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# Defending the Defenders: International Protection for Local Human Rights Defenders in the Global South

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## Summary

Local human rights defenders play a significant role in the realization and enjoyment of human rights. Working alone or in association with others, they peacefully advocate for and promote fundamental freedoms and human rights for themselves and for their fellow citizens. In the process, they document violations; raise awareness to rights holders about the rights to which they are entitled; remind States about their obligations to respect, protect and fulfill human rights, and challenge State and non-State actors who tend to violate those rights.

Because of the aforementioned and other related activities, human rights defenders have become increasingly vulnerable to some of the very violations they defend others against. Some of the threats and attacks to which they are subjected include murders, death threats, torture and other forms of assault on their bodily integrity; intimidations, judicial harassment, sexual harassment; stigmatization; the use of legislation to criminalize and discredit their work; online and physical surveillance of their activities; enforced disappearances; illegal arrests, detention and denial of due process and fair trial; travel bans, among others.

The above abuses are more prevalent in the Global South. For the purpose of this thesis, the term Global South refers to countries mostly in Africa, Latin America and Asia. However, the focus of the research is Latin America and Africa, because those are the two regions in the Global South with active regional human rights systems at the time of publishing this thesis. The choice of local human rights defenders in the Global South is premised on the fact that their vulnerability is more acute because many of them work in countries where the judicial systems are predominantly non-independent; corruption and impunity are widespread, institutions are weak, and governments are generally repressive and unaccountable to their citizens. The risk for local human rights defenders in the Global South is therefore heightened by the fact that many of them challenge these institutionalized discrimination, marginalization, inequality and repression. In many cases they advocate for rights which are regarded as repulsive to societal and cultural norms and advocate against vices which are regarded as acceptable. Examples of such categories of human rights defenders include those campaigning for women's rights; LGBTI rights, environmental rights, indigenous and land rights, the right to vote and participate in public affairs, anti-corruption, among others.

This research seeks to ascertain what standards and mechanisms international and regional human rights systems have established to protect human rights defenders in the Global South, and how those regimes have contributed to the protection of human rights defenders. In doing so, it examines the contributions of the UN Human Rights System, the Inter-American Human Rights System, and African Human Rights System and the European Union to the protection of local human rights defenders in the Global South.

## Preface and Acknowledgments

First and foremost, I express thanks and appreciation to the Almighty God for the life, health, strength and ability to complete this milestone. He's the one who granted me the favor to be selected out of thousands of applicants for admission into the prestigious Lund University and as a recipient of the Swedish Institute Scholarship for Global Professionals.

This thesis is dedicated to my forever cheerful wife Philomena Gray Reeves and my most loyal admirers and supporters, my children Renford Rio Reeves and Ramona Rose Reeves. In the midst of the loneliness and deprivation through which I put you, you remained consistently understanding and patient. I love you.

When I was a child in Liberia, the news reported one evening that my favorite television reporter had been murdered. His name was Charles Gbenyon. I later learned that he had been shot by government soldiers for uncovering information relating to a military coup. That experience should have scared me into abandoning my dream of becoming a journalist. It did not. Instead, it inspired me to dream of continuing his legacy of seeking for the truth and making it public. As a tribute to him and other human rights defenders experiencing excruciating physical, mental and emotional pains and even death in the defense of human rights and fundamental freedoms in Global South countries like mine, I write this thesis.

Before becoming a lawyer, I longed to be like Alfred Brownell, a Liberian environmental human rights lawyer who used his legal expertise to defend the rights of indigenous peoples against the confiscation of their lands for use by multinational companies. On one occasion, his vehicle was surrounded by machete wielding thugs determined to murder him, but for the intervention of the local town chief. On several occasions, arrest warrants were issued for him. Eventually he, along with his family, fled Liberia to the US. This thesis was inspired by his work and experiences.

The first segment of the title of this thesis was borrowed from a seminar hosted by the Association of Foreign Affairs (UPF Lund) and presented by Julia Svanstrom of Swedish Fellowship for Reconciliation (SWEFoR). During the seminar, which was titled: "Defending the Defenders", Julia and her colleague shared SWEFoR's work of protecting human rights defenders in Colombia, Guatemala and Mexico by personally accompanying them.

I am sincerely and eternally grateful to the kind and generous people of Sweden for allowing their government, through the Swedish Institute, to use their hard-earned taxes to sponsor me in attaining the highest quality education that anyone can dream about. Because of your benevolence, I am now a proud graduate of one of the world's top 100 universities, one of the world's top 50 law schools and one of the world's top 10 International Human Rights Law Master programs. Thanks to my thesis supervisor Alejandro Fuentes for his helpful comments.

To my father, Timothy Lincoln Reeves, Sr., thanks for your persistent sacrifices and support; for never giving up on me, always searching for me and taking me back home when I ran away or was taken away by my mother. Had it not been for your persistence, I do doubt whether I would be making this achievement today. I extend profound gratitude to my aunt Rose Reeves for stepping up to play the role of my mother, Minty Gogoe and my grandmother Lorpu Reeves, both of whom I lost in the very early stages of my life.

## Abbreviations

<b>ACHPR</b>	African Charter on Human and People’s Rights
<b>ACHR</b>	American Convention on Human Rights
<b>AFCtHPR</b>	African Court on Human and People’s Rights
<b>AU</b>	African Union
<b>CJEU</b>	Court of Justice of the European Union
<b>ECtHR</b>	European Court on Human Rights
<b>EHRD</b>	Environmental Human Rights Defender
<b>EU</b>	European Union
<b>EUD</b>	European Union Delegations
<b>HoD</b>	Head of Mission
<b>HoM</b>	Head of Mission (EU)
<b>HRBA</b>	Human Rights Based Approach
<b>HRC</b>	Human Rights Committee/Human Rights Council
<b>HRCS</b>	Human Rights Country Strategy (EU)
<b>HRD</b>	Human Rights Defender
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court on Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>INGO</b>	International Non-Governmental Organization
<b>IO</b>	International Organization
<b>LGBTQI+</b>	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex+
<b>MoFA</b>	Ministry of Foreign Affairs
<b>MOSOP</b>	Movement for the Survival of the Ogoni People

<b>MSM</b>	Member State Missions (Embassy of EU Member States)
<b>NGO</b>	Non-Governmental Organization
<b>NHRI</b>	National Human Rights Institute
<b>OAS</b>	Organization of American States
<b>OAU</b>	Organization of African Unity
<b>OSCE</b>	Organization for Security and Cooperation in Europe
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNDHRD or UN Declaration on Human Rights Defenders</b>	Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Fundamental Human Rights
<b>UN OHCHR</b>	United Nations Office of the High Commissioner for Human Rights
<b>UNGA</b>	United Nations General Assembly
<b>UNION</b>	European Union
<b>UNSG</b>	United Nations Secretary General
<b>UNSP</b>	United Nations Special Procedures (Mechanisms)
<b>UPR</b>	Universal Periodic Review
<b>USA</b>	United States of America
<b>WHRD</b>	Women Human Rights Defender

# 1 Introduction

## 1.1 Background

Sikhosiphi Rhadebe, a prominent South African human rights defender (HRD), was murdered at his home On March 22, 2016.<sup>1</sup> He had reportedly been placed on a “hit list” of individuals and groups who opposed mining projects in the titanium-rich Xolobeni coastal dunes. He was shot eight times, including in the head.<sup>2</sup> His wife and son, who had witnessed the murder, were both hospitalized because they were in shock.<sup>3</sup>

In Egypt, Malak Al Kashef, a 19 year old transgender woman human rights defender (WHRD), was arrested and imprisoned in March 2019 for participating in peaceful protests.<sup>4</sup> Her charges: “aiding a terrorist organization and using social media to commit a crime punishable by law.”<sup>5</sup> While in detention, she was sexually assaulted by prison officials.<sup>6</sup> She was later released in July of 2019.

Myrna Mack Chang documented the massacre of more than 200,000<sup>7</sup> indigenous peoples by Guatemalan State security<sup>8</sup> and military personnel.<sup>9</sup> Sadly, she too was added to that statistics when on September 11, 1990,<sup>10</sup> she was killed by the military, just like the indigenous peoples whose deaths she sought accountability for, and on whose behalf she fought.<sup>11</sup>

Local human rights defenders (HRDs) play an indispensable role in the international community’s effort to ensure the realization and enjoyment of human rights and fundamental freedoms by all.<sup>12</sup> Working alone or in association with others,<sup>13</sup> they peacefully advocate for and mobilize their fellow citizens, putting their own lives at risk in the process.<sup>14</sup> They

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<sup>1</sup> International Federation for Human Rights (Fidh), ‘South Africa: Killing of Sikhosiphi “Bazooka” Rhadebe’, 15 April 2016, available at <https://www.fidh.org/en/issues/human-rights-defenders/south-africa-killing-of-mr-sikhosiphi-bazooka-rhadebe>, accessed on 20 March 2022

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Amnesty International, ‘From Slurs to Sexual Violence, Women Human Rights Defenders Come Under Global Attack’, November 29, 2019, available at <https://www.amnesty.org/en/latest/news/2019/11/from-slurs-to-sexual-violence-women-human-rights-defenders-come-under-global-attack/>, accessed on 20 March 2022

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Against the Current, ‘Myrna Mack, A Guatemalan Hero’ March to April 2003, available at <https://againstthecurrent.org/atc103/p631/>, accessed on 20 March 2022

<sup>8</sup> Loyola Law School, ‘Myrna Mack Chang v Guatemala (Case Summary)’, available at <https://iachr.lls.edu/cases/myrna-mack-chang-v-guatemala>, accessed on 20 March 2022

<sup>9</sup> Against the Current, ‘Myrna Mack’, A Guatemalan Hero’ (n 7 Supra)

<sup>10</sup> Myrna Mack Chang v Gutemala, Inter-American Court on Human Rights, , November 25, 2003, para. 4, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_101\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf), accessed on 20 March 2022

<sup>11</sup> Ibid.

<sup>12</sup> Karen Bennett, ‘European Guidelines on Human Rights Defenders: A Review of Policy and Practice Towards Effective Implementation’ (2015) International Journal of Human Rights 19:7, 908-934

<sup>13</sup> Article 1, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), available at <E:\ENGLISH\PDF\TMP\N9977089.WPF> (ohchr.org), accessed on 22 March 2022

<sup>14</sup> Bennett (n 12 Supra)



investigate<sup>15</sup> and document<sup>16</sup> violations; raise awareness to rights holders about the rights to which they are entitled;<sup>17</sup> remind States of their obligations to respect, protect and fulfill human rights, and challenge State and non-State actors who tend to violate those rights.<sup>18</sup>

The work of human rights defenders address a variety of human rights concerns, such as summary executions, torture, arbitrary arrest and detention, right to food and water, female genital mutilation, discrimination, labor rights, forced evictions, access to health care, environmental rights, right to adequate housing, right to education, movement, nationality and name, right to sexuality and reproductive health, among others.<sup>19</sup> In view of the foregoing, their advocacy is often in the interest of specific groups or classes. Examples are women, children, indigenous peoples, refugees, sexual minorities, etc.<sup>20</sup>

On account of the aforementioned and other related activities, HRDs have become increasingly<sup>21</sup> vulnerable to some of the very violations and attacks they defend others against. From 2015 to 2019, there were more than 2000 attacks on HRDs globally.<sup>22</sup> In 2019 alone, there were 572 attacks, mostly in Latin America, followed by Asia and the Pacific, Eastern Europe and Russia.<sup>23</sup> In 2020 alone, 331 HRDs were murdered around the world.<sup>24</sup> Global Witness reports the killing of 227 defenders in 2020.<sup>25</sup> This represents an average of four (4) murders a week.<sup>26</sup> All but one of the 227 killings recorded by Global Witness in 2020 occurred in the Global South, with Colombia witnessing the highest number (65) followed by Mexico (30) and The Philippines.<sup>27</sup> The UN Office of the High Commissioner for Human Rights (UN OHCHR) observed that from 2015 to 2019, HRDs were killed in 64 countries.<sup>28</sup> Of that amount, only five (Russia, The United Kingdom, Turkey, Ukraine and the United States) were not located in the Global South.<sup>29</sup>

Attacks against HRDs range from murders to physical assaults; to the use of state legal framework to restrict and criminalize their work, to judicial harassment.<sup>30</sup> Michel Forst, Former UN Special Rapporteur on the Situation of Human Rights Defenders, outlines an array

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<sup>15</sup> OHCHR, Human Rights Defenders: Protecting the Right to Defend Human Rights ("Fact Sheet No. 29), available at <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet29en.pdf>, accessed on 20 March 2022

<sup>16</sup> Ibid.

<sup>17</sup> UN Declaration (n 13 Supra) Article 6 (b)

<sup>18</sup> Alice Nah, 'Protecting Human Rights Defenders at Risk' in Alice Nah (ed) *Protecting Human Rights Defenders at Risk* (Routledge 2020)

<sup>19</sup> "Fact Sheet No. 29" (n 15 Supra)

<sup>20</sup> Ibid.

<sup>21</sup> Juan Ramirez, 'Human Rights Defenders Face Increased Threats', (2018) 47 Int'l L News 20

<sup>22</sup> Nah ( n 18 Supra)

<sup>23</sup> Ibid.

<sup>24</sup> Front Line defenders, 'Global Analysis 2020', available at [Layout 1 \(frontlinedefenders.org\)](Layout 1 (frontlinedefenders.org)), accessed on 21 March 2022

<sup>25</sup> Global Witness, 'Last Line of Defense' (September 13, 2021), available at <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>, accessed on 21 March 2022

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Mary Lawlor, 'Final warning: death threats and killings of human rights defenders', Report of the Special Rapporteur on Human Rights Defenders, 24 December 2020, para. 4

<sup>29</sup> Ibid.

<sup>30</sup> Front Line Defenders, 2013 Annual Report available at [2013 annual report.pdf \(frontlinedefenders.org\)](2013 annual report.pdf (frontlinedefenders.org)), accessed on 28 January 2022

of other forms of attacks and restrictive measures perpetrated against human rights defenders. These include enforced disappearance, illegal surveillance, travel bans, arbitrary arrests, detention and prosecution; harassment (including sexual harassment), blackmail, reprisals and the use of disproportionate force to dispel peaceful protests.<sup>31</sup>

Nah et al. observe that these abuses are committed by State actors such as the police, military, members of the judiciary, local authorities, State authorities and security services. In other instances, violations against HRDs are committed by non-State actors such as corporations, paramilitary and other armed groups; right-wing groups, the media, religious leaders and drug cartels.<sup>32</sup> Often, crimes committed by non-state actors against HRDs are committed with the support, acquiescence or condonation of the State.<sup>33</sup>

In addition to the more common and overt methods of attacking HRDs mentioned supra, there are other “more subtle but nonetheless damaging ways in which HRDs have also been forced to pay the price for their activism”.<sup>34</sup> These include dismissal from their jobs, eviction from their homes, defamation, ostracization, and stigmatization.<sup>35</sup> In some cases, murders are disguised as accidents, suicide or random attacks by “unknown assailants”.<sup>36</sup> Of equal concern is the fact that in numerous instances, the assailants of human rights defenders extend their violent and abusive acts to the families, colleagues and others who are closely connected to the HRDs.<sup>37</sup>

The above abuses are more prevalent in countries in the Global South.<sup>38</sup> The term “Global South” has often generated confusion and misunderstanding, with many mistakenly assuming that the term refers to a geographical south.<sup>39</sup> Even though majority of the countries classified as “Global South” are located in the Southern Hemisphere,<sup>40</sup> the term has multiple definitions with economic, political and historical underpinnings. Traditionally, the term “Global South” has referred to countries that are underdeveloped and “economically disadvantaged”.<sup>41</sup> Bulk of these countries have unstable democracies; are in the process of industrializing, or were colonized by countries in the Global North, particularly Europe.<sup>42</sup> However, dichotomization based solely on these characteristics could spark debates, as it is questionable as to whether countries like China would fit into the aforementioned categories.<sup>43</sup> For the purpose of this thesis, the term “Global South” refers to countries mostly in Africa, Latin America and Asia.

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<sup>31</sup> Michel Forst, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders', 3 August 2016 available at <https://undocs.org/A/71/281>, accessed on 28 January 2022

<sup>32</sup> Alice Nah, Karen Bennet, Danna Ingleton and James Savage, 'A Research Agenda for the Protection of Human Rights Defenders' *Journal of Human Rights Practice* Vol. 5 | Number 3 | November 2013 | pp. 401, 402 Citing Landman, 2006

<sup>33</sup> Nah, 'Protecting Human Rights Defenders at Risk (n 18 Supra )

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Kenneth Roth, 'The Abusers' Reaction: Intensifying Attacks on Human Rights Defenders, Organizations, and Institutions' (2010) 16 *Brown J World Aff* 15

<sup>37</sup> Commentary on the UN Declaration on the Rights of Human Rights Defenders (p 15), available at <https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf> accessed on 28 January 2022

<sup>38</sup> Forst, Report of the Special Rapporteur for Human Rights Defenders, August 2016 para. 28 (n 31 Supra)

<sup>39</sup> World Population Review 2020, 'Global South Countries 2022', available at [Global South Countries 2022 \(worldpopulationreview.com\)](https://www.worldpopulationreview.com), accessed on 21 March 2022

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

However, the research places the spotlight on Latin America and the Caribbean and Africa, because at the time of writing, these are the two regions in the Global South with functioning regional human rights systems. Accordingly and in addition to analyzing the contributions of other human rights systems to the protection of HRDs, this thesis draws upon the experiences of the two regional human rights systems in this sphere.

As a supplement, the contribution made by the European Union to the protection of HRDs is also analyzed, from the perspective of the protection it provides to human rights defenders in the Global South. Hence, it is important to point out that the discussion of the EU's contribution to the protection of HRDs is not intended to be a comprehensive analysis of the contributions of the European Human Rights System in this endeavor. Rather, the EU is being used as a case study to identify what mechanisms are established for the protection of HRDs by supra-national/international organizations and third states, especially when HRDs have to flee their home countries due to imminent threat to their lives and security. In the same vein, it investigates practical measures that are taken to implement those standards and how effective are those measures in the protection of HRDs.

The choice of local human rights defenders in the Global South is premised on the fact that their vulnerability is more acute than that of their counterparts in the Global North. This is due to a plethora of factors. Notably, many of them work in countries where the judicial systems are predominantly non independent;<sup>44</sup> corruption and impunity are widespread,<sup>45</sup> institutions are weak<sup>46</sup> and governments are generally repressive and unaccountable to their citizens.<sup>47</sup> Such societies are highly militarized,<sup>48</sup> experiencing or having emerged from armed conflicts.<sup>49</sup>

The economies of many Global South states are based on development models heavily dependent on agribusiness, extractive industries and infrastructural megaprojects,<sup>50</sup> thereby attracting multi-national corporations and industrial organizations, most of whose budgets far exceed the entire national income of some Global South countries.<sup>51</sup> On the other hand, national leaders, driven by personal and political motives or by the desire for development, rely on the revenue generated from the rent or sale of those resources.<sup>52</sup> Taking advantage of this imbalance in economic power, multi-nationals wield excessive influence<sup>53</sup> over Global South governments.<sup>54</sup> The stage for this unequal power dynamics is often set in the agreements drawn up by multinationals and the offers they make to Global South governments.<sup>55</sup> These contracts are usually couched in terms which the multinationals are aware that those governments, being

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<sup>44</sup> Peter Bille Larsen et al, 'Understanding and Responding to the Environmental Human Rights Crisis: The Case for Conservation Action' (25 August 2020) Wiley/Conservation Letters p 3 of 7

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Sandra Carvalho et al. 'Protection Policies for Human Rights Defenders' (2016) 23 SUR - Int'l J on Hum Rts 175

<sup>49</sup> Bille et al. (n 44 Supra)

<sup>50</sup> Sandra Carvalho et al (n )

<sup>51</sup> Christopher Weeramantry in Shawkat Alam et al. (eds) International Environmental Law and the Global South (first published 2015, CUP 2015)

<sup>52</sup> James A. Robinson et al., 'Political Foundations of the Resource Curse', Journal of Development Economics 79 (2006) 447 – 468

<sup>53</sup> Nah et al., 'Protecting Human Rights Defenders at Risk' (n 18 Supra)

<sup>54</sup> Weeramantry in Shawkat Alam et al. (eds) (n 51 Supra)

<sup>55</sup> Ibid.

the weaker, poorer and desperate party, will not resist.<sup>56</sup> Thus, the risk faced by HRDs in the Global South is further exacerbated by the fact that they challenge powerful State and non-State actors who come together in a conspiracy forged by economic interests that supersede the public good.<sup>57</sup> Due to the immense power wielded by these multi-national corporations in many Global South countries, the Business and Human Rights Resource Center discloses that corporations operate with almost complete impunity, with hardly any arrests or prosecution of those (corporations and their agents) who murder defenders.<sup>58</sup>

Another issue that aggravates the risk for local HRDs in the Global South is that many of them challenge systemic discrimination, marginalization and violations which are considered acceptable by society. On the flip side of the same coin, they advocate for rights which are regarded as repugnant to societal, religious and cultural norms.<sup>59</sup> Examples of such categories of human rights defenders include women human rights defenders (WHRDs) and those campaigning for women's rights; those campaigning for the rights of lesbians, gay, transgender questioning and Intersex (LGBTQI+),<sup>60</sup> environmental human rights defenders (EHRDs), indigenous and land rights defenders, those campaigning for the right to vote and participate in public affairs, anti-corruption human rights defenders, among others. Owing to the above mentioned factors, they are often labelled as enemies of the State,<sup>61</sup> paid agents,<sup>62</sup> cultural deviants,<sup>63</sup> anti-development,<sup>64</sup> among others.

In view of the above, there has been growing global concern about the situation of HRDs, thereby leading the UN, the two regional human rights systems in the Global South and the EU to take steps towards the protection of HRDs. Actions taken in this direction include, inter alia, the adoption of the UN Declaration on Human Rights Defenders; the Grand Bay and Kigali (African) Declarations; the EU Guidelines on Human Rights Defenders; the appointment of Special Rapporteurs for HRDs by the UN, Inter-American and African Human Rights Systems, and the provision of asylum, emergency visas and temporary relocation by the EU. Additionally, the UN, Inter-American and African Human Rights Systems have provided guidance on the rights of HRDs through their jurisprudence. Spurred by these initiatives, a few States have adopted measures to protect HRDs. Contradictorily, research shows that States, who have the primary duty to protect human rights, are the main perpetrators of attacks against HRDs.<sup>65</sup> This tragedy is persisting in many Global South countries, including those that have established legal mechanisms to protect HRDs, with some of them witnessing the highest instances of attacks.<sup>66</sup>

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<sup>56</sup> Ibid.

<sup>57</sup> Alice Na et al., 'Protecting Human Rights Defenders at Risk (n 18 Supra)

<sup>58</sup> Business and Human Rights Resource Center, 'Companies Implicated in Many of 227 Killings of Land and Environmental Defenders During 2020', available at ['Companies implicated in many of 227 killings of land & environment defenders' \(mailchi.mp\)](#) accessed on 21 March 2022

<sup>59</sup> Alice Nah, 'Protecting Human Rights Defenders at Risk (n 18 Supra)

<sup>60</sup> Ibid.

<sup>61</sup> Alice Nah et al., 'Protecting Human Rights Defenders at Risk (n 18 Supra)

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Larsen et al (n 44) and Sandra Carvalho et al (n 48) write that Colombia, Brazil, Mexico, Honduras, Burkina Faso, Cote D'Ivoire and Mali, have enacted legislations and/or established specific institutions to prosecute those responsible for violence against HRDs. Some of these countries e.g. Colombia, Mexico, Honduras, Burkina Faso) have witnessed the highest and most gruesome forms of attacks against HRDs.

Against this background, this thesis inquires into the level of protection that international and regional human rights systems have provided to human rights defenders situated in the Global South. It begins with a discussion of the contribution of the UN Human Rights System in this endeavor. The selection of the UN human rights system is justified on grounds that the rights of HRDs are first and foremost guaranteed by universal/international human rights treaties and legal frameworks under the auspices of the UN. Besides, when domestic and regional judicial systems are unable or unwilling to provide adequate justice to HRDs, the protective mechanism of the UN System could be triggered because most of the concerned States, by virtue of being members of the UN, have signed, ratified or acceded to the universal human rights instruments which guarantee the rights of HRDs. By virtue of the above actions on the part of States, these international treaties are binding upon them.

As for the regional human rights systems, the thesis specifically uses as case studies, the two existing and functioning human rights systems in the Global South: the Inter-American Human Rights System and the African Human Rights System. Several factors explain the the thesis' focus on these regional human rights systems. Besides being located in the home countries of the HRDs who are the subject matter of this research, these human rights systems largely subscribe to the same human rights norms provided for in universal human rights instruments, albeit with certain degree of modification based on cultural and/or historical contexts. Additionally, at the regional level, they are the primary providers of access to justice in their respective regions. This jurisdiction is conferred by the fact that most of the nations in these regions are members of the overall regional political organizations, and by virtue of that, have signed, approved, ratified or acceded to their regional human rights instruments, which are binding upon those States. Hence, when HRDs cannot obtain justice at the national level, these regional human rights systems offer the next level of redress for HRDs.

With respect to the European Union, its discussion is centered on the protection it provides to HRDs both within the Global South through its delegations and Member State Missions, as well as when HRDs, as a last resort, have to flee their home countries due to situations of extreme urgency and danger such as immediate threats to their lives or personal integrity.

These developments affirm that while seeking to defend their fellow citizens and communities from human rights violations, local HRDs in the Global South have themselves become a vulnerable and protected class that needs protection.<sup>67</sup> That protection, by all accounts, is not being provided by their home states, as evidenced by States' complicity in, or failure to prevent or end the violence perpetrated against them. Consistent with the above realities, there is a need for the international community to provide protection for defenders in the Global South. Regrettably, the more mechanisms, frameworks and measures that have been adopted and implemented to protect HRDs, the higher the rate of attacks, abuse, crimes and violence that has occurred against them.<sup>68</sup> This trend casts a dark shadow of doubt over the effectiveness of these measures.

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<sup>67</sup> Yvonne Donders, 'Defending Human Rights Defenders' (2016), 34 NETH Q HUM Rts 282

<sup>68</sup> Alice Nah et al., 'Protecting Human Rights Defenders at Risk (n 18 Supra)

## 1.2 Purpose and Research Questions

This research seeks to identify and critically analyze the standards that international and regional human rights systems have established to protect local human rights defenders in the Global South and the mechanisms through which those standards have been implemented. Essentially, it investigates the level of protection provided to HRDs by those regimes and how efficient are the measures taken to implement those regimes for the protection of local human rights defenders in the Global South.

In making the above-mentioned determinations, the research will answer the below questions:

How have international and regional human rights systems relevant to the Global South contributed to the protection of human rights defenders in the Global South?

What standards have the UN, Inter-American, African and European Human Rights Systems established for the protection of Human Rights Defenders in the Global South?

Through which mechanisms have those standards been implemented for the protection of human rights defenders in the Global South?

What is the level of protection that those standards and mechanisms have provided to human rights defenders in the Global South and how adequate is that protection?

## 1.3 Literature Review and Contribution to Current Research

Alongside the growing international empathy and norms to address the plight of HRDs, there has emerged a vast and rich corpus of international law on the subject, thanks to a crop of knowledgeable and devoted scholars and international organizations. The in-depth treatment of the subject of HRDs by these scholars and organizations has prompted this author to regard them as “Human Rights Defenders Scholars” or “Human Rights Defenders Experts”.

Alice Nah, in her individual capacity and in collaboration with others, has published numerous works on the situation of HRDs. Outstanding among them is the book “Protecting Human Rights Defenders at Risk”. In that volume, edited by Nah, she and her contributors uses “a variety of data gathering methods and an intersectional, contextually rooted approach”<sup>69</sup> to navigate some of the most critical issues affecting the protection of HRDs. These include case studies from Global South countries such as Indonesia, Kenya, Egypt, Mexico and Colombia; the global context of repression on the rise; the legitimacy and effectiveness of human rights in addressing the situation of HRDs, and the understanding of the concept of (in)security from the points of view of the international community and HRDs themselves.

through the reports and advocacy of international human rights organizations such as Global Witness, Front Line Defenders, The Business and Human Rights Resource Center, Amnesty International, CIVICUS, among others, international attention has been drawn to the

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<sup>69</sup> Margaret L. Satterthwaite, Professor of Clinical Law, NYU School of Law, USA, Foreword to the book: “Protecting Human Rights Defenders at Risk

oppression and ill-treatment of defenders.<sup>70</sup> These organizations, in their reports, document the decrease in civic space as occasioned by the spike in attacks and abuses against HRDs. In doing so, data pertaining to attacks on HRDs are usually disaggregate according to countries, giving readers a clear picture of the regions in which HRDs are most affected.

Alice Nah, Karen Bennett, Danna Ingleton and James Savage identify eight gaps in understanding and knowledge regarding the protection of HRDs.<sup>71</sup> One area identified as requiring further research includes the definition and use of the term “human rights defender”, especially in light of the controversy generated by its broad interpretation which incorporates anyone who carries out human rights work.<sup>72</sup> Nah et al. suggest that instead of conceptualizing risk, security and protection in a collective continuum for all HRDs, international actors must focus on how individual HRDs understand the risks involved in human rights work, and “how these understandings are mediated socially and culturally.”<sup>73</sup>

Culture, gender and diversity i.e. the particular risks faced by women human rights defenders, is one area requiring further exploration.<sup>74</sup> Nah et al. also recommend a study of the effectiveness of the various protection mechanisms. At the UN level, these include the UN Charter-based and treaty-based mechanisms, the Universal Periodic Review (UPR) Process, and the Special Rapporteurs.<sup>75</sup> At the regional level, these include the EU Guidelines on HRDs, and the Special Rapporteurs, courts and commissions of the African and Inter-American Human Rights Systems.

Martin Jones argues that International Human Rights Law has failed HRDs, as evidenced by the widespread impunity for crimes committed against them.<sup>76</sup> He suggests that the panacea is the international refugee regime, because HRDs fulfill all of the requirements of refugee status as prescribed by the Geneva (Refugee) Convention of 1951, including being outside of their country of nationality; having a well-founded fear of persecution and being at risk of persecution on grounds of... membership of a particular social group or political opinion.<sup>77</sup>

Aikaterini Kristina Koula agrees with Jones that International Human Rights Law has failed defenders.<sup>78</sup> However, she disagrees that International Refugee Law offers a viable alternative protection. Her point of divergence with Jones is predicated upon “common flaws” in refugee law which make it impracticable to accommodate HRDs. According to Koula, these “flaws” include the general State practice of adopting policies to protect their sovereignty and discourage refugee influx, a situation which refugee law has not been able to solve. Secondly, she contends that International Refugee Law does not suit the needs of HRDs, many of whom

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<sup>70</sup> Peter Bille et al (n 44)

<sup>71</sup> Nah et al, 'A Research Agenda for the Protection of Human Rights Defenders' (n 32 Supra)

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Martin Jones, 'Protecting Human Rights Defenders at Risk: Asylum and Temporary International Relocation' (2015) (19:7) (935-960), *The International Journal of Human Rights*, available at <https://www.tandfonline.com/loi/fjhr20>, accessed on 8 February 2022

<sup>77</sup> Ibid. citing 1951 Refugee Convention Article 1(A)(2)

<sup>78</sup> Aikaterini – Kristina Koula, 'International Refugee Regime: An Alternative Form of Protection for HRDs?' (2021) 54(3), pp 340-368

desire to continue their work in their home countries and therefore see the refugee regime as a measure of last resort.<sup>79</sup>

Yvonne Donders suggests that some of the measures employed by the international community to protect HRDs, particularly emergency visas and temporary relocation, take away the home States' responsibility as the primary duty bearers to provide protection for HRDs.<sup>80</sup>

While all HRDs are at risk of attacks, there is a need to prioritize those most marginalized and vulnerable. That is the rationale that informed the choice of the local HRDs in the Global South as the focus of this thesis. Upon assuming her post, Mary Lawlor, UN Special Rapporteur for Human Rights Defenders, confirmed this rationale when she outlined her priorities, which includes focusing on women human rights defenders; those defending the rights of lesbian, gay, bisexual, transgender and intersex+ (LGBTQI+) persons; defenders who are children; defenders with disability; HRDs working on the rights of migrants and refugees; defenders working on environmental and climate issues and those working in remote and isolated areas.<sup>81</sup>

Karen Bennett emphasizes her concern for those HRDs most exposed to risks but often most overlooked in protection responses. In her assessment of the effectiveness of policies and practices employed in the implementation of the EU Guidelines on HRDs, she decries the manner in which assistance, support and protection are only targeted at renowned HRDs who are mostly located in urban areas.<sup>82</sup>

In the same vein, Michel Forst discloses that bulk of the abuses and crimes committed against HRDs take place in the Global South.<sup>83</sup> He outlines series of factors that make countries in the Global South fertile grounds for this status quo to thrive, with impunity being the most prominent.<sup>84</sup>

Even though there is huge collection of literature on the plight of HRDs, there is no scholarly work exclusively devoted to an examination of the acute vulnerabilities of HRDs in the Global South by reason of their location in the Global South, a situation which creates the need for appropriate protection for them. Those who discuss the issue have mostly done so from a generic perspective, referencing the factors that compound the risks faced by HRDs in the Global South as part of an overall treatment of the topic, or for statistical purposes.

