a result of a more direct process that penalises the defence of certain specific rights.

¹⁰⁰ Eugenio R. Zaffaroni. (2002). Derecho penal. Parte General. Ediar. Buenos Aires. p. 8.

¹⁰¹ Ramírez G.. Op. Cit. p.145.

¹⁰² Luigi Ferrajoli (2). (n.d.). "Garantías y derecho penal." Available at: <http://www.juridicas.unam.mx/publica/librev/rev/jurid/cont/31/pr/pr11.pdf>.

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) publishes an annual report on **State Sponsored Homophobia**, which includes a survey of the current situation of LGBTI people around the world. The 2015 report contains a comprehensive analysis of laws that criminalise sexual acts between consenting adults of the same sex in at least 75 countries. Of these, at least four – Algeria, Lithuania, Nigeria and Russia – appear to have adopted legal frameworks that criminalise “homosexual propaganda”, while in 11 countries such legislation is currently under discussion.¹⁰³

In 2013 a law was passed in **Russia** that was directed against the LGBTI population. The law punishes anyone who spreads “propaganda in favour of non-traditional sexual relations,” with large fines for individuals that are even more stringent for authorities that are found to have transgressed. Organisations accused of spreading propaganda may even be suspended.¹⁰⁴

The laws regulating demonstrations in **Egypt** permitted the detention of 22 people who were arrested and accused of a range of crimes, including engaging in unauthorised demonstrations. The activist Yara Sallam was among the persons who were tried, and was sentenced to three years in prison.¹⁰⁶

In **Guatemala** the Law of Free Transit on Thoroughfares (known as the “speed bumps law”) which modifies article 158 of the Criminal Code, penalises interruptions to traffic flow with fines and prison sentences for “*anyone who puts the transit of vehicles at grave and imminent risk [or] incites speed bumps, sleeping policemen or other obstacles to be placed on the country’s highways, or who impedes their removal.*”¹⁰⁷

In 2014, in **Vietnam** three activists were arrested and accused of “public disorder” for having created “serious obstacles to traffic”. This kind of criminal action is based on the Criminal Code, which imposes a sentence of up to seven years on persons found guilty of the crime. According to Human Rights Watch the Vietnamese government uses traffic offences to pursue activists in the courts.¹⁰⁸

2.1.2. The classification as crimes of actions that are frequently carried out in defence of human rights

This category refers to the modification of crimes in order to associate the most frequent practices of HRDs and of social activists with criminal acts.¹⁰⁵

¹⁰³ For more information see the ILGA website: <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>.

¹⁰⁴ Amnesty International (AI). (August 2014). “Federation Rusa: Amnesty International ha documentado legislación discriminatoria, amenazas, agresiones y detenciones a personas LGBTI.” Available at: <http://amnistiaespana.tumblr.com/post/58235305535/federacion-rusa-amnistia-internacional-ha-documentado>. In English, see also AI. (19 January 2014). “Russia’s new crackdown on human rights”. Available at: <https://www.amnesty.org.uk/russia-crackdown-human-rights-lgbt-gay-law-protest-censorship-pussy-riot-sochi#.VnnADL-ArxU>.

¹⁰⁵ Special Rapporteur for Freedom of Expression (IACHR). (n.d.). “La agenda de la Relatoría Especial para la Libertad de Expresión: problemas persistentes y desafíos emergentes.” §35. Available at: www.iachr.org/relatoria/showDocument.asp?DocumentID=212.

¹⁰⁶ Amnesty International (AI). (2014). “Egypt: Release activists facing jail for defying repressive protest law.” Available at: <https://www.amnesty.org/en/press-releases/2014/10/egypt-release-activists-facing-jail-defying-repressive-protest-law/>.

¹⁰⁷ The text of the law may be consulted at: <http://www.congreso.gob.gt/noticias.php?id=5239>.

¹⁰⁸ HRW. “Vietnam: Activists Face Trial on Bogus Traffic Offense.” Available at <http://www.hrw.org/news/2014/08/24/vietnam-activists-face-trial-bogus-traffic-offense>.

The dissemination of information and public denunciations of abuses is another essential activity of HRDs. Several of the cases of criminalisation examined while this report was being prepared involved accusations that HRDs commit crimes including defamation and other crimes against public reputation and honour when they complain openly about certain acts.

Criminal laws are also produced that are associated with other kinds of action, including the defence of sexual and reproductive rights.

Kene Esom, a Nigerian activist working in **South Africa** in a group that defends homosexual rights has indicated that there are several laws that prevent him from distributing information about safe sex and access to drugs for the treatment of HIV.¹⁰⁹

The President of the **Gambia** published a presidential directive prohibiting the dissemination of personal messages opposing female genital mutilation and the health risks associated with the practice.¹¹⁰

When conduct that may be criminal is not defined clearly or is vague, justice operators are able to interpret and apply the norms to the detriment of HRDs and those engaged in social protest.

The crimes that may be categorised in this way and which are frequently used against HRDs and social activists include **sabotage, rebellion, unlawful association, intimidation, endorsing criminal acts, kidnapping¹¹⁴ and perturbation of public order.**¹¹⁵

Or, as the United Nations Special Rapporteur on the situation of human rights defenders put it, **“charges of ‘forming criminal gangs’, ‘obstructing public roads’, ‘inciting crime’, ‘creating civil disobedience’ or ‘threatening the State security, public safety or the protection of health or morals’.”**¹¹⁶

Leyla Yunus, a WHRD from **Azerbaijan** and a candidate for the Nobel Peace Prize, was accused of treason and received a three year prison sentence. This treatment was meted out in response to her active involvement in peace building projects in Azerbaijan and Armenia which sought to improve dialogue between intellectuals and leaders in the two countries in the context of serious difficulties associated with the region of Nagorno-Karabakh.¹¹⁷

2.1.3. The creation of broadly-defined criminal offences

The tendency to include **broadly-defined** or **ambiguous** offences in criminal codes¹¹¹ has been noted by the OSCE¹¹² and the IACHR.¹¹³

109 La Capital. (2014). “Denuncian que las leyes contra los homosexuales potencian el contagio del sida.” Available at <http://www.lacapital.com.ar/informacion-gral/Denuncian-que-las-leyes-contra-los-homosexuales-potencian-el-contagio-del-sida-20140721-0048.html>.

110 Margaret Sekaggya. (28 February 2011). “Report of the Special Rapporteur on the situation of human rights defenders, Addendum. Summary of cases transmitted to Governments and replies received.” A/HRC/16/44/Add.1. § 852 ff. Available at: http://www2.ohchr.org/english/issues/defenders/docs/A.HRC.16.44.Add.1_EFOnly.pdf.

111 Claus Roxin. (1979). Teoría del tipo penal. De Palama. Buenos Aires. p. 135.

112 The OSCE refers to provisions that contain “Legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work....” OSCE. Guidelines on the Protection of Human Rights Defenders. Op. cit. §25.

113 The IACHR refers to the use of offences that are ambiguous “or runs contrary to democratic standards so as to criminalise legitimate actions carried out by defenders would also constitute a violation of the principle of legality.” IACHR. Second Report. Op. cit. § 81.

114 Salazar Marín. Loc. Cit.

115 UN Secretary General’s Special Representative on the situation of human right defenders. “Human Rights Defenders: Protecting the Right to Defend Human Rights”. Human Rights Fact Sheet No. 29”. p. 14. Available at: <http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf>

116 Margaret Sekaggya. (2010). Report of the Special Rapporteur on the situation of human rights defenders. A/HRC/13/22/Add.3. § 32.

117 Women Human Rights Defenders International Coalition. (2014). “Leyla Yunus nominated for Nobel Peace Prize.” Available at: <http://defendingwomen-defendingrights.org/2014/10/24/leyla-yunus-nominated-for-nobel-peace-prize/>

2.1.4. Provisions restricting legal guarantees

A habitual response of states to serious criminal acts such as organised crime or terrorism, has been reliance on criminal rules that, in violation of international standards, limit guarantees. Consequently, the creation or application of this kind of provision to cases of alleged terrorism, organised crime and unlawful association has become increasingly common in different countries.¹¹⁸

Equally, and because of the looseness with which they are classified, the crimes of riot, violence against public servants, conspiracy, and terrorism or rebellion are frequently used to neutralise complaints made by communities and CSOs.

These kinds of provisions are not directly intended to penalise actions associated with human rights defence but they are, or can be, applied to HRDs and participants in social protests. Among them, antiterrorist legislation has become particularly important, having been used *“to harass and prosecute defenders in the name of public security.”*¹¹⁹

Laws that serve to limit guarantees are not only present in the norms governing the specific crimes mentioned above, but may also be observed in laws that permit detentions to be carried out without appropriate guarantees or in a manner that makes it hard to react once they have occurred.

In **Peru** the concept of *flagrante delicto* allows people to be detained without a warrant at any point during the 24 hours following the occurrence of the alleged crime; several norms have also been modified to permit individuals to be detained incommunicado for up to ten days. Military responses to disturbances have also been permitted and the scope of the military justice system extended, permitting it to hear cases involving ordinary crimes and human rights violations.¹²⁰

2.2. The effective employment of punitive instruments

A **second phase in the criminalisation of HRDs** occurs with the implementation of concrete actions by the institutions and when punishment is carried out.¹²¹ This process is conditioned by the selectiveness of a given criminal justice system and by other variables including organisational culture, levels of professionalism, the independence of officials and the like.¹²²

118 Mérida Pumalpa. “Nuevo escenario para la Criminalización a los defensores and defensoras de derechos humanos”.

Available at: http://inredh.org/index.php?view=article&catid=86:defensores-y-defensoras&id=374:criminalizacion-a-los-defensores-y-defensoras-de-derechos-humanos&option=com_content&Itemid=29

119 Margaret Sekaggya. (2013). Report of the Special Rapporteur on the situation of human rights defenders. A/HRC/25/55. §64.

120 Chérrez, Padilla, Otten (et al.). Op. cit.

121 Zaffaroni. Derecho penal. Parte General. Op. cit.

122 Ramírez G. Op. cit. p.145.

2.2.1. Arrest and detention

Detentions and arrests are usually required to be carried out either by order of a legal warrant or in *flagrante delicto*, that is, when the authors of the crime are surprised by the security forces during its commission. Despite this, arrests with or without subsequent criminal procedures have been, and still are, used as a method to intimidate HRDs and inhibit social protest. Evidence of this is provided by the fact that it tends to be leaders who are arrested rather than individuals who are alleged to have participated in the demonstrations that provoked the intervention of the police in the first place.

Of yet more concern are the arrests that are made in the absence of evidence linking the detainee to the actions of which they are accused or that are carried out without providing a minimum of guarantees. Furthermore, situations such as these occur as a result of a failure to comply with standards on detention and in infringement of international and national standards, resulting in illegal detentions.

It is for these reasons that HRDs may be released very shortly (just a matter of hours) after their arrest, the legal authorities considering that there is an absence of merit.¹²³

Dayuma is a rural parish in the **Ecuadorian** Amazon whose inhabitants protested about the environmental pollution produced by the extraction of oil.

In response to the protests, at the end of November 2007, the army forcibly entered several homes, indiscriminately detaining everyone they considered to be opponents of the government and to have incited civil disobedience.

Various videos showed that 27 of the people detained were in their houses at the time of their arrest and that they were not captured in *flagrante delicto* as was claimed at the trial.¹²⁴

Among the irregularities observed in operations that result in the detention of HRDs there are also cases of the **excessive use of force and different varieties of aggression** by state agents: this is a recurrent response to the marches and demonstrations that constitute both an important part of the campaigns of different social movements and a scenario of particular vulnerability for HRDs.

There are also cases where the confrontations between demonstrators and the state security forces are provoked by infiltrators who make it easier for a violent police intervention to occur. This practice constitutes a method that is used to punish participants in such actions.

