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Human Rights Defenders in Colombia

By

María Paola Quintero Gómez

Short bio on the author

About the Author: María Paola Quintero Gómez holds a Bachelor of Laws Degree (LL.B.) from Universidad Eafit, Medellín, Colombia and a Master of Laws (LL.M.) in Public International Law with a specialisation in International Criminal and Humanitarian Law from the University of Oslo, Norway. During her undergraduate and graduate studies, she has interned for human rights organisations, such as the Norwegian Human Rights Fund, where she had the opportunity to work with the initiative “I Defend Rights”. Her research interests include human rights, with a special focus on human rights defenders, and public international law. She is currently living in Oslo and aims to further develop her research on human rights defenders through a PhD.

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List of Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT-OP	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CCourt	The Constitutional Court of Colombia
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW-OP	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (The Revolutionary Armed Forces of Colombia – People's Army)
GA-OAS	General Assembly of the Organization of American States
HRDs or defenders	Human rights defenders
IACHR	The Inter-American Commission on Human Rights
IACtHR	The Inter-American Court of Human Rights
IAHRS	The Inter-American System for The Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ICESCR-OP	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
ICRC	The International Committee of the Red Cross
M.P.	Magistrado Ponente (Speaker Judge)
NGOs	Non-governmental organisations
NPP	National Protection Programme
OAS	The Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAO	Plan de Acción Oportuna de Prevención y Protección Para los Defensores de Derechos Humanos, Líderes Sociales, Comunales y Periodistas. (Timely Action Plan for the Prevention and Protection of Human Rights Defenders, Social and Communal Leaders, and Journalists)
Peace Agreement	The General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace
SIADDHH	El Sistema de Información sobre Agresiones contra Defensores y Defensoras de Derechos Humanos. (The Information System About Acts of Aggression Against Human Rights Defenders)
SRHRDs	Special Rapporteur on the Situation of Human Rights Defenders
The UN Declaration on HRDs	Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.
UDHR	Universal Declaration of Human Rights
UN	The United Nations
UNGA	The United Nations General Assembly

UNHRC	The United Nations Human Rights Council
UNP	Unidad Nacional de Protección (The National Protection Unit)
WHRDs	Women Human Rights Defenders

1 Introduction

1.1 Subject Matter and Research Question

Defending human rights is a right itself.¹ To fully enjoy this right, a safe and enabling environment for human rights defenders (HRDs) must be created.² To achieve this, Colombia has been implementing a protection programme for HRDs since 1997,³ making the Colombian State a pioneer in the region.⁴

This is not only the first programme in the Americas but it is also the largest programme with the biggest budget.⁵ It has evolved over the years, incorporating protection and preventive measures for both individuals and collectives.⁶ However, despite the state's efforts and regulations, Colombia remains the most dangerous country in the world for HRDs. In 2019, 35% of the defenders killed worldwide were in Colombia.⁷ The situation appears to be worsening in 2020 because, by 24 January, 23 HRDs had been killed.⁸

Thus, the aim of this master's thesis is to answer the question of *how the existing protection mechanism at a national level, could be improved in order to achieve better results?*

This question will be answered by analysing the existing protection mechanisms for HRDs in Colombia at an international, regional and national levels, as well as the State's obligations towards HRDs.

¹ General Assembly of the United Nations, Res 53/144 (9 December 1998) UN Doc A/RES/53/144

² The United Nations Human Rights Council 'Protecting Human Rights Defenders' (12 April 2013) UN Doc A/HRC/RES/22/6. Epigraph 2

³ Ley 418 de 1997 (26 December 1997) article 81

⁴ Inter-American Commission on Human Rights 'Towards Effective Integral Protection Policies for Human Rights Defenders' (29 December 2017) OEA/Ser.L/V/II. Doc 207/17. para. 154

⁵ It is important to highlight that the programme was not only developed for HRDs, but other groups too, such as journalists, union leaders, ex-presidents, and so. Luis Enrique Eguren, *The Time Is Now: For Effective Public Policies to Protect the Right to Defend Human Rights* (1st edn, Protection International/CEJIL 2017). 23 <https://www.cejil.org/sites/default/files/the_time_is_now_19_06_interactivo.pdf> Accessed 7 January 2020

⁶ Ibid., 112

⁷ Front Line Defenders, 'Front Line Defenders Global Analysis 2019' (Front Line, the International Foundation for the Protection of Human Rights Defenders 2020). <https://www.frontlinedefenders.org/sites/default/files/global_analysis_2019_web.pdf> accessed 1 February 2020. 4

⁸ 'Paz Al Liderazgo Social – Indepaz' (Indepaz, 2020) <<http://www.indepaz.org.co/paz-al-liderazgo-social/>> accessed 24 January 2020.

1.2 Methodology, Sources and Thesis Structure

This is a thesis on law. However, an approach that is broader than a purely legal analysis is required due to the research question, and the approaches used to answer it varies throughout the thesis. This is also reflected in the nature and variety of the sources, which includes legal instruments, case law and academic literature, as well as reports from non-governmental organisations (NGOs), media reports and press releases. The structure and methodology of the thesis are as follows:

In Chapter 2 the connection between HRDs and international law will be established and the term HRD will be defined. Additionally, the global and national situation for defenders will be presented, as well as the risks that they face. This chapter is more descriptive than analytical.

In Chapter 3 the existing international, regional and national protection mechanisms will be presented, and their impacts on HRDs will be analysed.

The focus regarding the international mechanism will be on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration or UN Declaration on HRDs), and the Special Rapporteur on the Situation of HRDs (SRHRDs). There are two reasons for this. First, they are the most frequently referred to in the subject due to their contributions. Second, the word limitation in this thesis makes it difficult to include and analyse the United Nations (UN) treaty body system in its entirety.

Regarding the regional mechanism, the work of both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) will be analysed, including the role of provisional and precautionary measures in the protection of HRDs. Lastly, regarding the national mechanism, the focus will be mainly on the National Protection Programme (NPP), the Timely Action Plan (PAO, for its Spanish acronym) and the “Early Warning System”.

In Chapter 4 the research question will be tried to be answered. This will be done by assessing the Colombian State’s obligations towards HRDs and providing recommendations to improve the national protection mechanism for HRDs. In no sense are the recommendations in this

chapter meant to be regarded as an exhaustive list, as the complexity of the topic requires different approaches that exceed the limits of this thesis.

1.3 Relevance of the Study

The relevance of the study resides in the lack or scarcity of academic research regarding HRDs, the potential risks they face and how to create a better environment, in which the defence of human rights does not presuppose a risk.⁹ Thus, this thesis could contribute to the existing academic literature as the analyses and the recommendations are made regarding both the existing academic literature on the topic, the regulations and their impact.

Analysing current protection mechanisms and finding better ways of protecting HRDs is relevant because they are agents of change who play a significant role in strengthening democracy and the Rule of Law.¹⁰ This makes their work particularly significant in states experiencing periods of political transitions, like Colombia, a state that is trying to overcome a long-lasting internal armed conflict.¹¹

Finally, it is important to highlight that HRDs are, above all, human beings. Thus, finding better ways of guaranteeing their rights and to protect them, particularly when they are in at-risk situations, should always be relevant.

1.4 Thesis Limitations

It is important to be aware of the limitations of this thesis:

- The author acknowledges the importance of the role, responsibility and behaviour of other relevant stakeholders, such as civil society and HRDs themselves with regards to the subject. Nevertheless, the focus of this thesis is the Colombian State.

⁹ Alice M. Nah et al., 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5:3 Journal of Human Rights Practice. 402

¹⁰ Eguren (n 5) 16

¹¹ Grupo de Memoria Histórica, *¡Basta Ya! Colombia: Memorias de Guerra y Dignidad* (Centro Nacional de Memoria Histórica 2013) <<http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf>> Accessed 7 November 2019. 111

- It is difficult to cover all the challenges that HRDs face as they operate within a vast variety of contexts and realities. Thus, important analyses such as the situation for women human rights defenders (WHRDs) or environmental HRDs have been omitted.
- The importance of the recommendations given lies within the academic analyses and contribution. However, they will not necessarily seem original, as the SRHRDs, the IACHR and different NGOs have done an exceptional job in this matter.

2 Human Rights Defenders

“People all over the world strive for the realization of human rights according to their circumstances and in their own way”.¹²

In 1998, after more than 13 years of drafting and discussions, the United Nations General Assembly (UNGA) adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,¹³ or the UN Declaration on Human Rights Defenders, as it is known.

The Declaration was highly criticised by some states and NGOs, describing it as “the strict minimum” or a “disappointment”, because many concessions had to be made in order for it to become a reality. One of the most criticised aspects of the Declaration was the lack of a formal definition of who is actually a human rights defender. Despite this, it is considered one of the most referenced human rights declarations to date, as it was the very first time that the UN defined the right to defend human rights.¹⁴ This paved the way for an entire system of international, regional and national mechanisms for protecting those who defend human rights.¹⁵

Nevertheless, concerns about the defenders and their situation were already present in some regional and national systems, as work was already taking place towards recognising their importance and defending their role. For example, the Organization of American States (OAS) had already recognised the role of the defenders in society and statements regarding its concerns about their situation and their need for protection were reiterated. One example of this is the preoccupation expressed by the IACHR in the Annual Report of 1981–1982

¹² Office of the United Nations High Commissioner for Human Rights, “Who is a Defender”, <<https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx>> accessed 08 October 2019.

¹³ UNGA (n 1)

¹⁴ Petter Wille, 'The History of The UN Declaration on Human Rights Defenders: Its Genesis, Drafting and Adoption - Universal Rights Group' (*Universal Rights Group*, 2019) <<https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/>> accessed 30 September 2019.

¹⁵ Nah et al. (n 9) 401

regarding the human rights situation in Chile, during the military dictatorship, as it had been aggravated by the persecution of lawyers and people who defended human rights.¹⁶

Regardless of the lack of explicit use, another element that gained momentum after the Declaration was the use of the term “human rights defender”, as terms such as “activist”, “professional”, “worker”, “social leader” or “monitor”, were more commonly used.¹⁷ Despite this, there are some countries in which these other terms are more common than “HRDs”. For example, in Colombia, the concept of “social leaders” has been historically used to describe people who play a leading role in their communities and represent a voice for human rights claims.¹⁸ Thus, it is a more frequently used term, but it fits in the description of HRDs.¹⁹

2.1 Who is Considered a Human Rights Defender?

As previously mentioned, the declaration does not formally define the term,²⁰ but its definition can be derived from Article 1:²¹

Article 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.

This definition was further established and explained on Fact Sheet No. 29,²² which is a part of a series developed by the OHCHR²³, whose aim is to explain basic human rights in order to reach a wider range of people.²⁴ The Fact Sheet, it was established that a defender can be anyone who works alone, or with others, to promote and protect human rights. A defender can

¹⁶ IACHR ‘Annual Report 1981-1982, Ch. V, Chile, para. 7, OAS Part II’ (20 September 1982) OEA/Ser.L/V/11.57 Doc. 6 rev. 1

¹⁷ OHCHR, “Human Rights Defenders: Protecting the Right to Defend Human Rights – Fact Sheet No. 29”, (United Nations 2004). 2

¹⁸ IACHR ‘Personas Defensoras de Derechos Humanos y Líderes Sociales en Colombia’ (6 de diciembre de 2019) OEA/Ser.L/V/II.Doc. 262. para. 28

¹⁹ Ibid., para. 29 – 30

²⁰ Nah et al. (n 9) 403

²¹ Wille P. (n 14)

²² OHCHR (n 17)

²³ ‘Fact Sheets’ (OHCHR) <<https://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>> accessed 11 May 2020.

²⁴ ‘UN Fact Sheets’ (Icelandic Human Rights Centre) <<http://www.humanrights.is/en/human-rights-education-project/general-comments-special-issue-papers-and-un-fact-sheets/un-fact-sheets>> accessed 11 May 2020.

also be working on a national or international level. They can be from any gender, age, nationality, profession or background. They are not only found in NGOs or intergovernmental organisations, but from any part of society. The work of a human rights defender can be paid or voluntary, sporadic or fixed, and it is not crucial for the person to be known or to recognise themselves as a human rights defender to be considered one. However, most importantly, HRDs are identified by what they do, not by who they are.²⁵

In this sense, there is no “qualification requirement” for the role, and many of them do not hold a relevant academic degree on the topic or even a upper secondary school diploma. What describes HRDs are their battles, circumstances and ways, which will not necessarily require formal education.²⁶ Thus, in principle, everyone who wants to be a human rights defender can become one. However, there are a minimum of standards that are required:²⁷

- Accepting the universality of human rights: if a person denies certain human rights and yet protects others, they cannot be considered an HRD.
- What is being defended must be a human right; it does not matter whether or not the arguments are valid, or which side they represent or support.
- The actions must be peacefully conducted.

Regarding the regional system in the Americas, the OAS has defined it as “every person who in any way promotes or seeks the realisation of human rights and fundamental freedoms, nationally or internationally”.²⁸ It should be interpreted in line with the broad concept given by the UN Declaration, as this is the definition that is used and promoted.²⁹ The same position has been adopted by the Colombian State.³⁰

²⁵ OHCHR (n 17) 2 – 8

²⁶ Ibid., 8

²⁷ Ibid., 8 – 10

²⁸ *Case of Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs, IACtHR (27 November 2008) footnote 38

²⁹ IACHR ‘Report on the Situation of Human Rights Defenders in the Americas’ (7 March 2006) OEA/Ser.L/V/II.124 Doc. 5 rev.1 (English version) para. 18.