This thesis seeks to fill that gap. In order to do so, it draws on those peculiar characteristics which accentuate the challenges faced by HRDs in the Global South, by reason of their being situated in the Global South. It then investigates whether and what frameworks are in place to address those challenges, before proceeding to make a case for international protection for HRDs in the Global South.

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<sup>79</sup> Ibid.

<sup>80</sup> Donders (n 67 Supra)

<sup>81</sup> Mary Lawlor, 'Report of the Special Rapporteur on Human Rights Defenders' (16 July 2020), A/75/165

<sup>82</sup> Karen Bennett, 'European Union Guidelines on Human Rights Defenders (n 12 Supra)

<sup>83</sup> Michel Forst, Report of the Special Rapporteur on the Situation of Human Rights Defenders', 3 August 2016 (n 31 Supra)

<sup>84</sup> Ibid.



## 1.4 Delimitations

It is important to point out that the list of protection mechanisms and measures assessed herein are by no means exhaustive. There is an array of interventions by dozens of international NGOs in favor of human rights defenders. Protective measures employed by them include personal accompaniment, material assistance, legal aid, grants, temporary relocation, among others. The question of the effectiveness of these strategies and tactics for protection require additional examination.<sup>85</sup>

The work of other UN Special Procedure mechanisms such as the Special Rapporteurs on Extrajudicial, Summary and Arbitration Executions; the Right to Freedom of Opinion and Expression; Freedom of Peaceful Assembly and Association, all address the situation of HRDs. However, due to time constraint, this research focuses mainly on the work of the Special Rapporteur on Human Rights Defenders, with occasional mention, when necessary, of the contribution of other Special Procedures. Also within the UN framework, all of the human rights instruments are relevant to the rights of HRDs. However, since this thesis is concerned with the rights which HRDs exercise when they defend human rights and which are violated as a result of their advocacy, the research is confined to an analysis of the International Covenant on Civil and Political Rights (ICCPR).

It is worth noting that this thesis discusses the contribution of the EU to the protection of HRDs and not the contribution of the European Human Rights System as a whole, which comprises the Council of Europe, the EU, the European Court of Human Rights (EctHR) and the Court of Justice of the EU. The reason is that the research is not intended to be a comprehensive analysis of the contributions of the European Human Rights System to the protection of HRDs as is the case with the other human rights systems under consideration in this study. Rather, the EU is being used as a case study to identify the mechanisms that are established for the protection of HRDs by international organizations and third countries, especially when HRDs have to flee their home countries due to imminent threat to their lives and security. In the same vein, the EU is being used as a case study to investigate the practical measures that are taken to implement those standards. Accordingly, it analyzes the EU Guidelines on Human Rights Defenders and practical measures taken taken by the EU and its Member States to implement the Guidelines in order to protect HRDs in the Global South. Hence, as a supplementary chapter, the chapter on the EU does not delve into an analysis of the case law of the European Human Rights System as the other chapters do for the other human rights systems discussed in this thesis.

There is a need for further research into the less obvious legal and administrative mechanisms used by States to repress HRDs.<sup>86</sup> These strategies, including charges for tax evasion and failure to register, have proven very effective in “weakening or completely shutting down”<sup>87</sup> the activities of HRDS. These types of charges make it difficult for donors and partners of HRDs to intervene, for fear of being perceived as interfering in the internal affairs of sovereign States.

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

More research is required on how to foster an enabling environment for HRDs (i.e. the need for adopting prevention-oriented protection measures).

The opportunities and threats presented to HRDs by technology and digital security is an area that needs further study.<sup>88</sup> This is especially true considering that HRDs have access to a wide range of digital tools (mobile phones, laptops, cameras) and social media sites which are very useful in documenting and transmitting information regarding human rights and the violations thereof. Conversely, these same instruments can be used for censorship, monitoring and surveillance.<sup>89</sup>

Human rights defenders around the world continue to be subjected to oppression and violence. This thesis; however, narrows its scope to HRDs in the Global South because of the extremity of their vulnerability. Even within the Global South, there is extensive crackdown on civic space and dissent in regions like Asia and the Middle East. However, because Africa and Latin America and the Caribbean are the only regions in the Global South with functioning human rights systems, this thesis focuses on these two Global South regions, with the aim of investigating whether the human rights standards developed within their regional human rights systems and the protection delivered by their regional bodies have enhanced or not the level of protection delivered to HRDs.

## 1.5 Theory and Methodology

The research employs a combination of the doctrinal and comparative methodologies. The doctrinal research involves the analysis of existing jurisprudence and statutory provisions through the application of logic and reasoning power.<sup>90</sup> Accordingly, this research conducts a critical analysis of the legal frameworks of the human rights systems under consideration as it relates to the protection of human rights defenders. These include reports, cases on State responsibility to respect, protect and fulfill the rights of human rights defenders, scholarly articles on the subject, as well as findings of studies and surveys conducted on the effectiveness of those standards, mechanisms and measures taken to protect human rights defenders.

The aim of using the doctrinal methodology is to assess the level of protection afforded to HRDs through the available legal standards and mechanisms of the human rights systems discussed. This will be done by critiquing how the various adjudicatory bodies, Special Rapporteurs and mechanisms of the human rights systems under review have interpreted the substantive rights of human rights defenders in their decisions, reports and general comments/commentaries. The aim of the analysis will be to determine whether or not these bodies and mechanisms have expanded, strengthened, reduced or undermined the protection provided to HRDs in the applicable legal instruments. This analysis will also inform the determination of whether or not the mechanisms established for the implementation of the standards developed to protect human rights defenders are meeting the desired objectives.

The comparative methodology is used to objectively identify advantages and disadvantages of a standard, practice, system, institution and procedure in relation to others. With respect to this thesis, the comparative methodology is employed to compare best practices, challenges and

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Chunuram Soren, 'Legal Research Methodology: An Overview' (2021) (8)(10) JETIR

achievements from the African and Inter-American Human Rights Systems in the protection of human rights defenders in the Global South. The reason for conducting a comparative analysis of the two systems is that firstly, they are the two functioning human rights systems located in the Global South. Secondly, by protecting the rights of the inhabitants of their respective regions, they are also protecting the rights of HRDs. By conducting such comparison, the research seeks to identify what lessons the two systems can learn from each other in providing more adequate protection to human rights defenders.

## **1.6 Structure of the Thesis**

Chapter Two (2) of this paper focuses on the contribution of the UN Human Rights System to the protection of HRDs. The UN system is relevant to the Global South in that the UN is the global body responsible for international peace, security and human rights.<sup>91</sup> In the area of human rights, the UN has instituted a plethora of instruments and mechanisms that guarantee the rights of all, including HRDs. With specific regard to the protection of HRDs, the UN has made and continues to make a plethora of interventions in the Global South. Among them is the adoption of the UN Declaration on Human Rights Defenders, the appointment of Special Rapporteurs for Human Rights Defenders, jurisprudence of UN Treaty Bodies on the rights of HRDs, among others. The chapter discusses some of these standards and mechanisms, with the aim of determining how effective they have been in protecting HRDs in the Global South.

Chapter Three (3) discusses the Inter-American Human Rights System's legal framework for the protection of HRDs in Latin America and the Caribbean. The Inter American Human Rights System is the first of the two existing and active human rights systems in the Global South. The System has made enormous contributions both in the Latin American region and globally to the protection and promotion of the human rights of HRDs through its legal framework, especially its jurisprudence. The chapter delves into some of the mechanisms and contributions made by the System, including the Special Rapporteurs on Human Rights Defenders and the System's jurisprudence on State responsibility to respect, protect and fulfill the human rights of human rights defenders.

Chapter Four (4) identifies and analyzes the standards and mechanisms established by the African System for the protection of human rights defenders in Africa, and the contributions those mechanisms have made in this regard. Some of those standards and mechanisms include the Grand Bay and Kigali Declarations on Human Rights Defenders, the contributions of the Special Rapporteurs on Human Rights Defenders and the jurisprudence regarding State responsibility to respect, protect and fulfill the human rights of HRDs. It then analyzes the achievements, prospects and challenges of this regime for the protection of human rights defenders.

Chapter Five (5) discusses some of the European Union's initiatives aimed at protecting HRDs in the Global South. Since the setting up of the UN's human rights defenders mechanisms in 1998, the EU has been active in protecting human rights defenders in the Global South. Steps taken in this direction include the EU Guidelines on Human Rights Defenders as well as practical measures taken by the EU and its member states to protect and support human rights defenders in the Global South. These measures include the granting of emergency visas and

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<sup>91</sup> UN Charter, First Preambular paragraph

temporary relocation to human rights defenders, financial and moral support, etc. It then analyzes the impact of these mechanisms on the protection of human rights defenders.

Chapter Six (6) presents the findings of the research and conducts a comparative analysis of the contributions made by the Inter-American and African Human Rights Systems to the protection of HRDs through their respective legal frameworks and initiatives. Owing to the fact that the two systems are located in the Global South, it considers best practices from these two regional human rights systems, as well as lessons that the two systems could learn from each other.

## **2 United Nations Regime for the Protection for Human Rights Defenders**

For the past three decades, there have been growing international concerns over the precarious situation of human rights defenders worldwide, and the risky nature of the work they do.<sup>92</sup> In response to the escalating trend of intimidation, harassment, ill-treatment, killings and other forms of violence against human rights defenders, the international community has taken steps and instituted different mechanisms to address their plight. This chapter discusses the standards and mechanisms instituted by the UN Human Rights System for this purpose, with the aim of ascertaining how and whether they have met the expectations and concerns that necessitated their evolution. The first section of the chapter reviews the applicable legal instruments, including those developed specifically for the protection of HRDs. These include the International Covenant on Civil and Political Rights (ICCPR) and the UN Declaration on Human Rights Defenders. Following that, the chapter considers the jurisprudence of the UN Treaty Bodies on the substantive rights of HRDs and State responsibility to respect, protect and fulfil those rights. Next, the chapter discusses the UN Special Rapporteurs on Human Rights Defenders with emphasis on their mandates, working methods and contributions to the protection of HRDs.

### **2.1 Applicable Legal Instruments**

This sub-section discusses the UN human rights instruments that are directly applicable to the rights of HRDs, i.e. those rights which they exercise when they carry out their work and which are violated as a result of their activities.

#### **2.1.1 The International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR) is one of the main UN human rights treaties guaranteeing human rights and fundamental freedoms.<sup>93</sup> The relevance of the Covenant to HRDs is apparent in the fact that it delineates the human rights and fundamental freedoms that States, as part of their obligation, are expected to respect and ensure to “all individuals”<sup>94</sup> (including HRDs) within their jurisdiction, without any discrimination whatsoever. Apart from articulating States’ responsibility to respect and ensure civil and political rights, the ICCPR was conceived on the principle that States, as part of their obligation under the UN Charter, have a duty to promote universal respect for, and observance of human rights and freedoms.<sup>95</sup>

Accordingly, it recognizes that the individual has duties to other individuals and that those duties include striving for the promotion and recognition of the rights guaranteed in the ICCPR.<sup>96</sup> By all accounts, the act of striving for the promotion and recognition of human rights concisely describes the work of HRDs in ensuring the realization of the substantive rights enshrined in the ICCPR and other human rights instruments. This undertaking, coupled with

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<sup>92</sup> Nah, ‘Protecting Human Rights Defenders at Risk’ in Alice Nah (n 18 Supra)

<sup>93</sup> Ibid.

<sup>94</sup> Article 2(1) ICCPR

<sup>95</sup> ICCPR, 4th Preambular paragraph

<sup>96</sup> Ibid.

the threats, intimidations and attacks to which HRDs are subjected in their effort to promote and defend human rights, points to the fact that some of those substantial human rights are essential to the wellbeing of HRDs and to the work they do. They include, inter alia, the right to life, freedom from torture and other cruel, inhuman and degrading treatment and punishment; freedom of opinion and expression; freedom of assembly, freedom of association, and the right to fair trial/due process/equality before the law.

Due to its broad scope and global ratification, the treaty, as well as the standards developed by its monitoring body, the Human Rights Committee (HRC), have provided universal recourse or been utilized as last resort by victims of human rights violations.<sup>97</sup> This is true especially when national or regional human rights systems are non-existent, ineffective or unable to provide the needed protection.<sup>98</sup> Additionally, since the ICCPR, as a treaty, is legally binding upon the States that ratify or accede to it, it is generally expected that those States would be willing to respect and ensure the above rights as inscribed in the document.<sup>99</sup> However, as observed supra, this has not always been the case.

Moreover, it is expected that the responsible monitoring mechanism (the HRC) would promote the observation and implementation of these rights at the national level.<sup>100</sup> How the Human Rights Committee has accomplished this task, and what level of protection has been provided to HRDs in this regard, are discussed in a subsequent sub-section of this chapter focusing on the Committee's jurisprudence on the substantive rights provided for in the Covenant and other international human rights instruments.

## **2.1.2 UN Declaration on Human Rights Defenders**

The first and major international action taken to specifically address the situation of human rights defenders was the adoption of the United Nations (UN) Declaration on Human Rights Defenders (UNDHRD). The Declaration was adopted by consensus by the UN General Assembly (UNGA) pursuant to Resolution A/RES/53/144. Apart from the historicity of the Declaration itself, it was adopted in December 1998, on the historic occasion of the fiftieth anniversary of the Universal Declaration of Human Rights (hereinafter UDHR).<sup>101</sup>

The adoption of the Declaration on Human Rights Defenders was preceded by 14 years of negotiations by human rights organizations, non-governmental organizations (NGOs) and states.<sup>102</sup> The full title of the Declaration is "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms". Presumably for the sake of convenience, actors in the human rights and international communities have chosen to commonly refer to the document as the "Declaration on Human Rights Defenders."<sup>103</sup>

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<sup>97</sup> Dimitris Xenos, 'The Issue of Safety of Media Professionals and Human Rights Defenders in the Jurisprudence of the UN Human Rights Committee' (2012) 11 Chinese J Int'l L 767

<sup>98</sup> Ibid.

<sup>99</sup> Linda Camp Keith, 'The International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?' (1999) Journal of Peace Research, (36)(1)

<sup>100</sup> Ibid.

<sup>101</sup> UN OHCHR, 'Declaration on Human Rights Defenders' (n 13 Supra) available at <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

<sup>102</sup> Mary Lawlor, 'Defending Those Who Defend Our Rights', Human Rights Defenders Vol. 30 Issue 1, (August 2021) pp 7-8

<sup>103</sup> Nah, 'Protecting Human Rights Defenders at Risk' (n 18)

## Significance of the Declaration on Human Rights Defenders

A key accomplishment of the Declaration is the global recognition of human rights defenders, their susceptibility; their struggles, the dangers they face in carrying out their work, and the need to protect them. It is the first UN instrument to particularly recognise the importance and legitimacy of the work of human rights defenders, as well as their need for protection.<sup>104</sup> The coming into existence of the instrument effectively established a new human right which the United Nations Office of the High Commissioner for Human Rights (UN OHCHR) aptly refers to as “The Right to Defend Human Rights”.<sup>105</sup>

Another groundbreaking achievement of the Declaration is the enunciation of a working definition of who is a Human Rights Defender. Article 1 of the Declaration provides: “Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”<sup>106</sup> Similarly, The fourth preambular paragraph of the declaration recognizes the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels”.<sup>107</sup> From the provisions cited supra, it can be deduced that the scope of human rights defenders’ work can be international, national and even at the community level. This research concerns itself with those HRDs whose work is concentrated at the national and community level. Moreover, it is clear that HRDs can work as individuals or as part of civil society organizations, NGOs or international organizations. Interestingly, the term “human rights defenders” is mentioned nowhere in the Declaration.<sup>108</sup>

Nah and others argue that the Declaration does not precisely define who a ‘Human Rights Defender’ is, nor does it suggest a standardized procedure for determining the status of a human rights defender.<sup>109</sup> This obscurity, they believe, poses a challenge for those interested in protecting and assisting HRDs to determine who is actually a human rights defender, catching them in the quagmire of whether to give preference to the specific actions of a person needing protection, or to only consider as a HRD those who demonstrate greater “professionalism”.<sup>110</sup>

Although I do agree with their assertion that “the lack of precision as to who is a human rights defender can cause controversy among those supporting them and even among HRDs themselves,”<sup>111</sup> I nonetheless consider the characteristics ascribed to a human rights defender as provided in Article 1 of the Declaration and its fourth preambular paragraph as a working

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<sup>104</sup> Petter Wille/Universal Rights Group, ‘The History of the UN Declaration on Human Rights Defenders: its genesis, drafting and adoption’ published on the website of Universal Rights Group (March 11, 2019), available at <https://www.universal-rights.org/blog/the-un-declaration-on-human-rights>, accessed on 29 January 2022

<sup>105</sup> ‘Human Rights Defenders: Protecting the Right to Defend Human Rights’ is the title of the UN’s ‘Fact Sheet No. 29’, a manual which provides guidance on the concept of human rights defenders and the Declaration on Human Rights Defenders, 2004

<sup>106</sup> Article 1, ‘Declaration on Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’, otherwise known as the ‘Declaration on Human Rights Defenders’

<sup>107</sup> Declaration on Human Rights Defenders (UNDHRD) fourth preambular para.

<sup>108</sup> UNOCHR, Fact Sheet No. 29 (n 15 Supra)

<sup>109</sup> Nah et al, (n 32 Supra) p 403

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

definition of who an HRD is. My reason for this submission is that this document is the first ever international instrument to spell out who can be involved in the work of defending human rights (individuals, groups and associations or entities) and where human rights work can be conducted (locally, nationally as well as internationally). Most importantly, and in accordance with the two provisions cited above, human rights defenders are defined by the nature of the work they do, which must entail promoting and striving for the protection and realization of human rights and fundamental freedoms.<sup>112</sup>

Furthermore, Articles 5 and 9 of the Declaration provide a summation of the activities in which human rights defenders typically engage. They include "To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems" (Article 6 (a))<sup>113</sup>; "freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms" (Article 6(b))<sup>114</sup>; to submit to governmental bodies, agencies and organizations concerned with public affairs, criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion... (of human rights)" (Article 8(2))<sup>115</sup>.

From a human rights perspective, there are positive dimensions to the broadness of the characteristics of human rights defenders and their geographical scope of operation as provided for in the instrument. Primarily, the broad categorization is non-discriminatory. This incorporates individuals or groups who may not be professionally trained in human rights education or whose titles or organizations' names do not include the phrase "human rights", but whose work involve defending causes or providing services that are human rights in nature.<sup>116</sup> "Fact Sheet No. 29", a manual developed by the UN to provide guidance on the Declaration and on the work and attributes of human rights defenders, illustrates that "no qualification is required to be a human rights defender... We can all be defenders of human rights if we choose to be."<sup>117</sup>

Donders describes this unrestrictiveness of the criteria for becoming a human rights defender as "inclusive", embracing individuals and organizations who advocate for the rights of certain vulnerable groups.<sup>118</sup> Examples include lesbians, gay, bisexual and intersex (LGBTI); indigenous rights advocates; persons with disability; political opposition; women's rights and children's rights advocates.<sup>119</sup> Human rights defenders can be women, men, children, and they can come from diverse professional and other backgrounds.<sup>120</sup> Their activities can vary from representing clients in court to public denunciations; from artistic engagement to street protests; from service provision to educational programmes;<sup>121</sup> from the provision of counselling and

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<sup>112</sup> OHCHR, 'About Human Rights Defenders', available at <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>, accessed on 29 January 2022

<sup>113</sup> UN Declaration on Human Rights Defenders (n 13 Supra) Article 6(a)

<sup>114</sup> Ibid. Article 6(b)

<sup>115</sup> Ibid. Article 8(2)

<sup>116</sup> Ibid.

<sup>117</sup> "Factsheet No. 29" (n 15 Supra) p 8

<sup>118</sup> Donders 'Defending Human Rights Defenders' (n 67 Supra)

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Alice Nah, 'Protecting Human Rights Defenders at Risk' (n 18 Supra)



rehabilitation support<sup>122</sup> to distributing food to Covid-affected residents.<sup>123</sup> This broad categorization essentially paved the way for legitimization and recognition of groups and individuals whose struggles are pertinent to the human rights discourse, but who would have otherwise been sidelined due their failure to meet certain professional, academic or institutional criteria.

One commendable feature of the Declaration is that in addition to granting rights to HRDs, it also imposes obligations.<sup>124</sup> Article 19 of the Declaration provides that it is prohibited for defenders "...to engage in any act aimed at the destruction of the rights and freedoms referred to in the present Declaration."<sup>125</sup> As Lawlor emphasizes, this injunction means that the activities of HRDs must be peaceful and not violate the tenets of human rights.<sup>126</sup>

### **Shortcomings of the Declaration on Human Rights Defenders**

While the act of adopting of the Declaration on Human Rights deserves much applause for foregrounding the value of human rights defenders and the work they do, the instrument leaves much to be desired in terms of specificity and authority.

Quite notably, the Declaration is not legally binding.<sup>127</sup> Secondly, although Article 7 of the Declaration encourages the development of new principles and ideas relative to human rights, the document itself does not espouse a distinct principle to guide international actors in protecting human rights defenders. Instead, it reiterates rights and principles already guaranteed by other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR).<sup>128</sup>

A close historical reflection on the Declaration's travaux préparatoires provides some possible explanations for the instrument's broadness and lack of legal certainty. Wille discloses that the negotiations, which took place during the period of the Cold War, were heavily influenced by the prevailing political differences between East and West.<sup>129</sup> Countries in the Eastern Bloc, joined by Global South states from Africa and Asia who had received support from Eastern Bloc nations during their fight against colonialism, opted for the preeminence of State sovereignty over individual rights.<sup>130</sup> On the other hand, governments in the West preferred according international recognition of, and protection for those who seek to promote the enjoyment of human rights for themselves and for others.<sup>131</sup>

In a report published in 1995, Amnesty International suggested "the debates of the Working Group responsible for the Draft Declaration have been characterized by tensions between those

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<sup>122</sup> UN "Fact Sheet No. 29" (n 15 Supra)

<sup>123</sup> Lawlor, 'Defending Those Who Defend Our Rights' (n 102 Supra)

<sup>124</sup> Donders (n 67 Supra)

<sup>125</sup> UN Declaration on Human Rights Defenders (n 13 Supra)

<sup>126</sup> Lawlor 'Defending Those Who Defend Our Rights' (n 102 Supra)

<sup>127</sup> OHCHR, 'Declaration on Human Rights Defenders', available at <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>, accessed on 30 January 2022

<sup>128</sup> Ibid.

<sup>129</sup> Wille (n 104 Supra)

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

who would protect human rights defenders and those who would like to impose limitations on them.”<sup>132</sup>

In view of the foregoing, the resulting document represented a ”compromise”<sup>133</sup> by all sides, with no camp being fully satisfied with the outcome.<sup>134</sup> NGOs described the final text of the Declaration as “strict minimum”,<sup>135</sup> while some delegations, including Australia, France and the United States of America (USA), expressed regret over a “weak text”,<sup>136</sup> and indicated that they would have preferred to have seen a ”more ambitious”<sup>137</sup> one.

Additionally, as Donders observes, the Declaration does not explicitly refer to the responsibility of non-state actors, although its reference to the responsibility of “...individuals, groups and organs of society...” could be relied upon to uphold the assumption that non-state actors are envisaged as also bearing responsibility for the protection of the human rights of human rights defenders.<sup>138</sup>

Finally, the Declaration is not sufficiently known by stakeholders including States, non-State actors, as well as the human rights defenders themselves. The OHCHR concedes this fact, and acknowledges the need for increased awareness surrounding the instrument to the aforementioned target groups, as they are the ones “who bear principal responsibility for its implementation.”<sup>139</sup>

## **2.2 UN Human Rights System: Jurisprudence on State Responsibility to Respect, Protect and Fulfill the Rights of Human Rights Defenders**

As stated supra, the nature of the work of HRDs exposes them to various forms of attacks including physical violence (killings, torture); intimidation and threats against their personal integrity and that of their families; false charges, arrests and detention; destruction of property; closure of offices, etc.<sup>140</sup> In this light, some of the substantive rights that are essential to the work of HRDs and for which State obligations are engaged when they suffer abuses include the right to life, freedom from torture and other cruel, inhuman and degrading treatment or punishment, freedom of expression and opinion, freedom of association, freedom of assembly and the right to fair trial and due process/equality before the law.<sup>141</sup> These rights are guaranteed by the ICCPR. This sub-chapter discusses the jurisprudence of the UN Treaty Bodies<sup>142</sup> regarding the substantive rights of HRDs.

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<sup>132</sup> Amnesty International, ‘Bridging the walls of silence: issues at stake in the UN Draft Declaration on Human Rights Defenders’, available at <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior400071995en.pdf>, accessed on 30 January 2022

<sup>133</sup> Wille (n 104 Supra)

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Donders (n 67 Supra)

<sup>139</sup> Commentary on UN Declaration on Human Rights Defenders (n 37 Supra)

<sup>140</sup> Dimitris Xenos, ‘The Issue of Safety of Media Professionals and Human Rights Defenders (n 97 Supra)

<sup>141</sup> Ibid.

<sup>142</sup> These Treaty Bodies include the Human Rights Committee (HRC) and other Treaty Bodies whose mandates correlate to the work and situation of HRDs.

## **Right to Life**

The ICCPR provides: “Every human being has the inherent right to life. This right shall be protected by law.”<sup>143</sup> In a proactive interpretation, the Human Rights Committee has commented that the right to life can be violated even if there is no loss of life.<sup>144</sup> Hence, the obligation of State parties to respect and ensure the right to life extends to threats that are foreseeable and that can result in the loss of life.<sup>145</sup> Based on this finding, the Committee urges States parties not only to refrain from engaging in conduct that arbitrarily deprive people of their lives, but to also exercise due diligence to protect against the deprivation of life by private individuals and entities.<sup>146</sup> According to the Human Rights Committee, specific steps that States must take in this direction include the enactment of legislations and administrative measures to protect individuals within its jurisdiction against activities of private entities and other governments that have foreseeable implications for the right to life.<sup>147</sup>

State responsibility to respect the right to life also extends outside the territory of the concerned State party, especially to those under the effective control of the State.<sup>148</sup>

## **Freedom from Torture and other Cruel, Inhuman and Degrading Treatment and Punishment**

Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”<sup>149</sup> Where a violent act inflicts harm of a high degree of severity but does not cause death, it falls within the scope of the above cited provision of the ICCPR.<sup>150</sup>

In the view of the HRC, this right includes protection of the dignity and the physical and mental integrity of the individual, and engages the State’s responsibility whether or not the harm is inflicted by parties acting in their individual capacity, in their official capacity or outside their official capacity.<sup>151</sup> In a rather progressive interpretation of the freedom from torture and other cruel, inhuman and degrading treatment, the Committee has held that even in the absence of the infliction of actual physical or mental violence, the right may be violated through threats and intimidations.<sup>152</sup> On the issue of threats made by non-State actors, the right to be free from cruel, inhuman and degrading treatment may be violated if the State fails to protect victims by taking necessary and appropriate steps to prevent, avert or punish the issuers of these threats. Such failure may amount to acquiescence, tolerance or complicity with the violence.<sup>153</sup>

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<sup>143</sup> Article 6(1) ICCPR

<sup>144</sup> Human Rights Committee, General Comment No. 36: on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, para. 7

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid. para. 22

<sup>148</sup> Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions:

Investigation into the unlawful death of Mr. Jamal Khashoggi A/HRC/41/CRP.1, 19 June 2019, para. 193

<sup>149</sup> Article 7 ICCPR

<sup>150</sup> Dimitris Xenos, 'The Issue of Safety of Media Professionals and Human Rights (n )

<sup>151</sup> Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para. 2

<sup>152</sup> Estrella v. Uruguay, Comm. No. 74/1980, Human Rights Committee, CCPR/C/18/D/74/1980, paras. 8.6, 10 (Mar. 19, 1983)

<sup>153</sup> Ibid.

## Freedom of Opinion and expression

Article 19 of the ICCPR provides that everyone has the right to freedom of opinion and expression.<sup>154</sup> It states further that everyone shall have the right to hold opinions without interference.<sup>155</sup> The International Covenant on the Elimination of Racial Discrimination (ICERD) obligates State parties to prohibit discrimination in the enjoyment of this right.<sup>156</sup> Similarly, the UN Declaration on Human Rights Defenders states "Everyone has the right to know, seek, receive and hold information, to form and hold opinions related to human rights and to publish, impart or disseminate those views to others."<sup>157</sup> This right encompasses the right to hold opinions without interference, the right to have access to information regarding to those opinions, and the right to impart information and ideas of all kind.<sup>158</sup>

This right is relevant to HRDs because it entails "the right to develop and discuss new human rights ideas and principles, which is exactly what some HRDs are engaged in."<sup>159</sup> Hence, it is a precondition to "guaranteeing the ongoing development of human rights, and to protect those defenders that advocate new visions and ideas of human rights."<sup>160</sup> Additionally, the Human Rights Committee has observed that the right to freedom of opinion and expression is an "indispensable condition"<sup>161</sup> for the development of both persons and society and is considered the "foundation stone"<sup>162</sup> for every free and democratic society.<sup>163</sup>

Notwithstanding the indispensability of this right, Article 19(3) of the ICCPR grants States the prerogative to impose certain limitations on the exercise of freedom of expression. However, any such limitations must be in accordance with the rule of law and meet the strict requirements of necessity and proportionality.<sup>164</sup> While States may impose limitations on the exercise of freedom of expression, limitations may not be used as excuse to "muzzle"<sup>165</sup> advocacy for multi-party democracy, democratic tenets and human rights.<sup>166</sup> No limitations or restrictions are allowed to be placed on freedom of opinion.<sup>167</sup> The HRC has expanded the scope of the right to freedom of opinion and expression by holding that even where there is no physical interference therewith, this right is violated when HRDs are threatened with such interference. In *Njaru v. Cameroon*, the HRC opined that these threats are a violation because they do not serve any legitimate purpose in imposing limitations on the right to freedom of expression.<sup>168</sup>

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<sup>154</sup> Article 19(1) ICCPR

<sup>155</sup> Article 19(2) ICCPR

<sup>156</sup> Article 5(d)(viii) ICERD

<sup>157</sup> Article 6 UN Declaration on Human Rights Defenders

<sup>158</sup> Article 19 UDHR; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, para. 24 (2010)

<sup>159</sup> Article 7, UN Declaration on Human Rights Defenders

<sup>160</sup> Margaret Sekagya (Special Rapporteur on the Situation of Human Rights Defenders), Commentary on the U.N. Declaration on HRDs (n 37) p 84 (2011)

<sup>161</sup> Human Right. Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, para. 2, U.N. Doc. CCPR/C/GC/34 (2011)

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Article 19(3) ICCPR

<sup>165</sup> Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, paras 9, 22, U.N. Doc. CCPR/C/GC/34 (2011) Para. 23

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> *Njaru v. Cameroon*, Comm. No. 1353/2005, Human Rights Committee, CCPR/C/89/D/1353/2005, para. 6.4 (Apr. 3, 2007)

Freedom of opinion and expression is also critical to the work of HRDs because democracy, human rights, the rule of law, and ultimately peace, are ideals which are practicable at the national level.<sup>169</sup> Human rights defenders, whether they be lawyers, journalists, judges, community or indigenous rights advocates, civil society organizations or NGOs, are the “private agents”<sup>170</sup> through whom these objectives are sought, realized and safeguarded.<sup>171</sup> However, unlike isolated or general incidents of violence, HRDs are deliberately and directly attacked because of their expression and other related activities.<sup>172</sup> These attacks are couched in the form of defamation laws and claims of the violation; incitement against the peace, among others. The HRC addressed this issue by stating that it is incompatible with Paragraph 1 (of Article 19 ICCPR) to criminalize the holding of an opinion.<sup>173</sup> The Human Rights Committee further commented that the harassment, intimidation or stigmatization of a person, including arrest, detention, trial and imprisonment of a person for reasons of the opinions they may hold, constitutes a violation of Article 19(1), because any attempt or effort to coerce the holding or not holding of an opinion is prohibited.<sup>174</sup> Additionally, even in cases where defamation can be established, criminal law should only be applied in the most serious of cases and imprisonment is never an appropriate penalty.<sup>175</sup>

### **The Right to Freedom of Assembly**

The right to peaceful assembly is provided for under a number of universal human rights instruments. The ICCPR provides that the right to peaceful assembly shall be recognized,<sup>176</sup> while in the ICERD, State parties undertake to prohibit discrimination in the enjoyment of the right to freedom of assembly.<sup>177</sup>

With respect to HRDs, the right to peaceful assembly involves the coming together of more than one individuals to promote and protect human rights.<sup>178</sup> The forums can range from mass public gatherings such as demonstrations, vigils, marches, picket lines, to meetings in private residences and conference halls/rooms.<sup>179</sup> The venue can be indoors or outdoors.<sup>180</sup>

Despite the protection afforded to HRDs for the exercise of this right under international and regional human rights instruments, there remains a pattern of its violation under the pretext of maintaining public order, fighting terrorism, among others.<sup>181</sup>

As part of their obligation to protect, States must ensure that HRDs can assemble peacefully and participate in the promotion and protection of human rights, free from threats or the use

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<sup>169</sup> Dimitris Xenos, "The Issue of Safety of Media Professionals and Human Rights (n 97 Supra)

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Human Rights Committee, General Comment No. 34, citing *Faurisson v. France*, No. 550/93; *Mpaka-Nsusu v. Zaire*, No. 157/1983; *Primo Jose Essono Mika Miha v. Equatorial Guinea*, No. 414/1990 and *Yong-Joo Kang v. Republic of Korea*, No. 878/1999

<sup>174</sup> Ibid.