Some of the irregularities observed in these processes might increase the intimidatory effects of an arrest. These include **the carrying out of large-scale operations** to arrest individuals who do not pose a threat,¹²⁵ or the issuing of **arrest warrants that remain in force for years** and that are reactivated at strategic moments.¹²⁶

During protests by the women of Agel, in San Marcos, **Guatemala**, against the installation of high tension electricity pylons that had not been authorised by the proprietors of the lands over which they were routed, Crisanta Pérez, one of the local leaders of the action caused a short circuit in the cables that passed over her house, leading to a power cut that affected mining operations.

Three days later representatives of the mine, private security agents and 35 members of the National Civilian Police arrived at the community and proceeded to threaten and violently mistreat women and children.¹²⁷

¹²³ ¹²³ According to the IACHR, "there shall be sufficient evidentiary elements that associate the accused with the facts of the case, in order to justify an order of preventive deprivation of liberty." IACHR. (2008). "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas." Available at <http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp>

¹²⁴ Salazar M.. Op. Cit.

¹²⁵ Chérrez, Padilla, Otten (et al.). Op.Cit.

¹²⁶ PBI. Op. Cit.

¹²⁷ Chérrez, Padilla, Otten (et al.). Op.Cit.

2.2.2. Unfounded criminal accusations

The existence of cases where the accusations have no merits and could in fact be defined as reckless or unfounded indicate that the formulation of criminal charges against HRDs may constitute acts of aggression against them. Rather than leading to criminal trials that result in judicial decisions, they produce delays, because the evidence required to support the accusation is missing, with the result that cases stagnate during the period of pre-trial investigations.¹²⁸

In a report on criminalisation and social protest, Catholic International Cooperation for Development and Solidarity (CIDSE) found that 60% of complaints against HRDs are dismissed.¹²⁹

These unfounded accusations may lead to delays in investigations and pretrial detention measures, to failure of cases to come to trial and to a failure to resolve the legal uncertainty hanging over the accused.¹³⁰ This increases the negative effects generated by criminalisation.

There are also cases of express recognition by the accusers of their having carried out acts of criminalisation in reprisal against specific HRDs.

On certain occasions HRDs are accused of common crimes that do not always have anything to do with their work in defence of human rights. When a link does exist they may include charges of slander and crimes against the honour or reputation of public servants, which are frequently used against critics of state employees.¹³¹

Pornpen Khongkachonkiet of the Cultural Foundation of the Cross, an organisation that monitors and documents cases of torture and mistreatment in **Thailand**, was accused by a member of the army of the crimes of slander and defamation. She is accused of damaging the reputation of the army by publishing an open letter that exposed acts of torture.¹³²

2.2.3. Pretrial detention

In order to ensure the success of judicial processes the accused may be detained while investigations are under way. This can involve **house arrest, prohibitions on leaving the country or pretrial detention**. In turn, this implies a restriction of the rights of HRDs who have been accused, but not sentenced.

According to the principle of the presumption of innocence domestic legislation should stipulate that these measures may be used exceptionally. In general, they should only be ordered if there is a risk of flight, of obstruction to an investigation or if *“there [are] sufficient evidentiary elements that associate the accused with the facts of the case.”*¹³³

In several countries pretrial detention is used almost automatically, especially when the accusation is of a crime that is classified as very serious. This practice favours the excessive use of such measures against HRDs, sharpening the effects of criminalisation that result from an accusation or the initiation of a prosecution. The effects of these tactics on the person who has been detained mean that **pretrial detention operates as an anticipation of criminal sanctions**.¹³⁴

¹²⁸ Salazar M.. Op. Cit.

¹²⁹ CIDSE, (June 2011). “Criminalisation of Social Protest related to Extractive Industries in Latin America”. Available at: http://www.cidse.org/publications/business-and-human-rights/criminalisation_social_protest_latam_america.html

¹³⁰ Salazar M.. Op. Cit.

¹³¹ Fact Sheet No. 29. p. 14.

¹³² Protection International, Union for Civil Liberties, Community Resource Centre, (et al.). (2014). “Statement on the Judicial Harassment of Leading Human Rights Defender, Ms. Pornpen Khongkachonkiet.” Available at: <http://protectiononline.org/tag/judicial-harassment/>.

¹³³ IACHR. “Principles and Best Practices...” Op. cit.

¹³⁴ Julio Maier. (2004). Derecho Procesal Penal. Buenos Aires. Del Puerto S.R.L. Tomo I. p. 514.

In 2013 the community of Río Blanco in **Honduras** initiated a peaceful protest against the construction of a hydroelectric dam that would affect their access to water.

Prosecutors accused Berta Cáceres, overall coordinator of the *Consejo Cívico de Organizaciones Populares e Indígenas de Honduras* (Civic Council of Popular and Indigenous Organisations of Honduras, COPINH), and the HRDs Aureliano Molina and Tomás Gómez Membreño, of having incited the population to commit the crimes of “usurpation, coercion and continued damages”, to the detriment of the company.

In the course of the criminal process the HRDs Molina and Gómez had to present themselves before the court every two weeks and to refrain from entering the area where the actions had occurred. Berta Cáceres was placed in pretrial detention despite the fact she was the beneficiary of precautionary protection measures ordered by the IACHR.¹³⁵

2.2.4. The development of investigations against HRDs

The activities of different officials (prosecutors, investigators, investigating magistrates, etc.) can lead to cases being opened against HRDs. Not only does this generate or deepen the intimidatory effects of an accusation and the exhaustion brought about by fighting it, but can in some cases also imply a significant financial burden, as the accused are forced to seek legal advice in an attempt to ensure the investigation is carried out correctly.

On occasion individuals under investigation, and their family members, are vulnerable to the actions of officials and may suffer seriously from stigmatisation. In these cases they are victimised or attacked merely because it is alleged that they have committed some crime, not because they actually have.

2.2.5. The initiation of criminal procedures

Legal proceedings have been documented in which, **despite the lack of evidence** of illegal conduct, prosecutors or judges, acting as accomplices in criminalisation processes, have brought HRDs to trial.

In 2013, in **Turkey**, the Kurdish political activist Pinar Selek was convicted of terrorism in spite of powerful counter evidence and that the only indication of her guilt was a statement by a co-accused, a statement that had been obtained under torture, as was subsequently indicated to the court.¹³⁶

Additionally, **staged trials** are used to bring a variety of criminal charges against HRDs. Evidence may be planted by state security forces (for example placing firearms, explosives, leaflets etc. in the homes of HRDs), or serious accusations made that they belong to armed or terrorist groups.¹³⁷

In these circumstances judges may act in conformity with the law and in a manner that would be appropriate in the context of a trial while the persons responsible for the criminalisation process are the officials (investigators, police officers or prosecutors) who were involved in planting the evidence.

¹³⁵ CEJIL. (2013). “Pronunciamiento conjunto sobre la criminalización de defensores y defensoras de derechos humanos en Honduras. Orden de prisión preventiva de la defensora Berta Cáceres evidencia persecución.” Available at: <http://cejil.org/en/node/5093>.

¹³⁶ OBS. (2014). “Turkey. Sentenced to life in prison for her research and defence of the rights of minorities. International Judicial Observation Mission Report on The 16-Year Long Judicial Harassment faced by Ms. Pinar Selek.” Available at: http://www.omct.org/files/2014/04/22642/turkey_mission_report_pinar_selek_2014.pdf

¹³⁷ United Nations Secretary General. Human Rights Defenders: Note by the Secretary General A/56/341. Op. cit.

2.2.6. Excessive delays in criminal procedures

This phenomenon occurs when the bodies responsible for investigating and pursuing criminal cases request extended periods for investigation. For example, judges, magistrates or prosecutors may fail to appear in court, an unsustainably large number of applications are made to the courts, or other tactics designed to delay and extend the process are employed. Situations also occur in which HRDs remain embroiled in cases for lengthy periods of time before it is eventually dismissed.¹³⁸

According to Human Rights Watch, cases of criminalisation occur in **Indonesia** in which investigations are inordinately long and trials may last for years: there are extended periods in which the authorities fail to communicate, generating situations of extreme uncertainty for those on trial.¹³⁹

The process of the criminalisation of the **Turkish** HRD Pinar Selek lasted 16 years. During its course the prosecutor appealed each interruption before the Court of Appeal, which ordered retrials on two occasions, in 2007 and in 2010, using vague arguments.¹⁴⁰

2.2.7. The sentencing of criminalised individuals

Tragically, there have been cases where the criminalisation process has ended in the accused being found guilty. Thus, courts have passed unjust, long-term, sentences on HRDs, confined them in psychiatric institutions and even ordered their “re-education through labour”.¹⁴¹

Following violent ethnic confrontations in the south of **Kyrgyzstan** in 2010, along with seven other HRDs of Uzbek ethnicity, the HRD Azimjan Askarov was found guilty of inciting racial hatred and organising mass disturbances that resulted in the death of a police officer.

Aksarov was sentenced to life imprisonment following an unfair trial that was marked by serious irregularities. The principal prosecution evidence comprised confessions obtained under torture and testimonies from police officers who were involved in the events.¹⁴²

The human rights lawyer from **Vietnam**, Bui Kim Thanh, was committed involuntarily to a psychiatric institution in 2008 for defending groups of farmers who were demanding compensation for the confiscation of their lands.¹⁴³

¹³⁸ This pattern has occurred in cases of criminalisation against members of several communities and peasant organisations in Guatemala. PBI. Op. cit.

¹³⁹ HRW. (3 May 2010). “Turning critics into criminals. The human rights consequences of criminal defamation law in Indonesia.” Available at: <https://www.hrw.org/report/2010/05/03/turning-critics-criminals/human-rights-consequences-criminal-defamation-law>

¹⁴⁰ OBS. Op.cit.

¹⁴¹ Human Rights Fact Sheet No. 29. p.14.

¹⁴² Front Line Defenders. (20 December 2011). “Kyrgyzstan: Politics Trump Justice; Human Rights Defender Azimjan Askarov conviction upheld by Supreme Court in spite of torture and grossly unfair trial.” Available at: <https://www.frontlinedefenders.org/node/16958>.

¹⁴³ Roth. Op. cit.

In September 2015, a leader of the Nasa indigenous people of **Colombia**, Feliciano Valencia, was sentenced by the Superior Court of Popayán to 18 years in prison for the crimes of kidnap and personal injury. Valencia has been a high a profile leader of the Indigenous Guard (groups organised – as permitted by the country’s Constitution – by the Nasa community itself to ensure the defence of their rights, territory, autonomy and culture). He has also played a key role in his community’s land claims.

The sentence referred to events in 2008 when members of the Indigenous Guard applied indigenous justice by detaining a soldier who they claimed was attempting to infiltrate a march dressed in plain clothes for two days and subjected him to 20 lashes

The decision has provoked debate about the constitutionality of the decision (the complainant is a soldier who does not belong to the community, for which it is possible that it would have been better to hand him over to the authorities immediately after his arrest). Thus, it is possible that the Superior Judicial Council should have been called in to resolve the clash between jurisdictions. In any case it is hard to maintain that a crime was committed.¹⁴⁴

See, also, the case of the **Colombian** HRD David Ravelo (*section 3.3.3, below* ➡).

Beyond the differences in the harshness of sentencing and the effects these differences may have on individual freedom, it is clear that any sentence considerably increases the stigmatisation faced by HRDs who are embroiled in judicial proceedings.

The same is true for any outcome that falls short of complete absolution, including the granting of amnesties or other solutions that do not confirm the clear innocence of the HRDs who are the subject of the case.

¹⁴⁴ Pascual Gaviria. 22 September 2015. “Según el indio es la condena”. El Espectador. Available at: <http://www.elespectador.com/opinion/segun-el-indio-condena>



3. Contexts that favour or facilitate the criminalisation of HRDs

The criminalisation processes analysed in this report are linked to particular realities, included the following:

3.1. Social and political contexts

In any country in the world, feeling the influence of powerful groups, the judicial system may become distorted and be used to attack individuals and groups defence of human rights opposes the interests of the powerful.