³⁰ Gobierno de Colombia, Ministerio del Interior, 'Plan De Acción Oportuna De Prevención Y Protección Para Los Defensores De Derechos Humanos, Líderes Sociales, Comunales Y Periodistas' (2018). 4 <https://www.mininterior.gov.co/sites/default/files/plan_de_accion_oportuna_de_prevencion_y_proteccion_0.pdf>

Such a broad definition helps in recognise the broad diversity of defenders and the rights they defend. This makes it easier for the concept to be applied in different contexts, but it does not come without challenges. The biggest challenge is that it becomes hard, in practice, to determine who is or who is not a defender, and this ambiguity may negatively impact the protection of HRDs.³¹ For example, some states have defined HRDs as what they consider to be beneficial for their government, while targeting others as enemies.³² However, a clearer definition, might not necessarily stop these states from targeting defenders. Thus, even if the definition is broad, it might not serve the best interests of HRDs if it were to be restricted.

2.2 Human Rights Defenders Under Attack

For HRDs to operate, there should be an enabling environment for them in the countries. According to the SRHRDs:

an enabling environment for defenders must be one in which their work is rooted in the broad support of society and in which the institutions and processes of government are aligned with their safety and the aim of their activities. Both are essential for the creation of an environment in which perpetrators of violations of defenders' rights are held to account and are not allowed to enjoy impunity for their actions.³³

Unfortunately, this environment does not exist in every country, and every single day in the world, a defender is being attacked somewhere in the world. For example, according to Front Line Defenders, 304 HRDs were killed in 2019.³⁴ This figure could be exponentially higher, considering the number of cases that go unseen because of a lack of reporting.³⁵

³¹ Luis Enrique Eguren and Champa Patel, 'Towards Developing a Critical and Ethical Approach for Better Recognising and Protecting Human Rights Defenders' (2015) 19:7 The International Journal of Human Rights. 897

³² Ibid., 897 – 898

³³ UNGA, *Report of the Special Rapporteur on the situation of human rights defenders*, Michel Forst (1 February 2016) UN Doc A/HRC/31/55. para. 77

³⁴ Front Line Defenders (n 7) 4

³⁵ Front Line Defenders, 'Annual Report of Human Rights Defenders at Risk 2017' (Front Line, the International Foundation for the Protection of Human Rights Defenders 2018). <https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf > accessed 1 September 2019. 21

These attacks can be perpetrated by non-state actors³⁶ and states' authorities. Even if the latest bear the primary responsibility for the defenders' protection, they are the most common perpetrators.³⁷ Regarding the nature of the attacks, it varies, as the defenders face different types of attacks, apart from fatal attacks. Thus, defenders are victims of:

extrajudicial executions, enforced disappearances, torture, cruel, inhuman or degrading treatment, arbitrary detentions, physical and digital threats, criminalization, forced displacement, harassment, stigmatization, digital attacks, restrictions on appearing before international bodies and administrative restrictions on the holding of demonstrations and on their work.³⁸

The main purposes of the attacks is to intimidate and silence HRDs and their communities, while sending a message to anyone who might want to defend human rights ³⁹ In addition, while the violence against HRDs might appear to be sporadic, the reality is that it is rooted in structural factors that exist in different countries.⁴⁰

Additionally, one of the best ways of protecting HRDs is through proper investigation and punishment of the perpetrators of the attacks against them.⁴¹ Unfortunately, impunity is common in such attacks⁴², which encourages future attacks.⁴³ Consequently, until these structural causes are addressed and the attacks are properly investigated and punished, the violence against HRDs may not cease.⁴⁴

2.3 The Situation for Human Rights Defenders in Colombia

The SRHRDs has expressed concerned about the situation that the defenders have to face in all countries, but a special emphasis has been place on countries in which: “(a) internal armed conflict or severe civil unrest exist; (b) the legal and institutional protections and guarantees

³⁶ This is a broad group that extends to armed groups, businesses, and individuals. OHCHR (n 17) 16

³⁷ Ibid., 15

³⁸ UNGA ‘Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst’ (15 July 2019) UN Doc A/74/159 para. 15

³⁹ Ibid., para. 16

⁴⁰ Eguren (n 5) 60 – 61

⁴¹ IACHR (n 4) para. 115

⁴² UNGA (n 38) para. 23

⁴³ Eguren (n 5) 66

⁴⁴ Ibid., 10

of human rights are not fully assured or do not exist at all”.⁴⁵ Both of these apply to Colombia, where the start of the internal armed conflict can be traced back to 1948.⁴⁶ Consequently, as stated by Oliver Kaplan, “the first response you will get from an average Colombian when inquiring about the armed conflict is, ‘It’s complicated.’ And it is true”.⁴⁷

In 2016, the General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace (Peace Agreement) was signed by the Colombian government and the FARC-EP. This agreement hoped to end one of the longest internal armed conflicts in modern times and achieve peace within the country. Unfortunately, this was far from becoming a reality. The demobilisation of most of the guerrilla members left a space in some communities in which the state has no presence, and which is now being disputed now. In addition, in August 2019, one of the ex-leaders of the FARC-EP issued a call on arms to his followers.⁴⁸ Furthermore, according to the ICRC, by December 2018, there were at least five active internal armed conflicts taking place in the country.⁴⁹

For HRDs in the country, the internal armed conflicts and their transition periods have historically represented a threat as they have been frequently targeted.⁵⁰ Currently, Colombia can be considered to be the deadliest country in the world for being an HRD⁵¹ and, since 2018, the defenders in the country have a constitutional presumption of risk – a figure that will be further explained in Chapter 3.3.1. Unfortunately, this is not a new situation. For example, in 1998, the Constitutional Court of Colombia (CCourt) declared an unconstitutional state of affairs⁵² regarding the conditions for HRDs in the country, which means that CCourt considered that a massviolation of fundamental rights was taking place regarding the

⁴⁵ OHCHR (n 17) 10

⁴⁶ Grupo de Memoria Histórica (n 11)

⁴⁷ Oliver Kaplan, *Resisting War* (Cambridge University Press 2017) 62

⁴⁸ BBC News 'Colombia Ex-Rebel Commander Issues Call to Arms' (2019) <<https://www.bbc.com/news/world-latin-america-49508411>> accessed 21 October 2019.

⁴⁹ 'Cinco Conflictos Armados En Colombia ¿Qué Está Pasando?' (Comité Internacional de la Cruz Roja, 2019) <<https://www.icrc.org/es/document/cinco-conflictos-armados-en-colombia-que-esta-pasando>> accessed 20 October 2019.

⁵⁰ Valentina Roza, Patrick Ball and César Rodríguez, 'Asesinatos de Líderes Sociales en Colombia en 2016-2017: Una Estimación del Universo' (*DeJusticia* 2018) <<https://www.dejusticia.org/wp-content/uploads/2018/09/Asesinatos-de-l%C3%ADderes-sociales-en-Colombia-en-2016-2017-una-estimaci%C3%B3n-del-universo.pdf>> accessed 28 December 2019. 2

⁵¹ Front Line Defenders (n 7) 4.

⁵² Sentencia T-473 de 2018, M.P. Alberto Rojas Ríos

defenders.⁵³ And in the past, the Colombian State has been held responsible for the deaths of HRDs at the IACtHR.⁵⁴

To better illustrate the recent situation of the defenders, Table 1 shows the number of attacks against HRDs in the country since 2015.⁵⁵

Types of attacks	2015	2016	2017	2018	2019
Threats	539	317	370	583	628
Killings	63	80	106	155	124
Attempted Murders	35	49	50	34	52
Detentions	26	17	23	4	29
Disappearances	3	2	0	4	3
Judicializations	8	9	9	19	1
Sexual Violence	0	1	0	0	0
Information Theft	8	6	2	6	7
Total Attacks	682	481	560	805	844

Table 1: Number of attacks against HRDs reported by SIADDHH in Colombia.⁵⁶

This table shows that the situation for HRDs in the country has been exponentially deteriorated since the signing of the Peace Agreement in 2016. The number of attacks against the defenders has significantly increased, with 2019 being the most violent. Thus, it is totally reasonable to claim that human rights defenders are at risk in Colombia and that this risk is increasing. Thus, the next chapter will analyse the protection mechanisms that are available for HRDs in the country.

⁵³ Sentencia T-590 de 1998, M.P. Dr. Alejandro Martínez Caballero

⁵⁴ *Case of Valle Jaramillo et al. v. Colombia* (n 28)

⁵⁵ This is in order to illustrate the situation for HRDs before and after the Peace Agreement.

⁵⁶ The table has been partially copied from the 2019 annual report. Programa Somos Defensores, 'La Ceguera: Informe Anual 2019' (2020) <https://somosdefensores.org/wp-content/uploads/2020/05/informe-2019_la-ceguera.pdf> accessed 25 May 2020. 104

3 International, Regional and National Protection Mechanisms for the Protection of Human Rights Defenders

“Only when human rights defenders have appropriate protection for their rights can they seek to protect the rights of others”.⁵⁷

The primary responsibility for the protection of HRDs rests with the states.⁵⁸ This responsibility should be seen in the light of the three types of obligations imposed by international human rights law on states. Namely, the obligation to respect, the obligation to protect and the obligation to fulfil.⁵⁹ As for HRDs, states have the obligation to:

- a) refrain from any acts that violate the rights of HRDs because of their human rights work; b) protect HRDs from abuses by third parties on account of their human rights work and to exercise due diligence in doing so; and c) take proactive steps to promote the full realization of the rights of HRDs, including their right to defend human rights.⁶⁰

Despite the previous points, not all states have developed a national protection mechanism for HRDs⁶¹ or protection policies. Thus, the development and enhancement of international and regional systems are crucial to achieving the goal of protecting HRDs.

3.1 The International/ UN System

3.1.1 The UN Declaration on HRDs

The Declaration was adopted in 1998 by the UN General Assembly and, even if there were disagreements following its adoption,⁶² the importance of the role it played was undeniable. As highlighted in the previous chapter, it was the first time that the right to defend human rights had been defined by the UN. Also, the Declaration has helped to create momentum for

⁵⁷ IACHR (n 29) para. 41

⁵⁸ UNGA ‘Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya’ (30 December 2009) UN Doc A/HRC/13/22, para. 42

⁵⁹ Olivier De Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014) 280. First developed in the UN Commission on Human Rights ‘Report on the right to adequate food as a human right submitted by Mr. Asbjørn Eide, Special Rapporteur’ (7 March 1988) UN Doc E/CN.4/RES/1988/29, para. 66.

⁶⁰ The OSCE Office for Democratic Institutions and Human Rights, ‘Guidelines on The Protection of Human Rights Defenders’ (ODIHR 2014), 2 <<https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders>> Accessed 20 November 2019

⁶¹ For example, only five out of 35 OAS members have developed a protection mechanism, Colombia is one of them. IACHR (n 4) para. 152

⁶² Wille P. (n 14)

the development of the entire international protection system for HRDs, and to develop the recognition for the role played by defenders as agents of change.⁶³

The Declaration is not a legally binding instrument and did not create new rights,⁶⁴ but “it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding”.⁶⁵ It primarily focuses on the right to be protected, the right to freedom of assembly and association, the right to freedom of opinion and expression, and the right to an effective remedy.⁶⁶ Table 2 shows the articles in which these rights are enshrined at an international, regional – the Inter-American System – and national level.

	UN Declaration on HRD	UDHR	ICCPR	CEDAW	CERD	CRC	CAT	ACHR	Colombian Constitution
The Right to be Protected	2, 9, 12(2)(3)	2	2	3				1	2
The Right to Freedom of Assembly	5, 12	20(1)	21		5(d)(ix)	15		15	37
The Right to Freedom of Association	5	20	22	7				16	38 – 39
The Right to Freedom of Opinion and Expression	6	19	19		5(d) (viii)	13		13	20
The Right to an Effective Remedy	9	8	2(3), 9(5)		6		13, 14	25	86, 89

Table 2: Rights.⁶⁷

⁶³ Nah et al. (n 9) 401

⁶⁴ OHCHR (n 17) 2

⁶⁵ Ibid., 19

⁶⁶ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013). 109

⁶⁷ The information on the international and regional system was gathered from The Commentary to the Declaration made by the OHCHR. OHCHR, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011. <<https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>>; the information on the Colombian Constitution was gathered by the author.

The Declaration also contains other rights such as the right to access and communicate with international bodies,⁶⁸ which is enshrined in: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP),⁶⁹ in the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT-OP)⁷⁰ and in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).⁷¹ The Declaration also included other rights such as the right to develop and discuss new human rights ideas, the right to access funding and the right to protest were also included in the Declaration. These rights are not necessarily included in any other international instrument, but their protection lies down in the recognition and protection of other major rights such as the right of assembly, and the right of freedom of opinion and expression.⁷²

Concerning the case of Colombia, the Colombian Constitution enshrines – article 96(4), the defence of human rights as a duty of all persons, and it contains the main rights present in the Declaration, as shown in Table 2. Furthermore, Colombia has ratified all six treaties and only one of the three aforementioned optional protocols.⁷³ This is important because the Constitution of Colombia – article 93, gives a supra-constitutional rank to ratified international treaties on human rights, which means that they can prevail even over the Constitution itself.⁷⁴ As an example of this, this article also states that all the constitutional provisions regarding human rights, are to be interpreted in accordance with the ratified international treaties.⁷⁵

Thus, even if the Declaration on HRDs is not binding on its own, the rights contained in its provisions are enshrined in other international, regional and even national instruments that are binding on the Colombian State.⁷⁶ Consequently, by not fulfilling its obligations towards the

⁶⁸ Articles 5(c), 9(4).

⁶⁹ Article 11.

⁷⁰ Article 15.

⁷¹ Article 13.

⁷² OHCHR (n 67) 70, 83, 95

⁷³ CEDAW-OP

⁷⁴ Allan Randolph Brewer-Carías, *Constitutional Protection of Human Rights in Latin America* (Cambridge University Press 2008). 32; Sentencia C-225 de 1995, M.P. Alejandro Martínez Caballero.