<sup>175</sup> Ibid. para. 47

<sup>176</sup> Article 21 ICCPR

<sup>177</sup> ICERD, art. 5(d)(ix) ICERD

<sup>178</sup> Article 5 UN Declaration on Human Rights Defenders; Commentary on the U.N. Declaration on HRDs, p. 25 (2011)

<sup>179</sup> Commentary on the U.N. Declaration on Human Rights Defenders (n 37 Supra)

<sup>180</sup> Ibid.

<sup>181</sup> Ibid. P 27

use of excessive and indiscriminate force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment, enforced disappearance, or abuse of criminal or civil proceedings.<sup>182</sup>

In addition to the actual use of force, the right to freedom of assembly may be violated through threats.<sup>183</sup> These threats could be verbal or non-verbal.<sup>184</sup> They could take place prior to, during or after HRDs' participation in peaceful protests, and they could be made against HRDs themselves or their families.<sup>185</sup>

### **The Right to Fair Trial, Due Process and Equality Before the Law**

The right to due process and fair trial is a cardinal principal of law regardless of jurisdiction or forum. This assertion is supported by the fact that this right is guaranteed in an array of legal instruments and case law, both domestic, regional and international. The ICCPR states: "All persons shall be equal before the courts and tribunals."<sup>186</sup> It adds: "In the determination of any criminal charge against him (the defendant), or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>187</sup>

The right to fair trial and equality before the courts is essential to HRDs and their work because, as mentioned supra, States use defamation legislation and terrorism as excuses to arrest, detain and use violence against them. Hence, HRDs are almost always the defenders in proceedings at the domestic level. By virtue of this role, they are entitled to certain procedural guarantees of Article 14 of the ICCPR. These include the presumption of innocence (Article 14 para. 2 ICCPR) and the defendant's right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf or under the same conditions as witnesses against him (ICCPR Article 14 3(e)).

When reading or citing Article 14 of the ICCPR, it is important to note the phrases "fair and public hearing" and "competent, independent and impartial tribunal". According to the Human Rights Committee, the notion of fairness or equality before courts and tribunals denotes that every party appearing before those tribunals, whether they are the powerful State or the weaker accused, should have equal access and equal status before these tribunals, and ensures that the parties to the proceedings are treated equally without any discrimination.<sup>188</sup> This means that regardless of their respective legal traditions, no State party has the sole discretion to deviate from the procedural guarantees outlined above.<sup>189</sup>

On the question of independence, the Committee notes that this refers to a body, whether judicial, administrative or quasi-judicial, established by law and independent of the legislative and executive branches of government.<sup>190</sup> Other determinants of the competence, independence

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<sup>182</sup> UNGA Resolution A/RES/68/181, 30 January 2014

<sup>183</sup> Commentary on the U.N. Declaration on HRDs (n 37 Supra) p. 29

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Article 14 ICCPR

<sup>187</sup> Ibid.

<sup>188</sup> HRC, General Comment No. 32, Article 14, Equality Before the Law, para. 8

<sup>189</sup> Ibid. para. 4

<sup>190</sup> Ibid. para. 18

and impartiality include the procedures for the qualification and appointment of judges, their security of tenure or the lack thereof, among others.<sup>191</sup>

## **2.2.1 General and Specific State Obligations to Protect Human Rights Defenders**

Having identified some of the key substantive rights of HRDs affected by threats, intimidations and attacks as well as how the UN Treaty Bodies have defined and expanded the scope of those rights particularly in the context of threats, intimidations and attacks, we will proceed to discuss the general and specific steps which States must take as part of their obligation to protect HRDs from these threats, intimidations and attacks.

### **General State Obligation: Prohibition of Attacks**

The general obligations of States with regards to protecting the Covenant rights of everyone including HRDs are prescribed in Article 2 of the ICCPR. They include the adoption of laws and other measures necessary for effectuating the rights recognized in the Covenant;<sup>192</sup> to ensure that any person whose rights and freedoms are violated shall have effective remedy whether or not those violations are perpetrated by persons in official or unofficial capacity;<sup>193</sup> to ensure that any person claiming such remedy shall have those claims determined by competent judicial, administrative or legislative authorities; or by any competent authority provided by the legal system of the State;<sup>194</sup> and to ensure that the competent authorities enforce the remedies when granted.<sup>195</sup>

Consistent with the above, the Human Rights Committee has pointed out that the obligation of States is both negative and positive in nature.<sup>196</sup> In its negative aspect, the State is obligated to refrain from violating the rights guaranteed in the Covenant, and to also refrain from placing any restrictions on the enjoyment of those rights, except those that are allowed under the Covenant.<sup>197</sup> In its positive dimension, the State must ensure that Covenant rights will be fully adhered to if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also by acts committed by private persons or entities that would impair the enjoyment of those Covenant rights.<sup>198</sup>

Based on the foregoing, it is obvious that the general obligations of States in protecting individuals including HRDs is the laying down of rules prohibiting violence and attacks against them.<sup>199</sup> A corollary of this obligation is the prescription and enforcement of appropriate sanctions to deter the prohibited behavior.<sup>200</sup>

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<sup>191</sup> Ibid. para. 19

<sup>192</sup> Article 2(2) ICCPR

<sup>193</sup> Ibid. Article 2(3)(a)

<sup>194</sup> Ibid. Article 2(3)(b)

<sup>195</sup> Ibid. Article 2(3)(c)

<sup>196</sup> HRC, General Comment No. 31 [80]: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 26 May 2004, para. 8

<sup>197</sup> Ibid.

<sup>198</sup> Ibid. para. 8

<sup>199</sup> Dimitris Xenos, 'The Issue of Safety of Media Professionals and Human Rights (n 97 Supra)

<sup>200</sup> Ibid.

## Specific State Obligations

State parties must take specific steps to “ensure” these rights by exercising due diligence to prevent, punish, investigate or redress harms arising from the acts of private persons or entities.<sup>201</sup> In terms of prevention, the Human Rights Committee has noted that States must take “specific and effective”<sup>202</sup> measures to prevent the disappearance of individuals, a trend which the Committee observes has become too frequent and results in arbitrary deprivation of life.<sup>203</sup> The Committee reaffirmed this position in the Bashasha case, which concerned the unlawful arrest and subsequent disappearance of the Petitioner’s cousin by the Libyan government during a crackdown on perceived dissidents.<sup>204</sup> Considering the connection that the Committee establishes between right to life and the act of disappearing individuals, this holding of the Committee signifies not only a protection against enforced disappearance, but can be viewed as an expansion of the right to life of HRDs.

Where prevention fails and actual harm is suffered, the State must ensure the victim(s) receive effective remedy. In *Evangeline Hernandez v Philippines*, a petition which involved the extrajudicial killing of Benjamin Hernandez, a human rights defender, the Human Rights Committee held that effective remedy encompasses the criminal prosecution and punishment of those responsible for perpetrating attacks and violence against HRDs, as well as compensation and reparation for victims.<sup>205</sup> The Committee also reached similar conclusion in the *El Ouerfeli* petition.<sup>206</sup>

In their jurisprudence on State responsibility to respect, protect and fulfill the rights of HRDs, the UN Treaty Bodies, especially the Human Rights Committee, affords broad protection of treaty rights to HRDs by finding in most cases that violation of those rights will lie even where the HRD suffers no actual harm. This type of progressive interpretation could compel States to take more active steps to not only prevent physical violence, killings and other forms of attacks, but also intimidations, threats and harassments. However, considering the fact that the concluding observations, recommendations and general comments of the Treaty Bodies are generally not legally binding,<sup>207</sup> and the prevalence of violence against HRDs in spite of States subscribing to these mechanisms, one cannot help but wonder what impact they are having in constraining States to respect, protect and fulfill the human rights of HRDs.

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<sup>201</sup> Ibid.

<sup>202</sup> HRC, ‘General Comment No. 6 Article 6 Right to Life’, para. 4

<sup>203</sup> Ibid.

<sup>204</sup> Salem Saad Ali Bashasha and Milhoud Ahmed Hussein Bashasha v. The Libyan Arab Jamahiriya, Communication No. 1776/2008, U.N. Doc. CCPR/C/100/D/1776/2008 (2010) para. 8

<sup>205</sup> *Evangeline Hernandez v. the Philippines* (2010) UN Doc. CCPR/C/99/D/ 1559/2007, para.9

<sup>206</sup> *Abdelhakim Wanis El Abani (El Ouerfeli) v. Libyan Arab Jamahiriya* (2010) UN Doc. CCPR/C/99/D/1640/2007, para.9

<sup>207</sup> International Justice Resource Center, (n 144)‘UN Human Rights Treaty Bodies



## 2.3 UN Special Rapporteur on the Situation of Human Rights Defenders

Not wanting to lose the momentum generated by the adoption of the Declaration on Human rights Defenders, stakeholders, especially the NGO community, pushed for a “follow up mechanism”<sup>208</sup> within the UN system to consolidate the formation of a legal framework in defense of HRDs.<sup>209</sup> In 2000, at the behest of Norway, the then Human Rights Commission requested the UN Secretary General to appoint a special representative on the subject of human rights defenders. In response, former Secretary General Kofi Annan appointed Hina Jilani of Pakistan as the first Special Representative on Human Rights Defenders. The title of Special Representative was later changed to Special Rapporteur and placed within the special procedures mechanism of the Human Rights Council.<sup>210</sup>

The mandate of the Special Rapporteur on the Situation of Human Rights Defenders was established by the Human Rights Commission in 2000 pursuant to Resolution E/CN.4/RES/2000/61.<sup>211</sup> The mandate has a three year term.<sup>212</sup> Since its establishment in 2000 it has been renewed by the Human Rights Council on the following occasions: 2008 by through Resolution 7/8; 2011 (Resolution 16/5); 2014 (Resolution 25/18)<sup>213</sup>; 2017 (Resolution A/HRC/RES/34/5) and March 2020 and June 2020 by HRC decision 43/115 and Resolution 43/16 respectively.<sup>214</sup>

Eaton points out that the Special Rapporteur is appointed in an independent capacity, meaning that he or she is not a United Nations staff member and does not receive salary.<sup>215</sup> The International Justice Resource Center (IJRC) stresses that the mandate is occupied by “one highly qualified individual.”<sup>216</sup> These competencies are essential for an independent, fearless, strong and efficient Office of the Special Rapporteur.

Broadly speaking, the mandate of the Special Rapporteur is to ensure the full implementation of the Declaration on Human Rights Defenders<sup>217</sup> by promo(ting) the work of human rights defenders and protect(ing) defenders at risk.<sup>218</sup> This involves study(ing) the trends, developments and challenges on the right to promote and protect human rights; recommend(ing) effective strategies to better protect human rights defenders and follow(ing) up on these recommendations; seek(ing), receiving, examining and respond(ing) to information on the situation of human rights defenders.<sup>219</sup>

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<sup>208</sup> Wille/Universal Rights Group (n 104 Supra)

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> OHCHR, ‘Special Rapporteurs on Human Rights Defenders: Mandate

<sup>212</sup> International Justice Resource Center, ‘Mandate of the Special Rapporteur on the Situation of Human Rights Defenders’, available at <https://ijrcenter.org/un-special-procedures/special-rapporteur-on-the-situation-of-human-rights-defenders>, accessed on 30 January 2022

<sup>213</sup> Ibid.

<sup>214</sup> OHCHR, ‘Mandate of the Special Rapporteur on Human Rights Defenders’ (n 143 Supra)

<sup>215</sup> Caitlin Eaton, ‘Human Rights Defenders in the United Nations Framework’ (2016) 25 Hum Rts Defender 7

<sup>216</sup> International Justice Resource Center, (n 144)

<sup>217</sup> OHCHR, ‘Special Rapporteurs on Human Rights Defenders: Mandate (n 143 Supra)

<sup>218</sup> UN Special Rapporteur on Human Rights Defenders Official Website, ‘What the Special Rapporteur Can and Can’t Do’, available at <https://srdefenders.org/the-mandate/the-special-rapporteur/what-the-special-rapporteur-can-cant-do/>, accessed on 31 January 2022

<sup>219</sup> OHCHR, Special Rapporteur (n 143 Supra)

### 2.3.1 Working Methods and Contributions of the UN Special Rapporteur to the Protection of Human Rights Defenders

In order to accomplish the above tasks, the Special Rapporteur undertakes certain specific activities as outlined below.

A key highlight of the Special Rapporteur's work is the writing of annual thematic reports. These reports, which focus on various themes affecting the wellbeing of HRDs and their work, are submitted to the the UN General Assembly and to the Human Rights Council (HRC)<sup>220</sup> through the Universal Periodic Review (UPR) process.<sup>221</sup> These thematic annual reports have addressed a plethora of issues, providing interpretation as well as guidance to States on what they are required to do to respect, protect and fulfill the rights of HRDs.

For example, on the issue of the persisting impunity for human rights violations against HRDs, Special Rapporteur Michel Forst developed the principles of due diligence in the investigation of such violations against HRDs. According to the Special Rapporteur, consistent with the victim's right of access to justice<sup>222</sup> and as part of States' obligation to investigate,<sup>223</sup> these principles require States to ensure the following:

- Own initiative: Once a State becomes aware of the occurrence of a human rights violation, it should initiate an investigation on its own initiative.
- Timeliness and expeditiousness: Investigations should be initiated immediately and proactively, without undue delay.
- Competence: Investigations and proceedings should be conducted by professionals with with the requisite knowledge and qualifications, using appropriate tools and procedures.
- Independence and Impartiality: Independence requires that the bodies responsible for conducting investigations be independent of the status or personalities of those implicated or having interests in the violations, while impartiality requires that the proceedings not be affected by preconceptions or prejudices.

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<sup>220</sup> Ibid.

<sup>221</sup> A detailed explanation of the Universal Periodic Review process is provided on the Human Rights Council's OHCHR's website at <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx#:~:text=The%20Universal%20Periodic%20Review>, accessed on 31 January 2022. During the UPR process, states and civil society can use the opportunity to raise concerns about human rights violations against HRDs in countries under the spotlight. Following these reviews, recommendations are made to the States under consideration for the improvement of the situation of HRDs. During the preparation of the reports, the Special Rapporteur usually encourages inputs from civil society in the form of information.

<sup>222</sup> Michel Forst, Report of the Special Rapporteur on Human Rights Defenders, A/74/159 (15 July 2019), paras. 31-37

<sup>223</sup> Ibid. Paras. 38-40

- Exhaustiveness: This entails using all available means to establish the truth and identify all those responsible (materially and intellectually) as well as the systemic failings that made the violation possible.
- Participation of victims: This entails giving voice to the victims or recognizing their views at all stages of the process, respecting their dignity, ensuring they have access to information, legal and psychological care and reparation.
- Transparency: States must ensure public scrutiny of the investigations and proceedings, to avoid the possibility of cover-up or tolerance of violations.<sup>224</sup>

In drawing attention to the issue of the long term detention of HRDs, Special Rapporteur Mary Lawlor identifies some of the underlying causes and factors contributing to this phenomenon. These include the fact that States have the power and ability to do so, and because they choose to use this power to silence defenders who expose corruption, raise alarm over human rights violations and highlight deficiencies in government.<sup>225</sup> In this vein, she observes that many defenders are accused, charged or sentenced under vague and unfounded laws often grounded in subversion, treason or terrorism.<sup>226</sup> Interestingly, the Special Rapporteur defends the status of the victims as HRDs, claiming that based on her long years of working with HRDs and her knowledge of who is and who is not a human rights defender, she knows that these victims are HRDs.<sup>227</sup> This defense on the part of the Special Rapporteur is apparently based on her knowledge of the work of these victims, who are involved the promotion and protection of human rights.

To halt this trend of imprisonment of HRDs, she urges States to, inter alia, desist from unlawfully arresting and detaining HRDs for engaging in human rights work; ensure that trials meet all of the international standards and guarantees of fairness and equality; provide HRDs prompt access to lawyers and to independent legal aid; take measures to discourage media outlets who discredit HRDs and their causes.<sup>228</sup>

Although effective remedy for violations against HRDs and their families is paramount to their safety and the continuity of their work, the Special Rapporteurs have stressed the need for States to prevent killings and attacks from happening in the first place. This, the Special Rapporteurs believe, can be achieved through the creation of an enabling environment that will enable HRDs to freely and peacefully carry out their work.<sup>229</sup> To this end, the Special Rapporteurship encourages State officials to issue regular and public statements recognizing the work of HRDs and condemning attacks against them; pass and enforce laws that specifically protect HRDs, and support existing mechanisms that increase accountability for killings and other attacks on HRDs including national and regional human rights and accountability mechanisms.<sup>230</sup>

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<sup>224</sup> Ibid. para. 41

<sup>225</sup> Mary Lawlor, 'States in Denial: Long Term Detention of Human Rights Defenders' Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/76/143, 19 July 2021 paras. 23-24

<sup>226</sup> Ibid. para. 70

<sup>227</sup> Ibid. para. 26

<sup>228</sup> Ibid. para. 158

<sup>229</sup> Mary Lawlor, Report of the Special Rapporteur on Human Rights Defenders, A/HRC/46/35 (24 December 2020)

<sup>230</sup> Ibid.

The Special Rapporteurs have also produced several reports and resource materials providing guidance to States, stakeholders and HRDs on the UN Declaration on Human Rights Defenders, including how to use the Declaration and how to ensure and claim and rights of HRDs guaranteed in the Declaration and in other international instruments. These include the 'Commentary on the UN Declaration on Human Rights Defenders' and 'Fact Sheet 29: Protecting the Right to Defend Human Rights', both of which are cited extensively in this thesis. In addition, the Rapporteurs have submitted thematic annual reports on the same subject matters.

For example, in her 2011 thematic annual report, Special Rapporteur Margaret Sekaggya outlines and analyzes the rights provided for in the Declaration and the common strategies and means through which those rights are violated by State and non-State actors. Thereafter, she points out to States and stakeholders the different issues that should be taken into consideration for the successful implementation of the Declaration and the guaranteeing of those rights. These include calling upon States to refrain from stigmatizing the work of HRDs and recognizing the role they play; to adopt national laws specifically on the protection of HRDs, including women HRDs; to ensure that law enforcement officers are trained on international human rights standards and that national human rights institutions (NHRIs) should prioritize HRDs in their programs, including investigating complaints made by defenders and disseminating the Declaration.<sup>231</sup> Addressing stakeholders, the Special Rapporteur implores the UN Office of the High Commissioner for Human Rights (UN OHCHR) to develop a holistic strategy to protect HRDs, including against threats and reprisals by non-State actors.<sup>232</sup> The aim of the report is to increase awareness to States about the rights provided for in the Declaration, as the Special Rapporteur admits that the document is not well known.<sup>233</sup> It is also to equip HRDs with a practical tool which they can use to claim the rights to which they are entitled under the instrument.<sup>234</sup>

Another cardinal function of the Special Rapporteur is country visits, which are undertaken on the invitation or permission of the country visited.<sup>235</sup> These country visits, which are made between once to thrice a year, provide the Special Rapporteur with an opportunity to see first hand the situation of human rights in the country under consideration, and to proffer recommendations for solutions to the challenges they face.<sup>236</sup> Following the country visits, the Special Rapporteur submits (country) reports of his or her findings, conclusions and recommendations to the Human Rights Council.<sup>237</sup>

The reports of the Special Rapporteurs have been of tremendous value in shedding light on the work of human rights defenders and the challenges they face.<sup>238</sup> They have provided guidance not only on how to remedy violations of the rights of HRDs, but how to prevent those attacks from occurring. However, a major handicap of the reporting function of the Special Rapporteur, which is also a handicap for the overall effectiveness of his or work, is that the recommendations arising out of the country visits and the UPR process are nothing more than

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<sup>231</sup> Margaret Sekaggya, 'Report of the Special Rapporteur on Human Rights Defenders', A/66/203, (28 July 2011)

<sup>232</sup> Ibid. Para. 87

<sup>233</sup> Ibid. paras. 82-86

<sup>234</sup> Ibid.

<sup>235</sup> International Justice Resource Center (n 144 Supra)

<sup>236</sup> Ibid.

<sup>237</sup> OHCHR Special Rapporteur (n 143 Supra)

<sup>238</sup> Wille/Universal Rights Group (n 104 Supra)

the name implies – “recommendations”. No restrictions, sanctions or any further actions are taken against defaulting states, even if they refuse to accept and implement those recommendations. This assertion is predicated upon the fact that no mechanism exists within the UN System for the implementation of recommendations.<sup>239</sup> For example, during the first cycle of the UPR process between 2008 to 2011, of the 326 recommendations made to States under review by other States regarding the protection of the rights of HRDs, 67.8 per cent were accepted and 15% rejected; the rest received either a general response (general acknowledgment of receipt) or no response at all.<sup>240</sup>

Although some progress has been made as a result of the Special Rapporteur’s interventions, many countries continue to pass laws that restrict civic space and that are incompatible with international standards and with the UN Declaration on Human Rights Defenders. Even where laws are adopted in line with international standards for the protection of HRDs, the objectives of those laws are undermined by their ineffective implementation.<sup>241</sup>

Another function of the Special Rapporteur is the receipt of complaints about human rights violations against HRDs. There are; however, two obstacles overshadowing the effectiveness of the complaints mechanism. Firstly, the Special Rapporteur cannot issue directives or injunctions to States to remedy the alleged violations.<sup>242</sup> Instead, he or she brings the issue to the attention of the concerned State and seeks clarification, comments or reminds the government of its human rights obligation.<sup>243</sup> Generally referred to as communications, these exchanges can take the form of allegation letters or urgent appeals. The difference between the two procedures lies conspicuously in their nomenclature. While the former is a letter sent to the government requesting clarification when the allegation is still not verified, the latter is an appeal sent where the violation has been established and there is serious threat to the life or wellbeing of HRDs, and that threat is time-bound.<sup>244</sup>

Lastly, the volume of complaints received by the Special Rapporteur is more than he or she can afford to respond to or address.<sup>245</sup>

## **2.4 Concluding Analysis on the UN Framework for the Protection of Human Rights Defenders**

Although the UN regime for the protection of human rights set the pace for the increased recognition of the situation of HRDs and the need to protect them, the protection offered by is more policy-oriented rather than action driven-driven. Although the ICCPR, out of which most of the rights of HRDs originate, is binding, the UN Declaration on Human Rights Defenders is not binding. Interventions of the Special Rapporteur on behalf of HRDs who are at risk or suffering abuses consists solely of recommendations and appeals to the responsible States, with no direct repercussions for defaulting States. So are the general comments and concluding

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<sup>239</sup> UPR Info 2013, the Annual Report of the UPR Process, available [upr-info annual report 2013.pdf](#), accessed on 31 January 2022

<sup>240</sup> Ibid.

<sup>241</sup> Margaret Sekaggya, 'Report of the Special Rapporteur on Human Rights Defenders'(July 2011) (n 163 Supra) para. 78

<sup>242</sup> International Justice Resource Center (n 144 Supra)

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Official Website of the UN Special Rapporteur on Human Rights Defenders (n 150 Supra)

observations of the Human Rights Committee. Moreover, there is just one Special Rapporteur, who does not have the capacity to deal with the caseload of complaints and information of violations against HRDs. Besides, the Declaration on Human Rights Defenders is not sufficiently known among stakeholders and even HRDs. There is therefore the need for the UN to create more awareness about the document.

### **3 Contributions of the Inter American Human Rights System to the Protection of Human Rights Defenders**

Since the establishment of the UN regime for the protection of HRDs in 1998, regional organizations have taken cue and instituted their own standards and mechanisms for the protection of human rights defenders. This chapter places the spotlight on the Inter American System of Human Rights, one of the human rights systems active in the Global South. Specifically, it examines the contribution of the System's various bodies to the protection of human rights defenders in Latin America and the Caribbean, the portion of the Americas falling within the Global South. The bodies discussed herein include the Organization of American States (OAS), the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

In that endeavour, the chapter begins by taking an introspection into the legal instruments and tools available and adopted for the protection of HRDS. These include the American Convention on Human Rights as well as Resolutions of the OAS and the Inter-American Commission and Court on Human Rights. Thereafter, it gives an overview of the adjudicatory bodies of the Inter-American System, their composition and functions. It then moves on to consider the jurisprudence of these bodies and how they have contributed to the protection of HRDs. Next, it highlights the appointment of Special Rapporteurs on Human Rights Defenders and their contributions towards the protection of HRDs. Following that, it takes a look at best practices employed by the System and challenges it faces in the protection of HRDs. It concludes by conducting an analysis of the Inter American system's framework and measures for the protection of human rights defenders.

#### **3.1 Applicable Legal Instruments**

This sub-chapter focuses on the human rights instrument(s) adopted by the Inter-American Human Rights System and applicable to the protection of human rights defenders.

##### **3.1.1 The American Convention on Human Rights**

The American Convention on Human Rights (ACHR) is the foundational instrument of the Inter American Human Rights System that guarantees the human rights of all individuals, including HRDs, within the Americas. It was adopted on 22 November 1969<sup>246</sup> and came into force on July 18, 1978.<sup>247</sup> The instrument was adopted by the Organization of American States (OAS), the international organization comprising individual nations of the Western Hemisphere and responsible for the overall protection of human rights in the region.<sup>248</sup>

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<sup>246</sup> University of Minnesota Human Rights Library, 'Basic Documents Pertaining to Human Rights in the Inter American System, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992), available at <http://hrlibrary.umn.edu/iachr/general.htm>, accessed on 18 February 2022

<sup>247</sup> Inter American Court of Human Rights Website, 'History', available at <https://www.corteidh.or.cr/historia.cfm>, accessed on 19 February 2022

<sup>248</sup> Jo M. Pasqualucci, 'The Inter American Human Rights System: Progress Made and Still to be Made' (2009) 52 German YB Int'l L 181

The Convention, which is legally binding for those Member States who ratify or adhere to it,<sup>249</sup> was born out of the desire of the OAS member states to cultivate and strengthen democracy, social justice and personal liberty based on respect for the “essential rights of man”, as spelled out in the Charter of the Organization of American States and the American Declaration on the Rights and Duties of Man.<sup>250</sup> The Convention goes further to name and define those “essential rights of man”<sup>251</sup>, while reemphasizing the obligation of State parties to respect and ensure the rights and freedoms recognized therein without discrimination on any grounds.<sup>252</sup>

Indeed, the use of the phrase “every person”, “all persons” and “any person” to describe the intended beneficiaries of the rights granted in nearly all provisions of the Convention, qualifies the American Convention as the overarching tool for the protection of the human rights of all individuals, including human rights defenders. The provision of Article 1 of the American Convention requiring States to respect and ensure the rights of “all persons” within their borders has been transcribed to the human rights defenders project and labelled by some commentators and scholars as “The Right to be Protected”.<sup>253</sup> Hence, as we will learn subsequently from the case laws and petitions of the Inter American Court and Commission respectively, HRDs claiming violation of their rights have sought redress by relying on the provisions of the Convention and the rights guaranteed therein.

## **3.2 The Inter American System of Human Rights: Composition and Jurisdiction/Functions**

### **The Court and Commission**

An understanding of the composition and workings of the Inter American Human Rights System is essential for the full appreciation of the System’s jurisprudence. In order to ensure the protection and enjoyment of human rights in the Americas, the American Convention, adopted in 1969, established two bodies to adjudicate claims of human rights violations. They are the Inter American Commission of Human Rights (IACHR) and the Inter American Court of Human Rights (IACtHR).<sup>254</sup> However, the former was already functional, having been established in 1959 and starting operation in 1960. The Court was established on 22 May 1979 when the Member States elected its first judges who served in their personal capacities as all judges and members of the Commission do to this date.<sup>255</sup>

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<sup>249</sup> Inter American Court of Human Rights Website (n 249 Supra)

<sup>250</sup> American Declaration on Human Rights, First and Third Preambular paragraphs, available at <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf>, accessed on 18 February 2022

<sup>251</sup> Ibid. Chapters I - IV

<sup>252</sup> Ibid. Chapter 1

<sup>253</sup> Ulisses Terto Neto, ‘Law and the Protection of Human Rights Defenders: An Analysis of the International, Inter American and Brazilian Legal Frameworks for the Protection of Human Rights Defenders’ *Revista Argumentum* – RA, eISSN 2359-6889, Marília/SP, V. 17, pp. 361-386, (2016) – RA, eISSN 2359-6889, Marília/SP, V. 17, pp. 361-386; Also see Commentary on the Declaration of Human Rights Defenders (n 13), providing an interpretation of Article 1 of the American Convention on Human Rights and the provisions of other international human rights instruments deemed to guarantee “The Right to be Protected”.

<sup>254</sup> Inter American Court of Human Rights Website (n 249 Supra)

<sup>255</sup> Ibid.



Both the Court and the Commission are composed of seven members each.<sup>256</sup> The judges of the Court are elected by OAS Members States regardless of nationality.<sup>257</sup> This means that they serve in individual capacities and do not represent their states of nationality. Each judge serves a six year term, re-electable once.<sup>258</sup> The number of commissioners and judges of the Inter American System has been described as limited in comparison with the European Court of Human Rights (EctHR), the which has a judge for every state.<sup>259</sup> Buergenthal believes that the limited number of judges may have negative consequences for enforcement because it impedes contact between judges of the IACtHR and domestic judges and their governments.<sup>260</sup>

The bodies have distinct yet complementary functions.<sup>261</sup> The Commission's broad mandate is to promote respect for and defense of human rights.<sup>262</sup> In order to accomplish this, it has a promotional function and an adjudicatory function. In its promotional role, it conducts awareness on human rights; makes recommendations to governments on actions necessary for the observance of those rights; monitors human rights situation and prepares studies and reports on various human rights themes and situations in selected Member States;<sup>263</sup> investigates and submits reports on human rights violations, even where no legal claim has been filed before it.<sup>264</sup> In performing its adjudicatory role, it receives and examines individual petitions. As a rule, individual petitions are initially lodged with the Commission who starts by determining the admissibility of such cases. If the Commission determines that the petition is admissible, it seeks to reach a settlement between the parties or makes a finding of fault with recommendations on how the State should resolve the the matter.<sup>265</sup> This recommendation is called decision on the merit or report on the merit.<sup>266</sup> If the State Party does not comply with the recommendation and has accepted the contentious jurisdiction of the Court, the Commission forwards the matter to the Court, which has the power to issue legally binding orders to the State.<sup>267</sup> The State may also challenge the Commission's findings by referring the matter to the Court.<sup>268</sup>

While both institutions have "supreme competence"<sup>269</sup> to interpret and apply the human rights treaties of the OAS, the Court is the forum of last resort for complaints of human rights abuses where the alleged victims were not afforded adequate domestic remedies.<sup>270</sup> In addition to rendering binding decisions and orders in contentious cases, the Court also issues advisory opinions at the request of State Parties and organs of the OAS. These advisory opinions are

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<sup>256</sup> ACHR Article 52

<sup>257</sup> Ibid. Article 53

<sup>258</sup> Ibid. Article 54

<sup>259</sup> Pasqualucci (n 248 Supra)

<sup>260</sup> Thomas Buergenthal, Remembering the Early Years of the Inter-American Court of Human Rights, *New York University Journal of International Law and Policy (NYUJILP)* 37 (2005), 259, 259-263

<sup>261</sup> Lea Shaver, "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?" (2010) 9 *Wash U Global Stud L Rev* 639, 641

<sup>262</sup> ACHR art. 41

<sup>263</sup> Ibid.

<sup>264</sup> Shaver (n 320 Supra)

<sup>265</sup> Ibid.

<sup>266</sup> Ibid. 648

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid. 645-646

important because through them, the Court has provided expert advice on critical topics surrounding democracy and human rights.<sup>271</sup>

### **3.3 Inter-American Court and Commission: Jurisprudence on State Responsibility to Respect, Protect and Fulfill the Rights of Human Rights Defenders**

The previous sub-chapter discussed the structure and jurisdiction/functions of the Inter-American System of Human Rights, thereby describing the organs through which the System protects the rights of HRDs. This section highlights the System's jurisprudence, specifically its case law, on the subject. The jurisprudence is another means through which the Inter-American System determines the substantive human rights of HRDs, adjudicate whether or not those rights were violated, and to point out State responsibility for those rights.

#### **The right to life<sup>272</sup> and Right to Liberty and Security of the Person<sup>273</sup>**

The Inter American Court of Human Rights was the first judicial body to hold that State practice of enforced disappearance violates the right to life, personal integrity and personal liberty in conjunction with the State's obligation to guarantee human rights, even when there was no such provision in the ACHR and other international human rights treaties.<sup>274</sup> The Court made this finding in the Velasquez Rodriguez Case.<sup>275</sup>

In another groundbreaking judicial move, the Inter American Court has incorporated economic and social rights into the concept of the right to life, finding a violation even where no death has occurred. Accordingly, in the Yakye Axa Indigenous Community Case, the Court held that the right to life encompasses the right to have a "viva digna", meaning a dignified life or a dignified existence.<sup>276</sup>

#### **The Right to Freedom of Opinion and Expression<sup>277</sup>**

In the area of freedom of opinion, the the Inter American Court of Human Rights has rejected criminal defamation laws and declared them to be inconsistent with the ACHR. For instance, the Herrera Ullua case concerned an Applicant who was criminally convicted by domestic courts under the "desacato" laws, also referred to as "insult laws" or "contempt laws", for insulting public officials or persons involved in public activities. The Court ruled that criminal defamation laws are not the most reasonable means of limiting freedom of expression in order

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<sup>271</sup> Inter American Court of Human Rights, 'What are the Advisory Opinions?', available at [https://www.corteidh.or.cr/que\\_son\\_las\\_opiniones\\_consultivas.cfm?lang=en](https://www.corteidh.or.cr/que_son_las_opiniones_consultivas.cfm?lang=en), accessed on 22 February 2022

<sup>272</sup> ACHR ART. 4 (Every person has the right to have his life respected. This right shall be protected by law...")