However, the phenomenon of criminalisation occurs in states in which the following factors are present:

- + High indices of social and economic inequality, in which the justice system permits elevated levels of impunity;
- + Authoritarian governments;
- + Highly repressive security forces; or
- + Private security companies that wield a lot of power.

Thus, it is not social conflicts per se that are definitive in terms of criminalisation but the **mechanisms that are used to resolve them**, which quickly dispense with the negotiation spaces that may be available or simply make them disappear.¹⁴⁵ This is exacerbated through processes that legitimise the use of force or of other coercive mechanisms, including disproportionate punitive mechanisms against persons who participate actively in the social conflict, and who are perceived to represent a threat to stability, the social order and deep-rooted tradition.¹⁴⁶

Conventional thinking (that can favour criminalisation) may represent a hierarchical vision of the groups that make up society and justify economic and social inequality. It may also favour the adoption of positions and the implementation of actions that are intended to increase the *perception* that security is being provided in a context of extreme uncertainty and threat (whether or not the threat is real or perceived).¹⁴⁷ This phenomenon may occur in regimes of right and left alike.¹⁴⁸

3.2. The role of the media in criminalisation processes

The communications media play an exceedingly important role in criminalisation, as they frequently disseminate a range of messages that discredit, stigmatise and slander HRDs.

The links between the large media groups and the centres of economic and political power mean that, by publishing such positions, they construct a consensus that holds that it is necessary to criminalise social protest and the people who participate in it.

This end is achieved by employing stereotypes that allow HRDs to be portrayed negatively as people who generate conflicts and by the reiterated use of terms that associate their actions with the disturbance of public order, calm and citizen security. This stigmatising discourse permits society to associate protest with chaos, civil disorder, the perturbation of public order and criminality, and to equate protesters with criminals.

Criminalisation is not merely a consequence of the stigmatisation caused by the discourse of the media but has another cause: the detention and arrest of people who defend human rights contributes to *“stigmatisation, since they are depicted and perceived as troublemakers by the population.”*¹⁴⁹

¹⁴⁵ Jan M. Rottenbacher and Mathias Schmitz. (2013). “Condicionantes ideológicos de la criminalización de la protesta social y el apoyo a la democracia en una muestra limeña.” *Revista de Psicología*. Vol. 31 (2). Pontificia Universidad Católica del Peru.

¹⁴⁶ J. Linz. (1978). “Una Interpretación de los Regímenes Autoritarios.” *Revista de Sociología*. No.8. pp. 11-26. Quoted in Rottenbacher in Schmitz. Op. cit.

¹⁴⁷ *ibid*.

¹⁴⁸ Chérrez, Padilla, Otten (et al). Op. cit.

¹⁴⁹ Margaret Sekaggya.(2010). Report of the Special Rapporteur on the situation of human rights defenders. A/HRC/13/22/Add.3. §32.

3.3. Legal contexts

Criminalisation is not an isolated phenomenon; it is produced within weak judicial systems that enable generalised situations of impunity to emerge. This weakness of legal systems is apparent in several ways, including:

- + In systems that are permeable to powerful interests (that feel challenged by HRDs);
- + Where officials are easily corrupted (for example, where salaries are low or there are scant administrative controls over their actions).

When a justice system is selective, that is, when it fails to respond to aggressions committed against specific social groups (in this case HRDs) but is zealous in its response to crimes of which that group is accused, the perception is reinforced that the system behaves in a biased manner, favouring the criminalisation of HRDs.

Irregularities that occur as a result of processes that criminalise HRDs include:¹⁵⁰

- + Obstacles to gaining access to case files.
- + Difficulties for the legal representatives of HRDs to gain access to courtrooms.
- + Hearings that are repeatedly suspended.

In 2014, Supreme Court of **Turkey** overturned the life sentence of Pinar Selek, finding that the court that had heard the case had violated procedural rules. Innumerable procedural irregularities were incurred, including the use of inadmissible evidence (statements obtained using coercion) and the violation of the principle of double jeopardy and of the right to face trial in a reasonable timeframe.¹⁵¹
(See also Section 2.3.5 above ➡)

On the other hand, there are countries whose legal systems are more respectful of due process and international standards but that nevertheless exhibit problems of criminalisation. The existence of controls and guarantees, however, permits better access to legal services, with the result that the negative impacts of the phenomenon on affected persons may be reduced.¹⁵²

3.3.1. States of emergency

Other contexts exist in which criminalisation is made easier and more frequent. These include **states of emergency** under which, when faced by particularly trying circumstances, state authorities have the power to suspend certain rights and guarantees.

Guatemala provides several cases of criminalisation carried out under states of emergency, for example in the conflicts in Barillas, San Juan Sacatepéquez, San Rafael las Flores and Jalapa (2012-2013). In all of these, confrontations caused by the imposition of megaprojects in rural communities led to the declaration of states of emergency, under which several community leaders were arrested.

The conflict generated by the imposition of the "San Juan Project" to construct a cement works resulted in 43 detentions that were declared illegal several months later. According to the *Procurador de Derechos Humanos* (Human Rights Ombudsman), in addition to accusations, arrest warrants and imprisonment, multiple abuses were committed against opponents of the cement works in the community by members of the state security forces, employees of the company and private security agents.¹⁵³

¹⁵¹ Hans Thoolen. (2014). "Pinar Selek case in Turkey: the Supreme Court overturns life sentence against Pinar Selek." Available at: <http://thoolen.wordpress.com/2014/07/09/pinar-selek-case-in-turkey-the-supreme-court-overturns-life-sentence-against-pinar-selek/>

¹⁵² APRODEV, CIDSE, CIFCA (et al). Op. cit.

¹⁵³ Ibid.

In **Mexico**, in 2014, there was widespread criticism of the way in which the state of emergency was regulated (regulated by article 29 of the Constitution), as not only did it facilitate a violent response by state security forces and restrict social protest and the defence of human rights, but might also have facilitated the criminalisation of such acts.¹⁵⁴

The IACHR reports that it has received information on the reiterated use of states of emergency in **Ecuador** to stifle social protests.¹⁵⁵

3.3.2. Martial law and the use of military tribunals

The declaration of martial law results in legal guarantees and due process being severely limited. The military and security forces are given wide-ranging powers to guarantee public order. While they are acting within a legal framework, in practice these circumstances can produce situations that encourage abuses, including the criminalisation of HRDs, and impunity.

In **Thailand** Martial Law was imposed following the 2014 coup d'état. The declaration facilitated the criminalisation of inhabitants of Loeie Province who had created the organisation *Khon Rak Ban Koed* (People who love their homes) in order to resist a mining project

Under the terms of martial law in Thailand civilian officials are required to follow the orders of the military authorities. In consequence the army and its members acquire extensive powers of detention and arbitrary imprisonment, which makes it easier for interrogations and detentions to be extended for up to seven days without a requirement to present evidence or formulate charges and for people to be held in centres that were not designed for the purpose.¹⁵⁶

In addition, trying HRDs and demonstrators under military jurisdiction can result in the limitation of the rights and guarantees of the accused. In contexts where military justice takes precedence over the ordinary system abuses may occur that include illegal detentions, the illegal procurement of evidence, torture, etc. This situation may come about as a result of legal frameworks that permit such acts or because they are tolerated by the authorities, which do not react to abuses committed by state security forces. This reduces rights and guarantees to mere scraps of paper.¹⁵⁷

¹⁵⁴ PBI Mexico. (2014). "PBI Mexico observes with great concern recent trend to restrict the rights to freedom of expression and social protest in different Mexican states. Available at: [http://www.pbi-mexico.org/los-proyectos/pbi-mexico/noticias/news/?no_cache=1&tx_ttnews\[tt_news\]=4261&cHash=6291e3b5624f1f125df28a22cd6650b0&L=0](http://www.pbi-mexico.org/los-proyectos/pbi-mexico/noticias/news/?no_cache=1&tx_ttnews[tt_news]=4261&cHash=6291e3b5624f1f125df28a22cd6650b0&L=0)

¹⁵⁵ IACHR. Second Report. Op. cit. §146.

¹⁵⁶ Protection International. (27 May 2014). "Briefing note. On the situation of community based human right defenders and on recent political developments in Thailand." Protection International. (17 June 2014). "Second briefing note. On the situation of community based human right defenders: the khong rak ban koed group challenges in the Loei province."

¹⁵⁷ Federico Andreu-Guzmán. (December 2011). "Tribunales militares y graves violaciones de derechos humanos." Comisión Colombiana de Juristas. Bogotá. Available at: http://www.coljuristas.org/documentos/libros_e_informes/tribunales_militares.pdf.

One month after the coup d'état in **Thailand**, the National Council for Peace and Order (NCPO), emitted rules governing the imposition of martial law throughout the Kingdom, establishing military tribunals with authority to decide cases on certain crimes. These rules have permitted the military regime to set up a structure of criminalisation that targets HRDs.¹⁵⁸

While in Latin American countries there is a tendency to prohibit the use of immunity for members of the armed forces accused of committing abuses, in Honduras the actions of the Military Police are heard by military tribunals. As this military body is one of the principal perpetrators of aggressions against HRDs, their trial by military tribunals offers no guarantee of independence.¹⁵⁹

Before he was sentenced to 18 years in prison following a trial that different human rights organisations classified as irregular, David Ravelo, a recognised HRD from **Colombia**, and a member of the *Movimiento Nacional de Víctimas de Crímenes de Estado* (National Movement for the Victims of State Crimes, MOVICE) and *Corporation Regional para la Defensa de los Human rights* (CREDHOS), spent 26 months under pretrial detention before he was sentenced.¹⁶¹

3.3.4. Intelligence services with few legal constraints

Concerning on arbitrary or abusive activities of the intelligence services, the Office of the United Nations High Commissioner for Human Rights has indicated that:

*In some States, national intelligence and security services have the power to detain human rights defenders without charge for a prolonged period of time. In some instances, agents of intelligence and security services are granted immunity from prosecution, and can therefore commit human rights violations against defenders in total impunity. Defenders may also face arrests, detention and harsh sentences, including the death penalty, under various State secret laws.*¹⁶²

3.3.3. The abuse of pretrial detention

Several countries have legal frameworks that enable **pretrial detention** to be used beyond what is permitted by international standards. In other countries the practice is used systematically against detained individuals, even in the absence of clear rules governing the practice.¹⁶⁰

Thus, despite the fact that depriving individuals of their liberty even though are yet to have been found guilty should be the exception, these circumstances mean it is possible that individuals who are criminalised will face long periods of detention without having been convicted.

¹⁵⁸ Thai Lawyers for Human Rights. (25 June 2014). "Human Rights Situation Report: One month after the 2014 coup." Available at <http://voicefromthais.wordpress.com/2014/06/25/human-rights-situation-report-one-month-after-the-2014-coup-by-thai-lawyers-for-human-rights/>.

¹⁵⁹ Andreu-Guzmán. Op. cit.

¹⁶⁰ Rapporteurship of the IACHR on the rights of persons deprived of liberty. (2013). Report on the use of Pretrial Detention in the Americas. Available at: <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf>

¹⁶¹ Protection International, ABColombia, Christian Aid (et al). (10 December 2013). "Joint Declaration marks third anniversary of the detention of human rights defender David Ravelo." Available at: <http://www.abcolombia.org.uk/subpage.asp?subid=522&mainid=23>

¹⁶² OACNUDH, Colombia, Guatemala and Mexico. Op. cit. p.13.

At least 14 of the 28 cases analysed by Human Rights First in its report on criminalisation in **Colombia** involved reliance on flawed intelligence reports, which are usually prepared by the armed forces or by one of the various institutions that make up the judicial police. Although Colombian law expressly prohibits this practice, these reports have generally been essential for the initiation or continuation of cases against HRDs.¹⁶³

3.3.5. Anti-terrorist laws

In common with other international bodies in Europe and the Americas the UN Special Rapporteur has on different occasions referred to the important role accusations of terrorism play in limiting the activities of HRDs and in the processes of criminalisation and stigmatisation that affect them.