⁷⁵ Ibid., 54

⁷⁶ See Table 2.

right to defend human rights, Colombia is not only violating its obligations under international law, but it is also acting against its own Constitution.

3.1.2 The Special Rapporteur on the Situation of Human Rights Defenders

The special procedure⁷⁷ was established in 2000, when the Commission on Human Rights requested the Secretary-General to appoint, for a period of three years, what was then called the Special Representative on Human Rights Defenders.⁷⁸ The mandate has been subsequently renewed and in 2008 the OHCHR extended it,⁷⁹ but as the SRHRDs.⁸⁰

The Special Rapporteur main roles are:

To seek, receive, examine and respond to information on the situation of human rights defenders; establish cooperation and conduct dialogue with governments and other interested actors on the promotion and effective implementation of the Declaration; recommend effective strategies better to protect human rights defenders and follow up on these recommendations; integrate a gender perspective throughout the Special Rapporteur's work.⁸¹

Since the mandate is a very broad one, there are eight practical activities that the SRHRDs is expected to perform:⁸²

- Keep contact with HRDs.
- Keep contacts with States.
- Keep contacts with other key actors.
- Draw attention to individual cases in which the rights of HRDs have been or are going to be violated, so that the state involved can take up the appropriate measures to stop or prevent the violation.
- Perform country visits and issue reports about such visits to the UNGA.

⁷⁷ Meaning that “they were not created either by the United Nations Charter or by an international treaty”. OHCHR, *Human Rights: A Basic Handbook for UN Staff*, 2000 <<https://www.ohchr.org/documents/publications/hrhandbooken.pdf>> accessed 17 November 2019

⁷⁸ UN Commission on Human Rights, Res 2000/61 (27 April 2000) UN Doc E/CN.4/RES/2000/61

⁷⁹ UNHRC, Mandate of the Special Rapporteur on the Situation of Human Rights Defenders Res 7/8 (27 March 2008)

⁸⁰ The UN gives several names to the special procedures, such as Special Rapporteurs, Special Representatives, Special Envoys and Independent Experts. The former does not denote seniority or differences in the functions. OHCHR (n 77)

⁸¹ 'Mandate' (OHCHR) <<https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Mandate.aspx>> accessed 18 November 2019.

⁸² Information gathered from Fact Sheet No. 29. OHCHR (n 17) 23 – 27

- Attend workshops and conferences.
- Identify topics that are particularly important for supporting the role of HRDs in society and develop corresponding strategies.
- Submit annual reports to both the UNGA and the OHCHR. These reports should describe the year’s activities, primary trends and concerns identified during the year. They should also make recommendations on how these trends and concerns should be addressed; they can also show the impact of security legislation on HRDs and their work. Some reports can even examine major themes of concerns. For example, the situation for WHRDs,⁸³ environmental HRDs,⁸⁴ or the impunity regarding human rights violations against HRDs.⁸⁵

The Special Representative and now also the Special Rapporteur have visited Colombia on three different occasions,⁸⁶ 2018 being the last occasion. According to the official country visit report,⁸⁷ the main objective of the visit was “to assess the situation of human rights defenders in Colombia and to evaluate whether the Colombian State guarantees a safe and supportive environment for the defence of human rights throughout the country”.⁸⁸

The conclusion of this visit was that:

the vast majority of human rights defenders in Colombia are unable to work in a safe and supportive environment. They lack positive social and public recognition and are undermined and criminalized because of their human rights work by State and non-State actors. They are in danger and the risks they face have increased in the three years since the signing of the Peace Agreement.⁸⁹

⁸³ UNGA ‘Situation of women human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders, Michael Forst’ (10 January 2019) UN Doc A/HRC/40/60

⁸⁴ UNGA ‘Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst’ (3 August 2016) UN Doc A/71/281

⁸⁵ UNGA (n 38)

⁸⁶ 2001, 2009 and 2018.

⁸⁷ UNGA ‘Visit to Colombia, Report of the Special Rapporteur on the situation of Human Rights Defenders, Michel Forst’ (26 December 2019) UN Doc A/HRC/43/51/Add.1

⁸⁸ Ibid., para. 1

⁸⁹ Ibid., para. 69

This conclusion was very similar to the conclusions of the reports on the two previous visits, in which the previous SRHRDs have also expressed great concern for the situation of HRDs in the country.⁹⁰

In the report of the latest visit, the SRHRDs also provided a series of recommendations to the State, the Ombudsman's Office, non-State actors and civil society,⁹¹ most of which will, most likely, remain unimplemented. This is because, as stated in the "End of Visit Statement", almost all the recommendations made by the SRHRDs predecessors in the other visits, remained unimplemented.⁹²

Additionally, the most recent report has created controversy as the Colombian State did not agree with its findings. In its comments, the State indicated that the SRHRDs was far from reality by making remarks such as "the vast majority of human rights defenders are at risk", or that "Colombia remains the country with the highest number of murdered human rights defenders in Latin America, and threats against this group have soared", as these do not apply to the Colombian context.⁹³ However, the Colombian State did not specify why it considered these statements to be out of context. It was subsequently revealed that this report was supposed to be based on two visits, but that the Colombian State had avoided responding to the requests from the SRHRDs and never issued a new invitation.⁹⁴

This controversy and the lack of implementation of the previous recommendations highlights the biggest problem with the SRHRDs: regardless of the training, capabilities, capacity, willingness and disposition of the SRHRDs, they can only ask questions and make

⁹⁰ United Nations Economic and Social Council 'Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders, pursuant to Commission on Human Rights resolution 2000/61, Mission to Colombia' (24 April 2002) UN Doc E/CN.4/2002/106/Add.2; UNGA 'Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to Colombia' (4 March 2010) UN Doc A/HRC/13/22/Add.3

⁹¹ UNGA (n 87) para. 74 – 78

⁹² Michel Forst, 'End of Mission Statement by The United Nations Special Rapporteur on The Situation of Human Rights Defenders, Michel Forst On His Visit to Colombia, 20 November to 3 December 2018'. Footnote 7

⁹³ UNGA 'Informe del Relator Especial sobre la situación de los defensores de derechos humanos acerca de su visita a Colombia, Comentarios formulados por el Estado' (27 de enero de 2020) UN Doc A/HRC/43/51/Add.4. para. 5 – 7

⁹⁴ Semana, "'Querían Borrar Por Completo Mi Informe': Relator De La ONU Sobre El Gobierno" (2020) <<https://www.semana.com/nacion/articulo/michel-forst-relator-de-la-onu-habla-del-desaire-del-gobierno-colombiano/654179>> accessed 23 April 2020.

recommendations. Thus, their visits and the implementation of their recommendations mainly lie in the political will of those in the Government. However, as Felipe González has stated, it is well-known that the different Special Rapporteurs at the UN, play an important role in the recognition, development and more effective implementation of human rights.⁹⁵ And the SRHRDs is not the exception.

Since the mandate of the SRHRDs only focuses on promoting the right to defend human rights and the importance of HRDs, its establishment has contributed to retaining the right to defend human rights and HRDs on the international agenda. Moreover, the annual reports are considered very useful indicators of the problems faced by HRDs in specific regions, as well providing a global picture of the situation of HRDs.⁹⁶

In conclusion, both the Declaration and the SRHRDs have been a point of reference for the development of an entire protection system. They have both been successful in raising international awareness and recognition of the right to defend human rights. In this sense, they have also been successful in increasing the visibility of HRDs and their work. Yet, HRDs are continuously under attack globally. Thus, neither the Declaration nor the SRHRDs can be considered a complete success if HRDs are not safe when exercising their right to defend human rights.

3.2 The Regional System

At a regional levels, various regional mechanisms and instruments have been established to increase the protection of HRDs. Other than the Inter-American system, the current regional mechanisms and instruments are the Special Rapporteur on Human Rights Defenders of the African Commission on Human and Peoples' Rights; the Council of Europe Commissioner for Human Rights;⁹⁷ the Office for Democratic Institutions and Human Rights of the

⁹⁵ Felipe González Morales, 'La Comisión Interamericana de Derechos Humanos: Antecedentes, Funciones y Otros Aspectos' (2009) 5 Anuario de Derechos Humanos. <<https://anuariocdh.uchile.cl/index.php/ADH/article/view/11516>> accessed 29 February 2020. 43

⁹⁶ OHCHR (n 17) 27

⁹⁷ The mandate on HRDs was enhanced in 2008 by the Declaration on HRDs adopted by the Committee of Ministers on 6 February 2008. Council of Europe (Committee of Ministers) 'Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities' (6 February 2008)

Organisation for Security and Co-operation in Europe and the 2008 European Union Guidelines on Human Rights Defenders.

In the case of the Inter-American system for the protection of human rights (IAHRS), an Office of the Rapporteur on the Situation of Human Rights Defenders has been established within the IACHR. However, this is not the only protection mechanism within this regional system. The OAS judicial organ, namely the IACtHR, has found international state responsibility for human rights violations, including violations against HRDs, on multiple occasions.⁹⁸ Also, a series of protection mechanisms for persons at risk have been established within the system, namely, the provisional measures and the precautionary measures, both of which have been used to protect HRDs.⁹⁹ This is important considering that the Americas is currently the most dangerous region in the world for HRDs.¹⁰⁰

It is important to clarify that the IAHRS acts under the principle of subsidiarity.¹⁰¹ Thus, the system is meant to complement and not to replace the national system.¹⁰²

3.2.1 The Inter-American Commission on Human Rights

The IACHR was established in 1959,¹⁰³ and subsequently incorporated into the Charter of the OAS in 1967.¹⁰⁴ The IACHR comprises seven members, who represent all the member countries of the OAS.¹⁰⁵ Its principal functions are “to promote the observance and protection of human rights and to serve as a consultative organ of the Organisation in these matters”.¹⁰⁶ In this sense, the IACHR can develop an awareness of human rights among the peoples of the Americas through different events and strategies; receive, analyse and investigate individual

⁹⁸ E.g.: *Case of Nogueira de Carvalho et al. v. Brazil*, Preliminary Objections and Merits, IACtHR (28 November 2006); *Case of Yarce et al. v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (22 November 2016); *Case of Valle Jaramillo et al. v. Colombia* (n 28)

⁹⁹ This will be further developed in Chapter 3.2.3

¹⁰⁰ 68,4% of HRDs killed in 2019 were in the Americas. Front Line Defenders (n 7) 4

¹⁰¹ American Convention on Human Rights, "Pact of San Jose", OAS (adopted 22 November 1969, entered into force 18 July 1978) Preamble

¹⁰² González M. (n 95) 43

¹⁰³ OAS 'Fifth Meeting of Consultation of Ministers of Foreign Affairs, Resolution VIII' (1960) OEA/Ser.C/II.5. <<https://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf>>

¹⁰⁴ Protocol of Amendment to The Charter of The Organization of American States (B-31) "Protocol of Buenos Aires", OAS (adopted 27 February 1967) Article VII

¹⁰⁵ ACHR (n 101) Articles 34 – 35

¹⁰⁶ Charter of the Organization of American States (A-41), OAS (adopted 30 April 1948). Article 106

petitions which can later be presented to the IACtHR; conduct *in loco* visits; make recommendations to the Member States regarding human rights; order/request Member States to adopt precautionary measures; request advisory opinions from the IACtHR; receive and examine communications.¹⁰⁷

The work of the IACHR through these, and other functions, has been extremely important for the development and protection of human rights in the region, as supported by González.¹⁰⁸ However, the focus of this thesis is on the precautionary measures and the specialised office within the IACHR for HRDs. This is because of their relevance to the protection of HRDs.

3.2.1.1 *Office of the Rapporteur on the Situation of Human Rights Defenders*

The situation for HRDs has been a concern for the OAS since the 1980s, as shown in the previous chapter. In 2001, the GA-OAS requested the IACHR to consider preparing an extensive report in the topic.¹⁰⁹ So in December of the same year, the Executive Secretariat of the IACHR established a Unit for HRDs, whose main role was to follow the situation of HRDs in the Americas and support the IACHR. Subsequently, during the 141st session of the IACHR, the Unit was turned into an Office of the Rapporteur.¹¹⁰

The Office's role is performed by supporting the IACHR in the investigations of cases and petitions, presenting reports, preparing specialised studies about the matter, visiting states with the prior consent of the state involved, and performing other types of activities that can promote HRDs, their rights and their protection.¹¹¹ However, it does not work independently of the IACHR, as the Rapporteur is also a Commissioner for the IACHR.

The reports and specialised studies issued by the Office and the IACHR have contributed to further developing the protection system for HRDs in the region. This has been achieved by reiterating the importance of defenders within democratic societies, going as far as stating that

¹⁰⁷ This is not an exhaustive list, and it has been partially taken from: 'Functions and Powers of The Commission' (OAS) <<https://www.oas.org/en/iachr/mandate/functions.asp>> accessed 2 March 2020.

¹⁰⁸ González M. (n 95) 56

¹⁰⁹ GA-OAS 'Defensores de derechos humanos en las Américas: Apoyo a las tareas que desarrollan las personas, grupos y organizaciones de la sociedad civil para la promoción y protección de los derechos humanos en las Américas' Asamblea General Res AG/RES. 1818 (XXXI-O/01) (5 June 2001)

¹¹⁰ 'Rapporteurship On Human Rights Defenders' (OAS) <<http://www.oas.org/en/iachr/defenders/default.asp>> accessed 20 October 2019.