<sup>273</sup> ACHR, arts. 5 ("Every person has the right to have his physical, mental, and moral integrity respected.")

<sup>274</sup> Pasqualucci (n 248 Supra)

<sup>275</sup> Velásquez Rodríguez v. Honduras IACtHR, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, paras. 155-157

<sup>276</sup> Yakye Axa Indigenous Community v. Paraguay, IACtHR, Judgment of 17 June 2005, Series C, No. 125, paras. 162-164

<sup>277</sup> ACHR, art. 13 ("Everyone has the right to freedom of thought and expression."); U.N. Declaration on HRDs, art. 6 ("...everyone has the right to "know, seek, obtain, receive and hold information" and to "form and hold opinions" related to human rights and "freely to publish, impart or disseminate" those views to others.")

to protect the rights of others. Hence, the Court concluded, the State had violated the right of the HRD who had been domestically convicted of criminal defamation.<sup>278</sup> Similarly, in *Yakye Axa Indigenous Community v Paraguay*, the IACtHR decided that a person who claims injury on account of defamation should file a civil law suit rather than a criminal law suit.<sup>279</sup>

Other substantive rights of HRDs that are violated or at stake include Freedom From Torture, Cruel, Inhuman and Degrading or Ill Treatment;<sup>280</sup> The Right to Freedom of Assembly;<sup>281</sup> The Right to Freedom of Association;<sup>282</sup> The Right to Access and Communicate with International Bodies;<sup>283</sup> Right to Fair Trial and Judicial Protection;<sup>284</sup> The Right to Freedom of Movement, Residence and Protection from Forced Displacement,<sup>285</sup> and The Right to Privacy, Honor and Dignity.<sup>286</sup>

### 3.3.1 The Tripartite Typology of State Responsibility: Respect, Protect and Fulfill

State responsibility to respect, protect and fulfill human rights is a well established principle in international human rights law.<sup>287</sup> Known as the "Tripartite Typology of duties,"<sup>288</sup> it requires States to respect human rights by refraining from interfering with the enjoyment of those rights. In the context of HRDs, the IACtHR held in *Velasquez Rodriguez v Honduras* that the obligation to respect and ensure as provided by Article 1 of the ACHR are interrelated, and require the State to "abstain from violating guaranteed human rights of HRDs."<sup>289</sup> The State's obligation to protect human rights defenders comprise both negative and positive

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<sup>278</sup> *Herrera Ulloa v. Costa Rica (La Nación Newspaper Case)*, IACtHR, Judgment of 2 July 2004, Series C, No. 107

<sup>279</sup> *Yakye Axa Indigenous Community v. Paraguay*, IACtHR Judgment of 17 June 2005, Series C, No. 125, paras. 162-164

<sup>280</sup> ACHR Article 5 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.")

<sup>281</sup> ACHR, art. 15 ("The right of peaceful assembly, without arms, is recognized."); U.N. Declaration on HRDs, arts. 5 & 12

<sup>282</sup> ACHR, art. 16 ("Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.")

<sup>283</sup> U.N. Declaration on HRDs, arts. 5(c) ("[E]veryone has the right, individually and in association with others, at the national and international levels . . . [t]o communicate with non-governmental or intergovernmental organizations");

<sup>284</sup> ACHR, arts. 8 ("Everyone has the right to a hearing, the right to be presumed innocent until proven guilty, the right to public criminal proceedings...")

<sup>285</sup> ACHR, art. 22 ("Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. Every person has the right to leave any country freely, including his own.")

<sup>286</sup> ACHR, art. 11 ("Everyone has the right to have his honor respected and his dignity recognized. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. Everyone has the right to the protection of the law against such interference or attacks.")

<sup>287</sup> Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3<sup>rd</sup> Edition Cambridge University Press 2019) pp 292-606

<sup>288</sup> *Ibid.* citing Asbjorn Eide, *The Right to Adequate Food as a Human Right*, Report of the Special Rapporteur on the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1987/23(1987)

<sup>289</sup> *Velásquez Rodríguez v. Honduras* paras. 73-77

dimensions.<sup>290</sup> As a negative duty, it requires the State to ensure that the rights of defenders are not violated by non-State actors.<sup>291</sup> This is achieved by adopting legal, administrative and institutional frameworks for the protection of HRDs; establishing and strengthening national human rights institutions (NHRIs) and instituting effective protection policies and mechanisms for the protection of HRDs.<sup>292</sup> Under certain circumstances, failure to do so could engage the State's responsibility.<sup>293</sup> When such legal frameworks are adopted and enforced, this will contribute to the creation of an enabling environment for HRDs to carry out their work. As the Inter American Court pointed out in the *Gilson Nogueira de Carvalho* case: "...in a democratic society, the duty of States to effectively respect and guarantee the rights of everyone under their jurisdiction is intrinsically linked to the role played by human rights defenders and their protection."<sup>294</sup>

As a positive duty, States should ensure that HRDs who are victims of human rights violations have effective remedy. To that end, all violations against HRDs must be investigated promptly and impartially and the perpetrators penalized.<sup>295</sup> As Former Special Rapporteur Margaret Sekagya writes, curtailing impunity for violations against HRDs is the surest means of providing them an enabling environment in which to do their work.<sup>296</sup> To fulfill human rights, States must provide for those who are unable to provide for themselves.<sup>297</sup>

### **Due Diligence Standards that States Owe to Human Rights Defenders<sup>298</sup>**

The due diligence system was first developed by the Inter American Human Rights System<sup>299</sup> in the case *Velasquez v Honduras*.<sup>300</sup> It holds a state responsible for human rights violations where it is proved that the harm done to the HRD was foreseeable but that the state failed to exercise due diligence to prevent it.<sup>301</sup>

In the *Velasquez* Case referenced supra, the IACtHR held that even if a state is not directly responsible for a human rights violation, the state can nevertheless be held responsible for its failure to exercise due diligence.<sup>302</sup> In *Human Rights Defenders et al v. Guatemala*, the IACtHR held that the due diligence obligation "is engaged whenever the State knew, was made aware, or when they ought to have known of the existence of immediate risk to the human

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<sup>290</sup> Margaret Sekagya, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders', 4 August 2010, para. 29, available at <https://undocs.org/A/65/223>, accessed on 22 February 2022

<sup>291</sup> Ibid.

<sup>292</sup> Center for Justice and International Law (CEJIL) in 'The Esperanza Protocol' (n 140)

<sup>293</sup> Margaret Sekagya, 'Report of the Special Rapporteur' August 2020, (n 349 Supra)

<sup>294</sup> *Nogueira de Carvalho and others vs Brazil*, Inter-American Court of Human Rights, Ruling of 28 November 2006 - preliminary waivers - para. 74 onwards

<sup>295</sup> Margaret Sekagya, 'Report of the Special Rapporteur', (n 349 Supra)

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> This section adopts, with slight modifications, the models of state responsibility for the rights of HRDs, developed by the Center for Justice and International Law re: "The Esperanza Protocol", and by Protection International respectively. See Center for Justice and International Law (CEJIL), 'The Esperanza Protocol: International Legal Framework Applicable to Threats Against Human Rights Defenders: A Review of Relevant Jurisprudence in International Law' (July 2019). See also Protection International: Best Practices (n 254)

<sup>299</sup> Ibid. p 14

<sup>300</sup> Margaret Sekagya, 'Report of the Special Rapporteur', (n 349 Supra) para. 34

<sup>301</sup> Ibid.

<sup>302</sup> *Velásquez Rodríguez v. Honduras, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4*, para. 173

rights defender.”<sup>303</sup> Upon becoming aware of the reality and imminence of the risks posed by the threats against human rights defender(s), the State becomes obligated to exercise due diligence by taking “immediate reasonable measures”<sup>304</sup> within its capacity to avert such risks and prevent any harm that could result therefrom.<sup>305</sup>

This precondition is satisfied especially in situations where the HRD had received threats and had brought those threats to the attention of the authorities who had failed to take action to prevent harm. Again, in *Human Rights Defenders et v Guatemala*, the IACtHR found that the failure of the State to provide “adequate, timely and effective” measures to an HRD and her son even after she had filed numerous complaints with the police and public prosecutor informing them of frequent threats, constituted breach of the State’s due diligence obligation.<sup>306</sup>

### **Reinforced Obligation/Specific Measures Required to Protect Human Rights Defenders**

In addition to the general obligation to create a safe and enabling environment for HRDs to carry out their work, the Inter American Court has determined that the States’ reinforced obligation requires them to take certain specific measures in favor of HRDs.<sup>307</sup> In the case of *Vélez Restrepo and Relatives v. Colombia*, a case involving journalists and other HRDs acquiring and disseminating information, the Court ruled that owing to the sensitivity of, and public interest in the types of information they gather, and the places they must go in order to do their work, their profession is of such a dangerous nature that it behoves the State to adopt special measures of prevention and protection.<sup>308</sup> The Court reasoned that “journalism can only be exercised freely” when journalists are “not victims of threats or physical, mental or moral attacks or other acts of harassment.” Depending on the individual circumstances and the prevention and protection need of particular HRDs, the State may be required to take the below “special measures”, which could best be equated to the due diligence required of states.<sup>309</sup> The State must launch prompt investigation into complaints of threats, punish those responsible and provide adequate redress to the victim/HRD.<sup>310</sup>

For example, in the *Luna Lopez* case, which concerned the murder of a human rights defender and member of the city council of Catacamas, Olancho Province, Honduras,<sup>311</sup> the Inter American Court held that the State had the obligation to act with due diligence considering Mr. Luna López’s “situation of special risk”, which supported the conclusion that in this specific case, the motive of the threat against him was related to his actions as a public official defending

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<sup>303</sup> Case of Human Rights Defender et al v Guatemala, IACtHR, Judgment of August 28, 2014 (Preliminary objections, merits, reparations and costs), para. 140

<sup>304</sup> Inter American Commission on Human Rights, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II., doc. 66 rev. Para. 42 (2011)

<sup>305</sup> Ibid. para. 44

<sup>306</sup> *Human Rights Defender et al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter American Court of Human Rights (ser. C) No. 283, para. 157 (Aug. 28, 2014)

<sup>307</sup> Center for Justice and International Law (CEJIL) (n 357 Supra) and Protection International (n 254 Supra) p 43

<sup>308</sup> *Vélez Restrepo and Relatives v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, para. 194 (Sep. 3, 2012)

<sup>309</sup> Center for Justice and International Law (CEJIL) (n 357) p 44

<sup>310</sup> IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, available at <https://www.refworld.org/docid/51ff7a3b4.html>, accessed on 24 May 2022

<sup>311</sup> Loyola Law School Database, available at <https://iachr.ils.edu/cases/luna-1%C3%B3pez-v-honduras>, accessed on 21 February 2022

the environment. The Court believed that the State of Honduras did not discharge its obligation to prevent the violation of the victim's right through the adoption of timely and necessary measures for his protection.<sup>312</sup> The Court declared that in response to the death threats received by Mr. Lopez, the State should have "maximized its efforts" and used all resources at its disposal to save his life by, *inter alia*, providing security measures and personal protection to enable him continue his work as well as taking all necessary steps to immediately and effectively investigate all other threats received by the victim.<sup>313</sup>

Additionally, the State should also provide means of reporting threats and situations of risks;<sup>314</sup> issue restraining orders against potential aggressors,<sup>315</sup> and refrain from making public statements that cast aspersion upon the work of HRDs.<sup>316</sup>

In deciding on the special measures to be taken on behalf of HRDs, the State must take the following principles into account:<sup>317</sup>

Protective measures must be decided in consultation with the defenders. This will ensure a timely, focused intervention proportional to the danger and suitable to the protection need of specific HRDs.<sup>318</sup> Measures must also consider the activities of the HRD,<sup>319</sup> the degree of risk faced by the HRD,<sup>320</sup> as well as monitor those measures already in force.<sup>321</sup>

### **Obligation to Remedy and Repair/Right to Effective Remedy**

In the event that violations occur, International Human Rights Law provides that the State has the obligation to ensure that victims receive effective remedy and reparations.<sup>322</sup> In order to fulfill this obligation, the State must provide access to adjudicatory forums where victims whose rights have been violated by threats, intimidation and attacks can seek "appropriate forms of redress."<sup>323</sup> In addition to having access to effective remedy, these "appropriate redress" include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>324</sup>

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<sup>312</sup> Luna Lopez v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, para. 137 (Oct. 10, 2013)

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.* para. 123

<sup>315</sup> Human Rights Committee (HRC), General Comment No. 36: on article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 27

<sup>316</sup> Center for Justice and International Law (CEJIL) (n 357 *Supra*)

<sup>317</sup> *Ibid.* p 45

<sup>318</sup> Human Rights Defender et al. v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter American Court of Human Rights (ser. C) No. 283, para. 157 (Aug. 28, 2014)

<sup>319</sup> *Ibid.* 141–42, 157, 263

<sup>320</sup> *Ibid.* para. 157

<sup>321</sup> *Ibid.*

<sup>322</sup> UDHR, art. 8; ICCPR, arts. 2(3), 9(5); CAT, arts. 13, 14; ICERD, art. 6; ACHPR, art. 7; ACHR, art. 25; ECHR, art. 13; U.N. Declaration on HRDs, art. 9

<sup>323</sup> Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, para. 23, U.N. Doc. CCPR/C/GC/34 (2011) (which states that victims of threats and intimidation should "be in receipt of appropriate forms of redress").

<sup>324</sup> Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras. 16–17, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004); U.N. G.A., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 15, 19–22, A/RES/60/147

In the case of human rights defenders, the Inter American Court of Human Rights has emphasized that the State is obligated to provide reparations in order to alleviate the mental anguish that individuals have suffered due to threats. A vivid example of this holding is seen in the case *García Prieto et v El Salvador*, whose subject matter was the murder of García Prieto, and subsequent threats and harassment of his family. The Court found that the aforementioned loss, threats and harassment caused suffering to Mr. Prieto's family and violated various rights, and that consequently, the State was obligated to provide reparations in the form of "adequate and indefinite medical, psychological and psychiatric treatment."<sup>325</sup>

In *Gutiérrez-Soler*, looking into the case of an HRD taxi driver who was illegally arrested, detained and tortured by State authorities for allegedly being in possession of incriminating business documents of a former military colonel, the Court held that the victim and his family were entitled to monetary compensation. The Court's line of reasoning was that even though the Applicant was released, he and his family were thereafter subjected to a "campaign" of threats and harassment, thereby effectively violating the entire family's right to personal integrity under Article 5(1) of the ACHR.<sup>326</sup>

An overarching function of the due diligence standard and its component requirements is the discouragement of impunity for attacks and crimes committed against HRDs. For example, in the *Barros Alto Case*, the IACtHR held that two amnesty laws enacted by the government of then Peruvian president Alberto Fujimori were incompatible with the ACHR, as it allowed people who had committed grave human rights violations to escape accountability.<sup>327</sup>

Similarly, in *Myrna Mack v Guatemala*, although the government accepted full responsibility for the HRD's murder and prosecuted one of the officers involved, the IACtHR found Guatemala to be in violation of the ACHR, reasoning that the State's failure to investigate the facts and punish all of the perpetrators amounted to "grave impunity". In view of this, the Court held that the State's actions were "mere formality"; that the domestic remedy was not effective, and that it was therefore "injurious" to the next of kin of the victim. For the foregoing reasons, the Court emphasized that such practices fuel "chronic recidivism" of human rights violations.<sup>328</sup>

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<sup>325</sup> *García-Prieto et al. v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268, paras. 194, 201 (Nov. 20, 2007)

<sup>326</sup> *Gutiérrez-Soler v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 132, para. 69 (Sep. 12, 2005)

<sup>327</sup> *Barrios Altos v. Peru*, IACtHR, Judgment of 14 March 2001, Series C, No. 75, operative para. 4

<sup>328</sup> 'Myrna Mack Chang v Guatemala', Inter-American Court of Human Rights, Judgment of November 25, 2003, paras. 217-301, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_101\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf), accessed on 20 March 2022



### 3.4 Special Rapporteur on the Situation of Human Rights Defenders

Since 1999, a year after the adoption of the UN Declaration of Human Rights Defenders, the OAS has demonstrated serious concern about violations against HRDs in Latin America and the Caribbean, thereby adopting resolutions every year on the subject.<sup>329</sup> These resolutions, which are usually the product of agenda items of the regular sessions of the OAS' General Assembly, focus on different topics concerning HRDs.<sup>330</sup> They consistently reiterate the OAS General Assembly's concern for the predicament of HRDs; condemn abuses and violation of their rights, and call on governments to provide special protection to HRDs, while constantly reminding States that the obligation to promote and protect human rights is their first and foremost obligation.<sup>331</sup>

In June 1999, the OAS General Assembly adopted Resolution AG/RES. 1671 (XXIX-O/99) expressing concern about the violence being perpetrated against human rights defenders and instructing one of its main organs responsible for the protection of human rights in the region, the Inter American Commission on Human Rights (IACHR), to monitor and examine the situation of HRDs.<sup>332</sup> Subsequently on 5 June 2001, through Resolution AG/RES. 1818 (XXXI-O/01),<sup>333</sup> the OAS General Assembly requested the Commission to prepare a study on the matter.<sup>334</sup> That resolution was very instrumental in that it led to the establishment of the Human Rights Defenders Unit, which was tasked with receiving information on the situation of HRDs in the region, maintaining contacts with NGOs and governmental organizations and coordinating the work of the IACHR Executive Secretariat as it relates to HRDs in Latin America and the Caribbean.<sup>335</sup>

Ten years after the establishment of the Human Rights Defenders Unit by the Inter American Commission, the Commission decided to go a step further in strengthening the protection of HRDs in Latin America and the Caribbean. In March 2011 at its 141st session, the IACHR agreed to transform the Unit on Human Rights Defenders into the Office of the Rapporteur on the Situation of Human Rights Defenders.<sup>336</sup> The Commission acknowledged that this action was necessary need to give prominent visibility to the important role that HRDs and justice operators play in building a democratic society where the rule of law thrives.<sup>337</sup>

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<sup>329</sup> Protection International, 'Protection of Human Rights Defenders: Best Practices and Lessons Learnt' (2012), available at [www.protectiononline.org](http://www.protectiononline.org), accessed on 18 February 2022

<sup>330</sup> Inter American Commission, 'Report on the Situation of Human Rights Defenders' (n 272) para. 22

<sup>331</sup> Ibid.

<sup>332</sup> Organization of American States, 'AG/RES. 1671 (XXIX-O/99), June 7, 1999 'Human Rights Defenders: Support for Individuals, Groups and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas', available at <http://www.oas.org/juridico/english/ga-res99/eres1671.htm>, accessed on 18 February 2022.

<sup>333</sup> OAS General Assembly, Resolution AG/RES. 1818 (XXXI-O/01), 'Human Rights Defenders in the Americas: Support for Individuals, Groups and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas', available at [Documents \(oas.org\)](http://www.oas.org/Documentos(oas.org)), accessed on 18 February 2022

<sup>334</sup> Protection International (n 254 Supra)

<sup>335</sup> Ibid.

<sup>336</sup> Inter American Commission on Human Rights Website, 'Rapporteurship on Human rights Defenders and Justice Operators', available at <http://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/r/DDDH/default.asp>, accessed on 19 February 2022

<sup>337</sup> Ibid.



## Mandate of the Rapporteur on Human Rights Defenders and Justice Operators

The overall responsibility of the Special Rapporteur is to protect people who defend human rights in all OAS member states.<sup>338</sup> This is done by, among others, conducting “specialized analysis” of petitions filed before the Inter American Commission alleging violations of the rights of HRDs and workers within the judicial system<sup>339</sup> such as judges, attorneys and ombudspersons.<sup>340</sup> One of the Commission’s seven Commissioners is selected to serve as Rapporteur for a three year term, which may be renewed once.<sup>341</sup> As each Commissioner holds office on an independent basis not representing his or her country of nationality, so does the Commissioner selected as Rapporteur. Equally so, the Rapporteur also serves on a part time basis just as every Commissioner does.<sup>342</sup>

### 3.4.1 Working Methods and Contributions of the Special Rapporteur to the Protection of Human Rights Defenders

Consistent with the above enumerated responsibilities of the Special Rapporteur on Human Rights Defenders, he/she conducts studies on the situation of HRDs and justice operators, particularly as it relates to the dangers and challenges they face in carrying out their work.<sup>343</sup> Based on the observations made during these studies, the Rapporteur identifies and develops international standards for the protection of HRDs and justice actors, and provides guidance to States on how to appropriately comply with those international standards.<sup>344</sup> The findings of these studies are often published as reports. These reports form part of the reports which the Rapporteurship is obliged to submit to the Commission on an annual basis.<sup>345</sup> They are then incorporated into the Commission’s annual report for onward submission to the OAS General Assembly.<sup>346</sup> In these reports, the Special Rapporteurs have provided provided interpretation on a variety of issues pertaining to State responsibility to respect, protect and fulfill the rights of HRDs.

For example, on the issue of the right to promote and protect human rights, the Special Rapporteurship has found that this right has three dimensions that should be protected by States.<sup>347</sup> They are the individual dimension, the collective dimension and the social dimension.<sup>348</sup> The individual dimension originates from the exercise of universally recognized human rights that are available to everyone including each of the persons who have committed

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<sup>338</sup> International Justice Resource Center (n 144 Supra) ‘Rapporteurship on Human Rights Defenders/Mandate of the Rapporteur on Human Rights Defenders’, available at <https://ijrcenter.org/regional/inter-american-system/rapporteurship-on-human-rights-defenders/>, accessed on 19 February 2022

<sup>339</sup> Inter American Commission on Human Rights Website (n 261 Supra) ‘Rapporteurship on Human rights Defenders

<sup>340</sup> International Justice Resource Center (n 144 Supra) ‘Rapporteurship on Human Rights Defenders (n 105)

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> Inter American Commission on Human Rights Website, (n 261 Supra) ‘Rapporteurship on Human rights Defenders (n 102)

<sup>344</sup> Ibid.

<sup>345</sup> International Justice Resource Center (n 144 Supra) ‘Rapporteurship on Human Rights Defenders (n 105)

<sup>346</sup> Ibid.

<sup>347</sup> Inter American Commission of Human Rights, ‘Report on the Situation of Human Rights Defenders in the Americas’, 7 March 2006, paras. 32-34, available at

<http://www.cidh.org/countryrep/Defenders/defenderstoc.htm>, accessed on 9 May 2022

<sup>348</sup> Ibid.

their lives to the defense of human rights.<sup>349</sup> States must therefore ensure that HRDs, like all individuals under their jurisdiction, do not suffer violation of their rights nor the the curtailment of their fundamental freedoms.<sup>350</sup>

The Special Rapporteur opines that the collective dimension is rooted in the fact that the defense of human rights is a matter of public interest, and generally includes the participation of various persons associat(ing) with one another.<sup>351</sup> Additionally, the Special Rapporteur observes that some of the rights which are crucial to the practicalization of the defense of human rights have collective facets. These include freedoms of assembly, association, or some aspects of freedom of expression. Accordingly, States have the obligation to guarantee the collective dimension of those rights.<sup>352</sup>

The social dimension is based on the notion that the goal of human rights protection and promotion initiatives is to catalyze positive changes in the attainment of the rights of society in general.<sup>353</sup> Accordingly, the Special Rapporteurship suggests that when a person is prevented from defending human rights, the rest of society is adversely affected.<sup>354</sup>

Regarding the right to life, humane treatment and personal liberty, the Special Rapporteur has noted that violations of the right to life, be it through enforced disappearances or extra-judicial executions of HRDs, have a “chilling effect”<sup>355</sup> that extends beyond the direct victim to other HRDs, directly diminishing their possibility to exercise the right to defend human rights.<sup>356</sup>

Furthermore, the Special Rapporteur has realized that the practice of systemically and repeatedly attacking the life, physical integrity and liberty of members of a human rights organization is a violation of the freedom of association.<sup>357</sup> This interpretation by the Rapporteur is remarkable in that apart from establishing an interconnectedness between the various rights to which HRDs are entitled in the conduct of their activities, it interprets the rights in such a way that grants more rights to HRDs, thereby leaving a narrow window or no window for governments to justify violation of those rights. As the Special Rapporteur points out, the protection of human rights, “particularly the civil and political rights set forth in the Convention, is in effect based on affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power.”<sup>358</sup>

Moreover, the Rapporteur believes that in accordance with the norms of the Inter-American System of Human Rights, the general clause of protecting the individual from the arbitrary deprivation of life entails an absolute prohibition on forced disappearances.<sup>359</sup> Interpreting this

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<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

<sup>351</sup> Ibid.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid. Para. 43

<sup>356</sup> Ibid.

<sup>357</sup> Ibid. para. 44

<sup>358</sup> IACHR, ‘Integral Protection Policies for Human Rights Defenders’, (29 December 2017), citing Inter-American Court of Human Rights, Advisory Opinion OC-6/86, May 9, 1986 The Word “Laws” in Article 30 of the American Convention on Human Rights., Series A, No. 6, para. 21 available at [Defensores-eng-2017.pdf \(oas.org\)](#), accessed on 9 May 2022

<sup>359</sup> Ibid.

clause in line with States' obligation to respect and ensure human rights as required by the ACHR, the Rapporteur suggests that it gives rise to a negative and positive obligation on the States. In the case of HRDs, that general obligation requires States to avoid creating environments which are dangerous to the promotion and protection of human rights.<sup>360</sup> Pursuant to States' obligation to promote and protect the right to life, this involves establishing conditions that will discourage violations by State agents and private persons. Accordingly, the Special Rapporteur emphasizes that an essential component of the State's duty to prevent violations of the right to life is to investigate immediately, exhaustively and seriously attacks and threats, and punish those responsible, with the aim of preventing them from carrying out those threats.<sup>361</sup>

In its 2017 report titled: "Integral Protection Policies for Human Rights Defenders", the Office of the Special Rapporteur stressed that States must ensure that the rights of defenders are not left to the discretion of government but rather, that they are safeguarded by "a set of guarantees designed to ensure that the inviolable attributes of the individual are not impaired."<sup>362</sup> The Rapporteurship implies that perhaps the most important of these guarantees is that restrictions on the exercise of basic rights should only be enforced through laws passed by the legislature. The Rapporteur implores States to ensure that their regulatory frameworks, whether decrees, protocols, administrative regulations, should conform to international standards on the particular subject.<sup>363</sup> These interpretations and recommendations by the Rapporteur convey the assumption that legislative endorsement of statutes or regulatory frameworks instantly endow them with legality.

While this assumption may be true to some extent, it fails to take into account the reality of the Global South context, which bespeaks a strong influence of the executive over other branches of government. As mentioned in Chapter One, one of the factors that increases the vulnerability of HRDs in the Global South is the lack of judicial independence. In many instances, this phenomenon may also extend to legislatures in the Global South. For instance, Barkan applauds the legislatures in Africa for emerging from its state of being a "rubber stamp"<sup>364</sup> of the executive to exert(ing) their independence as powerful actors in the political process; as "watchdogs of the executive"<sup>365</sup>, and as bodies that provide support and relief to the demands of civil society.<sup>366</sup> However, he concedes that while they are becoming institutions "that matter"<sup>367</sup> in African politics and increasingly significant, they are still weak.<sup>368</sup> For their part, Matebese-Notshulwana and Lebakeng are strictly critical of the exercise (or lack thereof) of oversight by African legislatures. They outline an array of challenges plaguing legislatures on the continent: remarkably low levels of public and social trust, and legislative oversight in many African countries are inadequate and overshadowed by scandals.<sup>369</sup>

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<sup>360</sup> Ibid. para. 45

<sup>361</sup> Ibid.

<sup>362</sup> IACHR, 'Integral Protection Policies for Human Rights Defenders' (n 283 Supra) para. 126

<sup>363</sup> Ibid.

<sup>364</sup> Joel D. Barkan, 'African Legislature and the "Third Wave of Democratization' in Joel D. Barkan (ed) 'Legislative Power in Emerging African Democracies' (Lynne Rienner Publishers 2009)

<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

<sup>369</sup> Koliswa M. Matebese-Notshulwana and Teboho J. Lebakeng, 'The Legislature and the Challenges of Re-imagining South Africa' (2020) (42)(1) Strategic Review of Africa 191, 196

Through their reports, the Rapporteurs of the Inter-American System have also provided interpretative guidance on the qualifications, rights, and importance of HRDs and their work as spelled out in the UN Declaration on Human Rights Defenders. Consistent with the Declaration, which provides that “[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels”,<sup>370</sup> the Rapporteur agrees that “every person who in any way promotes or seeks the realization of human rights and fundamental freedoms, nationally or internationally”<sup>371</sup> has to be considered as a human rights defender. In supporting this concurrence with the UN Declaration, the Rapporteur also buttresses the OHCHR’s criterion for determining who is a human rights defender: i.e. the activity undertaken by the person rather than other qualities, such as whether or not they are compensated for their work or whether or not they belong to a civil society organization.<sup>372</sup> Notably, the Special Rapporteur acknowledges that the UN Declaration is the first international instrument to formally recognize the defense of human rights as a right in itself. Based on this acknowledgement, the Rapporteur confirms that this right: the right to defend human rights – has also been incorporated into regional systems for the protection for human rights, including the Inter-American System.<sup>373</sup>

Several conclusions can be drawn from these perspectives of the Special Rapporteur. Firstly, the Inter-American System of Human Rights agrees with the definition and qualification of HRDs as provided by the UN Declaration, which states that anyone can be a human rights defender as long as their activity is in pursuit of, or defending human rights. This unanimity in definition translates into a wider scope of protection for HRDs, allowing unrestrained promotion and protection of human rights by HRDs. It leaves no room or ground for restriction and discrimination against HRDs by governments and private actors.

The Inter-American Human Rights System, through its Rapporteur on Human Rights Defenders and Justice Operators, should be commended for recognizing and subscribing to the universal norms protecting HRDs as inscribed in the ICCPR and the UN Declaration. However, the System, or rather the OAS, has not adopted a legal instrument at the regional political level specifically addressing the situation and rights of HRDs in the region. This observation stems from the fact that apart from the Rapporteurs’ reports and the American Convention (which spells out the overall rights guaranteed to everyone including HRDs), there is no such instrument adopted at the political level specifically defining the rights of HRDs and affirming their right to defend human rights.

Such an instrument would enhance the protection of HRDs in that it would be adapted to the peculiar circumstances of HRDs in Latin America and the Caribbean. It is possible, without deviating from universal human rights norms as inscribed in the ICCPR and other international instruments, to adopt a regional human rights instrument taking into account the unique challenges of HRDs in the region. Subsequently, guidance provided to States, stakeholders and HRDs themselves could then be tailored to respond to the specific protection needs of HRDs within the regional context. Human rights defenders’ protection must not be approached

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<sup>370</sup> Article 1 UN Declaration on Human Rights Defenders (n 13)

<sup>371</sup> IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, para. 12, available at <https://www.refworld.org/docid/51ff7a3b4.html>, accessed on 10 May 2022

<sup>372</sup> Ibid. Citing Fact Sheet No. 29: Human Rights Defenders: Protecting the Right to Defend Human Rights. Geneva 2004

<sup>373</sup> Ibid. para. 15

from a one-size-fits-all perspective. While it is arguable that the resolutions of the OAS could suffice in this regard, these resolutions mostly express concerns about the situation of HRDs and instruct the Commission to take action to remedy the situation, including the establishment of appropriate mechanisms. In addition to the resolutions of the OAS, such a declaration or treaty would demonstrate reinforced political commitment on the part of States to the protection of HRDs and their prioritization of the HRD project.

At this interval, the Escazu Agreement is worth mentioning as an example from which the Inter-American System could take cue.<sup>374</sup> Against the background of the highest number of killings worldwide of Environmental HRDs occurring in Latin America and the Caribbean,<sup>375</sup> the Agreement was adopted on 4 March 2018 in Escazu, Costa Rica<sup>376</sup> by countries from the region under the auspices of the UN Economic Commission for Latin America and the Caribbean (ECLAC). Article 9(3) of the Agreement encapsulates the concern of its adopters. It requires each State Party to take “appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the Agreement. Although the Agreement is legally binding, it is basically a UN instrument, as it was adopted under the auspices of UN ECLAC.<sup>377</sup> Besides, its objective is to guarantee procedural rights in environmental matters, thus, it not be applicable to all HRDs.<sup>378</sup> Furthermore, the low ratification of the instrument is a possible foreboding of why such an instrument has not been adopted at the regional level, or what would be the outcome of any attempt to adopt such an instrument. Of the 33 countries of Latin America and the Caribbean, 24 have signed the Agreement while 12 have ratified, accepted or approved.<sup>379</sup>

The endorsement by the Special Rapporteurs of the universal human rights norms amounts to solidarity between universal and international mechanisms for the protection of HRDs. As the Special Rapporteur has stated: “The States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.”<sup>380</sup>

While this solidarity combined with the non-restrictive definition increases the weight and degree of legal protection or guarantee afforded to HRDs in the Global South, the incessant abuses suffered by HRDs begs the question of what impact this expansion of legal protection

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<sup>374</sup> The full title of the Agreement is: “Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean”.