Such legislation allows the military authorities and the justice system to react rapidly and efficiently to crimes associated with these threats. However, the proliferation of **anti-terrorist policies** following 9/11, and the strengthening of theories of the **criminal law of the enemy** (that is, the application of criminal law according to the identity of the accused rather than to a given illegal act).¹⁶⁴ has favoured the adoption of anti-terrorism laws that encourage the criminalisation of political opponents and HRDs.

This situation is made very much worse by certain conceptual confusions that are present in the approach to security in some countries, according to which a large number of political, economic, social, health and, even, environmental problems may be considered to be potential threats to security. This results in social struggles being equated with terrorism and military solutions being proposed as the essential response.¹⁶⁵

In **Ethiopia**, the important journalist and HRD Eskinder Nega was detained in 2011, a few days after the publication of an article in which he questioned the imprisonment of a terrorist suspect. He was declared guilty of participating in a terrorist network and sentenced to 18 years in prison for having taken part in a public forum, in which, video evidence showed, he indicated that the popular uprisings then occurring in North Africa and the Middle East might extend to his country.¹⁶⁶

Juan Carlos Celis, a member of the *Movimiento por la Vida* (Movement for Life) in Bogotá, is an HRD accused of crimes linked to terrorism in **Colombia**. Celis was accused of rebellion and illegal possession of arms by Special Prosecutor 13 of the Bogotá Anti-Terrorism Unit. The prosecutor argued that human rights defence was tantamount to support of the FARC.¹⁶⁷

¹⁶³ Human Rights First. Op.cit.

¹⁶⁴ Jakobs and Meliá. Op. cit.

¹⁶⁵ Gastón Chillier and Laurie Freeman. (July 2005). "Potential Threat: The New OAS Concept of Hemispheric Security ." WOLA. Available at: http://www.wola.org/sites/default/files/downloadable/Regional%20Security/past/Potential%20threat%20security_lowres.pdf

¹⁶⁶ Action for Fundamental Change and Development, ASOEDC, AfriMAP (et al.). (9 October 2012). "Joint letter requesting Prime Minister Hailemariam Desalegn to remove arbitrary restrictions on the rights to freedom of expression and association in Ethiopia."

Available at: <http://www.defenddefenders.org/2012/10/joint-letter-requesting-prime-minister-hailemariam-desalegn-to-remove-arbitrary-restrictions-on-the-rights-to-freedom-of-expression-and-association-in-ethiopia/>

¹⁶⁷ Human Rights First. Op. cit. p. 50.



4. Main players in the development and articulation of criminalisation

Acts of criminalisation, particularly when they occur in complex contexts, generally require different powers, forces and actors to work together to establish a justice system that deployable against HRDs. These may be drawn from among a wide range of different public servants and private agents, all of whom answer to different interests.

Family members of high ranking officials in the **Guatemalan** army have lodged complaints against HRDs on several occasions, in response to the legal actions the latter have developed against members of the armed forces for grave human rights violations committed during the internal armed conflict until the 1990s.¹⁶⁸

The involvement of private actors in processes of criminalisation usually involves the coordination of actions with state employees – that is, members of the security forces and/or of the justice system.

In 2004, in Cali, **Colombia**, documentation was found concerning *Operación Dragón* (Operation Dragon) which involved the secret gathering of information on HRDs. It was discovered that the *Cuerpo Técnico de Investigaciones* (the Special Investigations Unit of the National Public Prosecutor's Office), the, the National Police, the now-disbanded DAS (see Section 1.3.5) and the Colombian Army's Third Brigade, working jointly with private security firms contracted for the purpose, had coordinated activities in order to gather information on 170 HRDs and politicians in the city.

This endeavour led to the production of a secret military intelligence report that falsely declared that several of the HRDs were involved in terrorist and subversive activities, with the consequence that a memorandum of the National Public Prosecutor's identified several of the people contained in it as members of a terrorist network.¹⁶⁹

4.1 Actors involved in the criminalisation of HRDs

An enormous variety of agents is involved in the processes in which HRDs are criminalised. From among the cases examined during the preparation of this article the following have been identified:

¹⁶⁸ Chapines Unidos por Guate. (n.d.). "Militares y familiares denuncian por crímenes de la guerra interna Continúa arremetida contra la fiscal general, Claudia Paz y Paz." Available at: <http://chapinesunidosporguate.com/militares-y-familiares-denuncian-por-cri%C2%ADmenes-de-la-guerra-interna-continua-arremetida-contra-la-fiscal-general-claudia-paz-y-paz/>.

¹⁶⁹ Human Rights First. Op. cit. pp. 23-27.

4.1.1. Public servants

Political actors, in both the executive and legislative branches are responsible, in an initial phase, for elaborating and adopting punitive legal frameworks. Once the legislation has been created it is the criminal justice operators (the judiciary, prosecutors, the police and the prison authorities) that, with very different social interests, are responsible for its application.¹⁷⁰ The role played by individuals and bodies involved in the second phase is fundamental, as it is they that determine on the basis of the facts which persons should be criminalised and, simultaneously, who the system is going to recognise as victims.¹⁷¹

- **Legislators**

Legislators play a key role in the process by which criminal justice policy is determined, as it is they who facilitate or complicate the processes of criminalisation that are carried out using laws that directly repress the act of defending human rights or who permit them to remain on the statute book, such as those that apply sanctions to HRDs who defend the rights of the LGTBI community, or anti-terrorist laws.

- **Police and state security bodies**

In the implementation and execution of criminal justice policy a particularly important role is played by the police and the state security bodies. Not only are their agents the authors of serious physical aggressions against HRDs but they are also responsible for detentions and searches, which in many cases are carried out arbitrary or illegally.¹⁷²

The violence carried out by these groups against HRDs cannot be qualified as criminalisation, but other events that occur during the operations in which they participate frequently do involve criminalisation – such as (frequently mass) detentions or searches.

In 2009 a group of about 450 demonstrators gathered near the Ministry of Education in Zimbabwe in order to present a petition on the right to education to the Minister. Despite the fact they had an appointment to see the Minister the riot police dispersed the demonstrators violently and ten members of Women of **Zimbabwe** Arise (WOZA), an NGO that works for women's rights, were arrested.¹⁷³

The **police units whose job it is to control**

demonstrations (riot police or specialist demonstration squads) play an equally important role in criminalisation. The relevant norms generally permit them to intervene when demonstrators commit a crime. However, when these forces are strengthened, or increased in size, it may indicate the intention of certain governments to advance a repressive response to social demands.¹⁷⁴

In this regard, the conduct both of the **civilian and military intelligence services** is important. Although the intelligence operations of which HRDs are the target are not, strictly, be considered to be acts of criminalisation, they may constitute a part of processes that lead to it, including prohibited intelligence operations or information gathering by plain clothes agents in demonstrations carried out.

In some countries, the security bodies charged with responding to social protest are drawn from the same intelligence apparatus that was instrumental in carrying out state repression during periods of conflict and state repression.

¹⁷⁰ Ramírez G. Op.cit.

¹⁷¹ Zaffaroni. Derecho penal. Op.cit.

¹⁷² Echeverría. Op. cit.

¹⁷³ Front Line Defenders. (2009). "Zimbabwe: Beatings and arrests of members of Women of Zimbabwe Arise (WOZA)." Available at: <https://www.frontlinedefenders.org/node/1814>.

¹⁷⁴ Etcheverry. Op. cit.

In **Argentina**, in 2001, plain clothes and uniformed agents not only killed and injured dozens of demonstrators in Buenos Aires, but also arrested several more. Later, in 2004, operations were carried out in which most of the people detained were taken prisoner by police officers who had infiltrated the demonstrations.

One of the defence lawyers acting for the demonstrators indicated that while he was in the police station a man in plain clothes identified himself as a member of the intelligence services and requested the police hand over a list of detainees.¹⁷⁵

• Judges and prosecutors

The actions of judges and prosecutors are of great importance in secondary criminalisation because they are linked to police procedure and can complicate or facilitate attacks on HRDs.¹⁷⁶

A. Tolerance of irregular acts committed by the security forces

Judges and prosecutors may tolerate or encourage abuse, violence or illegal detentions carried out by the armed forces against HRDs when:

- + They do not order investigations into the circumstances surrounding detentions or acts of aggression;
- + HRDs are arrested in *flagrante delicto* for crimes crudely invented by the police during evictions or when demonstrations are being broken up; or
- + The accused who appear before them are clearly injured.

B. Encouraging irregular actions

Irregular actions may also be encouraged when judges issue arrest warrants or prosecutors initiate investigations on the basis of inadequately formulated suspicions and in the knowledge that the actions of members of the security forces frequently respond to repressive impulses rather than being rooted in respect for judicial guarantees.

Among the procedural irregularities in court procedures are the failure to provide information to the persons being criminalised or to their defence lawyers, who frequently encounter serious difficulties gaining details of the charges formulated against their clients. Lawyers also have difficulty gaining access to the case files that detail the investigations that have been conducted. These are fundamental elements of the right to a defence.¹⁷⁷

Situations also occur in which the institutions with responsibility for pursuing criminal prosecutions seek to ensure that minor offences are punished applying laws that were intended for more serious offenses, or in which attempts are made to initiate a trial in the absence of solid evidence.¹⁷⁸

In 2012 the Litoral Provincial Court (**Equatorial Guinea**) declared the doctor and HRD Wenceslao Mansogo guilty of professional negligence for the death of a patient, sentencing him to three years in prison.

Mansogo was arrested without a warrant and his trial and conviction were based on unsubstantiated accusations. The autopsy report on the body (prepared by the Ministry of Health) concluded that the patient had died as a result of poorly administered anaesthetic, for which Mansogo was not responsible.¹⁷⁹

¹⁷⁵ *ibid.*

¹⁷⁶ Echeverría. *Op. cit.*

¹⁷⁷ PBI. "The ongoing criminalisation of social protest." *Op. cit.*

¹⁷⁸ Salazar. *Op. cit.*

¹⁷⁹ Amnesty International. (2012). "Equatorial Guinea: Human rights defender falsely arrested: Wenceslao Mansogo Alo." Available at: <https://www.amnesty.org/en/documents/AFR24/004/2012/en/>.

Of the irregularities that have been documented and that are attributable to prosecutors (and at times tolerated by the jurisdictional bodies), some are derived from the prejudice against HRDs displayed by the individuals in question. These irregularities include the formulation of charges without evidence or without taking exculpatory evidence into account, exceeding the time limits for initial investigations, arbitrary detention and unjustified pretrial detention.

Serious evidential problems occur too, associated with the unreliability of witness statements that may have been manipulated, or because of inconsistencies, contradictions or vagueness. In addition, inadmissible intelligence reports may be used, that display signs of having been falsified or are without merit. There may also be insufficient grounds to have initiated an investigation in the first place.

It is, furthermore, a common practice to describe HRDs publicly as terrorists, including before trial proceedings begin – a practice that illustrates a propensity to declare the accused prematurely guilty, violating in this manner the principle of the presumption of innocence.¹⁸⁰

Human Rights First has argued that in **Colombia** the intelligence and security forces, and even prosecutors operating in the regions, have displayed a tendency to detain HRDs and accuse them publicly of being terrorists, at times before formal charges have been laid.

In countries such as this, with such high levels of political polarisation, this situation also places the lives of HRDs at grave risk. Accusing them of belonging to a revolutionary armed group can serve to promote attacks against them, in particular by far-right groups and by paramilitaries.¹⁸¹

Situations like these can be categorised not only as illegitimate but also illegal. They provide indications of how this kind of action carried out by justice system operators is intended to constitute an act of aggression against HRDs and to obstruct their work by ignoring the importance of protecting freedom of expression and the right to defend human rights.