¹¹¹ Ibid.

it is because of the work performed by HRDs, that the region now has guarantees of protection for all its inhabitants.¹¹²

Moreover, the Office has determined that the work of HRDs involves three important dimensions that must be protected by the states: individual, collective and social. It has an individual dimension because the defence of human rights involves the exercise of universally recognised human rights. Thus, defenders should be protected like all the other individuals under their jurisdiction. It has a collective dimension because their work is a matter of public interest, and frequently involves the participation of others. Their collective rights must therefore be protected. And lastly, it has a social dimension because HRDs seek, through their work, positive outcomes for society in general. Thus, when a defender is stopped from defending human rights, it will directly impact society.¹¹³

Thus, a comprehensive and efficient protection system, “must go beyond the mere operation of a protection program against acts of violence, it should be geared toward eradicating actions that directly or indirectly prevent or hamper the work of HRDs”.¹¹⁴

The work of the Office is also significant because of the IACHR’s role regarding individual cases and petitions. Here, the IACHR considers whether a state has violated human rights, can grant precautionary measures and submit cases to the IACtHR. The measures, recommendations and considerations issued by the IACHR are binding on the States Parties to the American Convention on Human Rights (ACHR) as according to article 33 of the ACHR, both the IACHR and the IACtHR, have competence to oversee the states’ compliance of the commitments made. Despite this, there has been some debate about the binding nature of the decisions and precautionary measures issued by the IACHR, as will be examined later.

Consequently, the Office – and therefore the IACHR – not only contribute to strengthening the regional protection system but also the national system.

Even if the Office’s work has contributed to strengthening the regional protection system, its potential impact may be limited. This is because the Office does not have a Rapporteur who is not a commissioner, due to a lack of funds. Thus, the work performed represents an extra

¹¹² IACHR (n 29) para.1 – 2

¹¹³ Ibid. para. 32 – 34

¹¹⁴ Ibid. para. 131 – 133

burden on all the existing responsibilities as a commissioner.¹¹⁵ In this sense and considering the difficult situation for HRDs in the region,¹¹⁶ the OAS should prioritise the Office and the work performed towards protecting HRDs. This could be achieved by treating this Office in the same way that the Office of the Special Rapporteur for Freedom of Expression has been treated, which has its own team and the Special Rapporteur is not a commissioner.¹¹⁷ In this way, the work capacity of the office could greatly improve toward the protection of HRDs.

3.2.2 The Inter-American Court of Human Rights

The IACtHR is the judicial body of the Inter-American system and was established by the American Convention. It is an autonomous judicial institution, with contentious and advisory functions.¹¹⁸ Within the contentious function, the Court can resolve contentious cases, which can only be brought before the Court by the States or the IACHR.¹¹⁹ According to this function, the Court must also ensure that the States are complying with the judgements of the Court.¹²⁰ Regarding its advisory function, the member states of the AOS may consult the Court regarding the interpretation of the ACHR or other treaties concerning the protection of human rights in the American states.¹²¹

“States Parties to the American Convention are obligated to comply with all substantive and procedural decisions of the IACtHR”,¹²² although it should not be understood as being unconditionally binding. This is because the states can also declare it to be binding on the condition of reciprocity, for a specified period, or for specific cases.¹²³ Concerning the case of Colombia, the IACtHR’s jurisdiction is unconditionally binding, as no special declaration has been made.

¹¹⁵ González M. (n 95) 43

¹¹⁶ IACHR (n 4) para. 38

¹¹⁷ González M. (n 95) 43

¹¹⁸ The IACtHR also has a function in which it can order provisional measures, a function that will be covered in the next section.

¹¹⁹ ACHR (n 101) Article 61

¹²⁰ Ibid., Article 65

¹²¹ Ibid., Article 64

¹²² Jo M. Pasqualucci, *The Practice and Procedure of The Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2013). 291

¹²³ ACHR (n 101) Article 62

Regarding HRDs, the Court stated that they not only complement the role of the states but also of the IAHRS.¹²⁴ Thus, in its jurisprudence it has established that:

The threats and attempts on the safety and life of human rights defenders and the impunity of those responsible for such actions are particularly grave because they have an impact that is not only individual, but also collective. When such things happen, society is prevented from learning the truth about whether the rights of persons are being respected or violated under the jurisdiction of a given State. [...]

The States have the duty to provide the resources necessary for human rights defenders to conduct their activities freely; to protect them when they are subject to threats and thus ward off any attempt against their life and safety; to refrain from setting up hindrances that might make their work more difficult, and to conduct conscientious, effective investigations of violations against them, thus preventing impunity.¹²⁵

In one of the most iconic cases, *Case of Valle Jaramillo et al. v. Colombia*, the IACtHR established that the States could be held internationally responsible for acts performed by third parties or individuals which, in principle, are not attributable to the state.¹²⁶ Despite this, the IACtHR also established that:

even though the legal consequences of an act or omission of an individual is a violation of the human rights of another, that violation cannot be automatically attributed to the State, but must be considered in light of the particular circumstances of the case and the way the State has carried out its obligations as guarantor.¹²⁷

The IACtHR can also order reparations in its judgements, of which there are several types.¹²⁸ These include economical or symbolic reparations, prevention through legal reforms, and the investigation and prosecution of the human rights violation. The modalities of these reparations have been generally ordered in cases regarding HRDs.¹²⁹ Thus, it is safe to state that the Court has taken the role of HRDs in society and their need for protection very

¹²⁴ *Case of Valle Jaramillo et al. v. Colombia* (n 28) para.88

¹²⁵ *Case of Nogueira de Carvalho et al. v. Brazil* (n 98) para. 74 – 77

¹²⁶ *Case of Valle Jaramillo et al. v. Colombia* (n 28) para. 77

¹²⁷ *Ibid.*, para. 78

¹²⁸ Fernando Basch Et al., 'La Efectividad Del Sistema Interamericano De Protección De Derechos Humanos: Un Enfoque Cuantitativo Sobre Su Funcionamiento y Sobre el Cumplimiento de Sus Decisiones' (2010) 7 SUR Revista Internacional de Derechos Humanos. 13 – 14 <<https://sur.conectas.org/wp-content/uploads/2017/11/sur12-esp-fernando-basch.pdf>> accessed 25 November 2019.

¹²⁹ See, for example, *Case of Valle Jaramillo et al. v. Colombia* (n 28); *Case of Yarce et al. v. Colombia* (n 98)

seriously, as it has reiterated their importance within democratic societies, reaffirming its support for them and trying to safeguard their rights.

Colombia has 22 cases in the supervision stage at the IACtHR, being the oldest case being from 1997.¹³⁰ In these cases the Court has ordered a total of 182 reparations, including economic and symbolic reparations, legal or necessary reforms, to investigate and prosecute those responsible, reparations regarding a corpse – finding, identifying and/or returning to the family –, reparations regarding security – protection and/or the possibility to return – and other reparations, such as publishing the sentence, educating the military and/or public servants, providing medical and/or psychological services free of charge, providing scholarships, and so on. Table 3 provides an overview of these reparations.

	Economical reparations	Symbolical reparations	Legal reforms	Investigate and prosecute	Reparations regarding the corpse	Reparations regarding security	Other reparations	Total
Fulfilled	26	10	0	1	1	4	27	69
Partially fulfilled	10	2	0	0	0	0	5	17
Declared pending	11	16	3	21	9	8	28	96
Total	47	28	3	22	10	12	60	182

Table 3: Reparations ordered by the IACtHR to the Colombian State.¹³¹

The IACtHR has only declared 38% of these reparations as being fulfilled by the Colombian State, while 9% have been declared partially fulfilled and 53% pending. The former represents a major obstacle for the implementation of the work conducted by the IACtHR, as

¹³⁰ 'Casos En Etapa De Supervisión' (*Corte Interamericana de Derechos Humanos*) <http://www.corteidh.or.cr/cf/jurisprudencia2/casos_en_etapa_de_supervision.cfm?lang=es> accessed 26 April 2020.

¹³¹ Table made by the author based on the information found at 'Casos En Etapa De Supervisión' (*Corte Interamericana de Derechos Humanos*) <http://www.corteidh.or.cr/cf/jurisprudencia2/casos_en_etapa_de_supervision.cfm?lang=es> accessed 26 April 2020.

the State lacks the willingness and/or the ability to implement the reparations ordered by the Court. This is particularly true when considering that none of the legal reforms ordered by the Court have been fulfilled and that the implementation of key measures such as investigating and prosecuting, and those regarding the corpses, have only occurred in 5% and 10% of the cases, respectively.

This shows the most significant shortcoming of the IACrHR: despite its willingness to protect human rights and HRDs in the region, it lacks effective and timely solutions. As presented by Pasqualucci, IACtHR cases have an average processing time of 6,7 years. And while the Court can monitor a states' compliance, the average time for issuing a compliance order is 20.9 years from the date of the actual violation. Also, no real international sanctions are in place for failing to comply with the Court's orders. Thus, it is up to the states whether or not the comply.¹³²

Consequently, the Court may strongly emphasise why HRDs are crucial for society, determine state responsibility for human rights violations against them, as well as order measures to protect defenders. Nevertheless, if the states do not want to comply, there is not much that the IACtHR can do apart issuing compliance orders.

3.2.3 Provisional and Precautionary Measures

The IACHR and the IACtHR can issue precautionary and provisional measures, respectively. These measures are issued when in situations of extreme gravity, urgency and the measures are necessary to avoid irreparable damage.¹³³ The former is understood as situations that could have a great impact, where it exists an imminent risk or threat to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.¹³⁴

¹³² Pasqualucci (n 122) 478 – 481

¹³³ IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, Costa Rica (adopted October 2009, modified in September 2011 and March 2013, entered into force August 2013) Article 25; ACHR (n 94) article 63(2)

¹³⁴ Pasqualucci (n 122) 252 – 253

By 2011, 86 HRDs were beneficiaries of precautionary measures, representing 42% of the total beneficiaries,¹³⁵ a figure that could now be exponentially higher. Having said that, the murder of defenders who are beneficiaries of the precautionary measures continues.¹³⁶

The Commission may issue the precautionary measures on its own initiative or upon the request of a party to a petition filed at the IACHR. The Commission can also submit a request to the IACtHR for provisional measures to the IACtHR, where necessary, even if the case is still not under the Court's jurisdiction.¹³⁷ On the other hand, the Court may, at any stage of the process, and by its own initiative, call upon the state concerned to adopt a provisional measure; as well as by request from the IACHR, as previously mentioned.¹³⁸

The adoption of these measures does not constitute a prejudgment of the violation of any right or the case in question.¹³⁹ These measures are supposed to be subsidiary to the national systems, but the existence of national protections for the beneficiaries of the measures does not automatically mean that the states can invoke the subsidiarity principle, as the effectiveness of this protection must be evaluated.¹⁴⁰ Hence, the main difference between the provisional and the precautionary measures is that the provisional measures are ordered by the IACtHR and the precautionary measures are ordered by the IACHR.

The IACHR has stated that both the provisional and the precautionary measures are binding upon States,¹⁴¹ but this has been met with resistance. The binding nature of the provisional measures has been accepted,¹⁴² while the binding nature of the precautionary measures has been a source of debate. This is because the IACHR is quasi-judicial body, not a judicial

¹³⁵ IACHR 'Segundo Informe Sobre la Situación de las Defensoras y Defensores de Derechos Humanos en las Américas' (31 de diciembre de 2011) OEA/Ser.L/V/II. Doc. 66 (Spanish versión) para. 434

¹³⁶ Six examples of murdered defenders were provided by the IACHR in its last specialised report. IACHR (n 4) footnote 134

¹³⁷ IACHR (n 133) article 25 (8)

¹³⁸ IACtHR, Rules of Procedure of The Inter-American Court of Human Rights, Costa Rica (adopted November 2009, entered into force 1 January 2010) Article 27

¹³⁹ IACHR (n 133) article 25 (8)

¹⁴⁰ IACHR (n 4) para. 69

¹⁴¹ Ibid., para. 330

¹⁴² Pasqualucci (n 122) 291

body,¹⁴³ and its competence to adopt these measures is not based on a treaty, but on the Rules of Procedure established by the Commission.¹⁴⁴ Thus, those who challenge the binding nature of the precautionary measures argue that to claim that a state is bound by these measures due to the state's ratification of the American Convention would mean going against the principle of good faith in the interpretation of the treaty.¹⁴⁵ This is because the state could not have foreseen that this would be a consequence when ratifying the Convention.¹⁴⁶

In this sense, the IACtHR has concluded that “the State Parties to the convention should fully comply in good faith (*pacta sunt servanda*) to all of the provisions of the Convention, including those relative to the operation of the two supervisory organs”.¹⁴⁷ This position is also shared by the Constitutional Court of Colombia, which has stated that these measures are binding as they are meant to protect rights enshrined in the American Convention. This is a treaty that deals with human rights that Colombia has ratified and therefore has supra-constitutional status. Moreover, articles 1 and 2 of the ACHR state that the States Parties to the American Convention undertake “to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms” and “to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”. Consequently, to interpret these measures as non-binding would mean going against the principle of good faith in interpretation of the treaty and could also lead to a breach of Colombia's international obligations.¹⁴⁸

At the same time, it is important to consider that the IACHR's mandate is to “promote respect for and defence of human rights”.¹⁴⁹ Thus, the precautionary measures are a significant tool for the IACHR regarding the protection of human rights in the region as they are issued in

¹⁴³ Quasi-judicial bodies are those that share the same characteristics as a Court or Tribunal, but not all of them. Daniel O'Donnell, *Derecho Internacional de los Derechos Humanos* (Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos 2007). 50 – 51

¹⁴⁴ IACHR (n 133) article 25

¹⁴⁵ Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331. Article 31(1)

¹⁴⁶ Juan Carlos Upegui and Jorge Ernesto Roa, 'La Fuerza Vinculante de Las Medidas Cautelares de la CIDH' (*Ámbito Jurídico*, 2014) <<https://www.ambitojuridico.com/noticias/educacion-y-cultura/la-fuerza-vinculante-de-las-medidas-cautelares-de-la-cidh>> accessed 2 December 2019.

¹⁴⁷ *James Et Al. Case*, Provisional Measures Adopted by The Inter-American Court of Human Rights in The Matter of The Republic of Trinidad y Tobago, IACtHR (29 August 1998). Considerations para. 7

¹⁴⁸ Sentencia T-524 de 2005, M.P. Dr. Humberto Antonio Sierra Porto.