<sup>375</sup> The Guardian, ‘[At least 331 human rights defenders were murdered in 2020, report finds | Activism | The Guardian](#)’, accessed on 23 February 2022

<sup>376</sup> Attila Panovics, ‘The Escazu Agreement and the Protection of Environmental Human Rights Defenders’ (2021) 2021 Pecs J Int’l & Eur L 23, citing Report of the thirty-eighth session of ECLAC, LC/SES.38/14, 26 March 2021, p. 35.

<sup>377</sup> Ibid.

<sup>378</sup> Chapter 1, Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“The Escazu Agreement”), available at <https://treaties.un.org/doc/Treaties/>, accessed on 20 February 2022

<sup>379</sup> Article 22(1) of the Escazu Agreement provides that the Agreement shall enter into force on the 19th day after the date of deposit of the eleventh instrument of ratification, approval or acceptance.

<sup>380</sup> Panovics (n 301) Citing the Case of *Kawas-Fernández v. Honduras*, IACtHR, Merits. Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 45

and coming together of regional and universal human rights mechanisms is having on the behavior of States.

In fulfilling its mandate, the Special Rapporteur also pays visits to selected Member States with the prior consent of the States concerned.<sup>381</sup> During these visits, the Office of the Rapporteur consults with government authorities and members of civil society.<sup>382</sup> These visits afford the Office of the Rapporteur and the IACHR the opportunity to acquire first hand understanding of the problems confronting HRDs in the region, and to make recommendations to States on how these issues can be adequately addressed to ensure that HRDs fully enjoy their rights.<sup>383</sup> These recommendations, in addition to the information gathered during these country visits, are compiled into country reports.

In addition to the information gathered during country visits, the Rapporteur also seeks, receives, examines and responds to information on the situation of HRDs. One of the channels through which the Rapporteur receives information on the situation of HRDs is by participating in various kinds of events and activities intended to promote the works of HRDs and the Inter-American Commission on Human Rights.<sup>384</sup> These activities include seminars, conferences, special meetings and workshops covering topics such as the situation of HRDs<sup>385</sup> and justice operators; mechanisms for their protection; the international responsibility of States for their protection,<sup>386</sup> among others. In addition to providing the Rapporteur with information, these forums provide an avenue for the Rapporteur to make expert inputs on the topics under discussion and to share information regarding initiatives taken by the Office of the Special Rapporteur, as well as progress made and challenges in responding to the protection needs of HRDs. Another information gathering method employed by the Rapporteurship is the issuance of questionnaires through which information is solicited for its reports.<sup>387</sup>

### 3.5 Best Practices and Challenges

Apart from hearing contentious cases and rendering opinions and recommendations; conducting studies and publishing reports, the Inter American Human Rights System has an array of "additional tools" for the protection and promotion of human rights defenders.<sup>388</sup> These include, inter alia, urgent/interim measures, thematic and country hearings and giving increased recognition to the role of victims.

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<sup>381</sup> Inter American Commission on Human Rights Website, 'Rapporteurship on Human rights Defenders (n 261 Supra)

<sup>382</sup> Ibid.

<sup>383</sup> Ibid.

<sup>384</sup> International Justice Resource Center 'Rapporteurship on Human Rights Defenders (n 144 Supra)

<sup>385</sup> Ibid.

<sup>386</sup> Inter American Commission on Human Rights Website, 'Rapporteurship on Human rights Defenders (n 261 Supra)

<sup>387</sup> Ibid. 'Rapporteurship on Human Rights Defenders

<sup>388</sup> Lea Shaver, 'The Inter-American Human Rights System (n ) p 648

### 3.5.1 Interim/Urgent Measures: Precautionary and Provisional

Interim Measures, also known as urgent measures, are procedural safeguards used in the Inter-American System for the protection of the human rights of everyone including HRDs.<sup>389</sup> Within the System, the Commission and Court have the authority to order interim measures known as precautionary and provisional measures respectively.<sup>390</sup>

#### Precautionary Measures

Precautionary measures are issued by the Inter American Commission on Human Rights. This authority is derived from Article 25 of the Rules of Procedure of the Commission. In the case of human rights defenders, it allows the Commission, in serious and urgent cases, to request the State concerned to adopt measures necessary to prevent harm to the defender.<sup>391</sup> The request for precautionary measure is not prejudicial against the State<sup>392</sup>, and it can be requested even if there no case pending before the Commission on the matter at issue.<sup>393</sup> In issuing precautionary measures, the Commission examines each situation on a case by case basis. This involves, inter alia, taking cognizance of the general situation in the concerned country; the existence of documented cases of attacks on HRDs; and the possibility that the threatened defender's situation could be exacerbated by characteristics such as gender, historical discrimination and other conditions of vulnerability.<sup>394</sup>

Through its petition and case system, the Commission has clarified the implications of State failure to implement a precautionary measure in relation to its international responsibility, particularly in relation to the obligation to protect.<sup>395</sup> Thus, in its report on the Matter of José Rusbell Lara et al, the Commission determined that the fact that the human rights defender Rusbell Lara was murdered while he was the beneficiary of a precautionary, meant that the State had not upheld its duty of protection, which was triggered when the precautionary measure was issued.<sup>396</sup> The Commission concluded that “granting precautionary measures enables the State to be aware of a situation of risk and, therefore imposes a special duty of protection upon the State to prevent the foreseeable acts of actors who contribute to that situation, with the result that effectively implementing the measures constitutes a reasonable means of prevention to stop the risk from materializing”<sup>397</sup>

#### Provisional Measures

Provisional measures are issued by the IACtHR under circumstances of extreme danger, where it becomes necessary to take urgent actions to avert the loss of life of an individual or group

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<sup>389</sup> Inter American Commission on Human Rights, 'Report on the Situation of Human Rights Defenders in the Americas', para. 235, available at <http://www.cidh.org/countryrep/Defenders/defenderschap6-8.htm#Precautionary>, accessed on 22 February 2022

<sup>390</sup> Ibid.

<sup>391</sup> Ibid. para. 236

<sup>392</sup> Ibid.

<sup>393</sup> Ibid. para. 238

<sup>394</sup> IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, (n 296 Supra) para. 442

<sup>395</sup> IACHR, 'Toward Effective Protection Policies for Human Rights Defenders' (n 395 Supra)

<sup>396</sup> José Rusbell Lara et al., IACHR, Report No. 35/17, Case 12.713, Merits, Colombia, March 21, 2017, paras. 152, 157

<sup>397</sup> Ibid.



who is being threatened, in this case, the human rights defender(s).<sup>398</sup> In other words, provisional measures are used by the Court to order State Parties to delay an imminent execution or to provide urgent protection to persons who have been threatened with imminent bodily or other irreparable harm.<sup>399</sup> For example, in *Tradesmen v Colombia*, the Court ordered the Respondent State to undertake measures to protect the lives and personal integrity of the relatives of the victim.<sup>400</sup> Also in *Genie-Lacayo*, the Court ordered the government of Nicaragua to provide armored car and security detail to a presidential candidate who had been attacked.<sup>401</sup>

In the Matter of Guerrero-Gallucci regarding Venezuela, the Court emphasized that provisional measures are necessary as part of the general duty of State parties to respect and guarantee the enjoyment of the rights contained in the American Convention. This duty, the Court reasoned, imposes upon States the obligation to guarantee a favorable environment for HRDs to freely exercise their activities.<sup>402</sup> In further elucidating this obligation, the Court insists that whether or not the person is the beneficiary of provisional measures, the State has the duty to guarantee the rights of persons who are facing situations of risk, and this includes the obligation to swiftly investigate the risks, establish the facts and where necessary, punish those responsible.<sup>403</sup> This holding by the Court is yet another expansion of the rights and protection of HRDs as provided under the ACHR and interpreted by the Inter-American System. By requiring States to ensure the safety of HRDs in the absence of provisional measures, the Court is effectively increasing the protection afforded to HRDs under the ACHR by obliging States parties to proactively and intentionally protect HRDs, without any shade of discrimination or malice.

Although the findings and interim measures of the Commission and the Court are binding on the State Parties of the Inter-American System,<sup>404</sup> these bodies face the daunting twin challenges of compliance and enforcement. Unlike the European Human Rights System which vests enforcement power in the Committee of Ministers, the American Convention and the OAS Charter lack any provision as to how States should be made to comply with judgments and orders of the Inter-American judicial bodies.<sup>405</sup> Shaver suggests that the OAS General Assembly is a suitable panacea to overcome this challenge. She notes that the American Convention instructs the Court and the Commission to submit reports to the OAS General Assembly, which provides some enforcement oversight.<sup>406</sup> Pasqualucci contends that there has been a failure of the political organs of the OAS, including the General Assembly, to oversee State compliance.<sup>407</sup> She offers a chain of causation theory for the weak compliance and enforcement capability of the inter American System. She names "chronic underfunding"<sup>408</sup>,

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<sup>398</sup> Inter -American Court of Human Rights Website, 'What are Provisional Measures?', available at [https://www.corteidh.or.cr/que\\_son\\_medidas\\_provisionales.cfm](https://www.corteidh.or.cr/que_son_medidas_provisionales.cfm), accessed on 22 February 2022

<sup>399</sup> Shaver, (n 320 Supra) p 663

<sup>400</sup> *Tradesmen v. Colombia*, Provisional Measures, Order of the Court (Inter-Am. Ct. H.R. Sept. 3, 2004), available at <https://summa.cejil.org/api/files/962.pdf>, accessed on 22 February 2022

<sup>401</sup> *Genie-Lacayo v. Nicaragua*, Provisional Measures, Order of the Court (Inter-Am. Ct. H.R. Feb. 2, 1996)

<sup>402</sup> *Matter of Guerrero-Gallucci regarding Venezuela*, IACtH.R., Provisional Measures. Order of the Inter American Court of Human Rights of November 21, 2011, e) considering para. 33

<sup>403</sup> *Matter of Giraldo Cardona and others regarding Colombia*, IACtHR, Provisional Measures. Order of the Inter-American Court of Human Rights of January 28, 2015, considering paras. 21 and 40

<sup>404</sup> American Convention on Human Rights, Article 45

<sup>405</sup> Shaver (n 320 Supra)

<sup>406</sup> *Ibid.* p 663

<sup>407</sup> Pasqualucci (n 248 Supra) p 222

<sup>408</sup> *Ibid.* 195



which leads to understaffing (e.g. seven judges and Commissioners), which is the reason that judges and members of the Commission work on a part time basis in the first place.<sup>409</sup>

To transcend the aforementioned barriers, the Court and the Commission (as discussed *infra*) have tried to be innovative as usual, holding special hearings away from their seats in San Jose, Costa Rica and Washington, DC respectively.<sup>410</sup> Countries visited include Mexico, Brazil, Paraguay, Colombia, Chile and El Salvador.<sup>411</sup> This practice; however, could prove costly for a system that is already financially deprived.

In spite of the above setbacks, the Inter American Court has made immense contributions to international human rights law in the area of reparations.<sup>412</sup> Whether the Court finds a State liable for violating the right of a victim or the State accepts responsibility for violation, States are ordered to make reparations.<sup>413</sup> In addition to victim centered reparations, the Court has ordered States make reparation to entire communities.<sup>414</sup> On that note, States have proven to be more willing to comply with orders for reparation. According to the IACtHR, States have complied with 81% of orders for reparation.<sup>415</sup> While this is complimented as a positive development, financial reparations are inadequate to compensate for the violations suffered by the victims, in this case HRDs and for the loss and trauma experienced by their families.<sup>416</sup>

### 3.5.2 Thematic and Country Hearings

Article 63 of the Inter American Commission's Rules of Procedures mandates it to hold hearings for the purpose of receiving information regarding human rights situations in Member States and on selected themes.<sup>417</sup> According to the Commission, these hearings, which are held in Member States, have been very indispensable in bringing to light some of the obstacles faced by defenders, as HRDs attending the hearings have described appalling situations that they undergo, mostly at the hands of their own state authorities; sometimes in complicity with non-state actors or by states condoning violations by non-state actors.<sup>418</sup> A unique feature of these hearings is that States are legally barred from retaliating against HRDs and their families for divulging information about abuses they suffer in their countries. This injunction is enshrined in Article 63 of the Commission's Rules of Procedure.<sup>419</sup> Despite this edict, the reality on the ground for HRDs in many Latin American and Caribbean countries paint a grim picture of reprisals and attacks against them and their families.

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<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

<sup>412</sup> Pasqualucci (n 248 *Supra*) p 206

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> IACtHR, Annual Report (2008), 73; available at: <http://www.cidh.org/annualrep/2008eng/TOC.htm>, accessed on 23 February 2022

<sup>416</sup> Viviana Krsticevic, Conference on Reparations in the Inter-American System: A Comparative Approach, AULR56 (2007), 1418, 1420-1421.

<sup>417</sup> Inter American Commission on Human Rights, 'Report on the Situation of Human Rights Defenders in the Americas' (n 272 *Supra*) para. 412

<sup>418</sup> Ibid. 413

<sup>419</sup> Ibid.

### 3.5.3 Increased Role of Victims

In its interpretation, practices and procedure, the Inter American Human Rights System grants the greatest degree of protection to the human beings under its guardianship, in line with international law in general, and with international human rights law specifically.<sup>420</sup> Consistent with this credo, the System has afforded victims a greater role in its proceedings, mainly by adopting several changes to its Rules and Procedure.<sup>421</sup>

#### Autonomous Participation at All Stages of Proceedings

Before 1991, the only role that victims were allowed to play in contentious cases, as provided by the ACHR and the Statute of the Court, were as witnesses.<sup>422</sup> However, the amendment of the Court's Rules of Procedure in 1991 has changed, thus allowing the victim to participate in all stages of the proceedings once the case has been filed by the Commission or the State.<sup>423</sup> This full participation of the victim means, among others, that victims, including HRDs, have the right to be directly represented in the reparation stage; to file written memoranda; to propose and examine witnesses, and make final arguments independently.<sup>424</sup> Thus, defenders, as a victims, now have an independent standing to represent themselves at all stages of proceedings, unlike the past where the Commission represented the victim before the Court. In fact, this enhanced role of the victim requires the Commission to name the personal attorneys of the victims to serve as the Commission's assistants.<sup>425</sup>

#### The Inter American Defender

In another reformative move, the Inter American Court in 2009 introduced "an unprecedented legal aid model".<sup>426</sup> The model, referred to as the "Inter-American Defender", consists of the Court appointing an attorney to represent victims who have not designated, or cannot afford to hire their own legal representatives.<sup>427</sup> This pro bono legal aid mechanism was effected through a memorandum of understanding entered between the Court and the Inter American Association of Public Defenders (AIDEF for its Spanish acronym), a non profit umbrella organization of public defenders associations of Member States.<sup>428</sup> Under the Agreement, the lawyers are appointed by AIDEF and not the Court.<sup>429</sup>

Since financial incapacity of victims is a major factor that gave rise to the Inter-American Defender scheme, its work is complemented by the Legal Assistance Fund of the Inter-

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<sup>420</sup> Benjamin et al. v. Trinidad and Tobago, Preliminary Objections, Judgment of 1 September 2001, Series C, No. 81, para. 70

<sup>421</sup> Pasqualucci (n 248 Supra) p 197

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.

<sup>425</sup> Ibid. 197-198

<sup>426</sup> Valeska David, 'The Inauguration of the Inter-American Defenders' Era: Reflections after the Furlan Case' (2014) 7 Inter-Am & Eur Hum Rts J 245

<sup>427</sup> Ibid. 250

<sup>428</sup> Presentation/Slides on the AIDEF-IACtHR Agreement, available at

[http://internationallegalaidgroup.org/images/miscdocs/South\\_Africa\\_2017\\_PowerPoints/PP\\_Interamerican\\_Public\\_Defender\\_Office\\_version.pdf](http://internationallegalaidgroup.org/images/miscdocs/South_Africa_2017_PowerPoints/PP_Interamerican_Public_Defender_Office_version.pdf), accessed on 22 February 2022

<sup>429</sup> AIDEF-Court Agreement signed in Costa Rica, 25 September 2009, available at <http://www.aidef.org/documentos.asp>, accessed on 22 February 2022

American System of Human Rights, which was established by the OAS, and is supported through voluntary contributions to enable Applicants have access to the Inter-American human rights organs.<sup>430</sup>

The Inter American Defender presents a unique opportunity for securing the rights of human rights defenders, most of whom might not have the financial means to litigate cases against powerful and financially potent State and non-State actors. However, considering the fact that the initiative is supported primarily through voluntary contributions, it remains to be seen if these voluntary contributions will be sufficient to sustain the project, and how they will affect or be affected by voluntary contributions being made to other activities of the Inter American Human Rights System.<sup>431</sup>

### 3.6 Concluding Analysis

As a regional human rights system, the Inter-American Human Rights System has pioneered innovative, revolutionary and groundbreaking approaches and jurisprudence for the protection of human rights defenders. These include the due diligence principle of State responsibility for the human rights of HRDs; the Inter American Defender Program; thematic and country hearings; precautionary and provisional measures; giving the victim an autonomous voice and a role in proceedings, thematic and annual reports, appointment of Special Rapporteurs for human rights defenders, among others.

Despite these landmark jurisprudence, measures and reforms in the interest of human rights defenders, Latin America and the Caribbean remains the most dangerous region in the world to be a human rights defender, as it continues to record the highest number of killings and other forms of attacks against HRDs.<sup>432</sup>

While the ACHR and the Court and Commission's interim measures and judgments are binding upon State Parties and provide overall protection for everyone including HRDs within the Inter American System's jurisdiction, the System has not adopted any other regional declaration specifically for the protection of HRDs. The Escazu Agreement is the only binding treaty that expressly mentions HRDs; however it applies only to environmental human rights defenders. Moreover, it is a UN document, its negotiation and adoption having occurred under the auspices of the UN Economic Commission for Latin America and the Caribbean (ECLAC).

The Inter-American System of Human Rights agrees with the definition and qualification of HRDs as provided by the UN Declaration, which states that anyone can be a human rights once their activity in which they are engaged is peaceful and in pursuit of human rights. This unanimity in definition translates into a wider scope of legal protection for HRDs, allowing unrestrained promotion and protection of human rights. In other words it leaves no room or grounds for governments and private actors to infringe on the right to defend human rights. In addition, it amounts to solidarity between universal and international mechanisms for the

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<sup>430</sup> OAS, 'Rules for the Operation of the Legal Assistance Fund of the Inter American Human Rights System', 4 February 2010, available at [https://www.corteidh.or.cr/docs/regla\\_victimias/victimias\\_eng.pdf](https://www.corteidh.or.cr/docs/regla_victimias/victimias_eng.pdf), accessed on 22 February 2022

<sup>431</sup> Pasqualucci (n 248 Supra)

<sup>432</sup> The Guardian, 'At least 331 human rights defenders were murdered in 2020, report finds', <https://www.theguardian.com/global-development/2021/feb/11/human-rights-defenders-murder-2020-report>

protection of HRDs, thereby adding more weight to the level of regional and international protection available to HRDs.

While this partnership and the Inter American System's conformance with universal human rights standards for the protection of HRDs bear hope for defenders, the System, or rather the OAS, has not adopted a regional legal instrument such as a declaration, specifically defining the rights and legitimacy of HRDs in the region, taking into their unique challenges. This is despite the fact that few States have developed regimes specifically for the protection of HRDs.

In spite of the extended scope of legal protection of HRDs under the Inter-American legal framework and the adoption of protection policies by some States, HRDs continue to be victims of the worst forms of attacks, including murder. This brings into question the efficacy of these protection regimes and the sincerity of governments to effectively and impartially implement them. Most importantly, it points to impunity as the source of the repeated and increased attacks against HRDs. It is against this backdrop that the Inter-American System articulated the due diligence principle of State responsibility for protection of the rights of HRDs. This principle obligates States to investigate attacks and threats against HRDs and ensure effective remedy to victims by prosecuting perpetrators of those attacks. At this point, it is worth noting that the Inter-American System concurs with the UN Human Rights System on the need for States to prevent threats and attacks against HRDs by creating an enabling environment for HRDs to freely and fearlessly carry out their work. This consensus between the two systems is remarkable because in addition to requiring States to react to attacks and threats against HRDs, it raises the standard of responsibility of States and therefore increases the rights of HRDs by requiring States to proactively, intentionally and impartially prevent attacks and threats from occurring against HRDs in the first place.

A primary indicator for measuring the effectiveness of an international tribunal, or any adjudicatory body for that matter, is the number of cases it resolves, and whether or not its orders are obeyed.<sup>433</sup> In one year, the Commission received 1,330 complaints. Of that amount, it was able to process only eighty four.<sup>434</sup> The record of state compliance with recommendations of the Commission also reflects a disproportion between number of cases heard and number of recommendations followed. Out of ninety cases heard between 2002 to 2005, full compliance was achieved in only six.<sup>435</sup> Results have also not been encouraging in the area of the Court's provisional measures. In 2005, in seven cases, non compliance by States resulted in deaths.<sup>436</sup>

From the jurisprudence of the Inter-American System regarding the protection of HRDs, one can safely to conclude that impunity is a major factor contributing to the increased attacks against HRDs. Hence, there is a need for the OAS and the Inter-American Human Rights System to effect some measures that will ensure stronger enforcement and improved State compliance with its interim measures, orders, recommendations and decisions with the aim of ensuring that States fulfill their due diligence obligations to human rights defenders. This could begin with the OAS setting up an enforcement mechanism similar to the Committee of

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<sup>433</sup> Pasqualucci (n 248 Supra)

<sup>434</sup> IACHR, 2005 Report, para. 6, available at <http://www.cidh.org/annualrep/2005eng/toc.htm>, accessed 23 February 2022

<sup>435</sup> Ibid. Para. 3

<sup>436</sup> IACHR, 2005 Report, (n 434 Supra)

Ministers of the Council of Europe.<sup>437</sup> Additionally, the allocation of resources for the conversion of the IACHR and IACtHR into permanent bodies and the appointment of more judges and commissioners will help ensure that HRDs have speedy access to justice at the regional level.<sup>438</sup>

Finally, human Rights Defenders must also be involved in the process of designing and implementing measures, framework and programs for their protection. Being the victims of the abuses sought to be eradicated, they understand best what their protection needs are.

## **4 The African Human Rights System and the Protection of Human Rights Defenders**

This chapter focuses on the African Human Rights System, specifically the level of protection it provides to human rights defenders through the available legal framework: standards, mechanisms and measures. It examines the adequacy of such standards and mechanisms in protecting HRDs. In doing so, the next sub-chapter discusses the applicable legal instruments adopted under the African Human Rights System that guarantee the protection of HRDs. Section 4.2 gives a brief overview of the composition and jurisdiction of the African Human Rights System. Section 4.3 discusses the jurisprudence of the African Human Rights System on the substantive rights of HRDs and State responsibility for respecting, protecting and fulfilling those rights. Section 4.4 focuses on the Special Rapporteurs on Human Rights Defenders and their contributions to the protection of HRDs. Section 4.5 explores achievements and challenges of the System in the protection of HRDs and Section 4.6 conducts a concluding analysis of the contributions of the African Human Rights System to the protection of HRDs on the continent.

### **4.1 Applicable Legal Instruments**

Similar to the Inter-American Human Rights System discussed in the previous chapter, the African Human Rights System derives its existence and essence from the continent's foremost inter-governmental organization – The African Union (AU), formerly the Organization of African Unity (OAU). The Union's Constitutive Act, which was adopted in June 2000 and came into force on May 26, 2001, defines its objective as, inter alia, “promot(ing) and protect(ing) human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments.”<sup>439</sup>

A panoply of regional legal instruments guarantees the protection of human rights defenders within the African Human Rights System. These include, inter alia, the African Charter on Human and People's Rights (ACHPR) the Grand Bay Declaration on Human Rights Defenders and the Kigali Declaration on Human Rights Defenders.

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<sup>437</sup> International Justice Resource Center, (n 144 Supra) ‘European Court of Human Rights: Merits’, available at <https://ijrcenter.org/european-court-of-human-rights/#:~:text=The%20Committee>, accessed on 23 May 2022

<sup>438</sup> Shaver, (n 320) p 669

<sup>439</sup> Article 3(h) Constitutive Act of the African Union, Available at [https://au.int/en/member\\_states/countryprofiles2](https://au.int/en/member_states/countryprofiles2), accessed on 2 March 2022

### 4.1.1 The African Charter on Human and People's Rights

Similar to the Inter-American Human Rights System, the protection of human rights defenders in the African Human Rights System is embedded within the continent's supreme human rights treaty, the African Charter on Human and People's Rights (ACHPR). As Makau Mutua poignantly illustrates, "The African Human Rights System is anchored by the African Charter and implemented by the (African) Commission (on Human and People's Rights and African Court on Human and People's Rights)."<sup>440</sup> It was adopted in 1981 and came into force in 1986.

Under the African System, States have a four-fold obligation to respect, promote, protect and fulfill the human rights enshrined in the Charter;<sup>441</sup> to recognize those rights, duties and freedoms, and to adopt legislative and other measures to give effect to them.<sup>442</sup>

The Charter contains provisions relevant to human rights defenders. Principally, within the section of the Charter dealing with individual rights, all of the rights defined therein are guaranteed to "every individual...without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth, or any other status".<sup>443</sup> In addition, the Charter specifically addresses the role of non-governmental organizations (NGOs) in the hearing mechanisms of the Commission and Court's. Article 55 of the Charter permits individuals and NGOs to file complaints before the African Commission, provided certain conditions, prescribed in Article 56, are met.<sup>444</sup> Those conditions shall be discussed in a subsequent portion of this paper.

### 4.1.2 Declarations

This section discusses declarations within the African Human Rights System which are applicable to the protection of HRDs in Africa. In guaranteeing the protection of human rights defenders, two declarations stand out within the framework of the African Human Rights System. They are the Grand Bay Declaration and the Kigali Declaration.

#### The Grand Bay Declaration and Plan of Action

The Grand Bay Declaration was adopted on April 16, 1999 by the First OAU Ministerial Conference on Human Rights held in Grand Bay, Mauritius.<sup>445</sup> To a large extent, the Declaration recognizes and gives prominence to the role and importance of HRDs. In the Declaration, the Conference commended the UN for the adoption of the UN Declaration on Human Rights Defenders a year earlier, describing this accomplishment by the UN Human Rights Commission as a "significant turning point",<sup>446</sup> and calling on African States to take the

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<sup>440</sup> Makau Mutua, 'The African Human Rights System: A Critical Evaluation' A policy paper prepared for the UNDP, available at <https://hdr.undp.org/sites/default/files/mutua.pdf>, accessed on March 2, 2022

<sup>441</sup> Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria ("Ogoniland Case"), Comm. No. 155/96, African Commission on Human and People's Rights, 44 (Oct. 27, 2001)

<sup>442</sup> Article 1 ACHPR

<sup>443</sup> Ibid. Article 2

<sup>444</sup> Article 55 African Charter on Human and People's Rights

<sup>445</sup> African Commission on Human and People's Rights, The Grand Bay Declaration and Plan of Action, available at <https://www.achpr.org/legalinstruments/detail?id=44>, accessed on 2 March 2022

<sup>446</sup> Ibid. Para. 19



necessary steps to implement the Declaration in Africa.<sup>447</sup> It also calls for the promotion and cultivation of a vibrant African civil society, particularly NGOs, and calls on African governments to offer their assistance in this endeavor.<sup>448</sup> For human rights defenders working as journalists, the Declaration acknowledges the role they play in the promotion of human rights in Africa and urges governments to ensure a free and independent press in Africa.<sup>449</sup>

An important component of the Declaration is that recognizes that the primary responsibility for the protection of human rights lies with States. Accordingly, it admonishes States to take steps to meet this obligation. One of such steps is the establishment of national human rights institutions (NHRI), providing them with adequate financial resources and ensuring their independence.<sup>450</sup> This recommendation is critical for the protection of HRDs in that when NHRIs are independent and well functioning, this will not only demonstrate governments' commitment to human rights and fundamental freedoms in general and to the rights of HRDs in particular.

One commendable feature of the Declaration for the protection of HRDs is that it adopts a contextual approach to the rights guaranteed in universal human rights instruments. In this connection, the Declaration points out some of the violations of human rights that are endemic to the African continent and their root causes, while expounding on some rights not explicitly enshrined in universal human rights instruments but which are relevant within the African context.

These include contemporary forms of slavery; neo colonialism, racism and religious intolerance; poverty, disease, ignorance and illiteracy; conflicts leading to refugee outflows and internal population displacements; social dislocations which may arise from the implementation of certain aspects of structural adjustment programs; the debt problem; mismanagement, bad governance and corruption; lack of accountability in the management of public affairs; monopoly in the exercise of power; harmful traditional practices; lack of independence of the judiciary; lack of independent NHRIs; lack of freedom of the press and association; lack of freedom of the press and association; environmental degradation; unconstitutional changes of government; terrorism; nepotism and exploitation of ethnicity.<sup>451</sup> To address these human rights issues, the Conference of Ministers, adopters of the Declaration, calls on African governments to offer their constructive assistance in the promotion of an African civil society, particularly NGOs, "rooted in the realities of the continent" and geared towards consolidating democracy and realizing the right to development.<sup>452</sup>

The above issues are connected to the protection of HRDs because they are the root causes of human rights abuses within the African context. Most importantly, they are the issues that HRDs in African work to address, for which they are persistently coming under attack.

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<sup>447</sup> Ibid.

<sup>448</sup> Ibid. 17

<sup>449</sup> Ibid. para. 21

<sup>450</sup> Ibid. para. 15

<sup>451</sup> Ibid. Article 8

<sup>452</sup> Ibid. Article 17

## The Kigali Declaration

The Kigali Declaration is a sequel to the Grand Bay Declaration in affirming the importance of the work of human rights defenders and the need to protect them. It was adopted on May 8, 2003 by the First African Union Ministerial Conference, held in Kigali, Rwanda. The Declaration recognizes the importance of the role played by civil society in general and human rights defenders in particular, in promoting and protecting human rights.<sup>453</sup> To that end, it implores States to protect them, and to ensure that civil society organizations (CSOs) participate in decision making as a way of cultivating a culture of participatory democratic governance.<sup>454</sup> This enjoinder is important for the protection of HRDs because by guaranteeing HRDs the procedural right to participate in public decision making, this is another way of creating an enabling environment for HRDs. This, in effect, is a preventive form protection of HRDs, which amounts to expansion of the rights guaranteed to HRDs under the African Charter and other international instruments. At the same time, the Declaration advises civil society to be independent and transparent.<sup>455</sup> While this provision could be interpreted as being consistent with the African Charter's imposition of duties towards other people and the community, it is also consonant with the UN Declaration on Human Rights Defender's guarantee of rights and imposition of responsibilities on all parties including States, private actors and human rights defenders.

In the same spirit of guaranteeing the protection of journalist HRDs, the Declaration recognizes that the media play an indispensable role in the protection of the right to information, and calls on Member States to enact appropriate legislative and policy measures that will allow journalists and media institutions to carry out their duties freely and independently.<sup>456</sup>

These Declarations present a golden opportunity for expanding and strengthening the rights of HRDs for several reasons. Firstly, by providing a contextual background of the issues hampering the enjoyment of human rights in Africa, they give stakeholders an understanding of the peculiar challenges facing HRDs on the continent, because these are the very issues against which African HRDs confront in their work and for which they face risk. They therefore inform HRDs, stakeholders and States on how to effectively execute their responsibilities of defending human rights and protecting human rights defenders respectively.

Secondly, the massive political weight behind the adoption of the Declarations (Council of Ministers of the AU) signals a momentous shift from the generally hostile reaction towards human rights by African leaders during the adoption of the African Charter. This, as recognized by the Grand Bay Declaration, is due to the democratization process sweeping across the continent within this timeframe.<sup>457</sup> The fact that those ministers, representing their respective heads of state, could identify the vices undermining the enjoyment of human rights on the African continent, reaffirm their commitment to those rights and urge one another to take measures to protect those rights, provides a basis on which the Special Rapporteurs, the African Court and other stakeholders should, and have been, expanding the scope of the rights

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<sup>453</sup> Remy Ngoy Lumbu, Special Rapporteur on Human Rights Defenders, 'Compendium on the Legal Protection of Human Rights Defenders in Africa', available at <https://www.achpr.org/presspublic/publication?id=16>, accessed on 2 March 2022

<sup>454</sup> Ibid. para. 28

<sup>455</sup> Ibid.

<sup>456</sup> Ibid.

<sup>457</sup> Ibid. Eighth preambular para.



for everyone including HRDs. Most importantly, it demonstrates that a large number of African leaders recognize the legitimacy of HRDs and the rights for which they advocate. Notwithstanding these opportunities and the use thereof, the increased rate of attacks against HRDs on the continent continues to raise serious concerns.

The Declarations do not provide detailed definitions of the applicable rights as the UN Declaration does. However, this gap is compensated for by the fact that they contain lists of human rights which are specifically applicable to HRDs and to the African context. Moreover, the fact that they spell out those human rights as provided for in international human rights instruments demonstrates the African System's adherence to the principle of the universality of human rights. Besides listing and commenting on universally guaranteed human rights, the Declaration goes further to reaffirm the African continent's support to an array of international human rights instruments which, though universal, are applicable to the African context and the work of HRDs.