In these cases they ignore the fact that in the area of freedom of expression and peaceful resistance, sanctions should only be applied in exceptional circumstances. Fundamentally, the role of these justice operators should be limited to the examination of whether the facts at hand constitute conduct that is punishable according to the terms of the Criminal Code.¹⁸²

C. Retaliation between state employees

Some processes of criminalisation may also involve officials from different levels of government (that is, local and national) who may enter into conflict with each other associated with the positions they assume concerning the promotion and defence of human rights.

On possession in **Guatemala** of an Attorney General who was widely recognised for her human rights work a significant number of cases of criminalisation were in train, including some involving HRDs working to protect indigenous territories in the municipality of Barillas in the Department of Huehuetenango. Gilda Aguilar, the prosecutor of the neighbouring municipality of Santa Eulalia was sacked for having initiated cases of criminalisation when, without evidence, she accused local leaders of having caused disturbances. Since then, Aguilar headed a large number of actions against the Attorney General, including attempts to criminalise her work in favour of human rights.¹⁸³

¹⁸⁰ Human Rights First. Op.cit.

¹⁸¹ *ibid.*

¹⁸² Salazar. Op. cit.

¹⁸³ Edgar Chacón. (24 July 2014). "Presentan denuncia contra Claudia Paz y Paz." La Nación. Available at: <http://www.lanacion.com.gt/presentan-denuncia-contra-claudia-paz-y-paz/>.

In 2004, Usman Hamid, coordinator of the NGO *Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan* (Commission of the 'Disappeared' and Victims of Violence, or KontraS), one of **Indonesia's** leading organisations of HRDs, was designated as a member of the presidential investigation team to monitor and evaluate an investigation into a murder that had allegedly been committed by a high ranking official of the National Intelligence Agency.

During the trial the accused was found not guilty and accused Usman of defamation because of his role in the trial and because he had stated publicly that he believed the accused had been wrongfully absolved.¹⁸⁴

4.1.2. Private actors

The interests behind the criminalisation of HRDs are not exclusively associated with the actions of the state.

Private actors responding to particular interests also play a role in the criminalisation of social protest and the defence of human rights. In Fact Sheet N° 29 the UN Secretary General's Special Representative on the situation of HRDs refers specifically to private economic interests.¹⁸⁵

Among these, of particular importance are those associated with land and property holding and the development of megaprojects (mining, energy generation, tourism, etc.). Landowners, alongside national and multinational enterprises, are important agents of criminalisation.¹⁸⁶

The IACHR refers to the role played by these actors in criminalisation when it indicates that "[o]ften **the owners who manage these megaprojects or the staff who work on them** are the ones lodging criminal complaints against defenders for the purpose of reducing their activities of defence of their rights."¹⁸⁷ It is particularly important to note, in relation to this kind of actor, the role played by the **private security firms that work for the companies**, whether they are their direct employees or work for private security agencies contracted for the purpose.¹⁸⁸

Ultra-conservative groups, principally linked to certain churches and groups of religious or cultural fundamentalists may be considered important actors that are responsible for aggressions against HRDs, especially in respect of people who defend the LGBTI population, or women.¹⁸⁹

In **Kenya**, the criminalisation processes involving defenders of women's bodies from female genital mutilation shows how groups defending "tradition" can be key stakeholders in the criminalisation of opponents of this kind of practice that violates human rights. .

The same occurs in **Central America**, where religious leaders are increasing their influence and control over authorities and public institutions that are responsible for determining public policy.¹⁹⁰

Finally, concerning stigmatisation and its links with criminalisation, the important role of the **communications media** and those who work in them should not be forgotten. But it is not just a question of news broadcasts that stigmatise HRDs but also the ways in which cases involving the criminalisation of HRDs are reported.

184 HRW. "Turning critics into criminals." Op. cit.

185 UN Secretary General's Special Representative on the situation of human right defenders . Human Rights Fact Sheet No. 29. Op. cit. pp. 18 and 19.

186 Echeverría. Op. cit.

187 IACHR. Second Report.... Op. Cit.

188 APRODEV, CIDSE, CIFCA (et al). Op. cit. and Echeverría. Op. cit.

189 IM-Defensoras. "Violencia en contra de defensoras de derechos humanos." Op. cit.

190 Marusia López Cruz. (July 2010). "Violencia contra Defensoras de Derechos Humanos en Mesoamérica. Un Diagnóstico en Construcción". Available at: http://sidoc.puntos.org.ni/isis_sidoc/documentos/13350/13350_00.pdf. .

4.1.3. Connections between different public and private actors

Criminalisation processes may result from the coordinated efforts of different actors or even the joint efforts of very dissimilar groups. For example, collaborations may occur between different public servants (drawn from the justice system, state security forces and certain representatives of government bodies, etc.) and private actors.

In this sense, local dynamics play an important role in criminalisation, and authorities at this level, whether they be the police, prosecutors or members of the judiciary respond to the holders of political or de facto power - which may operate locally or form a part of broader power structures that exert influence in the area.

The inhabitants of the community of San Sebastián Bachajón (south west **Mexico**), decided to exercise their right to self-determination over their lands and resources as original peoples, declaring themselves in resistance to the imposition of tourist megaprojects planned by state and federal governments.

The *ejidatarios* (traditional authorities) of the community complained of having suffered a series of acts of violence committed by the (local and state) police, the army and paramilitary groups. The acts remain in impunity. In 2014, in addition to continuing harassment and even murders, three ejidatarios were accused of wounding a municipal police officer and they were detained and tortured by a member of the Ocosinga Office of the Specialised Prosecutor for Indigenous Justice, in a effort to force them to sign a confession.

The judge of first instance of the same locality, who heard the case, set bail at a price equivalent to almost €20,000, an exaggeratedly high figure given the economic situation of the detainees. In this case of police and legal harassment, the collective intervention of local, state, and federal authorities - including the municipal president, the state governor and federal authorities - is apparent.¹⁹¹

¹⁹¹ Desinformémonos. (2014). "Manos oscuras e intereses turísticos detrás de la detención de ejidatarios de Bachajón." Available at: <http://desinformemonos.org/2014/09/manos-oscuras-e-intereses-turisticos-detras-de-la-detencion-de-ejidatarios-de-bachajon/>.

There are also cases where members of the security forces and justice system operators have been accused of defending powerful economic interests over and above the human rights of their citizens, and in cases of criminalisation, acting against those who defend and promote these rights.

Such situations occur, for example, where members of the security forces cooperate with employees of private security groups working for companies and megaprojects.¹⁹²

4.2. Particularly vulnerable sectors

There are certain classes of HRD that could be said to be particularly vulnerable to criminalisation.

Earlier references in the report to the selectiveness of the criminal justice system suggest that the higher levels of exclusion or marginalisation may be related to factors including class, sex, ethnic origin or skin colour, or to the greater or lesser visibility of the activities in defence of human rights in these areas.

In addition, the degree of power enjoyed by the persons, institutions or companies that are challenged by HRDs in the course of their work and which respond to the conflict by initiating or participating in a process of criminalisation should also be taken into account, as this conditions their ability to influence the security forces and legal operators.

The following groups of HRDs are amongst the most vulnerable to criminalisation:

4.2.1. Defenders of land, territory and natural resources

Social protest is on the increase in many parts of the planet, and to a considerable extent this is associated with struggles for land and territory and the right to decide over the use of natural resources in the face of the interests of large (principally transnational) companies. HRDs who are based in communities in remote areas have faced coordinated repressive actions, including criminalisation, carried out by public authorities and economically powerful groups in response to their legitimate efforts to promote and defend the rights of the peasant and indigenous communities affected by these plans.¹⁹³

In these situations states act to protect private interests and what they define as “national priorities and the public interest.”¹⁹⁴

It is similarly of concern that in these conflicts technical advisors to the communities and organisations are also victims of aggression. This occurs in an attempt to ensure that the protests do not benefit from the technical and legal support that are so vital if they are to achieve their aims or to mount a legal defence. There are also cases of judges who have been criminalised when their decisions have recognised the rights of others who have themselves been criminalised.¹⁹⁵

4.2.2. Women Human Rights Defenders

Violence against women has very important nuances that should be borne in mind when analysing criminalisation, because in this area of human rights defence the differences may also be reproduced in the causes, methods and consequences of the violence WHRDs face and the actors who are involved.¹⁹⁶

As United Nations Special Rapporteur Jilani has said, WHRDs suffer violence not only as a result of the work they carry out, but also because they are women.¹⁹⁷ In terms of criminalisation, the punishment WHRDs receive at the hands of the criminal justice system may be influenced by the prejudices of its operators concerning the role they believe should be played by women in society.

There is a certain selectiveness in the criminal justice system, to which may be added the rebukes that can result from the fact WHRDs defend certain rights against cultural, social and religious practices. Similarly, activities in defence of sexual and reproductive rights bring women into conflict with religious or cultural fundamentalists and the more conservative social sectors, which can play a central role in their criminalisation.

¹⁹² The special link that may exist between private security firms and state institutions should be borne in mind, as the personnel employed by the former are generally former members of the state security forces.

¹⁹³ APRODEV, CIDSE, CIFCA (et al). Op. cit.

¹⁹⁴ Chérrez, Padilla, Otten (et al). Op.cit.

¹⁹⁵ Ibid.

¹⁹⁶ María Martín (2012). “Herramientas para la protección de mujeres defensoras de derechos humanos.” UDEFEGUA. Guatemala.

¹⁹⁷ Hina Jilani. Special Representative of the Secretary General on human rights defenders. (February 2002). “Report on Human Rights Defenders”. E/CN.4/2002/106.

In the case of police violence against the women of WOZA in **Zimbabwe** and their subsequent arrest, mentioned earlier, the riot police showed their shields and sang “today we’re going to hit you.” They then broke into song again, this time asking a question: “Why did your husbands let you come and demonstrate?”¹⁹⁸

The crimes of which WHRDs are accused or for which they are tried or convicted frequently have to do with morality or tradition.

In 2012, members of WONETHA, a CSO dedicated to defending the human rights of sex workers in **Uganda**, were arrested without being informed of the charges they faced. Three days later, they were accused of “living off the proceeds of prostitution”, a crime which under the Ugandan Criminal Code, carries a sentence of seven years in prison. The charges were dropped several months later.¹⁹⁹

In **Nicaragua** several feminist groups have had to face legal action. In 2007, nine leaders of the *Red de Mujeres Contra la Violencia* (the Women’s Network against Violence) were arrested on charges of allegedly commissioning crimes against public administration, conspiracy, and justifying the crime of abortion.²⁰⁰

4.2.3. Individuals who expose irregular activities of public servants, with special reference to journalists and professional communicators

Because of the importance of protecting the principle and honour of public service, many legal frameworks include **criminal codes that are used to punish persons who accuse public servants of committing criminal acts**. This leads to public servants making criminal complaints against those who defend the right to justice in cases of abuses and irregularities committed by public servants. This phenomenon affects, in particular, journalists and other communications professionals. The actions of the latter might take the form of public denunciations or the initiation of proceedings for corruption or abuse of power. They may also include complaints about abuses committed by the state security forces, such as grave violations of human rights (e.g. forced disappearance, extrajudicial executions, torture, etc.).²⁰¹ Ce phénomène affecte particulièrement les journalistes et les communicateurs.

198 Front Line Defenders. “Zimbabwe: golpean y arrestan a miembros de WOZA.” Op. cit.

199 AWID. (2012). “When States Use Legislation Against Women Human Rights Defenders”.

Available at: <http://www.awid.org/news-and-analysis/when-states-use-legislation-against-women-human-rights-defenders>

200 Dayra Valle. “Criminalización de la protesta social en Nicaragua como forma de restricción de la libertad de expresión.” In Eduardo Bertoní (compilador). (2010). ¿Es legítima la criminalización de la protesta social?: Derecho penal y libertad de expresión en Latin America. Universidad de Palermo. Buenos Aires.