¹⁴⁹ ACHR (n 101) Article 41

order to avoid irreparable damage to those rights. Nevertheless, the nature of the precautionary measures has raised several discussions in Colombia.¹⁵⁰

Regarding HRDs, the failure by States to implement the precautionary measures effectively implies a failure in its duty to protect. This is because the granting of the measures enables States to be aware of the risk, creating a special duty of protection for them.¹⁵¹ This has not stopped the Colombian National Protection Unit (UNP for its Spanish acronym) from denying or revoking, arbitrarily and against the State's international obligations, the measures granted by the IACHR. This has taken place through a re-evaluation of the defenders' risk after being granted precautionary measures, concluding, in some cases, that the risk "is not high enough" for the protection measures to be needed or implemented,¹⁵² thereby leaving defenders at great risk.

However, as stated by Pasqualucci, these measures can only protect a small number of people in limited situations and time. Thus, neither provisional nor precautionary measures can be considered a solution.¹⁵³ Furthermore, it is important to bear in mind that the IAHRs constitutes only a minimum and complementary framework of protection.¹⁵⁴ The States are ultimately responsible for the protection of the defenders under their jurisdictions. Thus, if the states fail to do abide by their obligations, defending human rights in the Americas will remain a dangerous activity, regardless of the quality of the regional system or how much it has advocated on behalf of the defenders, their rights and their protection.

3.3 The National System

The Colombian State is subject to international obligations to refrain from violating, directly or indirectly, the rights of HRDs (respect), to prevent attacks from third-parties against HRDs and exercise due diligence in doing so (protect), as well as take proactive steps to ensure a safe and enabling environment (fulfil).¹⁵⁵

¹⁵⁰ Upegui and Roa (n 146)

¹⁵¹ IACHR, Report No. 35/17, Case 12.713, Merits, *José Rusbell Lara et al.*, Colombia (21 March 2017) OEA/Ser.L/V/II.161 Doc. 42. para. 157

¹⁵² For an example see Sentencia T-078 de 2013, M.P. Gabriel Eduardo Mendoza Martelo

¹⁵³ Pasqualucci (n 122) 298

¹⁵⁴ IACHR (n 4) para. 67

¹⁵⁵ See Chapter 4

In this sense, Colombia has developed a protection mechanism comprising a series of programmes and measures. According to the National Government, 14 laws and decrees have been promulgated since 1997 and these incorporated different intervention instruments regarding prevention and protection in the face of human rights violations.¹⁵⁶ Also, besides the ordinary legislation, the Peace Agreement includes 10 dispositions that contribute to the security and protection of specific groups, including HRDs. However, by 2018, 60% of these dispositions were to begin their implementation, and none of them were fully implemented.¹⁵⁷

Thus, for the purpose of this thesis, the focus will primarily be on the NPP, and a brief reference will be made to the PAO and the “Early Warning System” under the Ombudsman’s leadership. This prioritisation has been made due to the importance of the role played by the mentioned within the national protection mechanism.

3.3.1 The National Protection Programme

The NPP is considered to be a pioneer¹⁵⁸ and the most sophisticated mechanism for protecting HRDs in the region.¹⁵⁹ This programme was implemented in 1997¹⁶⁰ and it was not exclusively created for HRDs¹⁶¹ but also for journalists, trade unionists, social or political leaders and anyone who has witnessed serious human rights violations. The NPP is currently regulated by the Decree 4912 (2011) and the Decree 2078 (2017).

The NPP has both a preventive and a protective role. The Office for Human Rights of the Ministry of Internal Affairs is the office in charge of overseeing the preventive strategy¹⁶² and is responsible for preventing violations of human rights and international humanitarian law, as well as mitigating the risk-generating circumstances and adopting guarantees of non-

¹⁵⁶ Gobierno de Colombia (n 30) 19

¹⁵⁷ Kroc Institute for International Peace Studies, 'Segundo Informe Sobre El Estado Efectivo De La Implementación Del Acuerdo De Paz En Colombia diciembre 2016 – mayo 2018' (2018) (Spanish version) <https://kroc.nd.edu/assets/284864/informe_2_instituto_kroc_final_with_logos.pdf> accessed 1 December 2019, 68

¹⁵⁸ IACHR (n 4) para. 154

¹⁵⁹ UNGA (n 87) para.11

¹⁶⁰ Ley 418 de 1997 (n 3) article 81

¹⁶¹ The term “human rights defenders” was not used at all. They were referred to as “leaders or activists of human rights organisations”. Ibid.

¹⁶² Decreto 4912 de 2011 (26 December 2011), article 10(a)

repetition.¹⁶³ In the meantime, the protection strategy is overseen by the UNP and the Ministry of National Defence.¹⁶⁴ This strategy aims to protect the lives, physical integrity and the security of those who are protected.¹⁶⁵ There are two types of protection measures: the individual measures and the collective measures.¹⁶⁶

Collective protection measures can comprise: strengthening and organizing the community; strengthening the institutional presence in the area; establishing communication strategies that reduce the risk level; supporting the communities in the denouncing process; psychosocial assistance; strengthening the capacity of the communities to protect themselves; creating campaigns that reduce the stigmatization of the communities, and more.¹⁶⁷ These measures are yet to prove their effectiveness as they have only been recently incorporated.

Individual protection measures can comprise protection schemes and resources for them to be implemented; reallocation support, whereas internationally or nationally; economic support for temporal reallocation; communication means to contact the authorities such as cell phones and panic buttons. They can also include real estate shielding and the installation of safety equipment.¹⁶⁸

For any of these measures to be granted, a request must be submitted to the UNP, which will then begin with the internal procedure that has been established, a procedure that will end up in a notification either granting or denying the protection measures. The former process must be in accordance with the individual¹⁶⁹ or collective¹⁷⁰ risk evaluation, as only risks categorised as extreme or extraordinary are to be protected.¹⁷¹ An extreme risk is a direct consequence of the work, function or position of a person or group of persons, the consequences of which they are not expected to tolerate as they are exceptional and not generalised to the population. The risk must be specific, concrete and present to the person or

¹⁶³ Ibid., article 12

¹⁶⁴ Ibid., article 25

¹⁶⁵ Ibid., article 3(9)

¹⁶⁶ Decreto 2078 de 2011 (7 December 2017)

¹⁶⁷ Ibid., article 2.4.1.5.5

¹⁶⁸ Decreto 4912 de 2011 (n 162) article 11

¹⁶⁹ Ibid., article 39

¹⁷⁰ Decreto 2078 de 2017 (7 December 2017), article 2.4.1.5.5.

¹⁷¹ Decreto 4912 de 2011 (n 162) article 3(13)

collective. It cannot be based on suppositions; it has to be serious and there has to be a high probability of it materialising.¹⁷² Likewise, an extraordinary risk is an extreme risk that is additionally serious and imminent.¹⁷³

Correspondingly, the CCourt has developed a constitutional presumption of risk¹⁷⁴ for those who are entitled to receive special constitutional protection. Persons entitled to this protection are those who, due to their physical, psychological or social condition, deserve a positive action from the State to achieve real and effective equality in society. For example, children, internally displaced people and victims of internal armed conflict.¹⁷⁵ In this sense, the UNP must grant them the “emergency measures” while the protection measures are being decided.¹⁷⁶

In Colombia, HRDs have had a constitutional presumption of risk since 2007,¹⁷⁷ and around 4500 HRDs have received protection measures.¹⁷⁸ However, even if the NPP might appear to be good and adequate on paper, its implementation presents many flaws. For example, there is a lack of gender, ethnic and context perspective when analysing the risk and implementing the measures. Thus, no differential approach – intersectionality approach – is conducted, even though this is considered to be one of the principles of the programme.¹⁷⁹ This lack of a differential approach means that risks that should be regarded as extreme, or even as extraordinary, are regarded as ordinary. Consequently, the protection measures are not granted or are revoked in cases in which they had already been granted. Such was the case of an afro-descendant WHRD. The defender had to request precautionary measures from the IACHR, because her risk level was constantly being assessed as ordinary by the UNP, despite

¹⁷² Ibid., article 3(16)

¹⁷³ Ibid., article 3(17)

¹⁷⁴ Auto No. 200 de 2007, M.P. Manuel José Cepeda Espinosa.

¹⁷⁵ Sentencia T-167 de 2011, M.P. Juan Carlos Henao Pérez

¹⁷⁶ Decreto 4912 de 2011 (n 162) article 9

¹⁷⁷ Auto No. 200 de 2007 (n 174)

¹⁷⁸ Adrián Atehortúa, “‘Estamos Desbordados En Solicitudes De Protección’: Director De La UNP” (*Hacemos Memoria*, 2019) <<http://hacemosmemoria.org/2019/02/16/entrevista-a-pablo-elias-gonzalez-unidad-nacional-proteccion/>> accessed 15 December 2019.

¹⁷⁹ Decreto 4912 de 2011 (n 162) article 2

her having received several threats from paramilitary groups and having four members of her family murdered by these groups. The precautionary measures were granted.¹⁸⁰

Another problem is that when HRDs are granted the protection measures, as these measures are not always in accordance with their contexts, which render the measures to be ineffective. As an example, mobile phones and panic buttons have been provided to defenders who live in areas with no access to electricity or satellite signals.¹⁸¹

Regarding these problems, the CCourt has recognised that the UNP has autonomy when evaluating the risk and granting the protection measures. However, this means that the risk evaluations that are performed, and the measures taken, must correspond to the real risk and context that the defenders face in Colombia, as they must be performed effectively and properly. Thus, the CCourt has considered it inadmissible when the risk of HRDs is regarded as ordinary, without taking into account the specific context of the defender.¹⁸²

The previous assessment of the CCourt is based on the aforementioned constitutional presumption of risk that HRDs have,¹⁸³ which is activated when a person, entitled to receive special constitutional protection, requests protection measures from the UNP. This does not mean that all defenders in the country are exposed to an extreme or extraordinary level of risk, but that the UNP has a heavier burden of proof when the risk is regarded as ordinary.¹⁸⁴

Moreover, the NPP faces a challenge regarding the bias of state's officials towards HRDs, as defenders are often delegitimised and blamed for putting themselves at risk. This has happened to such an extent that the risk levels and killings have been attributed to "love affairs", and not something relating to the work they do.¹⁸⁵ The declarations made by the former Minister of National Defence have not been the only declarations that have attempted to delegitimise the work of HRDs, as the former President and now Senator, Álvaro Uribe

¹⁸⁰ Erlendy Cuero Bravo y otros Respecto a la República Colombia, Medida Cautelar No. 658-16, CIDH Res. 63/2016 (6 de diciembre de 2016)

¹⁸¹ IACHR (n 4) para. 294

¹⁸² Sentencia T-473 de 2018 (n 52)

¹⁸³ Auto No. 200 de 2007 (n 174)

¹⁸⁴ Sentencia T-473 de 2018 (n 52)

¹⁸⁵ 'Asesinatos De Líderes Son Por "Líos De Faldas": Ministro De Defensa' (*El Espectador*, 2019) <<https://www.elespectador.com/noticias/politica/asesinatos-de-lideres-son-por-lios-de-faldas-ministro-de-defensa-articulo-728893>> Accessed 10 December 2019.

Vélez, has referred to HRDs as terrorists on numerous occasions,¹⁸⁶ something that is even more serious when taking into account that the unit in charge of the protection of HRDs before the UNP,¹⁸⁷ conducted illegal surveillance against HRDs and human rights organisations using military intelligence.¹⁸⁸ Both the illegal surveillance and the delegitimising comments from state officials can be serious obstacles to HRDs obtaining adequate protection. This is because the trust within the system could be damaged as those who are meant to protect them are the ones attacking them.¹⁸⁹

Another challenge faced by the NPP is that the focus has been centred mainly on a reactive individual protection rather than on preventive protection measures. The UNP has primarily relied on individual armed protection provided by the military, police and members of the UNP.¹⁹⁰ In this respect, the current President of Colombia, Ivan Duque, has declared that there are too many HRDs in Colombia for the State to protect them all with individual measures.¹⁹¹ This could be true due to the way in which the State has approached the protection of HRDs, as it is unrealistic to assign an armed bodyguard to every single HRD in the country. This focus is not only unrealistic, it is also expensive, has not proven to be effective, could increase the fear of HRDs, and could also hinder their work as defenders, as supported by Eguren.¹⁹² Thus, it should not be the exclusive focus of an effective protection programme.

It is therefore that Colombia might have developed an internationally recognised NPP, but this programme has significant flaws, such as the lack of a differential approach, inexplicable delays, arbitrary decisions regarding the risks faced by the defenders, ineffective measures and bias from state officials towards the defenders. Furthermore, the programme has an

¹⁸⁶ Hasan Dodwell and Jaume Fortuño, 'The Stigmatisation of Human Rights Defenders in Colombia' (*Peace Insight*, 2010) <<https://www.peaceinsight.org/es/blog/2010/05/the-stigmatisation-of-human-rights-defenders-in-colombia/?en=1>> Accessed 15 December 2019.

¹⁸⁷ It was the now-dissolved Administrative Department of Security (DAS). Decreto 4912 de 2011 (n 162) article 52

¹⁸⁸ 'Colombia's Intelligence Agency: Spying on Democracy' (*Latin America Working Group*, 2009) <<https://www.lawg.org/colombias-intelligence-agency-spying-on-democracy/>> accessed 15 December 2019.

¹⁸⁹ IACHR (n 4) para. 275

¹⁹⁰ Eguren (n 5) 102

¹⁹¹ EFE, 'Duque Reconoce Que Es "Difícil" Proteger A Siete Millones De Líderes Sociales' (2019) <<https://www.efe.com/efe/espana/mundo/duque-reconoce-que-es-difcil-proteger-a-siete-millones-de-lideres-sociales/10001-4024704>> accessed 15 December 2019.