## **4.2 African Human Rights System: Composition and Jurisdiction/Functions**

Within the African Human Rights System, there are two organs principally clothed with the authority of adjudicating human rights claims and forming the jurisprudence on issues affecting the rights of everyone including human rights defenders. They are the African Commission on Human and People's Rights and the African Court on Human and People's Rights. In order to attain a comprehensive and informed knowledge of the jurisprudence of these bodies with respect to human rights defenders, it is expedient first of all provide a brief background to the composition, jurisdiction and roles of the two forums.

As mentioned earlier, the African Commission on Human Rights and People's Rights was born out of the African Charter on Human and People's Rights in 1986 and inaugurated on 2 November 1987 in Addis Ababa, Ethiopia.<sup>458</sup> Its co-adjudicatory body the African Court on Human and People's Rights ("The African Court" or "The Court") was established by means of a Protocol to the African Charter. The Protocol was adopted on 9 June 1998 in Burkina Faso and came into force on 25 January 2004.<sup>459</sup> The Court and Commission have 11 Commissioners and judges each.<sup>460</sup>

The Commission has three broad functions: promotion of human and people's rights; the protection of human and people's rights, and the interpretation of the African Charter on Human and People's Rights.<sup>461</sup> As part of its promotional functions, the Commission disseminates information about human and people's rights by holding seminars, symposia, conferences and missions to Member States.<sup>462</sup>

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<sup>458</sup> African Commission on Human and People's Rights, available at <https://www.achpr.org/home>, accessed on 3 March 2022

<sup>459</sup> African Court on Human and People's Rights, 'Establishment of the Court', available at <https://www.african-court.org/wpafc/basic-information/#establishment>, accessed on 3 March 2022

<sup>460</sup> Ibid.

<sup>461</sup> African Commission on Human and People's Rights, 'About ACHPR', available at <https://www.achpr.org/aboutus>, accessed on 3 March 2022

<sup>462</sup> Ibid. 'Mandate of the Commission', available at <https://www.achpr.org/mandateofthecommission>, accessed on

In its protection capacity, the Commission operates a communications/case procedure. This involves the receipt, hearing and rendering of decisions on the merit in individual and inter-state complaints,<sup>463</sup> brokering friendly settlements,<sup>464</sup> determining admissibility and referring cases to the African Court.<sup>465</sup> It also entails coordinating the State Reporting process, which embraces “shadow reports”<sup>466</sup> from NGOs, stating the NGOs own analysis and observations on the human rights situation in the reporting country.<sup>467</sup>

The Commission’s interpretative role is entwined with its communications procedure. In this function, it interprets provisions of the African Charter based on request from State Parties, organs of the AU, NGOs and individuals.<sup>468</sup>

It is important to note that the foregoing functions of the Commission are executed within the confines of the Special Mechanism process. Hence, since the Commissioners also double-task as Special Rapporteurs of the respective mandates, it is fair to conclude that the Special Rapporteur on Human Rights Defenders performs the above responsibilities in the process of protecting defenders.

The African Court was established to “complement” and “reinforce” the functions of the African Commission.<sup>469</sup> The Court has a contentious role and an advisory role.<sup>470</sup> In its contentious role, the Court entertains disputes on the interpretation of the African Charter, the Protocol Establishing the Court, and any other relevant instrument ratified by the State concerned.<sup>471</sup> The Court admits applications from the African Commission on Human and People’s Rights, State Parties to the Protocol or African Inter-Governmental Organizations (e.g. AU and African Regional Economic Communities).<sup>472</sup> To date, 27 States have ratified the Protocol.<sup>473</sup> For individuals and NGOs alleging violation by a State Party, such cases can only be heard by the Court if the accused State has signed a declaration allowing the Court to hear such cases against them.<sup>474</sup> This is in addition to the requirement of the case being filed through the Commission. At the time of this writing, only eight States have deposited such declarations.<sup>475</sup>

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<sup>463</sup> Rules of Procedure of the African Commission on Human and People’s Rights, Rules 119-120, available at <https://www.achpr.org/legalinstruments/detail?id=72>, accessed on 4 March 2022

<sup>464</sup> Ibid. Rule 123

<sup>465</sup> Ibid. Rule 130-131

<sup>466</sup> African Commission Website (n 445 Supra)

<sup>467</sup> Ibid.

<sup>468</sup> Ibid.

<sup>469</sup> African Court (n 499 Supra)

<sup>470</sup> Child Rights International Network, ‘African Court on Human and People’s Rights,’ available at <https://archive.crin.org/en/guides/un-international-system/regional-mechanisms/african-court-human-and-peoples-rights.html>, accessed on 4 March 2022

<sup>471</sup> Ibid.

<sup>472</sup> Ibid.

<sup>473</sup> Ibid.

<sup>474</sup> Ibid.

<sup>475</sup> ACTHPR, ‘The Republic of Guinea Bissau Becomes the Eighth Country to Deposit a Declaration Under Article 34(6). The other seven are Niger, Burkina Faso, the Gambia, Ghana, Tunisia, Malawi and Mali. Available at <https://www.african-court.org/wpafc/>, accessed on 16 May 2022

In line with its advisory jurisdiction, upon request from AU Member States, the AU and any organization recognized by the AU, the Court issues opinions on topics arising out of the African Charter or other instruments ratified by the concerned State.<sup>476</sup>

### **4.3 The African Commission and Court: Jurisprudence on State Responsibility to Respect, Protect and Fulfill the Rights of Human Rights Defenders**

The African Human Rights System imposes a four-fold obligation upon States to respect, protect, promote and fulfill the human rights guaranteed under the African Charter.<sup>477</sup> These obligations of the African States are clearly articulated in the landmark case *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (“The Ogoni Case”).

In the above-mentioned complaint, the Applicants accused the Government of Nigeria, through the Nigeria National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC), of exploiting oil reserves in Ogoniland, and in the process releasing toxic pollutants which degraded the environment and the waterways,<sup>478</sup> thereby violating the Ogoni People’s rights to health, the environment and food.

In ruling upon the Respondent State’s obligation to respect, the ACHPR held that the obligation to respect is a negative obligation which requires the State to refrain from interfering with all fundamental rights and “respect(ing) rights-holders, their freedoms, autonomy, resources and liberty of their action.”<sup>479</sup>

Regarding the duty to protect, the African Commission found that this obligation requires States to protect rights-holders against third parties and non-State actors (such as Shell), by instituting and enforcing legislative and regulatory framework that affords individuals the opportunity to realize their rights and providing effective remedies when those rights are infringed.<sup>480</sup>

Promoting human rights, according to the ACHPR, is a positive obligation under which the State shall “promot[e] tolerance, rais[e] awareness, and even build...infrastructures” to enable individuals enjoy their rights.<sup>481</sup>

To fulfill human rights, States have a positive obligation to “fulfill the rights it freely undertook under various human rights regimes. This, the Commission determined, is achieved by the physical provision or adjustment of infrastructure, money or material to bring about the actual realization of the rights concerned.”<sup>482</sup> Examples of these positive acts by the State include the provision of food, resources and social security.

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<sup>476</sup> Ibid.

<sup>477</sup> Article 1, African Charter on Human and People’s Rights; See also *Esperanza Protocol* (n 141) p 13

<sup>478</sup> *SERAC and CESR v Nigeria* (n 441 *Supra*)

<sup>479</sup> Ibid. para. 45

<sup>480</sup> Ibid. para. 46

<sup>481</sup> Ibid.

<sup>482</sup> Ibid. para. 47

The Ogoni case is a remarkable achievement by the African Human Rights System in pronouncing on the rights of HRDs for several reasons. First, in determining the Nigerian (and by extension the African) State's responsibility for the above four-pronged obligations, the Commission weaved civil and political rights into social and economic rights by deciding that the State's duty to meet the above-mentioned obligations have implications for the right to life.<sup>483</sup>

Secondly, the Ogoni people who peacefully protested against the violation of their rights, whether they used conventional or unconventional methods, perfectly fulfill the requirements of human rights defenders as prescribed in the UN Declaration on Human Rights Defenders, which defines HRDs as individuals or organizations who alone, or in association with others, strive to (peacefully) promote and protect human rights and fundamental freedoms at the national and international levels.<sup>484</sup>

Indeed, many of the different forms of abuses suffered by human rights defenders, and the State and non-State actors perpetrating those abuses, play out in the Ogoni case. For instance, in response to the Ogoni's non-violent<sup>485</sup> campaign opposing the destruction of their environment and livelihood by the government and Shell, the Nigerian security forces attacked, burned down and destroyed several Ogoni villages and homes, under the pretext of fighting officials of the Movement for the Survival of the Ogoni People (MOSOP).<sup>486</sup> In addition to destroying the houses and villages of the Ogonis, the government, through its security forces, obstructed, harassed, beat, and in some cases, shot and killed people who attempted to return and rebuild their damaged homes.<sup>487</sup> On account of these acts; the government's failure to prevent private actors from engaging in similar acts as well as its failure to investigate and punish those responsible for these violations, the Commission held the Nigerian State liable for not upholding its negative and positive duties in connection with a series of rights guaranteed under the African Charter. These include the right to property (Article 14 ACHPR); the right to family (Article 18 ACHPR), and the right to life, physical and mental health (Articles 14, 16, & 18(1) ACHPR).<sup>488</sup>

A stronger establishment of the relevance of the Ogoni case for human rights defenders in Africa requires a brief reflection on the fate of Ken Saro Wiwa, a well-known Nigerian author and television producer who was leader of MOSOP, the organization defending the environmental and human rights of the Ogoni people who live in the oil-rich Niger Delta of Nigeria.<sup>489</sup> Among his many activities, Saro-Wiwa organized a peaceful march bringing together 300,000 Ogonis who demanded a share in oil revenues, compensation for damages, political autonomy, and remedy for environmental degradation caused by the government and oil companies.<sup>490</sup>

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<sup>483</sup> Ibid.

<sup>484</sup> OHCHR, Article 1, UN Declaration on Human Rights Defenders (n 13 Supra) available at <https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>, accessed on 4 March 2022

<sup>485</sup> SERAC and CESR v Nigeria (n 441 Supra) para. 7

<sup>486</sup> Ibid.

<sup>487</sup> Ibid. para. 62

<sup>488</sup> Ibid. paras. 60-62

<sup>489</sup> The Goldman Environmental Prize, Ken Saro Wiwa, 1995 Goldman Environmental Prize Recipient, available at <https://www.goldmanprize.org/recipient/ken-saro-wiwa/#>, accessed on 20 February 2022

<sup>490</sup> Ibid.

For his advocacy, he was awarded the Goldman Environmental Prize in 1995. Also, for his advocacy, he was executed by the Nigerian government in 1995.<sup>491</sup> Deutsche Welle (DW), Germany's international broadcaster, has described Saro-Wiwa's execution as "judicial murder", alluding to a pattern of violations wherein States, through the use of legislation, criminalize the work of HRDs, imprison them, and in some cases, execute them.<sup>492</sup>

It is perhaps against the foregoing backdrop that the African Commission produced what this author considers as a flagship, historic and landmark decision on State responsibility for the respect, protection, promotion and fulfillment of the human rights of HRDs as enshrined in the African Charter and universal human rights instruments.

Having incorporated State Responsibility to respect, protect, promote and fulfill the human rights of HRDs into the discussion of one of the African Human Rights System's flagship cases in this realm, I now move on to discuss the African System's jurisprudence on State responsibility for other substantial and fundamental human rights of HRDs.

### **Freedom from Discrimination**

The Commission has found sexual assault and violence against women human rights defenders (WHRDs) to be gender-specific and discriminatory in nature<sup>493</sup>, in violation of Article 2 of the African Charter.<sup>494</sup> In a case involving journalist WHRDs who were covering protests in Egypt in 2011, the Commission recalled the fact that when the victim asked a police officer for help while she was being sexually assaulted, he hit her and remarked: "This is so that you stop coming to the areas belonging to men."<sup>495</sup> The Commission reasoned that the attacks took place in a systematic sexual violence targeted at women...and were perpetrated as a means of punishing and silencing them from expressing their political opinions.<sup>496</sup> This, the Commission believed, held true in the context of the Egyptian society, an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband.<sup>497</sup>

### **Right to Life; Freedom from Inhuman and Degrading Treatment**

Like its Inter-American counterpart, The African Human Rights System has employed a dynamic interpretation of the right to life. In *Kazeem Aminu v Nigeria*, the Commission held that to insist that the violation of the right to life will lie only when there is death will be too narrow a threshold to set.<sup>498</sup> In this vein, the Commission concluded that State actions that cause persons to live in hiding due to constant fear for, and threat to their lives, after they had

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<sup>491</sup> Ibid.

<sup>492</sup> Deutsche Welle (DW), 'Why Nigerian activist Ken Saro-Wiwa was executed', available at [Why Nigerian activist Ken Saro-Wiwa was executed | Africa | DW | 09.11.2015](#), accessed on 4 March 2022

<sup>493</sup> *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, Comm. 323/06, Afr. Comm'n H.P.R., paras. 152 -154 (Dec. 16, 2011)

<sup>494</sup> ACHPR, Article 2 –"Everyone shall be entitled to the rights and freedoms guaranteed in the present Charter without any distinction on the basis of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

<sup>495</sup> *Egyptian Initiative for Personal Rights & INTERIGHTS* (n 533 Supra)

<sup>496</sup> Ibid. 152

<sup>497</sup> Ibid.

<sup>498</sup> *Kazeem Aminu v. Nigeria*, Comm. No. 205/97, African Commission on Human and People's Rights, para. 18 (May 11, 2000)

been subjected to arbitrary arrest, detention and inhuman treatment by State authorities, is a violation of the right to life.<sup>499</sup>

### **Right to Liberty, Security and Integrity of Persons**

Article 6 of the African Charter on Human and People's Rights provides that every individual shall have the right to liberty and security of the person.<sup>500</sup>

The African System has found that even in the absence of physical assault, violation of the right to security and integrity of HRDs will lie where they are threatened, especially if those threats are aimed at dehumanizing the victims mentally and physically. In the Ghazi Suleiman Case, the African Commission found a violation of Article 6 of the ACHPR when the Petitioner, a human rights lawyer, was first threatened with arrest and detention, and later arrested and detained for the sole purpose of preventing him from travelling and speaking to other HRDs in another part of the country.<sup>501</sup> Notably, this act on the part of State authorities also constituted a violation of the Petitioner's right to freedom of movement as guaranteed by Article 12 of the ACHPR, which grants unto every individual the right to freedom of movement and residence within the borders of a state provided he abides by the law.<sup>502</sup> It also defines conditions under which the right may be curtailed, including for the protection of national security, law and order, public health and morality.<sup>503</sup> As in many other instances involving the violation of the rights of HRDs, there was no situation of emergency or threat to the public health or morals of the society in this case.

### **The Right to be Free from Torture and Cruel, Inhuman, Degrading or Ill-Treatment**

Article 5 of the ACHPR states: "All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." In *Monik Elgak*, the African Commission found a violation of this provision when some HRDs, accused of cooperating with the International Criminal Court (ICC), were subjected to severe mental pain, physical beatings, threats, sleep deprivation and detention by State authorities. More importantly, the Commission reasoned that the State's subsequent failure to investigate, punish, and repair such acts once the allegations of torture were brought to their attention constituted a violation of the HRDs' right to be free from torture and ill-treatment.<sup>504</sup>

Regarding the scope and threshold of the prohibition, the Commission has extended the definition of the term "cruel, inhuman and degrading treatment or punishment" to offer the "widest possible protection against physical and mental abuses"<sup>505</sup> and has also held that prohibition is absolute.<sup>506</sup>

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<sup>499</sup> Ibid.

<sup>500</sup> ACHPR Article 6

<sup>501</sup> *Ghazi Suleiman v. Sudan*, Comm. No. 228/99, African Commission on Human and People's Rights, para. 53 (May 29, 2003)

<sup>502</sup> ACHPR, Article 12(1)

<sup>503</sup> Ibid. Article 12(2)

<sup>504</sup> *Monim Elgak, Osman Hummeida, and Amir Suliman v. Sudan*, Comm. 379/09, African Commission on Human and People's Rights, paras. 76, 99–101 (Mar. 14, 2014)

<sup>505</sup> *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000), para 71

<sup>506</sup> *Huri-Laws v. Nigeria*, Comm. No. 225/98, African Commission on Human and People's Rights, (Nov. 6, 2000), para. 41

## Right to Fair Trial

The African Charter guarantees the right of everyone to due process.<sup>507</sup> It proceeds further to outline the components of this right. Those include the right to an appeal, to be presumed innocent; to be tried within a reasonable time before an impartial tribunal,<sup>508</sup> among others. In *Media Rights Agenda v. Nigeria*, popularly known as the *Niran Malaoulu Case*, the Commission concluded that the government had violated this right of the Petitioner, a journalist, because it had neglected to inform him of the reason for his arrest and the charge against him; because the decision of the tribunal which tried and convicted the Petitioner was not subject to appeal, and because the Applicant was denied his right to be presumed innocent.<sup>509</sup>

## The Right to Freedom of Opinion and Expression

This is one of the rights most critical for the work of HRDs, as it constitutes one of the core essentials of the work of a human rights defender as provided in the UN Declaration of Human Rights Defenders – “To know, seek, obtain, receive, hold, information about all human rights and fundamental freedoms...and freely to publish, impart or disseminate...views, information and knowledge on all human rights and fundamental freedoms”<sup>510</sup> Article 9 of the ACHPR states: “Every individual shall have the right to express and disseminate his opinions within the law.”<sup>511</sup>

In *Huri Laws v Nigeria*, the African Commission found a violation of freedom of expression when security forces raided the offices and harassed and detained employees of the Applicant, a human rights organization working to promote human rights by organizing programs to enlighten people about their rights. These acts, the Commission held, was an attempt to undermine the organization’s ability to continue these activities.<sup>512</sup>

## 4.4 Special Rapporteur on Human Rights Defenders

In 2004, the African Commission created the position of Special Rapporteur on Human Rights Defenders. The first resolution<sup>513</sup> addressing the protection of human rights defenders in Africa was adopted in 2004 at the 35th Ordinary Session of the African Commission on Human and People’s Rights held in Banjul, The Gambia.<sup>514</sup> It was this resolution which created the post of Special Rapporteur for the Protection of Human Rights Defenders.<sup>515</sup>

As a follow up to the creation of the post, Resolution 83(XXXVIII)05 of 5 December 2005, adopted at the African Commission’s 38th Ordinary Session held in Banjul, the Gambia,

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<sup>507</sup> ACHPR, Article 7(1)

<sup>508</sup> Ibid. Article 7(1) (i) – (iv) and (2)

<sup>509</sup> *Huri-Laws v. Nigeria* ( n 548) paras. 43-48

<sup>510</sup> UN Declaration on Human Rights Defenders, Article 6(a) and (b)

<sup>511</sup> ACHPR Article 9

<sup>512</sup> *Huri-Laws v. Nigeria*, (n 548) paras 47–48

<sup>513</sup> Protection International, ‘Protection of Human Rights Defenders (n 254 Supra) p 10

<sup>514</sup> African Commission on Human and People’s Rights, Resolution 69 on the Protection of Human Rights Defenders in Africa – ACHPR/ Res.69(XXXV)03

<sup>515</sup> African Commission on Human and People’s Rights, ‘Resolution 69 on the Protection of Human Rights Defenders’, available at <https://www.achpr.org/sessions/resolutions?id=74>, accessed on 2 March 2022



appointed a Special Rapporteur on Human Rights Defenders in Africa.<sup>516</sup> Since then, the mandate of the Special Rapporteur, which runs for a period of two years,<sup>517</sup> has been extended by the adoption of resolutions.<sup>518</sup>

### **Mandate of the Special Rapporteur**

Generally, the Special Rapporteur on Human Rights Defenders is responsible to, inter alia, gather, accept, investigate and take actions on information regarding the situation of human rights defenders in Africa;<sup>519</sup> submit reports at every ordinary session of the African Commission and produces reports on different themes affecting the rights of human rights defenders;<sup>520</sup> constructively engage and work with Member States, national human rights institutions, relevant inter-governmental bodies, NGOs, international and regional mechanisms and other practitioners interested and involved in the protection of human rights defenders;<sup>521</sup> develop standards, systems, strategies and recommendations for the effective protection of human rights defenders, and make follow-up on his/her<sup>522</sup> recommendations, and raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa.<sup>523</sup>

The African Commission appoints one of its own members as Special Rapporteur either by consensus or by vote.<sup>524</sup>

#### **4.4.1 Working Methods and Contributions of the Special Rapporteur to the Protection of Human Rights Defenders**

In order to implement the above mandate, the Special Rapporteur engages in the below and other activities:

Writes “confidential communications”<sup>525</sup>/letters of allegations to State Parties as a way of engaging with the concerned States regarding complaints of human rights violations against HRDs;<sup>526</sup> During deliberations of the Commission on communications involving the rights of human rights defenders, the Special Rapporteur provides expert opinions to his/her

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<sup>516</sup> Ibid.

<sup>517</sup> ACHPR, ‘Resolution 69 Establishing the Mandate of the Special Rapporteur’ (n 459 Supra)

<sup>518</sup> African Commission, Resolution 273 on Extending the Scope of the Mandate of the Special Rapporteur on Human Rights Defenders in Africa’ – ACHPR/RES.273(LV)2014. Also see African Commission, Resolution ACHPR/Res.125 (XXXXII) 07 on the renewal of the mandate of the Special Rapporteur on Human Rights Defenders in Africa, adopted at its 42nd Ordinary Session held in Brazzaville, Republic of Congo from 13 to 28 November 2007

<sup>519</sup> ACHPR Website ‘Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa’, available at <https://www.achpr.org/specialmechanisms/detail?id=4>, accessed on 3 March 2022

<sup>520</sup> Ibid.

<sup>521</sup> Ibid.

<sup>522</sup> Ibid.

<sup>524</sup> International Justice Resource Center,(n 144) ‘Mandate of the Special Rapporteur on Human Rights Defenders’, available at <https://ijrcenter.org/regional/african/special-rapporteur-on-human-rights-defenders/>, accessed on 3 March 2022

<sup>525</sup> Ms. Reine Alapini Gansou, ‘Report on the Implementation of the Mandate of the Special Rapporteur on Human Rights Defenders in Africa’, 52nd Ordinary Session Special 25th Anniversary of the African Commission Yamoussoukro, 9 - 22 October 2012

<sup>526</sup> Ibid.



colleagues on the matter.<sup>527</sup> He/she also Publishes press releases on individual cases of violations received;<sup>528</sup> undertakes visits to Member States with the aim of assessing the situation of HRDs, making recommendations to the concerned States, and creating awareness on the rights of human rights defenders;<sup>529</sup> builds the capacity of HRDs through seminars, workshops, consultations, on his/her own initiative or in collaboration with national human rights institutes (NHRIs).<sup>530</sup>

Consistent with its mandate of developing standards, systems, strategies and recommendations for the effective protection of human rights defenders, the Office of the Special Rapporteur has developed several guidelines and model laws spelling out State responsibility to respect, protect and fulfill the rights of HRDs and guiding HRDs and other stakeholders in understanding and claiming those rights. These include the Guidelines on Freedom of Association and Assembly in Africa; the Principles and Guidelines on Human and People's Rights While Countering Terrorism in Africa, and the Model Law for the Recognition and Protection of Human Rights Defenders.

### **Guidelines on Freedom of Association and Assembly in Africa**

In response to the practice by several Member States of using legislation to criminalize the work of HRDs, the African Commission developed the Guidelines on Freedom of Association. Making reference to Resolution 69 (XXXV) 04; Resolution 119 (XXXXII) 07 and Resolution 196 (L) 11, which were all adopted on the situation of human rights defenders in Africa,<sup>531</sup> the Guidelines establish the concern of its crafters for the plight of HRDs.

In traversing the rights to freedom of association, expression and assembly, the Guidelines provide guidance on such practical issues as the registration of civil society organizations, imposition of sanctions, blanket bans, what qualifies as hate speech, among others. They encourage States to observe the principles of non-discrimination, proportionality and the availability of effective remedy to those HRDs whose rights are violated in this domain.<sup>532</sup>

### **Principles and Guidelines on Human and People's Rights While Countering Terrorism in Africa**

Cognizant that the fight against terrorism is often used as a pretext by governments to enact legislations falsely criminalizing the work of human rights defenders and to abuse them, the Special Rapporteur developed these Principles and Guidelines in accordance with Article 45(b) of the African Charter with the aim of providing standards and rules on which African governments can base their legislation.<sup>533</sup>

While recognizing that terrorism constitutes a violation of the rights of its victims, and that States have a duty to bring justice to the victims of terrorism and secure their territories against

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<sup>527</sup> International Justice Resource Center, (n 144 Supra)

<sup>528</sup> Ibid.

<sup>529</sup> Ibid.

<sup>530</sup> Ibid. p 7

<sup>531</sup> Ibid.

<sup>532</sup> Ibid.

<sup>533</sup> African Commission on Human and People's Rights, 'Principles and Guidelines on Human and People's Rights While Countering Terrorism in Africa' p5, available at <https://www.achpr.org/presspublic/publication?id=21>, accessed on 2 March 2022

the "scourge of terrorism and violent extremism",<sup>534</sup> the Principles and Guidelines caution States against using the fight against terrorism as a pretext to illegally restrict fundamental freedoms, especially the freedom of assembly, association, movement, expression, religion and right to privacy and property.<sup>535</sup> In doing so, it provides explanatory notes containing interpretation of each of the foregoing rights. In this connection, it outlines specific legal considerations and factors to be taken into account when combatting terrorism. One such consideration highlighted by the Guidelines and Principles is the principle of legality. On that note, it reiterates that States should refrain from condemning individuals and groups for acts or omissions which do not constitute legally punishable offenses under national or international law as defined by clear and precise provisions in the law. In addition, it instructs that such offenses must be made accessible to the public and non-discriminatory.<sup>536</sup> On the same note, the Rapporteurship advises States to adhere to the principle of judicial independence by ensuring the independence of judges and courts.<sup>537</sup>

The Principles and Guidelines offer holistic instructions to governments on how to avoid falsely labelling human rights defenders as terrorists and mistreating them as such. Notably, they also prescribe what States should do to provide protection to victims of terrorism, those testifying as witnesses in terrorism trials, those investigating terrorism-related human rights violations, and their families.<sup>538</sup> As a starting point, States shall ensure that witnesses and victims of counter-terrorism-related human rights abuses; those conducting any investigation into human rights abuses; judicial officers; journalists and media practitioners; other human rights defenders; and their family members, in particular women and children, are protected from violence, threats of violence, or any other form of intimidation or reprisal from a State agent or other private individual. This must encompass the full respect and protection of their rights to life, physical security and privacy, and must also ensure that any protective measures adopted are compatible with the accused person's right to a fair and public hearing.<sup>539</sup>

Other rights of relevance to the protection and work of HRDs explained by the Guidelines and Principles are the right of access to information and the right to truth.<sup>540</sup>

### **Model Law for the Recognition and Protection of Human Rights Defenders**

The objective of the Model Law is to provide guidance to States and human rights actors on how to "full(y) and effective(ly)" implement the UN Declaration on Human Rights Defenders.<sup>541</sup> In meeting this objective, it explains the rights of human rights defenders, how those rights are violated and what are States' obligation to respect, promote, protect and fulfill the rights of HRDs. (Note the addition of word "promote", which is also used in the UN Declaration).

It also provides a definition of HRDs consistent with the definition of human rights defenders espoused by the UN Declaration, which describes a human rights defender as any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for

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<sup>534</sup> Ibid. P10

<sup>535</sup> Ibid.

<sup>536</sup> Ibid. p 15

<sup>537</sup> Ibid.

<sup>538</sup> Ibid. p 34

<sup>539</sup> Ibid.

<sup>540</sup> Ibid. pp 36-37

<sup>541</sup> Remy Ngoy Lumbu, Special Rapporteur on Human Rights Defenders, 'Compendium (n 453)

the protection and realization of human rights and fundamental freedoms, at the local, national, regional and international levels.<sup>542</sup> By subscribing to the same definition of HRDs as given by the UN Declaration, the African Human Rights System, through the Rapporteur, demonstrates that it is inclined to uphold the absoluteness and universality of the rights of HRDs as individuals. This submission is based on the awareness that the ACHPR provides for people's rights in addition to individual rights. Furthermore, given the entrenchment in Africa of some cultural practices which violate human rights and against which some HRDs advocate, this could be interpreted as a ray of hope for HRDs. However, the reality of persistent and increased attacks against HRDs in Africa undermines this conclusion.

The Model Law spells out measures that States should take and strategies they should employ in the development of laws, policies, measures and institutions at the national level for the promotion of the work of HRDs and for their protection.<sup>543</sup> Generally, it urges States, as part of their obligation to respect, promote, protect and fulfill the rights of HRDs, to take all necessary measures to ensure that the human rights and fundamental freedoms explained in the Model Law are effectively guaranteed and ensured; to ensure that that laws, policies and programs are consistent with those rights, and that HRDs are able to undertake and that HRDs are able to undertake their activities and work in an environment without any impediment.<sup>544</sup>

Specifically, the Model Law implores States to facilitate the work of HRDs by giving them access to places and information; prevent intimidation and reprisal by public or private actors; ensure protection against arbitrary and unlawful intrusion into the privacy of HRDs; conduct investigation whenever the right of HRDs are violated or when there is reasonable grounds to believe that those rights have been violated and ensure effective remedy and full reparation.<sup>545</sup>

The Model Law widens the scope of State responsibility by insisting, *inter alia*, that States have a responsibility to make intimidation and reprisal an offense; to conduct human rights education among public authorities and everyone within their jurisdiction, and to implement protection and urgent protection measures for HRDs.<sup>546</sup> The Law is a tool which States can consult guidance help in setting up measures to protect HRDs defenders in Africa. It is also a useful tool for HRDs to use in carrying out their activities more effectively.<sup>547</sup>

The development and dissemination of the above standards have persuaded some States to adopt legislations and establish mechanisms for the protection of human rights defenders. Despite this achievement, human rights defenders in Africa continue to be abused, assaulted, oppressed and killed. These violations are mostly perpetrated or condoned by State authorities, including in countries that have developed mechanisms for the protection of HRDs. Amnesty International reports the illegal arrest, detention and freezing of bank accounts of HRDs and human rights NGOs in Burundi, Tanzania, Cote D'Ivoire, Guinea, Niger, Burkina Faso and Uganda.<sup>548</sup> Other forms of violations include the murder, abduction and forced disappearance of HRD In Mali and Mozambique; the use of the legal system to persecute HRDs in Mali and

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<sup>542</sup> Ibid. p 118

<sup>543</sup> Ibid.

<sup>544</sup> Ibid. p 124

<sup>545</sup> Ibid. pp 125-127

<sup>546</sup> Ibid. 128

<sup>547</sup> Ibid.

<sup>548</sup> Amnesty International, 'African Report 2020', available at <https://www.amnesty.org/en/location/africa/report-africa/>, accessed on 7 March 2022

Uganda; violent oppression of protests and excessive use of force in Nigeria, Ethiopia, Burkina Faso, Angola, Kenya, South African, Uganda, and Togo, among others.<sup>549</sup>

### **Impacts of the Special Rapporteurship on Human Rights Defenders**

As a result of the above activities undertaken by the Special Rapporteurs in fulfillment of their mandate, several achievements have been made in the protection of HRDs. Notably, through their reports and recommendations, the Special Rapporteurs have expanded the substantive rights of HRDs by providing progressive interpretations of those rights, in many instances requiring States to take proactive measures to protect those rights instead of waiting for them to be violated. Similarly, the Rapporteurs have contributed to the protection of HRDs by developing additional standards to guide States and HRDs in the protection of the rights of HRDs and the defense of human rights respectively. They have also been innovative in the execution of their promotional and protective functions. These include the practice of holding consultations with HRDs to identify their problems and protection needs. This practice are crucial to the protection of HRDs because by understanding the protection needs of HRDs, this ensures that HRD protection measures are not developed in a vacuum, but are adopted to respond effectively to specific challenges facing HRDs. The consultations with HRDs, are often held during the Rapporteur's visits to Member States. The results of these visits are the growing recognition of the Special Rapporteurship by more Member States; strengthening of the regional and sub-regional networks of HRDs at the continental level, thereby engendering a collaborative relationship between those networks.<sup>550</sup> Eventually, this leads to a stronger solidarity among HRDs which may augment or highlight the protection provided (or not provided) by national and regional human rights bodies.

In spite of the aforementioned progress made in the area of HRD protection in Africa, the Rapporteurship continues to be confronted with series of challenges. One of such challenges is the failure of State Parties to respond to communications and recommendations meant for the protection of HRDs.<sup>551</sup> Another is the refusal of some States to allow country visits from the Special Rapporteur.<sup>552</sup>

## **4.5 Achievements and Challenges**

The African Human Rights System has made numerous procedural<sup>553</sup> and normative<sup>554</sup> achievements in the protection of human rights defenders.

### **Procedural Achievements**

One outstanding achievement is the introduction of the system whereby cases are filed by email. For example, both the *Niran Maloulu* and *Avocats Sans Frontieres* cases were filed by

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<sup>549</sup> Ibid.

<sup>550</sup> Ibid. 12-13

<sup>551</sup> Ibid. p 13-14

<sup>552</sup> Ibid.