201 UN Secretary General’s Special Representative on the situation of human right defenders. Human Rights Fact Sheet No. 29. Op. cit. p. 14.

Articles 230, 231 and 232 of the Criminal Code of **Ecuador** define crimes against the authorities. There is a tendency in the country to use these offences to punish persons who express critical opinions about the exercise of public service in a way that is considered offensive to authority. More than a dozen people have been tried for alleged insults directed against the President of the Republic.²⁰²

This phenomenon may be exacerbated by linkages that exist between public administration and the justice system. A poorly-understood culture of solidarity between state employees means that it is more likely that attempts will be made to punish people who seek accountability.

4.2.4. Defenders of civil and political rights in authoritarian regimes

Authoritarian governments usually possess legal instruments that allow them to use the criminal justice system to react repressively against HRDs who question the exercise of power.

202 Salazar. Op. cit.



5. The effects of criminalisation

The negative impacts of the criminalisation of HRDs are multiple; the costs may be psychological, social or economic. These impacts not only affect the lives of those who are directly affected but also have serious impacts on others, who are close to them, the organisations they work for and, in the final instance, the entire social movement.²⁰³

The conflict in **Guatemala** mentioned above, between a mining company and the community of Agel, is a good example of the varied impacts suffered by people who have been criminalised. In this case the leader Gregoria Crisanta Pérez, even though she was able to avoid the implementation of the arrest warrant against her, was obliged to remain in hiding for six months – fearful of capture, suffering from rumours she might be kidnapped, and with no chance of working.²⁰⁴

5.1. The nature of the impact

When it comes to analysing the impact of criminalisation it is important to consider the negative consequences both of criminalisation itself and of stigmatisation. As mentioned in Section 1.3.1, the latter phenomenon may mark the initiation of a criminalisation process or might be its consequence, deepening a pre-existing situation of stigmatisation.

Such effects on public image can affect the different social connections of HRDs including their family, community or workplace comrades. It can also lead to further impacts, both financial and psychological, as well as having negative effects on the CSO for which they work and, in addition, the social movement of which the organisation forms a part.

5.1.1. Financial impact

These processes might imply posting bail in order to avoid imprisonment, fines if they are ordered in sentencing, or administrative sanctions. In addition, there are legal fees and the cost of travel to legal installations far from home.

In certain cases, criminalisation might also result in measures that complicate or preclude the possibility of earning a living: imprisonment, or alternative measures that make it impossible for HRDs to pursue their careers lead to the loss of working days (when they have to travel a long way to register in a courthouse, for example).

Not all HRDs are remunerated for their work – that is, for many, the defence of human rights is a voluntary activity carried out in parallel with their main wage-earning activities. In situations such as this, taken together, criminalisation and stigmatisation might even result in the person who has been criminalised being fired, or affect the sustainability of their own businesses or their ability to invest time in them.

In **Indonesia**, the journalist Upi Asmaradhana, who questioned the declarations of a high ranking official who urged limits to freedom of expression, was ordered by her superiors to choose between publishing the story and losing her job, forcing her to resign and to go freelance.²⁰⁵

203 IACHR. "Second Report." Op. cit. §92.

204 Chérrez, Padilla, Otten (et al). Op.cit.

205 HRW. "Turning critics into criminals." Op. cit.

5.1.2. Impact on the work of the criminalised individual

The different actions that constitute criminalisation represent a permanent process of intimidation that affects the personal liberty of victims as well as their political activities and their role in society. They also generate situations of isolation and discouragement, time pressures and lapses in concentration. All these aspects impede the ability of HRDs to work effectively

In this regard the IACHR has indicated that:

Opening groundless criminal investigations or judicial actions against human rights defenders not only has a chilling effect on their work but it can also paralyse their efforts to defend human rights, since their time, resources, and energy must be dedicated to their own defence.²⁰⁶

5.1.3. Psychological impact

Criminalisation processes not only presuppose intimidation but can also create situations of fear, uncertainty, defencelessness, vulnerability and isolation that can have a significant impact on the mental health of victims.²⁰⁷ They experience intense feelings of anxiety and shame as well as guilt and concern about the impact the events may have on their families.²⁰⁸

To this should be added the psychological impacts that might result from other situations associated with criminalisation, such as flight and the seeking of exile, or displacement,²⁰⁹ financial difficulties or stigmatisation.

The issuing of arrest warrants and the uncertain situation they create leads to “a context that lends itself to the propagation of rumours” about the legal status of the persons to whom they refer, generating a new form of harassment against HRDs, because they create confusion and alarmism.²¹⁰

In **Indonesia** some of the persons affected by criminalisation as a result the framing of the defamation laws speak of the uncertainty and fear that are produced as a result of the long periods of time during which they receive no information about their case.

Others speak of the shame they feel when members of their communities learn that they are being investigated by the police. Some indicated that even though they were absolved they still feel as though they were public enemies and feel disillusioned at the reaction of their friends and colleagues.²¹¹

5.1.4. Impact on family members

Criminalisation has a wide range of impacts on the personal and family lives of HRDs: for example, family breakdowns have occurred,²¹² whose impact may be worsened when the criminalisation is maintained over a long period of time, when it implies the loss of freedom, or when the victim of criminalisation is a head of household and is responsible for maintaining the family.

Similarly, the stigmatisation that occurs, during or after criminalisation affects the reputation and good name of individuals and this can have a very marked effect on the social relations of family members. For their children in particular it can lead to confusion, silence and anguish for their children and anxiety and problems at school.²¹³

206 IACHR. “Second Report.” Op. cit. Par. 76

207 APRODEV, CIDSE, CIFCA (et al). Op. cit.

208 HRW. “Turning critics into criminals.” Op. cit.

209 United Nations Secretary General. Human Rights Defenders: Note by the Secretary General A/56/341. Op. Cit.

210 PBI.Op. cit.

211 HRW. “Turning critics into criminals.” Op. cit.

212 ibid.

213 Ángeles Herráez. (n.d.). “Impacto psicosocial en hijos e hijas de defensoras y defensores de derechos humanos en Guatemala.” UDEFEGUA. p. 21.

5.1.5. The reduction of civil society space

As has been seen, stigmatisation and criminalisation have negative effects on the work and image of the CSOs for which the affected HRDs work and, also, for the broader social movement.

Faced with the criminalisation of one of their members, CSOs and – indeed – the social movement within which they operate, tend to respond by ceasing human rights defence work. In effect, attending to the person or persons who have been criminalised and to their families takes priority.

The isolation and discouragement of the victim of criminalisation distances them from the human rights space in which they have worked and from the people with whom, ordinarily, they would collaborate. This weakens the capacity of criminalised organisations to continue promoting human rights.

Mohammed Dadang Iskandar from Gunungkidul, **Indonesia**, member of Corruption Watch in the country, has said that his relationships with NGO colleagues and friends with whom he went on the demonstration that led to his criminalisation have all been affected, as the police have questioned many of them as witnesses in the case. *“I feel alone, because many of my friends keep away from me.”*²¹⁴

Furthermore, when these HRDs are linked to serious criminal charges their work is **delegitimised**. This delegitimation may also extend to the organisations in which they work, or to the entire social movement; it is linked to the work they carry out or to their alleged lack of integrity and honour.²¹⁵ By identifying the work of HRDs with punishable crimes, an intolerant or even threatening message is conveyed to the

person who has acted (this is known as special prevention) and to society as a whole (general prevention).²¹⁶

It might also lead colleagues to distance themselves and/or to stop working because they fear becoming targets of criminalisation themselves. But the **intimidatory effect** of this form of aggression may go further, as it sends a dissuasive message to all who are active in the region in defence of human rights.²¹⁷

In **Indonesia** criminalisation, with its origins in defamation, has had a particular effect on the work of human rights NGOs in the fight against corruption. As it has been high profile HRDs who have suffered in this way, less well known defenders fear they will be the victims of even more severe actions. The phenomenon also has a negative effect on freedom of the press and on participation in demonstrations, because of fear that actions will be taken against them.²¹⁸

Similarly, criminalisation exerts an **inhibitory** effect, weakening community organisations and the social struggles in which they are engaged and discouraging anyone who is interested in exercising their right to peaceful protest and the defence of human rights.²¹⁹

5.2. Specific impacts on HRDs based in rural communities

In addition to the duration of the process, eventual conviction and imprisonment, the impact of criminalisation also depends on the context in which HRDs who are its victims work.

²¹⁴ HRW. “Turning critics into criminals.” Op. cit.

²¹⁵ PBI. Op.cit. APRODEV, CIDSE, CIFCA (et al). Op. cit.

²¹⁶ Alejandro Rodríguez. “La pena”. en: José L. Díez and Esther Giménez (Coordinadores). (2001). Manual de Derecho Penal Guatemalteco. Artemis y Edinter. Guatemala. p. 526.

²¹⁷ Ibid.

²¹⁸ HRW. “Turning critics into criminals.” Op. cit..

²¹⁹ Salazar. Op. cit.

In the **rural environment**, the effects of criminalisation on **community leaders**, generally in cases of resistance to megaprojects and extractive activities are frequently result in division and internal conflict in their communities.²²⁰

This can even affect **local authorities** (e.g. mayors) who are committed to defending the rights of communities over their territories.²²¹

On occasion, the **marginalisation** that is experienced in rural areas, especially if they are far from major urban centres, where access to education and the legal apparatus is limited, means it is extremely difficult to deal with highly complex legal cases:

- + It is difficult for communities to gain access to lawyers or the legal advice they require to defend themselves as well as to the institutions of the judicial system, which are usually concentrated in urban areas.
- + There may be significant financial implications when the population generally lives in poverty.

5.3. Particular effects on women and LGBTI Human Rights Defenders

WHRDs and HRDs who defend the rights of the LGBTI population face multiple negative impacts as a result of criminalisation. The sharp social reproach and stigmatisation that come with the kind of population groups and rights they defend (e.g. sexual and reproductive rights, etc.) can seriously affect their reputation and public image.

Additionally, criminalisation of these groups of HRDs can be accompanied by violence, including sexual violence, which might occur while in police custody or, in prison, perpetrated by prison staff or fellow detainees.

Finally, the financial impacts felt by WHRDs can be greater than for their male counterparts. This may be exacerbated by the feminisation of poverty but because in many cases women are heads of household and are obliged to respond alone to the burdens of family life (maternity, care and maintenance of elderly or sick family members, etc.). This situation deepens the psychological and emotional impacts of criminalisation on the families of WHRDs.

220 APRODEV, CIDSE, CIFCA (et al). Op. cit.

221 Chérrez, Padilla, Otten (et al). Op. cit.



6. Alternative strategies to respond to criminalisation and related phenomena

As criminalisation may be carried out in many different ways, and as it has varied effects, the measures that may be used to confront it also vary. Among these methods the following may be highlighted:

6.1. Preventive and reactive actions in response to cases or to the phenomenon of criminalisation itself

Usually, **reactive actions** are only able to respond to concrete cases. That is, to take measures to combat a case or process of criminalisation that has already started.

However, it should not be forgotten that it is important to take prior, preventive, measures before criminalisation occurs and not to wait until it has had a negative effect on HRDs and their milieu. By that time, the possibilities of minimising the effects of criminalisation or of preventing it from ending in a guilty verdict are fewer. Thus, the implementation of **preventive actions** may be successful in combating criminalisation or facing concrete situations when a crisis or conflict have begun but as yet no criminalisation process has been initiated,

Preventive measures may also be taken, for example, to prevent stigmatisation, which has been identified in some cases as the precursor to criminalisation.

6.2. Different arenas and scales of intervention

As has been seen, the individuals and spaces that are affected by criminalisation are extremely varied: the criminalised HRDs, their families, the CSOs in which the direct victims work or the communities in which they live.