¹⁹² Eguren (n 5) 10, 100 – 102

ineffective and expensive focus on individual protection measures, and on solving all the problems through militarisation, without addressing the real structural causes, which are creating a bleak future for HRDs in the country. Greater focus on addressing the real structural causes could be a better and more effective way to protect the defenders, without forgetting about the physical protection measures.¹⁹³

3.3.2 Timely Action Plan

The PAO¹⁹⁴ is the latest attempt by the government to prevent the attacks against HRDs – 2018. This plan has raised concerns within human rights organisations as it is almost a repetition of the NPP, but with the aggravating factor that it focuses even more on the military forces as a solution, thereby creating an excuse to militarize the communities.¹⁹⁵ Some experts have also stated that the PAO limits the protection measures established by the NPP, this by reducing them to a minimum level of individual protection, while also failing to address the structural factors that have led to the current situation for HRDs.¹⁹⁶

As previously mentioned, the militarization of communities is controversial because of the illegal surveillance operations conducted by military intelligence against the defenders. Also, it can create unnecessary fear or even danger within the communities and the HRDs due to the recent history of the Colombian Armed Forces. This is because members of the Colombian military killed more than 2000 civilians and then claimed that they were guerrillas who were killed in combat. These extrajudicial killings are known in Colombia as “false positives”.¹⁹⁷

Likewise, reducing the protection measures to the minimal level of individual protection will not contribute to the creation of a safe and enabling environment for HRDs, because these measures alone are unrealistic, expensive and have not proven to be effective.

¹⁹³ Ibid. 130, 132

¹⁹⁴ Gobierno de Colombia (n 30)

¹⁹⁵ Programa Somos Defensores, ‘La Naranja Mecánica: Informe Anual 2018’ (2019) <<https://somosdefensores.org/wp-content/uploads/2019/04/informe-somos-defensores-2019-espanol-web.pdf>> accessed 30 October 2019. 42 – 43

¹⁹⁶ ‘#Elderechoadefenderderechos: Intervenciones A Favor De La Tutela Que Busca Proteger Líderes Sociales’ (*DeJusticia*, 2019) <<https://www.dejusticia.org/intervenciones-a-favor-de-la-tutela-lideres-sociales/>> accessed 8 February 2020.

¹⁹⁷ Sebastián Pacheco Jiménez, ‘La Real Dimensión De Las Ejecuciones Extrajudiciales En Colombia’ (*El Espectador*, 2018) <<https://www.elspectador.com/colombia2020/opinion/la-real-dimension-de-las-ejecuciones-extrajudiciales-en-colombia-columna-859056>> accessed 15 December 2019.

Consequently, the PAO might create unnecessary situations, and exacerbate the risk for HRDs, without providing effective solutions for their situation.

3.3.3 The Early Warning System

The creation of this early warning system was stipulated in the Peace Agreements¹⁹⁸ and subsequently regulated through the Decree 2124 of 2017. It is overseen by the Colombian National Human Rights Institution – the Ombudsman’s Office, which has been accredited with an “A” status according to the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).¹⁹⁹

Its purpose is to identify, verify and analyse different situations or risk factors that could place the population at risk, particularly concerning massive violations of human rights. When such situations are found, the Ombudsman’s Office issues an early warning to the government, so the necessary measures to prevent or stop the risk can be taken in time.²⁰⁰

As a result of this system, the Ombudsman’s Office issued 179 early warnings through 2018 and the first semester of 2019.²⁰¹ It has also published two documents – one risk report²⁰² and one generalised early warning.²⁰³ These reports described the generalised risks for HRDs that are present in more than 220 municipalities in Colombia, the factors for these risks and the pertinent recommendations to the authorities in charge.²⁰⁴

Thanks to the efforts of the Ombudsman’s Office, the system has been welcomed by HRDs,²⁰⁵ but not without criticism.²⁰⁶ The biggest problem is that the system has issued the early warnings, without an effective response from the government, as supported by the

¹⁹⁸ Points 2.1.2.1 and 3.4.9

¹⁹⁹ GANHRI, 'Accreditation Status as of 04 March 2019' (GANHRI 2019) <[https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20\(04%20March%202019.pdf](https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20(04%20March%202019.pdf)> accessed 6 March 2020.

²⁰⁰ Decreto 2124 de 2017 (18 December 2017), articles 1, 5

²⁰¹ UNGA (n 87) para. 62

²⁰² Defensoría del Pueblo, 'Informe de Riesgo N° 010-17 A.I.' (Defensoría del Pueblo 2017).

²⁰³ Defensoría del Pueblo, 'Alerta Temprana N° 026 –18' (Defensoría del Pueblo 2018).

²⁰⁴ Ibid.

²⁰⁵ Somos Defensores (n 195) 76 – 78

²⁰⁶ 'Una Alerta Temprana Que Llegó 282 Muertos Después' (*VerdadAbierta*, 2018) <<https://verdadabierta.com/alerta-temprana-sobre-defensores-de-derechos-humanos-y-lideres-sociales/>> accessed 6 March 2020.

SRHRDs.²⁰⁷ This means that it is effective in pointing out the risk situations for the defenders and warning the pertinent authorities but it is ineffective in the sense that these authorities do not respond effectively. Thus, the system is not sufficient for preventing attacks against HRDs.

As a way of concluding the chapter, as previously mentioned, the Colombian protection mechanism was a pioneer in the region²⁰⁸ and it is regarded as one of the most extensive in the world.²⁰⁹ Consequently, the IACHR has consistently recognised the State's efforts towards the development, consolidation and improvement of the programme.²¹⁰

Nevertheless, in 2019, 2.3 defenders on average were attacked per day.²¹¹ Thus, the problem in Colombia is not about a lack of regulations or the quality of such regulations. The real problem lies within the implementation of these regulations. Hence, as highlighted by the Attorney General,²¹² there is a need for the preventive and protective stipulations to be translated into reality; they must extend beyond theory. Otherwise, the national protection system for protecting HRDs cannot be considered a success.

²⁰⁷ UNGA (n 87) para. 74(iv)

²⁰⁸ IACHR (n 4) para. 154

²⁰⁹ Maria Martin Quintana and Enrique Eguren Fernández, *Protection of Human Rights Defenders: Best Practices and Lessons Learnt* (Protection International 2012). 15

²¹⁰ IACHR (n 4) para. 166

²¹¹ Programa Somos Defensores (n 56) 85

²¹² 'Fracasó Sistema De Protección De Líderes Sociales: Procurador' (*Procuraduría General de la Nación*, 2018) <<https://www.procuraduria.gov.co/portal/fracaso-sistema-proteccion-lideres-sociales-procurador.news>> accessed 10 December 2019.

4 The Colombian State's obligations towards HRDs: Assessment and recommendations

“If the State fully fulfilled its duty to prevent, investigate and punish human rights’ violations, there would not be a need for particulars to become the defenders of those rights”.²¹³

As shown in the previous chapter, both the international and the regional systems have helped strengthen the Colombian national mechanism for the protection of HRDs. However, at the same time, the national system continues to be the well-deserved target of critics. This is because since its creation, the number of defenders killed or attacked has risen instead of fallen.²¹⁴ And, in 2018 and 2019, at least two defenders were being attacked every single day in the country.²¹⁵

Thus, this chapter aims to assess the different obligations of the Colombian State to HRDs in the light of international human rights law, namely, the obligation to respect, protect and fulfil. Likewise, the obligation to investigate, prosecute and punish has been included as a separate obligation. This is because of its importance to the protection of HRDs, which will be discussed below.

This assessment will be complemented by a series of recommendations given to the Colombian State. These recommendations were made by following what has been internationally recognised as crucial for the defenders’ protection. They aim to approach the situation of HRDs in an holistic manner, and to see HRDs not as objects of protection, but as subjects of rights. This in a sphere where security is not to be defined as physical security alone,²¹⁶ in which the respect, protection and fulfilment of the right to defend human rights is the focus of the national protection mechanism, thereby helping to create an enabling environment for HRDs in the country and to comply with the State’s international obligations.

²¹³ Translation by the author. Sentencia 590 de 1998, M.P. Dr. Alejandro Martinez Caballero.

²¹⁴ Eguren (n 5) 23

²¹⁵ See Table 1.

²¹⁶ Inmaculada Barcia, *Our Right to Safety: Women Human Rights Defenders’ Holistic Approach to Protection* (Association for Women’s Rights in Development 2014). 11
<https://www.awid.org/sites/default/files/atoms/files/Our%20Right%20To%20Safety_FINAL.pdf>
Accessed 15 February 2020; Eguren (n 5) 67; UNGA (n 33) para. 44

In this context, and as a first general approach to the assessment, it is important to acknowledge that the term “HRD” is beneficial for defenders. It situates them within the international human rights framework, giving them recognition, status and the possibility of accessing international protection and funds.²¹⁷ The term also makes them subjects of rights and not simple objects of protection.²¹⁸ However, as supported by Eguren, the term has an acknowledged shortcoming: Its definition is too broad, something which could create controversy regarding who is and who is not an HRD.²¹⁹ This controversy could be smoothed by interpreting the definition as “anyone who carries out peaceful activities in the defence of human rights”,²²⁰ and with the help of Fact Sheet 29. Also, this broad definition serves a purpose and it is more beneficial than detrimental for the protection of HRDs, as shown in Chapter 2.

Correspondingly, due to this broad definition, HRDs can be as diverse as the population itself. They comprise are women, men, LGTBI+, family members, community leaders, judges, lawyers, indigenous people, farm workers, etc. In this way, they are to be found within different contexts and realities, facing different challenges and threats. This also means that the defenders might identify themselves with one or several identities, without necessarily being “HRD”, the predominant identity.²²¹ Thus, governments in general, and the Colombian government in particular, must acknowledge and incorporate this reality into their protection policies for HRDs.

It is also essential to remember that until all of the structural factors that cause the violence against HRDs are understood and addressed, violence against the defenders may not cease.²²² Thus, the recommendations given within the analysis of each obligation are not to be interpreted as being exhaustive.

²¹⁷ Karen Bennett et al., 'Critical Perspectives on The Security and Protection of Human Rights Defenders' (2015) 19:7 The International Journal of Human Rights. 888

²¹⁸ Eguren (n 5) 105

²¹⁹ Eguren and Patel (n 31) 897

²²⁰ Nah et al. (n 9) 403

²²¹ Eguren (n 5) 59

²²² Ibid., 10

4.1 Obligation to Respect

The obligation to respect is a negative obligation, meaning that it requires the states to refrain from taking any action that could interfere with the enjoyment of the rights. This does not mean that human rights cannot be limited or restricted.²²³ However, as stated by Kälin and Künzli, “the extent to which rights may be restricted cannot be determined in general terms but has to be ascertained for each right individually”.²²⁴ In order to assess whether or not a human rights limitation clause violates human rights, it must be assessed whether “(1) they are based on the law, (2) serve a legitimate goal and (3) are necessary in a democratic society”.²²⁵

Concerning HRDs, the obligation to respect means that state agents must refrain from violating the rights of HRDs.²²⁶ In this sense, the IACHR has emphasised that an integral policy for protecting defenders must start with the states agents’ respect for their rights. Thus, there is a need for authorities to refrain from arbitrarily interfering in their rights, or harassing HRDs through manipulation of the punitive power of the State and judicial apparatus.²²⁷

In this sense, there are well-known measures and recommendations, such as the obligation of states agents to refrain from attacking HRDs in the forms of killings, threats, forced-disappearances, prosecutions without grounds and any commonly known interferences with their rights. These are undoubtedly crucial for the protection of HRDs. However, in Colombia, there is another quite common practice: stigmatisation or defamation statements or campaigns.²²⁸

These campaigns not only undermine the rights of HRDs, they delegitimise their work, which could be interpreted as a way for a state to support attacks against the defenders. This is particularly true in countries with high levels of violence, such as Colombia.²²⁹ Thus, the

²²³ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, Oxford University Press 2019). 90

²²⁴ *Ibid.*, 91

²²⁵ *Ibid.*

²²⁶ See Table 2.

²²⁷ IACHR (n 4) para. 125

²²⁸ UNGA (n 87) para. 27

²²⁹ IACHR (n 4) para. 128

Colombian State must have *zero tolerance for defamation campaigns proceeding from states officials*, and this should be clearly stated in the protection policy.

In this regard, the damage inflicted by these defamation campaigns has been referred to in the PAO,²³⁰ although no measures have been considered to stop them when have been started by state officials.

Consequently, *the Colombian State must not only refrain from engaging in physical attacks against HRDs, but also from engaging in verbal attacks against defenders*. In addition, the State should investigate and prosecute those state officials who are involved in the defamation campaigns.

4.2 Obligation to Protect

The obligation to protect is a positive obligation requiring from the states to take action in order to protect the rights enshrined under the international human rights treaties from breaches by third parties – e.g. private actors, or particular situations – e.g. natural disasters.²³¹

This obligation “arises only insofar as the state is aware, or could have been aware, if sufficient caution had been exercised, of the violation or threat thereof and has the practical and legal means to prevent it”.²³²

According to the IACtHR:

this obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (...) and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.²³³

Regarding HRDs, the obligation to protect means that:

States must adopt short-term and long-term measures to allow human rights defenders to freely pursue their activities through the fostering of a human rights culture and an environment free from violence and threats; the gathering and maintaining of accurate statistics on violence against defenders; the

²³⁰ Gobierno de Colombia (n 30) 33 – 36

²³¹ Kälín and Künzli (n 223) 87

²³² Ibid., 88

²³³ *Case of Velásquez-Rodríguez v. Honduras*, Merits, IACtHR (29 July 1988). para. 166

training of public officials; the official recognition of the role and importance of the work of defenders; and the carrying out of serious and effective investigations of any human rights violations against them.²³⁴

In this sense, four assessments and recommendations have been made to improve the national protection mechanism: recognise the magnitude of the problem, empower and support HRDs, change the individual protection focus of the NPP and implement the measures in accordance with the diversity present within HRDs.