<sup>553</sup> Chidi Anselm Odinkalu, 'Africa's Regional Human Rights System: Recent Developments and Jurisprudence' (2002) 2 Hum Rts L Rev 99, 116

<sup>554</sup> Center for Human Rights, University of Pretoria, 'A Guide to the African Human Rights System', (2016) Pretoria University Law Press, pp 4-5

email.<sup>555</sup> Considering the geographical vastness of the continent of Africa and the time it takes for mail to travel by post from one region to another, this development quickens the pace of filing and processing cases.<sup>556</sup>

Secondly, even where friendly settlements have been disputed or failed, the African Commission has proceeded to render decisions on the merit, instead of consuming additional time to refer those communications to the Court.<sup>557</sup>

### **Normative Achievements**

Makau Mutua has described the African Charter as “a departure from the narrow formulation of other regional and universal human rights instruments.”<sup>558</sup> This acclaim is in apparent reference to the innovative manner in which the Charter and the System’s jurisprudence have introduced and defined new rights, resulting in the “three generations of rights.”<sup>559</sup> They include civil and political rights; economic and social rights,<sup>560</sup> and the people and group right to development, free disposal of natural resources and self-determination.<sup>561</sup>

In the same token, another groundbreaking achievement by the African System is the origination of the right to development. The African Charter is the only binding international instrument to recognize this right.<sup>562</sup> This was accomplished in the Endorois Case, where the Commission found the Kenyan government to be in violation of the culture, religion, tradition and way of life of the Endorois People.<sup>563</sup> This progressive interpretation of the Charter has provided guidance to States on a number of issues affecting HRDs. One State, Nigeria, has incorporated the Charter into its national law.<sup>564</sup>

In light of these normative and jurisprudential developments, a number of states have enacted legislations specifically providing protection for HRDs.<sup>565</sup> They include Burkina Faso, Cote D’Ivoire, Mali and Sierra Leone.<sup>566</sup>

### **Challenges of the African Human Rights System in the Protection of Human Rights Defenders**

While the African Human Rights System has been innovative jurisprudentially and normatively in providing protection for human rights defenders, it is not without shortcomings. A few of the challenges confronting the System in providing protection to HRDs are discussed in this segment.

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<sup>555</sup> C.A. Odinkalu (n 555 Supra)

<sup>556</sup> Ibid.

<sup>557</sup> Ibid.

<sup>558</sup> Makau Mutua, ‘The African Human Rights System: A Critical Evaluation’ (n 440)

<sup>559</sup> Ibid.

<sup>560</sup> Ibid.

<sup>561</sup> Center for Human Rights, University of Pretoria, (n 556 Supra)

<sup>562</sup> Ibid.

<sup>563</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and People’s Rights, Comm. No. 276 / 2003, para. 277-288

<sup>564</sup> Center for Human Rights, University of Pretoria (n 380)

<sup>565</sup> Center for Justice and International Law (CEJIL) (n 357 Supra) and Protection International (n 254 Supra) 18

<sup>566</sup> Ibid.

Article 55 of the Charter allows communications from individuals and NGO to be filed with the Commission.<sup>567</sup> The Charter is silent on the issue of standing and the Rules of Procedure does not require victim status.<sup>568</sup> This means that a communication may be submitted by the victim or by any other individual or NGO on their behalf, even without their consent; even if the individual or NGO is not a citizen or registered in the country against whom the complaint is brought.<sup>569</sup>

While the above conditions appear prima facie favorable to HRDs, the pre-conditions for the submission of individual and NGO communications pose a serious detriment to their protection of HRDs. For example, in order for individual and NGO communications to be filed, certain requirements must be met, as outlined by Article 56. They include the disclosure of the name of the Applicant “even if the latter requests anonymity... exhaustion of domestic remedies... submission within reasonable period of time, among others.”<sup>570</sup> On the issue of domestic remedy, the Commission overcame this hurdle when it provided yet another progressive interpretation of the requirement. In the Jawara Case, it held that domestic remedy was not available to the Applicant, a former President, who had been overthrown in a military coup.<sup>571</sup> The Commission believed that the general atmosphere of threat in the territory of the State Party, coupled with the arrests, detention and killing of the Petitioner’s supporters after he was overthrown, marked the non-existence of domestic remedy.<sup>572</sup> It is worth noting that the Applicant in this case was the President of Gambia who played a pivotal role in the development and adoption of the African Charter by hosting the meeting of the African Commission that led to the adoption of the document in Banjul, The Gambia.<sup>573</sup>

Similarly, the Protocol Establishing the African Court on Human and People’s Rights provides that the Court may allow individuals and NGOs recognized by the Commission to file cases directly before it.<sup>574</sup> However, even if an individual or NGO fulfills all of the requirements as prescribed in Article 56, Article 34(6) of the Protocol Establishing the Court provides that the Court will not entertain said petition unless the accused State has submitted a declaration allowing individual and NGO petitions to be heard against it.<sup>575</sup> This means that even if the State concerned has ratified the Protocol establishing the Court but has not deposited such a declaration, the case will not proceed. Thus far, only eight States have filed such declarations. They are Burkina Faso, The Gambia, Ghana, Mali, Malawi, Tunisia, Guinea Bissau and Niger.<sup>576</sup>

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<sup>567</sup> ACHPR Article 55: “Before each session, the Secretary of the Commission shall make a list of communications other than those of the State Parties to the present Charter...”

<sup>568</sup> Center for Human Rights, University of Pretoria, (380)

<sup>569</sup> Ibid.

<sup>570</sup> ACHPR Article 56

<sup>571</sup> Sir Dawda K. Jawara v Gambia, Communication 147/95 and 149/96 African Commission on Human and People’s Rights, available at <http://hrlibrary.umn.edu/africa/comcases/Comm147-95.pdf>, accessed on 7 March 2022

<sup>572</sup> Ibid.

<sup>573</sup> African Commission on Human and People’s Rights, Press Statement on the Death of Sir Dawda K. Jawara, available at <https://www.achpr.org/pressrelease/detail?id=433>, accessed on 7 March 2022

<sup>574</sup> Protocol to the African Charter Establishing the Court of Human and People’s Rights Article 5(3)

<sup>575</sup> Ibid. Article 34(6)

<sup>576</sup> African Court on Human and People’s Rights, ‘The Republic of Guinea Bissau becomes the eighth country to deposit a declaration under Article 34(6) of the Protocol Establishing the Court’, available at <https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit>, accessed on 6 March 2022

The Article 34(6) pre-requisite imposes limitations on the rights of HRDs to gain access to effective remedy at the level of the continent's regional human rights adjudicatory body. States may abuse this sort of immense power by preventing individuals and NGOs, who fit the category of HRDs, from instituting petitions against them.<sup>577</sup>

El Sheikh asserts that Article 34(6) was a compromise provision intended to encourage States to ratify the Protocol without necessarily permitting the Court to have jurisdiction over individual and NGO petitions against them.<sup>578</sup> I fully agree with his assessment that in order to provide an "additional outlet"<sup>579</sup> for the protection of human rights (in general and of human rights defenders in particular), States will have to grant the Court such jurisdiction.

Another feature of the African Human Rights System that hampers the rights of HRDs is the "claw back" clauses.<sup>580</sup> These are clauses in the African Charter which, while guaranteeing certain fundamental rights, withhold the full exercise of those rights by employing such clauses like "except for reasons and conditions previously laid down by law...for the protection of national security..." It must be noted that every international human rights instrument provides for derogation. That is because all human rights are not absolute. As discussed in Chapter Two supra, some human rights are subject to limitations based on grounds such as the protection of public order, health, morals, etc. In this token, the ACHPR must specify which rights are absolute and which ones are permitted to be derogated from, instead of maintaining these "claw back" clauses. The "claw back" clauses have generated debate among human rights scholars regarding whether or not it bolsters or undermines the enjoyment of the rights guaranteed in the ACHPR.

Some have opined that the clauses are based on the Charter's preoccupation with duties (the duty of the individual to other individuals, the State, the community, family and society, and the duty of the State to its subjects.)<sup>581</sup> These argue that the "claw back" clauses allow States to suspend many fundamental rights in their domestic legislations. H.W.O Okoth describes these clauses as the "formulation, entrenchment and legitimation of State rights against the rights of individuals and peoples."<sup>582</sup>

Mutua contends that these arguments are mistaken because they suggest that individuals should not have any duties to the State.<sup>583</sup> While he concedes that many African states have appalling human rights records, he notes that this has not been due to their adherence to the concept of duties, but rather to the insecurity of regimes whose political classes have no sense of national interest and are willing to engage in any kind of violation, including murder, to retain state power.<sup>584</sup>

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<sup>577</sup> Abdelsalam A. Mohamed, 'Individual and NGO Participation in Human Rights Litigation Before the African Court on Human and People's Rights: Lessons from the European and Inter-American Courts on Human Rights (1999) *Journal of African Law* 43:2 pp 201-213

<sup>578</sup> *Ibid.* citing El Sheikh

<sup>579</sup> *Ibid.*

<sup>580</sup> Mutua (n 440 Supra)

<sup>581</sup> African Charter on Human and People's Rights, Articles 1, 25-29

<sup>582</sup> Mutua (n 440 Supra) citing H.W.O. Okoth "Human and Peoples' Rights: What Point is Africa Trying to Make?" in *Human Rights and Governance*, 74, 78-79

<sup>583</sup> *Ibid.*

<sup>584</sup> *Ibid.*

Another challenge is that the Special Rapporteur serves in dual capacity as Commissioner and Special Rapporteur.<sup>585</sup> This adversely affects the amount of time he/she has to commit to the work of protecting human rights defenders.<sup>586</sup>

Resources are also inadequate to execute the functions of the Special Rapporteur, and although state consent is required for country visits, it is often not given.<sup>587</sup>

Like the Inter-American System, the African System lacks any mechanism for enforcement or tracking of State compliance.<sup>588</sup> Again, similar to the Inter American Human Rights System, all of the judges, with the exception of the President, serve on a part time basis.<sup>589</sup> This, combined with the lengthy time lapse between the submission of complaint and the rendering of decisions, has resulted in a back log of cases.<sup>590</sup> These shortcomings seriously undermine the protection of human rights defenders, as “Justice delayed, said Gladstone, is just denied.”<sup>591</sup>

## 4.6 Concluding Analysis

The African Human Rights System has made innovative contributions to human rights and protection of HRDs. These have emerged through, inter alia, its progressive interpretation of State responsibility for human rights norms enshrined in the African Charter and other international human rights instruments; introduction and definition of new rights, and the development of standards including guidelines and model laws. These efforts have led some States to adopt legislations that protect human rights defenders and criminalize attacks against them and their work.

In spite of the foregoing achievements, human rights defenders in Africa continue to be increasingly abused, assaulted, oppressed and killed. These violations are mostly perpetrated or condoned by State authorities, including in countries that have developed mechanisms for the protection of HRDs. These developments underscore the need for more robust measures to protect HRDs, in addition to the available standards and mechanisms.

Impunity and lack of adequate domestic remedy constitute major factors contributing to the attacks against HRDs. In an effort to address this phenomenon, the African Human Rights System, through the Office of the Special Rapporteur for Human Rights Defenders, the African Commission and the African Court, has developed standards and provided interpretations on the rights of HRDs as well as guidance to States on their responsibility to prevent threats and attacks against HRDs and their specific responsibility to investigate threats and attacks as well as provide effective remedy by punishing the perpetrators. Additionally, it has instituted provisional and precautionary measures to protect HRDs facing imminent threat or danger to life and limb. While these frameworks and measures have been innovative in expanding the scope and meaning of rights of HRDs, the low rate of compliance by Member States and the

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<sup>585</sup> Center for Human Rights, University of Pretoria, (n 556 Supra) p 33

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

<sup>588</sup> Mutua (n 440 Supra) p 20

<sup>589</sup> Ibid.

<sup>590</sup> Center for Human Rights, University of Pretoria, (n 556 Supra) 40

<sup>591</sup> Forbes Quote, ‘William E. Gladstone: Justice delayed is justice denied.’, available at

<https://www.forbes.com/quotes/9805/#:~:text=Justice%20delayed%2C%20is%20justice%20denied,Gladstone%20%2D%20Forbes%20Quotes> accessed on 7 March 2022



increasing attacks against HRDs, mostly by State authorities, brings into question their efficacy in protecting HRDs.

In order to make the System more responsive to the needs of HRDs, the AU must hire one or more full time Special Rapporteur(s) for Human Rights Defenders. More judges must also be hired as well as on a full time basis. This will afford them sufficient time to focus on the issues of HRDs and provide more effective remedy which is lacking in the HRDs' home countries, for which reason they revert to the African Human Rights System. One of the components of effective remedy is the speedy delivery of justice.

There is also a need to conduct a thorough revision of the Charter and clearly spell out which rights are derogable and which rights are not derogable. In that case, there should be provisions detailing which rights States can derogate from, when, and why.<sup>592</sup>

While the Commission has been proactive in executing its promotional mandate and engaging with HRDs, there is a need to invent strategies to reach out to HRDs in the rural areas, who have the greatest need for protection, awareness and empowerment by virtue of being far removed from development, enlightenment and the public eye.<sup>593</sup>

In order to overcome the inability of HRDs, i.e. individuals and NGOs to seek redress directly at the level of the African Court because of the requirement of a declaration from States to that effect, the Court should resort to Article 33 of the Protocol (Establishing the Court), which gives it the power to draw up its own rules and determine its own procedures.<sup>594</sup> This opportunity could be used by the Court to introduce provisions governing circumstances under which it would entertain individuals and NGOs which fit the definition of HRDs, to appear before it, whether to directly contest a violation of a Charter right or as amici curiae.<sup>595</sup>

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<sup>592</sup> Ibid. 8

<sup>593</sup> F. T. Abioye, 'The African Commission on Human and Peoples' Rights: Achieving Its Purpose' (2014) 39 S Afr YB Int'l L 80

<sup>594</sup> Abdelsalam A. Mohamed, 'Individual and NGO Participation in Human Rights Litigation Before the African Court on Human and People's Rights (n 579 Supra)

<sup>595</sup> Ibid.

## **5 The European Union Response to the Protection of Human Rights Defenders**

Since the setting up of the UN regime for the protection of human rights defenders, the international community has witnessed a “growing momentum”<sup>596</sup> among different actors for the implementation of protection regimes for human rights defenders worldwide.<sup>597</sup> Accordingly, other international, regional and supranational organizations have established standards and mechanisms for the protection of HRDs at risk.<sup>598</sup> One such organization is the European Union (EU). This chapter outlines a few of the standards and initiatives undertaken by the EU. This is done with the aim of examining their efficacy in protecting human rights defenders in the Global South.

The discussion of the EU response to the protection of HRDs is conducted from the perspective of the protection it provides to HRDs both within the Global South through its delegations and Member State Missions, as well as when HRDs, as a last resort, have to flee their home countries due to situations of extreme urgency and danger such as immediate threats to their lives or personal integrity and that of their families. The chapter is not intended to conduct an analysis of the European Human Rights System as a whole as it relates to the protection of HRDs; rather, its aim is to use the EU as a case study in an attempt to identify and analyze the protection measures instituted by supranational organizations like the EU for the protection of HRDs. This chapter is not concerned with the nuances, merits and de merits of the different international relocation/protection seeking regimes operated by different international organizations. Its purpose is to investigate the efficacy of the practice of HRDs relocating, under the auspices of the EU, from their home countries to another, whether as a means of protecting them from danger or for the purpose of rest or respite; whether voluntary or as a result of extreme danger to the lives and physical integrity of them and their families. Hence, the chapter conducts a holistic examination of the advantages and disadvantages of relocating HRDs to different countries.

The next sub-chapter explores the EU Guidelines on Human Rights Defenders. Sub-Chapter 5.2 considers practical measures taken by EU Member State Delegations and EU Missions to implement the Guidelines. These include the granting of emergency/humanitarian visas, temporary relocation and asylum as well as financial support.

### **5.1 The EU Guidelines on Human Rights Defenders**

The EU’s agenda on human rights and democracy comprise the EU Strategic Framework and Action Plan on Human Rights and Democracy, different EU Guidelines, and various policy documents.<sup>599</sup> Since 1998, 11 separate Guidelines, including the EU Guidelines on Human Rights Defenders, have been developed under the EU’s human rights agenda.<sup>600</sup> The EU

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<sup>596</sup> Nah, ‘Protecting Human Rights Defenders at Risk (n 18 Supra)

<sup>597</sup> Ibid.

<sup>598</sup> Nah et al, (n 32 Supra)

<sup>599</sup> Jan Wouters and Marta Hermez, ‘EU Guidelines on Human Rights as a Foreign Policy Instrument: an Assessment’ Working Paper No. 170, Written for and published by Leuven Centre for Global Governance Studies and Institute for International Law (February 2016)

<sup>600</sup> Ibid.

Guidelines on Human Rights Defenders was developed in 2004<sup>601</sup> and updated in 2008.<sup>602</sup> According to the EU, the Guidelines, developed within the context of its Common Foreign and Security Policy<sup>603</sup>, are in furtherance of human rights and other norms upon which the EU is founded, as pronounced in Article 2 of the Treaty on the Formation of the European Union (TFEU).<sup>604</sup> In this regard, the Guidelines set forth how the EU supports and protects human rights defenders in “non-EU countries”,<sup>605</sup> with the objective of creating an enabling environment for them to “operate freely”.<sup>606</sup>

### **Highlights of the EU Guidelines on Human Rights Defenders**

The Guidelines spell out interventions of the Union on behalf of human rights defenders at risk and suggests practical actions that will be taken to implement the Guidelines, i.e. to protect and support HRDs.<sup>607</sup>

Addressed to EU Heads of Mission (HoM) and Heads of Delegations (HoD) in third countries, the Guidelines are intended to provide them guidance and practical suggestions as to how they, on behalf of the EU and its member states, should support and assist human rights defenders. As part of this endeavor, the Guidelines implores (HODs) to monitor the situation of human rights defenders in their countries of accreditation and submit periodic reports on same.<sup>608</sup> On the basis of these reports, the Council Working Party on Human Rights (COHOM)<sup>609</sup> is required to indentify situations that deserve the intervention of the EU.<sup>610</sup>

The Guideline affirms the EU’s commitment to work closely with other countries that also have policies to protect human rights defenders, and with human rights mechanisms of other regional organizations, such as the African Union (AU), the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe.<sup>611</sup>

### **Best Practices from the EU Guidelines on Human Rights Defenders**

Since the adoption of the Guidelines in 2004, the EU and Member States have taken series of measures aimed at institutionalizing and implementing the document.<sup>612</sup> These include developing and elaborating local strategies for the implementation of Guidelines in third

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<sup>601</sup> Ibid.

<sup>602</sup> Ibid.

<sup>603</sup> “Ensuring Protection: European Union Guidelines on Human Rights Defenders”, available at [https://eeas.europa.eu/sites/default/files/eu\\_guidelines\\_hrd\\_en.pdf](https://eeas.europa.eu/sites/default/files/eu_guidelines_hrd_en.pdf), accessed on 31 January 2022

<sup>604</sup> EUR LEX, the official website on EU Law, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133601>, accessed on 2 February 2022 citing Article 2

<sup>605</sup> A discussion of the relevance and implication of the “non-EU countries” designation is discussed in sub-chapter 3.3 of this paper

<sup>606</sup> Ibid.

<sup>607</sup> EU Guidelines (n 605 Supra)

<sup>608</sup> Ibid. para. 13

<sup>609</sup> The Working Party on Human Rights deals with human rights aspects of the external relations of the EU and supports the Council’s decision making process in this area.

<sup>610</sup> EUR LEX (n 606 Supra)

<sup>611</sup> Ibid.

<sup>612</sup> Karen Bennet, ‘European Union Guidelines on Human Rights Defenders: A Review of Policy and Practice towards Effective Implementation’ (2015) *The International Journal of Human Rights*, 19:7, 908-934, DOI10.1080/13642987.2015.1075303, available at <https://doi.org/10.1080/13642987.2015.1075303>, accessed on 2 February 2022, p 910

countries; increased coordination between EU representations and member state missions (MSMs) in the field; the setting up of EU Delegation (EUD) offices in field, and the appointment of Human Rights Defenders Liaison Officers to EU member state missions in 2010.<sup>613</sup>

The diplomats in the field have in turn taken various actions to effectuate the recommendations contained in the Guidelines. Specific approaches taken include accompanying HRDs to the airport to ensure security; monitoring HRD hearings and trials; providing financial and logistical support to HRDs in emergency situations; providing respite or health-related assistance to HRDs; questioning laws that criminalize HRDs and their work; developing European diplomats' outreach initiative to HRDs; requesting information from state authorities in cases of serious concern; supporting HRD protection networks; encouraging and facilitating HRD engagement with states and with national human rights institutions (NHRIs) and intervening through "quiet diplomacy" in serious situations involving HRDs, visiting HRDs in prison and issuing public statements condemning violations of the rights of HRDs.<sup>614</sup>

### **Legal/Normative Basis and Authority of the EU Guidelines on Human Rights Defenders**

The Guidelines are grounded in the UN Declaration on Human Rights. In fact, its definition of HRDs initially states and then expands on the definition of human rights defenders provided in Article 1 of the UNDHRD which defines HRDs as "individuals, groups and organs of society that promote and protect...human rights..." Complementing this definition, the Guidelines add that human rights defenders are those who "...seek the promotion and protection of civil and political rights as well the promotion, protection and realization of economic, social and cultural rights...also promote and protect the rights of groups such as indigenous communities."<sup>615</sup>

The reference to "indigenous communities" is quite praiseworthy because, as stated earlier in this chapter, it takes into consideration a category of persons who also advocate for environmental human rights, but who do not fall into the "professional" category of human rights defenders. Moreover, the reference to international human rights norms legitimizes the Guidelines, and by doing so, the EU tries to send the message that these Guidelines are not an attempt to export European values to Global South countries, but that they are based on global human rights standards.<sup>616</sup> Notwithstanding the reference to indigenous HRDs in the Guidelines, research suggests (as we shall elaborate further in this thesis), that this group of HRDs is marginalized during the implementation of the Guidelines, as they are far removed from the urban centers where renowned HRDs and human rights NGOs are located. These renowned HRDs and human rights NGOs are the ones who receive recognition, protection and support from the EU and its Member States in the implementation of the EU Guidelines.

The Guidelines also augment the Declaration on HRDs' list of activities in which human rights defenders engage. In addition to those already contained in the Declaration of Human Rights Defenders, it prescribes other activities such as "documenting violations; combating the culture

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<sup>613</sup> Ibid.

<sup>614</sup> Ibid. p 915

<sup>615</sup> EU Guidelines (n 605 Supra) Para. 3

<sup>616</sup> Wouters and Hermez (n 601 Supra) p 14

of impunity which entrenches repeated violations of human rights,... and mainstreaming human rights culture and information at the national, regional and international level.”<sup>617</sup>

As an indication of the momentum and commitment generated by the establishment of UN HRD protection mechanism, the EU Guidelines also express support for, and recognition of the HRC Special Procedures, in this case the Special Procedure on Human Rights Defenders. The EU demonstrates this support and recognition by encouraging states to accept country visits of the Special Rapporteur, allocating funds from the general EU budget to the OHCHR, among others.<sup>618</sup>

The magnanimity of the EU towards the wellbeing and protection of human rights defenders is particularly demonstrated in the ”practical supports”<sup>619</sup> programs put in place to assist HRDs at risk and in imminent danger. These practical measures include capacity building for human rights defenders and NGOs that promote and protect human rights defenders’ activities; financial and other resources to human rights defenders in third countries, and, most notably, the provision of ”swift assistance” including humanitarian visas and temporary relocation and shelter to EU member states.<sup>620</sup> These practical actions are further elaborated in the next sub-chapter below.

It is worth mentioning that the Guidelines, like UN Declaration on Human Rights Defenders, are not legally binding.<sup>621</sup> However, Wouters and Hermez believe that under customary international law, they can be considered as *opinio juris* of the EU and member states.<sup>622</sup>

### **Weaknesses of the Guidelines**

While some scholars and international NGOs claim that the EU Guidelines have prompted good practice by some EU Member State missions in a number of third countries,<sup>623</sup> others have identified lapses, particularly with respect to its dissemination and implementation. In a study conducted in three Global South Countries (Kyrgyzstan, Thailand and Tunisia) to assess the the implementation of the Guidelines, several factors were discovered to be hindering their effective implementation.<sup>624</sup> These include inter alia, limited awareness of the Guidelines by HRDs and EU diplomats; inconsistent/incoherent planning and implementation; marginalization of non-prominent HRDs and those in remote areas; ambiguity regarding the modes of engagement between HRDs and HRD Liaison Officers, and non-involvement of HRDs in the crafting of the Guidelines. This segment delves into the aforementioned gaps, and subsequently proposes steps that could be taken to remedy them.<sup>625</sup>

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<sup>617</sup> EU Guidelines (n 605 Supra) para. 4

<sup>618</sup> Ibid. para. 13

<sup>619</sup> Ibid. p 10 para. 14

<sup>620</sup> Ibid. para. 14

<sup>621</sup> Wouters and Hermez, (n 601 Supra) p 14)

<sup>622</sup> Ibid.

<sup>623</sup> Nah et al (n 32 Supra) p 410, citing Collier (2006), Front Line Defenders (2005) and Observation for the Protection of Human Rights Defenders (2006)

<sup>624</sup> Karen Bennet/European Parliament, 'Assessing the Implementation of the European Union Guidelines on Human Rights Defenders – The Cases of Kyrgyzstan, Thailand and Tunisia (2013), available at [Assessing the implementation of the European Union guidelines on human rights defenders \(europa.eu\)](#), accessed on 4

February 2022

<sup>625</sup> Ibid.

## Limited Awareness

It has been reported that knowledge of the Guidelines' recommendation is limited among diplomats and other stakeholders, especially HRDs.<sup>626</sup> In the above mentioned study, conducted by Bennet for the European Parliament, 48 participants<sup>627</sup> were interviewed, drawn from the ranks of human rights defenders, INGO experts on HRDs, EU officials, HoMs, and diplomats responsible for human rights and human rights defenders work in their missions.<sup>628</sup> Of the number of persons interviewed, only 16 reported having knowledge about the contents of the Guidelines; 8 reported having "some familiarity" (meaning vague understanding of the content)<sup>629</sup>; 13 reported having no knowledge, and 4 preferring not to make any comment.<sup>630</sup> Additionally, diplomats taking part in the study disclosed that they had not received any training which would equip them with knowledge or strategies for the implementation of the Guidelines.<sup>631</sup>

Muguruza and others believe that the variance in knowledge of the Guidelines from one diplomatic mission to another is due to the differences in the professional and academic background of the diplomats, as not all of them are human rights experts.<sup>632</sup>

The lack of awareness and knowledge of the Guidelines can be attributed to a number of factors or give rise to a number of conclusions. Most outstanding is the fact that it demonstrates a general lack of interest in, or priority for, human rights defenders in the scheme of EU foreign policy objectives.<sup>633</sup> In view of this, I agree with Rhodes that such oblivion to the Guidelines by the intended beneficiaries and those charged with its implementation undermines the overall response of Europe to the challenges facing HRDs and constitutes a failure on their part to fully meet their international obligations as it relates to the protection of human rights defenders.<sup>634</sup>

## Incoherent Planning and Implementation

Another factor besetting the effective implementation of the Guidelines is the lack of consistency in their implementation as a result of poor coordination and weak monitoring.<sup>635</sup> The European Parliament has expressed disappointment at such disjointedness in the EU's overall strategy on external relations, including human rights and HRDs protection, and called on the European Council to undertake a "truly farsighted, ambitious and coherent strategy."<sup>636</sup>

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<sup>626</sup> Bennet, European Union Guidelines: Policy and Practice Towards Effective Implementation (n 614)

<sup>627</sup> Bennet, Assessing the EU Guidelines, (n 626 Supra)

<sup>628</sup> Ibid. 21

<sup>629</sup> Bennet, European Union Guidelines, (n 614) 914

<sup>630</sup> Bennet, Assessing the EU Guidelines (n 626 Supra)

<sup>631</sup> Ibid. 913

<sup>632</sup> Churruca Muguruza et al, 'Report Mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support, FRAME Deliverable 12.1 (2014) Utrecht University Repository, available at [Report mapping legal and policy instruments of the EU for human rights and democracy support, FRAME Deliverable 12.1 \(uu.nl\)](#), accessed on 6 February 2022

<sup>633</sup> Ibid.

<sup>634</sup> Aaron Rhodes, 'Protecting Human Rights Defenders: A Priority for the OSCE Participating States' (2006) 17 Helsinki Monitor 295

<sup>635</sup> Amnesty International (2008), cited by Nah et al (n 5)

<sup>636</sup> European Parliament, 'Resolution 16 June 2010 on EU 2020', available at [Texts adopted - EU 2020 - Wednesday, 16 June 2010 \(europa.eu\)](#), accessed on 6 February 2022

Although EU Missions were urged to devise common local strategies to strengthen coordination and cooperation for the promotion of the Guidelines, and to engage national authorities in the implementation of activities on behalf of HRDs in a sustainable way<sup>637</sup>, that goal has not been forthcoming. When the Council convened in 2007 to review progress with respect to the implementation of the local strategies, only 59 out of 124 missions reported having developed local implementation strategies.<sup>638</sup> This low rate of response to the recommendations is compounded by the fact that various EU country missions have crafted their own “mission specific” human rights actions plans, completely divergent from those of their colleagues.<sup>639</sup>

In spite the foregoing, Wouters and Hermez insist that the fact that the EU and its member states can adopt Guidelines on the subject of human rights defenders is indicative of EU member states finding a common moral ground...on certain human rights issues.”<sup>640</sup> This “common value”, they argue, overrides every other discrepancy.<sup>641</sup>

The lack of consistency in rolling out the Guidelines have been attributed to several to a host of possible factors. Key among them is the ‘gap’ that exists between ‘headquarters’ and field missions.<sup>642</sup>

### **Marginalization of Non-Prominent HRDs and Those Working in Remote Areas**

Human Rights Defenders working in remote areas make enormous contributions to the realization of economic, social and cultural rights, including the rights to a safe, clean, healthy and sustainable environment; health, food, among others. The reason is that many of these HRDs are peasants, members of indigenous and local communities, advocating for the conservation of their land, environment, resources and cultural heritage against destructive projects.<sup>643</sup> They generally become HRDs by “accident” or “necessity”.<sup>644</sup> The fact that they live and work in rural communities while challenging powerful state and non-state actors, heightens their vulnerability.<sup>645</sup>

Owing to the foregoing factors, the marginalization of these “non-prominent” or “unestablished” HRDs in any human rights defenders protection project is counter-productive, in that without their work, the prominent national and international non-governmental organizations as well as the international international community will be oblivious to much needed information regarding most of the crucial human rights needs and violations taking place in areas where they are unable to go.<sup>646</sup>

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<sup>637</sup> Council of the European Union, ‘Draft Council Conclusion on the First Review of the Implementation of the Implementation of the EU Guidelines on Human Rights Defenders, 101111/6, Brussels, (6 June 2006), available at <http://register.consilium.europa.eu/pdf/en/06/st10/st101111.en06.pdf>, accessed on 6 February 2022 pp 11-12

<sup>638</sup> Bennet, European Union Guidelines (n 614) 910

<sup>639</sup> Ibid.

<sup>640</sup> Wouters and Hermez, (n ) p 7

<sup>641</sup> Ibid.

<sup>642</sup> Ibid.

<sup>643</sup> Larsen et al, ‘Understanding the Environmental Human Rights Crisis’ (n 44 Supra)

<sup>644</sup> Forst, Report of the Special Rapporteur on HRDs, (n 31 Supra)

<sup>645</sup> Ibid.

<sup>646</sup> Rhodes (n 636 Supra)

In the Bennet/European study mentioned supra, some HRDs falling into the above category accused the diplomats of pick(ing) and choos(ing) which HRDs to support and work with.<sup>647</sup> They expressed pessimism about any new, creative ideas being contributed to the process.<sup>648</sup> Many of them were not aware of the Guidelines and its recommendations, nor were they aware that they could contact the EU for protection.<sup>649</sup>

The exclusion of certain human rights defenders from the HRD responses and protection measures also fails to take into account the peculiar vulnerabilities and needs not only of HRDs working in remote geographical locations, but of other groups of HRDs who are equally made vulnerable by the fact that they challenge “institutional societal discrimination”<sup>650</sup>. Examples include women human rights defenders (WHRDs) and HRDs working on subjects pertaining to LGBTI.<sup>651</sup>

### **Ambiguity of the Modes of Engagement Between HRD Liaison Officers and HRDs**

Although some INGOs have hailed the appointment of HRD Liaison Officers as a significant step in the implementation of the Guidelines, it was found that the appointment of focal persons for HRDs did not result in increased engagement of the diplomats with the HRDs and vice versa.<sup>652</sup> One explanation for this is that most of the diplomats find it impractical or even impossible to mainstream HRD related activities into their main diplomatic responsibilities, which is, “focusing on bilateral relations”<sup>653</sup>. In fact, the mode of engagement, i.e. “liaising” is not defined in the guidelines. Hence, many HRDs do not know how to engage with HRD Liaison Officers, as in many instances the busy itineraries of these diplomats make them inaccessible.<sup>654</sup>

While some HRDs fear reprisals from non-State actors if seen interacting with foreign Western diplomats, others simply do not know how to initiate contacts within diplomatic circles, a “world they are unfamiliar and uncomfortable with”. This is further exacerbated by the language and cultural barriers.<sup>655</sup>

In the absence of a clear *modus operandi* to guide interaction between the HRD Liaison officers and the HRDs, who are the prime beneficiaries of their protection efforts, the objective of EU Guidelines will continue to be hampered.

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<sup>647</sup> Bennet/European Parliament, ‘Assessing the Implementation of EU Guidelines’ (n 626 Supra) p 916 - 917

<sup>648</sup> Ibid.