Equally, and in recognition that other organisations, movements and communities that defend human rights are affected by similar issues, broader measures may be taken that target civil society or, even, society as a whole. Consequently, the preventive and reactive measures taken should be implemented in order to achieve the **broadest range of effects** possible.

The **scale of the interventions** that are required to combat criminalisation and other associated phenomena should also be considered. For example, measures may be taken to apply political pressure or to develop communications at community, municipal, regional, national or international level (depending on the strategic actors it is hoped to influence and on the concrete impacts a determined action is intended to generate).

In the case of the stigmatisation or delegitimation of HRDs that occurs at the level of the community, any potential counter strategy should include the production of counter-narratives, for example by using community radio. On the other hand, if this kind of attack is made in the national media then that is where the response should appear. In the case of administrative sanctions the circumstances are similar. In response to actions of national-level authorities, media campaigns can be organised, or political backing sought either domestically or internationally. In some situations such actions may make it possible to resolve a situation at local level when the authorities or centres of power relevant to the case are located there.

International campaigns, such as the one organised by several organisations in favour of the Sahrawi human rights campaigner Aminatou Haidar, can be useful in cases such as these, in which the campaigner sought to prevent her expulsion from **Morocco** (of which she is a citizen).²²²

6.3. Arenas of intervention – different events imply different effects and measures of response

Although the logical response would be to construct responses in the legal sphere, the vastly variable effects that harassment may have, and their connections with other kinds of events, should not be forgotten. In consequence, the responses required also have to be vastly complex if it is to prove possible to organise an integral response.

- + For example, **measures to apply political pressure** can be a much more effective response to administrative sanctions than to criminal punishment (either because the legal authorities are truly independent or because they hide behind the illusion of being so).
- + When criminalisation is accompanied by stigmatisation, **legal measures** and a **communications strategy** can be as important as **psychosocial support**, the solidarity of other organisations and actions to ensure dignity for the victim of criminalisation.²²³

6.3.1. Communications

Some measures are suggested below that are intended to combat stigmatisation (which, as was shown above, may be a cause or a consequence of criminalisation or occur in parallel to it):

- + Create and strengthen links between social movements and alternative media in order to generate counter-narratives that highlight the positive values of the work of HRDs in the promotion of human rights and the crucial role they play in strengthening democracy and the rule of law.

²²² HRW. (2009). "Morocco: Reverse Expulsion of Sahrawi Activist."

Available at: <https://www.hrw.org/news/2009/11/19/morocco-reverse-expulsion-sahrawi-activist>.

²²³ Interview with Ángeles Herráez. (25 August 2014). Psychologist specialising in psychosocial accompaniment to HRDs. Guatemala City.

²²⁴ This right is recognised by article 14 of the American Convention on Human Rights which states: "Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish".

²²⁵ For more information on the concept of "safe working space" ("work space" in the language of the manual) for HRDs and the different aspects of a protection strategy for HRDs, see Chapter 1.6 "Drawing a Global Protection Strategy," in Marie Caraj and Enrique Eguren. (2009). New Protection Manual for Human Rights Defenders. Protection International. pp. 65-73

- + Efforts at communication of this kind, developed by the protagonists themselves, can play a preventive as well as a reactive role in counteracting the discourses advanced by powerful media outlets in order to stigmatise and delegitimise social struggles and HRDs, and which have the effect of nourishing processes of criminalisation and deepening their effects.
- + In some countries legislation exists that gives the right to rectification or reply,²²⁴ permitting responses to news stories, defamatory opinions or points of view that undermine the reputation and honour of persons to be prepared.
- + Criminal and civil proceedings may also be initiated in response to stigmatisation if it constitutes defamation, slander or other crimes associated with public reputation. It is also possible to appeal to the professional associations of journalists and communications professionals, which might help ensure disciplinary sanctions are ordered.

6.3.2. Political interventions

As has been indicated in earlier sections of this report, political action can be of great importance in these processes, including in response to criminalisation. In most cases it seeks to raise the profile of the HRDs and increase the political cost of attacks. Efforts are made to dissuade the persons involved in processes of criminalisation from acting, by employing rational and/or moral arguments, or by persuading them of the political benefits of ending the process. These lobbying and advocacy activities mean that different stakeholders work together to support criminalised HRDs, strengthening as a result the **work space** that is available to them to carry on their activities.²²⁵

In effect, one of the principal demands civil society and of international bodies is that high state officials should publicly state their support and recognition for the contribution HRDs make to the functioning of democracy and the rule of law.

Political actions are also considered to be useful methods of preventing different kinds of aggression towards HRDs. In the case of criminalisation, these actions may help dissuade officials from becoming involved in inappropriate actions that they might otherwise have pursued.

Establishing alliances and working with external support networks is fundamental in this respect, as it allows political actions to be developed that combine lobbying activities and advocacy at local, national and international level.

Responding to many years of pressure exerted by civil society and international human rights NGOs, as well as international governments and institutions, the government of **Colombia** has begun to organise a variety of acts to recognise the work of HRDs. It has also invested in a permanent, public, campaign “[in] recognition of the legitimacy of the activity of defending human rights and of non-stigmatisation.”²²⁶

As was made clear in section 1.4.3 ➡ several countries have adopted guidelines for the protection of HRDs operating in third countries. These guidelines contain specific recommendations for their diplomatic representatives on accompaniment and support, including in cases of criminalisation.

Emin Huseynov, a journalist and HRD who works at the Institute for Reporters' Freedom and Security (IRFS) in **Azerbaijan** was given temporary asylum in the **Swiss** Embassy in Baku. Huseynov sought support from the Embassy in August 2014, after the Azeri authorities formulated several criminal charges against him, searched his office and seized equipment and documents. The organisation's office has been sealed and its employees have been questioned. The Embassy's response was justified by the judicial harassment to which Azeri HRDs are frequently subjected and by the impossibility of defending themselves in court because of the lack of independence of the legal system and the pressures under which defence lawyers have to work. The *demarches* of the Swiss authorities to their Azeri counterparts enabled Huseynov to leave the country and receive asylum in Switzerland in June 2015.²²⁷

The temporary housing of an HRD in the Swiss Embassy in Baku is a clear example of good practice and of the way in which the diplomatic community is able to respond to the spirit as well as the letter of guidelines for the protection of HRDs.

²²⁶ See Misión permanente de Colombia ante las Naciones Unidas y otros organismos internacionales. DCHONU N° 712. Available at: <http://www.ohchr.org/Documents/Issues/Defenders/LargeScale/Govts/Colombia.pdf>.

²²⁷ Human Rights House Foundation. (13 June 2015). “Emin Huseynov is free and safe.” Available at: <http://humanrightshouse.org/Articles/21025.html>

6.3.3. Legal actions

The legal actions that are taken in order to combat criminalisation are carried out not only to defend victims of criminalisation in the courts but also to monitor investigations in order to ensure they meet international standards.

Such actions may also involve more strategic activities intended to reform the legal system or the regulatory framework governing it, including the elevation of the cases of criminalised HRDs to international courts and tribunals (the regional human rights systems) in order to achieve sentences and decisions that are binding on national authorities (see Sections 1.4.2, 1.4.3 and 1.4.4 ➔).

- **Legal actions in response to specific cases**

In different cases, the detentions that initiate criminalisation have frequently been carried out irregularly. In response *habeas corpus* writs may be presented in an attempt to ensure the personal integrity of persons who have been deprived of their liberty. These actions may also be successful in bringing illegal detentions to an end, along with the abuses that might occur during them.²²⁸

In 2001 **Ecuador** signed a contract for the construction of a pipeline with the consortium *Oleoducto de Crudos Pesados* (OCP). Work began in July of the same year in the face of opposition from several sectors of the local population, environmental activists and small farmers who were affected by the plans.

By 2003 the organisation Acción Ecológica was reporting that 73 people had been imprisoned for their peaceful opposition to the construction of the OCP pipeline. Some were detained for a few hours and others for up to five days. As the detentions were illegal, almost all were released following the presentation of *habeas corpus* writs.²²⁹

- **Amnesties**

When states have been responsible for abuses and potential violations of human rights, they should correct the wrongs through the action of the superior courts, ensuring they are not repeated in the future. This process of rectification may include amnesties.

However, there are several factors that mean that amnesties should not necessarily be considered a suitable way to correct this kind of abuse. Amnesty measures imply forgiving or forgetting any crimes that might have been committed. But this is a contradiction, as a significant number of criminalisation processes are built on spurious accusations and manipulations of the judicial system. The institutions of the state should therefore recognise that the criminal justice system has been used illegitimately to punish acts of protest and /or the defence of human rights.²³⁰

The National Constituent Assembly that operated in **Ecuador** from 2007 to 2008, granted amnesties to hundreds of people who had been criminalised for actions of protest and resistance. This decision was made in consideration of the fact that the nature of these actions was “essentially political and intended to advance social demands”, and that the victims were being penalised for exercising the right to protest.²³¹

While all of this is very positive the same cannot be said of the vague way in which the amnesties were granted: ignoring certain excesses that had been committed and that should perhaps have been punished, and without the legal system having the opportunity to review its own decisions or to provide an analysis of the surrounding circumstances.²³²

²²⁸ “Of the essential judicial guarantees not subject to derogation or suspension, *habeas corpus* is the proper remedy in “ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment”. IACtHR. (Sentencia de 30 May 1999). “Case of Castillo Petruzzi et al. v. Peru (Merits, Reparations and Costs).” Series C No. 52. §187.

²²⁹ Salazar. Op. cit.

²³⁰ *ibid.*

²³¹ Asamblea Constituyente. (2008). Mesa de Legislación y Fiscalización. Informe favorable para conceder amnistía a las personas acusadas de varios delitos vinculados con la protesta y movilización. Montecristi, Ecuador.

²³² Salazar. Op. cit..

- **Strategic lawsuits**

Strategic lawsuits go beyond merely seeking responses to specific cases, as they are capable of creating a climate that is amenable to the promotion and defence of human rights. Some examples of the practice are as follows:

A. Seeking an effective response and achieving recognition of the right to defend human rights, to protest and to resist, or: prohibiting criminalisation

Several countries have norms that to a greater or lesser extent provide express recognition of the right to defend human rights, or of rights associated with the activity, such as civil and political rights or rights of freedom of expression.

Some countries expressly recognise the right to resist or, looked at from a different angle, prohibit the criminalisation of certain conducts. In some cases these principles are contained in the constitution, in others in declarative norms intended to recognise the importance to society of the work of HRDs and in yet others in the regulations creating protection mechanisms

The most recent example of an express recognition of the right to defend human rights, in line with the UN Declaration on HRDs is the Law for the protection of HRDs, journalists, social communicators and justice operators (Decree 34-2015) approved by the **Honduran** Congress in May 2015.

In **Indonesia**, article 66 of the 2009 Environmental Law establishes that no one working for the right to an adequate and healthy environment may be accused of a criminal or civil offence.

Protection International runs the **Focus Project**, an observatory of national public policies on HRD protection. Its annual report, also called Focus, provides detailed monitoring of the evolution of these policies around the world and of countries where efforts are being made to approve legal frameworks for the protection of HRDs.

For more information see:
<http://focus.protectionline.org> 📄

B. Changes to legislation

The United Nations Special Rapporteur on the situation of HRDs has made suggestions on which aspects of national legal frameworks might be adapted to contribute to the construction of an environment that is favourable to HRDs. These are: anti-terrorism legislation and other national security laws and to laws on public morality, defamation and blasphemy.²³³

233 United Nations Secretary General. A/67/292. Op. cit.

She adds a short list of provisions that should be taken into account during the elaboration and implementation of laws that affect the activities of HRDs – to ensure respect for human rights and that domestic legislation does not make HRDs vulnerable. These include the requirement to respect the principles of legality, necessity, proportionality and non-discrimination, and constitutional and procedural safeguards.²³⁴

Actions at this level might include lobbying and advocacy directed at advancing actions of unconstitutionality in relation to laws that are frequently used to criminalise HRDs. Clearly, these activities need to be accompanied by campaigns to raise the awareness of legislators to ensure that the laws brought in as a replacement are not equally prejudicial to the defence of human rights.