4.2.1 The Colombian State must recognise the magnitude of the problem

Despite the international recognition given to the State because of its efforts to improve the national mechanism,²³⁵ reality shows that protecting HRDs does not appear to be a priority for the Colombian State.²³⁶ The proposed solutions are just a repetition of what has previously been incorporated into the mechanism before, but using a less effective approach.²³⁷ Also, a large part of the discussion has been focused on how many defenders have been attacked, and whether or not the attacks are widespread and/or systematic.²³⁸

Colombia lacks a unified and differentiated official record regarding the attacks against the defenders.²³⁹ This is unfortunate because it could help to understand the magnitude of the problem and to adopt more effectively the preventive and investigative actions.²⁴⁰

Due to this lack of a unified and differentiated official record, the government relies on the information provided by the OHCHR.²⁴¹ However, the OHCHR is not the only organisation collecting this information as Cumbre Agraria, Indepaz, Somos Defensores, Front Line Defenders and the Ombudsman's Office also do collect it. This has led to a difference within

²³⁴ IACHR (n 4) page 12

²³⁵ Ibid., para. 166

²³⁶ El Espectador, "'El Asesinato De Líderes Sociales No Es Una Prioridad Del Gobierno Duque': Amnistía Internacional' (2019) <<https://www.elespectador.com/noticias/paz/el-asesinato-de-lideres-sociales-no-es-una-prioridad-del-gobierno-duque-amnistia-internacional-articulo-838440>> accessed 6 February 2020.

²³⁷ E.g.: the PAO. See Chapter 3.3.2

²³⁸ These will be further discussed below.

²³⁹ Gobierno de Colombia, (n 30) 7

²⁴⁰ UNGA (n 38) para. 60

²⁴¹ Gobierno de Colombia (n 30) 7 – 8

the statistics on the total number of defenders killed, as these are the most common statistics to measure.²⁴² This that has created many discussions in the country.²⁴³

The differences within the statistics can be seen in Table 4

Year	Indepaz	Somos Defensores	Cumbre Agraria	Front Line Defenders	OHCHR	Ombudsman's Office
2016	114	80	92	86	61	133
2017	-	106	106	89	84	126
2018	261	164	-	125	115	177

Table 4: HRDs killed in Colombia according to different organisations.²⁴⁴

These debates do not help to improve the conditions for HRDs in the country, as the differences in the statistics could be explained by the difficulty relating to the definition of HRDs, and the complexity of their contexts: Each organisation might slightly differ on what they consider an HRD to be, and not all of them have the same connections and trusts within the communities.²⁴⁵

This does not mean that these different NGOs should stop reporting the cases or unify their databases. While the government should have an official record, the work done by the different organisations helps to make more cases visible, leaving as few as possible without being reported.²⁴⁶ Therefore, the discussion should not be focused on what the exact number is, but on why the number is increasing and what can be done to improve the situation.

Another debate that has dominated the discussion surrounding the plight of HRDs in Colombia has been about the nature of the attacks, whether they are generalised and/or systematic. The generalised nature of the attacks means that the attacks are carried out on a

²⁴² See Table 4.

²⁴³ E.g.: El Espectador, "'En 2020 Solo Hay un Caso que ONU Clasifica Como Asesinato de un Líder Social': Fiscal Espitia' (2020) <<https://www.elespectador.com/noticias/judicial/en-2020-solo-hay-un-caso-que-onu-clasifica-como-asesinato-de-un-lider-social-fiscal-espitia-articulo-900722>> accessed 1 February 2020.

²⁴⁴ Table taken from: Valentina Rozo Ángel and Patrick Ball, 'Killings of Social Movement Leaders in Colombia: An Estimation of The Total Population of Victims - Update 2018' (DeJusticia 2019) 2 <<https://hrdag.org/wp-content/uploads/2019/12/2019-HRDAG-killings-colombia-update-english.pdf>> accessed 28 December 2019.

²⁴⁵ Ibid., 2

²⁴⁶ Ibid., 7

large scale, leaving many victims,²⁴⁷ while the systematic nature reflects on whereas “the pattern or methodical plan is evident”,²⁴⁸ meaning it is organised, and its random occurrence is improbable.²⁴⁹

The official government position has been to deny the systematic nature of the attacks and to blame them on several different factors.²⁵⁰ Meanwhile, the Offices of the Attorney General²⁵¹ and the General Prosecutor,²⁵² have stated that the attacks are systematic, thereby supporting the position of the IACtHR,²⁵³ NGOs²⁵⁴ and academics.²⁵⁵

The previous discussion could be partially explained by previous IACtHR cases, which considered that the Colombian State had violated its international obligations regarding HRDs, thereby condemning the State for its acts and omissions, when a generalised or systematic pattern to the attacks have been present.²⁵⁶

Consequently, it is not surprise that the government is unwilling to recognise the attacks as being of a generalised and systematic nature, as it does not want to acknowledge its possible responsibility for and/or a violation of its international obligations.

A shortcoming of this discussion is that the state does not have a unified and discriminated official record regarding the attacks against HRDs, as previously mentioned. Thus, how can the state claim that the attacks are not generalised nor systematic if they have not been keeping track of them? The State’s argument cannot continue to be about the precise number nor the nature of the attacks. The focus of the State must be on trying to understand the

²⁴⁷ *Tadic Case* (Opinion and Judgment) ICTY-94-1 (7 May 1997) para. 648

²⁴⁸ *Ibid.*

²⁴⁹ *Kunarac et al. Case* (Judgment) ICTY- 96-23 & 23/1 (12 June 2002) para. 94

²⁵⁰ El Espectador, 'Gobiernos De Santos y Duque Coinciden: Asesinato de Líderes Sociales No Es Sistemático' (2018) <<https://www.elespectador.com/noticias/politica/gobiernos-de-santos-y-duque-coinciden-asesinato-de-lideres-sociales-no-es-sistemático-artículo-813250>> accessed 8 February 2020.

²⁵¹ Regarding land defenders. Procuraduría General de la Nación, 'Violencia Sistemática Contra Defensores De Derechos Territoriales En Colombia' (Procuraduría General de la Nación 2018) <https://www.procuraduria.gov.co/portal/media/file/180710_Violencia%20sistemática-contra%20defensores-derechos-territoriales.pdf> accessed 10 October 2019.

²⁵² El Espectador, 'Fiscalía Reconoce Sistemática En Crímenes Contra Líderes Sociales' (2019) <<https://www.elespectador.com/noticias/politica/fiscalia-reconoce-sistemática-en-crímenes-contra-lideres-sociales-artículo-833539>> accessed 1 February 2020.

²⁵³ Regarding WHRDs in *La Comuna 13*, in Medellín. *Case of Yarce et al. v. Colombia* (n 98) para. 87-99

²⁵⁴ *Somos Defensores* (n 195) 42

²⁵⁵ *DeJusticia* (n 196)

²⁵⁶ *Case of Valle Jaramillo et al. v. Colombia* (n 28), *Case of Yarce et al. v. Colombia* (n 98)

possible patterns and root causes, instead of denying their existence. This could be accomplished by starting to keep an official record of the attacks and analysing them. The Colombian State must recognise the magnitude of the problem and start finding genuine solutions for it.

4.2.2 Empower and support HRDs

Legitimation campaigns can help protect HRDs and are of utmost importance as they are a way of legitimising their role in society and democracy.²⁵⁷ The problem is that in Colombia, there appears to be a lack of State recognition of HRDs, which can be seen in the aforementioned defamation remarks made by state officials. Likewise, the government of Colombia appears to have an aversion to referring to HRDs as so. For example, the law regulating the NNP makes no reference to defenders, but instead refers to them as “activists”,²⁵⁸ and it even ask for them to have an accreditation as an “activist” from a legally recognised organisation,²⁵⁹ when an accreditation is not considered to be necessary in order for someone to be recognised as an HRD.²⁶⁰

Another potential example is the tendency to refer to them as “social leaders” to which the SRHRDs has referred, stating that social leaders are HRDs.²⁶¹ There are some exceptions to this aversion, for example, Resolution 0002/17 issued by the Public Prosecutor.²⁶²

In this sense, the first step should be for the State to recognise the work performed by HRDs and their importance in a democratic society. This is because defenders do not tend to recognise themselves as so, nor to use the term to refer to themselves,²⁶³ or are unaware of their rights.²⁶⁴ All of which might be rooted in the lack of a state recognition of defenders and their importance.²⁶⁵ Furthermore, these campaigns could be a contributory factor to reducing

²⁵⁷ Eguren (n 5) 105

²⁵⁸ Decreto 4912 de 2011 (n 162) article 3.1

²⁵⁹ Ibid.

²⁶⁰ OHCHR (n 17) 6

²⁶¹ Forst M. (n 92)

²⁶² This Resolution will be further described in Section 4.3. Directiva 0002 de 2017, Fiscalía General de la Nación (30 November 2017)

²⁶³ Bennett and others (n 217)

²⁶⁴ UNGA (n 38) para. 54

²⁶⁵ Ibid., para. 51

the risks of aggression. This is because these risks could be reduced by decreasing the perceived State tolerance of the attacks against HRDs.²⁶⁶

These types of legitimization campaigns have been previously conducted and have also been considered in the PAO,²⁶⁷ although the last campaign only ran until 2015.²⁶⁸ Hence, the importance of starting them again. These campaigns can be communicated through official speeches or broadcasting information about HRDs, their work and importance through social media, newspapers and/or television. They can also be communicated through the divulgation of the UN Declaration on HRDs.

Another significant way of supporting the work of HRDs could be the training of public servants regarding human rights and the defenders, including the UN Declaration on HRDs, their rights, importance and different contexts they are to be found in. In this way, some of the shortcomings of the national mechanisms could be improved.²⁶⁹

4.2.3 The mechanism cannot only have an individual protection focus

The Colombian mechanism has placed a lot of focus on the individual protection measures.²⁷⁰ However, as Eguren stated, the problem with these measures is that they are not very effective in dealing with a collective threat.²⁷¹ Likewise, these measures can sometimes represent an additional difficulty and leave defenders more vulnerable than before. Also, it is easier to implement individual protection measures in urban areas than in rural areas,²⁷² which is a problem when taking into account that 66.4% of killings of HRDs in Colombia in 2018 took place in rural areas.²⁷³ Also, these measures are expensive to implement, making them an unrealistic solution for all the defenders who may be at risk in the country, particularly when

²⁶⁶ Eguren (n 5) 66 – 67

²⁶⁷ Gobierno de Colombia (n 30) 34

²⁶⁸ “You Defend my Rights, I Defend Your Work” ‘Todos En Los Derechos’ (*Tu Defiendes mis Derechos, Yo Defiendo tu Labor*, 2014) <<http://www.tudefiendesmisderechos.com/>> accessed 26 January 2020.

²⁶⁹ For an example see: Martin and Eguren (n 209)

²⁷⁰ Eguren (n 5) 103

²⁷¹ Ibid., 107

²⁷² Ibid., 100, 103

²⁷³ Somos Defensores (n 195) 92

the UNP has previously complained about a lack of resources.²⁷⁴ For example, in 2015 alone, the UNP spent USD 145 million on the implementation of individual protection measures.²⁷⁵

However, security should be a key focus of the mechanisms for HRDs,²⁷⁶ this without meaning physical individual security alone.²⁷⁷ With a focus on individual security, the main goal is to prevent further attacks – the symptom of the problem – without dealing with the possible roots of it.²⁷⁸ Furthermore, if HRDs are diverse, the individual protection measures might be useful and necessary for some defenders, while other measures such as preventive and collective measures could be more useful in other contexts.²⁷⁹

Both preventive²⁸⁰ and collective measures²⁸¹ have been incorporated into the NPP. However, the problem lies in their implementation, as both HRDs and NGOs consider that the preventive and the collective measures have been poorly implemented so far.²⁸² Therefore, the national mechanism needs to stop focusing so much on the individual protection measures and start implementing the other types of measures, which could help to offer better protection to HRDs in the country.