<sup>649</sup> Ibid. Pp. 48-56

<sup>650</sup> Bennet et al, ‘Critical Perspectives on the Security and Protection of Human Rights Defenders’ (2015) *The International Journal of Human Rights*, Vol. 19, No. 7, 883, 891, available at [Full article: Critical perspectives on the security and protection of human rights defenders \(tandfonline.com\)](#), accessed on 7 February 2022

<sup>651</sup> Bennet, European Union Guidelines, (n 614 Supra) p 918

<sup>652</sup> Ibid. P 914

<sup>653</sup> Wouters and Hermez (n 601 Supra) p 17

<sup>654</sup> Bennet/European Parliament, ‘Assessing the Implementation, (n 626 Supra)

<sup>655</sup> Ibid.



## **5.2 Practical Measures to Implement the Guidelines/Protect Human Rights Defenders in the Global South**

Beyond the institutionalization of the HRD protection regime and the establishment of diplomatic channels of engagement with HRDs as elaborated in the previous sub-chapter, the EU has undertaken further steps aimed at providing practical protection and support to human rights defenders. This sub-chapter surveys a few of those measures, with a view of analyzing the overall human rights implications of those interventions, both for the protection of HRDs and for the promotion and protection of human rights in general.

At this juncture, it is worth noting that the list of interventions discussed herein is by no means exhaustive. There are dozens of international NGOs and human rights organizations involved in an array of programs assisting human rights defenders at risk and HRDs in general. Some of these programs are distinct, some similar to the ones being carried out by the EU. However, due to the time bound nature of this research, and due to the fact that the EU and its member states have been "particularly active" in providing protection to HRDs in the Global South since the setting up of the UN's human rights defenders mechanisms in 1998<sup>656</sup>, the EU and its members states are being used to represent Western interventions on behalf of HRDs in the Global South.

### **5.2.1 Emergency/Humanitarian Visas, Temporary Relocation and Asylum**

In addition to the threats and attacks against the lives and bodily integrity of HRDs, they also experience pressure and stigmatization from society as a result of their work.<sup>657</sup> For instance, people who lose their jobs because the company they worked for has been closed down as a result of the advocacy of HRDs tend to abhor the HRD(s) responsible and their work.<sup>658</sup> They and their families therefore become the object of resentment from their own communities and fellow citizens, thereby causing them to lose their legitimacy and status in society. These kinds of phenomena often drive HRDs into a state of psychological trauma, creating the necessity for them to leave their environments in order to escape the threats, reprisals, attacks. It also becomes necessary for them to rest and recover physically and psychologically.<sup>659</sup> Thus, HRDs seek or are offered emergency visas, temporary relocation and asylum.<sup>660</sup>

#### **Background to the EU's Asylum, Emergency Visa and Relocation Program**

The European Commission has demonstrated interest in supporting temporary relocation and asylum of HRDs at risk since 2012.<sup>661</sup> This support is channeled through the EU Human Rights

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<sup>656</sup> Donders (n 67 Supra) 285

<sup>657</sup> Salome Nduta and Patrick Mutahi, SSOAR 'Relocation Initiatives and their Impact on Home Communities: A Case Study of Kenyan Human Rights Defenders' A Research Report (2020), (7) available at . <https://doi.org/10.17901/AKBP1.05.2020>, accessed on 8 February 2022

<sup>658</sup> Ibid.

<sup>659</sup> Ibid.

<sup>660</sup> Ibid.

<sup>661</sup> Sanna Eriksson, 'Temporary Relocation in an Academic Setting for Human Rights Defenders at Risk: Good Practices, Lessons Learned and Challenges' (2018) (10), 482-507, *Journal of Human Rights Practice*, available at [Temporary Relocation in an Academic Setting for Human Rights Defenders at Risk: Good Practice Lessons](#)

Defender Relocation Platform operated by ProtectDefenders.eu and the EU HRD Mechanism.<sup>662</sup> While temporary relocation initiatives are based both in the Global South and the Global North, programs in the Global South tend to relocate HRDs in their own countries or regions. On the other hand, the Global North relocation programs, also known as Temporary International Relocation Initiatives (TIRIs), relocate HRDs from around the world in the Global North.<sup>663</sup>

In 2010 the European Parliament adopted a resolution on EU policies in favor of human rights defenders.<sup>664</sup> Article 39 of the Resolution requests member states to issue emergency visas for HRDs and members of their families.<sup>665</sup> Furthermore, the same article implores states to accompany such visas with ...”measures of temporary protection protection and shelter in Europe for human rights defenders, possibly providing for financial resources to shelter human rights defenders, as well as accompanying programs (human rights activities, lecturing in European universities, etc.”<sup>666</sup>

A large percentage of the of the HRD relocation initiatives ongoing in Europe are either supported by the EU or under the auspices of the EU. During a mapping of organizations involved in HRD relocation programs in 2012, it was found that there were 50 TIRIs existing at that time.<sup>667</sup> In 2018, the EU Human Rights Defenders Relocation Platform, which is the custodian and coordinator of the program, had a membership of 49 organizations.<sup>668</sup> The TIRIs run by these organizations vary in activities, and they cater to HRDs of all backgrounds, from indigenous HRDs to professional HRDs.<sup>669</sup> Some of them specialize in supporting specific categories of HRDs. One of the largest of such programs in Europe, run by NGOs but funded by the EU, is the Shelter City Initiative coordinated by Justice and Peace Netherlands.<sup>670</sup> There are a total of 20 shelter cities.<sup>671</sup> In Netherlands alone there are 11 ”shelters”.<sup>672</sup> The rest are located in 20 cities located in Georgia, Tanzania, Benin, Costa Rica, Nepal and the United Kingdom<sup>673</sup> where HRDs are relocated for a period of three months at a time and hosted by more than 100<sup>674</sup> local partner organizations.<sup>675</sup> More than 300 HRDs have been supported through the initiative.<sup>676</sup> A glimpse into the list of the the beneficiaries’ countries reveal that

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[and Challenges | Journal of Human Rights Practice | Oxford Academic \(oup.com\)](#), accessed on 8 February 2022

<sup>662</sup> Ibid.

<sup>663</sup> Ibid.

<sup>664</sup> European Parliament Resolution of 17 June 2010 in favor of Human Rights Defenders, (2009/2199(INI)) available at [EU policies in favour of human rights defenders European Parliament resolution of 17 June 2010 on EU policies in favour of human rights defenders \(2009/2199\(INI\)\) - Publications Office of the EU \(europa.eu\)](#),

<sup>665</sup> Ibid. Article 39

<sup>666</sup> Ibid.

<sup>667</sup> GHK Consulting, ‘Mapping of Temporary Shelter Initiatives for Human Rights Defenders in and Outside the EU’ (201) (10), available at [504\\_mapping\\_en.pdf \(europa.eu\)](#), accessed on 8 February 2022

<sup>668</sup> EU Human Rights Defenders Relocation Platform, ‘EU Annual Report on Human Rights and Democracy in the World 2018, available at <https://www.consilium.europa.eu/media/39343/human-rights-2018-eu-annual-report-adopted.pdf>, accessed on 8 February 2022

<sup>669</sup> GHK Consulting, ‘Mapping of Temporary Shelter Initiatives, (n 669 Supra)

<sup>670</sup> Eriksson, (n 663 Supra)

<sup>671</sup> Justice and Peace, available at <https://justiceandpeace.nl/en/initiatives/shelter-city/>, accessed on 9 February 2022

<sup>672</sup> Eriksson (n 663 Supra)

<sup>673</sup> Justice and Peace (n 673 Supra)

<sup>674</sup> Shelter City, available at <https://sheltercity.org/>, accessed on 9 February 2022

<sup>675</sup> Ibid. 485

<sup>676</sup> Shelter City (n 676 Supra)

they are drawn largely from countries in the Global South: Uganda, Kyrgyzstan, Senegal, Russia, Congo, Zimbabwe, Ukraine, Burundi, Somaliland, and Palestine.<sup>677</sup>

Due to the temporary nature of relocation programs (ranging from 3 to six months) and the persistence of persecution and threats against the HRDs in their home countries, many human rights defenders eventually apply for asylum and remain in the countries of temporary residence when the human rights climate back home continues to be unfavorable.<sup>678</sup> Martin Jones has provided in depth enlightenment on the similarities and differences between temporary relocation and refugee status as well as the advantages of latter over the former. The main differences, according to Jones, lie in their duration (TIRIs have a shorter timespan.) and the fact that refugee status affords HRDs more benefits to HRDs, to wit, all of the benefits to which refugees are entitled.<sup>679</sup>

### **Benefits of Relocating Human Rights Defenders**

Jones submits that human rights defenders should be provided safe haven in countries other than their own and accorded refugee status because they qualify as refugees in accordance with the 1951 Refugee Convention and its 1967 Protocol.<sup>680</sup> He relies on the definition of a refugee provided in Article 1(2) of the Convention which provides that a refugee is "... anyone who...due to well founded fear of persecution because of their membership of a particular social group or political opinion, is outside their country of nationality and is unable or unwilling to return due to such fear."<sup>681</sup> He argues that HRDs fulfill the criterion of belonging to particular social groups or political opinions, and that the attacks, abuses and stigmatizations they suffer amount to persecution.<sup>682</sup> On that basis, he believes that they can benefit from the wide range of protections available to refugees, especially non-refoulement.<sup>683</sup>

Aikaterini Kristina Koula agrees with Jones that International Human Rights Law has failed defenders.<sup>684</sup> However, she disagrees that International Refugee Law offers a viable alternative protection. She contends that International Refugee Law does not suit the needs of HRDs, many of whom desire to continue their work in their home countries and therefore see the refugee regime as a measure of last resort.<sup>685</sup> Her other point of divergence with Jones is predicated upon "common flaws" in refugee law which make it impracticable to accommodate HRDs. According to Koula, these "flaws" include the general State practice of adopting policies to protect their sovereignty and discouraging refugee influx, a situation which refugee law has not been able to solve.

Other benefits of relocation for HRDs include safety and improved psychological state; capacity building and knowledge sharing opportunities which equips the HRDs to contribute

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<sup>677</sup> Donders, (n 67 Supra)

<sup>678</sup> Ibid. 499

<sup>679</sup> Jones, 'Protecting Human Rights Defenders at Risk: Asylum and Temporary International Protection' (n 76 Supra)

<sup>680</sup> Ibid.

<sup>681</sup> Convention and Protocol Relating to the Status of Refugees, available at <https://www.unhcr.org/3b66c2aa10>, accessed on 9 February 2022

<sup>682</sup> Ibid.

<sup>683</sup> Ibid.

<sup>684</sup> Koula, (n 78 Supra) pp. 340-368

<sup>685</sup> Ibid.

more effectively to the promotion of human rights in their home communities and countries, as well as networking and fundraising opportunities.<sup>686</sup>

### **Challenges for the Relocation of HRDs**

Although the EU's relocation initiatives for HRDs at risk have attracted much applause for the benefits accrued by HRDs from the project, it falls short on several fronts.

### **Protection and Advocacy Gap Created in Human Rights Defenders' Home Countries**

Even though, as noted above, some HRDs might choose to apply for asylum or subsidiary protection upon relocation, some of them still harbor the desire to continue their work in the home countries.<sup>687</sup> This is because they believe that the nature of their work and the passion they have for the ideals for which they fight are closely connected to their home countries, such that staying away will have "disastrous impact for the realization of human rights and the rule of law".<sup>688</sup> According to Koula, "vast majority" therefore feel a sense of guilt for abandoning the persons for whom they fight.<sup>689</sup> Jones acknowledges that this sense of guilt is worsened by the fact that their colleagues accuse them of "giving up"<sup>690</sup> on the struggle.

Judging from the above-mentioned sentiments of HRDs seeking asylum and temporary relocation abroad, it is safe to infer that the relocation of HRDs not only places them in unfamiliar territory where some might not be able to cope socially, professionally and economically; it also creates a gap for the attainment of the human rights which these HRDs fought for.

### **Eligibility for Relocation**

Although the Declaration on Human Rights Defenders and Fact Sheet No. 29 provide a broad and inclusive definition of who is a human rights defender, there are indications that the definition itself has occasioned challenges for the human rights of some of HRDs and for the selection of HRDs to benefit from relocation programs. In other words, many observers, like Donders, have wondered how partners and governments determine which HRDs are eligible for emergency/humanitarian visas, asylum and temporary relocation."<sup>691</sup>

Having said that, it is worth noting that some civil society and national actors implementing EU relocation program may not be adhering to the inclusivity aspect of the HRD definition enshrined in the Declaration on Human Rights Defenders and Fact Sheet No. 29, which imply that anyone can be a human rights defender as long as he or she is advocating for or promoting any human right.<sup>692</sup>

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<sup>686</sup> Salome Nduta and Patrick Mutahi, SSOAR 'Relocation Initiatives (n 659 Supra)

<sup>687</sup> Aikaterini – Kristina Koula, 'International Refugee Regime: An Alternative (n 170)

<sup>688</sup> Ibid. 352

<sup>689</sup> Ibid.

<sup>690</sup> Jones, Protecting Human Rights Defenders at Risk, (n 76) p 945

<sup>691</sup> Yvonne Donders, 'Defending Human Rights Defenders' (n 67 Supra)

<sup>692</sup> UNDHRD (n 13 Supra) Art. 1 'Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels' (UN General Assembly 1998 UNOHCHR (2004) (2) (n 13): 'To be a human rights defender, a person can act to address any human right (or rights) on behalf of individuals or groups.'

## Complex and Expensive Application Processes

Many human rights defenders who are otherwise eligible for relocation due to the imminent and grave nature of the danger they face are "locked out"<sup>693</sup> of the scheme because of a myriad of factors. Some of these factors include language barriers; complicated processes for obtaining travel documents from their home countries and the expenses that are sometimes associated with the process.<sup>694</sup>

These challenges hold true especially for HRDs working in remote areas and those who are "unprofessional" and unestablished. Findings of a survey conducted by Salome Nduta and Patrick Mutahi with HRDs from Kenya who had experience with emergency and temporary relocation show that majority of the respondents found the process difficult, especially with regard to the complicated questions and technical language used by the programmes.<sup>695</sup>

Those working in rural areas face difficulties in obtaining travel documents, as these documents are issued in the capital cities or bigger towns which are sometimes very far away from the HRDs' areas of operation, thereby imposing upon them huge financial burdens in terms of logistics for travel and for the acquisition of the needed documents.<sup>696</sup> The spouse of one of the HRDs interviewed during the survey narrated how her family endured a lot of psychological and financial stress since her husband was not only busy with human rights work but had to travel to another town to file his application and spent all of the income they had on the application process.<sup>697</sup> For them, it was more "demoralizing"<sup>698</sup> when her husband, who was under serious threat, did not get the relocation he wanted.

Closely associated with the financial challenges faced by rural and unestablished HRDs in the application process is the technical challenge which concerns the lack of internet access and unaffordability thereof. Some of the HRDs have to pay cyber cafes to complete their online applications.<sup>699</sup>

Also, in the aforementioned study of the implementation of the EU Guidelines, Bennet discovered that majority of the HRDs and diplomats are not quite familiar with the process of accessing emergency protection.<sup>700</sup>

### 5.2.2 Financial Support to Human Rights Defenders

As part of the implementation of the EU Guidelines on Human Rights Defenders, EU Delegations and member state missions may directly fund projects implemented by HRDs.<sup>701</sup> Additionally, under the overall EU human rights system, there exists a funding program that provides support for the promotion of democracy and human rights in non EU countries. The fund is known as the European Instrument for Democracy and Human Rights (EIDHR).<sup>702</sup>

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<sup>693</sup> Salome Nduta and Patrick Mutahi, SSOAR 'Relocation Initiatives (n 659 Supra) pp 16-18

<sup>694</sup> Ibid.

<sup>695</sup> Ibid.

<sup>696</sup> Ibid. P 18

<sup>697</sup> Ibid.

<sup>698</sup> Ibid.

<sup>699</sup> Ibid. 17

<sup>700</sup> Bennet/European Parliament, 'Assessing the Implementation of Guidelines' (n 626 Supra)

<sup>701</sup> Ibid.

<sup>702</sup> Ibid.

Prominent on the list of the program's funding priorities include "enhancing respect for human rights and fundamental freedoms in countries where they are most at risk" and "supporting actions in areas covered by the EU Guidelines: dialogue on human rights, human rights defenders, the death penalty, torture, children and armed conflict and violence against women".<sup>703</sup>

In addition to providing direct funding to the HRDs' activities, EUDs and MSMs can assist them to access funding support through the EIDHR.<sup>704</sup> Apart from the general funding allocated for activities of HRDs', the EIDHR also has a small grants program that provides up to 10,000 euros to specifically respond to HRDs at risk.<sup>705</sup>

The provision of financial assistance to HRDs is a truly benevolent gesture on the part of the EU. Besides, it qualifies as a preventive form of protection, intended to create an enabling environment in which HRDs have the resources to operate. By supporting the work of HRDs, this demonstrates the recognition of the work and legitimacy of HRDs by a powerful supranational organization as the EU. This kind of recognition and support sends a message to governmental and private assailants of HRDs that the defenders have a strong protective and supportive partner in the EU. This support could be compared to the strategy of personal accompaniment employed by the Swedish Fellowship for Reconciliation (SWEFoR) and other international NGOs. The practice involves sending staff of these INGOs to the Global South country to work with and accompany the HRDs around.<sup>706</sup>

Nevertheless, it is overshadowed by several issues. One of such issues is the seeming discrimination against some HRDs especially those working in remote areas and those who are not connected to organized and renowned of civil society organizations. Another deficit is the lack of sufficient awareness about the program and the modes of application. HRDs working in remote areas often do not know of the availability of funding to support their work.<sup>707</sup> Some HRDs accuse the EU diplomats of "pick(ing) and "choos(ing)" "trusted" HRDs to fund.<sup>708</sup>

### **Closing the Gaps: General Recommendations for Strengthening Implementation of the EU Guidelines on Human Rights Defenders**

In order to remedy some the limitations in the implementation of the Guidelines as identified above, the EU should consider taking the below steps.

To address the lack of awareness of the Guidelines, Wouters and Hermez propose the provision of "rigorous, systematic and effective" training on the Guidelines' recommendations and modes of implementation to diplomats and staff at EU Delegations and member state missions.<sup>709</sup> They further advise that such trainings should include knowledge and experience

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<sup>703</sup> Euro Access "Programme: European Instrument for Democracy and Human Rights", available at [https://www.euro-access.eu/programm/european\\_instrument\\_for\\_democracy\\_and\\_human\\_rights](https://www.euro-access.eu/programm/european_instrument_for_democracy_and_human_rights), accessed on 10 February 2022

<sup>704</sup> Bennet, 'European Union Guidelines', (n 614) 910

<sup>705</sup> Ibid.

<sup>706</sup> Swedish Fellowship for Reconciliation, 'Supporting Human Rights Defenders', available at <https://swefor.org/about-us/protection-to-human-rights-defenders/>, accessed on 17 May 2022

<sup>707</sup> Ibid. 916-917

<sup>708</sup> Ibid.

<sup>709</sup> Wouters and Hermez (n 601 Supra) p 18

sharing among participants, as is the practice of EU human rights focal persons.<sup>710</sup> These will not only build diplomats' knowledge of the Guidelines; it will also result in standardized modes of implementation among HRD Liaison Officers.

Additional practical actions that could be taken to ensure wider publicity of, and familiarization with the Guidelines include posting the links of the Guidelines on member states' and EU missions' websites; organizing public events to promote the guidelines, and increased translation of the Guidelines.<sup>711</sup>

In order to surmount the challenge of the ambiguity of the modes of communication between HRDs and HRD Liaison Officers, the EU foreign service must prioritize support to, and interaction with, HRDs by making it a mandatory requirement to work in the foreign service, especially for diplomats who will be charged with the responsibility of working as HRD Liaison Officers.<sup>712</sup> In order to make reaching out to HRDs a mandatory task, the job descriptions of the designated diplomats must include proactive steps that these diplomats should take in that direction.<sup>713</sup>

For the EU's HRD protection regime to be inclusive and effective, it must embrace HRDs who operate by unconventional means, that is, those who do not necessarily have established offices or practices but whose work involve advocating for human rights. These include HRDs working in remote regions, WHRDs, those working on LGBTI issues, among others. This does not have to be accomplished by individually visiting all of them, because that is understandably impracticable.<sup>714</sup> It could; however, involve the "parceling" out of the country into regions of HRDs, wherein HRD Liaison Officers will arrange to periodically meet HRDs from specific regions.<sup>715</sup>

Finally, regardless of their status, characteristics or particular vulnerability, HRDs should be consulted during the process of developing policies and guidelines that affect their security and wellbeing. Guidelines and policies developed in the Global North on behalf of HRDs in the Global South might not always reflect the actual security and protection needs of those HRDs<sup>716</sup>. This assertion is premised on the fact that those who operate on the frontlines of injustice and human rights violations best understand the context they work in, the challenges they face, as well as their security and protection needs. To ensure that these instruments and the protection measures prescribed therein align with the protection needs of the beneficiaries on the ground, an effective strategy could be that of "parceling" out the regions of the HRDs' home countries, as referenced supra, and bringing them together to solicit their inputs during the drafting of said documents.

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<sup>710</sup> Ibid.

<sup>711</sup> Council of the European Union, 'Mainstreaming Human Rights Across CSFP and Other EU Policies' (7 June 2006), available at <https://data.consilium.europa.eu/doc/document/ST-10076-2006-INIT/en/pdf>, accessed on 7 February 2022

<sup>712</sup> Bennet, European Union Guidelines, (n 614 supra) p 914

<sup>713</sup> Ibid.

<sup>714</sup> Ibid.

<sup>715</sup> Ibid. p 918

<sup>716</sup> Bennet et al, 'Critical Perspectives (n 652)



## **Specific Recommendations Pertaining to the Granting of Emergency/Humanitarian Visas, Temporary Relocation and Asylum**

Removing HRDs from their home countries is justifiable when there is an urgent need for relocation where the life of the HRD is in immediate danger. It also provides an opportunity for HRDs to stay away from the environment of threats, stress and psychological trauma brought about by the work they do.

Notwithstanding the above, these relocation initiatives (emergency/humanitarian visas, temporary relocation and asylum) have adverse implications for human rights, both for the HRDs, their families and the people they defend. To address these gaps, the EU should add a component to the relocation programs which will enable HRDs to develop and implement projects in their home countries while in exile.<sup>717</sup> This will ensure continuity of the work they do and give them a sense of continued solidarity with the people on whose behalf they fight.

The requirements of the program should also be made more flexible<sup>718</sup> in order to accommodate HRDs who work in rural areas and are not well "established or professionalized", but whose vulnerabilities and risk might be more acute. This could be achieved by broadening the selection requirements and using unsophisticated language and application process. Details of the temporary relocation initiative should be disseminated to all diplomats in third countries, including providing them with a list of host countries.<sup>719</sup> In that same vein, EUDs and MSM staff coordinating the program should meet annually to evaluate how to make the program better accessible to HRDs.<sup>720</sup>

### **5.2.3 Concluding Analysis on the European Response to the Protection of Human Rights Defenders**

While the EU response to the plight of human rights defenders is commendable for going beyond the establishment of policies and frameworks and taking practical actions to physically protect human rights defenders in danger, it is wanting of overall effectiveness.

Donders thinks that the protection of human rights defenders by foreign States disguises the fact that they should primarily be protected by their home States.<sup>721</sup> I do agree with her but not entirely. I agree that when the State fails to comply with its obligation to protect human rights, it incurs responsibility for human rights violations under both treaty and customary international law.<sup>722</sup>

In the case of human rights defenders, most of the abuses, threats and crimes committed are neither investigated nor punished, thereby leading to more violations.<sup>723</sup> It is this blatant impunity that justifies the intervention of the international community to protect human rights defenders. This is in consonance with the very principles upon which the United Nations was founded: "to achieve international co-operation in solving problems of an economic, cultural,

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<sup>717</sup> Eriksson (n 663 Supra) p 502

<sup>718</sup> Bennet, 'European Union Guidelines' (n ) pp 916-917

<sup>719</sup> Ibid. 920

<sup>720</sup> Ibid.

<sup>721</sup> Donders (n 67 Supra)

<sup>722</sup> Koula, 'International Refugee Regime', (n 78) 345

<sup>723</sup> Ibid. 346



social, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language or religion...”<sup>724</sup>

My point of divergence with Donders is that it is not the protection provided for HRDs by foreign States that encourages the home states of the HRDs to default in their responsibility to respect, protect and fulfill the rights of HRDs and to continue attacking them and discrediting their work. Rather, it is the strategies employed by foreign States to protect human rights defenders that veils the responsibility of the home countries of HRDs to protect them. As Bennet, Nah and Ingleton have written, the positive developments in the human rights defenders protection regime are overshadowed by the fact that more States have become more emboldened in attack(ing) human rights defenders and challeng(ing) their legitimacy, recognition and the integrity of their work.<sup>725</sup>

There is need for the EU and the international community in general to readjust their strategies and take robust actions that will compel states to comply with their international obligations to respect, protect and fulfill the rights of HRDs. As a starting point, policies and initiatives must be geared towards protecting the HRDs in their home countries and creating an enabling environment for them to continue to carry out their work there.

For example, instead of just issuing public statements condemning threats, attending trials of HRDs and visiting them in prison, punitive diplomatic and political actions should be taken against responsible governments. These could take the form of targeted economic sanctions and travel restrictions against officials and adverse consequences for diplomatic relations.

To counter impunity and stigmatization, massive human rights education should be supported and carried out targeting State authorities, civil servants and members of the judiciary and criminal justice system.<sup>726</sup> Finally, coordination and cooperation between organizations and EU Member States should be strengthened to ensure a more effective and uniform response to the protection needs of HRDs.

## **6 Conclusion and Recommendations**

For the past three decades, the UN, Inter-American and African Human Rights Systems as well as the EU have become increasingly aware of the crucial role that local human rights defenders in the Global South play in the realization of human rights for themselves, their communities and their fellow citizens. Most importantly, the global and regional human rights communities have recognized that due to their activities of peacefully advocating for and promoting human rights, HRDs are subjected to attacks amounting to the very human rights violations they defend others against. In response to the plight of HRDs, regional and international human rights systems have instituted an array of frameworks and measures aimed at protecting them.

This thesis identified and examined the standards and mechanisms adopted by the UN, Inter-American and African Human Rights Systems plus the EU for the protection of HRDs. The research also conducted a comparative analysis of the protection provided to HRDs by the two

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<sup>724</sup> United Nations Charter, Article 1(3)

<sup>725</sup> Karen Bennet et al (n 652 Supra)

<sup>726</sup> Koula (n 78 Supra) p 366

human rights systems located in two geographical regions of the Global South: Latin America and the Caribbean and Africa. The purpose of this investigation was to inquire into the level of protection the human rights systems and the EU provide through their legal frameworks and mechanisms, as well as their effectiveness in providing protection to HRDs. These mechanisms include, *inter alia*, the adoption of Declarations on Human Rights Defenders by the UN and African Human Rights Systems; the appointment of Special Rapporteurs by the UN, Inter-American and African Human Rights Systems, and the adoption of the Guidelines on Human Rights Defenders and the provision of asylum, emergency visas and temporary relocation to HRDs by the EU.

The aforementioned legal frameworks, mechanisms and efforts have contributed immensely to the protection of HRDs by establishing their status as a class that requires protection and by legitimizing their work. The UN and the two human rights systems that were used as case studies have been very innovative in defining the rights of HRDs through their jurisprudence and other activities. They have done this by providing progressive interpretations of the substantive rights of HRDs enshrined in universal and regional human rights instruments, in most instances finding violations where actual harm or death does not occur. Moreover, these human rights systems have articulated the responsibilities of States for the respect, protection and fulfillment of the rights of human rights defenders. Occasionally, these interpretations have required States to take proactive measures to prevent violations against HRDs by creating an enabling environment for them to freely exercise their right to defend human rights. By doing so, they have expanded the scope of rights guaranteed to HRDs under the applicable legal frameworks. This has persuaded a few States in the Global South to create legislations and mechanisms for the protection of HRDs.

In spite of the afore-listed accomplishments, HRDs in the Global South increasingly constitute the highest number of victims of attacks against HRDs worldwide. These attacks include murders, torture and other forms of physical and mental abuse; enforced disappearance, judicial and sexual harassment, among others. These abuses are committed by State and non-State actors alike without any repercussions or punishment for the perpetrators. This appalling and risky situation of Global South HRDs indicate that impunity is the major factor contributing to the incessant attacks against HRDs. Additionally, it suggests that the standards established for the protection of HRDs and the mechanisms and measures instituted to implement those standards are not yielding their desired results. This status quo bespeaks the need for a revision of those standards and the strengthening of the mechanisms, measures and actions in order to ensure more robust and adequate protection to HRDs. A few recommendations to this effect are outlined below.

While the Special Rapporteurs in the two regions have done extremely well in promoting and defending the rights of HRDs, their capacity is limited by numerous challenges. Principal among them is financial deprivation. As a result, Commissioners work on a part-time basis and have to double as Special Rapporteurs. Judges also function on a part time basis. This undermines their effectiveness in protecting the rights of HRDs, as it causes them to devote less time to the promotion and adjudication of the of cases in general, thereby also affecting HRDs in particular. As a result, there is a back log of cases, some involving HRDs. This delay in the adjudication of matters is tantamount to delay in the rendering of justice and effective remedy to HRDs, as effective remedy is not only the availability of a forum; it also encompasses the resolution of cases. State visits by Special Rapporteurs are mostly not granted, and even when granted, the recommendations from those visits are not complied with.

In this vein, compliance and enforcement remain a twin challenge of the human rights systems in the protection of HRDs.

Although an impressive collection of legal frameworks has been adopted for the protection of HRDs, they are not sufficiently known by interlocutors including HRDs. More awareness to, and engagement with stakeholders is needed on the legal frameworks and the plight of HRDs. This must involve massive education on human rights to government personnel especially members of the security sector and the judiciary. The Inter-American and African Human Rights Systems should devise strategies to reach HRDs in rural areas with awareness and capacity building, as they are often more vulnerable and overlooked due to the remote locations in which they work.

Human rights defenders must be involved in the development of standards, policies and measures for their protection. This will ensure that the measures align with the protection needs of HRDs, thereby contributing to their effectiveness. Protection standards and measures should also be designed taking into consideration the peculiarity of certain groups of HRDs and the acuteness of the risk they face due to their characteristics and the subjects of their advocacy factored against the cultural, religious, political and economic contexts in which they operate. These include WHRDs, LGBTQI+, anti-corruption HRDs, environmental HRDs, etc.

Of the human rights systems covered in this thesis, the European System has taken an outstanding practical action to provide physical protection to HRDs by providing emergency visas and temporary relocation to them. While this is remarkable especially if HRDs are in desperate situations of extreme danger to lives and limbs, it lacks overall effectiveness because it takes away the home States' responsibility as the primary bearers of the responsibility to protect these HRDs. Protection measures for HRDs in the Global South should be designed to compel home States to take their full responsibility for the respect, protection and fulfillment of the human rights of HRDs. In other words, these measures must ensure that the HRDs can remain in their countries or be able continue to do their work even if they are in exile. As a means of accomplishing this, the EU must encourage or impel States to enact laws, frameworks and mechanisms specifically protecting HRDs and their rights. Additionally, HRDs who have to flee as a last resort should be supported with projects that they can implement in their home countries while in exile.

In order to combat impunity, Governments in the Global South must be compelled to abide by their due diligence obligations, particularly by providing effective domestic remedy through the investigation of violations against HRDs and ensuring that perpetrators are punished. States failing to meet these standards must face firmer political and economic consequences including targeted sanctions against leaders. Additionally, defaulting States must be made to understand that repeated violations against HRDs and condonation thereof will lead to consequences for diplomatic relations.

Of the two regional human rights systems located and operational in the Global South, the Inter-American System has not adopted any regional international instrument, such as a declaration or treaty, specifically mentioning HRDs or addressing the issue of the protection of HRDs as a distinct group. The African Human Rights System on the other hand, has adopted two Declarations to that effect. They are the Grand Bay Declaration and the Kigali Declaration. The significance of such a declaration for the protection of HRDs is that it adopts a contextual approach to the rights guaranteed in universal human rights instruments. By adopting such an

approach, it would assist stakeholders and States to frame the protection measures for HRDs within the context of the particular region. Human rights protection and promotion must not be carried out using a one-size-fits-all approach. Moreover, the adoption of such declaration will signal political will and prioritization on the part of States for the protection of HRDs.

The Inter American System, through the Inter-American Defender and the Legal Assistance Fund, has introduced procedures aimed at giving HRDs/victims easier access to the Court. Conversely, the African System has stifled the ability of individuals and NGOs to directly file cases before the Court. This status quo has been brought about through Articles 5(3) and 34(6) of the Protocol Establishing the Court, which require that in order for an individual or NGO complaint to be brought against any Member State, the State must have filed a declaration permitting such hearing to take place.

The issue of access to the Court is critical for the protection of HRDs because having access to an adjudicatory forum is a key step in the process of seeking and obtaining effective remedy. For victims in general and HRDs in particular, denial of such access to the Court can be viewed as denial of access to the justice which HRDs are denied in their home countries, which prompts them to seek redress to the regional human rights system. While some may argue that access to justice is available at the level of the Commission, the Court is the supreme judicial body of the regional human rights system and therefore cannot afford to be the one denying access to victims of human rights violations, in this case human rights defenders.

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