In June 2014 the **Zimbabwean** Constitutional Court overturned the law of defamation, arguing that it was not compatible with the country's new constitution and that its regulation violated freedom of expression. The Court indicated, also, that civil law granted adequate protection to those who claim defamation.

This decision was in response to a petition presented by two journalists after they were arrested in 2011 for allegedly defaming a former advisor to the Central Bank and member of the governing party.²³⁵

Faced with a lack of appropriate measures from governments, HRDs have appealed to regional human rights protection mechanisms as a means of generating the pressure that is required to achieve these legislative changes.

During the IACHR sessions of November 2009 members of the Fundación Regional de Derechos Humanos (INREDH), from **Ecuador**, attended the thematic hearing. The Ecuadorian government had committed to reforming the provisions that permitted the criminalisation of HRDs and environmental defenders. Although the government did pass a law to reform the criminal code, the code of criminal procedure and related laws, the effects of the changes fell far short of what had been promised in the hearing.²³⁶

C. The establishment and strengthening of controls on the actions of members of the state security forces and the justice system

A considerable number of cases in which criminalisation occurs are based on the irregular or illegal actions of public servants. It might be suggested in response that efforts be made to discipline members of the judicial branch who make arbitrary use of their criminal authority.

HRDs can also carry out lobbying and advocacy activities calling for the publication of administrative instructions and directives in a way that guarantees justice operators (principally prosecutors) and/or state security agents interpret the law in a way that is respectful of the work of HRDs.

D. Psychological and psychosocial actions

In response to acts of criminalisation, in addition to the legal services provided by lawyers the support of other professionals, including psychologists, may be made available. These actions may also be offered to close family members, in order to strengthen the social networks that

234 *ibid.*

235 Committee to Protect Journalists. (13 June 2014). "News alert. Zimbabwe's top court finds criminal defamation to be unconstitutional." Available at: <https://cpj.org/2014/06/zimbabwes-top-court-finds-criminal-defamation-to-b.php>.

236 Pumalpa. Op. cit.

contribute to improving the emotional situation of HRDs and their loved ones.²³⁷

Equally, processes may be developed to help HRDs recover their dignity, something that can help neutralise – at least to an extent – the stigmatisation associated with these processes. Such actions contribute to confronting criminalisation processes at the personal, family and professional level.²³⁸

In the **Central American region** the member organisations of the *Iniciativa Mesoamericana de Defensoras* (Mesoamerican Human Rights Defenders' Initiative, IMD), have provided psychological support to HRDs (some of whom have been victims of criminalisation) and their immediate circles.

Through its **Protection Desk** in **Guatemala, PI** and the *Unidad de Defensoras and Defensores de Human rights de Guatemala* (UDEFEQUA) offered psychosocial support to the community of La Puya between 2012 and 2014. Initially, the intervention consisted of actions to support HRDs from the community who had been directly affected by events. The second phase of support involved a collective intervention with the individuals who were involved in the process of resistance.²³⁹

E. Financial measures

Financial measures are intended to provide support to cover the different costs that are caused by criminalisation. The good practices followed by some organisations mean that they have anticipated the situation and have requested

donors to help them create emergency funds. These funds may be used to respond to the impacts of their circumstances felt by criminalised individuals and their families, when they are no longer able to earn a living because they do not have an alternative source of income, or when specialised legal, psychological or medical support is required.

In **Central America**, with the support of different emergency funds, IMD has provided financial support to WHRDs and their families to help them cover the costs of psychological support and other measures intended to improve their welfare. In **Guatemala**, UDEFEGUA, has used its emergency funds to provide financial support to help sustain the families of victims of criminalisation.²⁴⁰

F. Measures to respond to criminalisation processes that occur following demonstrations or other mass actions

Demonstrations or other mass actions require measures that are agreed upon during the planning phase, such as ensuring that participants march in closed ranks; creating groups that are responsible for security and coordinating movements in order to prevent infiltration by agents provocateur or confrontations with the security forces; prior examination of the route and meeting spaces; the use of photographic and video equipment to record the evolution of the event and capture evidence of possible infiltrations or excesses in the case of violent repression; and, finally the preparations of backup or emergency plans.²⁴¹

²³⁷ Interview with Ángeles Herráez. Op. cit.

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ Protection International's Protection guide for community-based HRDs includes a section that suggests measures that can be taken to ensure marches and meetings for human rights can be developed peacefully and in safety. Protection International. (2013). Protection Manual for Community-based Human Rights Defenders. Available (in Thai) at: <http://protectioninternational.org/publication/protection-manual-for-community-based-human-rights-defenders/>.

In some countries NGOs try to inform people of their rights in demonstrations and how they should react if they are detained. An understanding of the rights of detained persons can help avoid different abuses occurring. For example, leaflets or flyers have been produced and distributed to marchers before demonstrations.

IF THEY DETAIN YOU WHAT SHOULD YOU DO?

According to the Federal Penal Code you have the right to:

- The people arresting you identifying themselves and explaining why you have been detained
- Be handed over immediately to the Prosecuting Authorities (Ministerio Público)
- Refuse to make any statement and if you have to, to do so in front of a judge
- Not be kept in isolation
- Speak to a lawyer, family member, friend or any person you trust, in private
- An adequate, free, defence if needed
- Be informed of the facts or the causes of the accusation
- Not be mistreated either physically or psychologically. Torture is prohibited, they cannot hit you, keep food from you, threaten you or in any way force you to give evidence against yourself
- Not be paraded publicly before the media
- Medical attention from the moment you are detained
- Be released unless sufficient evidence is provided to a judge
- Be housed in conditions of dignity
- Be handed over to the judicial authorities immediately
- Not to be held by the Prosecuting Authorities for more than 48 hours
- Not to be held by the judicial authorities for more than 72 hours.

**An example of a leaflets that are distributed in a Latin American country before marches and demonstrations.*

In **Spain** initiatives have emerged that are intended to ensure that HRDs are aware of their rights. An example is the workshops presented by the independent media organisation La Diagonal, which offer training to journalists, activists and lawyers.²⁴²

Good practices have been developed in other countries too, in which guidelines have been promoted that clarify how public officials should behave in demonstrations and other mass actions, such as evictions, that frequently involve police interventions and acts of criminalisation. These guidelines also help identify criteria for the punishment of officials and the excesses they commit.

The prosecuting authorities in **Guatemala** have implemented an initiative that has the potential to be exceedingly important in cases of criminalisation that occur during evictions, crowd dispersal and the clearing of blockaded thoroughfares. The framework should be used in cases of criminalisation in as much as it includes the involvement of observers from human rights organisations. Furthermore, as it imposes controls on the use of violence, it might help to reduce the levels of confrontation that frequently accompany detentions, as well as the excessive use of force and other grave violations of human rights that tend to be associated with these situations.²⁴³

²⁴² La Diagonal. "Diagonal imparte un taller dentro del proyecto Defender a quien Defiende."

Available at: <https://www.diagonalperiodico.net/blogs/colectivodiagonal/diagonal-imparte-taller-para-comunicadores-ante-contexto-criminalizacion-la>.

²⁴³ Ministerio Público de Guatemala. Instrucción General 7/2011. (31 August 2011). "Instrucción General para el procedimiento de desalojo en áreas comunes y protegidas." Ministerio de Gobernación de Guatemala. "Protocolos para en desalojos, de disolución de masas y de desbloqueo de rutas."

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7. Recommendations

Given the variety of entities and organisations that can act to prevent criminalisation or to react when it occurs' the following recommendations are made:

7.1. To authorities, justice operators and other state institutions, concerning the protection of HRDs:

Provide training on human rights for members of the security forces and justice system operators and, in concrete, on their protection, freedom of expression and criminalisation as a method of harassing HRDs.

Issue instructions, circulars and other internal orders to ensure that public officials act to guarantee the right to defend human rights and freedom of expression and do not engage in acts of criminalisation against HRDs.

Strengthen measures to ensure that public officials who use the justice system illegally to criminalise HRDs are duly punished.

In line with Human Rights Council Resolution 22/6, modify criminal or procedural rules that, by failing to comply with international standards, permit or facilitate criminalisation. Alternatively, expedite mechanisms to ensure that laws are interpreted according to international standards.

Include rules, actions and measures to combat and prevent criminalisation in mechanisms, laws and public policies for the protection of HRDs.

Carry out public actions to support and legitimise HRDs and their work.

Intervene to prevent criminalisation and to offer mediation in situations that usually result criminalisation.

Provide integral reparations for the damage caused to victims.

7.2. To other key stakeholders: the international community, human rights protection systems, collaborating states and their embassies, and donors

Attend to the potential effects of foreign investment from third countries on the criminalisation of HRDs, and implement measures to guarantee that economic projects are developed in a manner that respects human rights and those who promote and defend them.

Attend to the effects of international agreements to combat terrorism and other international criminal enterprises on the criminalisation of HRDs, and implement procedures to ensure that the measures that are planned to combat these phenomena comply with international standards.

Ensure that the financial contributions made to justice systems as part of cooperation agreements with third countries are directed at generating conditions that impede or hinder criminalisation. In particular pay attention to:

- + Strengthening the systems of administrative control over officials to ensure they are sanctioned if they perform their functions in an irregular manner by using the criminal justice system to criminalise the defence of human rights.
- + Strengthening capacity to monitor and track due process in the institutions that have this responsibility.

Urge third country governments to implement measures for the protection of HRDs, which should include practices intended to prevent criminalisation.

In line with Human Rights Council Resolution 22/6, support the abolition, repeal or modification of those criminal or procedural norms that facilitate the criminalisation of HRDs and fail to comply with international standards.

At international, national or local level implement actions to support HRDs and the important role they play in the consolidation and protection of the Rule of Law and in strengthening democracy.

Support counter-strategies in order to maintain funding for CSOs and NGOs that might become victims of campaigns of stigmatisation and defamation, as well as cases in which local laws impose restrictions on accessing funding; support, also the creation of emergency funds to help cover the financial costs that may be incurred by HRDs as a result of criminalisation.

Take action to express concern at actions of criminalisation directed against HRDs, paying particular attention to individuals who have already been victims of the phenomenon or who are at risk of being so.

Monitor cases of criminalisation by taking actions that might include:

- + Observing trials where HRDs are accused of crimes.
- + Visiting the places of detention where victims of criminalisation have been sent following arrest or for preventive or definitive detention.
- + Visiting the areas in which HRDs are being criminalised, or run the risk of being so, in particular far-flung rural areas.

Offer, or facilitate, support to family members of victims of criminalisation.

7.3. To civil society organisations and human rights defenders:

Carry out research in order to identify the patterns of criminalisation in different countries and to analyse the following aspects:

- + Criminal or procedural norms in each national legal system that permit or facilitate the criminalisation of HRDs.
- + National and local practices of justice operators and of other officials who facilitate criminalisation.
- + National contexts that generate situations of heightened vulnerability.
- + Specific groups that face the greatest levels of vulnerability in their local or national contexts.

Develop legal strategies to counter accusations of specific crimes, responding to the evidentiary requirements for each and the practices followed by justice system operators. Respond to the need to develop preventive actions that enable the design of responses to criminalisation and to its causes, avoiding purely palliative responses when criminalisation has already occurred.

Clearly identify forms of harassment, their effects and the persons affected in each case, in order to offer an integral and adequate response that goes beyond legal action.

Develop coordinated, collective, actions that permit criminalisation to be opposed, and to provide integral support (legal, psychosocial and financial) to the different victims of criminalisation (HRDs, their families and colleagues from their workplace). Together with donors, create emergency funds to support the (economic and other) costs incurred by HRDs as a result of criminalisation.

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CATEGORISATION OF THE PROBLEM AND MEASURES IN RESPONSE

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