4.2.4 The measures must be in accordance with the diversity present in HRDs

HRDs are diverse. Thus, the measures taken to prevent acts of aggression against defenders and the measures taken to protect HRDs cannot be homogenous,²⁸³ something which is referred to, in Colombia, as the “principle of differential approach”. This principle has gained momentum following a ruling by the CCourt. In the ruling, the Court set out the national and international obligations of the State regarding internally displaced women, in which the State should prevent the displacement from happening and protect the women when it happens, as women are disproportionately impacted by internal displacement.²⁸⁴

²⁷⁴ Atehortúa A. (n 178)

²⁷⁵ Eguren (n 5) 103

²⁷⁶ Ibid., 68

²⁷⁷ UNGA (n 33) para. 44

²⁷⁸ Eguren (n 5) 37

²⁷⁹ Ibid., 101

²⁸⁰ Decreto 1740 de 2010 (19 May 2010)

²⁸¹ Decreto 2078 de 2011 (7 December 2017)

²⁸² Somos Defensores (n 195) 95

²⁸³ Eguren (n 5) 129 – 130

²⁸⁴ Auto No. 092 de 2008, M.P. Manuel José Cepeda Espinosa

The principle is currently interpreted as an affirmative action towards substantive equality, which has been incorporated into the Constitution.²⁸⁵ Thus, the State is obliged to incorporate the principle into all of its policies and laws, this in order to provide special protection to those who are considered to be in a vulnerable position due to their characteristics or contexts.²⁸⁶

Regarding the protection of HRDs, the differential approach means that the authorities overseeing the study and implementation measures should consider the context and situation of the individual – or collective, particularly regarding union leaders, farm workers, community leaders, indigenous leaders, leaders of afro-descendant communities, judges, WHRDs, environmental defenders and LGTBI+.²⁸⁷ This is because these groups have a special protection status given by the CCourt within its jurisprudence.²⁸⁸

The NPP incorporated the differential approach in 2011.²⁸⁹ However, one of the biggest complaints against both the mechanism and the UNP is the lack of application of this principle when assessing the risk level and/or when adopting the measures.²⁹⁰ This lack of application can be seen, for example, when defenders in remote areas with limited access to communication are granted mobile phones or panic buttons, which cannot work because of lack of connection.²⁹¹

Consequently, as Peláez has stated, the incorporation of the differential approach could be interpreted as a strategy by the State to demonstrate its commitment to its human rights obligations, without this actually being the case.²⁹²

²⁸⁵ Sentencia T-531 de 2017, M.P. Alberto Rojas Ríos; Constitución Política de Colombia [1991], article 13

²⁸⁶ Sentencia T-531 de 2017, M.P. Alberto Rojas Ríos

²⁸⁷ Sentencia T-424 de 2014, M.P. Gloria Stella Ortiz Delgado

²⁸⁸ Holmedo Peláez Grisales, 'Una Mirada Al Problema Del Derecho de los Sujetos y Grupos Desaventajados De Especial Protección En Colombia Y La Apuesta Por Una Necesaria Fundamentación Teórica Desde Las Teorías Contemporáneas De La Justicia' (2015) 17(1) Estudios Socio-Jurídicos. 142 – 143

²⁸⁹ Decreto 4912 de 2011 (n 162) article 2(8)

²⁹⁰ IACHR (n 4) para. 91

²⁹¹ See UNGA 'Situation of Human Rights in Colombia, Report of the United Nations High Commissioner for Human Rights' (4 February 2019) UN Doc A/HRC/40/3/Add.3 para. 27

²⁹² Peláez G. (n 288) 130

Applying a differentiated approach may represent a challenge as it could be difficult to provide different solutions to everyone. However, to offer better protection to HRDs, it is necessary to understand the culture, contexts, potential stereotypes and structures of violence that are linked to different HRDs.²⁹³ Also, some defenders are at greater risk because of who they are – their other identities, or the rights that they defend.²⁹⁴ If this were recognised, a differential approach could help to better understand, and fight, the roots causes of the acts of aggression against HRDs. It could also lead to creating better preventive and protective measures for both individuals and collectives.

4.3 Obligation to Investigate, Prosecute and Punish

The obligation to investigate, prosecute and punish could be incorporated into the obligation to protect, as “the duties to prevent violations against and protect human rights defenders include the obligation to investigate and sanction human rights violations perpetrated against them”.²⁹⁵ However, since the impunity reduction is one of the most effective means of protecting HRDs,²⁹⁶ it has been separately analysed.

The obligation to investigate, prosecute and punish is a positive obligation, requiring from States to take action to investigate human rights violations, particularly those concerning the right to life.²⁹⁷ This obligation contains five core constituent elements: Instigate an investigation on own initiative; the investigation should be effective; the investigation should be performed promptly and within a reasonable time frame; it should be independent and impartial; and it should involve the next of kin and victims if they want to be involved.²⁹⁸

Also, according to the IACtHR, the standard of due diligence is higher when it involves gross and systematic human rights violations. In this sense, the IACtHR has stated that:

²⁹³ Eguren (n 5) 67 – 68

²⁹⁴ UNGA (n 33) para. 111(3)

²⁹⁵ IACHR (n 4) page 12

²⁹⁶ Ibid., para. 86

²⁹⁷ Philip Leach, Rachel Murray and Clara Sandoval, ‘The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?’ in Carla M. Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law* (Brill 2016) 33

²⁹⁸ Ibid., 34 – 41

This requires the State to determine by means of legal proceedings the patterns of joint actions, and all those who, in different ways, took part in the said violations and their corresponding responsibilities, and to provide reparations to the victims in the case. Consequently, (...) the authorities in charge of the investigation have the duty to ensure that, during its course, they assess the systematic patterns that allowed grave human rights violations (...) to be committed.²⁹⁹

Regarding HRDs in Colombia, there is an ongoing discussion regarding whether or not the attacks are systematic, as the official position is to not consider them as being systematic.³⁰⁰ Nevertheless, if there is a common factor to the attacks against HRDs, it is that the majority of them remain in impunity.³⁰¹ As impunity has been historically present in around 95% of the murder cases involving HRDs,³⁰² the Public Prosecutor issued the Directive 0002/17, in which an investigation guidance was created in respect of these violations.³⁰³

The Directive was created in accordance with the definition of HRDs given by the Declaration on HRDs and the UNHRC.³⁰⁴ It was supposedly established following the principles of due diligence in the investigation of human rights violations³⁰⁵ and international standards, as they are based on the work performed by CEJIL.³⁰⁶ However, in reality and according to CEJIL, the incorporation of international standards was poor.³⁰⁷

Despite the shortcomings, the Directive and measures taken have led to a slight improvement in the impunity rate. For example, according to the Office, out of 285 murder cases reported by the UNHRC from 2016, a progress was made in 167 cases, representing 58.6% of the total number of cases. Such a percentage might look like a positive sign, but when closely analysed it reveals the following: three (1.1%) cases were discharged because of the accused's death,

²⁹⁹ *Case of The Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, IACtHR (4 September 2012) para. 194

³⁰⁰ See Chapter 4.2.1

³⁰¹ UNGA (n 38) para. 23

³⁰² *Somos Defensores* (n 195) 63

³⁰³ Fiscalía General de la Nación (n 262)

³⁰⁴ *Ibid.*, 1 – 9

³⁰⁵ CEJIL, 'Debida Diligencia en la Investigación de Graves Violaciones a Derechos Humanos' (CEJIL 2010) <https://www.cejil.org/sites/default/files/legacy_files/debida_diligencia_en_la_investigacion_de_graves_violaciones_a_dh.pdf> accessed 28 January 2020.

³⁰⁶ Fiscalía General de la Nación (n 262) Footnote 13

³⁰⁷ *Carta Dirigida Al Fiscal Nacional De Colombia, Respecto A La Directiva 002 De 2017* (CEJIL 2020) <https://www.cejil.org/sites/default/files/2018_06_29_co_carta_fiscal_directiva_0002.pdf> accessed 29 January 2020.

77 (27%) are in the preliminary stage of the process, 55 (19.3%) are in the trial stage, and only 32 (11.2%) of the cases resulted in a judicial sentence.³⁰⁸

A major challenge of this Directive and its results is that they only represent the cases from 2016, whereas HRDs have been killed in the country for several years, if not decades, when considering the internal armed conflict. Also, 58.6% may appear to be a good statistic but it does not represent cases in which the facts have been clarified, as they have tried to present it before.³⁰⁹ The clarification of the facts does not only involves an active investigation, it also involves a sentence.³¹⁰ Thus, only 11.2% of the cases have been “clarified”.

Likewise, the cases only refer to judicial processes in which a defender has been killed. Even if these cases involve the most serious kind of aggression against HRDs, it only represents one type of aggression that HRDs face in the country. As an example, in 2019, more defenders were threatened than killed³¹¹ but nothing was mentioned about these investigations. Likewise, no reference was made regarding the motives of the crimes, who was behind the crimes or if a pattern had been discovered.³¹² All of this was supposed to have been included in the exhaustivity principle, which is a guiding principle of the Directive.³¹³

Consequently, the improvements have been limited to a small constellation of the aggression statistics. Also, it does not help understand the causes of the risks faced by HRDs in the country, the patterns, or who is benefiting from these attacks. Thus, a significant effort towards reducing the impunity rate must be made, as *impunity must stop being the common denominator in the aftermath of the attacks against HRDs*.

³⁰⁸ *Estrategia de Investigación y Judicialización de Delitos Contra Defensores De DDHH* (Fiscalía General de la Nación 2019) <https://www.cejil.org/sites/default/files/informe_de_la_fiscalia_sobre_defensores_de_dh_asesinados_a_mayo_de_2019.pdf> accessed 28 January 2020.

³⁰⁹ 'Resultados Históricos En Investigaciones Por Homicidios De Defensores De Derechos Humanos | Fiscalía General De La Nación' (*Fiscalía General de la Nación*, 2020) <<https://www.fiscalia.gov.co/colombia/derechos-humanos/resultados-historicos-en-investigaciones-por-homicidios-de-defensores-de-derechos-humanos/>> accessed 28 January 2020.

³¹⁰ IACHR ‘Derecho a la Verdad en las Américas’ (13 de agosto de 2014) OEA/Ser.L/V/II.152 Doc. 2. para. 73

³¹¹ See Table 1.

³¹² IACHR, ‘Colombia: Defensores de DDHH’ (6 de diciembre 2018) 10:33 <https://www.youtube.com/watch?v=6TeBGs2Xkd0&list=PL5QlapyOGhXvwUE7_o7ptZEAD7QVPxWD> Accessed 28 January 2020

³¹³ Fiscalía General de la Nación (n 262) (iv)(v)

4.4 Obligation to Fulfil

The obligation to fulfil is a positive obligation, requiring states to take action by creating the legal, institutional and procedural frameworks that are necessary for the full realization and enjoyment of the rights, to the extent that the States are able to provide them.³¹⁴

In respect of HRDs and the obligation to fulfil, the SRHRDs has stated that the States should ensure a safe and enabling environment for HRDs, in which they can enjoy their rights and carry out their activities as defenders.³¹⁵

In this regard, Colombia has 14 normative bodies, 18 official bodies, and international recognition for its efforts to improve the national protection mechanism.³¹⁶ However, around 3,372 defenders have still been attacked since 2015, including the 528 who were killed.³¹⁷ Also, if the recommendations already given in the previous assessments have something in common, it is that all of them have already been somehow incorporated into the national protection mechanism

Consequently, there is a clear implementation deficit in the HRDs protection policy in Colombia, as the objectives of the policy and its actual results are completely different.³¹⁸ Thus, *the implementation deficit/gap needs to be reduced* if the Colombian State wants to create an enabling environment for HRDs.

³¹⁴ Kälén and Künzli (n 223) 88, 104

³¹⁵ Forst M. (n 92)

³¹⁶ IACHR (n 4) para. 166, 252 – 252

³¹⁷ See Table 1.

³¹⁸ Eguren (n 5) 121

5 Conclusions

The UN Declaration for HRDs, the work performed by the SRHRDs and the work of the IACHR and the IACtHR have all been crucial for the development of better protection mechanisms for the HRDs. They have helped to achieve international and regional recognition for defenders and the right to defend human rights, placing the struggles faced by HRDs on the international and regional agenda. Nevertheless, states are ultimately responsible for the protection of defenders. Thus, they must be willing to incorporate and implement the recommendations and decisions at the international and regional level.

In this context, Colombia has one of the oldest and most developed protection mechanisms for HRDs. However, the programme has failed to achieve its objectives because defenders in the country remain vulnerable to attacks every day. Thus, the Colombian State has failed to provide a safe and enabling environment for HRDs.

This situation needs to change, and the Colombian State needs to start fulfilling its international obligations to HRDs – respect, protect and fulfil. To achieve this, there is a need to improve the national protection mechanism. This improvement could start by the State recognising the magnitude of the problem as the constant denial and debates surrounding the statistics do not help to improve the situation when it is clearly deteriorating.

It is also crucial for the State to empower and support HRDs through legitimization campaigns. This can be achieved by creating awareness of the term “human rights defender”, the people behind it and their importance to society. In this sense, it is also necessary for the State officials, the military and public servants to receive training in human rights that focuses on HRDs. This is because defenders cannot be effectively protected if they do not trust the State’s apparatus – a lack of trust that is common in Colombia. In this regard, it is fundamental that the Colombian State has zero tolerance for attacks against defenders proceeding from the State’s apparatus. These attacks undermine the rights of HRDs and could place them in further danger.

Also, defenders must start to be seen as the subjects of rights and not as mere objects of protection. In this sense, the State must understand that individual protection measures are important, but they cannot be the only focus. These individual protection measures are

reactive, not preventive, and they can only cover a limited number of defenders. Thus, there is a need to implement both preventive and collective measures more effectively. In addition, the entire process of assessing risk levels, deciding on measures and then implementing them, must reflect the context of the defenders. HRDs are diverse. Thus, not every measure is suitable for all of them. This will not be easy to accomplish, but it is necessary, as it could lead to achieving better results.

Another way of improving the results of the national protection mechanism is to properly investigate, prosecute and punish the attacks against defenders. This is because reducing the impunity rate for the acts of aggression against HRDs is one of the most effective means of protecting the defenders. Some progress has been made in this sense and the situation has slightly improved, but this improvement is limited to murder cases after 2016. Also, when investigating the acts of aggression against HRDs, there must be a greater focus on understanding the underlying reason for the attacks, as this could help to better protect defenders in the future.

Lastly, if the previous assessments have a common denominator, it is that they have all been already considered in the national protection mechanism. As previously stated, this is one of the oldest and most developed national protection mechanisms in the world and has been internationally and regionally recognised as being so. Nevertheless, the Colombian State has failed to implement the measures that have already been considered in the mechanism. Thus, the most important way of improving the national protection mechanism, for it to achieve better results, is to fully implement it.

However, considering the precarious situation of HRDs in Colombia, the previous are just a few measures that could be implemented in order to improve the national protection mechanism. Yet they could potentially improve this precarious situation if they were properly implemented. This is because they have been presented in a way in which international, regional and national law, as well as the work of scholars, the advice of experts, and the claims of HRDs, are taken into consideration.

As a closing note, it is fundamental to remember that behind every statistic used in this thesis, there are human beings who have either been attacked or killed as a result of their work as

human rights defenders. Thus, it is crucial to find better ways of protecting them and guaranteeing their rights.

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